HONEST-SERVICES FRAUD: THE SUPREME COURT DEFUSES THE GOVERNMENT'S WEAPON OF MASS DISCRETION IN *SKILLING V. UNITED STATES*

Abstract

For over two decades federal prosecutors wielded a "weapon of mass discretion" in their fight against corruption: the honest-services fraud statute. Although prosecutors welcomed the statute's ambiguous text, judges, defendants, and scholars struggled to answer a number of difficult constitutional questions arising from its vague language. In 2010, the Supreme Court used Skilling v. United States*—a case chronicling the events leading up to the epic collapse of former energy giant Enron—to defuse the government's weapon of mass discretion by limiting honest-services fraud to schemes involving bribery or kickbacks, thereby placing more subtle forms of dishonesty, such as undisclosed self-dealing, outside the statute's reach.*

This Comment discusses the case's impact on the fallen Enron CEO's fight for freedom, in addition to its impact on two other petitioners who successfully challenged the honest-services fraud statute in 2010. I also examine the rights of the defendants whose convictions or plea agreements were premised on an application of the statute now declared unconstitutional, as well as analyze the decision's impact on pending and future cases of honest-services fraud.

Finally, I explain why Congress will likely supersede Skilling *by amending 18 U.S.C. § 1346 to explicitly criminalize schemes involving an individual's failure to disclose their self-dealing. I then analyze the*

proposed Honest Services Restoration Act (HSRA)—which was drafted to accomplish this goal—and conclude that, although not perfect, the HSRA's proposed language adequately addresses the major constitutional concerns surrounding the use of honest-services fraud to prosecute undisclosed self-dealing.

I. INTRODUCTION

Of the estimated 4,000+ federal crimes contained in the United States Penal Code, few, if any, have endured as tumultuous a journey to the footsteps of the Supreme Court as that of the honest-services fraud statute.[1]

Dishonesty, like obscenity, is hard to define, but we "know it when [we] see it."[2] Twelve random jurors would most assuredly agree that a crooked politician who steals an election by casting votes on behalf of nursing-home residents without their knowledge has acted dishonestly.[3] Most judges and jurors would also likely agree that a man who carries out a scheme to "meet and seduce young women" by setting up a phony talent agency and pretending to be a well-connected movie producer has conducted himself dishonestly.[4] But what about a priest who, after having a particularly rough week, delivers an insincere mass one Sunday morning?[5] Is this dishonest behavior as well? If so, should he be thrown in prison for it? How about an employee who phones in sick to work so that he can take his son to a ballgame?[6] Truthful? No. Dishonest? Perhaps. What about a parent who joins the board of trustees for her child's school district and then runs personal errands on a tank of gas purchased with the district's credit card?[7] Should the parent spend several years in prison for her lapse in judgment? It likely depends on whom you ask. The point is, when we start to drift into the gray area of dishonesty—again, like obscenity—the answer

1. *See* Julie R. O'Sullivan, *The Federal Criminal "Code" is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 648–49 (2006) (citing studies estimating that the Federal Penal Code contains over 4,000 crimes, which add to a total of 10,000 federal offenses when combined with criminally enforceable regulations).

2. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

3. *See* United States v. Odom, 736 F.2d 104, 106–07 (4th Cir. 1984).

4. United States v. Condolon, 600 F.2d 7, 8 (4th Cir. 1979), *abrogated by* McNally v. United States, 483 U.S. 350 (1987).

5. *See* Brief of the Chamber of Commerce of the United States as Amicus Curiae in Support of Petitioners at 5, Black v. United States, 130 S. Ct. 2963 (2010) (No. 01-1015).

6. *See* Sorich v. United States, 129 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting) (denial of certiorari).

7. *See* Parr v. United States, 363 U.S. 370, 392–93 (1960).

to whether an individual's deceptive conduct is reprehensible enough to warrant criminal punishment becomes a highly subjective inquiry sure to illicit markedly different responses.

For instance, imagine you live in a state that has an abundance of oil and natural gas reserves. Also assume that nearly every facet of your state's economy is in some way tied to the natural-resources industry: Your neighbors work for "Resource Extraction Co.," the coach of your daughter's soccer team is employed by "Resource Transportation, Inc.," and you play bridge every Thursday night with a friend who happens to be the vice president of "Resource Consulting LLP." One Thursday night, your bridge-partner casually mentions to you that his consulting firm is looking to expand over the next few years, adding, "Given your background in engineering, I'd be happy to pass along your résumé to my boss; I'm sure by the time your term in the state legislature is up we'll be looking to hire someone with your expertise." Thinking nothing more of the friendly gesture, you thank your friend for the lead, tell him you'll "shoot him a résumé," and finish your game of bridge.

The next morning, after shoveling snow from your driveway followed by a pit stop at your favorite coffee shop, you make it to your office just a half-hour late. Glancing at your watch, you notice that you have fifteen minutes before the legislature reconvenes. "Perfect," you think, just enough time to parse through your clerk's report on today's "House Bill 3249: Resource Extraction Reporting Regulations" and "House Bill 3250: Tax Relief Program for Resource-Consulting Firms." After scanning the reports, you remember your friend's offer from last night's bridge game. You also remember that the end of your term as state representative is fast approaching, at which point you will need a job in the private sector to help pay the remaining portion of your son's college tuition not covered by the scholarship he received from the founder of "Resource Enterprises."

You think to yourself—"Good thing I didn't cancel last night's game, I'll get the ball rolling on my job search today!" With five minutes to spare, you gulp down your last few drops of coffee, log in to your computer, fire off an e-mail to your friend at "Resource Consulting LLP" with your résumé attached, and make it to the floor just in time to vote on today's pending legislation. Your voting record proves your consistent support of the natural-resource industry; today is no different. After casting your ballot, you race back to your office to check your inbox.

Have you just acted dishonestly? If so, should federal marshals show up at your doorstep next week with handcuffs? What if your alleged

behavior was completely legal in your home state?[8] Depending on the state, city, and neighborhood in which you reside, your answer to these questions may be completely different from those elicited from neighboring communities.

It may come as a shock then, to learn that the above fact pattern is loosely based on one of three "honest-services fraud" cases decided by the Supreme Court in 2010.[9] This trilogy of cases—*Skilling v. United States*,[10] *Black v. United States*,[11] and *Weyhrauch v. United States*[12]—centered around a federal statute that makes it a crime to plan or commit a dishonest act using mail, telephone, or e-mail, where victims do not lose money or property, rather, the defendant's behavior deprives them of their intangible right to receive honest services.[13] This sounds ambiguous, because it *is* ambiguous. That is precisely why the Supreme Court decided to hear not one, but three honest-services challenges during its October 2009 term. Other factors, including growing public concern that the statute's limitless language failed to draw a clear enough line between harmless white lies and felonious white-collar crimes,[14] also likely persuaded the Court to grant certiorari in these cases.

Perhaps the Court's biggest fear however, was that—having enacted such a sweepingingly standardless statute—Congress had effectively handed federal prosecutors a weapon of mass discretion. As a result, the Supreme Court used its decision in *Skilling v. United States* to defuse the government's mighty weapon, limiting its scope to only those schemes of dishonesty considered to comprise the core of corruption: bribery and

8. *See* Charles N. Whitaker, Note, *Federal Prosecution of State and Local Bribery: Inappropriate Tools and the Need for a Structured Approach*, 78 VA. L. REV. 1617, 1625 (1992) ("Before 1987, courts routinely interpreted 'scheme to defraud' to include conduct that deprived citizens of their intangible right to honest government. Under this interpretation, federal prosecutors were able to prosecute local corruption, even if it did not violate state law." (footnote omitted)).

9. *See* United States v. Weyhrauch, 548 F.3d 1237, 1239 (9th Cir. 2008), *vacated and remanded without opinion by* Weyhrauch v. United States, 130 S. Ct. 2971, 2971 (2010) (per curiam).

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

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

12. Weyhrauch v. United States, 130 S. Ct. 2971 (2010) (per curiam).

13. 18 U.S.C. § 1346 (2006) (honest-services fraud).

14. *See* Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 786 (1985) (characterizing bribery as the "black core" of corruption). The author explained that the innumerable other forms of impropriety fall somewhere within the "gray circles surround[ing] the bribery core, growing progressively lighter . . . until they blend into the surrounding white area that represents perfectly proper and innocent conduct." *Id.*

kickbacks.[15]

Part II of this Comment highlights the mail-fraud statute's humble origin and subsequent expansion, which ultimately landed federal prosecutors' favorite catch-all fraud law before the Supreme Court twice: first in 1987 and again in 2010. Part III describes the Supreme Court's unanimous decision in *Skilling v. United States* to defuse the government's preferred weapon for combating corruption by limiting 18 U.S.C. § 1346 to prohibit only bribery and kickback schemes, excluding those involving undisclosed self-dealing and conflicts of interest. In Part IV, I discuss *Skilling's* impact on the fallen Enron CEO's fight for freedom in addition to the two other petitioners who successfully challenged the honest-services fraud statute in 2010. I also discuss the rights of the defendants whose convictions or plea agreements were premised on an application of the statute now declared unconstitutional, as well as analyze the decision's impact on pending and future cases of honest-services fraud. Finally, in Part V, I explain why Congress will likely supersede *Skilling* by amending § 1346 to expressly criminalize schemes involving an individual's failure to disclose their self-dealing; analyze the proposed "Honest Services Restoration Act," which was designed to accomplish this goal; and address several concerns raised by the Court as they pertain to Congress's proposed amendment.

II. ORIGIN AND DEVELOPMENT OF HONEST-SERVICES FRAUD

A. The Early Mail- and Wire-Fraud Statutes: From Humble Beginnings to Intangible Rights

Although the hotly contested honest-services fraud statute found itself at the center of heated legal, academic, and political debate by 2010, few eyebrows were raised when its predecessor statute was conceived. In the late 1800s,

> [A]ll through the country thousands of innocent and unsophisticated people, knowing nothing about the ways of . . . city thieves and robbers, [were] continually fleeced and robbed [through a variety of frauds targeting the largely uninformed rural population], and the mails [were] made use of for the purpose of aiding them in their

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

nefarious designs.[16]

To protect its rural constituents, in 1872 members of Congress used their power to regulate interstate commerce—including the United States Postal Service—to enact the predecessor to the modern mail-fraud statute, which essentially criminalized schemes to defraud where mail played a part in furthering the scheme.[17]

Even in its earliest form, the statute's vague language and minimal legislative history lent itself to expansive judicial interpretation, as courts throughout the mid-to-late-nineteenth century struggled to determine whether the amorphous phrase scheme to defraud covered an ever-changing variety of frauds, swindles, and schemes concocted by creative con-artists.[18] In 1889, Congress attempted to provide guidance to courts by amending the statute to include a list of example schemes that were explicitly prohibited as schemes to defraud, including "sawdust swindles," "counterfeit money fraud," "green coin," "green cigars," and a host of other frauds common at the time.[19] This just led to more confusion. Some courts believed Congress

16. CONG. GLOBE, 41ST CONG., 3D SESS. 35 (1870). One such scheme involved specimen circulars and letters mailed from fictitious businesses to the targeted victims, in which the victims were tricked into purchasing counterfeit money. *Id.*

17. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323 (codified as amended at 18 U.S.C. § 1341 (2006)). *See generally* Michael McDonough, *Mail Fraud and the Good Faith Defense*, 14 ST. JOHN'S J. LEGAL COMMENT. 279, 282 (1999) ("In *Ex Parte Jackson*, the Supreme Court determined the extent of Congress' power to regulate the mail. The Court held, pursuant to Article I, § 8 of the Constitution, that Congress acted within its right to create a criminal statute to protect the postal system." (footnotes omitted)); Joshua A. Kobrin, Note, *Betraying Honest Services: Theories of Trust and Betrayal Applied to the Mail Fraud Statute and § 1346*, 61 N.Y.U. ANN. SURV. AM. L. 779, 784 (2006).

> When Congress created what is now 18 U.S.C. § 1341 in 1877, the legislation was intentionally expansive. After several weaker efforts to criminalize certain types of mailings (e.g., obscene material, lotteries), Congress provided the Postal Service with a great deal of latitude in its efforts to prevent all forms of fraud that utilized the mail. Passed as part of a recodification of the postal laws, the original version of § 1341 aimed to resolve growing concerns about mail fraud by making it illegal to "devise any scheme or artifice to defraud . . . by means of the post-office establishment of the United States."

Id. (footnote omitted) (ellipsis in original).

18. *See* United States v. Mandel, 591 F.2d 1347, 1360 (4th Cir. 1979), *aff'd on reh'g per curiam*, 602 F.2d 653, 653 (4th Cir. 1979) (en banc) ("Congress has never defined or established the precise limits of the phrase 'scheme or artifice to defraud.'"), *abrogated by* McNally v. United States, 483 U.S. 350 (1987); Weiss v. United States, 122 F.2d 675, 681 (5th Cir. 1941) ("The law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human ingenuity.").

19. Act of Mar. 2, 1889, ch. 393, § 5480, 25 Stat. 873, 873 (codified as amended at 18 U.S.C. § 1341 (2006)).

intended the amendment to limit the type of schemes criminalized under the statute to those expressly listed in the statute as fraudulent.[20] Other courts believed "the purpose of the amendment was not to restrict, but to extend, the operation of the statute."[21]

In what marked the first in a series of expansive interpretations of the mail-fraud statute, the Supreme Court in 1895 held that conduct need not necessarily fit within one of the expressly-listed example schemes to qualify as a "scheme to defraud."[22] Following its refusal to limit mail fraud to Congress's laundry list of example schemes, the Court again expanded the phrase in *Durland v. United States*, this time to encompass "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future."[23] A mere three decades from its inception, the once humble mail-fraud statute had rapidly expanded alongside the power of the federal government and increasingly sophisticated fraud that emerged during the Reconstruction Era.[24]

Taking a cue from the Supreme Court's expansive language in *Durland*, Congress attached an additional phrase to its statute that broadened the type of schemes prohibited. The new language of the statute criminalized both a general scheme to defraud "*or* [a scheme specifically designed] for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[25] Although the new language merely codified *Durland's* holding,

20. *See* United States v. Beach, 71 F. 160, 161 (D. Colo. 1895) ("'[A]ny scheme or artifice to defraud' . . . must be taken to mean any scheme or artifice of the general character of those specified in the act. The general language of the act must be limited to such schemes and artifices as are ejusdem generis with those named.").

21. Culp v. United States, 82 F. 990, 991 (3d Cir. 1897); *see also* Miller v. United States, 133 F. 337, 340 (8th Cir. 1904).

> The result is that the amendment of section 5480 by the act of March 2, 1889, did not detract from the effect, nor limit the scope, of the original act, to the schemes, artifices, or devices described in the amendment, or to those of a similar character, but its effect was to add to the offenses denounced by the original section those specified in the act of 1889.

Id.; Milby v. United States, 120 F. 1, 4 (6th Cir. 1903) (adopting *Culp's* expansive reading of the amendment).

22. *See* Stokes v. United States, 157 U.S. 187, 188–89 (1895).

23. 161 U.S. 306, 313 (1896).

24. *See generally* Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 779 (1980) (summarizing the mail-fraud statute's growth following the Civil War); Kobrin, Note, *supra* note 17, at 784–88 (same).

25. Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130 (codified as amended at 18 U.S.C. § 1341 (2006)).

> In later years, [the additional language] would prove integral to [enabling even greater] expansion of mail fraud .... The disjunctive "or" allowed courts to interpret the first clause—"any scheme or artifice to defraud"—to include schemes other than those "for obtaining money or property," such as efforts to deprive a victim of "intangible rights."[26]

As the Supreme Court would later mention, Congress failed to "[a]ddress the significance of the new language, stating that it was self-explanatory."[27]

Naturally, with the new statutory language and little guidance from Congress, early courts identified a multitude of criminal behavior under this theory, such as an individual's "[s]cheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official,"[28] or an employee's scheme to undermine his employer's best interest while simultaneously feigning loyalty.[29] Describing the historical significance of these early cases, the Supreme Court observed,

> Unlike fraud in which the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other, the honest-services theory targeted corruption that lacked similar symmetry. While the offender profited, the betrayed party suffered no deprivation of money or property; instead, a third party, who had not been deceived, provided the enrichment.[30]

By the mid-twentieth century, suburban telephone lines laced the once-rural countryside, allowing baby-boomers—including those with "nefarious designs"—to communicate through wires rather than by mail. To keep this new technology free of old-fashioned fraud, Congress enacted the wire-fraud statute to accompany its sister mail-fraud statute—identical in every

26. Kobrin, Note, *supra* note 17, at 789.

27. McNally v. United States, 483 U.S. 350, 358 n.7 (1987) (citing 42 CONG. REC. 1026 (1908) (statement of Sen. Weldon Heyburn)), *superseded by statute*, Act of Nov. 18, 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508 (codified as amended at 18 U.S.C. § 1346), *as recognized in* Skilling v. United States, 130 S. Ct. 2896 (2010).

