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Skilling Reconsidered: the Legislative-Judicial Dynamic, Honest Services, Fraud, and the Ill-Conceived "Clean Up Government Act"

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SKILLING RECONSIDERED: THE LEGISLATIVE-JUDICIAL DYNAMIC, HONEST SERVICES FRAUD, AND THE ILL-CONCEIVED "CLEAN UP GOVERNMENT ACT"*

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> A real-estate developer seeks expedited environmental review of a proposed real estate project. When the matter comes before the local government, a local official opposes the developer's request for expedited review. At the time this matter is pending, the official's spouse is seeking payment for work she had performed for the developer's overseas affiliate on an unrelated matter.[1]

INTRODUCTION

Every day, all across the country, local and state governmental entities face a myriad of ethical issues and decisions. These entities set up rules and regulations, and the elected officials in these jurisdictions are accountable to their voters for establishing and maintaining ethical rules and standards. In the news story outlined above, one such official may have overstepped ethical bounds and, if so, violated a state ethics rule that subjects the official to a $5000 regulatory fine. But, if the official used the United States mail in connection with this matter, proposed legislation before Congress would render that official guilty of a federal offense and subject to a possible twenty years in federal prison.[2] If we multiply this story by many thousands, then

1. *See* Garrett Therolf, *Supervisor's Wife Was Owed $200,000 by an AEG Affiliate When He Voted on a Measure About Stadium Plans*, L.A. TIMES, Sept. 2, 2011, at A4.

2. The Clean Up Government Act of 2011," H.R. 2572, 111th Cong. (2011). The relevant text is contained in the Appendix. *See infra* pp. 339–41. An earlier version was introduced as the "Honest Services Restoration Act," S. 3854, 111th Cong. (2010). As this Article goes to press, competing versions of this bill are still pending before Congress. The Public Corruption Prosecution Improvements Act, S. 401, 112th Cong. (2011), was reported out of the Senate Judiciary Committee on July 28, 2011. 157 CONG. REC. S5017 (daily ed. July 28, 2011) (reports of committees). The Clean Up Government Act of 2011, H.R. 2572 (2011) was reported out of the House Judiciary Committee on December 1, 2011. 157 CONG. REC. D1303 (daily ed. Dec. 1, 2011) (miscellaneous measures). In addition, there is a third bill, Restore Public Trust Act, H.R. 4054, 112th Cong. (2012), introduced after unsuccessful attempts were made to pass the text of S. 401 and H.R. 2572 in other bills. These other bills include the STOCK Act, which prohibits insider trading by members of Congress. The honest services language was ultimately omitted from that bill. *See* Press Release, Congresswoman Louise M. Slaughter, *After Six Years, Slaughter's Work to End Insider Trading in Congress Will Become Law* (Mar. 22, 2012), http://www.louise.house.gov/index.php?option=com_content&view=article&id=2689:after-six-years-slaughters-work-to-end-insider-trading-in-congress-will-become-law&catid=101:2012-press-releases&Itemid=55 (stating that public corruption prosecution improvements were left out of the STOCK Act). *See Slaughter Claims STOCK Victory*, NIAGARA GAZETTE, Mar. 23, 2012, *available at* 2012 WLNR 6214369 (stating that public corruption prosecution improvements were left out of the STOCK Act).

we may start to feel that there is something seriously wrong with this picture.

The underlying disease is the United States Congress's attempt, over the last forty years, to expand federal power to prosecute an ever-broader array of crimes.[3] In a case arising out of the notorious Enron financial fraud scandal, the United States Supreme Court in *United States v. Skilling* at last confronted one of the most egregious such crimes—federal "honest services" fraud.[4] In its decision, the Court narrowed the statute's reach in order to avoid holding the statute unconstitutionally vague.[5]

With its decision partially striking down the federal honest services fraud statute in the criminal case against former Enron CEO Jeffrey Skilling, the United States Supreme Court took a modest step to combat the trend towards the proliferation of overly-broad federal criminal statutes. Such laws are often passed—or existing laws expanded by prosecutors—in the midst of financial or political scandal, when the government needs to appear to be "doing something."[6] The government faces pressure to produce criminal charges whenever there is a perceived scandal or crisis, whether it is the recent financial sector melt-down or the Enron-era financial scandals. Many of these laws are passed quickly and with little thought or deliberation, producing the synergistic crises of overcriminalization[7] and overfederalization.[8]

3. *See* J. Kelly Strader, *White Collar Crime and Punishment—Reflections on Michael, Martha, and Milberg Weiss,* 15 GEO. MASON L. REV. 45, 48–49 & nn.17–21 (2007) [hereinafter Strader, *White Collar Crime*].

