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Pamela Mathy

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HONEST SERVICES FRAUD AFTER *SKILLING*

JUDGE PAMELA MATHY*

* United States Magistrate Judge, United States District Court for the Western District of Texas, 1998. B.A. *magna cum laude*, 1973, Marquette University. M.A., 1976, University of Texas, Austin. J.D. *cum laude*, 1978, University of Wisconsin-Madison. L.L.M., 1982, Georgetown University. This Article was written in the author's private capacity. No official support or endorsement by the United States District Court for the Western District of Texas or any other division of the federal judiciary or by any United States Department or Agency has been provided, is intended, or should be inferred.

I. INTRODUCTION

In a trio of cases decided on June 24, 2010,[1] the United States Supreme Court sharply limited the reach of the "honest services" fraud statute—Title 18 of the United States Code § 1346—and the judicial doctrine of honest services mail and wire fraud it implicitly references, by restricting honest services fraud to what the Court determined was its historical origins.[2] The Court's ruling in *Skilling v. United States*,[3] one of the most significant white-collar decisions in decades, limits honest services fraud prosecutions of both public officials and private individuals to schemes involving bribes or kickbacks.[4] Over the past two decades, federal prosecutors have used the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, to reach not only schemes to defraud or deprive victims of money or property, but also schemes to deprive citizens of the intangible right of honest services even if no victim suffered a loss of money or property. Since the enactment of 18 U.S.C. § 1346 in 1988, in which Congress endorsed the theory of honest services mail and wire fraud, the United States Department of Justice has brought honest services fraud charges against an array of defendants ranging from politicians accused of graft to corporate executives accused of looting a company.[5] In furtherance of the well-established rule that "'ambiguity

1. Skilling v. United States, 130 S. Ct. 2896 (2010); Weyhrauch v. United States, 130 S. Ct. 2971 (2010) (per curiam); Black v. United States, 130 S. Ct. 2963 (2010).

2. *See, e.g.*, *Skilling*, 130 S. Ct. at 2928–34 (analyzing the doctrine's pre-*McNally* roots and seeking to preserve Congress's intent by conforming to precedent).

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

4. *See id.* at 2931 ("In view of this history, there is no doubt that Congress intended § 1346 to reach *at least* bribes and kickbacks. Reading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine.").

5. *See id.* at 2907–08 (discussing defendant Jeffrey Skilling's position as an executive in the seventh most lucrative company in America before being charged with mail and wire fraud); McNally v. United States, 483 U.S. 350, 352–54 (1987) (describing the background behind the charges brought against a public official for mail fraud), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181 (codified as amended at 18 U.S.C. § 1346 (2006)), *as recognized in Skilling*, 130 S. Ct. 2896.

concerning the ambit of criminal statutes should be resolved in favor of lenity,'"[6] courts have struggled to find limiting principles for honest services prosecutions. Nevertheless, prior to *Skilling*, no circuit court had held that § 1346 was unconstitutionally vague or over-broad.

The Court's ruling in *Skilling* removes a category of deceptive, fraudulent, and corrupt conduct from the scope of the honest services law.[7] By limiting honest services fraud under § 1346 to bribes and kickbacks, the Court in *Skilling* fashioned elements to provide clearer notice as to criminal conduct. Not every ethical lapse is a crime.[8] To the extent alternate criminal code provisions cannot be applied to the underlying conduct, the ruling in *Skilling* places certain deceptive conduct beyond the reach of federal criminal law.[9] Specifically, after *Skilling*, prosecutors will no longer be able to use § 1346 to prosecute undisclosed self-dealing by public officials or private fiduciaries, a class of cases not always able to be pursued under the traditional theories of mail and wire fraud.[10]

As after the United States Supreme Court's last major pronouncement on federal mail and wire fraud in 1987—when the Court eliminated intangible rights fraud prosecutions by limiting wire and mail fraud to schemes involving money or property[11]—the Court's ruling in *Skilling* may initially prompt cases that test

6. Cleveland v. United States, 531 U.S. 12, 25 (2000) (quoting Rewis v. United States, 401 U.S. 808, 812 (1971)).

7. *See Skilling*, 130 S. Ct. at 2933 (declaring that, after having limited the scope of 18 U.S.C. § 1346 to bribes and kickbacks, "no other misconduct falls within § 1346's province").

8. *See, e.g.*, United States v. George, 477 F.2d 508, 512 (7th Cir. 1973) ("Not every breach of every fiduciary duty works a criminal fraud.").

9. By limiting the scope of § 1346 to bribes and kickbacks, it follows *a fortiori* that crimes otherwise chargeable under the mail fraud statute may no longer be within the statute's reach. *See Skilling*, 130 S. Ct. at 2933 (stating that no misconduct other than bribes and kickbacks falls within the province of § 1346).

10. *See* Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 DUKE L.J. 945, 954 (1993) (stating the mail and wire fraud statutes "have been interpreted to criminalize a wide range of conduct involving conflicts of interest").

11. In *McNally v. United States*, the Supreme Court eliminated the intangible rights theory. *See* McNally v. United States, 483 U.S. 350, 360 (1987) ("[W]e read [the mail fraud statute] as limited in scope to the protection of property rights."), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181 (codified as amended at 18 U.S.C. § 1346 (2006)), *as recognized in* United States v. Berlin, 707 F. Supp. 832 (E.D. Va. 1989); *see also Skilling*, 130 S. Ct. at 2927 ("In 1987, this Court . . . stopped the development of the intangible-rights doctrine in its tracks.").

the boundaries of honest services fraud under § 1346. For example, the terms "bribery" or "kickback" are not defined by *Skilling*, or §§ 1341, 1343, or 1346[12] Will an exchange of benefits unconnected by a specific agreement capable of being successfully characterized as a bribe or kickback?

Further, just as in 1988, when the United States Congress enacted legislation to "overrule" the Supreme Court and reinstate an "intangible rights" theory of mail and wire fraud,[13] Congress may again enact remedial legislation to define a more expansive role for federal prosecution of fraudulent conduct. In particular, soon after *Skilling*, new legislation was proposed that addressed undisclosed self-dealing by public officials or private fiduciaries.[14] The assessment of the need for new legislation to fill the void created by the recent ruling, as well as the scope of any new laws, may well be guided by a thoughtful consideration of the development of honest services fraud prosecutions and the difficulties encountered in fashioning defining principles. This Article explores the history of honest services mail and wire fraud, the key rulings of the Supreme Court and other federal courts, and arising issues.

II. A SHORT HISTORY OF THE MAIL FRAUD STATUTE

First enacted in 1872, the mail fraud statute made it illegal to use the mails to advance "any scheme or artifice to defraud."[15] The

12. *See* 18 U.S.C. §§ 1341, 1343, 1346 (2006 & Supp. III 2009) (lacking any definition of "bribery" or "kickback"); *Skilling*, 130 S. Ct. at 2896–963 (offering no definition of "bribery" or "kickback").

13. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346 (2006)) (adding language to Title 18 of the United Stated Code that read "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services").

14. Honest Services Restoration Act, S. 3854, 111th Cong. (2d Sess. 2010), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-111s3854is/pdf/BILLS-111s3854is.pdf.

15. In 1872, the mail fraud statute provided:

> That if any person having devised or intending to devise any scheme or artifice to defraud, or be effected by either opening or intending to open correspondence or communication with any other person (whether resident within or outside the United States), by means of the post-office establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice (or attempting so to do), place any letter or packet in any post-office of the United States, or take or receive any therefrom, such person, so misusing the post-office establishment, shall be guilty of a misdemeanor . . . .

statute, even in its current codification, does not define its key term, "scheme or artifice to defraud."[16] What may constitute a scheme or artifice to defraud is measured by the factual context of any given case, allowing mail fraud prosecutions (and, later civil Racketeer Influenced and Corrupt Organization Act[17] (RICO) cases incorporating mail fraud) to address the evolving ingenuity of criminals and the increasing complexity of commerce and public office.[18]

There have been persistent concerns about notice and over-breadth regarding the conduct that falls within the scope of the mail fraud statute.[19] Under usual conventions of statutory construction, statutory terms are understood to have the plain meaning as accepted at the time of enactment.[20] As the United

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Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323 (codified as amended at 18 U.S.C. § 1341 (Supp. III 2009)); *see also* Jed S. Rakoff, *The Federal Mail Fraud Statute (Part 1)*, 18 DUQ. L. REV. 771, 772 (1980) (detailing the legislative history of the mail fraud statute). In 1889, Congress amended the mail fraud statute to add a list of prohibited schemes of property fraud in addition to "any scheme or artifice to defraud" and to add the phrase "cause to be placed" to the language describing the use of the mails so that a defendant's indirect mailing would suffice. The 1889 amendment provided, in relevant part:

> If any person having devised or intending to devise any scheme or artifice to defraud, or to sell, dispose of, loan, exchange, alter, give away . . . or procure for unlawful use any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States . . . or . . . what is commonly called the 'sawdust swindle' or 'counterfeit money fraud', or by dealing or pretending to deal in what is commonly called 'green articles,' 'green coin,' 'bills,' 'paper goods,' 'spurious Treasury notes,' . . . shall, in and for executing such scheme . . . place or cause to be placed, any letter . . . in any post office . . . shall . . . be punishable by a fine . . . .

Act of Mar. 2, 1889, ch. 393, sec. 1, § 5480, 25 Stat. 873, 873 (codified as amended at 18 U.S.C. § 1341 (Supp. III 2009)).

16. 18 U.S.C. § 1341 (Supp. III 2009).

17. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968 (2006).

18. *See* Black v. United States, 130 S. Ct. 2963, 2966–67 (2010) (detailing the theft of millions of dollars by defendants from their corporation prior to being indicted on criminal charges); *see also* Skilling v. United States, 130 S. Ct. 2896, 2908 (2010) (describing the indictment which alleged the defendant manipulated financial reports and made disingenuous statements about his company's true financial performance).

19. *See Skilling*, 130 S. Ct. at 2911–12, 2925–34 (analyzing the defendant's claim that § 1346 is unconstitutionally vague); United States v. Urciuoli, 513 F.3d 290, 294 (1st Cir. 2008) ("The central problem is that the concept of 'honest services' is vague and undefined by the statute.").

20. *See* Jerome v. United States, 318 U.S. 101, 108 n.6 (1943) ("It has frequently been held that when a federal statute uses a term which it does not define but which was a common law offense, it will be given its common law meaning." (citing Harrison v. United

States Supreme Court observed in *McNally v. United States*,[21] the term "to defraud," as commonly understood when Congress enacted the mail fraud statute in 1872, referred "'to wronging one in his property rights by dishonest methods or schemes,'" and "'usually signif[ied] the deprivation of something of value by trick, deceit, chicane or overreaching.'"[22] Further, fraud in nineteenth and early twentieth century jurisprudence at the time of the enactment of the mail fraud statute and its early substantive amendments was a crime against property implemented by trickery or deceit.[23] Courts have recognized that the common law crime of false pretenses consists of three elements: "(1) specific intent to defraud, (2) the advancement of a false pretense, and (3) [the resulting] acquisition of money or property."[24]

In 1909, Congress amended the mail fraud statute to prohibit, as the mail fraud statute does today, "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[25] In simply looking at the statutory words after the 1909 amendment, the mail fraud statute prohibited, in its first clause, "any scheme or artifice

States, 163 U.S. 140, 142 (1896))). It is also well-established that "there is no federal common law of crimes." Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 181 (1994). "[F]ederal crimes are defined by statute rather than by common law." United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 490 (2001).

21. McNally v. United States, 483 U.S. 350 (1987), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181 (codified as amended at 18 U.S.C. § 1346 (2006)), *as recognized in* Skilling v. United States, 130 S. Ct. 2896 (2010).

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

23. *See* W. Robert Gray, Comment, *The Intangible-Rights Doctrine and Political—Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. CHI. L. REV. 562, 567–68 (1980) (discussing Congress's desire to deter fraudulent acts against property by enacting the mail fraud statute).

24. *See* John J. O'Connor, McNally v. United States*: Intangible Rights Mail Fraud Declared a Dead Letter*, 37 CATH. U. L. REV. 851, 857 & nn.50–61 (1988) (listing the elements of false pretenses and detailing the history of the law's treatment of the crime); *see also* Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 420 n.43 (1959) (discussing the seventeenth century roots of common law cheats and the requirements of an actionable fraud claim).

25. Act of Mar. 4, 1909, ch. 321, sec. 215, § 5480, 35 Stat. 1088, 1130–31 (codified as amended at 18 U.S.C. § 1341 (Supp. III 2009)). As with the 1872 and 1889 enactments, little legislative history accompanies the enactments. *See* John J. O'Connor, McNally v. United States: *Intangible Rights Mail Fraud Declared a Dead Letter*, 37 CATH. U. L. REV. 851, 852 & n.9 (summarizing the circumstances surrounding the 1872 and 1889 enactments of the mail fraud statute and subsequent judicial interpretations thereof).

to defraud," and, in its second clause, "any scheme or artifice . . . for obtaining money or property by means of false or fraudulent pretenses, representations or promises."[26]

The United States Supreme Court observed in *McNally* that the meager legislative history regarding the 1909 amendment indicates the statute was amended to codify the holding of the Supreme Court in *Durland v. United States*[27] and make clear that the prohibited schemes to defraud were not limited to "false pretenses," as that term was then understood as applying not only to past and present activities, but also included false or fraudulent pretenses, representations, or promises as to future events.[28] Congress made no other changes to the mail fraud statute in 1909.[29] Thus, as discussed by the Supreme Court in *McNally*, nothing suggests that Congress intended to criminalize schemes and artifices to defraud that do not involve money or property.[30] Today, the mail fraud statute, captioned "Frauds and swindles" provides:

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26. Based on the common understanding of "to defraud" at the time of enactment, the Court in *McNally* rejected any separate reading of the two clauses to allow the conviction for a mail fraud not affecting money or property. *McNally*, 483 U.S. at 358–59. Dissenting in *McNally*, Justice Stevens stated that the reading that the courts of appeals had given the statute to allow schemes and artifices to defraud involving intangible rights (not money or property) was a permissible one, given the statutory language. *Id.* at 364–65 (Stevens, J., dissenting). He further opined:

> As the language makes clear, each of these restrictions is independent. One can violate the second clause—obtaining money or property by false pretenses—even though one does not violate the third clause—counterfeiting. Similarly, one can violate the first clause—devising a scheme or artifice to defraud—without violating the counterfeiting provision. . . . Certainly no canon of statutory construction requires us to ignore the plain language of the provision.

Id. at 364–65.

27. Durland v. United States, 161 U.S. 306 (1896).

28. S. DOC. NO. 68, pt. 2, at 63–64 (1901); *see also McNally*, 483 U.S. at 358–59 (analyzing Congress's language in the 1909 amendment). The information about the legislative history was found in a note in the margin of the 1901 Senate Report. *Id.* at 357–58 n.7.

29. *See generally* Act of Mar. 4, 1909, ch. 321, 35 Stat. 1088, 1088–1159 (amending only one section of the mail fraud statute).

30. After the 1909 amendment, Congress amended the mail fraud statute three times, making minor language revisions. *See* Act of June 25, 1948, ch. 645, § 1341, 62 Stat. 683, 763 (removing superfluous language from the 1889 version of the mail fraud statute), *amending* Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1108, 1130–31, *amended by* Act of May 24, 1949, ch. 139, § 34, 63 Stat. 89, 94 (replacing the word "or" with "of"), *amended by* Postal Reorganization Act, Pub. L. No. 91-375, § 6(j)(11), 84 Stat. 719, 775–83 (1970) (codified as amended at 18 U.S.C. § 1341 (Supp. III 2009)) (renaming the "Post Office Department" as the "Postal Service").

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.[31]

The wire fraud statute captioned "Fraud by wire, radio, or television," enacted in 1952, tracks the mail fraud statute but proscribes the use of any transmission by means of wire, radio, or television communication in interstate or foreign commerce to effectuate a fraudulent scheme, and also includes no statutory definitions of its key terms.[32] Accordingly, courts have similarly

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31. 18 U.S.C. § 1341 (Supp. III 2009), *limited on constitutional grounds by* United States v. Saathoff, 708 F. Supp. 2d 1020, 1021, 1036–37 (S.D. Cal. 2010) (holding that § 1341 was unconstitutionally vague as applied to the defendants); Act of May 24, 1949, ch. 139, § 34, 63 Stat. 94, 94 (replacing 'dispose of' with 'dispose or'); Act of June 25, 1948, ch. 645, § 1341, 62 Stat. 763, 763 (surplus from 1889 version removed). The substantive statement of the offense of mail fraud today is essentially as it was at the time of the decisions in *McNally* and *Skilling*. Since *McNally*, Congress has increased the penalty for conviction, made other related changes to the statute, and, as discussed further below, enacted 18 U.S.C. § 1346.

32. 18 U.S.C. § 1343 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses,

construed the mail and wire fraud statutes.[33]

III. PRE-*MCNALLY* CASES

Prior to *McNally*, courts generally understood the reference to "money or property" in the second clause of the mail fraud to refer to money or tangible property.[34] But, because the first clause of the statute, which punished "any scheme or artifice to defraud," did not mention money or property, in approximately the 1970s, courts acceded to the theory that the first clause could be interpreted to encompass schemes to deprive victims of intangible rights, such as honest services. As the case law developed leading up to the Supreme Court's 1987 decision in *McNally*, a conviction under the mail fraud statute could be obtained under either of two theories: (1) the traditional theory; or (2) the honest

representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C.§ 1343 (Supp. III 2009).

33. *See* United States v. Gimbel, 830 F.2d 621, 627 (7th Cir. 1987) (applying *McNally* and concluding that the scope of the wire fraud statute is limited to the protection of property rights in the same manner as the mail fraud statute); United States v. Feldman, 711 F.2d 758, 763 n.1 (7th Cir. 1983) (stating that "the wire and mail fraud provisions are similar and cases construing the mail fraud statute are also applicable to the wire fraud statute"); United States v. Benmuhar, 658 F.2d 14, 21 (1st Cir. 1981) (holding that the trial court's conviction of a defendant for "separate mail and wire fraud violations on the basis of different telephone and mail communications even though there was but a single fraudulent scheme" was not erroneous); United States v. Hodge, 674 F. Supp. 585, 589 (N.D. Ohio 1987) (holding that both the mail and wire fraud statutes make each separate communication separate offenses and separately punishable).

34. *See* Elizabeth Wagner Pittman, *Mail and Wire Fraud*, 47 AM. CRIM. L. REV. 797, 811 n.85 (2010) ("In the century following its 1872 enactment, the mail fraud statute was typically used to prosecute traditional frauds, in which people used the mails in furtherance of a scheme to defraud someone of money or other tangible property."). *But see* McNally v. United States, 483 U.S. 350, 375 (1987) (Stevens, J., dissenting) (describing Chief Justice Taft's 1924 opinion in *Hammerschmidt* as making it "perfectly clear that a fraud on the public need not deprive it of tangible property"), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181 (codified as amended at 18 U.S.C. § 1346 (2006)), *as recognized in* Skilling v. United States, 130 S. Ct. 2896 (2010).

services theory, also called the intangible rights theory or fiduciary fraud theory.[35]

Under the traditional theory, the Government proves the victim was deprived of money or property through the fraudulent conduct of the defendant.[36] The Government proves a victim lost money or property and an offender gained money or property, often with one being the mirror image of the other. *Mens rea* is a critical limiting element of mail fraud and courts require the Government to prove the defendant's specific intent to deceive or defraud and intent to cause harm, which can be inferred from the circumstances.[37] Proof of actual harm is not required, as the scheme itself is the crime, but an identifiable harm apart from the breach itself must be reasonably foreseeable.[38]

Under the honest services theory of mail and wire fraud, the focus is on corruption; thus the focus is on neither the victim who lost money or property nor the offender who gained money or property.[39] Under the "honest services" theory, the Government must prove the victim was deprived of the right to honest

35. *See* United States v. Rybicki, 354 F.3d 124, 132 (2d Cir. 2003) (summarizing the procedure for enforcing the mail and wire fraud statutes prior to the 1987 *McNally* ruling).

36. *See* United States v. Leahy, 464 F.3d 773, 787 & n.2 (7th Cir. 2006) (recognizing that the mail and wire fraud statutes require that money or property be the object of the fraud perpetrated by the defendant, rather than an intangible right, but acknowledging there is a "limited exception to this rule for the deprivation of the 'intangible right of honest services'" (quoting 18 U.S.C. § 1346 (2006))).

37. *See, e.g.*, United States v. Regent Office Supply Co., 421 F.2d 1174, 1180 (2d Cir. 1970) ("It is generally stated that there are two elements to the offense of mail fraud: use of the mails and a scheme to defraud."). "Since only a 'scheme to defraud' and not actual fraud is required for conviction, we have said that 'it is not essential that the Government allege or prove that purchasers were in fact defrauded.'" *Id.* at 1180 (quoting United States v. Andreadis, 366 F.2d 423, 431 (2d Cir. 1966)). The court in *Regent Office Supply* further opined:

> But this does not mean that the government can escape the burden of showing that some actual harm or injury was contemplated by the schemer. Proof that someone was actually defrauded is unnecessary simply because the critical element in a scheme to defraud is fraudulent intent, and therefore the accused need not have succeeded in his scheme to be guilty of the crime. But the purpose of the scheme must be to injure, which doubtless may be inferred when the scheme has such effect as a necessary result of carrying it out. Of course proof that someone was actually victimized by the fraud is good evidence of the schemer's intent.

Id. (citations omitted) (internal quotation marks omitted).

38. *See, e.g.*, Pritchard v. United States, 386 F.2d 760, 766 (8th Cir. 1967) (holding that success in the scheme is not an essential element of mail fraud).

39. Skilling v. United States, 130 S. Ct. 2896, 2904 (2010).

services—a loosely defined right, often equated with a fiduciary duty, such as an employee's duty to an employer to give good and true service or a public official's duty to give constituents fair and good government.[40] In part because the Government had not proved injury to any victim as measured by loss of money or property, courts struggled with the boundaries of the doctrine.

An early case presenting the honest services theory of mail fraud is the case of *Shushan v. United States*,[41] a mail fraud prosecution filed in the United States District Court for the Eastern District of Louisiana and appealed to United States Court of Appeals for the Fifth Circuit.[42] In *Shushan*, five persons were convicted of seven of eight counts in an indictment that charged the use of the mail to execute a scheme to defraud the commissioners of a board of levee by means of a bond refunding plan.[43] The Government proved that one of the defendants, a public official, accepted bribes from businessmen in exchange for urging city action that benefitted the bribe payers, but did not prove the board of levee suffered any loss as a result of the bond refunding.[44] On appeal, the Fifth Circuit rejected the argument that because the levee board realized a savings under the bond refunding plan, the Government did not prove fraud within the meaning of the mail fraud statute.[45] The court upheld the mail

40. *See* United States v. Lopez-Lukis, 102 F.3d 1164, 1169 (11th Cir. 1997) (explaining that the crux of the honest services theory is "when a political official uses his office for personal gain, he deprives his constituents of their right to have him perform his official duties in their best interest" and such elected officials "owe a fiduciary duty to the electorate"); United States v. George, 477 F.2d 508, 512 (7th Cir. 1973) (citing Shushan v. United States, 117 F.2d 110, 115 (5th Cir. 1941), *overruled by* United States v. Cruz, 478 F.2d 408 (5th Cir. 1973)) (discussing the defendant employee's duties owed to his employer and how the mail fraud statute is applicable thereto).

41. Shushan v. United States, 117 F.2d 110 (5th Cir. 1941), *overruled by* United States v. Cruz, 478 F.2d 408 (5th Cir. 1973).

42. Justice Ginsburg's majority opinion in *Skilling* credited *Shushan* as likely the first published case addressing the intangible rights theory. *Skilling*, 130 S. Ct. at 2904 (citing generally *Shushan*, 117 F.2d 110). For a thoughtful analysis of the momentum that the intangible rights theory has gained in the judiciary, see Daniel J. Hurson, *Limiting the Federal Mail Fraud Statute—A Legislative Approach*, 20 AM. CRIM. L. REV. 423 (1983).

43. Defendants were charged with mail fraud in violation of 18 U.S.C. § 338 (a predecessor to § 1341), which "punishes one who places or causes to be placed in the mail, or causes to be delivered to the addressee, mail matter for the purpose of executing 'any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.'" *Shushan*, 117 F.2d at 115.

44. *Id.* at 114–15, 118–19.

45. *Id.*

fraud convictions, holding "[a] scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public."[46] Further, the court stated:

> It is not true that because the Board was to make and did make a saving by the operations there could not have been an intent to defraud. The great demand for tax exempt bonds and the fall in interest rates on them, gave a potential profit to the Levee Board in refunding its callable bonds which bore a high rate of interest. That potential profit, all of it, was the property of the Board. These defendants had no original right to any of it. They could get no share except by some arrangement with the Board. If the arrangement was not fair, but intentionally fraudulent, the Board was to be defrauded of a part, though not all, of its property. But the defendants in fact did not receive, and it may be concluded, did not intend to receive, a share in the profit, realizable in the long future, but they received cash, to the amount of nearly a half million dollars, out of the proceeds of sale of new bonds. This cash unquestionably was the money of the Board.[47]

The court held that because defendant Waguespack, a member of the Levee Board, concealed his interest in the bond refinancing proposal, "the jury could well conclude that in his position his conduct was so irreconcilable with public duty and private morality that neither he nor anyone privy to it could intend fairness and honesty."[48]

In both public and private sector fraud cases, courts recognize that certain conduct by a defendant breaches the right to honest and faithful services from that defendant even if there is no proof of loss of tangible property or money.[49] A strict *quid pro quo* was

46. *Id.* at 115.