28. Shushan v. United States, 117 F.2d 110, 115 (5th Cir. 1941), *overruled on other grounds by* United States v. Cruz, 478 F.2d 408, 412 n.8 (5th Cir. 1973) (refusing to review the sufficiency of evidence for grand jury indictments). The Supreme Court credited *Shushan* with being the first case to present the intangible-rights theory. *Skilling*, 130 S. Ct. at 2926.

29. *See* United States v. Procter & Gamble Co., 47 F. Supp. 676, 678 (D. Mass. 1942). The Supreme Court credited *Procter & Gamble Co.* as "perhaps the earliest application of the [intangible-rights] theory to private actors." *Skilling*, 130 S. Ct. at 2926–27.

30. *Skilling*, 130 S. Ct. at 2926 (citation omitted).

way except for the channel of communication used to further the fraud.[31]

At some point during the early 1970s, perhaps while parsing through *Procter & Gamble Co.* or *Shushan*, prosecutors in Illinois stumbled upon a lethal theory that would truly "unleash" the awesome power of the mail- and wire-fraud statutes.[32] The prosecutor's theory—that the intangible rights protected by these statutes included one's right to receive honest services—withstood its first test in 1973 when the Seventh Circuit sustained a defendant's mail-fraud conviction because the defendant had "h[eld] himself out to be a loyal employee, acting in [his employer's] best interests, but actually [did] not giv[e] his honest and faithful services, to [his employer's] . . . detriment."[33] Shortly thereafter, the federal government declared war on public corruption,[34] which led one federal prosecutor to later remark, "We've got a full-court press on this stuff. It's absolutely clear to me that there have been increased efforts to find public corruption."[35]

With a war to wage, combined with §§ 1341 and 1343's ambiguous language, sparse legislative history, and loose interpretation by courts, the federal government successfully assembled the ultimate weapon of mass prosecutorial discretion: honest-services fraud. Initially, prosecutors used their newfound honest-services theory to decimate scores of corrupt public officials engaged in bribery schemes,[36] and would later deploy it against public officials who used their position of public trust to procure

31. Act of July 16, 1952, ch. 879, § 18(a), 66 Stat. 722 (codified as amended at 18 U.S.C. § 1343 (2006)).

32. *See* 18 U.S.C. § 1341 (2006); *see also* Jason T. Elder, Comment, *Federal Mail Fraud Unleashed: Revisiting the Criminal Catch-All*, 77 OR. L. REV. 707, 712–13 (1998).

33. United States v. George, 477 F.2d 508, 513 (7th Cir. 1973), *abrogated by* McNally v. United States, 483 U.S. 350 (1987).

34. *See* FRANK ANECHIARICO & JAMES B. JACOBS, THE PURSUIT OF ABSOLUTE INTEGRITY: HOW CORRUPTION CONTROL MAKES GOVERNMENT INEFFECTIVE 103 (1996).

35. Philip Shenon, *U.S. Officials See Sweeping Effort to Combat Municipal Corruption*, N.Y. TIMES, Mar. 30, 1986, at A1.

36. *See, e.g.*, United States v. Bohonus, 628 F.2d 1167, 1171 (9th Cir. 1980), ("Most often these cases . . . involved bribery of public officials."), *abrogated by* McNally v. United States, 483 U.S. 350 (1987); United States v. Caldwell, 544 F.2d 691, 693 (4th Cir. 1976) (affirming state treasurer's mail-fraud conviction for accepting bribes); United States v. Brown, 540 F.2d 364, 369–70 (8th Cir. 1976) (affirming city official's mail-fraud conviction for soliciting and extorting bribes from local contractors to pay for, *inter alia*, his "female acquaintance's" rent), *abrogated by* McNally v. United States, 483 U.S. 350 (1987); United States v. Isaacs, 493 F.2d 1124, 1131 (7th Cir. 1974) (per curiam) (affirming former Governor of Illinois's mail-fraud conviction where he accepted a bribe from a Chicago business owner in exchange for his influence over favorable legislation and ability to tie up competing businesses with red tape).

kickbacks.[37] In several cases, prosecutors stretched the theory even further by targeting instances of undisclosed self-dealing and conflicts of interest.[38] "[B]y 1982, all Courts of Appeals had embraced the honest-services theory of fraud."[39] By his own analogy, Professor John Coffee, Jr., famously wrote: "[Like] an exotic flower [the intangible-rights theory] quickly overgrew the legal landscape in the manner of the kudzu vine until by the mid-1980s few ethical or fiduciary breaches seemed beyond its potential reach."[40] Although the government primarily focused on beating down droves of state and local officials throughout the 1970s and early-'80s, it used the theory to make a number of prosecutorial forays into the private sector as well—no one was safe.[41]

37. *See, e.g.*, United States v. Barber, 668 F.2d 778, 781, 787 (4th Cir. 1982) (affirming state alcohol commissioner's mail-fraud conviction where the defendant used his office to receive kickbacks including free liquor); United States v. Curry, 681 F.2d 406, 408, 418 (5th Cir. 1982) (reversing political committee chairman's mail-fraud conviction for diverting money donated to his organization to cover personal expenses because the district court failed to instruct the jury on the defense of good faith where there was sufficient evidence to justify such an instruction); United States v. Mandel, 591 F.2d 1347, 1356 (4th Cir. 1979), *aff'd on reh'g per curiam*, 602 F.2d 653, 653 (4th Cir. 1979) (en banc) (affirming former Governor of Maryland's mail-fraud conviction for accepting extravagant gifts including a diamond bracelet for his wife given to him by local business because of his influence of favorable legislation), *abrogated by* McNally v. United States, 483 U.S. 350 (1987); United States v. Keane, 522 F.2d 534, 544, 551, 561 (7th Cir. 1975) (affirming government official's mail fraud conviction for using of "his position and influence" to obtain intangible kickbacks such as free assistance and inside information benefiting his personal real estate interests), *abrogated by* McNally v. United States, 483 U.S. 350 (1987).

38. *See, e.g.*, United States v. Diggs, 613 F.2d 988, 995, 1004 (D.C. Cir. 1979) (affirming United States Congressman's mail-fraud conviction for submitting inflated staff expenses to the government with the intent to use the excess pay to cover personal, business, and other expenses); United States v. Bush, 522 F.2d 641, 643, 653 (7th Cir. 1975) (affirming Chicago official's mail-fraud conviction for misrepresentation, deceit, and subsequent cover-up in furtherance of his scheme to profit from the awarding of a public contract), *abrogated by* McNally v. United States, 483 U.S. 350 (1987); *Keane*, 522 F.2d at 544, 561 (affirming city alderman's mail-fraud conviction for undisclosed conflicts-of-interest and self-dealing).

39. Skilling v. United States, 130 S. Ct. 2896, 2927 (2010) (citing Daniel J. Hurson, *Limiting the Federal Mail Fraud Statute—A Legislative Approach*, 20 AM. CRIM. L. REV. 423, 456 (1983)).

40. John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 427 (1998).

41. *See, e.g.*, United States v. Lemire, 720 F.2d 1327, 1331, 1332, 1355 (D.C. Cir. 1983) (affirming employee's wire-fraud conviction where he secretly schemed to defraud a contractor building a military base and missile system in breach of his employer's conflict-of-interest disclosure policy), *superseded by statute*, Act of Nov. 18, 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508 (codified as amended at 18 U.S.C. § 1346), *as recognized in* United States v. Sun-Diamond Growers of Cal., 941 F. Supp. 1262, 1277 (D.D.C. 1996); United States v. Von Barta, 635 F.2d 999, 1007 (2d Cir. 1980), *abrogated by* McNally v. United States, 483 U.S. 350 (1987); *Bohonus*, 628 F.2d at 1170; United States v. George, 477 F.2d 508, 510 (7th Cir. 1973), *abrogated*

B. A Weapon of Mass Discretion

What began as an inconsequential statute enacted to keep the United States Postal Service free from fraud had evolved into an all-encompassing statute that criminalized every conceivable sin, seedy deal, and workplace deception. Federal prosecutors were not shy about expressing affection for their beloved weapon either. As former Chief of the Business and Securities Fraud Prosecution Unit of the United States Attorney's office Jed Rakoff once gushed,

> To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love. We may flirt with RICO, show off with 10b-5, and call the conspiracy law "darling," but we always come home to the virtues of 18 U.S.C. § 1341, with its simplicity, adaptability, and comfortable familiarity. It understands us and, like many a foolish spouse, we like to think we understand it. To ask us to explain it or deal with its problems, however, is quite another matter; . . . .[42]

Offering a more fire-and-brimstone description of § 1341, former Assistant United States Attorney Craig Bradley referred to the mail-fraud statute as one of his "Four Horsemen of the Apocalypse."[43] Paying tribute to a phrase originally coined by Judge Learned Hand in reference to the conspiracy statute, another former prosecutor would later crown the honest-services fraud statute as "the new 'darling of the modern prosecutor's nursery,'"[44] confessing, "[i]n a typical federal corruption case, honest services fraud will now be easier to charge and prove than bribery or gratuities, will apply to a wider range of conduct, and will carry a greater potential penalty. From the prosecutor's standpoint, what's not to like?"[45]

Not surprisingly, through the mid-1980s the United States Department

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by McNally v. United States, 483 U.S. 350 (1987).

42. Rakoff, *supra* note 24, at 771. In 1986, former Attorney General Edwin Meese III reassured the public that the government would continue to use its "Louisville Slugger" statute to "go on knocking . . . corrupt heads—that's our business, that's our duty." Arthur Maass, *Public Policy by Prosecution*, 89 THE PUB. INT. 107, 110 (1987), *available at* http://www.nationalaffairs.com/doc lib/20080708_1987898publicpolicybyprosecutionarthurmaass.pdf.

43. Craig M. Bradley, *Federalism and the Federal Criminal Law*, 55 HASTINGS L.J. 573, 574 (2004).

44. Randall D. Eliason, *Surgery with a Meat Axe: Using Honest Services Fraud to Prosecute Federal Corruption*, 99 J. CRIM. L. & CRIMINOLOGY 929, 932–33, 933 n.8 (2009).

45. *Id.* at 932.

of Justice (DOJ) continued to strap charges of honest-services fraud onto a large number of indictments, often as a procedural sidestep around statutes that—although more applicable to the criminal activity being alleged—would have made conviction more difficult.[46] Little did these prosecutors know, the Supreme Court—for the first time—was about to defuse their beloved weapon.

C. *The Impact of* McNally *and* Carpenter *on the Intangible-Rights Theory of Mail and Wire Fraud*

At last, the Supreme Court in *McNally v. United States* decided to limit the scope of the mail-fraud statute, interpreting "scheme to defraud" to cover only those schemes designed to defraud others of property, but not of their intangible right to honest services.[47] Before reaching this conclusion, out of caution the Court searched for clues to suggest that Congress had intended the mail- and wire-fraud statutes to protect not only money or tangible property, but also the intangible property right central to the case.[48] Unfortunately for the prosecutors, Congress's "sparse legislative history" offered little evidence to support the expansive interpretation proffered by the Government.[49] Instead, the Court limited mail fraud to schemes targeting only tangible property based on old common law interpretations

46. *See, e.g.*, 18 U.S.C. § 201 (2006) (criminalizing the receipt or solicitation of bribes or kickbacks by federal public officials). In cases where federal government officials are suspected of accepting bribes, it is much easier to obtain a conviction under the honest-services fraud statute than the more directly applicable § 201 (bribing a public official). Curiously, this phenomenon is the result of the Supreme Court's decision to limit the statute in *United States v. Sun-Diamond Growers of California* to criminalize only bribes paid in exchange for an identifiable official act in satisfaction of the statute's strict quid-pro-quo requirement. 526 U.S. 398, 414 (1999). On the other hand, prosecutors are not required to show a quid pro quo to convict a federal public official for bribery under the honest-services fraud statute. Similarly, 18 U.S.C. § 666 criminalizes the receipt or solicitation of bribes or kickbacks in excess of $5,000 by agents of a state or local organization or government entity that receives more than $10,000 in federal funds in any one-year period. Prosecutors likely prefer the honest-services statute to § 666 (federal programs bribery) because it does not require the existence of a minimum dollar-value of the bribe, nor does it require proof that federal funds were accepted by the alleged corrupt state or local official to obtain the federal jurisdiction needed to prosecute government corruption at the state and local levels.

47. 483 U.S. 350, 356 (1987) ("The mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government."), *superseded by statute*, Act of Nov. 18, 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508 (codified as amended at 18 U.S.C. § 1346), *as recognized in* Skilling v. United States, 130 S. Ct. 2896 (2010).

48. *McNally*, 483 U.S. at 356.

49. *Id.*

of the word "to defraud," which "commonly refer[red] 'to wronging one in his *property rights* by dishonest methods or schemes,'" but made no mention of protecting victims' *intangible rights*.[50]

Although *McNally* was significant because it marked the first time the Supreme Court reined in the previously boundless application of the mail- and wire-fraud statutes, several key factors undermined the decision's impact. First, noticeably absent from the opinion was any elaboration on the more fundamental concern that the statute may have been worded so vaguely as to render it unconstitutional, which, in turn, would have forced Congress to draft a more clearly-worded replacement statute if it still wished to prohibit such fraud targeting intangible rights.[51] Second, in his dissent, Justice Stevens persuasively picked apart the majority's rationale for limiting the scope of the statute.[52] Foreshadowing events to come, Justice Stevens capped off his dissent with a call to the Legislature: "Congress can, of course, negate [*McNally*] by amending the statute" to explicitly prohibit schemes to defraud individuals of their intangible right to honest services.[53]

Finally, *McNally's* intended result of narrowing the honest-services theory was significantly diminished by years-end, due in large part to the Court's subsequent holding in *Carpenter v. United States* just months later, as well as a number of lower courts that adopted Justice Stevens's expansive dissenting theory laid out in *McNally*.[54] The Court in *Carpenter*

50. *McNally*, 483 U.S. at 358 (emphasis added) (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)).

51. *See infra* section II.*F.1.* (discussing the Void-for-Vagueness Doctrine).

52. *See McNally*, 483 U.S. at 365–66, 377 n.10 (Stevens, J., dissenting).

> In [his] important [*McNally*] dissent, Justice Stevens raised an original and subversive interpretation of the majority's position that still has not been entirely resolved by lower courts. He argued that the requisite property loss can be found in the fact that the employee retains the bribe or kickback, which under classic agency law belongs to the employer.

John C. Coffee, Jr. & Charles K. Whitehead, *The Federalization of Fraud: Mail and Wire Fraud Statutes*, *in* 1 WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES 9-7 (Otto G. Obermaier et al. eds., rel. 37 2008) (footnotes omitted).

53. *McNally*, 483 U.S. at 377 (Stevens, J., dissenting).

54. Coffee & Whitehead, *supra* note 52, at 9-9 n.28 (citing courts following Justice Stevens's *McNally* dissent). *See generally* Carpenter v. United States, 484 U.S. 19, 25, 28 (1987), *superseded by statute*, Act of Nov. 18, 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508 (codified as amended at 18 U.S.C. § 1346). Courts effectively circumvented *McNally* in light of *Carpenter* using Justice Stevens's "constructive trust" theory by simply characterizing honest-services breaches as traditional money or property fraud. *See, e.g.*, United States v. Richerson, 833 F.2d 1147, 1157 (5th Cir. 1987); United States v. Runnels, 833 F.2d 1183, 1186 (6th Cir.1987).

recognized that, although mail fraud did not cover the *intangible* right to honest *services* pursuant to its recent *McNally* decision, the statute did in fact cover instances where an individual or entity had been deprived of an *intangible property* right.[55]

To illustrate the potential contours of sections 1341 and 1343 established by *McNally* and *Carpenter*, imagine that a disgruntled employee working for a carbonated-beverage manufacturer placed a telephone call to her employer's fiercest competitor claiming to have access to her employer's confidential files. Later in the same conversation, the rogue employee offered to obtain the top-secret formula for her employer's most popular line of carbonated beverages and fax it to the competitor for a fee. Based on these facts, the disloyal employee is likely to have been convicted of wire fraud for depriving her employer of its exclusive right to protect and use its intangible secret formula, but not because she deprived her employer of its intangible right to her honest services as an employee. Although *McNally* and *Carpenter* left a number of questions unanswered regarding the rights protected by the mail- and wire-fraud statutes, Congress swiftly answered Justice Stevens's call to action, leaving little time for the lower courts to grapple with the implications of these cases on the honest-services theory of fraud.