4. 130 S. Ct. 2896 (2010). Although recently decided, the *Skilling* decision has already generated a substantial amount of commentary. For commentary written before the decision was issued, see Nancy J. King, *Introduction:* Skilling v. United States, 63 VAND. L. REV. EN BANC 1 (2010); Julie R. O'Sullivan, *Honest-Services Fraud: A (Vague) Threat to Millions of Blissfully Unaware (and Non-Culpable) American Workers*, 63 VAND. L. REV. EN BANC 23 (2010). For more recent commentary, see Samuel W. Buell, *The Court's Fraud Dud*, 6 DUKE J. CONST. L. & PUB. POL'Y 31 (2010); Lisa Kern Griffin, *The Federal Common Law Crime of Corruption*, 89 N.C. L. REV. 1815, 1823 (2011).

5. The Court's opinion does not expressly state that the statute is unconstitutionally vague, only that the statute might be interpreted as such without the limitation imposed by the Court. *See Skilling*, 130 S. Ct. at 2933.

6. *See* Strader, *White Collar Crime*, *supra* note 3, at 52 ("[T]he explosions of creative, aggressive white collar prosecutions tend to come in cycles. Not surprisingly, these waves tend to coincide with political pressure on the government to address areas of public concern.").

7. *See, e.g.*, Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 748 (2005) [hereinafter Beale, *Many Faces*]. For one recent example of overcriminalization, see Orin

This trend has the potential to affect the criminal justice system in basic ways. Most fundamentally, under the U.S. Constitution's Due Process Clause,[9] we all have a right to know what conduct is criminal and what conduct is not. But the rush to criminalization has produced laws that no one—not even members of the U.S. Supreme Court—can understand. As Justice Scalia famously noted about the federal racketeering (RICO) statute, the definition of one of the crime's key elements is about as clear as "life is a fountain."[10] Such statutes provide prosecutors with largely unfettered discretion in bringing cases based upon novel, untested theories.[11] And to the extent that Congress has played the overcriminalization game, we have had a dramatic intrusion of federal law enforcement authority into areas usually reserved for state and local prosecutors.[12]

Where have the courts been during this overcriminalization crisis? Strangely absent. Courts have been hesitant to interfere with the legislative process by overturning criminal statutes. Even the U.S. Supreme Court has rarely invalidated criminal laws on the grounds that the laws are vague and incomprehensible.

Once again, in the *Skilling* case, the Court declined to find the criminal statute unconstitutionally vague.[13] Instead, the six member majority simply decided to rewrite the statute so that it only applies to bribery and kickbacks—even though those words appear nowhere in the statute.[14] In reaching this result, the Court opened itself to criticism from both sides. For some, including Justice Scalia in concurrence,[15] the Court had exceeded its power by rewriting the honest services statute and thereby acting as a sort of super-legislative body.

S. Kerr, *Should Faking a Name on Facebook Be a Felony?*, WALL ST. J., Sept. 15, 2011, at A15.

8. *See, e.g.*, Beale, *Many Faces*, *supra* note 7, at 768.

9. U.S. CONST. amend. V.

10. H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 252 (1989) (Scalia, J., concurring).

11. Lucian E. Dervan, *Overcriminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 J.L. ECON. & POL'Y 645, 653 (2011). Because of the prevalence of plea bargaining, many of these novel theories are never tested in court. *Id.* at 649.

12. Many have commented on the overcriminalization phenomenon. *See, e.g.*, Beale, *Many Faces*, *supra* note 7, at 748.

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

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

15. In a concurring opinion joined by two other members of the Court, Justice Scalia said that the Court should simply have invalidated a law that is so vague that it cannot be understood. The concurring justices would have found the statute invalid and left it to Congress to remedy the problem. *Skilling*, 130 S. Ct. at 2935 (Scalia, J., concurring).