47. *Id.* at 119.

48. *Shushan*, 117 F.2d at 120.

49. *See* United States v. Dixon, 536 F.2d 1388, 1400 (2d Cir. 1976) (stating that the honest services mail fraud doctrine "has developed to fit the situation in which a public official avails himself of his public position to enhance his private advantage, often by taking bribes," and while "[s]uch actions may not deplete the fisc . . . they are nonetheless frauds"); United States v. Isaacs, 493 F.2d 1124, 1149 (7th Cir. 1974) (upholding mail fraud convictions because the citizens of Illinois were defrauded of "Kerner's honest and faithful services as governor"). The defendants in *Isaacs* challenged their mail fraud convictions "because the indictment failed to charge that they had defrauded the State of Illinois, its citizens, or the racing associations 'out of something of definable value, money or

not required in these cases—i.e. both sides did not have to benefit for there to be a fraud.[50] For example, in *Shushan* the Government proved a city official accepted a bribe and therefore established its case, even if the evidence did not show the terms of the resulting contract were not the same as the likely arms-length contract[51] or the "betrayed" party suffered a tangible property loss, and even if the evidence showed the "betrayed" party may have realized a gain in money or property.[52]

Prior to *McNally*, some courts also approved the use of the mail fraud statute to attack corruption that deprived victims of intangible rights other than honest services, even if no property loss was proved. For example, in 1978, the United States Court of Appeals for the Ninth Circuit affirmed the wire fraud convictions of operators of a collection agency who misrepresented themselves over the telephone to debtors to obtain personal information about the debtors for the apparent use in collecting the debts.[53] The court held the defendants defrauded the debtors of intangible privacy rights.[54] In 1973, the United States Court of Appeals for the Eighth Circuit affirmed the mail fraud conviction of a defendant who participated in a ballot box stuffing scheme which deprived the citizens of Missouri and its board of elections commissioners of "intangible political and civil rights."[55] In these cases, there was no proof of any loss or intended loss of money or property.[56] By 1982, all federal circuits had accepted some form

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property'" and "the breach of fiduciary duty which occurred . . . amounts to no more than a constructive fraud and not a violation of § 1341." *Id.* at 1149. The Seventh Circuit, in *United States v. George*, observed:

> If there was intent . . . to deprive Zenith of [its employee's] honest and loyal services in the form of his giving [the supplier] preferential treatment, it is simply beside the point that [the employee] may not have had to (or had occasion to) exert special influence in favor of [the supplier] or that Zenith was satisfied with [the supplier's] product and prices.

United States v. George, 477 F.2d 508, 512 (7th Cir. 1973).

50. *See, e.g., Dixon*, 536 F.2d at 1400 ("This is a considerable distance from the ordinary meaning of a 'scheme or artifice to defraud.'").

51. *Shushan*, 117 F.2d at 118–19.

52. *Id.*

53. United States v. Louderman, 576 F.2d 1383, 1387 (9th Cir. 1978).

54. *Id.*

55. United States v. States, 488 F.2d 761, 765 (8th Cir. 1973) ("Here, we have a scheme by the appellants to deceive and defraud the public and the Board of Election Commissioners of certain intangible political and civil rights.").

56. *See Louderman*, 576 F.2d at 1387 (recognizing that the purpose of the scheme

of the honest services theory of fraud.[57]

IV. UNITED STATES SUPREME COURT'S DECISIONS IN *MCNALLY* AND *CARPENTER*

In 1987, in *United States v. McNally*, the United States Supreme Court reversed the law in all circuits addressing the issue, invalidated the honest services, intangible rights, and fiduciary fraud theory of mail fraud, and held that the mail fraud statute criminalized only schemes that defraud others of property rights.[58] Specifically, in *McNally* (a public sector honest services case) the Court held that while "[t]he mail fraud statute clearly protects property rights, [it] does not refer to the intangible right of the citizenry to good government."[59] The Court held that the general right of any employer to the faithful services of its employees, or the right of the government to faithful observance of the law by its citizens, was not a sufficiently definite interest to come within the mail fraud statute.[60] Rather, the Court held that the mail fraud statute prohibited obtaining money or property by false representations, and the term "other property" should be given its ordinary meaning.[61]

At first blush, *McNally* seems to present a clear case of criminality: proof that a Kentucky democratic party official got rich at the taxpayers' expense.[62] *McNally* involved a state political

was to obtain information, not tangible property); *States*, 488 F.2d at 766 (noting that previous case law makes it clear that a loss of tangible property is not necessary for a finding of fraud).

57. *See, e.g.*, John J. O'Connor, McNally v. United States*: Intangible Rights Mail Fraud Declared a Dead Letter*, 37 CATH. U. L. REV. 851, 853 & n.22, 870 (1988) ("[B]y 1987 every federal circuit in the country had considered and accepted the intangible rights theory." (citing United States v. Silvano, 812 F.2d 754, 758–59 (1st Cir. 1987))).

58. McNally v. United States, 483 U.S. 350, 356 (1987), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181 (codified as amended at 18 U.S.C. § 1346 (2006)), *as recognized in* Skilling v. United States, 130 S. Ct. 2896 (2010).

59. *See id.* at 356 (noting it is "unmistakable" that the statute is intended to only protect against fraud which involves money or property).

60. *Id.* at 356.

61. *Id.* at 358–59 ("The codification of the holding in *Durland* in 1909 does not indicate that Congress was departing from this *common understanding.* As we *see* it, adding the second phrase simply made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property." (emphasis added)).

62. *See id.* at 353 (identifying that the approximate amount of $851,000 was distributed to agencies controlled by the official).

party chairman, Hunt, whose selection of Kentucky's insurance agent was contingent upon an arrangement to procure a share of the agent's commissions through kickbacks paid to various insurance companies designated by Hunt as political patronage.[63] Under the Government's theory of mail fraud at trial, the fraud occurred when Hunt, Gray (a public official), and McNally (a private business person) set up a fake insurance agency to receive some of the commissions.[64] There was no proof that absent the kickbacks, the state of Kentucky would have paid a lower premium or gained better insurance coverage. Rather, the proof and theory of proof was that the kickback scheme deprived Kentucky of the right to have its business conducted honestly.[65]

Hunt pleaded guilty. A jury convicted Gray and McNally of one count of conspiracy to commit mail fraud to defraud the citizens of Kentucky of their right to have state affairs conducted honestly and one count of substantive mail fraud involving a check mailed to show the scheme to obtain money and property by false and fraudulent pretenses.[66] The court of appeals affirmed the convictions of Gray and McNally.[67]

On certiorari, the United States Supreme Court held that nothing indicates Congress intended the mail fraud statute to cover intangible rights, as opposed to money or property.[68] In reaching its conclusion, the Court alluded to federalism, notice, vagueness, and over-breadth concerns:

> Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read [the mail and wire fraud statutes] as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.[69]

The Court essentially held that the phrase "to defraud" in the

63. *McNally*, 483 U.S. at 353.
64. *Id.* at 360.
65. *Id.* at 353.
66. *Id.*
67. *Id.* at 355.
68. McNally v. United States, 483 U.S. 350, 358–59 (1987), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181 (codified as amended at 18 U.S.C. § 1346 (2006)), *as recognized in* Skilling v. United States, 130 S. Ct. 2896 (2010).
69. *Id.* at 360.

first clause of the mail fraud statute must be limited to schemes and artifices to defraud involving money or property, just as the second clause addressing schemes for "obtaining money or property" was so limited.[70] The Court did not hold the two clauses in the mail fraud statute have the same meaning and expressly declined to address the applicability of the second clause, "obtaining money or property," to the indictment of McNally.[71] Rather, the Court expressly held that both clauses need to be read together.[72] Justice Stevens' strong dissent, joined by Justice O'Connor, pointed out the unanimity of the courts of appeals in supporting the intangible rights theory, and argued that whatever Congress's original purpose in 1872, the Court should not be bound by it today, given that the terms of the statute support the intangible rights approach.[73]

The Supreme Court granted certiorari in *Carpenter v. United States*[74] on December 15, 1986, just nine days after certiorari was granted in *McNally*, and decided the case soon after.[75] *Carpenter* addressed the distinction between tangible property and intangible interests which *McNally* seemed to suggest was critical.[76] Winans, the defendant, was a *Wall Street Journal* reporter who wrote the "*Heard on the Street*" column.[77] Recognizing that the column often affected stock prices, Winans and two stockbrokers entered into an agreement to trade on this information.[78] All three were

70. *Id.*

71. *Id.* at 358–59. In his dissent, Justice Stevens identified the distinctions between the two clauses. *See id.* at 366 (Stevens, J., dissenting) ("The Court recognizes that the 'money or property' limitation of the second clause may not actually apply to prosecutions under the first clause.").

72. *McNally*, 483 U.S. at 358–59 (majority opinion).

73. *Id.* at 366 (Stevens, J., dissenting). Justice Stevens' analysis does not discuss the theory that the terms in a criminal statute should be construed according to their ordinary meaning at the time of drafting, as best as that ordinary meaning can be determined. *Id.* He stressed instead that Congress's purpose in enacting the mail fraud statute was to prevent the misuse of the mails and that there was no indication Congress was willing to tolerate the fraudulent infringement of a right to honest government while it prohibited fraudulent deprivation of money. *Id.*

74. Carpenter v. United States, 484 U.S. 19 (1987), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181 (codified as amended at 18 U.S.C. § 1346 (2006)), *as recognized in* Skilling v. United States, 130 S. Ct. 2896 (2010).

75. *See generally id.* (deciding the case on November 16, 1987).

76. *See id.* at 25 (stating that the mail fraud statute is not limited to tangible property but encompasses intangible property as well).

77. *Id.* at 22.

78. *Id.* at 24.

convicted of securities fraud, mail and wire fraud, and conspiracy.[79]

On certiorari, the Government, in its original, brief did not argue the *Wall Street Journal* was deprived of property, but focused on Winans' breach of his position of trust with the *Wall Street Journal*.[80] After the Court decided *McNally*, the Government filed a supplemental brief urging that Winans' fraudulent conduct—within the scope of the mail and wire fraud statutes—was his embezzlement of confidential business information which harmed the *Wall Street Journal* when it lost its exclusive use of that information.[81] In a unanimous Supreme Court opinion authored by Justice White, the *Carpenter* Court affirmed the convictions of Winans and the two stockbrokers.[82] The Court reaffirmed *McNally*, noting:

> The [*Wall Street Journal*], as Winans' employer, was defrauded of much more than its contractual right to his honest and faithful service, an interest too ethereal in itself to fall within the protection of the mail fraud statute, which "had its origin in the desire to protect individual property rights."[83]

The Court further stated:

> As we observed last Term in *McNally*, the words "to defraud" in the mail fraud statute have the "common understanding" of "'wronging one in his *property rights* by dishonest methods or schemes,' and 'usually signify the deprivation of *something of value* by trick, deceit, chicane or overreaching.'"[84]

Citing decisions of the Court as well as a corporate law treatise, the Court observed, "Confidential business information has long been recognized as property."[85] The Court unanimously held that the *Wall Street Journal*'s "confidential business information—the publication schedule and contents of the '*Heard*' column—and its intangible nature does not make it any less property protected by

79. *Carpenter*, 484 U.S. at 23.

80. Craig M. Bradley, Foreword, *Mail Fraud After* McNally *and* Carpenter*: The Essence of Fraud*, 79 J. CRIM. L. & CRIMINOLOGY 573, 586 (1988) (internal quotation marks omitted).

81. *Id.* at 585.

82. *Carpenter*, 484 U.S. at 19.

83. *Id.* at 25 (quoting McNally v. United States, 483 U.S. 350, 359 n.8 (1987)).

84. *Id.* at 27 (emphasis added) (quoting *McNally*, 483 U.S. at 358).

85. *Id.* at 26.

the mail and wire fraud statutes. *McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights."[86]

As discussed in *McNally*, at the time of enactment of the mail fraud statute, "defraud" was understood to involve "trick, deceit, chicane or overreaching" as an element of fraud.[87] An employee's breach of a fiduciary duty not to disclose the employer's confidential information "has long been recognized as satisfying the deceit element of a fraud."[88] Further, although *McNally*'s rejection of the intangible rights theory limited mail fraud to prohibiting the procurement of money or other property by false representations,[89] *Carpenter* makes it clear that both intangible and tangible property as well as money fall within the scope of the mail fraud statute.[90]

One commentator has criticized the determination in *Carpenter* that "[t]he concept of 'fraud' includes the act of embezzlement,"[91] arguing "it was an overstatement by the Court to suggest that any embezzlement is a fraud."[92] Craig M. Bradley asserts, "The Court should have recognized Winans' behavior as involving the kind of deceitful behavior traditionally encompassed by the concept of false pretenses, not embezzlement."[93] He further contends that even if it is accepted that "Winans' acts constituted fraud, whether they are characterized as embezzlement or false pretenses[,] . . . neither of these traditional crimes were defined in terms of intangible property" at the time of the enactment of the mail fraud

86. Carpenter v. United States, 484 U.S. 19, 25 (1987), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181 (codified as amended at 18 U.S.C. § 1346 (2006)), *as recognized in* Skilling v. United States, 130 S. Ct. 2896 (2010).

87. *McNally*, 483 U.S. at 358.

88. Craig M. Bradley, Foreword, *Mail Fraud After* McNally *and* Carpenter*: The Essence of Fraud*, 79 J. CRIM. L. & CRIMINOLOGY 573, 585 (1988) (internal quotation marks omitted).

89. *McNally*, 483 U.S. at 359.

90. *Carpenter*, 484 U.S. at 25 ("We held in *McNally* that the mail fraud statute does not reach schemes to defraud citizens of their intangible rights to honest and impartial government, and that the statute is limited in scope to the protection of property rights." (citation omitted) (internal quotation marks omitted)).

91. *Id.* at 27–28 (1987).

92. Craig M. Bradley, Foreword, *Mail Fraud After* McNally *and* Carpenter*: The Essence of Fraud*, 79 J. CRIM. L. & CRIMINOLOGY 573, 588 (1988).

93. *Id.*

statute.[94] Because "false pretenses" was limited to money or *tangible* property, Bradley argues "while history supported the Court's holding in *McNally*, limiting 'fraud' to money or property, it did not support *Carpenter*'s extension of 'property' to include such intangibles as confidential information."[95] Under this view, just as the Supreme Court in *Durland* "'refused to accept the restriction [as to representations of past or present fact]'"[96] (prompting Congress's 1909 amendment to the mail fraud statute), the Court in *Carpenter* refused to accept that false pretenses and fraud should be limited to tangible property.[97]

V. *MCNALLY*'S IMMEDIATE AFTERMATH

Following *McNally*, convictions were vacated, prosecutors changed the way in which mail and wire fraud offenses were charged, and Congress considered legislation to overrule *McNally*. Applying *McNally*, federal courts dismissed § 1341 prosecutions involving public corruption, often because there was no loss of money or property.[98] For example, in *United States v. Murphy*,[99]

94. *Id.* (internal quotation marks omitted). "While it is certainly true that 'false pretenses' meant the same thing as fraud in 1909, and therefore required a deprivation of money or property, the 1909 amendment went beyond the common law understanding of 'false pretenses' to forbid 'obtaining money or property by false . . . representations or promises." *Id.* at 609–10 (alteration in original). "Given this clear statutory language (unlike the 'to defraud' language interpreted in *McNally*) an 'unjust gain' scheme should be prosecutable under Clause 2 without reference to any loss." *Id.*

95. Craig M. Bradley, Foreword, *Mail Fraud After* McNally *and* Carpenter*: The Essence of Fraud*, 79 J. CRIM. L. & CRIMINOLOGY 573, 587 n.105, 591 (1988) (agreeing that "Winans' misappropriation was the kind of deceitful behavior that fraud has always been concerned with").

96. *Id.* at 591 (alteration in original) (quoting Arthur R. Pearce, *Theft by False Promises*, 101 U. PA. L. REV. 967, 979 (1953)).

97. *Id.* at 590–92. Bradley states:

> The Court put itself in a box in *McNally* from which it could only escape[] in *Carpenter*, by a gross distortion of the historical evidence on which *McNally* had been based. A far better approach would have been to have recognized the problem in *McNally* as being the lack of an identifiable victim who suffered economic harm, rather than holding that a traditional view of property was an essential element of fraud. Then, in *Carpenter*, it could have noted the presence of a specific victim and a potential economic loss to that victim as satisfying the *McNally* requirement.

Id. at 592 (internal citations and quotation marks omitted).

98. *See, e.g.*, United States v. Huls, 841 F.2d 109, 110 (5th Cir. 1988) (reversing convictions for mail fraud because the indictment and jury instructions were "based on a scheme to deprive citizens of their right to honest government," and the jury was not required to find deprivation of a property right).

the Sixth Circuit overturned the mail fraud conviction of a state official charged with using false information to help a charitable organization obtain a state bingo license.[100] Acknowledging the *McNally* limitations on § 1341, the court said that the issue "distills to a consideration of whether Tennessee's 'right to control or object' with respect to the issuance of a bingo permit to a charitable organization constitutes 'property.'"[101] It then held that "the certificate of registration or the bingo license may well be 'property' once issued, insofar as the charitable organization is concerned, but certainly an unissued certificate of registration is not property of the State of Tennessee and once issued, it is not the property of the State of Tennessee."[102]

Honest services fraud convictions of private sector actors also were reversed based on *McNally*. For example, in *United States v. Covino*,[103] the Second Circuit reversed the wire fraud conviction of a an employee of NYNEX Mobile Communications Co., who was charged with extorting money and property from Great Northeastern Building and Management Corporation, a contractor doing business with NYNEX, in return for awarding NYNEX

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99. United States v. Murphy, 836 F.2d 248 (6th Cir. 1988).

100. *Id.* at 254.

101. *Id.* at 253.

102. *Id.* at 253–54. With similar reasoning, the Eighth Circuit held that a school bus operator permit is not "property" within the meaning of the mail fraud statute. *See* United States v. Granberry, 908 F.2d 278, 280 (8th Cir. 1990) ("A governmental permit may in some sense be property in the hands of the person who receives it, but licensing authorities have no property interest in licenses or permits, and allegations that they were obtained by fraud are not sufficient to state an offense under [§] 1341."). The Ninth Circuit has held that federal pilot licenses are not "property" before the government issues them. United States v. Kato, 878 F.2d 267, 268–69 (9th Cir. 1989). The court in *Toulabi v. United States* held:

> The license may be property from the driver's perspective, in the sense that he may not be compelled to surrender the entitlement except on proof of wrongdoing. For constitutional purposes an entitlement depending on substantive criteria is "property." From the government's perspective, however, the license is a promise not to interfere rather than a sliver of property.... Taxi driving is not something made possible by dint of the City's resources; it is something the applicant can do without the City's assistance, and the license simply signifies that the City will not hinder or penalize one who pursues this line of work.

Toulabi v. United States, 875 F.2d 122, 125 (7th Cir. 1989) (citations omitted).

103. United States v. Covino, 837 F.2d 65 (2d Cir. 1988). Note that some circuit courts opine that § 1346 superseded mail fraud cases like *Covino*. *See, e.g.*, United States v. Little, 889 F.2d 1367, 1369 (5th Cir. 1989) ("This new section effectively overrules *McNally* by eliminating the requirement of property loss.").

business to the contractor.[104] In four wire fraud counts, Covino was charged with breaching his fiduciary duty to NYNEX by concealing his receipt of money and property from Great Northeastern—information that was "material to the conduct of the business of NYNEX."[105] The court noted there was no evidence suggesting NYNEX overpaid the contractor or that the contract was administered poorly.[106] There was proof of an unjust gain by Covino, an identifiable victim with standing to sue, but no proof NYNEX suffered any property loss beyond its intangible, non-property interest in the honest and faithful service of an employee.[107]

Courts also addressed whether the holding of *McNally* was retroactive[108]—a potentially knotty problem when a conviction was based on a combination of property and non-property interests. In *United States v. Mandel*,[109] the court vacated the conviction of Marvin Mandel, the former governor of Maryland, and five others of fifteen counts of mail fraud, based on the ruling in *McNally*.[110] Specifically, although the evidence showed that Mandel and others received bribes in connection with proposed legislation affecting horse racing and other related matters, the court applied *McNally* retroactively[111] and found:

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104. Covino, 837 F.2d at 66–67.

105. *Id.* at 70.

106. *See id.* at 71 ("The indictment and the charge . . . neither alleged nor asked the jury to find that NYNEX was defrauded of money or property.").

107. *See id.* ("The conviction on the wire fraud counts thus rested on Covino's failure to inform NYNEX that he was soliciting and receiving money and services from Great Northeastern, not that he was defrauding NYNEX itself of its property, . . . precisely the legal theory rejected by the Supreme Court [in *McNally*].").

108. *See* United States v. Callanan, 671 F. Supp. 487, 494 (E.D. Mich. 1987) (denying habeas relief on the ground *McNally* is not retroactive in collateral attacks). After § 1346 was enacted to repeal the effect of *McNally*, courts addressed whether § 1346 was retroactive. *E.g.*, United States v. Granberry, 908 F.2d 278, 281 n.1 ("The Amendment [(§ 1346)], of course, is not retroactive (because of the Ex Post Facto Clause, if for no other reason) . . . .").

109. United States v. Mandel, 672 F. Supp. 864 (D. Md. 1987), *aff'd*, 862 F.2d 1067 (4th Cir. 1988).

110. *E.g.*, *id.* at 876 (listing the counts charged in the defendant's indictment).

111. *Id.* at 873; *see also* McMahan v. United States, 483 U.S. 1015, 1015 (1987) (vacating United States v. Price, 788 F.2d 234, 236–37 (4th Cir. 1986)). In *Price*, the Fourth Circuit held that the allegations and evidence "that [defendant union officials] devised a scheme to defraud the union of their 'faithful and honest services,' and the mails were used in furtherance of the scheme were sufficient to support defendants mail fraud convictions." *Price*, 788 F.2d at 236–37; *see also* United States v. Gimbel, 830 F.2d 621,

> The charge given here did not require for conviction that the United States prove that the citizens of Maryland or its public officials suffered any economic loss or injury as a result of petitioners' conduct. Indeed, Judge Taylor declined to give a requested instruction that would have required that the Government prove loss of money or property by the citizens flowing from petitioners' "scheme to defraud," just as the trial judge in *McNally* had denied such an instruction. Petitioners thus were convicted of using the mails to defraud citizens and public officials of intangible, non-monetary rights—conduct which has never been made criminal by federal statute.[112]

Thus, even though the prosecution proved bribery, the theory of the case presented to the jury did not require the jury to find the obtainment of money or property, and accordingly, the court found it had no choice but to vacate the mail fraud convictions.[113]

VI. UNITED STATES CONGRESS'S "LEGISLATIVE FIX" TO OVERRULE *MCNALLY*

The reaction to *McNally* was mixed. The *Harvard Law Review* accused the Court of "fail[ing] to fulfill its role" in statutory interpretation and "insulat[ing] schemes of unquestionably criminal character from federal prosecution."[114] Representative John Conyers, Jr. of Michigan, then-Chair of the House Judiciary Subcommittee on Criminal Justice, introduced a bill to overrule *McNally*, calling *McNally* a "crippling blow" to prosecutors.[115]

Representative Conyers initially introduced a bill (not enacted), to amend chapter 1, title 1 of the United States Code to add a definition of "fraud" throughout the criminal code.[116] The proposed definition included depriving another of "intangible

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626 (7th Cir. 1987) (reversing conviction for mail and wire fraud when indictment stated that "the scheme consisted of depriving the Treasury Department of Currency Transaction Reports and of other accurate and truthful information and data" (internal quotation marks omitted)).

112. *Mandel*, 672 F. Supp. at 875.

113. *Id.* at 876. *But see* Moore v. United States, 865 F.2d 149, 154 (7th Cir. 1989) (refusing to reverse a conviction where jury instructions were premised on "money or property"); Ranke v. United States, 873 F.2d 1033, 1040 (7th Cir. 1989) (requiring no reversal when scheme was premised on "money or property").

114. *The Supreme Court, 1986 Term: Leading Cases*, 101 HARV. L. REV. 119, 330 (1987).

115. Fraud Amendments Act of 1987, H.R. 3089, 100th Cong. (1st Sess. 1987).

116. *Id.*

rights of any kind whatsoever in any manner or for any purpose whatsoever; or by using material private information wrongfully stolen, converted, or misappropriated in breach of any statutory, common law, contractual, employment, personal, or other fiduciary relationship."[117] Representative Conyers stated the jurisdiction for the bill, especially as applied to allegations of state and local governmental corruption, was found in Article IV, Section 4 of the United States Constitution, which provides the United States shall "guarantee to every State . . . a Republican Form of Government."[118] Although Congress did enact a law to overrule *McNally*, the scope of the revisions to the criminal code was much narrower and did not purport to change the meaning of "fraud" as it appears the other 500 or so times in the Code.[119]

In 1988, Congress promulgated title 18, United States Code § 1346, to provide a statutory basis for the intangible rights fraud theory and, specifically, that a scheme or artifice to defraud can include any effort to deprive someone of the "intangible right to honest services."[120] The new provision, included in the Anti-Drug Abuse Act of 1988, and captioned "Definition of 'scheme or artifice to defraud,'" states: "For the purposes of this chapter [(mail fraud and wire fraud)], the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[121] Even though Congress undoubtedly has the power to define statutory terms such as those in the mail and wire fraud statutes, § 1346 does not define the phrase "scheme or artifice to defraud," nor does it define the

117. *See generally id.* (proposing a far broader definition of fraud).