D. *Codification of Honest-Services Fraud and the Resurrection of Pre-*McNally *Precedent*

"Desperate to reverse the damage [done by *McNally*], prosecutors pleaded with Congress to give them back their precious weapon."[56] Congress—anxious to adjourn for the 1988 presidential election[57]—quickly responded by tacking "the terse language of today's honest-services fraud law . . . onto a mammoth drug bill, [which] passed a couple hours later without debate."[58] The statute, as codified at 18 U.S.C. § 1346 and altered

Most courts rejected this theory however. *See, e.g.*, United States v. Walgreen, 885 F.2d 1417 (9th Cir. 1989); United States v. Goodrich, 871 F.2d 1011 (11th Cir. 1989); United States v. Ochs, 842 F.2d 515 (1st Cir. 1988); United States v. Zauber, 857 F.2d 137 (3d Cir. 1988); United States v. Holzer, 840 F.2d 1343 (7th Cir. 1988); United States v. Slay, 858 F.2d 1310 (8th Cir. 1988); United States v. Shelton, 848 F.2d 1485 (10th Cir. 1988).

55. *See Carpenter*, 484 U.S. at 25.

56. Roger Parloff, *The Catchall Fraud Law that Catches Too Much*, FORTUNE, Jan. 18, 2010, at 86, 90.

57. *See* Coffee & Whitehead, *supra* note 52, at 9-49.

58. Parloff, *supra* note 56, at 90–91.

by the Supreme Court, simply reads: "For the purposes of th[e] chapter [of the United States Code that prohibits, *inter alia*, mail fraud, § 1341, and wire fraud, § 1343], the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[59]

Although commonly referred to as "honest-services fraud," this statute does not create an independent crime; rather, it expressly identifies one's intangible right to receive another's honest services as being protected by the mail- and wire-fraud statutes, which criminalize any "scheme or artifice to defraud."[60] Thus, "This amendment [was] intended merely to overturn the *McNally* decision. No other change in the law [was] intended."[61] Section 1346 not only resurrected the intangible right to honest services, it also resurrected the confused body of case law interpreting the theory previously buried by *McNally*.[62] Nonetheless, federal prosecutors were happy to have their weapon of mass discretion back.

E. Two Decades with 18 U.S.C. § 1346

Following the codification of the honest-services theory of fraud, the circuit courts were left with a box of twenty-eight meaningless words with no instructions from Congress on how to construct them.[63] Nevertheless, the government continued to use honest-services fraud as its primary weapon against public and private corruption.[64] In response, the appellate courts recognized the need to construe § 1346 in a manner that afforded due process by limiting the breadth of conduct it covered, but "[u]niformly . . . declined to throw out the statute as irremediably vague."[65] As the respective circuit courts quickly discovered however, each held vastly different ideas on how the statute should be limited.[66] This division led to numerous circuit splits, which ultimately created one of history's most confused bodies of

59. Skilling v. United States, 130 S. Ct. 2896, 2927 (2010) (alterations in original) (quoting 18 U.S.C. § 1346 (2006)).

60. 18 U.S.C. § 1341 (2006).

61. 134 CONG. REC. 33,297 (1988) (statement of Rep. John Conyers).

62. *See infra* section III.*B.4.*

63. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 565 (2001) (analogizing a criminal statute to a box, labeled by the legislature, then handed to courts to fill up with culpable conduct).

64. *See infra* note 68.

65. Skilling v. United States, 130 S. Ct. 2896, 2928 (2010).

66. *See id.* n.37.

case law.[67] Much to the pleasure of prosecutors, over the next two decades § 1346 would emerge as a federal "catch-all" fraud law.[68]

F. Constitutional Challenges to the Honest-Services Fraud Statute

In 2009, Justice Scalia penned a seething dissent to the majority's refusal to hear yet another honest-services-fraud challenge in *Sorich v. United States*.[69] His decision to dissent to a mere denial of certiorari sounded the alarms in the high court, bringing to the other Justices' attention several major constitutional concerns created by the language and application of 18 U.S.C. § 1346.[70] Although Congress had answered *McNally's* call to codify the intangible-rights theory of fraud, Justice Scalia expressed grave concern over the statute's use "to impose criminal penalties upon a staggeringly broad swath of behavior."[71] First, Justice Scalia pointed out that "the Courts of Appeals . . . spent two decades attempting to cabin the breadth of § 1346 through a variety of limiting principles. [Yet n]o consensus has emerged."[72] Even if courts had agreed on the nature of conduct prohibited by the statute, *Sorich's* dissent explained that the "principle . . . that separate[d] the criminal breaches, conflicts and misstatements from the obnoxious but lawful ones, remain[ed] entirely unspecified."[73]

In addition to its overbreadth, Justice Scalia worried about the statute's validity in light of other constitutional principles such as federalism,[74]

67. *See* Eliason, *supra* note 44, at 960. ("It is probably safe to say that no area of federal criminal law has led to greater confusion and turmoil [than honest-services fraud].").

68. *See, e.g.*, *id.* at 953. ("Mail fraud has evolved over time to become a virtual catch-all federal fraud statute."); Elder, *supra* note 32, at 707, 722; Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 438 (1995); Parloff, *supra* note 56, at 87–88.

69. 129 S. Ct. 1308 (2009) (Scalia, J., dissenting) (denial of certiorari).

70. Kenneth M. Breen & Sean T. Haran, *Honest Services*, CHAMPION, Dec. 2009, at 59. ("Many believe, based in part on Justice Scalia's strong words [in *Sorich*, that] the Court will significantly curtail the reach of the statute, if not declare the [honest-services] statute unconstitutionally vague.").

71. *Sorich*, 129 S. Ct. at 1309.

72. *Id.*

73. *Id.* at 1310.

74. *Id.*

> [T]he prospect of federal prosecutors' (or the federal courts') creating ethics codes and setting disclosure requirements for local and state officials [raises concern for federalism and fair notice]. Is it the role of the Federal Government to define the fiduciary duties that a town alderman or school board trustee owes to his constituents? It is one thing to enact and enforce clear rules against certain types of

separation of powers, and due process.[75] Reiterating his concern that the ambiguous language did not afford those charged with committing honest-services fraud fair warning that their behavior was in fact illegal, Justice Scalia noted, "It may be true that petitioners here, like the defendants in other 'honest services' cases, have acted improperly. But '[b]ad men, like good men, are entitled to be tried and sentenced in accordance with law.'"[76] A number of commentators subsequently pointed out that *Sorich's* dissent provided a roadmap for the arguments ultimately presented to the Supreme Court by the petitioners in *Skilling*, *Black*, and *Weyhrauch*.[77]

1. Void-for-Vagueness Doctrine

Simply stated, "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."[78] When Congress enacts a vague law, its failure to speak clearly "offend[s] several important values."[79] The Court identified two particularly important values in *Grayned v. City of Rockford*:

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary

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> corrupt behavior [where a clear federal interest is involved], *e.g.*, 18 U.S.C. § 666(a) (bribes and gratuities to public officials), but quite another to mandate a freestanding, open-ended duty to provide "honest services"—with the details to be worked out case-by-case.

Id.

75. *See id.*

> [T]his Court has long recognized the "basic principle that a criminal statute must give fair warning of the conduct it makes a crime." There is a serious argument that § 1346 is nothing more than an invitation for federal courts to develop a common-law crime of unethical conduct. But "the notion of a common-law crime is utterly anathema today," and for good reason. It is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail.

Id. (citations omitted).

76. *Id.* at 1311 (alteration in original) (quoting Green v. United States, 365 U.S. 301, 309 (1961) (Black, J., dissenting).

77. *See* Lisa L. Casey, *Twenty-Eight Words: Enforcing Corporate Fiduciary Duties Through Criminal Prosecution of Honest Services Fraud*, 35 DEL. J. CORP. L. 1, 68 (2010) (observing that Justice Scalia's dissent created "a road-map to the issues before the Court" in the trilogy of honest-services fraud cases decided in 2010). Professor Casey also drew attention to the fortunate timing of Black's petition, which he filed just in time for Justice Scalia's *Sorich* dissent to direct the Court's attention to the problems that plagued § 1346, remarking, "Lord Conrad Black . . . may have Justice Antonin Scalia to thank for his good fortune." *Id.* at 4.

78. 408 U.S. 104, 108 (1972).

79. *Id.*

> intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.... Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.[80]

The Supreme Court later concluded that "[v]agueness may invalidate a criminal law for either of [these] two independent reasons."[81] The Court may strike down a vague law that offends the first value using the Due Process Clause "if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . . ."[82] Alternatively, the Court may strike down a vague law that offends the second value if it "permit[s] 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'"[83] These principles are designed to protect individuals from unwittingly violating criminal law, which would place them "at peril of life, liberty or property . . . ."[84]

Although the Court in *McNally* did not declare the mail- and wire-fraud statutes unconstitutionally vague, it refused to speculate on whether the ambiguous statutory language protected citizens' right to honest government, which would have extended the fraud statutes' scope significantly.[85] The majority relied on vagueness principles—albeit, with little elaboration—to instead limit the statutes to fraud targeting property, refusing to "construe the statute in a manner that le[ft] its outer boundaries ambiguous and involve[d] the Federal Government in setting standards of disclosure and good government for local and state officials."[86] Foreshadowing events to come, the Court added, "If Congress desires to go further, it must speak more clearly than it has."[87]

a. Fair Notice

Vague laws undermine the purported policy of deterring corrupt

80. *Id.*

81. City of Chicago v. Morales, 527 U.S. 41, 56 (1999).

82. *Id.* (quoting Giaccio v. Pennsylvania, 382 U.S. 399, 402–03 (1966)); *see also Grayned*, 408 U.S. at 108 ("Vague laws may trap the innocent by not providing fair warning.").

83. Kolender v. Lawson, 461 U.S. 352, 358 (1983) (second alteration in original) (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974)).

84. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

85. *See* McNally v. United States, 483 U.S. 350, 356 (1987), *superseded by statute*, Act of Nov. 18, 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508 (codified as amended at 18 U.S.C. § 1346), *as recognized in* Skilling v. United States, 130 S. Ct. 2896 (2010).

86. *Id.* at 360.

87. *Id.*

behavior because they do not draw clear lines for those who wish to avoid "stray[ing] from the straight and narrow."[88] As discussed *supra*, the divergent interpretations of § 1346 that emerged in each circuit illustrate this point.[89] As a result, corporate officers and public officials who wanted to obey the law in, say, California, were not able to look at case law from Texas, New York, or Illinois for guidance because of the numerous circuit splits.[90] Likely influencing the Supreme Court's decision to hear not one, but three honest-services cases in 2010, a large body of scholarship criticized the statute for impinging on the first prong of the Vagueness Doctrine.[91]

Fearing that § 1346's facially vague language coupled with the Judiciary's predisposition towards interpreting mail fraud broadly might lead to over-criminalization, judges, scholars, and commentators envisioned a "parade of horribles."[92] Perhaps most notably, Justice Scalia worried that,

> [C]arried to its logical conclusion, [honest-services fraud] renders criminal a state legislator's decision to vote for a bill because he expects it will curry favor with a small minority essential to his reelection; a mayor's attempt to use the prestige of his office to obtain a restaurant table without a reservation; a public employee's recommendation of his incompetent friend for a public contract; and any self-dealing by a corporate officer. Indeed, it would seemingly

88. *See* United States v. Rybicki, 354 F.3d 124, 164 (2d Cir. 2003) (en banc) (Jacobs, J., dissenting) (criticizing the majority's interpretation of the facially ambiguous honest-services-fraud statute by comparing it to an attempt to derive meaning from a hypothetical statute "that makes it an offense to . . . 'stray from the straight and narrow'"); *see also* McBoyle v. United States, 283 U.S. 25, 27 (1931) ("[F]air warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."). *Cf.* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2627 (2008) ("[E]ven Justice Holmes's 'bad man' can look ahead with some ability to know what the stakes are in choosing one course of action or another.").

89. *See supra* note 66 and accompanying text.

90. Even where circuit courts apply a uniform standard of interpretation to an otherwise vague statute, courts, including the Second Circuit, have "held that notice is insufficient if lay persons are required to 'perform[] the lawyer-like task of statutory interpretation by reconciling the text of . . . separate documents.'" *Rybicki*, 354 F.3d at 158 (alterations in original) (quoting Chatin v. Coombe, 186 F.3d 82, 89 (2d Cir. 1999)).

91. *See, e.g.*, Eliason, *supra* note 44, at 932–33; Alexa Lawson-Remer, Note, *Rightful Prosecution or Wrongful Persecution? Abuse of Honest Services Fraud for Political Purpose*, 82 S. CAL. L. REV. 1289, 1290–92 (2009); Mark Zingale, *Fashioning a Victim Standard in Mail and Wire Fraud: Ordinarily Prudent Person or Monumentally Credulous Gull?*, 99 COLUM. L. REV. 795, 795–98 (1999); Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 155–56 (1994).

92. *See* United States v. Panarella, 277 F.3d 678, 699 (3d Cir. 2002).

cover a salaried employee's phoning in sick to go to a ball game.[93]

Similarly, Judge Winter of the Second Circuit feared that "[a] partisan political leader who throws his decisive support behind a candidate known to the leader to be less qualified than his or her opponent because that candidate is more cooperative with the party organization, is guilty of mail fraud unless that motive is disclosed to the public."[94] Likewise, the Seventh Circuit explained that, had it accepted the Government's argument that honest-services fraud imposed a duty on every city employee to act at all times in their city's best interest, "every city employee would be required to shop exclusively [at retailers located within city limits] in order to maximize [city] receipts from sales taxes, and would be guilty of a federal felony if he bought a pair of boots through the mail from L.L. Bean."[95] Other conduct that may have been criminalized by § 1346 included "a regulated company that employs a political spouse; an employee who violates an employee code of conduct; a lawyer who provides sky-box tickets to a client's general counsel; [or] a trustee who makes a self-dealing investment that pays off."[96]

Concern about the statute's seemingly limitless application was not limited to the judiciary however, as one scholar stressed, "These observations should not be dismissed as an alarmist assertion or an overdrawn parade of horribles."[97] Another scholar wondered whether

93. Sorich v. United States, 129 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting) (denial of certiorari).

94. United States v. Margiotta, 688 F.2d 108, 140 (2d Cir. 1982) (Winter, J., concurring in part and dissenting in part), *abrogated by* McNally v. United States, 483 U.S. 350 (1987), *superseded by statute*, Act of Nov. 18, 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508 (codified as amended at 18 U.S.C. § 1346), *as recognized in* Skilling v. United States, 130 S. Ct. 2896 (2010).

95. United States v. Bloom, 149 F.3d 649, 654 (7th Cir. 1998).

96. United States v. Rybicki, 354 F.3d 124, 161 (2d Cir. 2003) (en banc) (Jacobs, J., dissenting).

97. Moohr, *supra* note 91, at 182. (warning that participating in partisan politics could have conceivably been characterized as depriving the public of the intangible right to honest government). The Chamber of Commerce of the United States echoed this concern in its amicus curiae brief to the Supreme Court by citing to *United States v. Thompson*, which involved

> [a] state procurement official [who] departed from the rules governing an elaborate process for awarding a contract to a travel agency. There were no kickbacks or bribes. "The prosecution's theory was that any politically motivated departure from state administrative rules is a federal crime, when either the mails or federal funds are involved." The court of appeals reversed the conviction immediately after hearing oral argument, and Judge Easterbrook commentated that this prosecution "may well induce Congress to take another look at the wisdom of enacting ambulatory criminal prohibitions. Haziness designed to avoid loopholes

"following a supervisor's order to write an unlawful contract [was] an instance of dishonest services to the firm? [Or whether] sending a personal e-mail from an employer's computer violate[d] the obligation to provide honest services?"[98] What about a professor who allowed a graduate student to submit a plagiarized thesis,[99] or a coach who helped a student athlete cheat to maintain his scholarship?[100] One commentator even suggested using § 1346 to go after athletes who tested positive for performance-enhancing substances in breach of their collective bargaining agreement with Major League Baseball.[101]

During oral arguments in *Black*, even Justice Breyer joined the parade by asking the Solicitor General whether an employee who disingenuously compliments her boss's hat "so the boss will leave the room so that the worker can continue to read the racing form" has committed honest-services fraud.[102] Given the vague language of § 1346, it is no wonder Justice Breyer feared the idea of making felons out of the "over 100 million workers" he predicted were likely to engage in workplace deception at some point during their career.[103] The seemingly infinite hypothetical horror show spawned from § 1346's ambiguous language made it clear that the Supreme Court once again needed to intervene to ensure that individuals convicted of mail and wire fraud received fair warning.

b. Prosecutorial Abuse of Discretion

If "a lawyer with his briefcase can steal more than a thousand men

> through which bad persons can wriggle can impose high costs on people the statute was not designed to catch."