Under this view, the Court should have voided the statute in its entirety. For others, the Court had overstepped its bounds by taking a powerful anti-corruption tool away from prosecutors.[16] Under this view, the Court should have upheld the statute without modification.

This Article provides a soft defense of the *Skilling* decision, and a critique of Congress's proposed response to the decision.[17] The Article argues that the honest services statute indeed created a vague crime that failed to provide fair notice to potential defendants or to cabin prosecutors' discretion.[18] But, in light of Congress's complicity in creating the overcriminalization and overfederalization crises, the Court probably took the best (or least bad) route in attempting to provide rational boundaries for honest services prosecutions.[19]

Part I of this Article traces the background of honest services fraud.[20] Part II examines the disparate responses to and criticisms of the *Skilling* decision.[21] Part III analyzes the Court's options in *Skilling*, concluding that the judicial-legislative dynamic, in an environment rife with overcriminalization and overfederalization, inevitably requires courts to attempt to provide some rational limits on our ever-expanding federal criminal laws.[22] Part IV provides a preliminary analysis of the proposed Congressional response to *Skilling*, a statute that fails to solve the fundamental ambiguities inherent in "honest services" fraud and that creates more problems than it solves.[23]

I. THE EVOLUTION OF HONEST SERVICES FRAUD

Beginning in the 1970s, federal prosecutors increasingly employed the honest services theory to pursue corrupt politicians on the grounds that those politicians had used the U.S. mails or interstate wires to deprive their constituents of "honest services."[24] Among those convicted were state governors and many others.[25] The theory

16. *See* Griffin, *supra* note 4, at 1823.

17. *See infra* Parts III–IV.

18. *See infra* notes 98–127 and accompanying text.

19. *See infra* notes 142–58 and accompanying text.

20. *See infra* notes 25–60 and accompanying text.

21. *See infra* notes 61–141 and accompanying text.

22. *See infra* notes 142–59 and accompanying text.

23. *See infra* notes 160–82 and accompanying text.

24. *See* J. KELLY STRADER, UNDERSTANDING WHITE COLLAR CRIME 63–64 (3d ed. 2011) [hereinafter STRADER, UNDERSTANDING].

25. *See, e.g.*, United States v. Mandel, 591 F.2d 1347, 1352 (4th Cir. 1979), *aff'd on reh'g*, 602 F.2d 653 (4th Cir. 1979).

was also used against private employees who deprived their employers of "honest services."[26]

A. Prosecutorial Invention of Honest Services Fraud

Federal prosecutors, the courts, and Congress have all contributed to the evolution of the honest services quagmire. It all started in federal prosecutors' offices. In traditional mail or wire fraud cases, the government alleges that the defendant schemed to deprive the victim of money or property.[27] About forty years ago, however, another theory came to be widely applied in mail and wire fraud cases—honest services fraud. Initially, this theory was a prosecutorially-created and judicially-approved form of fraud that was not grounded in the language or history of the underlying statutes. The predecessor to the current mail fraud statute was adopted in 1872, and the wire fraud statute in 1952.[28]

In the 1970s, prosecutors began to charge an array of crimes based on the theory that the defendants' schemes were designed to deprive the victims of the intangible right to honest services.[29] Public officials and private persons were charged with honest services mail or wire fraud based upon alleged deprivations owed, typically, to public citizens and private employers, respectively.[30] In the highest profile cases, the government employed the theory to prosecute state and local officials who had allegedly deprived their constituents of the officials' duty to provide the public with honest services.[31]

B. The *McNally* Decision

Federal courts consistently upheld this new mail and wire fraud theory.[32] Not surprisingly, the honest services theory produced case law that was both inconsistent and difficult to comprehend. In *McNally v. United States*, the Supreme Court overturned the law in all the circuits that had considered the issue and ruled that the honest

26. *See, e.g.*, United States v. George, 477 F.2d 508, 514 (7th Cir. 1973).

27. *See* STRADER, UNDERSTANDING, *supra* note 24, at 78–88.

28. *See* Nicholas J. Wagoner, *Honest-Services Fraud: The Supreme Court Defuses the Government's Weapon of Mass Discretion in* Skilling v. United States, 51 S. TEX. L. REV. 1087, 1092–96 (2010).