118. U.S. CONST. art. IV, § 4; Fraud Amendments Act of 1987, H.R. 3089, 100th Cong. (1st Sess. 1987); *see also* 133 CONG. REC. 3240-02 (1987) (offering floor remarks by Representative Conyers on his proposed mail fraud bill).

119. *See generally* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended at 18 U.S.C. § 1346 (2006)) (limiting its scope to the mail fraud statute).

120. *Id.* For a discussion of the legislative history of § 1346, see *United States v. Turner*, 465 F.3d 667, 673–74 (6th Cir. 2006); Randall D. Eliason, *Surgery with a Meat Axe: Using Honest Services Fraud to Prosecute Federal Corruption*, 99 J. CRIM. L. & CRIMINOLOGY 929, 959–61 (2009); Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch over Us*, 31 HARV. J. ON LEGIS. 153, 169–70 (Winter 1994) (discussing that a separate section that would have provided for specific prosecutions of voter fraud involving local elections was dropped in the eleventh hour deliberations).

121. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended at 18 U.S.C. § 1346 (2006) (internal quotation marks omitted).

terms "deprive," "another," or "honest services."[122] Honest services is not a term of art that has an accepted meaning in other legal contexts. Thus, honest services in § 1346 must derive its meaning from case law.[123] In part, due to its inclusion in a bill addressing unrelated matters, there is no useful contemporaneous legislative history to explain or limit the scope of § 1346. When the amendment was adopted, Representative Conyers said that it was intended "to restore[] the mail fraud provision to where that provision was before the *McNally* decision," and "it is no longer necessary to determine whether or not the scheme or artifice to defraud involved money or property."[124]

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122. *Id.*

123. *See* Robinson v. Shell Oil Co., 519 U.S. 337, 340–41 (1997) (recognizing that courts may interpret the meaning of statutory language where Congress is silent or ambiguous).

124. 134 CONG. REC. 11, 108-01 (1988) (statement of Rep. John Conyers, Jr.); *see also* United States v. Brumley, 116 F.3d 728, 742 (5th Cir. 1997) (Jolly & DeMoss, JJ., dissenting) (describing the legislative development of § 1346 and its chief supporter, Representative Conyers). The Fifth Circuit, in its second published decision in *Brumley*, summarized the sparse legislative history underlying § 1346. United States v. Brumley, 79 F.3d 1430, 1435 (5th Cir. 1996), *vacated*, 71 F.3d 676 (5th Cir.), *and rehearing en banc* 116 F.3d 728, 742 (5th Cir. 1997). After describing the Supreme Court decision in *McNally* and its effect on various prior federal circuit court opinions, the Court cited Representative Conyers' statements about the law:

> This amendment restores the mail fraud provision to where that provision was before the *McNally* decision. The amendment also applies to the wire fraud provision and precludes the *McNally* result with regard to that provision.
>
> The amendment adds a new section to 18 U.S.C. § 63 that defines the term "scheme or artifice to defraud to include a scheme or artifice to defraud another of the intangible right of honest services." Thus, it is no longer necessary to determine whether or not the scheme or artifice to defraud involved money or property. This amendment is intended merely to overturn the *McNally* decision. No other change in the law is intended.

United States v. Brumley, 79 F.3d 1430, 1436 (5th Cir. 1996) (citation omitted) (quoting 134 CONG. REC. 11, 108-01 (1988) (statement of Rep. John Conyers, Jr.)). The *Brumley* decision also cited the portion of the Senate Judiciary Report on the provisions in the Anti-Drug Abuse Act of 1988 pertaining to § 1346. Regarding the text of what is now 18 U.S.C. § 1346, this report states as follows:

> This section overturns the decision of *McNally v. United States* in which the Supreme Court held that the mail and wire fraud statutes protect property but not intangible rights. Under the amendment, those statutes will protect any person's intangible right to the honest services of another, including the right of the public to the honest services of public officials. The intent is to reinstate all of the pre-*McNally* case law pertaining to the mail and wire fraud statutes without change.

134 CONG. REC. 17, 360-02 (1988); *see also Brumley*, 79 F.3d at 1437 (detailing the report

There is general consensus among the courts that Congress's intent in passing § 1346 was to overturn *McNally* and to codify honest services or intangible rights theories of mail and wire fraud law as they existed before *McNally*.[125] A notable exception is the Fifth Circuit which sought to limit the potentially broad reach of § 1346 by refusing to consider pre-*McNally* case law when interpreting the statute. In *United States v. Brumley*,[126] the Fifth Circuit's en banc majority ruled that "it bears emphasis before *McNally*, the doctrine of honest services was not a unified set of rules. And Congress could not have intended to bless each and every pre-*McNally* lower court honest services opinion. Many of these opinions have expressions far broader than their holdings."[127] Instead, the Fifth Circuit looked to the plain language of § 1346 when "defining the statutory element of honest services."[128] Similarly, the Second Circuit in *United States v. Sancho*,[129] declined to consider pre-*McNally* case law, emphasizing the scheme to deprive another of the intangible right of honest services "is defined by [§] 1346, not judicial decisions that sought to interpret the mail and wire fraud statutes" before § 1346 was enacted.[130] Other circuits expressly looked to pre-*McNally* cases to define "honest services" fraud.[131]

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prepared by the Senate Judiciary Committee and entered into the Congressional Record).

125. *See, e.g.*, Cleveland v. United States, 531 U.S. 12, 19–20 (2000) ("Congress amended the law specifically to cover one of the 'intangible rights' that lower courts had protected under § 1341 prior to *McNally*: 'the intangible right of honest services.'" (citation omitted)).

126. United States v. Brumley, 116 F.3d 728 (5th Cir. 1997) (en banc).

127. *Id.* at 733.

128. *See id.* at 733–34 (taking a minority view that Congress's intent was not to broaden the scope of § 1346 to such a degree).

129. United States v. Sancho, 157 F.3d 918 (2d Cir. 1998) (per curiam), *overruled by* United States v. Rybicki, 354 F.3d 124 (2d Cir. 2003).

130. *Id.* at 921.

131. *See* United States v. Bloom, 149 F.3d 649, 655 (7th Cir. 1998) (recognizing that *McNally* disapproved of the intangible rights theory, defining it as when "a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud." (quoting McNally v. United States, 483 U.S. 350, 360 (1987)). This is the theory that *McNally* disapproved of because it was unsupported by § 1341, and that Congress reinstated by enacting § 1346. *Id.*; *see also* United States v. Frost, 125 F.3d 346, 364 (6th Cir. 1997) ("The timing and the explicit terms of § 1346 make clear that Congress intended the provision to reinstate the doctrine of intangible rights to honest services."); United States v. Czubinski, 106 F.3d 1069, 1076 (1st Cir. 1997) ("Congress responded to *McNally* in 1988 by enacting section 1346, the honest services amendment."); United States v. Catalfo, 64 F.3d 1070, 1077 n.5 (7th Cir. 1995) ("Congress overruled *McNally* on this

With respect to § 1346, what is "the intangible right to honest services?" *McNally* itself involved the breach of the duty of loyalty, undertaken with a material intent to deceive.[132] Must the defendant always be subject to a fiduciary duty? Must the holder of the duty be the victim? Must the victim suffer an economic harm? Must the harm be reasonably foreseeable to the defendant? The Government in *Skilling v. United States* agreed that § 1346 reinstated the pre-*McNally* definition of honest services fraud, but contended Skilling's brief overstated the extent to which the courts of appeals have differed in defining the scope of the offense prior to *McNally*.[133] Nevertheless, a rigorous examination of the pre-*McNally* case law shows disagreement regarding the fundamental elements of honest services fraud—an assessment ultimately adopted by the Supreme Court in *Skilling*.

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precise point by enacting 18 U.S.C. § 1346."); United States v. Bryan, 58 F.3d 933, 940–41 n.1 (4th Cir. 1995) (opining that "Congress was content with the pre[-]*McNally* interpretations of the mail fraud statute"); United States v. Waymer, 55 F.3d 564, 568 n.3 (11th Cir. 1995) (recognizing Congress's intent to "override" the Supreme Court's decision in *McNally*); United States v. DeFries, 43 F.3d 707, 709 n.1 (D.C. Cir. 1995) (dictum) (acknowledging that Congress overturned *McNally* with § 1346 to explicitly include the deprivation of the "intangible right of honest services" (internal citation and quotation marks omitted)); United States v. Dischner, 974 F.2d 1502, 1518 n.16 (9th Cir. 1992) (dictum) (noting that § 1346 nullified *McNally* and includes a "scheme or artifice to deprive another of the intangible right of honest services" (internal citation and quotation marks omitted)); United States v. Granberry, 908 F.2d 278, 281 n.1 (8th Cir. 1990) (dictum) (commenting that Congress amended § 1346 to repeal the effect of *McNally*); United States v. Martinez, 905 F.2d 709, 715 (3d Cir. 1990) (dictum) ("[Section 1346] was enacted to restore the mail fraud provision to where [it] was before [*McNally*]." (internal citation and quotation marks omitted)); *see also* Skilling v. United States, 130 S. Ct. 2896, 2928 (2010) ("There is 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." (citations omitted)). The *Skilling* Court further stated: "Satisfied that Congress, by enacting § 1346, 'meant to reinstate the body of pre-*McNally* honest[]services law,' we have surveyed that case law." *Skilling*, 130 S. Ct. at 2928 (citation omitted) (quoting Justice Scalia's concurring opinion); *see also* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 114–15 (1991) (Stevens, J., dissenting) (noting that Congress "quickly corrected" the holding in *McNally*); 134 CONG. REC. 17, 360-02 (1988) (statement of Sen. Joe Biden) ("The intent is to reinstate all of the pre-*McNally* case law pertaining to the mail and wire fraud statutes without change."); 134 CONG. REC. 11, 108-01 (1988) (statement of Rep. John Conyers, Jr.) ("This amendment is intended merely to overturn the *McNally* decision. No other change in the law is intended.").

132. *McNally*, 483 U.S. at 352–54.

133. Brief for the United States, Skilling v. United States, 130 S. Ct. 2896 (2010) (No. 08-1394), 2010 WL 302206, at *37 ("Section 1346 reinstated the pre-*McNally* definition of honest services fraud."); *see also id.* at 46 ("Petitioner significantly overstates the extent to which courts of appeals differed about the scope of an honest services offense before *McNally*.").

VII. HONEST SERVICES CASES AFTER THE ENACTMENT OF § 1346 AND BEFORE *SKILLING*

Once Congress passed the "legislative fix" by enacting § 1346, the mail and wire fraud statutes again were applied to address schemes and artifices to defraud or for obtaining property involving the "intangible right to honest services." Corruption indictments rose almost every year. For example, between 2006 and 2008, the United States Department of Justice statistics show corruption indictments rose more than forty percent.[134] Corruption is consistently one of the top priorities of the United States Department of Justice and the Federal Bureau of Investigation[135] "because of the extent and seriousness of their existence to a free democratic society."[136]

Meanwhile, courts struggled to define the limits of honest services fraud within the scope of § 1346, developing many of the same theories and conflicts that led to the Court's decision in

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134. The Department of Justice reported:

> [T]he Corporate Fraud Task Force, on which DOJ has played an important role . . . has obtained 1,063 corporate fraud convictions, including 167 corporate chief executive officers and 36 chief financial officers . . . includ[ing] Jeffrey Skilling. . . . Prosecuting corporate fraud will remain an important objective in the coming years. This type of crime requires new strategies to keep pace with criminal innovation. . . .
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> . . . .
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> . . . . In the last 2 years, FBI investigations have led to corruption convictions for more than 1,000 government employees, including military personnel. Corruption indictments are up more than 40%. In the last 18 months, some 200 agents have been added to the 400 already working on public corruption cases.

OFFICE OF THE ATT'Y GEN., U.S. DEP'T OF JUSTICE, STEWARDS OF THE AMERICAN DREAM: STRATEGIC PLAN FY 2007–2012 7 (2007), http://www.justice.gov/JMD/MPS/strategic2007-2012/strategic_plan20072012.pdf.

135. *Id.* at 14. The Federal Bureau of Investigation also reported on public corruption, stating:

> Public [c]orruption [is] [o]ur # 1 [c]riminal [p]riority. . . . Public corruption is a breach of trust by federal, state, or local officials—often with the help of private sector accomplices. It's also the FBI's top criminal investigative priority. . . .
>
> . . . . Corrupt public officials undermine our country's national security, our overall safety, the public trust, and confidence in the U.S. government, wasting billions of dollars along the way. This corruption can tarnish virtually every aspect of society.

Public Corruption: Why It's Our #1 Criminal Priority, FEDERAL BUREAU OF INVESTIGATION (MAR. 26, 2010), http://www.fbi.gov/news/stories/2010/march/corruption_032610.

136. OFFICE OF THE ATT'Y GEN., U.S. DEP'T OF JUSTICE, STEWARDS OF THE AMERICAN DREAM: STRATEGIC PLAN FY 2007–2012 6 (2007), http://www.justice.gov/JMD/MPS/strategic2007-2012/strategic_plan20072012.pdf.

McNally. The question of whether § 1341 can be read, in its two clauses,[137] as proposing two alternative ways to prove mail fraud, if not implicitly rejected in *McNally*,[138] was squarely addressed and rejected by the United States Supreme Court in *Cleveland*:

> In *McNally*, we recognized that "[b]ecause the two phrases identifying the proscribed schemes appear in the disjunctive, it is arguable that they are to be construed independently." But we rejected that construction of the statute, instead concluding that the second phrase simply modifies the first by "ma[king] it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property.[139]

When the focus of the honest services fraud is a deprivation of money or property, as required by the traditional theory of mail and wire fraud—even when it is acknowledged "property" includes intangible property rights, as addressed in *Carpenter*—the existence of other limiting factors noted by courts, such as the use of a fiduciary relationship,[140] can become irrelevant. Stated differently, defining § 1346 to encompass only bribes and kickbacks, as subsequently decided in *Skilling*, avoids the redundancy with traditional mail and wire fraud. In the bribery and kickback context, the defendant employee typically receives the money from a third party, not the deceived employer such that traditional money or property fraud would not be established.[141]

Mere breach of a fiduciary duty should not be sufficient to establish honest services fraud because fiduciary duties are defined broadly and do not provide sufficient notice of legal responsibility. Illustrating this point is Justice Breyer's query during oral argument in *Black*—does the average worker cheat his employer

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137. *See supra* text accompanying nn.11–12 (discussing the interpretation of § 1341).

138. *See* McNally v. United States, 483 U.S. 350, 360 (1987) ("[W]e read § 1341 as limited in scope to the protection of property rights."), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181 (codified as amended at 18 U.S.C. § 1346 (2006)), *as recognized in* Skilling v. United States, 130 S. Ct. 2896 (2010).

139. Cleveland v. United States, 531 U.S. 12, 26 (2000) (quoting *McNally*, 483 U.S. at 358–59).

140. *Compare* United States v. Lemire, 720 F.2d 1327, 1335 (D.C. Cir. 1983) (holding the element that "the fiduciary utilize his trusted position" is required), *with* United States v. Bronston, 658 F.2d 920, 926 (2d Cir. 1981) (stating "proof that the fiduciary relationship was used or manipulated in some way is not necessary").

141. *McNally*, 483 U.S. at 360–61; Brief for Petitioner, Skilling v. United States, 130 S. Ct. 2896 (2010) (No. 08-1394), 2009 WL 4818500, at *49.

when he reads the racing forum at work?[142] Justice Scalia's observation in his earlier dissent from the denial of certiorari in *United States v. Sorich*[143] also ponders this issue—does honest services fraud "cover a salaried employee's phoning in sick to go to a ball game?"[144]

Consistent with the recognition that not every breach of a fiduciary duty or ethical lapse involving the mail or wires constitutes a federal crime, courts fashioned limiting principles for honest services fraud. But courts differed on such central questions as: what *mens rea* must be proved;[145] whether foreseeability of harm was part of the *mens rea* requirement;[146]

142. Transcript of Oral Argument, Black v. United States, 130 S. Ct. 2963 (2010) (No. 08-876), 2009 WL 4623518, at *30–31.

143. Sorich v. United States, 129 S. Ct. 1308 (2009) (Scalia, J., dissenting).

144. *Id.* at 1309.

145. *Compare Lemire*, 720 F.2d at 1337 (discussing the *mens rea* required for wire fraud), United States v. Ballard, 663 F.2d 534, 541 (5th Cir. 1981) (discussing *mens rea* as it relates to the issue of materiality in wire fraud cases), *modified*, 680 F.2d 352 (5th Cir. 1982), United States v. Rabbitt, 583 F.2d 1014, 1026 (8th Cir. 1978) (refusing to expand the mail fraud statutes beyond their original scope), *overruled on other grounds by McNally*, 483 U.S. 350, *and* United States v. McNeive, 536 F.2d 1245, 1252 (8th Cir. 1976) (finding that the defendant lacked the necessary *mens rea* to commit the alleged offense), *with* United States v. Silvano, 812 F.2d 754, 760 (1st Cir. 1987) (explaining the broad scope of the mail fraud statute), *and* United States v. Price, 788 F.2d 234, 237 (4th Cir. 1986) (defining a scheme to target intangible rights as within the scope of § 1341), *judgment vacated*, Great Am. First Sav. Bank v. United States, 483 U.S. 1015 (1987). Whether foreseeability of harm is a required element of the mail fraud statute has been a central issue in interpreting § 1346. Brief for Petitioner, Skilling v. United States, 130 S. Ct. 2896 (2010) (No. 08-1394), 2009 WL 4818500, at *40–41 (considering undisclosed self-dealing cases as an example of depravation of honest services); *e.g.*, United States v. Regent Office Supply Co., 421 F.2d 1174, 1180–81 (2d Cir. 1970) (discussing the element of "'fraudulent intent'" (quoting Durland v. United States, 161 U.S. 306 (1896))); *see also Durland*, 161 U.S. at 313 (noting the significance of intent and purpose in a fraudulent business scheme); Pritchard v. United States, 386 F.2d 760, 766 (8th Cir. 1967) (explaining "[s]uccess of [a] fraudulent scheme is not an essential element of the mail fraud offense"); United States v. Andreadis, 366 F.2d 423, 431 (2d Cir. 1966) (stating that generally, the Government does not need proof of purchasers actually being defrauded to prove its case); Adjmi v. United States, 346 F.2d 654, 657–58 (5th Cir. 1965) (listing the elements for the offense of mail fraud); Horman v. United States, 116 F. 350, 352 (6th Cir. 1902) (listing the elements of the offense under a prior statute (citing Stokes v. United States, 157 U.S. 187 (1895))).

146. At least five circuits adopted a foreseeability of harm requirement after § 1346 was enacted. *See* United States v. Vinyard, 266 F.3d 320, 327 (4th Cir. 2001) (requiring that the defendant "'reasonably should have foreseen that the breach would create an identifiable economic risk to the victim'" (quoting United States v. Cochran, 109 F.3d 660, 667 (10th Cir. 1997))); United States v. Martin, 228 F.3d 1, 17 (1st Cir. 2000) (addressing the element of a foreseeable economic harm); United States v. deVegter, 198 F.3d 1324,

whether it must be proved that a defendant contemplated that his actions would cause economic harm to a property interest of the victim;[147] and whether the defendant must act in pursuit of private gain.[148] Some courts indicate the standards for public sector and private sector cases might differ.[149] Although most courts held

1329 (11th Cir. 1999) (citing United States v. Frost, 125 F.3d 346, 368 (6th Cir. 1997)) (requiring the prosecution to show the defendant's foresight); United States v. Sun-Diamond Growers of Cal., 138 F.3d 961, 974 (D.C. Cir. 1998) (requiring only that economic harm be within the defendant's reasonable contemplation), *aff'd*, 526 U.S. 398 (1999); *Frost*, 125 F.3d at 368 (discussing the foreseeability element of mail fraud (quoting United States v. DeCastris, 798 F.2d 261, 263 (7th Cir. 1986))). The Fifth, Tenth, and Second Circuits endorsed a materiality limitation, requiring the Government to prove the defendant's misrepresentation had a tendency to influence the decision-maker, rather than proof that the defendant intended to harm. *See* United States v. Rybicki, 354 F.3d 124, 145 (2d Cir. 2003) (en banc) (supporting the proposition that intent to harm the victim is not necessary); United States v. Cochran, 109 F.3d 660, 668 n.3 (10th Cir. 1997) (discussing the materiality issue and its dependence upon the other elements of the offense); United States v. Gray, 96 F.3d 769, 775 (5th Cir. 1996) (defining materiality in terms of how information influenced the decision-maker). Even when materiality is required, but intent to inflict economic harm is not, proof of actual or contemplated harm is a means of showing intent to defraud. *See* United States v. Welch, 327 F.3d 1081, 1104–06 (10th Cir. 2003) ("The notion of harm in a mail or wire fraud prosecution is important only in the sense that proof of contemplated or actual harm to the victim or others is one means of establishing the necessary intent to defraud.").

147. *See, e.g.*, *Sun-Diamond Growers of Cal.*, 138 F.3d at 973 ("Absent reasonably foreseeable economic harm, '[p]roof that the employer simply suffered only the loss of the loyalty and fidelity of the [employee] is insufficient to convict.'" (quoting *Frost*, 125 F.3d at 368 (alteration in original) (citation omitted)); *accord Regent Office Supply Co.*, 421 F.2d at 1180–81 (requiring the Government to show that some injury was contemplated by the defendant and explaining that proof that the victim was actually defrauded is unnecessary); *Andreadis*, 366 F.2d at 431 (stating that proof of actual injury or defrauding is not required); *cf. Durland*, 161 U.S. at 314 ("The significant fact is the intent and purpose."); *Pritchard*, 386 F.2d at 764 (requiring a defendant to have devised a scheme intended to defraud or with the knowledge that the scheme would defraud the victim); *Adjmi*, 346 F.2d at 657 (recognizing that success is not a necessary element of the offense); *Horman*, 116 F. at 352 (requiring an intent to injure or defraud and distinguishing activity resulting in the same).

148. *Compare* United States v. Bloom, 149 F.3d 649, 655 (7th Cir. 1998) (counseling client to use a proxy bidder at a tax scavenger sale to avoid paying taxes did not benefit defendant and was insufficient to establish honest services fraud), *with* United States v. Panarella, 277 F.3d 678, 694 (3d Cir. 2002) ("Rather than limiting honest services fraud to misuse of office for personal gain, we hold that a public official who conceals a financial interest in violation of state criminal law while taking discretionary action that the official knows will directly benefit that interest commits honest services fraud." (citations omitted)).

149. *Compare Lemire*, 720 F.2d at 1337 n.13 (finding that "[p]ublic officials may be held to a higher standard of public trust"); *Ballard*, 663 F.2d at 541 n.17 ("[P]ublic officials may have a special duty to disclose, based on the public trust, which lowers the threshold of materiality."), *and* United States v. Keane, 522 F.2d 534, 549 (7th Cir. 1975) (appearing

that the meaning of honest services in § 1346 should be defined by a uniform federal standard, the Fifth Circuit held that state, not federal law identifies, the illegal conduct.[150] Apart from the need to develop consistent, rational standards, significant federalism concerns potentially exist when state and local public officials are prosecuted in federal court for honest services fraud.[151] But a clear statement from Congress is required before state law may be used to define a federal crime.[152]

Regarding "money" or "property," personal gain to the defendant is one of the limiting factors recognized in honest services prosecutions. In *United States v. Bloom*,[153] the Seventh Circuit held that the allegation that the defendant, a city alderman and a lawyer, counseled a client to use a proxy bidder at a tax scavenger sale to avoid paying taxes was insufficient to establish honest services fraud when there was no allegation the defendant realized any personal benefit.[154] "No case we can find in the long history of intangible rights prosecutions holds that a breach of fiduciary duty, without misuse of one's position for private gain, is an intangible rights fraud."[155] Similarly, in *United States v.*

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to distinguish a private sector case from one which involves a public official), *with* United States v. Price, 788 F.2d 234, 237 (4th Cir. 1986) (applying the same standard in intangible rights cases), *vacated*, *Great Am. First Sav. Bank*, 483 U.S. 1015.

150. *See Panarella*, 277 F.3d at 692–95 (using state law as the yardstick for determining when conduct becomes honest services fraud).

151. *Id.* at 693–94. The *Panarella* court acknowledged:

> We are mindful that the prosecution of state public officials for honest services fraud raises federalism concerns about the appropriateness of the federal government's interference with the operation of state and local governments. In our view, use of state law as a limiting principle defining the scope of honest services fraud in close cases better addresses these federalism concerns than does the limiting principle of misuse of office for personal gain, which [appellant] Panarella urges upon us.
>
> In this case, the intrusion into state autonomy is significantly muted, since the conduct that amounts to honest services fraud is conduct that the state itself has chosen to criminalize.

Id. (citations omitted).

152. Jerome v. United States, 318 U.S. 101, 104–07 (1943).

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

154. *Id.* at 656.