Brief of the Chamber of Commerce of the U.S. as Amicus Curiae in Support of Petitioners at 9, Black v. United States, 130 S. Ct. 2963 (2010) (No. 01-1015) (citations omitted) (quoting United States v. Thompson, 484 F.3d 877, 878, 884 (7th Cir. 2007)).

98. Geraldine Szott Moohr, *Why the Skilling Case Affects Us All*, HOUS. CHRON. (May 10, 2010), http://www.chron.com/disp/story.mpl/editorial/outlook/7000838.html.

99. *See* United States v. Frost, 125 F.3d 346, 363–70 (6th Cir. 1997).

100. *See* United States v. Gray, 96 F.3d 769 (5th Cir. 1996) (affirming basketball coaches' mail- and wire-fraud convictions for providing homework and exam answers to athletes to maintain their eligibility, depriving the university of their honest services by failing to disclose their material misconduct).

101. *See* Joshua M. Kimura, Note/Comment, *The Return of the Natural: How the Federal Government can Ensure that Roy Hobbs Outlasts Barry Bonds in Major League Baseball*, 16 SPORTS LAW J. 111, 114, 123 (2009).

102. Transcript of Oral Argument at 30–31, Black v. United States, 130 S. Ct. 2963 (2010) (No. 08-876).

103. *Id.* at 31.

with guns,"[104] prior to *Skilling*, a prosecutor alleging honest-services fraud could shackle more than ten thousand businessmen with receding hairlines. The ambiguity that belied the theory of honest-services fraud afforded prosecutors even more discretion to attack whoever, whenever, and however they pleased.[105] Prosecutors defended their ambiguously-worded weapon on grounds that, had Congress more clearly identified the conduct prohibited by the statute, crafty con-artists could have easily tailored their schemes to slip through the inevitable loopholes created by more specific language.[106] Others countered by arguing that this concern, although credible, was by no means exclusive to § 1346; rather, all statutes struggle with striking a delicate balance between practical effectiveness and prosecutorial fair warning—a balancing act some accuse Congress of delegating to the judiciary.[107]

Few would dispute the need for prosecutors to operate with considerable discretionary power to effectively combat an ever-changing variety of fraud and swindles; history has shown however, that absolute

104. MARIO PUZO, THE GODFATHER 46 (New Am. Library, New Am. Library Essential ed. 2002) (1969).

105. In her comprehensive look at the forces driving the increased criminalization of conduct that formerly amounted to a mere civil breach of fiduciary duty, Professor Lisa Casey argued that, in addition to the heightened discretion created by vaguely worded statutes, several procedural mechanisms afford prosecutors even more discretionary power. *See* Casey, *supra* note 77, at 44. These advantages, *inter alia*, include "the sprawling federal criminal code at their disposal," the authority to negotiate plea agreements, a strikingly low number of grand jury indictment rejections, and trial courts' routine denial of defendants' motions to dismiss. Casey, *supra* note 77 at 44–45.

106. *See* Rakoff, *supra* note 24, at 772 ("In many . . . areas, where legislatures have sometimes been slow to enact specific prohibitory legislation, the mail fraud statute has frequently represented the sole instrument of justice that could be wielded against the ever-innovative practitioners of deceit.").

107. *See infra* note 240; Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 758 (1999).

> Seduced by the desire to be seen as tough on crime, senators and representatives have engaged in an orgy of ill-considered or unconsidered lawmaking. Giving little thought to the sheer breadth of conduct ostensibly criminalized by their enactments, . . . legislatures have all but abdicated the responsibility for deciding what conduct really ought to be prosecuted . . . .

Id. Professor Coffee similarly remarked,

> The all inclusive scope of [the mail- and wire-fraud] statutes depends upon a critical phrase, "scheme . . . to defraud," which is quietly buried in each statute and which has long invited courts to make law in as seductive a manner as the mythical sirens once invited sailors to crash upon their rocks.

Coffee & Whitehead, *supra* note 52, at 9-2 (ellipsis in original).

power corrupts absolutely—and prosecutors are no exception.[108] Prosecutors struggle with the same human weaknesses that drive the corrupt behavior of the public officials and corporate officers whom they prosecute—greed, pride, and yes, even dishonesty. As early as 1930, Roscoe Pound opined,

> Undoubtedly the bane of prosecution in the United States today is the intimate connection of the prosecutor's office with politics. . . . The position of public prosecutor is politically strategic in the highest degree. . . . If the prosecutor is ambitious, he looks upon his office as a stepping stone to Congress or to the Governorship.[109]

Supporting her observation that the "[s]uccessful prosecutions of public officials create sufficient capital to launch a political career," one commentator attributed former United States Attorney James Thompson's consideration by the Grand Old Party for United States Attorney General to the fact that Mr. Thompson's résumé boasted successful prosecutions of a slew of Democrats using none-other-than the honest-services theory of fraud.[110] It is no wonder Justice Scalia feared that § 1346's "expansive phras[ing] invite[d] abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct."[111]

Even prosecutors not looking to exploit their considerable discretion for personal gain faced pressure to use the theory to further the political aspirations of their superiors. "[J]udges and scholars have expressed growing concern that the ambiguous language in § 1346 has enabled the [DOJ] to prosecute public corruption cases for political purposes."[112] Former Assistant United States Attorney Thomas Dibiagio admitted that

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108. *See* John R. Emshwiller & Evan Perez, *Prosecutors Seldom Punished for Misconduct*, WSJ.COM (Oct. 4, 2010, 5:49 PM), http://online.wsj.com/article/SB10001424052748704847104575532340572909432.html (discussing high-profile instances of prosecutorial misconduct).

109. ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 183 (Transaction Pubs. 1998) (1930).

110. Moohr, *supra* note 91, at 181 n.119. Another commentator similarly pointed out that

> lawmakers have a strong incentive to add new offenses and enhanced penalties, which offer ready-made publicity stunts . . . . Conventional wisdom suggests that appearing tough on crime wins elections regardless of the underlying justifications, if only to provide another line on the resume or potential propaganda for a grandstanding candidate.

Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U.L. REV. 703, 718 (2005).

111. Sorich v. United States, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting) (denial of certiorari).

112. Casey, *supra* note 77, at 6.

"[t]he intimidation and use of the criminal process as but another political device is profoundly corrupting. With no established standards, a federal public corruption prosecution, based on the intangible right to honest services, is particularly vulnerable to being snarled by politics."[113]

In his brief to the Supreme Court, Skilling cited a number of examples where prosecutors "proffered whatever meaning [was] necessary to prosecute whatever defendant happen[ed] to be in the Government's sights."[114] He pointed to contradictory stances taken by the Government as to whether: (1) the existence of a fiduciary duty was a necessary element of honest-services fraud,[115] (2) "public officials who act for political motives do not commit honest-services fraud,"[116] (3) honest-services fraud required an "official action" rather than criminalizing any form of workplace misconduct,[117] (4) honest-services fraud derived its authority from state or federal common law,[118] (5) an employee's ignorance toward his duty to disclose negated his intent to deceive,[119] and finally, (6) whether the statute was limited to instances of bribery and kickbacks or extended to undisclosed self-dealing.[120] Although one can only speculate as to the reasons behind the government's flip-flopping in these cases, Skilling's list

113. Thomas M. DiBiagio, *Politics and the Criminal Process: Federal Public Corruption Prosecution of Popular Public Officials Under the Honest Services Component of the Mail and Wire Fraud Statutes*, 105 DICK. L. REV. 57, 57–58 (2000) (footnote omitted).

114. Brief for Petitioner at 43, Skilling v. United States, 130 S. Ct. 2896 (2010) (No. 08-1394).

115. *Id.* ("While the Government now argues that the statute requires the existence of a fiduciary duty, *Black* GB11-12, it recently argued the opposite, *U.S. v. McGeehan*, 584 F.3d 560, 574 (3d Cir. 2009).").

116. *Id.* ("While the Government now argues that public officials who act for political motives do not commit honest-services fraud, *Weyhrauch* GB45, it recently argued the opposite, *U.S. v. Thompson*, 484 F.3d 877, 878 (7th Cir. 2007).").

117. *Id.* ("While the Government now argues that a person can commit honest-services fraud only for 'official action,' *Black* GB36-37, it previously argued the opposite, and that *any* workplace misconduct would suffice, *U.S. v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997).").

118. *Id.* ("While the Government now argues that the honest-services statute itself, and not state law, is the source of any fiduciary duty, *Weyhrauch* GB11-12, it previously argued that a violation of a state law ethical duty is relevant and sufficient evidence of honest-services fraud, *U.S. v. Sawyer*, 85 F.3d 713, 726–27 (1st Cir. 1996).").

119. *Id.* ("While the Government now argues that a defendant's lack of knowledge of his disclosure obligation is relevant in assessing whether he had an intent to deceive, *Weyhrauch* GB48, it recently argued the opposite, *U.S. v. Carbo*, 572 F.3d 112, 116 (3d Cir. 2009).").

120. *Id.* at 43–44 ("And while the Government now argues that the defendant must act to further his personal financial interest, and that the statute essentially reduces to bribes, kickbacks, and self-dealing, *Weyhrauch* GB41, 45–46, the Government argued *against* exactly these limitations in both the district court and the court of appeals below, U.S.C.A. Br. 80-81 & n.9; R:41327-29.").

illustrated the potential for abuse created by the uncertainty that surrounded so many aspects of the statute.

2. *Separation of Powers*

Because Congress failed to clearly define the conduct prohibited by the honest-services fraud statute, appellate courts were forced to step in as de facto legislatures and decide exactly what type of conduct § 1346 prohibited.[121] As a result, the Supreme Court in *Weyhrauch* was asked to decide whether such judicially-created law offended the Constitution.[122] Under the Separation-of-Powers Doctrine, the Legislative Branch possesses the exclusive authority to create laws prohibiting particular conduct and define punishments for those who break them.[123] Once the legislature defines a crime, the Judicial Branch acquires the exclusive power to decide whether defendants have acted in a manner identified by the legislature as illegal.[124] It follows then, "If Congress has not declared an act . . . to be a crime against the United States, the courts have no power to treat it as such."[125] Thus, in upholding the Constitution, courts must respect the separation between the judiciary's power to interpret and apply laws, and the legislature's power to create and define laws.[126]

Where Congress enacts a criminal statute, but fails to clearly define the behavior it prohibits, courts may be tempted to create tests and elements that add meaning to Congress's otherwise meaningless statute.[127] Courts must exercise restraint in such circumstances because "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly

121. *See* United States v. Kincaid-Chauncey, 556 F.3d 923, 939–40 (9th Cir. 2009) ("'The 'intangible rights' theory [of honest-services fraud] has been a subject of controversy in the history of the federal mail and wire fraud statutes,' . . . and, we would add, it continues to cause controversy despite (or perhaps because of) Congress's statutory abrogation of *McNally*." (alteration in original) (quoting United States v. Williams, 441 F.3d 716, 721 (9th Cir. 2006))).

122. *See* Brief for Petitioner at i, Weyhrauch v. United States, 130 S. Ct. 2971 (2010) (per curiam) (No. 08-1196).

123. United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812).

124. *Id.*

125. United States v. Reese, 92 U.S. 214, 216 (1875).

126. *See* City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981) ("Federal courts, unlike state courts, are not general common-law courts and therefore do not possess a general power to develop and apply their own rules of decision."); Jerome v. United States, 318 U.S. 101, 104 (1943) ("[T]here is no common law offense against the United States.").

127. *See* United States v. Santos, 553 U.S. 507, 524 (2008) (Stevens, J., concurring) ("When Congress fails to define potentially ambiguous statutory terms, it effectively delegates to federal judges the task of filling gaps in a statute.").

in the case of federal crimes, which are solely creatures of statute."[128] It is for this reason the Supreme Court declared that "even if... statutory ambiguity 'effectively' licenses us to write a brand-new law, we cannot accept that power in a criminal case, where the law must be written by Congress."[129] Out of respect for this separation of power, a number of federal judges were reluctant to fill in the blanks left by Congress in its honest-services fraud statute.[130]

3. *Federalism*

Although highly effective at fighting public corruption, the federal government's use of § 1346 to toss state officials out of office and into prison raises fundamental concerns for federalism—particularly where an elected official's home state chose not to criminalize such behavior. The Framers envisioned a dual government in which each sovereign state has the power to regulate the affairs that occur within its borders—such as its education system, political process, and system of justice—whereas the Federal Government retains the power to regulate only those affairs that transcend state boundaries.[131] This vision is embodied in the Tenth

128. Liparota v. United States, 471 U.S. 419, 424 (1985); *see also* Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 181 (1994) ("Federal crimes are defined by Congress, not the courts.").

129. *Santos*, 553 U.S. at 523.

130. *See, e.g.*, United States v. Rybicki, 354 F.3d 124, 163–64 (2d Cir. 2003) (en banc) (Jacobs, J., dissenting) ("[T]he vagueness of [§ 1346] has induced court after court to undertake a rescue operation by fashioning something that (if enacted) would withstand a vagueness challenge.... Judicial invention cannot save a statute from unconstitutional vagueness; courts should not try to fill out a statute that makes it an offense to ... fail to render 'honest services.' ... When courts undertake to engage in legislative drafting, the process takes decades and the work is performed by unelected officials without the requisite skills or expertise; and as the statutory meaning is invented and accreted, prosecutors are unconstrained and people go to jail for inchoate offenses."); United States v. Brumley, 116 F.3d 728, 734 (5th Cir. 1997) (en banc) ("We find nothing to suggest that Congress was attempting in § 1346 to garner to the federal government the right to impose upon states a federal vision of appropriate services—to establish, in other words, an ethical regime for state employees. Such a taking of power would sorely tax separation of powers and erode our federalist structure.").

131. *See* THE FEDERALIST NO. 45, at 258 (James Madison), *in* FEDERALIST AND OTHER CONSTITUTIONAL PAPERS (E.H. Scott ed., 1828). Madison explained,

> The powers delegated by the proposed constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments, are numerous and indefinite.... [And] will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State.

Id.; *see also* John J. Parker, *Dual Sovereignty and the Federal Courts*, 51 NW. U. L. REV. 407, 407

Amendment, which states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[132] Although less tension would exist if our system of dual sovereignty were scrapped in favor of an exclusively national government, the Framers recognized that the several states comprised unique communities filled with people who were not only geographically divided, but also divided by their distinct moral, cultural, and political beliefs.[133]

The power to criminalize certain behavior—including fraud[134]—was traditionally considered one of the indefinite powers delegated to the states.[135] Recognizing this principle, the Tenth Amendment protects a state's right to establish its own system for electing and removing public officials from office.[136] Over time however, the Supreme Court eroded the protections afforded to states under the Tenth Amendment,[137] passively watching as Congress used its vast power under the Commerce Clause to

(1956) ("By providing for the control of local affairs by the several states, [the Constitution] has preserved the strength and freedom of local self-government. By delegating to the nation power to regulate life transcending state boundaries and to deal with foreign nations—power which is necessary to the preservation of harmony among the states, it has created a nation of imperial size and grandeur.").

132. U.S. CONST. amend. X.

133. THE FEDERALIST NO. 46, *supra* note 131, at 260 (James Madison). Madison elaborated,

> [T]he first and most material attachment of the people, will be to the Governments of their respective States. . . . By the superintending care of these [state and local governments], all the more domestic and personal interests of the people will be regulated and provided for. With the affairs of these [state and local governments], the people will be more familiarly and minutely conversant; with the members of these, will a greater proportion of the people have the ties of personal acquaintance and friendship, and of family and party attachments; on the side of these, therefore, the popular bias may well be expected most strongly to incline.