29. *See* STRADER, UNDERSTANDING, *supra* note 24, at 85–88.

30. *See* Wagoner, *supra* note 28, at 1096.

31. *See* STRADER, UNDERSTANDING, *supra* note 24, at 78–79; Wagoner, *supra* note 28, at 1096–97.

32. *See, e.g.*, Jason T. Elder, *Federal Mail Fraud Unlearned: Revisiting the Criminal Catch-All*, 77 OR. L. REV. 707, 714 n.33 (1998).

services fraud theory is invalid.[33] Instead, the Court held, a mail or wire fraud case must be based upon proof that the defendant intended to deprive the victim of money or property.[34] In *McNally*, a Kentucky state official participated in a kickback scheme involving state insurance providers.[35] The case was brought solely on the theory that the state and its citizens lost their right to the public officials' honest services; the government did not allege or prove that the scheme was designed to deprive the victims of money or property.[36]

The Supreme Court rejected the honest services theory on two grounds. Initially, the Court focused on the language of the statutes, which criminalize "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses . . . ."[37] The Court rejected the argument that the "money or property" requirement only applies to the false or fraudulent pretenses prong of the statute.[38] The Court further found that Congress intended to incorporate the common law of fraud, which requires a scheme to deprive a victim or money or property.[39]

C. The Honest Services Statute, 18 U.S.C. § 1346

Congress responded quickly to *McNally*.[40] The year after the *McNally* decision, Congress passed a law, codified at § 1346, simply providing that "[f]or purposes of this Chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[41] That is the entirety of the statute. This law was simply tacked on to an unrelated bill without

33. 483 U.S. 350, 359–60 (1987). For a recent, highly publicized case, see *United States v. Blagojevich*, 594 F. Supp. 2d 993 (N.D. Ill. 2009).

34. *McNally*, 483 U.S. at 358–59.

35. *Id.* at 352–53.

36. *Id.* at 352.

37. *Id.* at 352 n.1 (citing 18 U.S.C. § 1341 (1948)).

38. *Id.* at 356–58. The Court in *McNally* based its conclusion on the legislative history. The Court found that the false pretenses language was added to make clear that the mail fraud statute should reach future frauds, as the Court had held in *Durland v. United States*, 161 U.S. 306, 313 (1896).

39. *Id.* at 359 n.8.

40. One member of Congress stated that the law "restores the mail [and wire] fraud provision[s] to where [they were] before the *McNally* decision." 134 CONG. REC. H11, 108-01 (daily ed. Oct. 21, 1988) (statement of Rep. Conyers) (alteration to the original in the quoted text). However, even after § 1346 was enacted, *McNally* continued to operate to limit prosecutions involving intangible property interests. *See* Cleveland v. United States, 531 U.S. 12, 20 (2000) (holding that fraudulent schemes to obtain licenses and permits do not fall within the mail and wire fraud statutes).

41. 18 U.S.C. § 1346 (1994).

any meaningful legislative history.[42] Congress passed the statute as part of a narcotics bill, and the honest services statute was never discussed or debated.[43] The statute does not define "honest services" fraud, a task that was left principally to prosecutors and secondarily to courts.

As many others have recounted, the honest services statute produced a morass of case law with contradictory interpretations of the statute.[44] The Court in *Skilling* described this confusion, stating, "courts have disagreed about whether § 1346 prosecutions must be based on a violation of state law, whether a defendant must contemplate that the victim suffer economic harm, and whether the defendant must act in pursuit of private gain."[45] The courts had also been conflicted over whether pre-§ 1346 law was relevant when interpreting the honest services statute.[46]

42. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (codified as amended at 18 U.S.C. § 1346 (1994)); *see* United States v. Brumley, 116 F.3d 728, 746–47 (5th Cir. 1997) (Jolly, J., dissenting).

43. *Brumley*, 116 F.3d at 743 (Jolly, J., dissenting).

44. Justice Scalia, in his *Skilling* concurrence, described with characteristic flair the uncertain boundaries of honest services fraud:

> The possibilities range from any action that is contrary to public policy or otherwise immoral, to only the disloyalty of a public official or employee to his principal, to only the secret use of a perpetrator's position of trust in order to harm whomever he is beholden to. The duty probably did not have to be rooted in state law, but maybe it did. It might have been more demanding in the case of public officials, but perhaps not. At the time § 1346 was enacted there was no settled criterion for choosing among these options, for conclusively settling what was in and what was out.