155. *Id.* The Seventh Circuit Court in *Bloom* acknowledged:

> Given the tradition (which verges on constitutional status) against common-law federal crimes, and the rule of lenity that requires doubts to be resolved against criminalizing conduct, it is best to limit the intangible rights approach to the scope it held when the Court decided (and Congress undid) *McNally*. An employee deprives

Thompson,[156] the Seventh Circuit took the unusual step of ordering Thompson's immediate release from federal prison after oral argument on her appeal from her conviction of two felonies, including honest services fraud.[157] Thompson, a mid-level Wisconsin state employee and member of a panel that considered competitive bids for the state's travel contract, was indicted on charges that she steered the contract to a company that contributed to the governor's reelection campaign.[158] After the contract was awarded, Thompson was praised by her supervisors and received a $1,000 raise for her efforts.[159] The court rejected "[t]he prosecution's theory . . . that any politically motivated departure from state administrative rules is a federal crime, when either the mails or federal funds are involved."[160] The Seventh Circuit emphasized that the company that was awarded the contract was the lowest bidder,[161] and held that a raise received by a civil servant and her feeling of increased job security was not a sufficient personal gain to come within the purview of an honest services mail fraud prosecution.[162]

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his employer of his honest services only if he misuses his position (or the information he obtained in it) for personal gain.

Id. at 656–57; *see also* United States v. Rybicki, 354 F.3d 124, 127 (2d Cir. 2003) (upholding the conviction of two lawyers who made side-payments to insurance adjusters, "typically computed as a percentage of the total settlement amount," in exchange for the expedited processing of their clients' pending claims). The adjustors in *Rybicki* accepted the payments notwithstanding their employer's contrary policy, and the lawyers "took steps to disguise and conceal the payments." *Rybicki*, 354 F.3d at 127.

156. United States v. Thompson, 484 F.3d 877 (7th Cir. 2007).

157. *Id.* at 878.

158. *Id.* at 878–79.

159. *Id.* at 879.

160. *Id.*

161. *Thompson*, 484 F.3d at 878.

162. *Id.* at 884.

> The United States has not cited, and we have not found, any appellate decision holding that an increase in official salary, or a psychic benefit such as basking in a superior's approbation (and thinking one's job more secure), is the sort of "private gain" that makes an act criminal under § 1341 and § 1346. The United States does rely on a few decisions of district courts, but we do not find them persuasive. We now hold that neither an increase in salary for doing what one's superiors deem a good job, nor an addition to one's peace of mind, is a "private benefit" for the purpose of § 1346.

Id. at 884 (citations omitted); *see also* United States v. Frost, 125 F.3d 346, 369 (6th Cir. 1997) (upholding conviction of defendant students who schemed with their defendant professors to turn in plagiarized work to obtain advanced degrees). The *Frost* court

However, in *United States v. Sorich*,[163] when addressing a political patronage hiring and promotion scheme that rewarded those who participated in certain political campaigns, the trial court within the Seventh Circuit declined to dismiss honest services counts. The trial court held that intangible benefits such as job security for the public official or benefits realized by the third parties hired and promoted under the scheme could establish honest services fraud:

> [T]he Defendants created and supported an alternative, hidden system of hiring for non-policy jobs that allowed them to use the City payroll as a personal bank account whose sole purpose was rewarding those who were politically useful, at the expense of both the City—the entity stuck with the bill—and the populace—the entity that was misled about the hiring process via the issuance of false certifications promising that hiring was apolitical. The public was manipulated into believing that hiring for non-policy positions was not political.[164]

The Seventh Circuit affirmed, stating: "Misuse of office (more broadly, misuse of position) *for private gain* is the line that separates run-of-the-mill violations of state-law fiduciary duty . . . from federal crime";[165] "[s]howing misuse for private gain means showing *an intent* to reap private gain; it is well established that a fraudulent scheme that does not actually cause harm is still actionable";[166] and "[b]y 'private gain' we simply mean illegitimate gain, which usually will go to the defendant, but need not."[167] Honest services fraud can occur no matter who receives the benefit: "'In the case of a successful scheme, the public [or client] is deprived of its servants' [or attorney's] honest services no matter who receives the proceeds.'"[168] Even when intent to reap

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further found "the evidence indicates that all defendants intended, much less reasonably contemplated, that the University would suffer a concrete business harm by unwittingly conferring an undeserved advanced degree on each student defendant." *Frost*, 125 F.3d at 369.

163. United States v. Sorich, 427 F. Supp. 2d 820 (N.D. Ill. 2006), *aff'd*, 523 F.3d 702 (7th Cir. 2008).

164. *Id.* at 831.

165. *Sorich*, 523 F.3d at 707 (alteration in original) (emphasis added) (quoting United States v. Bloom, 149 F.3d 649, 655 (7th Cir. 1998)).

166. *Id.* at 708 (citations omitted).

167. *Id.* at 709.

168. *Id.* at 709 (alterations in original) (quoting United States v. Spano, 421 F.3d 599, 603 (7th Cir. 2005)).

private gain along with breach of fiduciary duty were recognized as elements of an honest services fraud prosecution, there was not always agreement, even within a circuit, as to the nature of the personal benefits required.[169]

Other courts held that a public or private fiduciary could be convicted of honest services fraud based on a defendant's nondisclosure of a conflict of interest from which either the defendant, or another, derived some personal benefit—even if there is no proof the victim suffered a monetary loss or that defendant intended to harm the victim.[170] For example, in *United States v. George*,[171] a private sector fraud case, the Seventh Circuit affirmed the honest services fraud conviction of an employee of Zenith Corporation who, with a representative of Zenith's cabinet supplier, set up a sham company that would invoice the cabinet supplier for commissions never earned. These commissions were paid, with the cabinet supplier and the Zenith employee sharing the proceeds.[172] There was no proof the cabinets were deficient, the cabinet supplier's quotations for the work were inflated, the price paid by Zenith was not fair and reasonable, or that the cabinet supplier, which was the only available source of the item at the time, received any preferential

169. In *Sorich*, the Seventh Circuit distinguished an earlier Seventh Circuit case, *United States v. Thompson*, 484 F.3d 877 (7th Cir. 2007), as follows:

> The defendants also contend that *United States v. Thompson* compels a decision in their favor. There we reversed the mail fraud conviction of Wisconsin procurement officer Georgia Thompson, who was in charge of awarding a contract for the state's travel needs. Thompson forced a run-off between her boss's contractor of choice, Adelman Travel Group, and another bidder that came out slightly ahead in a highly subjective scoring process. The two companies tied in the run-off and Thompson broke the tie in Adelman's favor according to approved procedures. Her boss was happy and she received a small raise through normal channels, but we held that this was not the sort of "private gain" that was necessary to sustain a conviction for mail fraud. We did not expressly discuss the possibility that the benefit of the contract to Adelman, a third party, could be construed as the necessary private gain, but we needn't have, for the point that distinguishes *Thompson* from this case is the absence of a scheme to defraud.

Sorich, 523 F.3d at 710 (citation omitted).

170. *See* United States v. George, 477 F.2d 508, 515 (7th Cir. 1973) (determining that a conflict-of-interest policy was admissible evidence bearing upon the defendant's intent to commit the offense of mail fraud).

171. United States v. George, 477 F.2d 508 (7th Cir. 1973).

172. *Id.* at 512.

treatment in return for the kickbacks.[173] The cabinet supplier received the monetary benefit accompanying the contract work and the Zenith employee received side payments from the cabinet supplier as well as his salary from Zenith.[174] The court held: "Here the fraud consisted in Yonan's holding himself out to be a loyal employee, acting in Zenith's best interests, but actually not giving his honest and faithful services, to Zenith's real detriment."[175] Unlike *Carpenter*, where the *Wall Street Journal*'s intangible property right to control the release of information in the "*Heard on the Street*" column was at issue, there was no proof that any property right of Zenith was at stake, unless one accepts the assumption that Zenith could have obtained the cabinets for less money if the cabinet supplier did not direct kickbacks to the sham company.[176] In a public sector case, the Second Circuit agreed that the Government must prove the public official defendant unjustly gained as well as defendant's breach of a fiduciary duty, even if there was neither loss to the public fisc nor

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173. *Id.* at 510.

174. *Id.*

175. *Id.* at 513; *see also* United States v. Hasner, 340 F.3d 1261, 1271 (11th Cir. 2003) (per curiam) (upholding the conviction of a local housing official who failed to disclose a conflict of interest). The *Hasner* court explained:

> A reasonable jury could conclude that Hasner breached his fiduciary duties by voting on Fisher's consulting contract without disclosing the agreement he had with Fisher to receive a referral fee, if the Chelsea Commons real estate transaction was completed.... Because Hasner, by voting on Fisher's contract, was taking discretionary action that directly benefitted Fisher, Hasner's agreement with Fisher to share the commission from the Chelsea Commons project was material.

Hasner, 340 F.3d at 1271; *see also* United States v. Potter, 463 F.3d 9, 18 (1st Cir. 2006) (affirming a conviction of a dog track company, its chief executive officer, and its general manager of wire fraud and conspiracy in scheme to defraud the citizens of Rhode Island of honest services of then-speaker of the Rhode Island House of Representatives). The defendants in *Potter* made retainer payments of more than $500,000 to a law firm partner of the then-speaker of the Rhode Island House of Representatives. *Id.* at 13. The court found, based upon the evidence, the jury could infer the defendants intended that payments would reach the speaker in exchange for his "informal and behind-the-scenes influence on legislation." *Id.* at 18.

176. *Compare* Carpenter v. United States, 484 U.S. 19, 22 (1987) (pertaining to the intangible property right of the *Wall Street Journal* to distribute information in a news column), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181 (codified as amended at 18 U.S.C. § 1346 (2006)), *as recognized in* Corcoran v. Am. Plan Corp., 886 F.2d 16 (2d Cir. 1989), *with George*, 477 F.2d at 514 (concluding that the jury did not need to find any further intent to defraud Zenith beyond loss of honest and faithful service).

injury to any other property right.[177] Conversely, in a private sector case, the Eighth Circuit held:

> To be sure, in a business context, proof of actual financial harm to the victim is highly relevant in distinguishing criminal fraud from a mere breach of fiduciary duty. Absent proof of actual harm, "the government must produce evidence independent of the alleged scheme to show the defendant's fraudulent intent."[178]

Analytically setting the table for *Skilling* in 2009, Justice Scalia, dissenting from the denial of certiorari in *Sorich*, presented a critical discussion of the law of honest services fraud under § 1346.[179] As noted, in *Sorich* the Seventh Circuit affirmed the convictions of former city employees for honest services fraud based on a political patronage hiring and promotion scheme in which city jobs were awarded based on participation in political

177. *See* United States v. Dixon, 536 F.2d 1388, 1400 (2d Cir. 1976) (refusing to view all "'false representations . . . [as] *per se* fraudulent despite the absence of any proof of actual injury to any customer'" (emphasis added) (quoting United States v. Rowe, 56 F.2d 747, 749 (2d Cir. 1932))); *see also* United States v. Urciuoli, 513 F.3d 290, 296–97 (1st Cir. 2008) (vacating a conviction of a state senator and his co-defendant holding that a state senator's alleged misuse of his official power over legislation to coerce insurers into settlements with a hospital that employed the senator could qualify as deprivation of honest services owed to public).

178. United States v. Lamoreaux, 422 F.3d 750, 754 (8th Cir. 2005) (citation omitted) (quoting United States v. Jain, 93 F.3d 436, 442 (8th Cir. 1996)). "[T]he government's theory was that Lamoreaux received secret kickbacks from Albers Medical that deprived NuCare of its intangible right to his honest services as a corporate officer in negotiating the most favorable possible repackaging transactions." *Id.* Consistent with the decision in *United States v. Pennington*, 168 F.3d 1060, 1065 (8th Cir. 1999), the district court instructed the jury: "A defendant's intent or knowledge may be proved like anything else. . . . You may infer that a person intends harm when there is a willful nondisclosure by a fiduciary, such as a corporate officer, of material information he has a duty to disclose." *Lamoreaux*, 422 F.3d at 754 (alteration in original); *see also* United States v. Brown, 459 F.3d 509, 519 (5th Cir. 2006) ("In order that not every breach of fiduciary duty owed by an employee to an employer constitute an illegal fraud, we have required some detriment to the employer."). In *Brown*, Enron and Merrill Lynch employees were charged with a "conspiracy and scheme to defraud Enron and its shareholders by 'parking' an Enron asset—an equity interest in three power-generating barges moored off the coast of Nigeria—with Merrill [Lynch] for six months [to enhance] Enron's 1999 end-of-year earnings report." *Brown*, 459 F.3d at 513. The court reversed the conspiracy and wire fraud convictions based on the honest services theory, finding there was no detriment to the employer "where an employer intentionally aligns the interests of the employee with a specified corporate goal, where the employee perceives his pursuit of that goal as mutually benefitting him and his employer, and where the employee's conduct is consistent with that perception of the mutual interest." *Id.* at 522.

179. Sorich v. United States, 129 S. Ct. 1308, 1308–11 (2009) (Scalia, J., dissenting).

campaigns.[180] The Seventh Circuit rejected defendants' argument that they could not be convicted of honest services fraud because they realized no personal benefit from the scheme, holding, in part, the "private gain" criterion of honest services mail fraud simply means illegitimate gain, which does not necessarily have to be realized by a defendant but can favor a third party.[181] The Seventh Circuit also held honest services mail fraud was not unconstitutionally vague as applied.[182] Further,

> just as *Leahy*[183] held that fraudulently obtained contracts are property, courts have found that salaries fraudulently obtained,[184] and job opportunities fraudulently denied,[185] represent property for purposes of mail fraud[,][186]

the jobs and salaries awarded to political cronies satisfied the "money or property" element of mail fraud.[187] Justice Scalia dissented from the denial of certiorari challenging the constitutionality of § 1346, and reviewed some of the conflicting post-*McNally* case law.[188] No other single source better summarizes the difficulties courts have confronted in determining the proper application of § 1346 honest services fraud:

> If the honest services theory—broadly stated, that officeholders and employees owe a duty to act only in the best interests of their constituents and employers—is taken seriously and carried to its logical conclusion, presumably the statute also renders criminal a state legislator's decision to vote for a bill because he expects it will

180. United States v. Sorich, 523 F.3d 702, 709–13 (7th Cir. 2008).

181. *Id.* at 709.

182. *Id.* at 711. The court in *Sorich* speculated:

> It is hard to take too seriously the contention that the defendants did not know that by creating a false hiring scheme that provided thousands of lucrative city jobs to political cronies, falsifying documents, and lying repeatedly about what they were doing, they were perpetrating a fraud. Indeed, the specific intent requirement of mail fraud seriously undercuts any claim to a lack of notice that their behavior was criminal.

Id. at 711.

183. United States v. Leahy, 464 F.3d 773, 787–89 (7th Cir. 2006).

184. United States v. Doherty, 867 F.2d 47, 56, 60 (1st Cir. 1989).

185. United States v. Douglas, 398 F.3d 407, 417–18 (6th Cir. 2005); United States v. Granberry, 908 F.2d 278, 280 (8th Cir. 1990).

186. *Id.* at 713 (citations omitted) (footnotes added).

187. *See id.* ("[W]e hold that jobs are property for purposes of mail fraud, and that the indictment sufficiently alleged a deprivation of property.").

188. Sorich v. United States, 129 S. Ct. 1308,1309–11 (2009) (Scalia, J., dissenting).

> 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 cover a salaried employee's phoning in sick to go to a ball game. . . .
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> To avoid some of these extreme results, the Courts of Appeals have spent two decades attempting to cabin the breadth of § 1346 through a variety of limiting principles. No consensus has emerged. The Fifth Circuit has held that the statute criminalizes only a deprivation of services that is unlawful under state law, *United States v. Brumley*, 116 F.3d 728, 735 (1997) (en banc), but other courts have not agreed, see *United States v. Martin*, 195 F.3d 961, 966 ([7th Cir.] 1999) (*Brumley* "is contrary to the law in this circuit . . . and in the other circuits [who] have addressed the question"). The Seventh Circuit has construed the statute to prohibit only the abuse of position "for private gain," *United States v. Bloom*, 149 F.3d 649, 655 (1998), but other [c]ircuits maintain that gain is not an element of the crime at all, [e.g.], *United States v. Panarella*, 277 F.3d 678, 692 ([3d Cir.] 2002). Courts have expressed frustration at the lack of any "simple formula specific enough to give clear cut answers to borderline problems." *United States v. Urciuoli*, 513 F.3d 290, 300 ([1st Cir.] 2008).
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> It is practically gospel in the lower courts that the statute "does not encompass every instance of official misconduct," *United States v. Sawyer*, 85 F.3d 713, 725 ([1st Cir.] 1996). The Tenth Circuit has confidently proclaimed that the statute is "not violated by every breach of contract, breach of duty, conflict of interest, or misstatement made in the course of dealing," *United States v. Welch*, 327 F.3d 1081, 1107 ([10th Cir.] 2003). But why that is so, and what principle it is that separates the criminal breaches, conflicts and misstatements from the obnoxious but lawful ones, remains entirely unspecified. Without some coherent limiting principle to define what "the intangible right of honest services" is, whence it derives, and how it is violated, this expansive phrase invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct.[189]

It is against this backdrop that the Supreme Court took up *Skilling*, *Black*, and *Weyhrauch*.

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189. *Id.*

VII. *SKILLING*, *BLACK*, AND *WEYHRAUCH*

The United States Supreme Court's decisions in *Skilling*, *Black*, and *Weyhrauch* dramatically changed the landscape of honest services mail and wire fraud prosecutions in federal court. The issues on which the Court granted certiorari would resolve at least three circuit splits and address significant limiting principles to the scope of § 1346:

1. *Skilling*—whether mail and fraud statutes were constitutional and whether the Government must show a private sector "honest services" defendant realized a financial gain;[190]
2. *Black*—whether a defendant can be convicted of private sector honest services fraud if his scheme contemplated no "identifiable economic harm to the party to whom the 'honest services' are owed," that is, if the honest services fraud had no foreseeable economic impact on the victim;[191] and
3. *Weyhrauch*—whether the disclosure obligations of state public officials enforceable under § 1346 are defined by state law or federal common law and, if the latter, whether the statutory prohibition is unconstitutionally vague.[192]

Using *Skilling* as its primary vehicle, the Court did find § 1346 to be constitutional, but only if limited to its historical origins and otherwise did not directly answer any of the precise questions presented about the limiting principles.[193] The Court spoke on the merits only in *Skilling*, remanding *Black* and *Weyhrauch* for consideration based on its holding in *Skilling*.

190. Petition for Writ of Certiorari, Skilling v. United States, 130 S. Ct. 2896 (2010) (No. 08-1394), 2009 WL 1339243, at *17–21. Skilling also challenged his conviction on the ground he had been denied a fair trial due to juror bias relating to pretrial publicity and community prejudice against Enron. A majority of the Supreme Court affirmed the Fifth Circuit's rejection of this challenge. *Id.* at 26. The fair trial issue is not addressed in this Article.

191. Petition for Writ of Certiorari, Black v. United States, 130 S. Ct. 2963 (2010) (No. 08-876), 2009 WL 75563, at *14.

192. Petition for Writ of Certiorari, Weyhrauch v. United States, 130 S. Ct. 2971 (2010) (No. 08-1196), 2009 WL 797581, at *10–14, *20–24.

193. *See* Skilling v. United States, 130 S. Ct. 2896, 2933 (2010) (rejecting defendant Skilling's assertion that § 1346 is unconstitutionally vague). *But see* United States v. Saathoff, 708 F. Supp. 2d 1020, 1021 (S.D. Cal. 2010) (holding § 1346 was unconstitutionally vague as-applied to defendant Saathoff). The Government filed notice of appeal to the Ninth Circuit Court of Appeals on April 15, 2010. Notice of Appeal, United States v. Saathoff, No. 06CR43-BEN (S.D. Cal. Apr. 15, 2010).

A. *Skilling*

Skilling was indicted with two other top Enron executives on charges of conspiracy, securities fraud, insider trading, and making false representations to auditors.[194] Count one charged Skilling with conspiracy to commit honest services wire fraud, traditional wire fraud, and securities fraud.[195] The honest services prosecution proceeded on the theory that Skilling "placed his interests in conflict with that of the [Enron] shareholders, when, for his own financial benefit, he engaged in an undisclosed scheme to artificially inflate the stock's price by deceiving the shareholders and others about the company's true financial condition."[196] More specifically, Skilling was charged with falsifying Enron's earnings, hiding its debt, inflating the share price, effectuated in part through "a range of secret side-deals . . . pending between Enron and [a special-purpose entity]."[197]

Skilling was convicted of nineteen counts, including the conspiracy count.[198] The Fifth Circuit unanimously affirmed, holding that the jury was entitled to convict Skilling for conspiracy to commit honest services fraud based on a "material breach of a fiduciary duty . . . that results in a detriment to the employer."[199]

The United States Supreme Court unanimously held that Skilling had not committed honest services fraud.[200] All nine Justices agreed that § 1346 was vague. But, in a 6–3 majority opinion written by Justice Ginsburg, the Court limited the reach of § 1346 mail fraud to honest services fraud cases involving bribes or kickbacks, holding that when it is "[i]nterpreted to encompass only bribery and kickback schemes, § 1346 is not unconstitutionally vague."[201] In its opening brief, the United States argued:

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194. Superseding Indictment at 3, United States v. Skilling, No. H-04-25 (S-2) (S.D. Tex. July 7, 2004).

195. *Id.* at 36.

196. Brief for the United States, Skilling v. United States, 130 S. Ct. 2896 (2010) (No. 08-1394), 2010 WL 302206, at *50.

197. Superseding Indictment at 7, 16, United States v. Skilling, CR No. H-04-25 (S-2) (S.D. Tex. July 7, 2004).

198. United States v. Skilling, 554 F.3d 529, 547 (5th Cir. 2009), *aff'd*, Skilling v. United States, 130 S. Ct. 2896 (2010); *see also* Shaheen Pasha, *Skilling Gets 24 Years*, CNNMONEY.COM (Oct. 24 2006, 9:32 AM), http://money.cnn.com/2006/10/23/news/newsmakers/skilling_sentence/index.htm (reporting on Skilling's nineteen convictions).

199. *Skilling*, 554 F.3d at 547.

200. *Skilling*, 130 S. Ct. at 2934–35, 2941–42.

201. *Id.* at 2933.

> A criminal statute is not unconstitutionally vague if it provides fair notice of the conduct it reaches and does not encourage arbitrary enforcement. This Court has recognized that the meaning of a statute can be illuminated by judicial decisions and that statutes can incorporate terms of art and judicial interpretations of protected rights. Section 1346 employs a term of art—"the intangible right of honest services"—which takes its meaning from the body of case law before this Court's decision in *McNally*. . . .[202]

The majority accepted that a statute is not unconstitutionally vague even if its meaning only becomes clear when read against the backdrop of court decisions and undertook a review of pre-*McNally* case law, noting:

> Most often these cases . . . involved bribery of public officials, but courts also recognized private-sector honest-services fraud. . . .
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> . . . .
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> . . . . Over time, "[a]n increasing number of courts" recognized that "a recreant employee"—public or private—"c[ould] be prosecuted under [the mail-fraud statute] if he breache[d] his allegiance to his employer by accepting bribes or kickbacks in the course of his employment;" by 1982, all [c]ourts of [a]ppeals had embraced the honest-services theory of fraud.[203]

Indeed, prior to *Skilling*, no Circuit Court of Appeals had found § 1346 to be unconstitutionally vague,[204] and no circuit had

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202. Brief for United States, Skilling v. United States, 130 S. Ct. 2896 (2010) (No. 08-1394), 2010 WL 302206, at *16.

203. *Skilling*, 130 S. Ct. at 2926–27 (alterations in original) (citations omitted).

204. *See, e.g.*, United States v. Sorich, 523 F.3d 702, 711 (7th Cir. 2008) (opining that § 1346 is not unconstitutionally vague); *accord* United States v. Williams, 441 F.3d 716, 724–25 (9th Cir. 2006) (stating the court examines whether a person of average intellect would comprehend a particular act was unlawful to determine whether the law prohibiting that act was vague); United States v. Rybicki, 354 F.3d 124, 142 (2d Cir. 2003) (holding that § 1346 is not facially vague or vague as applied to the facts); United States v. Welch, 327 F.3d 1081, 1109 n.29 (10th Cir. 2003) (opining that other circuit courts have also rejected challenges to the constitutionality of § 1346); United States v. Frost, 125 F.3d 346, 371 (6th Cir. 1997) (stressing that § 1346 is not vague); United States v. Bryan, 58 F.3d 933, 941 (4th Cir. 1995) (stating that the court was "unpersuaded" by Bryan's contention that § 1346 should be deemed void because of vagueness); *see also* United States v. Urciuoli, 513 F.3d 290, 294 (1st Cir. 2008) (finding § 1346 unclear, but "judicial glosses" may "clarify and focus" its language). *But see* Sorich v. United States, 129 S. Ct. 1308,(2009) (Scalia, J., dissenting) (arguing that certiorari should be granted to address the conflicts among the circuits to address both the "meaning and constitutionality of § 1346"); United States v. Brown, 459 F.3d 509, 534 (5th Cir. 2006) (DeMoss, J., dissenting) ("[T]he constitutionality of § 1346 may well be in serious doubt."); *Rybicki*, 354 F.3d at 157 (Jacobs, J., dissenting) ("[Section 1346] imposes insufficient restraint on prosecutors, gives insufficient guidance

limited § 1346 to bribes and kickbacks. Considering a recommendation of Albert W. Alschuler, Professor at Northwestern University Law School, in his *amicus* brief supporting neither party submitted in *Weyhrauch*,[205] the Court in *Skilling* held that § 1346 criminalizes only schemes to defraud that involve bribes or kickbacks, identified as the "core" of the pre-*McNally* cases. The Court opined that Congress, when enacting § 1346, must have intended to resurrect the pre-*McNally* rule:

> Although some applications of the pre-*McNally* honest-services doctrine occasioned disagreement among the [c]ourts of [a]ppeals, these cases do 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. Indeed, the *McNally* case itself, which spurred Congress to enact § 1346, presented a paradigmatic kickback fact pattern. Congress' reversal of *McNally* and reinstatement of the honest-services doctrine, we conclude, can and should be salvaged by confining its scope to the core pre-*McNally* applications.[206]

Further, "[a]s to fair notice, 'whatever the school of thought concerning the scope and meaning of § 1346, it has always been as

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to judges, and affords insufficient notice to defendants."). In *United States v. Handakas*, 286 F.3d 92 (2d Cir. 2002), the Second Circuit held that § 1346 was unconstitutionally vague as-applied to the facts of that case. *Id.* at 112. The following year, the Second Circuit, sitting en banc, overruled its previous holding in *Handakas* when the court rejected an as-applied, void-for-vagueness analysis, finding the statute's language was sufficiently definite. *Rybicki*, 354 F.3d at 144.