THE FEDERALIST NO. 46, *supra* note 131, at 260 (James Madison).

134. *See* United States v. Reese, 92 U.S. 214, 221 (1875); *see also* Evans v. United States, 504 U.S. 255, 278, 290 (Scalia & Thomas, JJ., dissenting) (1992) (criticizing the majority's construction of federal corruption law as "repugnant . . . to basic tenets of federalism" because it "served as the engine for stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws . . . .").

135. Unites States v. Craig, 528 F.2d 773, 779 (7th Cir. 1976) ("[T]he primary responsibility for ferreting out . . . political corruption must rest, until Congress directs otherwise, with the State, the political unit most directly involved."); Ralph E. Loomis, Comment, *Federal Prosecution of Elected State Officials for Mail Fraud: Creative Prosecution or an Affront to Federalism?*, 28 AM. U.L. REV. 63, 67 (1978) ("Historically, the day-to-day maintenance of societal order has been the responsibility of state and local law enforcement officials.").

136. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

137. United States v. Lopez, 514 U.S. 549, 556–59 (1995) (discussing the Court's expansion of Congress's regulatory power under the Commerce Clause from 1937 to 1995).

regulate nearly every aspect of modern society—including fraud said to affect interstate commerce.[138] Reacting to this recent development in constitutional law, judges and scholars argue that the mail-, wire-, and honest-services fraud statutes step too far over the line of federalism by allowing the federal government to not only police *interstate* commerce, but also *intrastate* politics—previously believed to comprise the core of those "numerous and indefinite" rights that James Madison believed must be reserved to the people of each state.[139] In *Weyhrauch*, the Government accused a member of the Alaska State Legislature of having criminally deprived his constituents of his honest services as a public official even though his behavior was completely legal in his home state.[140]

Naturally, federal prosecutors' decision to deploy honest-services fraud against state officials prompted widespread criticism, which ranged from academicians[141] to casual observers,[142] and likely influenced the Supreme Court's decision to grant certiorari to decide whether state law must be violated to sustain a conviction for honest-services fraud[143]—

138. *See* 18 U.S.C. § 1341 (2006) (federal mail fraud); 18 U.S.C. § 1343 (2006) (federal wire fraud). Just as telephone wires stretched out across state borders, so too had the government's power to regulate practically every form of fraudulent conduct, under the assumption that, regardless of the individual being prosecuted, they undoubtedly used mail or a telephone at some point during the planning or commission of their scheme. *See generally* Kobrin, Note, *supra* note 17, at 779–95 (discussing the historical trends that lead to the federal government's extension of authority over areas previously left to the states); Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy,* 65 GEO. L.J. 1171, 1172 (1977).

139. *See supra* note 131; *see also* United States v. Murphy, 323 F.3d 102, 117 (3d Cir. 2003) ("[F]ederalism concerns are paramount in federal prosecutions of local political party officials."); Gary W. Robert, Comment, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 CHI. L. REV. 562 (1980).

140. *See* Brief for the U.S. at 4, Weyhrauch v. United States, 130 S. Ct. 2971 (2010) (per curiam) (No. 08-1196).

141. *See generally*, Loomis, Comment, *supra* note 135.

142. *See, e.g.*, Von Hoffman, *Poster*, WASH. POST, Sept. 16, 1977, at B3. Following the conviction of former Illinois Governor Otto Kerner, Jr. for federal fraud, the Washington Post published a highly critical column directed at the federal government's encroachment onto states' rights, which read:

> [This] case . . . should be a warning, not to crooked politicians, but to anybody that if the feds want you, they'll nail you. . . . We are told there is no such thing as a federal police force, but in this matter District Attorney [sic] Skolnik not only invaded turf from which he is constitutionally barred but he perverted the federal statutes to do it.

Id.

143. *See supra* note 77. It seems the Judiciary was not impervious to public opinion surrounding honest-services fraud, as the Fifth Circuit acknowledged that "[t]he statue continues

although it ultimately left this question for another day. Other courts and commentators similarly wondered "[w]hat body of law gives rise to [a state official's] 'duty of honest services?'"[144] The circuits that have addressed the issue of federalism disagree over the correct answer to this question. The Fifth Circuit requires proof that a public official violated a state-created duty of honest services, but did not specify the body of law from which such duty is derived.[145] The Third Circuit agreed with the Fifth Circuit, similarly failing to point to a specific body of state law.[146] On the other hand, the First,[147] Fourth,[148] Ninth,[149] and Eleventh[150] Circuits each refused to limit the statute based on state sovereignty, finding that § 1346 "establishes a uniform standard of conduct governing every public official nationwide and that the prosecution need not prove an independent violation of state law in order to secure a conviction."[151]

In analogous cases where circuit courts have disregarded federalism concerns, the Supreme Court has employed various limiting principles to protect against unnecessary encroachment on states' rights. The Supreme Court—with the exception of a few narrow cases—has traditionally refused to create a coast-to-coast common law.[152] Additionally, the Court in

to draw much cogent and scholarly commentary." United States v. Brumley, 116 F.3d 728, 733 n.1 (5th Cir. 1997) (en banc).

144. Coffee & Whitehead, *supra* note 52, at 9-51.

145. *Brumley*, 116 F.3d at 734 ("We decide today that services must be owed under state law and that the government must prove in a federal prosecution that they were in fact not delivered. We do not reach the question of whether a breach of a duty to perform must violate the criminal law of the state.").

146. United States v. Panarella, 277 F.3d 678, 692–93 (3d Cir. 2002) ("Rather than substituting one ambiguous standard for another in holding that an official deprives the public of his honest services only if he misuses office for personal gain, we believe that state law offers a better limiting principle for purposes of determining when an official's failure to disclose a conflict of interest amounts to honest services fraud.").

147. *See* United States v. Urciuoli, 513 F.3d 290, 298–99 (1st Cir. 2008).

148. *See* United States v. Bryan, 58 F.3d 933, 942 (4th Cir. 1995).

149. United States v. Weyhrauch, 548 F.3d 1237, 1245 (9th Cir. 2008), *vacated and remanded without opinion by* Weyhrauch v. United States, 130 S. Ct. 2971 (2010) (per curiam).

150. *See* United States v. Walker, 490 F.3d 1282, 1299 (11th Cir. 2007).

151. Patrick Hamilton et al., *Ninth Circuit Joins Other Circuits in Ruling that Honest Services Fraud Conviction of a Public Official does not Require a Violation of State Law*, MARTINDALE.COM (Mar. 5, 2009), http://www.martindale.com/government-law/article_Day-Pitney-LLP_627678.htm.

152. *See* Munn v. Illinois, 94 U.S. 113 (1876); United States v. Reese, 92 U.S. 214 (1875). The Court summarized its reluctance to interpret federal statutes in a manner that preempted state law in *United States v. Bass*:

> [U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been

McNally explicitly refused to create a national standard of honest-services fraud because doing so would "involve[] the Federal Government in setting standards of disclosure and good government for local and state officials."[153] These principles served as pillars to Weyhrauch's argument that "[r]eading the single sentence of § 1346 as a delegation to federal prosecutors and federal judges of the task of defining conflict of interest disclosure duties of state officials would substantially impact each state's ability to establish its own governing framework."[154] Unfortunately, the Supreme Court, per curiam, ultimately sidestepped this issue when it vacated the Court of Appeals for the Ninth Circuit's judgment on other grounds pursuant to its *Skilling* decision.[155]

III. *SKILLING V. UNITED STATES*

In *Skilling v. United States*, the Supreme Court was asked to decide, *inter alia*, whether former Enron executive Jeffrey Skilling was improperly convicted of conspiracy to commit honest-services wire fraud.[156] Specifically, Skilling challenged the honest-services fraud statute as being unconstitutionally void for vagueness, or alternatively, that his alleged undisclosed self-dealing did not fit within the scope of the statute.[157] Although the Court refused to invalidate the statute under the Vagueness Doctrine, it narrowly construed the statute to "cover only bribery and

> reluctant to define as a federal crime conduct readily denounced as criminal by the States. This congressional policy is rooted in the same concepts of American federalism that have provided the basis for judge-made doctrines. . . . [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

404 U.S. 336, 349 (1971).

153. McNally v. United States, 483 U.S. 350, 361 (limiting the scope of the mail-fraud statute to protect property rights, but not intangible rights); *superseded by statute*, Act of Nov. 18, 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508 (codified as amended at 18 U.S.C. § 1346), *as recognized in* Skilling v. United States, 130 S. Ct. 2896 (2010).

154. Brief for Petitioner at 20, Weyhrauch v. United States, 130 S. Ct. 2971 (2010) (per curiam) (No. 08-1196).

155. *Weyhrauch*, 130 S. Ct. at 2971 (citing Skilling v. United States, 130 S. Ct. 2896, 2940 (2010) (holding that the honest-services-fraud statute is not void for vagueness when narrowly construed to encompass only schemes involving bribery and kickbacks)).

156. Skilling v. United States, 130 S. Ct. 2896, 2907 (2010).

157. *Id. See generally* 18 U.S.C. § 371 (2006) (conspiracy); 18 U.S.C. § 1343 (2006) (wire fraud); 18 U.S.C. § 1346 (honest-services fraud).

kickback schemes."[158] Accordingly, writing for the Court, Justice Ginsburg declared, "[A]s we read § 1346, Skilling did not commit honest-services fraud."[159] The Court remanded the case back to the Fifth Circuit to decide whether the jury may have convicted him for conspiracy to commit honest-services wire fraud pursuant to its new, narrowly tailored reading of the statute.[160]

A. Facts and Procedural History

The journey of Enron was as tumultuous as that of the honest-services fraud statute. In its prime, Enron was the nation's seventh largest corporation whose innovative ideas shook up the previously sleepy energy market.[161] Through the 1990s and into the early 2000s, Enron's stock continued to climb as local pride swelled in Houston—it seemed Enron could do no wrong.[162] Skilling, recruited to join Enron in 1990 by its founder Ken Lay, climbed the corporate ladder until he was ultimately named chief executive officer (CEO) in 2001.[163] In his interview for admission to the Harvard Business School, the dean asked, "Skilling are you smart?"[164] to which he infamously replied, "I'm f*cking smart."[165] At the hands of "the smartest guy in the room," the once-proud energy house soon crumbled to the ground amidst allegations of rampant fraud.[166]

Following Enron's stock plummet and Skilling's sudden departure just six months after becoming CEO, the DOJ launched a massive-scale

158. *Skilling*, 130 S. Ct. at 2940.

159. *Id.* at 2934.

160. *Id.* at 2935.

161. *See The Five-Hundred Largest U.S. Corporations*, FORTUNE, Apr. 16, 2001 at F-1 (listing Enron's revenue in 2000 as $100.8 billion); *see also The Rise and Fall of Enron: A Brief History*, CBC NEWS (May 25, 2006, 4:48 PM), http://www.cbc.ca/money/story/2006/05/25/enron-bkgd.html ("From the pipeline sector, Enron began moving into new fields. In 1999, the company launched its broadband services unit and Enron Online, the company's website for trading commodities, which soon became the largest business site in the world.").

162. *The Rise and Fall of Enron, supra* note 161 ("Growth of Enron was rapid. In 2000, the company's annual revenue reached $100 billion .... The company's stock price peaked at $90 ....").

163. *Skilling*, 130 S. Ct. at 2907.

164. BETHANY MCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON 31 (updated paperback ed. 2004) [hereinafter McLean, *The Smartest Guys*].

165. *Id.* (asterisk added).

166. *See id.* at 405, 408–13.

investigation into the cause of the corporation's magnificent implosion.[167] "The Government's investigation uncovered an elaborate conspiracy to prop up Enron's short-run stock prices by overstating the company's financial well-being."[168] Prosecutors brought criminal charges against "dozens of Enron employees who participated in the scheme. . . . [As] the Government worked its way up the corporation's chain of command."[169] The Government forced a number of plea agreements from former employees, many of whom were charged with committing honest-services fraud, including Enron's former chief accounting officer, Richard Causey.[170]

> In its indictment, the government accused Skilling of having engaged in a wide-ranging scheme to deceive the investing public, including Enron's shareholders, . . . about the true performance of Enron's businesses by: (a) manipulating Enron's publicly reported financial results; and (b) making public statements and representations about Enron's financial performance and results that were false and misleading.[171]

The fruits of Skilling's scheme, the Government claimed, included "salary, bonuses, grants of stock and stock options, other profits, and prestige" that he had helped himself to while simultaneously driving the company into the ground.[172] Skilling's undisclosed self-dealing, the Government argued, "depriv[ed] Enron and its shareholders of the intangible right of [his] honest services."[173] The Government also "charged Skilling with more than 25 substantive counts of securities fraud, wire fraud, making false representations to Enron's auditors, and insider trading."[174] Noticeably absent from the indictment, however, were allegations that bribes or kickbacks had played a part in Skilling's scheme.[175]

By the time Skilling was sentenced to prison, he was literally the "last

167. *Skilling*, 2130 S. Ct. at 2907.
168. *Id.*
169. *Id.*
170. United States v. Causey, No. H-04-025, 2004 WL 2414438 (S.D. Tex. Oct. 19, 2004), *aff'd sub nom.* United States v. Skilling, 554 F.3d 529 (5th Cir. 2009), *aff'd in part and vacated in part by* Skilling v. United States, 130 S. Ct. 2896 (2010).
171. *Skilling*, 2130 S. Ct. at 2907 (quoting App. ¶ 5, p. 277a).
172. *Id.* (citing App. ¶ 14, at 280a).
173. *Id.* (citing App. ¶ 87, at 318a) (second alteration in original).
174. *Id.* at 2908.
175. *See id.* at 2934 ("The Government did not, at any time, allege that Skilling solicited or accepted side payments from a third party in exchange for making these misrepresentations.").

man standing"; Andy Fastow[176] and Richard Causey both pleaded guilty,[177] while Ken Lay, at the age of sixty-four, had recently suffered a fatal heart attack.[178] Skilling was ultimately convicted of conspiracy to commit fraud and a host of other financial crimes.[179] As noted by the appellate court however,

> The indictment and the government's theory allowed for three objects of the conspiracy: to commit (1) securities fraud, (2) wire fraud to deprive Enron and its shareholders of money and property, and (3) . . . of the honest services owed by its employees. Because the jury returned a general verdict, [the Fifth Circuit held,] we cannot know on which of the three objects it relied.[180]

"On appeal, Skilling argue[d] that [the Fifth Circuit] must reverse all of his convictions because the government used an invalid theory of 'honest-services fraud' to convict him."[181] The Fifth Circuit disagreed and instead affirmed the trial court's conviction, holding, "Skilling failed to demonstrate that the government's case rested on an incorrect theory of law."[182] By 2010, Enron's tragic tale of corporate greed, arrogance, and deception had enthralled audiences across the globe as the subject of a tell-all book,[183] Broadway musical,[184] Academy Award-nominated documentary,[185] and thousands of newspaper articles.[186] In 2009, the

176. Press Release, U.S. Dep't of Justice, Former Enron Chief Financial Officer Andrew Fastow Pleads Guilty to Conspiracy to Commit Securities and Wire Fraud, Agrees to Cooperate With Enron Investigation (Jan. 14, 2004), http://www.fbi.gov/dojpressrel/pressrel04/enron011404.htm.

177. *Skilling*, 130 S. Ct. at 2901.

178. *See* Carrie Johnson, *Enron's Lay Dies of Heart Attack, Convicted Founder Faced Life in Prison*, WASH. POST, July 6, 2006, at A01.

179. United States v. Skilling, 554 F.3d 529, 542 (5th Cir. 2009), *aff'd in part and vacated in part by* Skilling v. United States, 130 S. Ct. 2896 (2010).

180. *Id.*

181. *Id.*

182. *Id.* at 548.

183. *See* MCLEAN & ELKIND, *The Smartest Guys*, supra note 164.

184. *See* Beth Kowitt, *Enron, Welcome to Broadway*, FORTUNE, Dec. 7, 2009, at 22. "Enron" the musical, introduced to Broadway audiences in Spring 2010 under the direction of Rupert Goold, featured "dramatic re-creations of Skilling and CFO Andy Fastow planning special-purpose entities" along with musical numbers including "one[] known by the cast as the 'Commodities Chorus.'" *Id.*

185. THE ACAD. OF MOTION PICTURE ARTS AND SCIS., *Nominees & Winners for the 78th Academy Awards*, http://www.oscars.org/awards/academyawards/oscarlegacy/2000-present/78nominees.html (last visited July 27, 2010).