Skilling v. United States, 130 S. Ct. 2896, 2938 (2010) (Scalia, J., concurring). Justice Scalia had earlier provided a more detailed critique of the statute. *See* Sorich v. United States, 555 U.S. 1204, 1309–10 (2009) (Scalia, J., dissenting from denial of certiorari).

45. *Skilling*, 130 S. Ct. at 2928 n.36. As one court noted:

> The relationship between state law and the federal honest services statute is unsettled. The Fifth Circuit has held that section 1346 extends only to conduct that independently violates state law. Other circuits have denied that state law plays any necessary role. It is plain that sections 1341 and 1346 enact a federal crime—but beyond that, broad generalizations may be unsafe.

United States v. Urciuoli, 513 F.3d 290, 298 (1st Cir. 2008) (citations omitted).

46. *Compare* United States v. Handakas, 286 F.3d 92, 103 (2d Cir. 2002), *abrogated by* United States v. Rybicki, 354 F.3d 124 (2d Cir. 2003) (en banc), *with Rybicki*, 354 F.3d at 143. The Court in *Skilling* expressly relied upon pre-*McNally* cases. *See Skilling*, 130 S. Ct. at 2933–34. *See generally* STRADER, UNDERSTANDING, *supra* note 24, at 86–87.

D. The *Skilling* Decision

Twenty-two years after Congress enacted § 1346, the Court in *Skilling* finally confronted the meaning and constitutionality of the honest services statute.[47] The *Skilling* case arose from the facts leading to 2001 bankruptcy of Enron. The government charged Jeffrey Skilling, Enron's former CEO, and others with a massive fraud case in connection with Enron's demise.[48] At his trial, the jury convicted Skilling of conspiracy, mail fraud under the honest services theory, and securities fraud.[49] The Court granted certiorari on two honest-services related issues: whether an honest services fraud scheme must include an intended private gain from the scheme's victim and whether the honest services statute is unconstitutionally vague.[50]

Many commentators had hoped that the Court would use the *Skilling* case as an opportunity either to invalidate the honest services statute in its entirety or to provide a comprehensive and coherent construct of the statute.[51] The Court did neither. Reversing Skilling's honest services conviction, the Court declined to invalidate the statute as unconstitutionally vague.[52] Instead, the Court purported to survey honest services case law in order to divine the meaning of the term "honest services."[53] The Court found that the "'vast majority' of the honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes . . . . Congress's 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 . . . ."[54] The Court continued:

> there is no doubt that Congress intended § 1346 to reach *at least* bribes and kickbacks. Reading the statute to proscribe a wider

47. In 2009, the Court granted certiorari in *Skilling* and two other honest services cases. In the first honest service case, the issue was whether an honest services violation must be based upon an underlying state law violation. United States v. Weyhrauch, 548 F.3d 1237, 1239 (2008). In the second honest service case, the issue was whether the honest services fraud scheme must be designed to cause harm to the intended victim of the scheme. Black v. United States, 130 S. Ct. 2963, 2965 (2010). The Court vacated and remanded both of those cases for reconsideration in light of *Skilling*. *Black*, 130 S. Ct. at 2970; *Weyhrauch*, 548 F.3d at 1248.

48. *Skilling*, 130 S. Ct. at 2900.

49. *Id.* at 2901.

50. *Id.* at 2912.

51. *See, e.g.*, Buell, *supra* note 4, at 43.

52. *Skilling* , 130 S. Ct. at 2933.

53. *Id.* at 2928–31.

54. *Id.* at 2930–31.

> range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine . . . . [W]e now hold that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law.[55]

In a footnote, the Court practically dared Congress to attempt to enact a broader honest services statute that would withstand a vagueness challenge.[56]

In an opinion authored by Justice Scalia, three concurring justices concluded that § 1346 is unconstitutionally vague and should have been held invalid in its entirety in Skilling's case.[57] The concurring justices also criticized the Court for overstepping its bounds by essentially creating a new federal crime that appears nowhere in the statute.[58]

II. THE REACTION TO *SKILLING*

Although there were many disparate reactions to the *Skilling* decision, one common response was surprise.[59] The Court's decision was rooted neither in precedent nor in the statute's legislative history or

55. *Id.* at 2931.