205. Brief of Albert W. Alschuler as Amici Curiae Supporting Neither Party, Weyhrauch v. United States, 130 S. Ct. 2971 (2010) (No. 08-1196), 2009 WL 3052480, at *2–3. Numerous amicus briefs were submitted in the three cases. Among others, such disparate groups as the United States Chamber of Commerce and the National Association of Criminal Defense Lawyers submitted amicus briefs urging the narrowing of the law. *See, e.g.*, Brief of the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioner, Skilling v. United States, 130 S. Ct. 2896 (2010) (No. 08-1394), 2009 WL 4759118, at *8 (arguing that "the statute's capacious language gives prosecutors nearly unbounded discretion, authorizing them to convert almost any imaginable ethical lapse into a federal criminal case"). Professor Alschuler's obviously influential amicus brief was cited by Justice Ginsburg in the majority opinion in *Skilling*. *Skilling*, 130 S. Ct. at 2993. In oral argument in *Black v United States*, Justice Breyer referred to Professor Alschuler's alternative A and alternative B. *See* Transcript of Oral Argument, Black v. United States, 130 S. Ct. 2963 (2010) (No. 08-876), 2009 WL 4623518, at *34 (noting that alternative A is limited to bribery and kickbacks whereas alternative B expands that definition to also include "undisclosed self-dealing capable of causing economic harm").

206. *Skilling*, 130 S. Ct. at 2930–31 (emphasis added) (citations omitted).

plain as a pikestaff that bribes and kickbacks constitute honest[]services fraud,' and the statute's *mens rea* requirement further blunts any notice concern."[207] So construed, § 1346 is not vague:

> [W]e pare that body of precedent down to its core: In the main, the pre-*McNally* cases involved fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived. Confined to these paramount applications, § 1346 presents no vagueness problem.[208]

The Government had accepted a reading of the core of pre-*McNally* honest services as addressing bribery and kickbacks, but argued that the core of pre-*McNally* honest services fraud also encompassed "undisclosed self-dealing by a public official or private employee—i.e., 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."[209] In expressly rejecting this contention, the

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207. *Id.* at 2933 (citations omitted) (quoting Williams v. United States, 341 U.S. 97, 101 (1951)).

208. *Id.* at 2928. The Court stated:

> [T]here is no doubt that Congress intended § 1346 to reach *at least* bribes and kickbacks. Reading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine. To preserve the statute without transgressing constitutional limitations, we now hold that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law.

Id. at 2931 (emphasis in original).

209. *Id.* at 2932. The United States' brief urged "the pre-*McNally* cases took two forms: (1) accepting a bribe or kickback in payment for official action, and (2) taking official action that furthers an undisclosed, conflicting personal financial interest." Brief for the United States, Skilling v. United States, 130 S. Ct. 2896 (2010) (No. 08-1394), 2010 WL 302206, at *14. Professor Alschuler argued first for a standard that would limit § 1346 to bribes and kickbacks and alternatively for a reading "that (at least for defendants other than public officials) limits honest-services fraud to schemes to obtain bribes or kickbacks or to engage in undisclosed self-dealing capable of causing economic detriment." Brief of Albert W. Alschuler as Amici Curiae Supporting Neither Party, Weyhrauch v. United States, 130 S. Ct. 2971 (2010) (No. 08-1196), 2009 WL 3052480, at *4. During oral argument in *Skilling*, the following exchange occurred, perhaps foreshadowing the majority's assessment of the core of honest services fraud and the facts presented in *Skilling*:

> **Justice Alito** (to Deputy Solicitor General Michael R. Dreeben): Were there any pre-*McNally* cases that involved a situation like this, where the benefit to the employee was in the form of the employee's disclosed compensation?
> **Mr. Dreeben**: There were not to my knowledge, Justice Alito, and I would frankly

Court acknowledged that "the Courts of Appeals upheld honest[]services convictions for 'some schemes of non-disclosure and concealment of material information,'"[210] but found that the category of cases involving undisclosed self-dealing by public officials or private employees was "amorphous" and that courts had "reached no consensus on which schemes qualified."[211]

B. *Black*

Defendants Conrad Black, John Boultbee, Mark Kipnis, and Peter Atkinson were executives of Hollinger International, Inc., a United States company that, through subsidiaries, owned newspapers in this and other countries, when they were indicted of various federal crimes, including three counts of mail fraud in violation of §§ 1341 and 1346.[212] The Government pursued two theories on each mail fraud count: (1) defendants stole millions from Hollinger by fraudulently paying themselves bogus noncompetition fees; and (2) by failing to disclose their receipt of those fees, defendants deprived Hollinger of their honest services as managers of the company.[213] The trial of the defendants lasted four months.[214] The jury found each defendant guilty of each of the three mail fraud counts.[215]

The Supreme Court held that by objecting at trial to the jury instructions, which instructed the jury on honest services mail fraud, defendants had preserved their right to challenge the jury

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> acknowledge that this case is a logical extension of the basic principle that we have urged the Court to adopt in the nondisclosure cases, and the Court can evaluate whether it believes that that is legitimately within the scope of an honest services violation or not. But it should not obscure our fundamental submission which was that there was a definable category of undisclosed conflict of interest cases that a person furthered through his official action that is constituted honest-services fraud.

Transcript of Oral Argument, Skilling v. United States, 130 S. Ct. 2896 (2010) (No. 08-1394), 2010 WL 710521, at *51–52.

210. Skilling v. United States, 130 S. Ct. 2896, 2932 (2010) (quoting United States v. Mandel, 591 F.2d 1347, 1361 (4th Cir. 1979)).

211. *Id.* at 2932.

212. United States v. Black, 530 F.3d 596, 598–99 (7th Cir. 2008), *vacated,* 130 S. Ct. 2963 (2010).

213. Black v. United States, 130 S. Ct. 2963, 2966–67 (2010).

214. *Black*, 130 S. Ct. at 2967.

215. The jury also found defendant Black guilty of obstruction of justice in violation of 18 U.S.C. § 1512(c)(1) (2006), while the district judge granted Kipnis' motion for judgment of acquittal on one of the mail fraud counts, and the jury acquitted defendants on all other charges. *Black*, 130 S. Ct. at 2967–68 & n.5.

instructions on honest services mail fraud and their convictions for mail fraud.[216] Therefore, because the content of the honest services jury instructions had not become moot, the Supreme Court vacated the judgments and remanded the case for further proceedings to determine if the defendant's convictions for honest services mail fraud must be set aside in light of *Skilling*.[217]

C. *Weyhrauch*

In *Weyhrauch v. United States*,[218] a public corruption case, the Government indicted Bruce Weyhrauch, a lawyer and member of the Alaska House of Representatives, for soliciting work as an attorney from VECO, an oil field services company.[219] Weyhrauch promised to vote, as directed by the company, on proposed legislation that would alter how Alaska taxed oil production and taking other legislative actions in favor of the company.[220] The indictment did not allege that Weyhrauch received any compensation or benefits from the company, but alleged facts suggesting that Weyhrauch took the actions favorable to the company on the understanding that the company would hire him in the future to provide legal services.[221] One count of the indictment charged Weyhrauch with "devising 'a scheme and artifice to defraud and deprive the State of Alaska of its intangible right to [his] honest services . . . performed free from deceit, self-dealing, bias, and concealment' and attempting to execute the scheme by mailing his resume to VECO ('the honest services

216. Before jury deliberations began, the Government asked the court to use a special verdict form that would have made clear on which theory or theories the jury based its verdict of guilt of mail fraud. *Black*, 130 S. Ct. at 2967. Defendants opposed the request and asked that a general verdict form be used, arguing that if the jury returned a guilty verdict on any mail fraud count, then the court could ask the jurors to specify the theory on which they relied, a suggestion the government opposed. *Id.* The trial court gave the jury a general verdict form, a proposal to which the Government did not object once the court had rejected its request for post-verdict interrogatories. *Id.* On direct appeal, the Seventh Circuit held that defendants had forfeited their objections to the honest services fraud jury instructions by opposing the Government's request for special interrogatories. *Id.* at 2968; *Black*, 530 F.3d at 603.

217. *Black*, 130 S. Ct. at 2968, 2970.

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

219. United States v. Weyhrauch, 548 F.3d 1237, 1239 (9th Cir. 2008), *vacated*, 130 S. Ct. 2971 (2010) (per curiam).

220. *Weyhrauch*, 548 F.3d at 1239.

221. *Id.*

charge')."[222] The Government lodged an interlocutory appeal to contest the trial judge's exclusion of evidence relating to Weyhrauch's state law ethical requirements and related matters.[223] The trial court found "the proffered evidence related only to duties to disclose a conflict of interest that might be imposed by state law, and that state law did not require Weyhrauch to disclose the conflict of interest he faced in discharging his duties while negotiating for future employment with a company affected by pending legislation." But, the Government appealed because the evidence was proof that he "knowingly concealed a conflict of interest may be used to support an honest services fraud conviction even if state law does not require disclosure of the conflict of interest."[224] On review, the Ninth Circuit noted:

> Our pre-*McNally* cases recognized two core categories of conduct by public officials that other courts have found sufficient to support an honest services conviction: (1) taking a bribe or otherwise being paid for a decision while purporting to be exercising independent discretion and (2) nondisclosure of material information.[225]

The Ninth Circuit held that the allegations regarding Weyhrauch's undisclosed negotiations for future work for VECO while taking official actions on legislation at the direction of VECO were sufficient to allow the Government to proceed under either of the two core theories of honest services fraud.[226] "Because the district court excluded the evidence based, in part, on its conclusion that the Government had to prove that state law imposed an affirmative duty on Weyhrauch to disclose a conflict of interest," a conclusion rejected by the Ninth Circuit when finding that "§ 1346 establishes a uniform standard for 'honest services' that governs every public official," the Ninth Circuit reversed, offering "no opinion whether the proffered evidence is relevant to proving the government's case under the standard we have announced."[227] The Supreme Court vacated the judgment of the Ninth Circuit on the interlocutory appeal and remanded the case,

222. *Id.*
223. *Id.* at 1240.
224. *Id.*
225. *Weyhrauch*, 548 F.3d at 1247.
226. *Id.*
227. *Id.* at 1248.

without any discussion, for further consideration in light of *Skilling*.[228]

IX. HONEST SERVICES CASES AFTER *SKILLING*

After *Skilling*, honest services mail and wire fraud requires proof of a fraudulent scheme to deprive another of honest services through bribes or kickbacks. As before the decision in *Skilling*, the enactment of § 1346, and even the decision in *McNally*, mail and wire fraud under a traditional theory is unaffected and may proceed, typically requiring the Government to prove the following elements beyond a reasonable doubt: (1) "defendant knowingly created a scheme to defraud" as described in the indictment; (2) "defendant acted with a specific intent to defraud"; (3) defendant mailed something or "caused another person to mail something through the United States Postal Service or a private or commercial interstate carrier for the purpose of carrying out the scheme"; and (4) "the scheme to defraud employed false material representations."[229] By limiting § 1346 to schemes involving bribes or kickbacks, the Court seems to have collapsed § 1346 into the money or property requirement of traditional mail or wire fraud. Although we do not know how courts will define "bribes" and "kickbacks," it seems clear they require prohibited financial transactions between a defendant and a third party. Skilling's brief argued that by so limiting § 1346, the Court might resolve the confusion in the circuits by finding: the source of the honest services' duty was bribery and kickback law, defendant must contemplate economic harm or gain, the same standards apply to private and public sector defendants, and official action must be proved.[230] But, the decision in *Skilling* leaves open to further debate many of these, and other, issues.[231] Three areas of inquiry

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

229. FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS: CRIMINAL CASES §§ 2.60–.61 (West 2001), *available at* http://www.lb5.uscourts.gov/juryinstructions/fifth/crim2001.pdf. Additional elements may be required if the indictment alleges facts that would result in enhanced penalties. Apprendi v. New Jersey, 530 U.S. 466, 493–94 (2000).

230. *See* Reply Brief for Petitioner, Skilling v. United States, 130 S. Ct. 2896 (2010) (No. 08-1394), 2010 WL 636023, at *22 (listing the benefits of limiting construction of § 1346 to kickbacks and bribery).

231. Additionally, the Court's analysis furthers a debate of issues important to criminal law scholarship, to include: the doctrine of constitutional avoidance, facial versus as-applied vagueness, and legislative interpretation. With respect to statutory

are at the forefront: (1) Should a past conviction for honest services be vacated in light of *Skilling*? (2) How will the government now charge public and private corruption involving alleged honest services fraud? (3) Will Congress pass legislation to provide a statutory avenue for additional prosecutions under the rubric of honest services fraud?

A. *Application of Skilling to Past Convictions and Ongoing Cases*

The *Skilling* and *Black* Courts did not reverse Skilling and Black's convictions,[232] but vacated the judgments and remanded the cases for further proceedings pursuant to a harmless error standard.[233] The ruling in *Skilling* also will prompt a reevaluation

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interpretation, the majority opinion in *Skilling* provides little textual analysis of § 1346 and does not explain how the limitation of § 1346 to bribery or kickback schemes flows from the text of § 1346 or its legislative history. *See* Skilling v. United States, 130 S. Ct. 2896, 2928–29 (2010) (writing for the majority, Justice Ginsburg acknowledged that when § 1346 refers to "the" right to honest services, it was referring to that right as defined in the pre-*McNally* cases). Few pre-*Skilling* circuit court opinions examined the words of § 1346. Notable exceptions are Judge Reena Raggi's concurring decision in *United States v. Rybicki*, 354 F.3d 124, 152–53 (2d Cir. 2003), and Judge Patrick Higginbotham's majority decision in *United States v. Brumley*, 116 F.3d 728, 731–32, 734–35 (5th Cir. 1997). As discussed, see text accompanying notes 114–25 *supra*, the legislative history to § 1346 shows little more than the intent to resurrect an honest services fraud theory of proof after *McNally*. Scholars will debate how the decision in *Skilling*, which upholds the intent to prohibit honest services fraud only to the extent it involves a bribe or kickback scheme, may be squared with *United States v. Stevens*, 130 S. Ct. 1577 (2010), another decision from the same term, in which Chief Justice Roberts, writing for eight members of the Court, declined to interpret 18 U.S.C. § 48 narrowly, to read in a requirement of extreme "cruelty" (a word that appeared in the statute), to save the statute because: "we 'will not rewrite a . . . law to conform it to constitutional requirements,' for doing so would constitute a 'serious invasion of the legislative domain,' and sharply diminish Congress's 'incentive to draft a narrowly tailored law in the first place.'" United States v. Stevens, 130 S. Ct. 1577, 1591–92 (2010) (alteration in original) (citations omitted) (quoting Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 397 (1988)).

232. As noted, *Weyhrauch* was a pre-trial interlocutory appeal. *Weyhrauch*, 548 F.3d at 1239.

233. *Skilling*, 130 S. Ct. at 2934.

> Because the indictment alleged three objects of the conspiracy—honest-services wire fraud, money-or-property wire fraud, and securities fraud—Skilling's conviction is flawed. *See* Yates v. United States, 354 U.S. 298 (1957) (constitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory). This determination, however, does not necessarily require reversal of the conspiracy conviction; we recently confirmed, in *Hedgpeth v. Pulido*, 555 U.S. ---- (2008) (per curiam), that errors of the *Yates* variety are subject to harmless-error analysis.
>
> *Id.*

of honest services fraud cases pending at the time of the decision. Any defendant whose conviction arguably rests on an honest services theory—for mail fraud, wire fraud, conspiracy, or other crimes not involving bribery or kickbacks—may have grounds under *Skilling* for requesting relief.[234] Just as *McNally* prompted a wave of collateral attacks on pre-*McNally* mail fraud convictions based on intangible rights,[235] *Skilling* could trigger the review of

234. A few days after the decision in *Skilling*, the Supreme Court ordered the Eleventh Circuit to review the convictions of former Alabama governor, Don Siegelman, and former HealthSouth chief executive officer, Richard Scrushy. Scrushy v. United States, 130 S. Ct. 3541, 3542 (2010) (mem.). Siegelman and Scrushy were convicted of a bribery and kickback scheme "based on allegations that they made and executed a corrupt agreement whereby Scrushy" made a $500,000 contribution to Siegelman's campaign for a state lottery. United States v. Siegelman, 561 F.3d 1215, 1219 (11th Cir. 2009) (per curiam), *vacated*, 130 S. Ct. 3541 (2010). In exchange for Scrushy's contribution, Siegelman would appoint Scrushy to a state health care board, Alabama's Certificate of Need Review Board (CON Board). *Id.* Scrushy and Siegelman were also convicted of honest services mail fraud, based on incorporated bribery allegations and assertions "that Scrushy used the CON Board seat obtained from Siegelman to further HealthSouth's interests." *Id.* Siegelman and Scrushy challenged their convictions, in part, based on the contention there was never an explicit *quid pro quo* agreement between the two. *Id.* at 1228–29.

Other proceedings that may be affected by the Court's ruling in *Skilling* are: former United States Representative William Jefferson who was convicted in 2009, after a trial in Virginia of three counts of honest services fraud for accepting bribes related to his efforts to influence foreign officials regarding contracts for a technology company, and sentenced to thirteen years in prison; former United States District Judge Thomas Porteous, whose articles of impeachment parallel the honest services statute; and former New York State Senate Majority Leader Joseph L. Bruno who was convicted of fraud in December 2009, when a jury found that he had concealed hundreds of thousands of dollars in payments from businessmen who wanted help from the legislature. Brief for Citizens for Responsibility and Ethics in Washington as Amicus Curiae supporting Respondent, United States v. Black, 130 S. Ct. 2963 (2010) (No. 08-876), 2009 WL 2978255, at *4–5 & n.3; *see also Impeachment of Judge G. Thomas Porteous, Jr.*, 156 CONG. REC. S8563–64 (daily ed. Dec. 7, 2010) (discussing the honest services charges brought against the judge); David Stout, *Ex-Louisiana Congressman Sentenced to 13 Years*, N.Y. TIMES, Nov. 14, 2009, at A14 (reporting on Jefferson's conviction for bribery, money laundering, and racketeering). After *Skilling*, George Ryan challenged his convictions for honest services fraud and racketeering relating to his conduct while serving as Illinois Secretary of State and Governor. *See* Ryan v. United States, No. 10 C 5512, 2010 WL 5373812, at *1 (N.D. Ill. Dec. 21, 2010) (noting that Ryan filed his petition in wake of the *Skilling* decision). In brief, Ryan was charged and convicted on counts relating to his actions in steering contracts and leases to entities controlled or represented by his co-defendant and others in exchange for thousands of dollars in benefits to him and his family. *See* United States v. Warner, 498 F.3d 666, 675 (7th Cir. 2007) (providing the facts of Ryan's case). The trial court denied Ryan's petition filed pursuant to 28 U.S.C. § 2255, finding *Skilling* does not impact Ryan's convictions because his conduct remains at the core of honest services fraud. *Ryan*, 2010 WL 5373812, at *1, *3.

235. *See* United States v. Mandel, 862 F.2d 1067, 1074 (4th Cir. 1988) (overturning a

any § 1346 honest services fraud case not based solely on a bribery or kickback scheme, under the theory that an erroneous instruction on § 1346 permeated the case.[236] A harmless standard will apply on both direct appeal and collateral review.[237]

If a defendant was convicted of honest services fraud and has completed his criminal sentence for an act which *Skilling* holds was not a crime under § 1346, that defendant may seek to have his record expunged under a writ of *coram nobis*.[238] Courts have held

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mail fraud conviction based on the decision in *McNally*); United States v. Slay, 858 F.2d 1310, 1311 (8th Cir. 1988) (granting a new trial based on the holding in *McNally*); United States v. Zauber, 857 F.2d 137, 140 (3d Cir. 1988) (stating that the appellate court is bound to consider *McNally* in light of the appellants' appeal); United States v. Dadanian, 856 F.2d 1391, 1392 (9th Cir. 1988) (reversing conviction because of *McNally*); United States v. Asher, 854 F.2d 1483, 1485 (3d Cir. 1988) (upholding a previous conviction despite petitioner's argument that the charges of mail fraud and conspiracy should be reviewed in light of *McNally*); United States v. Shelton, 848 F.2d 1485, 1487 (10th Cir. 1988) (applying *McNally* retroactively); United States v. Ochs, 842 F.2d 515, 524 (1st Cir. 1988) (reviewing petitioner's argument that the jury instruction used at trial was erroneous under *McNally*); United States v. Huls, 841 F.2d 109, 110 (5th Cir. 1988) (holding that *McNally* invalidated a previous conviction); United States v. Holzer, 840 F.2d 1343, 1345 (7th Cir. 1988) (reconsidering the case in light of *McNally*); United States v. Baldinger, 838 F.2d 176, 178 (6th Cir. 1988) (stating that Baldinger's indictment failed to include an ingredient which *McNally* held was essential); United States v. Covino, 837 F.2d 65, 67 (2d Cir. 1988) (holding Covino's conviction should not stand in light of *McNally*), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181 (codified as amended at 18 U.S.C. § 1346 (2006)), *as recognized in* United States v. Little, 889 F.2d 1367 (5th Cir. 1989); United States v. Italiano, 837 F.2d 1480, 1483–84 (11th Cir. 1988) (stating that in light of *McNally*, the district court erred when it failed to dismiss Italiano's indictment); United States v. Herron, 825 F.2d 50, 54 (5th Cir. 1987) (discussing how *McNally* changed the interpretation of § 1341). In sum, after *McNally*, if the "spillover" effect of evidence admitted with respect to charges premised on intangible rights tainted the decision on other counts, the conviction on the other counts also was reversed. *E.g.*, *Holzer*, 840 F.2d at 1346–52 (reversing mail fraud and RICO convictions based on a mail fraud predicate, but allowing extortion conviction to stand). But, when there was evidence of a deprivation of money or property, a conviction under an intangible rights theory was allowed to stand. *E.g.*, United States v. Giacomino, No. 82-CR-60-2, 1988 WL 7145, at *1 (N.D. Ill. Jan. 22, 1988) (upholding mail fraud convictions when "the indictment charged, and the evidence showed, a scheme to defraud two bonding companies . . . of money paid by the sureties on a defaulted construction contract performance bond, 90% of which was reimbursed by the SBA" as well as the deprivation of the intangible rights to honest services, noting "the indictment and proof in this case transcend *McNally*").

236. Defendant's Memorandum of Authorities in Support of His Motion to Vacate His Conviction Pursuant to 28 U.S.C. § 2255, United States v. Scruggs, No. 3:07CR192-b-a (N.D. Miss. Aug. 18, 2010), 2010 WL 3779140, at *1.

237. *See Skilling*, 130 S. Ct. at 2934 (examing error by harmless-error analysis).

238. 28 U.S.C. § 1651 (2006). The All Writs Statute confers upon federal courts the power to issue "all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usage and principles of law." *Id.*

that a writ of *coram nobis* is available only when "the petitioner can demonstrate that he is suffering civil disabilities as a consequence of the criminal convictions and that the challenged error is of sufficient magnitude to justify the extraordinary relief."[239] In *United States v. Morgan*,[240] the Supreme Court held that *coram nobis* should issue to correct only an error of "the most fundamental character" for which no other remedy is available and which results in a complete miscarriage of justice.[241] After the United States Supreme Court's decision in *McNally*, former Maryland Governor Marvin Mandel and his co-defendants filed a writ of *coram nobis* to vacate their convictions for mail fraud and racketeering based on the predicate offense of mail fraud, ten years after they were convicted and more than five years after they completed service of their sentences.[242] The Fourth Circuit affirmed the granting of the writ, which vacated the convictions and required the Government to return to petitioners all fines, finding that, "[a]s in *McNally*, a conviction here was permitted without a finding that the State was defrauded of money or property, only of the conscientious, loyal, faithful, disinterested and unbiased services of Marvin Mandel," a theory of mail fraud proof rejected in *McNally*.[243] The Court rejected the invitation of the Government to "look beyond the improper instructions to the record to determine if adequate evidence of criminal activity existed on which to base a conviction under post-*McNally* standards,"[244] finding the issuance of a writ of *coram nobis* was proper "in light of a retroactive dispositive change in the law of mail fraud."[245]

Defendants who have been convicted of honest services fraud and are still under the legal restraints imposed by their sentences may file post-conviction motions pursuant to 28 U.S.C. § 2255 to collaterally attack their convictions.[246] These defendants must

239. United States v. Marcello, 876 F.2d 1147, 1154 (5th Cir. 1989); *see also* Cline v. United States, 453 F.2d 873, 874 (5th Cir. 1972) (stating that "a writ of error *coram nobis* is an available remedy to correct fundamental errors in a criminal case, even though the sentence imposed has been served" (emphasis added)).