186. *See* Skilling v. United States, 130 S. Ct. 2896, 2943 (2010) (Sotomayor, J., joined by Stevens & Breyer, JJ., concurring in part and dissenting in part) ("The [Houston Chronicle

Supreme Court granted Skilling's writ of certiorari challenging the statute's constitutionality and application to his undisclosed self-dealing, setting the stage for the near-decade-long melodrama's final act.[187]

B. Supreme Court Decision

1. The Court's Refusal to Strike § 1346 Down as Void for Vagueness

Skilling first argued that the honest-services fraud statute was so vague that the Supreme Court should strike it down as unconstitutional. Under the fair-notice prong of the Vagueness Doctrine, Skilling asserted that the "spare words [of § 1346] 'provide[] no clue to the public or the courts as to what conduct is prohibited under the statute.'"[188] Under the second prong of the vagueness inquiry, Skilling contended that "§ 1346's 'standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections,' thereby facilitat[ing] opportunistic and arbitrary prosecutions.'"[189]

2. The Court's Narrow Construction of Honest-Services Fraud to Cover Only Bribery and Kickback Schemes

In refusing to strike the statute down as unconstitutionally vague, the Court began its discussion by pointing out that "Skilling swims against our case law's current, which requires us, if we can, to construe, not condemn, Congress's enactments."[190] Although the Court agreed with Skilling that "[c]onstruing the honest-services statute to extend beyond [its] core meaning, . . . would encounter a vagueness shoal," it refused to completely strike § 1346 down as unconstitutionally vague.[191] Section 1346's "core meaning," the Court held, was to proscribe "bribery and kickback schemes," but not schemes involving undisclosed self-dealing or conflicts

newspaper] mentioned Enron in more than 4,000 articles during the 3-year period following the company's December 2001 bankruptcy filing.").

187. Skilling v. United States, 130 S. Ct. 393 (2009) (granting writ of certiorari).

188. Brief for Petitioner Skilling at 38, Skilling v. United States, 130 S. Ct. 2896 (2010) (second alteration in original) (quoting United States v. Handakas, 286 F.3d 92, 104 (2d Cir. 2002), *overruled in part by* United States v. Rybicki, 354 F.3d 124, 144 (2d Cir. 2003) (en banc)).

189. *Skilling*, 130 S. Ct. at 2928 (alteration in original) (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

190. *Id.*

191. *Id.* at 2907.

of interest.[192]

In its search for meaning, the Court first journeyed to the halls of Congress. Although Congress offered little guidance regarding the statute's intended meaning, in the Supreme Court's opinion, there was "no doubt that Congress intended § 1346 to refer to and incorporate the honest-services doctrine recognized in Court of Appeals' decisions before *McNally* derailed the intangible-rights theory of fraud."[193] After "survey[ing] that case law.... [The Court] acknowledge[d] that... [the] honest-services decisions preceding *McNally* were not models of clarity or consistency."[194] Rather than strike the statute down, the Court rescued the statute from vagueness by narrowly construing it to encompass only those schemes involving bribery or kickbacks.[195]

In doing so the Court reasoned that, despite the considerable disarray that occurred when the statute was applied outside its "core," pre-*McNally* courts had "dominantly and consistently applied the fraud statute to bribery and kickback schemes—schemes that were the basis of most honest-services prosecutions."[196] The Court further explained,

> Although some applications of the pre-*McNally* honest-services doctrine occasioned disagreement among the Courts of Appeals, these cases [did] not cloud the doctrine's solid core: The "vast majority" of the honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes.[197]

Pursuant to "Congress's reversal of *McNally* and reinstatement of the honest-services doctrine, [the Supreme Court] conclude[d that the statute]... should be salvaged by confining its scope to the core pre-*McNally* applications."[198] Offering additional support for its conclusion that bribery and kickbacks composed the core of honest-services fraud, the Supreme Court pointed to the overwhelmingly predominate bribery prosecutions brought under the theory both before and after its codification.[199]

The majority also speculated in a footnote that, "[a]pprised that a broader reading of § 1346 could render the statute impermissibly vague,

192. *Id.*
193. *Id.* at 2928.
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.* at 2930.
198. *Id.*
199. *See id.*

Congress, we believe, would have drawn the honest-services line, as we do now, at bribery and kickback schemes."[200] To help identify future violations of § 1346, the Supreme Court suggested courts "draw[] content not only from the pre-*McNally* case law, but also from federal statutes proscribing—and defining—similar crimes"; for example, the Court pointed to two older bribery statutes as well as 41 U.S.C. § 52(2), which defines "[t]he term 'kickback' [as] mean[ing] any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to [enumerated persons] for the purpose of improperly obtaining or rewarding favorable treatment in connection with [enumerated circumstances]."[201]

Confident that it had rescued the honest-services statute from being void for vagueness, the Supreme Court shifted its focus to Skilling's dishonest failure to disclose his self-dealing; particularly, why extending § 1346 to cover such schemes might render the statute unconstitutionally vague. First, the Court called the Government out for misconstruing the theory of liability in *McNally* as one premised on "'nondisclosure of a conflicting financial interest,' . . . [as well as mistakenly suggesting that] 'Congress clearly intended to revive th[at] nondisclosure theory [by superseding *McNally's* decision through the enactment of § 1346].'"[202] In rejecting the Government's characterization of the scheme presented in *McNally*, the Court clarified, "*McNally* . . . involved a classic kickback scheme," therefore, "[r]eading § 1346 to proscribe bribes and kickbacks—and nothing more—satisfies Congress' undoubted aim to reverse *McNally* on its facts."[203] Second, the Court also rejected the Government's argument that "'[a]lthough not as numerous as the bribery and kickback cases, . . . 'the pre-*McNally* cases involving undisclosed self-dealing were abundant.'"[204] The Court countered by pointing out that, relative to its bribery and kickback counterparts, prosecutions under the nondisclosure theories of honest-services fraud were few and far between.[205] Furthermore, the Court explained that such cases, although not at the core of the doctrine, were the root of a disproportionate number of "intercircuit

200. *Id.* at 2931 n.43.
201. *Id.* at 2933–34 (some alterations in original) (citing 18 U.S.C. §§ 201(b), 666(a)(2); 41 U.S.C. § 52(2) (2006)).
202. *Id.* at 2932.
203. *Id.*
204. *Id.* (alteration in original).
205. *Id.*

inconsistencies."[206]

Justice Ginsburg concluded the Court's opinion limiting the scope of honest-services fraud by stating: "In sum, our construction of § 1346 'establish[es] a uniform national standard, define[s] honest services with clarity, reach[es] only seriously culpable conduct, and accomplish[es] Congress's goal of 'overruling' *McNally*.'"[207] Quoting its *McNally* directive that originally prompted Congress to codify the theory of honest-services fraud, the Court stated: "'If Congress desires to go further,' we reiterate, 'it must speak more clearly than it has.'"[208]

3. "Speaking More Clearly"

Curiously, the Court suggested in a footnote, "[If] Congress were to take up the enterprise of criminalizing 'undisclosed self-dealing by a public or private employee . . . it would have to employ standards of sufficient definiteness and specificity to overcome due process concerns."[209] The Court was skeptical that § 1346 would be definite and specific enough to survive a vagueness challenge if amended to encompass schemes of undisclosed self-dealing and conflicts of interest as advanced by the Government in *Skilling*, elaborating:

> [A] standard that prohibits the 'taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty,' so long as the employee acts with a specific intent to deceive and the undisclosed conduct could influence the victim to change its behavior.[210]

Such a standard, the Court believed, "le[ft] many questions unanswered."[211] For instance:

> How direct or significant does the conflicting financial interest have to be? To what extent does the official action have to further that interest in order to amount to fraud? To whom should the disclosure be made and what information should it convey? These questions and

206. *Id.*
207. *Id.* at 2933 (alterations in original) (quoting Brief of Albert W. Alschuler as *Amicus Curiae* in Support of Neither Party at 28–29, Weyhrauch v. United States, 130 S. Ct. 2971 (2010) (No. 08-1196)).
208. *Id.* (quoting McNally v. United States, 483 U.S. 350, 356 (1987)).
209. *Id.* at 2933 n.45.
210. *Id.*
211. *Id.*

> others call for particular care in attempting to formulate an adequate criminal prohibition in this context.[212]

4. Concurrence

Joined by Justices Thomas and Kennedy, Justice Scalia concurred in part with the majority's decision to reverse Skilling's honest-services fraud conviction.[213] In his concurrence, Justice Scalia revisited many of the same concerns he originally expressed in *Sorich*, clarifying that he "agree[d] that the decision upholding Skilling's conviction for so-called 'honest-services fraud' must be reversed, but for a different reason."[214] Rather than salvaging the statute through what he referred to as judicial "invention,"[215] Justice Scalia contended that § 1346 "violate[d] the Due Process Clause of the Fifth Amendment" and therefore should have been struck down as void for vagueness.[216]

First, Scalia agreed with Skilling that the statute failed to give would-be defendants adequate notice, asserting, "A statute that is unconstitutionally vague cannot be saved . . . by judicial construction that writes in specific criteria that its text does not contain."[217] Although Scalia agreed with the Court that Congress intended to resurrect the honest-services standard developed by lower courts prior to *McNally*, "[t]he problem [was] that that doctrine provide[d] no 'ascertainable standard of guilt,' . . . and certainly [was] not limited to 'bribes or kickbacks.'"[218]

Justice Scalia also attacked the majority's conclusion that Congress, by superseding *McNally*, intended to criminalize only those honest-services cases that involved bribery and kickback schemes—or, as the majority put it, the doctrine's "core" cases.[219] If bribery and kickback schemes were in fact the "core" of the honest-services theory tossed out by *McNally*, the argument went, "one would have expected those words to appear in the opinion's description of the cases. In fact, they do not. *Not at all.*"[220] Justice Scalia also pointed out that *McNally* failed to "provide a consistent

212. *Id.*
213. *Id.* at 2935.
214. *Id.*
215. *Id.* at 2939.
216. *Id.* at 2935.
217. *Id.* (citing United States v. Reese, 92 U.S. 214, 219–21 (1875)).
218. *Id.* (quoting United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1921)).
219. *See id.* at 2928.
220. *Id.* at 2936.

definition of the pre-existing theory of fraud it rejected."[221] In light of these observations, the concurring Justices cast considerable doubt on the Court's conjectured reading of congressional intent.

To illustrate this point, Justice Scalia highlighted a number of divisions between the circuits that attempted to construe the theory prior to *McNally*.[222] For instance, even in the cases that applied the theory to schemes of bribery and kickbacks, the circuits were divided as to whether honest-services fraud extended to dishonest public officials, quasi-public officials, private individuals, or anyone with an identifiable fiduciary duty.[223] Moreover, of the circuits that did in fact agree that honest-services fraud extended to both public and private fiduciaries, these circuits remained split as to whether "the demands of the duty were . . . to be greater for public officials than for private employees . . . ."[224] Furthermore, the concurring Justices criticized the Court's failure to address the obligation, nature, and content of the purported fiduciary duties, which Justice Ginsburg nevertheless declared is "central to the 'fraud' offense."[225]

The concurrence also chastised the Court for legislating from the bench, arguing, "In prior vagueness cases, we have resisted the temptation to make all things right with the stroke of our pen."[226] Justice Scalia continued by criticizing the Court's insincere "pose of judicial humility in proclaiming that [its] task [was] 'not to destroy the Act . . . but to construe it,'" arguing that, "in transforming the prohibition of 'honest-services fraud' into a prohibition of 'bribery and kickbacks' [the Court] wield[ed] a power [it] long ago abjured: the power to define new crimes."[227] Justice Scalia colorfully added, "Among all the pre-*McNally* smörgåsbord-offering of varieties of honest-services fraud, *not one* is limited to bribery or kickbacks. That is a dish the Court has cooked up all on its own."[228] He further lamented, "Perhaps it is true that 'Congress intended § 1346 to reach *at least* bribes and kickbacks,' . . . . That simply does not mean, as the Court now holds, that '§ 1346 criminalizes *only*' bribery and kickbacks, ... Arriving at that conclusion requires not interpretation but invention."[229]

221. *Id.*
222. *See id.* at 2936–38.
223. *See id* at 2936.
224. *Id.*
225. *Id.*
226. *Id.* at 2940.
227. *Id.* at 2935.
228. *Id.*
229. *Id.*

Raising the specter of federalism, Justice Scalia noted that "[t]here was not even universal agreement [by pre-*McNally* courts] concerning the *source* of the fiduciary obligation—whether it must be positive state or federal law, . . . or merely general principles . . . ."[230] Aside from the concurrence's concern for maintaining state sovereignty, creating a federal common law from pre-*McNally* precedent would do little to remedy the statute's fatally vague language, since, as Justice Scalia put it, many of the opinions construing the theory "indulge[d] in" the same "grandiloquence" as Congress did when it drafted the statute.[231] Even the cases that refrained from substituting one vague definition for another failed to "specify the duty at issue beyond loyalty or honesty. . . ."[232] Finally, the concurrence pointed out that, although "many courts held that some *je-ne-sais-quoi* beyond a mere breach of fiduciary duty was needed to establish honest-services fraud," the Court failed to establish uniform limiting principles for lower courts to apply in future cases of honest-services fraud involving bribery and kickback schemes.[233] "In short," Justice Scalia characterized the Court's "holding that 'the intangible right of honest services' refers to 'the honest-services doctrine recognized in Court of Appeals' decisions before *McNally*,' . . . [as] a step out of the frying pan into the fire."[234]

Although the majority clearly identified the general schemes prohibited by § 1346, the concurring Justices believed the Court's failure to "solve the most fundamental indeterminacy: the character of the 'fiduciary capacity' to which the bribery and kickback restriction applies" still left the statute unconstitutionally vague.[235]

> Justice Scalia further accused the Court of being completely aware that adopting by reference "the pre-*McNally* honest-services doctrine," . . . [it had] adopt[ed] by reference nothing more precise than the referring term itself ("the intangible right of honest services"). Hence the *deus ex machina:* "[W]e pare that body of precedent down to its core."[236]

230. *Id.* at 2936.
231. *Id.* at 2937.
232. *Id.*
233. *Id.*
234. *Id.* at 2938.
235. *Id.* at 2939.
236. *Id.* at 2938–39 (second alteration in original). Justice Scalia sarcastically continued: Since the honest-services doctrine "had its genesis" in bribery prosecutions, and since several cases and counsel for Skilling referred to bribery and kickback schemes as "core" or "paradigm" or "typical" examples, or "[t]he most obvious

The concurrence continued, "[E]ven with the bribery and kickback limitation the statute does not answer the question 'What is the criterion of guilt?'"[237] adding, "Does it apply only to public officials? Or in addition to private individuals who contract with the public? Or to everyone, including the corporate officer here?"[238] Simply stated, the concurrence argued that "[t]he pre-*McNally* case law d[id] not provide an answer."[239] Before closing the curtain on his *Skilling* concurrence, Justice Scalia admonished:

> It is hard to imagine a case that more clearly fits the description [than *Skilling*] of what Chief Justice Waite said could not be done, in a colorful passage oft-cited in our vagueness opinions:
>
> > The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.
> >
> > It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. . . .
> >
> > To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.[240]

IV. *SKILLING'S* IMPACT

A. What Happens to Skilling, Black, *and* Weyhrauch *Now?*

Although Skilling was convicted on a number of other counts aside from § 1346, he argued to the Supreme Court that "[a]ll of his convictions . . . hinged on the conspiracy [to commit honest-services fraud]

> form," of honest-services fraud, . . . and since two cases and counsel for the Government say that they formed the "vast-majority," or "most" or at least "[t]he bulk" of honest-services cases, . . . THEREFORE it must be the case that they are *all* Congress meant by its reference to the honest-services doctrine.

Id. at 2938 (alterations in original).

237. *Id.* at 2939.

238. *Id.* at 2938.

239. *Id.* at 2938–39.

240. *Id.* at 2940–41 (quoting United States v. Reese, 92 U.S. 214, 221 (1875)) (ellipsis in original) (citation omitted) (internal quotation marks omitted).

count and, like dominoes, must fall if it falls."[241] In response, the Court noted that, although "[t]he District Court . . . found this argument dubious, . . . the Fifth Circuit had no occasion to rule on it."[242] As a result, the Supreme Court remanded the case back to the Fifth Circuit to determine whether Skilling's "domino" argument merits his freedom.[243] The Supreme Court disposed of *Black*[244] and *Weyhrauch*[245]—in which the petitioners' honest-services fraud charges also hinged on their failure to disclose self-dealing and conflicts of interest—in a similar fashion.