240. United States v. Morgan, 346 U.S. 502 (1954).

241. *Id.* at 512.

242. United States v. Mandel, 862 F.2d 1067, 1068, 1071 (4th Cir. 1988).

243. *Id.* at 1072 (internal quotation marks omitted).

244. *Id.* at 1075.

245. *Id.*

246. Defendant's Memorandum of Authorities in Support of His Motion to Vacate His Conviction Pursuant to 28 U.S.C. § 2255, United States v. Scruggs, No. 3:07CR192-b-a

show that the scheme for which they were convicted is outside the scope of § 1346 in light of *Skilling*. For example, after *McNally*, the Fifth Circuit reversed the denial of defendant's § 2255 motion and vacated the conviction of Marcello, a public official who had been convicted of using his influence to cause the placement of state insurance contracts and received, or was to receive, a portion of the premiums.[247] A federal jury convicted Marcello of conspiracy to violate the RICO Act, 18 U.S.C. § 1962(d); "the pattern of racketeering activity alleged in the indictment included as predicate offenses: (1) state bribery, (2) violation of the interstate travel statute, (3) mail fraud, and (4) wire fraud."[248] After *McNally*, Marcello filed a motion to vacate, arguing the jury instructions summarized the scheme as one to deprive the citizens of Louisiana of "the honest and faithful services of . . . elected and appointed officials."[249] Holding that, "[a]s to mail and wire fraud, the indictment only charged intangible rights"[250] and "the mail and wire fraud charges at bar do not constitute crimes" after *McNally*.[251] The Court vacated Marcello's conviction for RICO conspiracy on the ground there was no indication in the record "that the jury rested its RICO conviction on two legally sufficient predicate acts."[252]

A defendant convicted of honest services fraud whose direct appeal is pending after the decision in *Skilling* may move to reverse and vacate the conviction on the ground that the

(N.D. Miss. Aug. 18, 2010), 2010, WL 3779140, at *1.

247. United States v. Marcello, 876 F.2d 1147, 1154 (5th Cir. 1989).

248. *Id.* at 1152, 1149. The jury convicted Marcello of a substantive RICO count, wire fraud, mail fraud, and a count of unlawful interstate travel in violation of 18 U.S.C. § 1952. Marcello's conviction was affirmed on appeal. United States v. Roemer, 703 F.2d 805, 805 (5th Cir. 1983), *aff'd*, United States v. Marcello, 876 F.2d 1147 (5th Cir. 1989).

249. *Marcello*, 876 F.2d at 1151.

250. *Id.*

251. *Id.* at 1152.

252. *See id.* at 1153 (stating "absent some indication by the jury that its determination of guilt rested on two or more predicate acts that are legally sufficient, we are required to reverse the conviction because the legally insufficient predicate act . . . may have been necessary to the verdict"). The jury acquitted Marcello of any substantive travel act violation, thus the court noted:

> As a consequence, it is not possible to discern what decision the jury made with respect to the various predicate acts. Assuming the propriety of a jury verdict, as we must, the guilty verdict establishes that the jury found at least two predicate acts proven. We can only speculate as to which two.

Id.

conviction is based on a discredited theory of proof or that the jury instructions could not assure that any conviction was based on evidence of bribes or kickbacks and the error was prejudicial and not harmless.[253] Defendants convicted on multiple counts, some of which did not charge honest services fraud, may be able to obtain a reversal on all counts if the honest services instruction could have had a spillover effect on the other counts.[254] For example, on remand to the Fifth Circuit from the Supreme Court, Skilling argued that the submission of an invalid honest services theory to the jury requires reversal of Skilling's conspiracy conviction because it "infected every other count of conviction" (securities fraud, insider trading, and false statements to auditors), an argument the court rejected.[255] So, too, Black argued on remand to the Seventh Circuit, that the erroneous jury charge on the elements of honest services fraud "contaminated" his conviction of obstruction of justice.[256] The Seventh Circuit affirmed Black's conviction for obstruction of justice based on the Seventh Circuit's first decision in *United States v. Black*,[257] because that portion of the *Black* opinion was "not disturbed by the Supreme Court and therefore the law of the case."[258] Therefore, "it is enough for conviction that a document was concealed in order to make it unavailable in an official proceeding."[259] The Seventh Circuit also affirmed Black's conviction for mail and wire fraud based on "pecuniary fraud," that is, "a scheme of fraudulent appropriation of money to which

253. *Marcello*, 876 F.2d at 1153; *accord* Hamling v. United States, 418 U.S. 87, 102 (1974) ("Our prior decisions establish a general rule that a change in the law occurring after a relevant event in a case will be given effect while the case is on direct review."); *see also* Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (recognizing new criminal procedure rules apply to cases pending on direct review).

254. Defendant's Opening Brief on Remand at 12, 39, United States v. Skilling, No. 06-20885 (5th Cir. Aug. 3, 2010).

255. *Id.* On remand, the Fifth Circuit determined "that the honest-services instruction was harmless error beyond a reasonable doubt," affirmed Skilling's conviction on all counts, and, for the reasons set out in its earlier opinion, vacated the sentence and remanded for resentencing. *United States v. Skilling*, No. 06-20885, 2011 WL 1290805, at *8 (5th Cir. Apr. 6, 2011).

256. United States v. Black, 625 F.3d 386, 389 (7th Cir. 2010).

257. United States v. Black, 530 F.3d 596 (7th Cir. 2008), *vacated*, Black v. United States, 130 S. Ct. 2963 (2010).

258. *Id.*

259. *Black*, 625 F.3d at 389.

Hollinger was legally entitled."[260] But, the Seventh Circuit reversed Black's conviction for mail and wire fraud based on a scheme to deprive Hollinger of its "intangible right of honest services."[261] The court also vacated the sentences and remanded the case "for resentencing, as well as for trial, limited however to the [subsidiary] count.[262] Even though "the jury returned a general verdict on the fraud counts" such that the court "cannot be absolutely certain that it found the defendants guilty of pecuniary fraud as well as, or instead of, honest services fraud," after a review of the trial evidence, the court concluded "no reasonable jury could have refused to convict" of pecuniary fraud.[263] Specifically, the court noted the lack of any evidence of a written non-competition covenant not to compete, "the absence of a written record of a $600,000 transaction," testimony that covenants not to compete had not been requested, and "the absence of an economic reason for them." Thus, the court reasoned that the only rational explanation for the jury's split verdict to acquit the "defendants on two other counts related to covenants not to compete" is that the pecuniary fraud count was premised on "plain-vanilla pecuniary fraud—and only a pecuniary fraud," and not honest services fraud.[264]

Finally, there is no question *Skilling* will limit the types of cases that can be prosecuted in federal court under the honest services fraud theory of proof.[265] A defendant charged with honest services fraud who is awaiting trial after the decision in *Skilling*, may move to dismiss the indictment on the ground it is not based on a scheme involving bribes or kickbacks and does not state an offense.[266] Similarly, a defendant who has pleaded guilty to an

260. *Id.* at 388, 391–93.

261. *Id.* at 388.

262. *Id.* at 394. Thus, the court observed the Government could dismiss the count for which retrial was required, proceed directly to resentencing where the judge could consider all the evidence that had been presented at the original trial as "'[a] jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.'" *Id.* at 394 (quoting United States v. Watts, 519 U.S. 148, 157 (1997) (per curiam)).

263. *Black*, 625 F.3d at 393.

264. *Id.*

265. Skilling v. United States, 130 S. Ct. 2896, 2931 (2010).

266. *See* Order Denying Motion to Dismiss, United States v. Belt, No. 07-10018, 2010 WL 3842700, at *3 (W.D. La. Sept. 24, 2010) (denying a motion to dismiss conspiracy "to

honest services fraud charge may move to withdraw his guilty plea;[267] but even if the scheme to defraud a victim of the right to

use the mails and interstate carriers for the purpose of executing the scheme and artifice they devised to defraud the citizens of Avoyelles Parish of the honest and faithful services of their Sheriff" based, in part, on eight overt acts, also alleged as separate mail fraud counts based on mailings of certain checks—allegations that "conceptually" equal the "'classic kickback scheme' as defined by *Skilling*"); Order Granting Defendant's Motion to Dismiss, United States v. Leslie, No. 09-115-JJB-DLD, 2010 WL 3210700, at *1 (M.D. La. Aug. 12, 2010) (granting a defendant's motion to dismiss an indictment for honest services fraud charges because defendant's conduct did not involve bribery or kickbacks and substantive mail fraud counts were dismissed because indictment did not allege facts showing any deprivation of "money or property"); *cf.* Order Denying Defendant's Motion to Dismiss, United States v. Schroeder, No. 3:08-CR-119-S, 2010 WL 3069093, at *1 (W.D. Ky. Aug. 3, 2010) (denying motion to dismiss mail fraud and money laundering counts, and finding the defendant was not charged with honest services fraud, as "[§] 1346 is cited nowhere in the superseding indictment," but rather with substantive mail fraud and money laundering relating to that mail fraud); Order Denying Defendant's Motion to Dismiss Indictment, United States v. Belt, (No. 07-10018), 2010 WL 4166774, at *2 (W.D. La. Oct. 7, 2010) (denying motion to dismiss mail fraud counts because they "are predicated on an alleged violation of the State Ethics Code").

Relatedly, a defendant who was convicted of honest services fraud, but whose conviction had not become final prior to the decision in *Skilling*, procedurally would move for a judgment of acquittal and new trial based on *Skilling*. *See* United States v. Botti, 722 F. Supp. 2d 207, 215–17 (D. Conn. 2010) (denying motions for judgment of acquittal and new trial when a jury convicted the defendant of honest services mail fraud, but failing to reach a verdict on traditional mail fraud, conspiracy, and bribery of a public official in violation of § 666). The court in *Botti* rejected a claim that the conviction under § 1346 must be vacated based on *Skilling* because there was "no evidence in the record of any sort of wrongdoing other than Botti's bribery of public officials," conduct within the core of honest services fraud approved in *Skilling*. *Id.*

267. O'Leary v. United States, 856 F.2d 1142, 1143 (8th Cir. 1988) (denying O'Leary's challenge of his indictment and sentence). The Eighth Circuit addressed a challenge to a guilty plea to an honest services mail fraud offense entered prior to the decision in *McNally* and the enactment of § 1346 in *O'Leary*:

> In pleading guilty, a defendant admits all of the factual allegations made in the indictment. A defendant pleading guilty also waives all challenges that do not relate to jurisdiction. In order to establish a jurisdictional defect, O'Leary must show that the indictment on its face fails to state an offense. He has failed to do so. The indictment clearly specified that using the mail to deposit corporate funds into the subsidiary account was a necessary part of O'Leary's scheme.
>
> In addition, *McNally v. United States* does not provide a basis for overturning O'Leary's conviction. Although the scheme to defraud Southern Comfort of its right to loyal, faithful, and honest employees may not state an offense under *McNally*, the balance of the indictment charges a violation of the mail fraud statute. When "a fraud[ulent] scheme involves multiple objectives, some of which are insufficient to state an offense under *McNally*, the remaining . . . charges [are] sufficient to state the offense if they are 'easily separable' from the charges deemed insufficient." Here, the reference in the indictment to loyal, faithful, and honest employees constitutes surplusage and thus does not affect the validity of the rest of the surplusage.

loyal, faithful, and honest services does not state an offense after *Skilling*, if the fraudulent scheme charges multiple schemes, the indictment may not be invalid and the plea may not be able to be set aside.[268]

B. *Prosecutive Scope of § 1346 Post*-Skilling

Many cases that could have been prosecuted under the honest services fraud theory, but do not involve bribes or kickbacks, might still be able to be prosecuted in federal court under the traditional theory of mail or wire fraud or under other existing statutes, such as bank fraud or securities fraud or theft from government programs.[269] Honest services fraud cases that may be charged as mail or wire fraud under the traditional theory—a scheme or artifice to defraud or obtain money or property from a victim[270]—or as honest services fraud involving bribes or

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O'Leary v. United States, 856 F.2d 1142, 1143 (8th Cir. 1988) (alterations in original) (citations omitted) (quoting United States v. Eckhardt, 843 F.2d 989, 997 (7th Cir. 1988)).

268. Courts have been asked to modify a defendant's plea agreement on the ground that the defendant's conviction of § 1346 is no longer valid after *Skilling*. *See* United States v. Scanlon, No. 05-CR-411, 2010 WL 4867613, at *2 (D.C. Cir. Nov. 30, 2010) (denying a motion to modify or amend defendant's pre-*Skilling* plea of guilty to conspiring with Jack Abramoff to defraud certain American Indian tribes of the right to Abramoff's honest services on the ground that the defendant's scheme "sets forth a classic kickback scheme" unaffected by *Skilling*). David Zachary Scruggs, the law firm partner and son of Richard F. Scruggs, pleaded guilty to the offense of misprision of a felony in violation of 18 U.S.C. § 4 relating to his failure to report an illegal conversation with the judge in a legal fees case relating to Hurricane Katrina insurance cases. Defendant's Memorandum of Authorities in Support of His Motion to Vacate His Conviction Pursuant to 28 U.S.C. § 2255, United States v. Scruggs, No. 3:07CR192-b-a, 2010 WL 3779140, at *4–5, *12 (N.D. Miss. Aug. 18, 2010). The underlying felony offense was described as a scheme to deprive the public of the honest services of Circuit Judge Henry Lackey. *Id.* Final judgment was entered on his conviction on July 2, 2008. *Id.* On July 28, 2008, the Mississippi Bar disbarred him from the practice of law. Miss. Bar v. Scruggs, 5 So. 3d 340, 340–41 (Miss. 2008). After *Skilling*, Scruggs moved to set aside his conviction pursuant to 18 U.S.C. § 2255, arguing that his failure to report the conversation did not constitute a bribery or kickback scheme and, therefore, he committed no federal crime. Defendant's Memorandum, *Scruggs*, 2010 WL 3779140, at *4–5, *12.

269. 18 U.S.C. § 666 (2006); 18 U.S.C. § 1341 (Supp. III 2009); 18 U.S.C. §§ 1342, 1344 (2006).

270. Skilling v. United States, 130 S. Ct. 2896, 2933 (2010). For example, a public sector honest services case may be able to be pursued under the traditional theory of mail fraud if the grand jury indicts, and the Government proves that the public suffered a money or other property loss, the state was deprived of control over how its money was spent or, absent the scheme, the state would have paid less for services or secured better services, apart from any allegation and proof of bribery or kickbacks. *Id.*; *see also* United States v. Bush, 522 F.2d 641, 648 (7th Cir. 1975) (concluding that the defendant committed

kickbacks, will continue to be prosecuted. By interpreting § 1346 to cover bribery and kickback schemes, the Supreme Court's ruling in *Skilling* does preserve a role for § 1346 to fill a significant gap in the mail and wire fraud statutes because the payment or receipt of a bribe or kickback may not result in the loss of property or money to the victim of a traditional mail and wire fraud charge, as that victim is defined in reference to the official action.[271]

But the ruling also removes an arguably significant class of cases from the purview of § 1346—cases involving undisclosed self-dealing. After *Skilling*, when an honest services fraud prosecution is based solely on a fiduciary's failure to disclose a personal interest in business with a third party or an undisclosed conflict of interest, the offense cannot be charged as honest services fraud.[272]

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mail fraud because his self-dealing deprived his public employer of money or property).

271. *Skilling*, 130 S. Ct. at 2931. By limiting § 1346 to bribes and kickbacks, the Court was not required to resolve key questions about the constitutional scope of self-dealing cases, such as: Do officials have a conflicting interest when a family member or friend of the official stands to gain from an official action? May an official act if there is disclosure and consent? To whom must the disclosure be made? Who may give the consent? *See id.* at 2933 n.44 (stating questions that would need to be answered if self-dealing cases were addressed). Further, the Court did not need to state how the "materiality" standard, generally understood as having "a natural tendency to influence, or is capable of influencing[] the decision of the decisionmaking body to which it is addressed," is to be applied in a public-sector case where the public is the "victim" and has no direct decision-making authority. Reply Brief for Petitioner, Skilling v. United States, 130 S. Ct. 2896 (2010) (No. 08-1394), 2010 WL 636023, at *22–23 (quoting United States v. Gaudin, 515 U.S. 506, 509 (1995)).

272. *See Skilling*, 130 S. Ct. at 2933 n.44 (explaining that in order to criminalize undisclosed self-dealing cases, Congress would need to overcome due process hurdles). In *Rybicki*, the Second Circuit identified only six cases involving prosecutions for undisclosed self-dealing in the private sector before *McNally*; in three of the cases, convictions were reversed. United States v. Rybicki, 354 F.3d 124, 140–41 (2d Cir. 2003). In *United States v. Saathoff*, 708 F. Supp. 2d 1020 (S.D. Cal. 2010), a post-*McNally* and pre-*Skilling* case, the trial court addressed the question of undisclosed conflicts of interest in the public sector, providing an excellent discussion on the facts presented of the indeterminacy of an honest services prosecution based on an undisclosed conflict that is not premised on a bribe or kickback. *Saathoff*, 708 F. Supp. 2d at 1033. In *Saathoff*, five San Diego officials, who also were members of the city's pension fund board or held positions as fund administrator or general counsel, were charged in a 44-page, 30-count superseding indictment with honest services fraud, honest services mail and wire fraud, and conspiracy for failing to disclose conflicts of interest regarding the management of the pension fund. *Id.* at 1022–24, 1029–32. The indictment alleged each of the five defendants either voted in favor of, or supported a proposal that lowered the trigger point for the city to replenish the pension fund for losses caused by a devaluation of its investments, an action that afforded the cash-strapped city government more time to budget the money needed to replenish the fund. *Id.* at 1023, 1026–27. In exchange for the increased risk to the fund caused by the lowering of the "trigger point," the proposal also increased future pension

Depending on the circumstances, such conduct may or may not qualify for prosecution under another federal statute.[273] Undisclosed self-dealing may be prosecutable under a traditional theory of mail or wire fraud because, unlike bribes or kickbacks

benefits for city employees. *Id.* The district court dismissed all counts, holding that § 1346 "is vague as applied to these defendants." *Id.* at 1041. The court acknowledged that failing to disclose a material conflict of interest can be a violation of the honest services statute, but held that the indictment failed to state a § 1346 claim. *Saathoff*, 708 F. Supp. 2d at 1024. The court found, in part: the "the conflict of interest was hardly undisclosed," as the other members of the board, the city counsel, and, therefore, the public knew that the five defendants were city employees. *Id.* at 1024. The membership of the board was dictated by state law in which "the majority of the board members had a personal stake in the health of the pension fund and the city." *Id.* at 1027, 1035–36. "[I]t is not at all clear what conflict of interest they possessed that should have been disclosed—or to whom it should have been disclosed." *Id.* at 1040. The court further noted that the indictment fails to allege facts giving rise to an inference of materiality or specific intent to defraud. United States v. Saathoff, 708 F. Supp. 2d 1020, 1040–41 (S.D. Cal. 2010). The United States filed a notice of appeal to the Ninth Circuit Court of Appeals on April 15, 2010. Appellant's Notice of Appeal, United States v. Saathoff, No. 06CR43-BEN (9th Cir. Apr. 15, 2010). In *United States v. Leslie*, No. 09-115-JJB-DLD, 2010 WL 3210700, at *1 (M.D. La. Aug. 12, 2010), a post-*Skilling* case, when dismissing an honest services fraud indictment for failing to state an offense actionable under § 1346, the court acknowledged the Government did not dispute that the defendant's activities didn't involve a bribery or kickback scheme and rejected the Government's argument that the facts of the defendant's self-dealing supported a charge of money or property fraud. *Leslie*, 2010 WL 3210700, at *1. The court found that whether the defendant "violated the state ethics code by engaging in self-dealing" is "an allegation best left to state prosecutors and state courts." *Id.* at *2.

273. *See* 18 U.S.C. § 201 (2006) (defining bribery of public officials); 18 U.S.C. § 371 (2006) (setting forth the requirements to be prosecuted for conspiracy to defraud the United States or conspiracy to commit another offense); 18 U.S.C. § 641 (2006) (criminalizing theft of government property); 18 U.S.C. § 656 (2006) (providing the punishment for embezzlement); 18 U.S.C. § 666 (2006) (detailing bribery relating to programs receiving more than $10,000 per year in federal funds); 18 U.S.C. § 1344 (2006) (defining bank fraud); 18 U.S.C. § 1951 (2006) (prohibiting obstructing, delaying, or affecting commerce by robbery or extortion, and defining extortion as obtaining property from another person by means of several specified inducements, including acting under color of official right); 18 U.S.C. § 1952 (2006) (prohibiting interstate or foreign travel in aid of various offenses including bribery and extortion punishable under state or federal law); 18 U.S.C. § 1956 (2006) (indicating that mail fraud is a predicate offense for money laundering); 18 U.S.C. § 1961 (2006) (forbidding the operation of an enterprise, i.e., a political office, through a pattern (two or more racketeering acts) of racketeering activity and listing state law bribery and extortion as predicate acts); 18 U.S.C. § 1832 (2006) (proscribing theft of an employer's trade secrets). The Federal Criminal Code codified in title 18 already reaches many forms of bribery and kickbacks as well as fraudulent conduct. Some of these statutes may provide alternative ways to charge fraudulent conduct that can no longer be charged as honest services fraud. In addition, federal prosecution may also be deferred in favor of state law prosecution for available state crimes.

where the money or property comes from a third party who is not deceived, the money or property in undisclosed self-dealing cases comes from the employer who has been deceived.[274] To the extent self-dealing cases are, effectively, money or property fraud cases, they do not need, and never needed, to be addressed under § 1346.[275]

Not all corruption prosecuted under § 1346 has arisen from a bribery or kickback. If a public official were to solicit or accept money in return for awarding a government contract to an unqualified bidder, the public official can be charged with bribery

274. *See, e.g.*, United States v. Lemire, 720 F.2d 1327, 1337–38 (D.C. Cir. 1983) (declaring that self-dealing requires proof that the defendant contemplated economic harm to a private employer); United States v. Bush, 522 F.2d 641, 648 (7th Cir. 1975) (concluding that the defendant committed mail fraud because his self-dealing deprived his public employer of money or property).

275. Justice Stevens' dissenting opinion in *McNally* identified two alternative theories under which intangible rights fraud cases might proceed after *McNally* (apart from a conspiracy to violate the mail and wire fraud statutes or substantive wire and mail fraud as defined by *McNally*), pre-dating, of course, the enactment of § 1346 and its limitation in *Skilling*. McNally v. United States, 483 U.S. 350, 376–77 (1987), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181 (codified as amended at 18 U.S.C. § 1346 (2006)), *as recognized in* Skilling v. United States, 130 S. Ct. 2896 (2010). The majority opinion in *McNally* did not address or deflect either theory. The two propositions, as Justice Stevens' suggestions as to how the "money or property" requirement might be satisfied under traditional wire and mail fraud, continue to be apt after *Skilling*. Under Justice Stevens' first approach, a fiduciary's breach of duty causes a financial loss to his employer who is not getting what he paid for. *Id.* at 377 n.10. Under Justice Stevens' second approach, a tangible benefit to the disloyal fiduciary may be provable under general agency principles when the fiduciary receives proceeds as a result of his breach of duty and does not forward them to his employer; "[t]his duty may fulfill the Court's 'money or property' requirement in most kickback schemes." *Id.* at 377 n.10 (citing RESTATEMENT (SECOND) OF AGENCY § 403 (1958)); *see also* United States v. Fagan, 821 F.2d 1002, 1010 n.6 (5th Cir. 1987) (explaining that an employee's failure to forward kickback scheme proceeds to the employer was a deprivation of property). Soon after *McNally*, the Supreme Court in *Carpenter* indirectly validated Justice Stevens' propositions when addressing an insider trading scheme and addressing the *Wall Street Journal*'s property interest in confidential information. Carpenter v. United States, 484 U.S. 19, 26–28 (1987), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181 (codified as amended at 18 U.S.C. § 1346 (2006)), *as recognized in* Skilling v. United States, 130 S. Ct. 2896 (2010). Although an undisclosed conflict of interest may be addressed under common law agency principles, unless there is a deprivation of money or property, it remains true that there is no clear indication Congress intended to treat it as a serious felony. *Skilling*, 130 S. Ct. at 2931; *see also* United States v. Panarella, 277 F.3d 678, 695 (3d Cir. 2002) (explaining that "'[f]raud in its elementary common law sense of deceit . . . includes the deliberate concealment of material information in a setting of fiduciary obligation'" (quoting United States v. Holzer, 816 F.2d 304, 307 (7th Cir. 1987))).

or accepting a kickback.[276] But, if the public official secretly acquires an interest in a company and uses his official position to funnel contracts to that company, it may be corrupt and violative of the public trust, but no bribery or a kickback has taken place. After *Skilling*, such a case of an undisclosed conflict of interest can no longer proceed in federal court under § 1346, but must proceed under another theory. If the facts suggest a bribe or kickback and sufficiently demonstrate an inference of a *quid pro quo* to exchange monetary or property benefits, as in a bribe or kickback, the United States Department of Justice may be able to proceed under a traditional mail or wire fraud or a post-*Skilling* honest services theory. For example, Weyhrauch, an Alaska state legislator, allegedly failed to disclose that he solicited legal work from VECO in exchange for taking legislative actions favorable to VECO's interests.[277] At the time of the Ninth Circuit's decision, prior to the Supreme Court's ruling in *Skilling*, the indictment alleged honest services mail fraud, but did not allege that Weyhrauch received any money or property apart from any property interest that might exist from his understanding he would be considered for legal employment in the future.[278] Although *Skilling* precluded prosecution from introducing evidence to prove "a knowing concealment of a conflict of interest," the Court did not rule the evidence might not otherwise be admissible or that the Government has not "alleged facts sufficient to pursue a § 1346 prosecution consistent with *Skilling*."[279]

The holding in *United States v. Panarella*,[280] decided eight years before *Skilling*, illustrates an example of an undisclosed self-dealing case that may be foreclosed by *Skilling*. The Third Circuit affirmed the trial court's conviction of Panarella for being an accessory after the fact to an honest services wire fraud scheme by a then-Pennsylvania state legislator, Loeper, who was also a paid business consultant for Panarella's business.[281] The indictment alleged Loeper failed to disclose his financial interest in

276. 18 U.S.C. § 201(b)(2) (2006).

277. United States v. Weyhrauch, 548 F.3d 1237, 1239 (9th Cir. 2008), *vacated*, 130 S. Ct. 2971 (2010) (per curiam).

278. *Id.*

279. *See* United States v. Weyhrauch, 623 F.3d 707, 707 (9th Cir. 2010) (revisiting the case on remand from the Supreme Court).

280. United States v. Panarella, 277 F.3d 678 (3d Cir. 2002).

281. *Id.* at 679, 696, 700.

Panarella's business in violation of Pennsylvania disclosure statutes and voted against legislation that would have harmed Panarella's business.[282] The Third Circuit held:

> [W]here a public official takes discretionary action that the official knows will directly benefit a financial interest that the official has concealed in violation of a state criminal law, that official has deprived the public of his honest services under 18 U.S.C. § 1346.[283]

The court rejected Panarella's argument that because there was no allegation "Loeper sold his vote, there was no misuse of office for personal gain."[284] Conversely, the court found "state law [regarding disclosure of financial interests] 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."[285] It does not appear that this case could proceed under § 1346 after *Skilling*, but would need to proceed under an alternate theory.

Other circuits also upheld honest services fraud convictions prior to *Skilling* based on the nondisclosure of a financial interest.[286] After *Skilling*, to successfully prosecute under § 1346, cases based on conflicts of interest must be pleaded as schemes involving bribes or kickbacks or must be addressed under the traditional money or property fraud statutes or another applicable statute.[287]

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282. *Id.* at 690.

283. *Id.* at 691.

284. *Id.*

285. *Panarella*, 277 F.3d at 692–93.

286. *See* United States v. Geddings, 278 Fed. App'x 281, 286 (4th Cir. 2008) (noting that "Geddings' conflict of interest resulted from a substantial financial relationship with Scientific Games, which he concealed when submitting his Ethics Form," and thereafter "took actions benefitting Scientific Games"); United States v. Jennings, 487 F.3d 564, 577–79 (8th Cir. 2007) (indicating that contrary to Minnesota law, a former Minnesota representative did not disclose financial interest in proposed legislation); United States v. Hasner, 340 F.3d 1261, 1271 (11th Cir. 2003) ("Hasner breached his fiduciary duties by voting on Fisher's consulting contract without disclosing the agreement he had with Fisher to receive a referral fee, if the Chelsea Commons real estate transaction was completed.").

287. Skilling v. United States, 130 S. Ct. 2896, 2931 (2010). Two other fact situations that may no longer be prosecuted as honest services fraud were discussed in the Petitioner's Reply Brief in *Skilling*:

> The Government complains that without a prohibition against self-dealing, a municipal official could vote to rezone property in which he has an undisclosed interest without fear of federal honest-services prosecution. But under the Government's theory, that same official would be insulated from prosecution under § 1346 as long as the undisclosed interest were held by his 21-year-old son, or his

Similarly, an honest services case predicated on the nondisclosure of material information may not proceed under § 1346 after *Skilling*. An illustration is provided in *United States v. Gray*,[288] a case in which the Fifth Circuit affirmed the honest services convictions of Baylor University basketball coaches who improperly helped recruits obtain academic "eligibility and possibly scholarships by providing these students with written course work or answers to correspondence exams."[289] The Fifth Circuit upheld the convictions even though there was no proof any defendant intended to obtain any personal benefit.[290] The court held that it was sufficient "the information withheld, i.e.[,] the 'coaches' cheating scheme', was material because Baylor did not get the quality student it expected," and "Baylor might have been able to recruit other qualified, eligible students to play basketball."[291] Because there is no indication any payment equating to a bribe or kickback was paid by or to any defendant or accomplice, this case could not be prosecuted as honest services fraud after *Skilling*.[292]

In the public sector, after *Skilling*, § 1346 does not add much to the prosecutor's arsenal. Section 666, in part, makes it a crime to

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mother, brother, or girlfriend. Section 1346 simply does not capture every unethical or blameworthy act. When it does not, state law and the watchful eye of the press and public remain as deterrents.

The Government also asserts that without a self-dealing prohibition, a state elected official could escape federal prosecution for voting against a tax increase that benefits someone from whom he is seeking employment. But the Government *can* prosecute that case, so long as it can establish that the vote was a quid pro quo for the employment opportunity. Otherwise, the conduct is *not* "core honest services fraud."

Reply Brief for Petitioner, Skilling v. United States, 130 S. Ct. 2896 (2010) (No. 08-1394), 2010 WL 636023, at *25 (citations omitted).

288. United States v. Gray, 96 F.3d 769 (5th Cir. 1996).

289. *Id.* at 772.

290. *Id.* at 777.

291. *See id.* at 775 (5th Cir. 1996) ("The indictment alleged and the jury was charged that [defendants] could have committed fraud under either of two theories: (1) they deprived victims of property, and (2) they deprived victims of the right to honest services."). The jury was instructed that "[a]n employee assisting ineligible students to obtain scholarships from his employer may constitute a scheme to defraud within the scope of the mail fraud and wire fraud statutes." *Id.* at 776. "The court held that the inclusion of this instruction was not plain error." *Gray*, 96 F.3d at 776. Thus, the defendants in *Gray* arguably could have been charged with mail fraud under the traditional theory only.

292. *See Skilling*, 130 S. Ct. at 2931 ("[W]e hold now that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law.").

solicit, accept, or demand "anything of value from any person, intending to be influenced or rewarded in connection with" business valued at $5,000 or more from any state or local agency receiving more than $10,000 in federal program funds.[293] Section 1951 makes it a crime to obtain property from another under color of official right in any way that affects commerce.[294] These statutes are powerful tools to address bribery and kickback schemes independently of § 1346. But, the post-*Skilling* limitation of honest services fraud to bribery and kickback schemes will have a significant impact in private sector cases. Neither § 666 nor § 1951 are likely to apply to the employee of a privately owned company. Therefore, such an employee is not a governmental employee (relevant to § 666), and is not acting under color of official right (relevant to § 1951). More specifically, *Skilling* is likely to have an impact in financial investigations if the Government cannot proceed under the securities laws, banking laws, or traditional fraud theories.[295] A § 1346 prosecution of a financial fiduciary's failure to disclose a personal interest in a business with a third party not involving a bribe or kickback is foreclosed by *Skilling*.[296] If the financial fiduciary does not make a material misrepresentation about his self-dealing, evidence may be lacking as to an essential element of a substantive mail or wire fraud offense.[297]

With respect to post-*Skilling* honest services prosecutions alleging a scheme involving bribes or kickbacks, the definition of

293. 18 U.S.C. § 666(a)(1)(B), (b) (2006). Among other things, § 666, titled "Theft or bribery concerning programs receiving federal funds," prohibits agents of a state or local government or American Indian tribe from obtaining by fraud any property valued at $5,000 or more. *Id.* § 666(a)(1)(B).

294. 18 U.S.C. § 1951(a), (b)(2) (2006).

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

296. *Id.* at 2931, 2933 n.44.

297. Carpenter v. United States, 484 U.S. 19, 25 (1987), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181 (codified as amended at 18 U.S.C. § 1346 (2006)), *as recognized in* Skilling v. United States, 130 S. Ct. 2896 (2010). As discussed in *Carpenter*, the right of the *Wall Street Journal* to control when the information would be made public was a property right that satisfied the *McNally* test, even though the right was intangible. *Id.* Can a right to control turn an intangible right into a property right that can be prosecuted under §§ 1341 and 1343? If the right of shareholders to control the conduct of corporate managers can make what managers are doing a species of property, then the conduct could be addressed under §§ 1341 and 1343 without reference to § 1346, thus marginalizing the limits on private sector honest services fraud recognized in *Skilling*. *Skilling*, 130 S. Ct. at 2931.

"bribery" and "kickbacks" may not be as straightforward as one might initially conclude. As the majority opinion in *Skilling* observed:

> As to arbitrary prosecutions, we perceive no significant risk that the honest-services statute, as we interpret it today, will be stretched out of shape. Its prohibition on bribes and kickbacks draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing-and defining-similar crimes.[298]

The question remains as to what content may be taken from the referenced statutes and specifically whether a *quid pro quo* must be proven. Bribery encompasses not only the classic *quid pro quo* situation, but can describe the transfer of gratuities and benefits so long as the transfer is made in exchange for a benefit to the bribe payer.[299] The pre-*Skilling* honest services fraud public corruption case provided a vehicle for prosecutors to prove a pattern of gifts to public officials of "you scratch my back, I'll scratch yours," without meeting the higher evidentiary hurdle of the bribery statute. Nothing in *Skilling* necessarily prevents a prosecutor from testing the limits of the post-*Skilling* honest services fraud doctrine by applying it to situations where there is no proof of an agreement to accept a benefit in exchange for a benefit.[300]

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298. *Skilling*, 130 S. Ct. at 2933–34 (citations omitted) ("The term 'kickback' means 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].").

299. *See* United States v. Mandel, 591 F.2d 1347, 1362 (4th Cir. 1979) (indicating that a state governor accepting a bribe in exchange for support of racetrack legislation is criminal even if the state treasury would benefit from the decision, or that an allegation that a state governor took action in return for financial as well as other benefits would constitute bribery). The federal "illegal gratuity statute," 18 U.S.C. § 201(c)(1)(A) (2006), applicable to defined public officials, prohibits giving anything of value to a present, past, or future public official "for or because of any official act performed or to be performed by such public official." 18 U.S.C. § 201(c)(1)(A) (2006). Bribery within the purview of 18 U.S.C. § 201(b) requires:

> [a] *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.

United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 404–05 (1999).

300. Even under the federal "illegal gratuity statute," the gratuity given or received must be "for or because of any official act performed or to be performed," such that "some particular official act [must] be identified and proved." *Sun-Diamond*, 526 U.S. at

Nevertheless, the Government will need to show that a payment was made for a specific benefit to the payor, and mere proof of a benefit such as increased compensation or increased value of stockholdings or benefits, expressly rejected in *Skilling*, will not be sufficient.[301]

The Government may be able to re-frame certain cases involving undisclosed conflicts of interest as a kickback scheme. For example, a case that might have been indicted as an undisclosed conflict of interest capable of causing economic detriment (such as the case of a buyer who has an interest in a third company that receives payments in exchange for contract shipments), may be able to be prosecuted as aiding and abetting a kickback. But, the evidence to support such an inference will not always be available. This can be illustrated by the hypothetical case of a state legislator who is allowed by state law to be employed when the legislature is not in session, and who receives employment from a constituent who benefitted from his legislative work. If that state legislator's work is permitted by applicable state ethics rules, it may never be able to be characterized as a kickback under post-*Skilling* honest services fraud. This applies even if the legislator did not disclose the employment, the legislator's work directly affected his employer, and the legislator's job duties required little effort.[302] It is also doubtful that a

406. An alternative reading of the statutory requirement

> would criminalize, for example, token gifts to the President based on his official position and not linked to any identifiable act—such as the replica jerseys given by championship sports teams each year during ceremonial White House visits . . . [and] a high school principal's gift of a school baseball cap to the Secretary of Education, by reason of his office, on the occasion of the latter's visit to the school.

Id. at 406–07. At the same time, Congress has enacted "more precise and more administrable" prohibitions on gift-giving in other statutes. *Id.* at 408–09; *see also* 18 U.S.C. § 213 (2006) (stating that the acceptance of offers by financial institution examiners is banned under the Act); 18 U.S.C. § 212 (2006) (including offers made by employees, directors, or officers of financial institutions made to examiners as prohibited); 18 U.S.C. § 209(a) (2006) (defining government officials and employees subject to penalties under the Act); 29 U.S.C. § 186 (2006) (prohibiting financial transactions between employers, employee agents, and labor organizations).

301. *See Skilling*, 130 S. Ct. at 2934 (finding Skilling innocent of committing honest services fraud because the Government did not allege Skilling received side payments in exchange for his misrepresentations even though he profited through increased stock value).

302. *See id.* at 2931 (expounding upon the Court's interpretation of "kickbacks" and inferring those who participate in kickback schemes would also be violating a fiduciary

constitutionally protected campaign contribution will be able to be characterized as a kickback or bribe. Although it may be generally accepted that the middle manager who is "wined and dined" by a corporation should disclose such contacts before playing a role in a decision to give the corporation business, an intangible rights theory involving bribery or kickbacks will require proof of more than "corporate hospitality" with no express or implied agreement for a *quid pro quo*.

As Justice Scalia noted in his concurring-in-part opinion in *Skilling*, "the most fundamental indeterminacy" after *Skilling* is "the character of the 'fiduciary capacity' to which the bribery and kickback restriction applies."[303] The majority opinion did identify a few of the "relationship[s]" from which a fiduciary duty may arise, but did not address to whom the duty is owed or the source or formulation of the duty, finding that the existence of a fiduciary duty was "beyond dispute" in cases at the core of honest services fraud.[304] The certiorari petition in *Weyhrauch* raised the question of whether the duty owed by the public official defendant was grounded in state law, federal law, or some general moral principle, but the Supreme Court did not reach the merits, vacating the Ninth Circuit's judgment and remanding for further consideration in light of *Skilling*.[305] As Justice Scalia points out, "The Courts of Appeals may have consistently found unlawful the acceptance of a bribe or kickback by one or another sort of fiduciary, but they have not consistently described (as the statute

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duty); *cf.* 41 U.S.C. § 52(2) (2006) (defining kickback as "any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind . . . for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract").

303. *Skilling*, 130 S. Ct. at 2938 (Scalia, J., concurring in part and concurring in the judgment).

304. *Id.* at 2931 n.41 (majority opinion).

> Justice Scalia emphasizes divisions in the Courts of Appeals regarding the source and scope of fiduciary duties. But these debates were rare in bribe and kickback cases. The existence of a fiduciary relationship, under any definition of that term, was usually beyond dispute; examples include public official-public, employee-employer, and union official-union members. *See generally* Chiarella v. United States, 445 U.S. 222, 233 (1980) (noting the "established doctrine that [a fiduciary] duty arises from a specific relationship between two parties").

Skilling v. United States, 130 S. Ct. 2896, 2931 n.41 (2010) (some citations omitted).

305. *Id.* at 2912 n.9, 2928 n.36.

does not) any test for who is a fiduciary."[306]

Prior to *Skilling*, the Fifth Circuit has held that state law defines the fiduciary duty at issue in § 1346.[307] The Third Circuit has held that a state law violation is sufficient to demonstrate a breach of fiduciary duty for the purposes of § 1346.[308] But, other circuits have held that proving an independent violation of state law is not always required to demonstrate a breach of fiduciary duty in a § 1346 case.[309] Two circuits have held that privately drafted documents—an employee handbook[310] and a power of attorney agreement[311]—were competent sources of fiduciary obligations in § 1346 prosecutions.[312] Conflicting pre-*Skilling* circuit court decisions on the source and scope of the fiduciary duty at issue in § 1346 prosecutions were not harmonized by *Skilling*.[313] Even "if one assumes that the pre-*McNally* cases developed a federal, common-law fiduciary duty," the "indeterminacy does not disappear" and the source of the fiduciary duty at issue in § 1346 cases "remain[s] hopelessly undefined."[314]

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306. *Id.* at 2937 n.1 (Scalia, J., concurring in part and concurring in the judgment).

307. United States v. Brumley, 116 F.3d 728, 734–35 (5th Cir. 1997); *see also supra* text at note 101.

308. *See* United States v. Carbo, 572 F.3d 112, 117 n.4 (3d Cir. 2009) (finding that an independent state law violation was sufficient); United States v. Panarella, 277 F.3d 678, 693 (3d Cir. 2002) ("Although we need not decide whether a violation of state law is always necessary for nondisclosure to amount to honest services fraud, . . . the existence of a violation of state law in this case mitigates the federalism concerns that arise from federal prosecutions of local public officials.").

309. *See* United States v. Weyhrauch, 548 F.3d 1237, 1245 (9th Cir. 2008) (declining to adopt a state law limiting principle), *vacated*, 130 S. Ct. 2971 (2010); United States v. Sorich, 523 F.3d 702, 712 (7th Cir. 2008) (refusing to adopt a state law limiting principle on the mere basis that another court had adopted that principle); United States v. Urciuoli, 513 F.3d 290, 298–99 (1st Cir. 2008) (explaining why a state law limiting principle is inappropriate); United States v. Walker, 490 F.3d 1282, 1299 (11th Cir. 2007) (stating that a federalism argument does not mandate a state law limiting principle); United States v. deVegter, 198 F.3d 1324, 1329 (11th Cir. 1999) ("The nature and interpretation of the duty owed is a question of federal law."); United States v. Frost, 125 F.3d 346, 366 (6th Cir. 1997) ("Federal law governs the existence of fiduciary duty under the mail fraud statute.").

310. United States v. George, 477 F.2d 508, 511 (7th Cir. 1973).

311. United States v. Williams, 441 F.3d 716, 723 (9th Cir. 2006) (pointing out that because the defendant was a fiduciary of his client, the court would not reach the issue of whether the "intangible right of honest services" applies to non-fiduciary relationships).

312. *See id.* at 511 (describing the defendant employees' contract that created fiduciary duties).

313. Skilling v. United States, 130 S. Ct. 2896, 2937 & n.1 (Scalia, J., concurring in part and concurring in the judgment).

314. *Id.* at 2937; *see also* United States v. Martin, 195 F.3d 961, 966 (7th Cir. 1999)

Notwithstanding the clear findings in *Skilling* that (1) "[t]he 'vast majority' of the honest[]services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes";[315] (2) debates about "the source and scope of fiduciary duties" "were rare in bribery and kickback cases";[316] and (3) it is "'as plain as a pikestaff that' bribes and kickbacks constitute honest[]services fraud,"[317] it must be acknowledged that simply because "[t]he existence of a fiduciary relationship, under any definition of that term, was usually beyond dispute" in pre-*Skilling* honest services fraud and kickback cases,[318] does not mean the source and scope of any fiduciary duty will be moot questions in all post-*Skilling* § 1346 cases.[319] Courts will be asked to determine matters relating to the fiduciary duty on which honest services' bribery and kickback schemes are grounded, such as: Must the duty that is violated be grounded in state law? Must private fiduciaries know they are fiduciaries and that the conduct at issue violates their fiduciary obligations?[320]

Courts will also be asked to address the intent that must be proved in a § 1346 prosecution. A specific intent to defraud must

("The fear that motivated the *Brumley* decision is that if federal courts are free to devise fiduciary duties the breach of which violates the mail fraud statute, the result will be the creation in effect of a class of federal common law crimes."); Ben Rosenberg, *The Growth of Federal Criminal Common Law*, 29 AM. J. CRIM. L. 193, 203–05 (2001) (discussing concerns involved in the creation of federal common law crimes).

315. *Skilling*, 130 S. Ct. at 2930 (citing United States v. Runnels, 833 F.2d 1183, 1187 (6th Cir. 1987)).

316. *Id.* at 2930–31 n.41.

317. *Id.* at 2933 (citing Williams v. United States, 341 U.S. 97, 101 (1951)).

318. *Id.* at 2930–31 n.41.

319. In a case decided less than six months after *Skilling*, a panel in the Ninth Circuit held that a fiduciary relationship is not required; rather, only proof of a legally enforceable right to have another provide honest services is required. *See* United States v. Milovanovic, 627 F.3d 405, 412–13 (9th Cir. 2010) (Raggi, J., concurring) (explaining that although "there must be a legally enforceable right to have another provide honest services, ... [h]onest services mail fraud does not require proof of a fiduciary relationship").

320. *See Skilling*, 130 S. Ct. at 2933 ("[T]he statute's *mens rea* requirement further blunts any notice concern ...."); *see also* Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973) ("[E]ven if the outermost boundaries of [a statute are] ... imprecise, any such uncertainty has little relevance ... where appellants' conduct falls squarely within the 'hard core' of the statute's proscriptions."); United States v. Carbo, 572 F.3d 112, 117 (3d Cir. 2009) ("When, as here, ... the defendant is a private citizen who has not been entrusted with a position in service of the public and who may very well have no understanding of ethics laws, the question of the defendant's knowledge of the law becomes much more important.").

be proved in "money" or "property" mail and wire fraud cases.[321] An intent to breach a duty to provide honest services is not necessarily the same as specific intent to defraud.[322] Will an intent to deceive on a material matter (relating to a bribery or kickback scheme) suffice or, as Mr. Skilling argued, must the Government prove an intent to obtain private gain by deceptive and dishonest means and/or an intent to harm the party to whom the defendant owes the duty?[323]

Just as the scope of the § 1346 honest services fraud prosecution is limited after *Skilling*, evidence of defense conduct will also likely be limited under Rule 404(b) of the Federal Rules of Criminal Procedure.[324] Instead of introducing evidence of all sorts of tangible and intangible benefits received by a defendant, the Government may be limited to proving the accused owed a duty of rendering honest services to the victim and received a bribe or kickback that caused him to violate that duty, without reference to other benefits that are not proved to be sufficiently part of the bribery or kickback scheme.

C. *Legislative Attention*

More than twenty years ago, the Supreme Court in *McNally* admonished Congress to "speak more clearly" about the applicability of the mail and wire fraud statutes to honest services

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321. *See supra* at note 160.

322. *Milovanovic*, 627 F.3d at 412 ("[T]he defendant must intend to defraud, because Section 1341 says having devised or intending to devise any scheme or artifice to defraud. That the victim may not get all the services it should is insufficient if the specific intent to defraud is absent.") (internal quotation marks omitted).

323. *See* Brief for Petitioner, Skilling v. United States, 130 S. Ct. 2896 (2010) (No. 08-1394), 2009 WL 4818500, at *48–52 (arguing that § 1346 at least requires a jury finding that "the defendant acted for private gain." This gain is separate and apart from the ordinary compensation incentives of the employee).

324. *See* United States v. Weyhrauch, 623 F.3d 707, 708 (9th Cir. 2010) (applying the Supreme Court's decision in *Skilling* and affirming the district court's order).

> Under *Skilling*, nondisclosure of a conflict of interest is no longer a basis for prosecution under 18 U.S.C. § 1346. *See Skilling*, 130 S. Ct. at 2932. *Skilling* therefore precludes the government from offering evidence to prove a violation of § 1346 based on such nondisclosure. Here, the government sought to introduce evidence to prove a knowing concealment of a conflict of interest. Because *Skilling* does not permit the government to prove a violation of § 1346 on that basis, we affirm the district court's evidentiary order.

Weyhrauch, 623 F.3d at 708 (internal quotation marks omitted).

fraud.[325] The troublesome predicate to *Skilling*—as it was to *McNally*—was that conduct under § 1346 that may be legal in one circuit may demonstrate honest services fraud in another circuit.[326] When Congress enacted § 1346 in 1988, Congress provided for an honest services theory of proof for mail and wire fraud, but did not define its statutory elements. It has been observed that Congress's failure to provide a statutory definition of honest services in § 1346 may have been based on its failure to agree on a definition of "public corruption,"[327] a task that likely is no easier today. When Congress enacted § 1346 to provide a means to address public and private sector fraud in federal court,[328] it definitively overruled the Supreme Court's holding in *McNally*. But, by failing to define statutory elements and boundaries, Congress did not harmonize important themes in the preexisting, conflicting case law that would continue to riddle the honest services fraud doctrine.

Congress's action to overrule *McNally* and the Supreme Court's requirement that a scheme or artifice to defraud in violation of §§ 1341 and 1343 must involve money or property—as expressed through the words of the statutes and their minimal legislative history—did not overcome the fundamental indeterminacy of the scope of intangible rights fraud.[329] Before § 1346, the mail and wire fraud statutes covered fraudulent schemes to obtain money or

325. McNally v. United States, 483 U.S. 350, 360 (1987), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181 (codified as amended at 18 U.S.C. § 1346 (2006)), *as recognized in* Skilling v. United States, 130 S. Ct. 2896 (2010). "[W]e read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has." *Id.* at 360.

326. *See Skilling*, 130 S. Ct. at 2926 (describing how different circuit courts have interpreted and ruled on the honest services doctrine and noting conclusions reached by the Fifth Circuit, Second Circuit, and Ninth Circuit Courts).

327. United States v. Brumley, 116 F.3d 728, 744 (5th Cir. 1997) (Jolly & DeMoss, JJ., dissenting) ("We may conclude from the demise of these more comprehensive bills (H.R. 3050 and S2793) that the House of Representatives was unwilling to join the Senate in the comprehensive definition of crime involving 'public corruption' as set forth in Section 2 of S2793.").