In response to the Court's ruling, counsel for Skilling stated, "This paves the way to completely exonerating Jeff Skilling."[246] Lord Conrad Black's representation similarly expressed "confiden[ce that] the lower courts will quickly conclude that the errors that the Supreme Court has now conclusively found tainted every aspect of this case."[247] As for former Alaska State Representative Bruce Weyhrauch, a spokesperson for the DOJ noted "that the prosecution of Mr. Weyhrauch, who has yet to stand trial, would go forward, presumably on modified charges."[248]

B. *Impact of* Skilling *on Similar Past, Present, and Future Cases*

Following *Skilling*, attorneys and reporters largely perceived the Supreme Court's decision as a major blow to the government's ability to prosecute corporate and public corruption. Counsel for Skilling believed that the Court's decision "has profound implications for every workplace in this country" and that "[a]ll employees are now free from the risk of the government criminalizing behavior that does not clearly violate the laws."[249] Reporters similarly described the impact of *Skilling* as having "gutted"[250] and "eviscerated"[251] one of federal prosecutors' favorite

241. *Id.* at 2935.
242. *Id.* (citation omitted).
243. *See id.*
244. Black v. United States, 130 S. Ct. 2963, 2970 (2010).
245. Weyhrauch v. United States, 130 S. Ct. 2971, 2971 (2010) (per curiam).
246. Jess Bravin, *Justices Limit Fraud Law*, WSJ.COM (June 25, 2010), http://online.wsj.com/article/SB10001424052748704911704575326644174012942.html (last visited Aug. 17, 2010) (quoting Jeff Skilling's attorney, Daniel Petrocelli).
247. *Id.* (quoting Lord Black's attorney, Miguel Estrada).
248. *Id.* (quoting DOJ spokesperson, Matthew Miller).
249. *Id.* (quoting Skilling's attorney, Daniel Petrocelli).
250. Robert Barnes, *Supreme Court Decision Casts Doubt on Former Enron CEO's Conviction*, WASH. POST (Friday, June 25, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/06/24/AR2010062402720.html.

weapons, as many perceived the decision as "a win for defense lawyers and a blow to prosecutors."[252] Nevertheless, a spokesperson for the DOJ reassured the public of its intention to "vigorously defend the *Skilling* and *Black* cases on remand as well as other prior convictions for honest-services fraud in line with the Court's holding."[253]

In addition to the future cases bound by *Skilling's* precedent, defendants convicted for honest-services fraud based on the now-defunct theory—that nondisclosure of self-dealing violates § 1346—may use *Skilling* to challenge their convictions or ask for shortened sentences by arguing that they were convicted under an unconstitutional application of the statute. Speculating on this matter, one scholar stated, "'I do not think anyone walks immediately, but there will be lots of complicated lawyer-court litigation' over whether convictions can stand."[254]

However, the first convicted felon to "walk" in light of *Skilling* did so a mere five days after the case was decided.[255] The defendant—whose business received substantial patronage from "a company that contract[ed] with states to operate lotteries"—was convicted on multiple counts of honest-services mail fraud for failing to disclose his industry ties when he sought appointment to the North Carolina Lottery Commission.[256] On appeal, "the Fourth Circuit affirmed his conviction and sentence [of forty-eight months imprisonment]. . . . [And] rejected [his] due process challenge under the vagueness doctrine."[257] Shortly after *Skilling* was decided, "the Government concede[d] that [the defendant was] entitled to have his conviction vacated,"[258] to which the court responded by directing the defendant's immediate release from prison.[259] Additionally, the Supreme Court has already granted a number of high-profile petitions for writ of certiorari, vacated the lower courts' judgments involving self-dealing and conflict-of-interest honest-services fraud, and remanded the cases back to

251. Bravin, *supra* note 246.

252. Nathan Koppel, *What Does the Future Hold for Honest Services Fraud?*, WALL ST. J. L. BLOG (June 24, 2010, 12:50 PM), http://blogs.wsj.com/law/2010/06/24/what-does-future-hold-for-honest-services-fraud/.

253. Bravin, *supra* note 246 (quoting DOJ spokesperson, Matthew Miller).

254. *Id.* (quoting University of Ohio professor of law, Douglas Berman).

255. *See* Geddings v. United States, No. 5:06-CR-136-D, No. 5:08-CV-425-D, 2010 WL 2639920, at *2, 2010 U.S. Dist. LEXIS 64229, at *5 (E.D.N.C. June 29, 2010).

256. *See Geddings*, 2010 WL 2639920, at *1, 2010 U.S. Dist. LEXIS 64229, at *1–2.

257. *See id.* (citations omitted).

258. *Geddings*, 2010 WL 2639920, at *2, 2010 U.S. Dist. LEXIS 64229, at *3–4.

259. *Geddings*, 2010 WL 2639920, at *2, 2010 U.S. Dist. LEXIS 64229, at *5.

their respective appellate courts for further consideration in light of *Skilling*.[260]

V. A PROPOSAL FOR AMENDING § 1346 TO PROHIBIT SCHEMES OF UNDISCLOSED SELF-DEALING

Perhaps the most compelling question in light of *Skilling* is whether Congress will decide to rewrite § 1346 to expressly include schemes that deprive another of honest services through undisclosed self-dealing and conflicts of interest. Although the Court found that Congress only intended to criminalize those "core" cases of corruption when it enacted the honest-services statute in 1988, several trends have since emerged that suggest Congress likely desires § 1346 to also criminalize dishonest nondisclosures.

The first trend to emerge over the past two decades is the increased criminalization of behavior that, until recently, only gave rise to civil liability.[261] A more recent trend, which emerged during the 2000s, involved the endless string of highly publicized corporate scandals.[262] Most notably, scandals involving Enron,[263] WorldCom,[264] Martha Stewart,[265] options

260. *See, e.g.*, Scrushy v. United States, No. 09-167, 2010 WL 2571879, at *1, 2010 U.S. LEXIS 5528, at *1 (S. Ct. June 29, 2010) (vacating former Health South CEO Richard Scrushy's judgment and remanding to the United States Court of Appeals for the Eleventh Circuit); Siegelman v. United States, No. 09-182, 2010 WL 2571880, at *1, 2010 U.S. LEXIS 5529, at *1 (S. Ct. June 29, 2010) (vacating former Alabama Governor Don Siegelman's judgment and remanding to the United States Court of Appeals for the Eleventh Circuit); Hargrove v. United States, No. 09-929, 2010 WL 390385, at *1, 2010 U.S. LEXIS 5527, at *1 (S. Ct. June 29, 2010) (vacating judgment of former board chairman accused of looting his clients' escrow accounts and remanding to the United States Court of Appeals for the Seventh Circuit); Hereimi v. United States, No. 09-1035, 2010 WL 752368, at *1, 2010 U.S. LEXIS 5535, at *1 (S. Ct. June 29, 2010) (vacating local business owner's judgment for defrauding the State of Alaska over printing contracts and remanding to the United States Court of Appeals for the Ninth Circuit); Harris v. United States, No. 09-6516, 2010 WL 2571883, at *1, 2010 U.S. LEXIS 5531, at *1 (June 29, 2010) (vacating judgment of a business owner convicted of fraudulently funneling city business contracts to her consulting firm and remanding to the United States Court of Appeals for the Ninth Circuit); Redzic v. United States, No. 09-7560, 2010 WL 2571885, at *1, 2010 U.S. LEXIS 5536, at *1 (S. Ct. June 29, 2010) (vacating owner of local truck driving school's judgment and remanding to the United States Court of Appeals for the Eighth Circuit).

261. *See generally* Casey, *supra* note 77, at 1, 8.

262. *See id.* at 1.

263. *See supra* Part III.*A.* (discussing the unraveling of the Enron scandal).

264. *See generally* Casey, *supra* note 77, at 39–41 (discussing Congress's increased focus on corporate corruption following the collapse of Enron and WorldCom).

265. *See generally* J. Kelly Strader, *White Collar Crime and Punishment: Reflections on Michael, Martha, and Milberg Weiss*, 15 GEO. MASON L. REV. 45, 65–82 (2007) (discussing the government's investigation and subsequent prosecution of Martha Stewart for securities fraud).

backdating,[266] lobbyist Jack Abramoff,[267] the mortgage crisis and subsequent bailout,[268] Bernie Madoff,[269] and Goldman Sachs[270] each left their mark on what *Time Magazine* characterized as the "Decade from Hell."[271]

In 1987, the Supreme Court used *McNally* to defuse the government's weapon of mass discretion for the first time. Under pressure from prosecutors, in addition to growing public outrage over government corruption, Congress superseded the Supreme Court's decision by enacting § 1346.[272] In 2010, the Supreme Court's *Skilling* opinion again defused prosecutors' reassembled weapon. Once again, faced with growing public animosity over perceived corruption—this time largely directed at corporate opportunistic behavior—Congress will likely amend § 1346 to explicitly include schemes involving undisclosed self-dealing and conflicts of

266. *See* Casey, *supra* note 77, at 75.

267. *See generally* Richard A. Hibey, Remarks, *The Impact of the Abramoff Scandal on Public Corruption Cases*, 52 WAYNE L. REV. 1363 (2006) (discussing the development of federal bribery and gratuity laws and the increased scrutiny of political lobbyists following the public-corruption scandal involving Jack Abramoff).

268. *See* Casey, *supra* note 77, at 75.

269. *See Testimony Concerning Investigations and Examinations by the Securities Exchange Commission and Issues Raised by the Bernard L. Madoff Investment Securities Matter: Hearing Before the S. Comm. on Banking, Housing and Urban Affairs*, 111th Cong. (2009) (statement of Linda Chatman Thomsen, Director, Division of Enforcement, SEC), *available at* http://www.sec.gov/news/testimony/2009/ts112709lct.htm (discussing Bernie Madoff's alleged Ponzi scheme).

270. *See* Olufunmilayo B. Arewa, *Risky Business: The Credit Crisis and Failure (Part I)*, 104 NW. U. L. REV. COLLOQUY 398, 410–11 (2010), http://www.law.northwestern.edu/lawreview/colloquy/2010/14/LRColl2010n14Arewa.pdf (discussing the "Abacus" transactions marketed and structured by Goldman Sachs that ultimately led the SEC to bring fraud charges against it in 2010).

271. Andy Serwer, The *'00s: Goodbye (at Last) to the Decade from Hell*, TIME, at 30 (Dec. 7, 2009). Citing the "wave of Wall Street scandals highlighted by Enron and WorldCom" that marred the first half of the decade, the article invites readers to "[c]all it the Decade from Hell, or the Reckoning, or the Decade of Broken Dreams, or the Lost Decade." *Id.* at 31. The article also asserts, "There is nothing natural about the economic meltdown we are still struggling with as the decade winds down," attributing the economic woes that defined the later half of the 2000s to "[a] housing bubble fueled by cheap money and excessive borrowing set ablaze by derivatives, so-called financial weapons of mass destruction," and Bernie Madoff, "the living, breathing symbol of this economic sordidness, . . . [who] orchestrat[ed] the biggest Ponzi scheme in the history of humanity." *Id.* at 32. Finally, of the four major reasons why "so much bad stuff happen[ed]" in the 2000s, two of these reasons—greed and self-interest—spotlight the human character flaws central to the motivation behind much of the behavior that the honest-services fraud statute was designed to prevent. *Id.* at 33.

272. *See supra* Part II.*D.* (discussing Congress's decision to pass § 1346 in response to *McNally* decision).

interest.[273] The Supreme Court also acknowledged this possibility by inviting Congress to once again "speak more clearly" if it desires to extend honest-services fraud beyond bribery and kickbacks.[274]

The Court offered several suggestions in the likely event "Congress were to take up the enterprise of criminalizing 'undisclosed self-dealing'" as a form of honest-services fraud.[275] The Court stated that if Congress pursues such a course, "it would have to employ standards of sufficient definiteness and specificity to overcome due process concerns."[276] Indeed, doing so would be no small task, as evidenced by the numerous pre-*McNally* "intercircuit inconsistencies" between courts attempting to create a unified standard for applying honest-services fraud to undisclosed self-dealing.[277]

A. Senate Bill 3854: The Honest Services Restoration Act

In an example of history repeating itself, the DOJ "urge[d] Congress to act quickly to restore" much of its power lost when *Skilling* defused the honest-services fraud statute.[278] And true to form, Congress answered the DOJ's plea by drafting new legislation expanding the scope of honest-services fraud to once again make it a federal crime to engage in undisclosed self-dealing. Introduced by Senator Patrick Leahy approximately three months after the Court issued its *Skilling* opinion, the "Honest Services Restoration Act"[279] (HSRA) looks to "restore the law to what it was before the [*Skilling*] decision, strengthening it to allow prosecutors to investigate and combat public corruption and corporate fraud."[280] To fend off potential constitutional attacks, drafters of the HSRA endeavored to craft "precise, careful legislation that fills [the] gaps [created by *Skilling*] in clear terms."[281]

273. *See* Serwer, *supra* note 271.

274. Skilling v. United States, 130 S. Ct. 2896, 2933 & n.45 (2010) (citation omitted).

275. *Id.* at 2933 n.45.

276. *Id.*

277. *Id.* at 2932.

278. *Honest Services Fraud: Hearing Before S. Comm. on the Judiciary*, 111th Cong. 6 (2010) (statement by Lanny A. Breuer, Assistant Att'y Gen. of the United States), *available at* http://judiciary.senate.gov/pdf/9-28-10%20Breuer%20Testimony.pdf.

279. Honest Services Restoration Act, S. 3854, 111th Cong. (2010).

280. Press Release, Leahy Introduces Bill to Address Supreme Court's Skilling Decision (Sept. 28, 2010), *available at* http://leahy.senate.gov/press/press_releases/release/?id=d6346bbc-22d0-40a8-832b-017465c53ce8.

281. *Hearing on "Restoring Key Tools to Combat Fraud and Corruption After the Supreme*

The HSRA contains two prongs: the first prong addresses undisclosed self-dealing in the public sector, while the second prong addresses undisclosed self-dealing in the private sector.[282] The elements of a public-sector violation include:

> (1) a "public official,"[283] which includes officers, employees, representatives (both elected and appointed), and other individuals working "for or on behalf of" the government at the federal, state, or local level;[284]
>
> (2) who performs an "official act"[285] "within the range of official duty" including "any decision, recommendation, or action on any question, matter, cause, suit, proceeding, or controversy" concerning matters that "may at any time be pending" or "may by law be brought before any public official" to act on in their official capacity, place of trust, or place of profit;[286]
>
> (3) wholly or partially for the purpose of "benefitting or furthering a financial interest of"
>
> (4) the public official personally, or those with whom the official is personally, professionally, or otherwise associated;[287] and
>
> (5) where "material information" required by law "to be disclosed regarding that financial interest"[288]
>
> (6) is knowingly falsified, concealed, covered up, or is otherwise not disclosed.[289]

Court's Skilling Decision" Before the S. Comm. on the Judiciary, 111th Cong. (2010) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=4816&wit_id=2629.

282. S. 3854, § 2(a)(1).

283. *Id.* § 2(b)(1)(A)(i).

284. *Id.* § 2(b)(1)(B).

285. *Id.* § 2(b)(1)(A)(i).

286. *Id.* § 2(b)(1)(A)(ii).

287. The proposed language provides a laundry-list of prohibited beneficiaries of undisclosed self-dealing by a public official. *Id.* § 2(b)(1)(A)(i)(I)–(VI). The list includes intended benefits to the public official personally, or the public official's spouse, minor child, or general partner; or "a business or organization in which the public official is serving as an employee, officer, director, trustee, or general partner"; or "an individual, business, or organization with whom the public official is negotiating for, or has any arrangement concerning, prospective employment or financial compensation"; or "person, business, or organization from whom the public official has received a thing of value, otherwise than as provided by law for proper discharge of official duty, or by rule or regulation." *Id.*

288. *Id.* § 2(b)(1)(A)(ii). Specifically, the duty to disclose must arise under "Federal, State, or local statute, rule, regulation, or charter applicable to the public official." *Id.*

289. *Id.*

The elements of a private-sector violation[290] include:

(1) an "officer or director"[291] of a publicly-traded corporation or private charity under section 501(c)(3) of the Internal Revenue Code of 1986;[292]

(2) who "performs an act"[293] that

(3) "causes or is intended to cause harm"[294]

(4) to the actor's "employer";[295]

(5) wholly or partially for the purpose of benefitting or furthering "by an actual or intended value of $5,000 or more a financial interest of" the director or officer personally, or those with whom the director or officer is personally, professionally, or otherwise associated;[296] and

(6) where "material information" required by law "to be disclosed regarding that financial interest"[297]

(7) is knowingly falsified, concealed, covered up, or is otherwise not disclosed.[298]

B. Constitutional Scrutiny

The HSRA does a much better job creating an "ascertainable standard of guilt" for self-dealing honest-services fraud than § 1346's original language, and would therefore likely withstand constitutional challenge if enacted. This is due to the fact that the proposed language answers a number of difficult questions that led the Court to place undisclosed self-dealing outside the core of § 1346's language in *Skilling*. The following

290. *Id.* § 2(a)(2).

291. *Id.* § 2(2)(A)(i).

292. *Id.* § 2(2)(B).

293. *Id.* § 2(2)(A)(i). The bill defines "act" to include "a decision or recommendation to take, or not take action, and can be a single act, more than one act, or a course of conduct." § 2(2)(C).

294. *Id.* § 2(2)(A)(i).

295. *Id.*

296. The proposed language provides a laundry-list of prohibited beneficiaries of undisclosed self-dealing by a corporate director or officer. *Id.* § 2(2)(A)(i)(I)–(V). The list includes intended benefits to the director or officer personally, or the director or officer's spouse, minor child, or general partner; or "another business or organization in which the public official [sic] is serving as an employee, officer, director, trustee, or general partner"; "an individual, business, or organization with whom the officer or director is negotiating for, or has any arrangement concerning, prospective employment or financial compensation." *Id.*

297. *Id.* § 2(2)(A)(ii). Specifically, the duty to disclose must arise under "Federal, State, or local statute, rule, regulation, or charter applicable to the officer or director." *Id.*

298. *Id.*

analysis highlights a number of major concerns that have arisen over the lifespan of the honest-services fraud law, explains how the HSRA addresses many of these concerns, and predicts how courts might resolve additional concerns not addressed by the Bill's proposed language.

1. How Significant, or to What Extent, does the Conflicting Financial Interest have to be to Amount to Fraud?

The HSRA's conflict-of-interest requirement was designed to reach the type of fraud the bill's sponsors believe should not go unpunished simply because it is more subtle and sophisticated than bribery and kickbacks. The language proposed by the HSRA prohibits any conduct that may be motivated "in whole or in part" for the benefit a public official or corporate officer/director's conflicting financial interest. Such conduct "can be a single act, more than one act, or a course of conduct."[299] In an obvious attempt to address the conduct at issue in *Weyhrauch*, the HSRA's language prohibits an elected representative from voting a particular way on pending legislation without disclosure, if motivated at least in part by the prospect of employment or some other form of potential future compensation.[300] Senator Leahy suggested that the HSRA was designed to reach "public officials who hid[e] their own financial interests and then act[] to benefit those interests" through their position of public trust.[301] As discussed *infra*, the language of the HSRA itself, in addition to its legislative history, suggest a more severe conflict must exist than § 1346's pre-*Skilling* enforcement, in order to prevent the self-dealing amendment from "licens[ing] federal prosecutors . . . to pursue their own untethered understanding of 'honesty' apart from any conventional understanding of 'fraud.'"[302]

2. To Whom Should the Disclosure be Made?

Under the proposed amendment, the audience to whom disclosures of

299. *Id.* §§ 2(b)(1)(C)(ii), (2)(C).

300. *Id.* § 2(b)(1)(A)(i)(V).

301. *Hearing on "Restoring Key Tools to Combat Fraud and Corruption After the Supreme Court's Skilling Decision" Before the S. Comm. on the Judiciary*, 111th Cong. (2010) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=4816&wit_id=2629.

302. Brief for Petitioners Conrad M. Black et al. at 32, Black v. United States, 130 S. Ct. 2963 (2010) (No. 08-876).

self-dealing must be made is determined by the "Federal, State, or local statute, rule, regulation, or charter" applicable to the alleged wrongdoer notwithstanding the honest-services fraud statute.[303] However, during a hearing before the Senate Committee on the Judiciary, Assistant Attorney General Lanny Breuer indicated that disclosures by elected officials should be made to "citizens [who] are entitled to know that their public servants are making decisions based upon the best interests of the citizens who elect them rather than for personal gain."[304] The HSRA's cosponsor, Senator Leahy, echoed this sentiment.[305]

In the private sector, disclosure of self-dealing might be made to "investors and shareholders [who] are entitled to know that corporate officers and fiduciaries are acting in [their] best interest and not attempting to secretly benefit themselves."[306] Senator Leahy suggested that the obligation to disclose such misconduct might also be owed to the "employees of their company."[307]

3. *What Information Should the Disclosure of One's Self-Dealing Convey?*

In addressing the substance of a sufficient disclosure of self-dealing, the HSRA's proposed language alludes to a conflicting financial interest. Beyond that however, public officials and private officers/directors appear to be on their own when determining whether federal, state, or local law requires disclosure of material information related to a potentially conflicting financial interest.

4. *Does the Proposed Amendment only Apply to Public Officials?*

No. The HSRA clearly prohibits undisclosed self-dealing committed both by public officials and private "officers and directors." As illustrated above, the proposed amendment appears to extend down to the lowest level of employees working in the public sector. Moreover, the definition of

303. S. 3854 §§ 2(b)(1)(A)(ii), 2(2)(A)(ii).

304. *Honest Services Fraud: Hearing Before S. Comm. on the Judiciary*, 111th Cong. 2 (2010) (statement by Lanny A. Breuer, Assistant Att'y Gen. of the United States), *available at* http://judiciary.senate.gov/pdf/9-28-10%20Breuer%20Testimony.pdf.

305. *Hearing on "Restoring Key Tools to Combat Fraud and Corruption After the Supreme Court's Skilling Decision" Before the S. Comm. on the Judiciary* (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary).

306. *Id.*

307. *Id.*

"public official" as including, *inter alia*, any "person acting for or on behalf of" a federal, state, or local government would apparently extend § 1346 to private individuals who merely contract with the public.

This is in stark contrast to individuals covered by the HSRA's private-sector self-dealing provisions, which only cover corporate officers and board members. The statute also offers a *de minimis* exception for private wrongdoers to hide behind when the actual or intended value of their undisclosed self-dealing does not exceed $5,000. The HSRA extends no such defense to public actors, which leads to the next question.

5. Does the Proposed Amendment Impose a Higher Standard on Public Officials than Corporate Officers or Directors?

Yes. Conviction under both the public- and private-sector prongs of the HSRA require more than the mere inadvertent failure to disclose, rather, the actor's concealment of (or decision not to disclose) their self-dealing must be made with *knowledge* of their obligation to disclose. However, to convict a corporate officer/director for knowingly failing to disclose self-dealing, prosecutors must additionally prove that the officer/director's conduct *actually* caused harm, or was *intended* to cause harm, to their employer. As noted during a committee hearing on this issue, "By requiring the government to prove both knowing concealment and a specific intent to defraud, there is no risk that a person could be convicted for a mistake or unwitting conflict of interest."[308]

6. What is the Source of the Duty to Disclose Self-Dealing?

Significantly, the HSRA rejects resort to judicially-created common law by confining its disclosure duty to those created and defined by lawmakers at the federal, state, and local levels of government in the form of statutes, rules, regulations, and charters. By tethering the disclosure duty to state and local law, if enacted, the HSRA may lead to inconsistencies within federal circuits. This would prove most troublesome for appellate courts at the federal level in cases where the underlying state and local disclosure laws within a particular circuit differ by jurisdiction. For instance, the disclosure laws imposed on public officials in Alaska are different from those found in California. Over time, defendants convicted

308. *Honest Services Fraud: Hearing Before S. Comm. on the Judiciary*, at 7 (statement by Lanny A. Breuer, Assistant Att'y Gen. of the United States) (underline removed).

under the amended honest-services fraud statute in both Alaska and California for breaching each state's respective disclosure obligation would challenge their convictions. In turn, the Court of Appeals for the Ninth Circuit would be forced to reconcile the differences between the two state's respective disclosure laws. Such lack of uniformity would also deprive defendants of notice, who, in the absence of a uniform standard, would have to guess as to how courts in their jurisdiction would resolve such discrepancies on appeal. Accordingly, to withstand constitutional challenge Congress must remove reference to state and local law before enacting a statute criminalizing undisclosed self-dealing.

C. *Unanswered Questions and Suggested Answers*

Although the efforts by the HSRA's drafters to create a clear and constitutionally sound self-dealing amendment to § 1346 are commendable, the proffered language leaves two key questions unanswered. The following analyzes how courts might interpret the HSRA's facially ambiguous "materiality" and "harm" elements if enacted in its present form.

1. *What Constitutes "Material" Information?*

The proposed language in the HSRA includes a "materiality" requirement, but fails to define the term. If enacted, courts will likely mine the rich vein of pre-*Skilling* cases that define materiality in the context of fraud to clarify this term. In *Neder v. United States*, the Supreme Court acknowledged that "the well-settled meaning of 'fraud' required a misrepresentation or concealment of *material* fact."[309] In turn, courts developed a well-settled meaning for materiality when applied to cases of honest-services fraud in the form of undisclosed self-dealing. The Second Circuit, along with four sister circuits,[310] identified concealed or undisclosed information as being material if such "misinformation or omission would naturally tend to lead or is capable of leading a reasonable employer to change its conduct."[311]

309. 527 U.S. 1, 22 (1999) (emphasis in original).

310. United States v. Vineyard, 266 F.3d 320, 327–28 (4th Cir. 2001); United States v. Cochran, 109 F.3d 660, 667 (10th Cir. 1997); United States v. Gray, 96 F.3d 769, 772, 776–77 (5th Cir. 1996); United States v. Jain, 93 F.3d 436, 441–42 (8th Cir. 1996).

311. United States v. Rybicki, 354 F.3d 124, 145 (2d Cir. 2003) (en banc).

2. What Constitutes "Harm"?

One of the central questions raised in *Black v. United States* was whether self-dealing that "did not contemplate economic or other property harm to the private party to whom honest services were owed" fell within the scope of the statute.[312] The Court avoided having to answer this question by simply finding that self-dealing—regardless of its resulting harm—fell outside the scope of § 1346.[313] The corporate-fraud prong of the HSRA similarly dodges this question by requiring "an act which causes or is intended to cause harm to the officer's or director's employer," without defining what type of "harm" suffices.[314] Is such "harm" limited to loss of property or money as the Court held in *McNally*? Or might other forms of harm be included in the scope of the term, such as potential harm to an employer's reputation? Does mere proof that material information was not disclosed in accordance with federal, state, or local law satisfy the harm requirement?

Several sources of legislative history shed light on the type of "harm" that HSRA's language seeks to prevent. First, it is important to point out that the HSRA only requires proof of harm where undisclosed self-dealing is allegedly committed by a corporate officer or director. If enacted, courts may interpret this to mean that self-dealing by a public official causes harm *per se*. This is consistent with Senator Feingold's stated desire for an amended § 1346 to cover the type of harm that does not necessarily involve money or property, rather, harm that "undermines people's faith in their government and destroys the integrity of our democracy."[315]

On a related note, Assistant Attorney General Lanny Breuer explained to the Senate Committee on the Judiciary that the DOJ would require a broadly-worded honest-services amendment to target the more subtle, but equally as harmful forms of corruption such as undisclosed self-dealing.[316] This is likely why drafters of the Bill opted for the "materiality" harm

312. Brief for Petitioners Conrad M. Black et al. at i, Black v. United States, 130 S. Ct. 2963 (2010) (No. 08-876).

313. Black v. United States, 130 S. Ct. 2963, 2968 (2010).

314. Honest Services Restoration Act, S. 3854, 111th Cong. § 2(2)(A)(i) (2010).

315. *Hearing on "Restoring Key Tools to Combat Fraud and Corruption After the Supreme Court's Skilling Decision" Before the S. Comm. on the Judiciary*, 111th Cong. (2010) (statement of Sen. Russell D. Feingold, S. Comm. on the Judiciary), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=4816&wit_id=4083.

316. *Honest Services Fraud: Hearing Before S. Comm. on the Judiciary*, 111th Cong. 3 (2010) (statement by Lanny A. Breuer, Assistant Att'y Gen. of the United States), *available at* http://judiciary.senate.gov/pdf/9-28-10%20Breuer%20Testimony.pdf.

test—which the Second Circuit noted "may be a somewhat broader test" than alternative harm tests because "[i]t may capture some cases of non-economic, yet serious, harm in the private sphere"[317]—over the narrower "economic or pecuniary harm" test considered by the Court in *Black*.[318]

Statements made by Senator Leahy offer additional insight into the harm sought to be remedied by the HSRA's self-dealing amendment:

> Recent years have also seen a plague of financial and corporate frauds that have severely undermined our economy and hurt many hardworking people in this country. These frauds have robbed people of their savings, their retirement accounts, college funds for their children, and have cost too many people their homes.[319]

Senator Feingold echoed these concerns by offering Enron, Tyco, and Worldcom as examples of the "destabilizing effect" that undisclosed self-dealing can have on the economy, which he warned "can ultimately lead to financial ruin for the employees and shareholders."[320] Although one federal prosecutor admitted that "undisclosed self-dealing in the private sector usually involves loss of money or property," which may be prosecuted under "existing mail and wire fraud statutes," the drafters of the HSRA likely included the private-sector prong in response to the same prosecutor's subsequent remark that "there are certain types of self-dealing by corporate officers that existing statutes do not allow us to reach and where a new prosecutorial tool would be welcomed."[321]

As a result, in the absence of clear language to the contrary, courts will likely interpret the "harm" requirement to reach far beyond instances where a corporate officer/director's undisclosed self-dealing results in economic or property loss to the wrongdoer's employer. Such less obvious forms of harm to an employer may include injury to its reputation, increased exposure to risk, and perhaps even intended harm that ultimately results in a

317. United States v. Rybicki, 354 F.3d 124, 146 (2d Cir. 2003) (en banc).

318. Brief for Petitioners Conrad M. Black et al. at 28, Black v. United States, 130 S. Ct. 2963 (2010) (No. 08-876) (arguing that honest-services fraud imposed on corporate officers and directors requires proof of contemplated economic harm and that the mere nondisclosure of material information was not sufficient to sustain a conviction for self-dealing).

319. *Hearing on "Restoring Key Tools to Combat Fraud and Corruption After the Supreme Court's Skilling Decision" Before the S. Comm. on the Judiciary* (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=4816&wit_id=2629.

320. *Id.* (statement of Sen. Russell D. Feingold, S. Comm. on the Judiciary), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=4816&wit_id=4083.

321. *Honest Services Fraud: Hearing Before S. Comm. on the Judiciary*, at 8 (statement by Lanny A. Breuer, Assistant Att'y Gen. of the United States).

benefit to the employer (for example, an undisclosed, unauthorized self-dealing investment made with corporate money that pays off for both the officer and his unwitting employer).

The list of issues I have discussed concerning the proposed self-dealing amendment to the honest-services fraud statute is by no means exhaustive. There are a number of other problems beyond the scope of this Comment that might arise if the HSRA is passed. For instance, would the $5,000 *de minimis* provision of the HSRA's private-sector prong lead to litigation becoming mired in debate over the value of the undisclosed financial interest at issue? The HSRA adequately addresses many of the difficult questions that led the Court to find undisclosed self-dealing outside the language of § 1346. As a result, if amended by the Act to once again extend honest-services fraud to undisclosed self-dealing, § 1346 would likely withstand the inevitable constitutional attacks that would ensue.

VI. CONCLUSION

Although § 1346, as construed in *Skilling*, is unconstitutionally vague when read to encompass undisclosed self-dealing, amending the statute to proscribe such corruption with the language Congress has proposed alleviates many of the concerns expressed by the Court. Before passing Senate Bill 3854 however, Congress should consider how courts might interpret the "materiality" and "harm" requirements in the absence of explicit definitions. Ultimately though, the enactment of the Honest Services Restoration Act would ensure that defendants charged with honest-services fraud receive a fighting chance, without entirely disarming the government of its essential weapon in the war on corruption.

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