328. One commentator has suggested: "Congress may well have passed a comprehensively defined anticorruption statute" if the Omnibus Drug Bill, to which § 1346 was appended as an amendment, had "not been center-stage in an election year." Joseph E. Huigens, Note, *If All Politicians Are Corrupt, but All Defendants Are Presumed Innocent, Then What? A Case for Change in Honest Services Fraud Prosecutions*, 85 NOTRE DAME L. REV. 1687, 1706 (2010).

329. *See* 18 U.S.C. § 1346 (2006) (abstaining from any mention of intangible rights fraud).

property.[330] The objective of § 1346 was to expand the statutes to apply to schemes not involving money or property, but to those involving a breach of a duty to provide honest services.[331] After *Skilling*, § 1346 is only constitutionally applied to bribery and kickback schemes, that is, schemes involving money or property.[332] Thus, Congress may once again conclude it must act in this area. Whether Congress considers passing a comprehensive anti-corruption statute, or amending existing statutes, an assessment of pre-*Skilling* honest services fraud case law may allow Congress to implement definite, determinable, and limited code provisions.

There is broad consensus that governmental ethics are viewed as a pillar of democracy, and corrupt behavior can threaten democratic institutions.[333] Even before the decision in *Skilling*, the growing concern that additional resources and tools were required to fight corruption was evidenced by bills introduced which addressed fraud prosecutions. On January 6, 2009, Senators Patrick Leahy (D–VT) and John Cornyn (R–TX) introduced the Public Corruption Prosecution Improvements Act that, in part, proposed to:

- increase investigative and prosecutorial resources to handle public corruption matters;
- lengthen the statute of limitations from five to six years for certain serious public corruption offenses, including honest services mail or wire fraud;
- revise the mail and wire fraud statutes to prohibit the taking of "money, property or any other thing of value";
- expand the prohibition against bribery in connection with programs receiving financial assistance;

330. 18 U.S.C. §§ 1341, 1343 (Supp. II 2008).

331. *See* 18 U.S.C. § 1346 (2006) (addressing the applicability of the term "scheme or artifice to defraud" to the "intangible right of honest services").

332. *See* Skilling v. United States, 130 S. Ct. 2896, 2931, 2933 (2010) (stating that "there is no doubt that Congress intended § 1346 to reach *at least* bribes and kickbacks," without invoking due process concerns, and identifying bribes and kickbacks as actions involving money or property).

333. *See* United States v. McNair, 605 F.3d 1152, 1200 (11th Cir. 2010) (recognizing that a public official who acts in his own interest "has defrauded the public of his honest services" (quoting United States v. Lopez-Lukis, 102 F.3d 1164, 1169 (11th Cir. 1997))); *see also* 5 C.F.R. § 2634.104(a) (West 2011) (instructing that federal officials disclose personal interests "to ensure confidence in the integrity of the Federal Government by demonstrating that they are able to carry out their duties without compromising the public trust").

- increase maximum penalties for theft of government property, bribery, and other offenses;
- include certain theft of government property and bribery offenses as predicates for RICO and wiretaps; and
- expand the definition of "official act" in the federal bribery statute to respond to *Valdes v. United States*,[334] in which a Metropolitan Police Department detective's conviction was reversed because his conduct (providing addresses and license plate numbers for persons), was not an "official act" prohibited by 18 U.S.C. § 201(c)(1)(B).[335]

The package of remedial provisions provided in Senate Bill 1946, working in the context of honest services law then being

334. Valdes v. United States, 475 F.3d 1319 (D.C. Cir. 2007).

335. Public Corruption Prosections Improvements Act, § 49, 111th Cong. (2009); 155 CONG. REC. S56–58 (daily ed. Jan. 6, 2009) (statement of Sen. Patrick Leahy). Senators Leahy and Cornyn first introduced Senate Bill 1946 in the 110th Congress on August 2, 2007. *See* 153 CONG. REC. 10,791–801, 10,795–98 (2007) (statement of Sen. Patrick Leahy) (introducing the Public Corruption Prosecution Improvements Act). When first introducing the bill in 2007, Senator Leahy stated:

> These [public corruption] offenses are very difficult to detect and even harder to prove. Because they attack the core of our democracy, these offenses must be found out and punished. Congress must send a signal that it will not tolerate this corruption by providing better tools for Federal prosecutors to combat it. This bill will do exactly that.

153 CONG. REC. 10,791–801, 10,795 (2007) (statement of Sen. Patrick Leahy). When reintroducing the bill in 2009, Senator Leahy stated:

> As we have seen in recent months, public corruption can erode the trust the American people have in those who are given the privilege of public service. Too often, though, loopholes in existing laws have meant that corrupt conduct can go unchecked. Make no mistake: The stain of corruption has spread to all levels of government. This is a problem that victimizes every American by chipping away at the foundations of our democracy. Rooting out the kinds of public corruption that have resulted in convictions of members of both the Senate and the House, and many others, requires us to give prosecutors the tools and resources they need to investigate and prosecute criminal public corruption offenses. This bill will do exactly that.

155 CONG. REC. S56 (daily ed. Jan. 6, 2009) (statement of Sen. Patrick Leahy). On April 17, 2007, Representative Henry Johnson (D-GA) introduced House Resolution 1872, the Effective Corruption Prosecutions Act of 2007, that, in part, proposed to: (a) extend the statute of limitations to eight years for certain offenses, including theft of government funds, racketeering, mail fraud, and bribery; and (b) permit wiretaps in bribery or theft of government property cases, and include the crimes within the scope of RICO. 153 CONG. REC. 3473-02, 3473 (2007) (statement of Rep. Henry Johnson); Effective Corruption Prosecution Act, H.R. Res. 1872, 110th Cong. §§ 2–3 (2007).

applied in the courts, is far different than the legislative challenge required after *Skilling* to look comprehensively at the area of honest services fraud.[336]

New legislation does provide an opportunity to systematically address legal and policy questions about federal prosecution of honest services or intangible rights cases.[337] Certainly, the history of honest services law since *McNally* illustrates the difficulty in fashioning limiting principles for honest services mail and wire fraud prosecutions under § 1346.[338] Indeed, Justice Ginsburg's majority decision in *Skilling* warns Congress that any attempt to amend the statute to criminalize undisclosed self-dealing, as the Government argued should be found within the permissible scope of honest services fraud, will not be an easy task:

> The Government proposes 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. That formulation, however, leaves many questions unanswered. 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 others call for particular care in attempting to formulate an adequate criminal prohibition in this context.[339]

Just as the Supreme Court's decision in *McNally* prompted a relatively swift legislative response, the United States Senate's

336. *Compare* 155 CONG. REC. S57 (daily ed. Jan. 6, 2009) (statement of Sen. Patrick Leahy) (altering the mail fraud statute to cover "any other thing of value" in order to close loopholes found in the current statute), *with* Skilling v. United States, 130 S. Ct. 2896, 2932 (2010) (concluding that § 1346 must be strictly construed and denying its application to the "amorphous category of cases" proposed by the Government).

337. Pursuant to the Ex Post Facto Clause, legislative action will have no effect on convictions already obtained or the legal challenges that are now available to past and on-going prosecutions as a result of the Court's construction of honest services fraud in *Skilling*. *See* U.S. CONST. art. I, § 9 ("No Bill of Attainder or ex post facto Law shall be passed."). *See generally* Dobbert v. Florida, 432 U.S. 282, 292–93 (1977) (describing the restrictions under the Ex Post Facto Clause).

338. *See Skilling*, 130 S. Ct. at 2932 (recognizing that appellate courts have "reached no consensus on which schemes qualified" under honest services convictions).

339. Skilling v. United States, 130 S. Ct. 2896, 2933 n.44 (2010) (citations omitted).

Judiciary Committee held its first hearing on honest services fraud on September 28, 2010, only three months after the Supreme Court's rulings.[340] The hearings focused on a primary class of cases no longer able to be prosecuted under § 1346—undisclosed conflicts of interest.[341] Despite cautionary overtones of some of the testimony,[342] Senate Judiciary Chair Patrick Leahy (D-VT),

340. 156 CONG. REC. S7620-01, S7631 (daily ed. Sept. 28, 2010) (statement of Sen. Patrick Leahy).

341. The petitioner in *Skilling* described the "narrow circumstances" in which breaches of a fiduciary duty based on a conflict of interest might qualify as honest services fraud: "To the extent that the Court wishes to include self-dealing within § 1346's compass, however, it should confine the concept to those narrow circumstances specifically described in prior case law: self-dealing where the defendant directs money or property to a third party in which he has an undisclosed interest." Brief for Petitioner, Skilling v. United States, 130 S.Ct. 2896 (2010) (No. 08-1394), 2009 WL 4818500, at *52 n.14. Professor Alschuler alternatively argued for a reading of § 1346 "that (at least for defendants other than public officials) limits honest-services fraud to schemes to obtain bribes or kickbacks or to engage in undisclosed self-dealing capable of causing economic detriment." Brief of Albert W. Alschuler as Amicus Curiae in Support of Neither Party, Weyhrauch v. United States, 130 S. Ct. 2971 (2010) (No. 08-1196), 2009 WL 3052480, at *3.

342. Assistant Attorney General, Criminal Division, United States Department of Justice Lanny A. Breuer encouraged Congress to pass legislation to enable the Government to use the mail and wire fraud statutes to prosecute undisclosed self-dealing by public officials because, unlike undisclosed self-dealing in the private sector, a loss of money or property may not be established. *Honest Services Fraud: Hearing on Statement of Lanny A. Breuer before the S. Comm. on the Judiciary*, 156 CONG. REC. S7004 (daily ed. Sept. 28, 2010). The National Association of Criminal Defense Lawyers ("NACDL") expressed the view that any congressional response would be difficult because of the constitutional concerns raised in *Skilling*, but was also unnecessary and ill-advised in light of the existing law and federalism concerns caused when the federal government addresses conduct of state and local officials. *Restoring Key Tools to Combat Fraud and Corruption After the Supreme Court's* Skilling *Decision; Hearing Before the U.S. S. Comm. on the Judiciary*, 111th Cong. (2010) (written statement of Timothy P. O'Toole on behalf of the NACDL), *available at* www.nacdl.org/public.nsf/whiteCollar/Letter-and-Testimony/$FILE/TIMO%27Toolestatement-092810.pdf. After the hearing, Mr. Breuer submitted written answers to questions posed by Senator Leahy in which he urged Congress to fill the "gap" created by *Skilling* because "[t]he public has a right to know that government officials are acting in the public's best interests, rather than attempting to further their own undisclosed financial interests." *Restoring Key Tools to Combat Fraud and Corruption After the Supreme Court's* Skilling *Decision: Hearing Before the S. Comm. On the Judiciary*, 111th Cong. (2010) (answers to written questions for Assistant Attorney General Lanny A. Breuer), *available at* http://www.nacdl.org/public.nsf/whitecollar/HonestServicesFraud. Former Deputy Attorney General, Criminal Division, United States Department of Justice, George J. Terwilliger III recommended that Congress defer any legislative action pending further study and, instead of enacting a new honest services provision, Congress should consider amending: 18 U.S.C. § 666 so that it covers undisclosed self-dealing by state and local officials; 18 U.S.C. §§ 201–227 so that they address undisclosed self-dealing by federal officials; but otherwise deferring for further study any new legislation addressing undisclosed self-dealing by corporate officers.

Senator Sheldon Whitehouse (D-RI), and then-Senator Ted Kaufman (D-DE) introduced the Honest Services Restoration Act in an effort to expand § 1346 to include "undisclosed self-dealing" by state and federal public officials and corporate officers and directors.[343] The proposed Act would prohibit public officials and corporate officers from secretly acting in their own financial interest and failing to disclose material information about financial interests benefitted or furthered by their official actions.[344] The next day, legislation bearing the same title was also proposed in the House of Representatives, and although the House bill proposed the same definition of "undisclosed self-dealing," the House bill applied only to public officials, not private individuals.[345]

A key inquiry concerns whether there should be a distinction

Hearing Before the S. Comm. on the Judiciary, 111th Cong. (2010) (statement of George J. Terwilliger, III, Former Deputy Att'y Gen., Criminal Division, U.S. Dep't of Justice), *available at* http://judiciary.senate.gov/pdf/9-28-10%20Terwilliger%20Testimony.pdf. Citizens for Responsibility and Ethics in Washington (CREW), a nonprofit group, offered a different proposal, suggesting to amend 18 U.S.C. § 208, the conflict of interest statute applying to executive branch officials, so it applies to members of Congress and their staff as well as state and local officers. *See* Press Release, CREW Issues Statement on Supreme Court's Honest Services Fraud Decision, CITIZENSFORETHICS.ORG (June 24, 2010), *available at* http://www.citizensforethics.org/press/entry/139/ ("Anticipating this ruling [in *Skilling*], CREW has been advocating a legislative fix. Federal law currently prohibits executive branch employees from taking any official action that affects their personal financial interest. This statute could easily be extended to cover members of Congress and state and local officials to ensure Americans are protected from government officials who sacrifice the public interest for their own private gain.")

343. Honest Services Restoration Act, S. 3854, 111th Cong. (2010), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-111s3854is/pdf/BILLS-111s3854is.pdf. Under the proposed statute, a public official engages in undisclosed self-dealing when the public official: (1) performs an official act to benefit that official (or a defined related person or entity); and (2) knowingly falsifies, conceals or covers up material information regarding that financial interest that is required to be disclosed by any federal, state, or local statute, rule, regulation or charter or knowingly fails to disclose material information about the financial interest as required by any federal, state or local statute, rule, regulation or charter. *Id.* "Public official" is defined to include federal, state, and local elected officials. On the other hand, an officer or director of a private company engages in undisclosed self-dealing when the officer or director: (1) performs an act that causes or is intended to cause harm to his employer, and which is undertaken in whole or part to benefit or further (by $5,000 or more) a financial interest of the officer or director (or a defined related person or entity), and (2) knowing falsifies, conceals, or covers up material information regarding that financial interest that is required to be disclosed by any federal, state, or local statute, rule, regulation or charter or knowingly fails to disclose material information about the financial interest as required by any federal, state or local statute, rule, regulation or charter. *Id.*

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

345. Honest Services Restoration Act, H.R. 6391, 111th Cong. (2010).

between public and private sector conduct.[346] There may be a greater need for the law to reach a wider range of conduct in the public sector than simply bribes or kickbacks. The public is entitled to have a high degree of confidence in the integrity of public governance and operations, and the aggressive enforcement of ethical obligations guards the social compact. Not all public officials are elected and can be recalled or voted out of office, and citizens do not have the same right of action as a shareholder in the private sector to reach apparent criminal conduct. To the extent that federal public officials are sued in federal court for breaches of federal conflict of interest statutes, the official will have clear notice of his duties and few federalism concerns are present.[347]

Federal court has also been considered to be a valuable venue for the prosecution of state and local officials for public corruption offenses. During the enactment process of § 1346, a Senate version of the bill made it clear that Congress wanted a law so that prosecutors could bring public corruption charges against those "who violate the public trust at any level of government."[348] Senator Dennis DeConcini (D-AZ) noted that "[s]tate laws are frequently insufficient to combat corruption. [This Act] will allow prosecutors to keep pace with those who attempt to violate the public trust at any level of government."[349] The desirability of a federal forum for state corruption cases was advocated in an amicus brief in *Black*: "Because state prosecutors may be reluctant to bring charges against their political allies or supporters, federal prosecutors with no such connections play an indispensible role in holding corrupt politicians accountable."[350] But, the prosecution

346. *See* John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 431 (1998) (comparing the application of § 1346 to public and private fiduciaries).

347. *See id.* at 456 (recognizing the argument that the "Guarantee Clause provides a source of congressional power for federal anticorruption legislation" (footnote omitted)).

348. 134 CONG. REC. 31,072 (1988) (statement of then-Sen. Joe Biden).

349. *Id.* (statement of then-Sen. Dennis DeConcini).

350. Brief As Amicus Curiae Citizens for Responsibility and Ethics in Washington Supporting Respondent, Black v. United States, 130 S. Ct. 2963 (2010) (No. 08-876), 2009 WL 2978255, at *5; *see also* United States v. Panarella, 277 F.3d 678, 694 (3d Cir. 2002) (describing why federal prosecutors in particular would be helpful in prosecuting public officials). The court in *United States v. Schermerhorn* pointed out:

> [O]ur own experiences in this court have taught us that numerous illegal kickback, election, and like schemes involving state and local officials are, for whatever reasons,

of state and local officials in federal court for breaches of the duty to provide honest services certainly raises federalism concerns.

Congress has a plenary role in policing the conduct of federal public officials. This role does not exist with respect to state and local officials who are subject to the laws of their state and local jurisdictions.[351] The public may find it unsatisfactory that federal officials are not accountable in federal criminal prosecutions for furthering undisclosed financial interests in connection with official decisions or concealing information capable of causing economic detriment to the public fisc. On the other hand, undisclosed self-dealing by state and local officials can be pursued in state court and undisclosed self-dealing in the private sector that involves a loss of money or property can be addressed by the existing mail and wire fraud statutes or other criminal statutes in federal and state court, as well as through civil remedies. Using federal criminal provisions to prosecute state and local officials for public corruption may be considered to "constitute[] an impermissible federal intrusion into the political affairs" of state and local government.[352] The Supreme Court in *McNally* voiced similar concerns that intangible rights mail and wire fraud prosecutions problematically "involve[] the Federal Government in setting standards of . . . good government for local and state officials."[353] States arguably have the most immediate interest in policing their own conflict of interest rules, which can significantly vary from state to state. "[T]he federalization of state ethical regulations and their transformation into twenty-year felonies"[354]

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often not prosecuted by state law enforcers. It is empirically clear to us, therefore, that in the absence of federal intervention many of these political crimes would go unpunished, and perhaps worse, unnoticed or undiscovered.

United States v. Schermerhorn, 713 F. Supp. 88, 92 n.4 (S.D.N.Y. 1989); *see also* Adam H. Kurland, *The Guarantee Clause As a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367, 377 (1989) ("For a variety of reasons, not all of them venal or corrupt, local prosecutors have generally been unable to prosecute local corruption consistently and effectively.").

351. *See* Gregory v. Ashcroft, 501 U.S. 452, 463 (1991) (citing the Guarantee Clause as a basis for state determination of the qualifications of their officials).

352. McNally v. United States, 483 U.S. 350, 357 (1987), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181 (codified as amended at 18 U.S.C. § 1346 (2006)), *as recognized in* Skilling v. United States, 130 S. Ct. 2896 (2010).

353. *Id.* at 360.

354. Brief of Albert W. Alschuler as Amici Curiae Supporting Neither Party, Weyhrauch v. United States, 130 S. Ct. 2971 (2010) (No. 08-1196), 2009 WL 3052480, at *3.

"unmistakably transform[s] the federal-state balance."[355] Even if a clear, uniform federal standard can be fashioned by Congress, a state has the ability to govern itself, police its own public officials, and implement its own interests and policy judgments.[356] Consider *Weyhrauch*, whose intentional failure to disclose a conflict of interest (not a criminal offense in Alaska) formed the basis of the pre-*Skilling* § 1346 prosecution.[357] Even though all citizens are desirous of honest services of governmental officials at all levels of government, given our model of government, federal court may not be the best choice for the prosecution of state and local officials for undisclosed self-dealing or breaches of ethical rules.[358]

With respect to private sector cases, the federal government is often perceived to have the resources to better investigate and prosecute large-scale, complex fraudulent schemes, often affecting more than one state. But, ambiguous criminal standards, such as the ones nullified in *Skilling*, affect not only the distribution of authority between federal and state governments to address criminal conduct, but may also violate the prohibition against the exercise of federal common law criminal jurisdiction.[359] The private interests and private economic gains or losses at stake

355. *Id.*

356. *See id.* at *22–24 (arguing that legislatures are in a better position than courts to draft legislative ethics rules). Professor Alschuler noted in his amicus brief:

> Legislatures can draw sharper lines than courts can. The Alaska Code of Legislative Conduct, for example, [at issue in *Weyhrauch*] declares that legislators and members of their immediate families may not be parties to or have interests in state contracts or leases, but then it establishes several exceptions, including an exception when "the total annual amount of the contract or lease is $5000 or less."

Id. at *22 (quoting ALASKA STAT. § 24.60.040 (2008)).

357. *See* United States v. Weyhrauch, 548 F.3d 1237, 1240 (9th Cir. 2008) (recognizing that federal statutes addressing dishonest conduct are not the only remedy available in light of state specific laws).

358. *See* Roderick M. Hills, Jr., *Corruption and Federalism: (When) Do Federal Criminal Prosecutions Improve Non-Federal Democracy*, 6 THEORETICAL INQUIRIES L. 113 (2004) (weighing the advantages and disadvantages of federal prosecutions).

359. *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812) (discussing the criminal jurisdiction limitations of the federal courts and emphasizing that "all exercise of criminal jurisdiction in common law cases" is not within the implied powers of the federal courts); George D. Brown, *Should Federalism Shield Corruption?—Mail Fraud, State Law and Post-*Lopez *Analysis*, 82 CORNELL L. REV. 225, 231, 277 n.447 (1997) (proposing that federal courts often use "state law to provide the governing standard" in mail fraud cases and suggesting this poses "a serious question as to whether" the federal courts may read the statute in such a manner).

when a private individual does not make a required disclosure are quite different from the public interest in honest government and the harm caused by the loss of public confidence in government at stake in the public sector context. There should be no desire to resurrect the use of civil RICO statutes to "convert[] supposed deprivations of honest services into predicates for . . . treble-damages liability in civil suits."[360]

In the case of private corporations, state law—and typically, Delaware state law—governs the content and enforcement of the legal duties of executives and officers. It is well accepted that many public companies incorporate in Delaware to ensure that Delaware law's limitation on director and officer personal liability will apply to any alleged breaches of fiduciary duties.[361] To the extent there is an increased demand that corporate executives be punished for undisclosed conflicts, and civil law typically insulates the executive from individual liability for breaches of corporate fiduciary duties, existing civil law does not meet that demand.[362] Congress could well conclude that the criminal prosecution of executives and officers of public companies who breach fiduciary

360. Brief for the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioner, Skilling v. United States, 130 S. Ct. 2896 (2010) (No. 08-1394), 2009 WL 4759118, at *3; *see also id.* at *12–13 (warning that the deprivation of honest services might potentially result in RICO offenses and cautioning against a broadened mail fraud statute as it creates the potential for penalties under RICO).

> "[T]here is no such thing as prosecutorial discretion to limit the use of civil RICO by plaintiffs' attorneys." William H. Rehnquist, *Remarks of the Chief Justice*, 21 ST. MARY'S L.J. 5, 10 (1989). Sure enough, plaintiffs' lawyers have figured out how to use [§] 1346 in conjunction with RICO to threaten businesses with treble damages and attorneys' fees under 18 U.S.C. § 1964(c).

Id. at *13.

361. *See* Lisa L. Casey, *Twenty-Eight Words: Enforcing Corporate Fiduciary Duties Through Criminal Prosecution of Honest Services Fraud*, 35 DEL. J. CORP. L. 1, 3, 77–80 (2010) (examining fiduciary duties of corporate executives under Delaware law, which "largely protect[s] public company fiduciaries from [individual] civil liability," and concluding federal criminal law is "trending" in the opposite direction "with the emergence of honest services law as a weapon against corporate wrongdoing"). Casey emphasizes the importance of a "vigilant, informed outside [board of] directors" and its receipt of "full and accurate information about the financial condition of the corporation from executive management" to monitor management effectively, concluding that "[c]riminalizing fraudulent misrepresentations made by officers and their advisors to the firm's directors will increase attention on the potential for such deception, both in the boardroom and in the courtroom." *Id.* at 95–96.

362. *Id.* at 8–9.

duties intending to harm their companies is preferable to any civil suit, including a shareholder suit, which may be possible.[363] But, a law addressing fiduciary duties of loyalty and candor of public companies, tied in with the information needed for effective corporate governance, does not address every employer-employee or fiduciary duty or intangible right to honest services that may have fallen within the purview of pre-*Skilling* honest services case law.

Following the Supreme Court's direction in *Skilling*, any legislation must provide clear and specific notice as to what conduct is prohibited.[364] Ambiguous statutory requirements present interpretive problems that require substantial resources to resolve, may again lead to circuit conflicts, and are unfair to those who should be able to refer to clear directives when acting.[365] To guard against the prosecution and conviction of those who make unwitting mistakes or develop unwitting conflicts of interest, and against the unsatisfactory situation if every person who breaches a fiduciary duty commits a crime, any undisclosed self-dealing to be addressed by Congress in new legislation should require the Government to prove both knowing concealment of material information *and* specific intent to defraud or cause harm.

X. CONCLUSION

The United States Supreme Court's decision in *Skilling* resolved the inconsistencies and conflicts in the interpretation of honest services fraud under § 1346.[366] *Skilling* has restored §§ 1346, 1341, and 1343 to their traditional focus on schemes to defraud or deprive a victim of money or property with the goal of providing clear notice to citizens as to what conduct is prohibited. But, *Skilling* also removed undisclosed self-dealing from the scope of the federal honest services law. It is likely that Congress will be called upon to restore the ability of federal prosecutors to address this significant category of fraudulent and corrupt conduct.

363. *See id.* at 17 (outlining the difficulties in bringing civil suits against executives).

364. *See* Skilling v. United States, 130 S. Ct. 2896, 2933 n.44 (2010) (noting that any new statute "would have to employ standards of sufficient definiteness and specificity to overcome due process concerns").

365. *Id.*

366. *See generally id.* at 2896 (delineating the application of § 1346).