56. Responding to arguments made in the government's brief, the Court wrote:

> If Congress were to take up the enterprise of criminalizing "undisclosed self-dealing by a public official or private employee," it would have to employ standards of sufficient definiteness and specificity to overcome due process concerns. 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.

Id. at 2933 n.44 (citations omitted).

57. Justice Scalia argued that the statute should have been held invalid on an as-applied basis, but that the decision would limit future prosecutions under the statute because of *stare decisis*. *Id.* at 2940 (Scalia, J., concurring).

58. *Id.* at 2935 (Scalia, J., concurring) ("[I]n transforming the prohibition of 'honest-services fraud' into a prohibition of 'bribery and kick-backs' [the majority] is wielding a power we long ago abjured: the power to define new federal crimes.") (alteration to the original in the quoted text).

59. Buell, *supra* note 4, at 43.

language.[60] In this light, the decision was vulnerable to attack from all sides, ranging from those who believe that honest services fraud provides prosecutors with an important route for attacking public and private malfeasance to those who believe that "honest services" is a fatally vague crime subject to prosecutorial abuse.[61] Others, including the concurring justices, believe that the new version of the crime leaves many questions unanswered and is nearly as vague as the old one.[62] Finally, some fault the Court for not using the opportunity to provide a comprehensive theory of the law of fraud.[63] This Section analyzes and responds to the principal criticisms of the *Skilling* decision.[64]

A. A Broad Honest Services Fraud Statute is Not a Necessary or Appropriate Vehicle for Addressing Public and Private Malfeasance

Many have argued that a broad honest services statute provides a necessary anti-corruption tool by supplementing existing laws.[65] The

60. *Skilling*, 130 S. Ct. at 2939 (Scalia, J., concurring) ("Among all the pre-*McNally* smorgasbord-offerings of varieties of honest-services fraud, *not one* is limited to bribery and kickbacks. That is a dish the Court has cooked up all on its own"); *see also id.* at 2940 (Scalia, J., concurring) ("Until today, no one has thought (and there is no basis for thinking) that the honest-services statute prohibited only bribery and kickbacks.").

61. *See* Buell, *supra* note 4, at 32.

62. The concurrence argued that limiting "honest services" fraud to bribes and kickbacks:

> would not suffice to eliminate the vagueness of the statute. It would solve (perhaps) the indeterminacy of what acts constitute a breach of the "honest services" obligation under the pre-*McNally* law. But it would not solve the most fundamental indeterminacy: the character of the "fiduciary capacity" to which the bribery and kickback restriction applies. Does it apply only to public officials? Or in addition to private individuals who contract with the public? Or to everyone, including the corporate officer here? The pre-*McNally* case law does not provide an answer. Thus, even with the bribery and kickback limitation the statute does not answer the question "What is the criterion of guilt?"

Skilling, 130 S. Ct. at 2938–39 (Scalia, J., concurring).

63. *See* Buell, *supra* note 4, at 43.

64. *See infra* Part II.A–D.

65. *See, e.g.*, Sara Sun Beale, *An Honest Services Debate*, 8 OHIO ST. J. CRIM. L. 251, 259 (2010) [hereinafter Beale, *Honest Services*] (Congress "enacted § 1346 in order to cast a wider prosecutorial net."); Elizabeth R. Sheyn, *Criminalizing the Denial of Honest Services After* Skilling, 11 WIS. L. REV. 27, 52 (2011) (advocating a Congressional response to *Skilling*); Jennifer I. Rowe, Comment, *The Future of Honest Services Fraud*, 74 ALB. L. REV. 421, 438–39 (2010–2011) (positing that fed-

usual reasons are lack of resources and potential political interference at the state and local level.[66] In the story discussed at the beginning of this Article, a local official may have been guilty of violating state ethics rules.[67] In one of the cases in which the Supreme Court granted certiorari along with *Skilling*,[68] a state legislator apparently violated state ethics rules by failing to disclose a more direct conflict of interest.[69] Such cases, some argue, are important crimes that should be prosecuted at the federal level.

The response is that rendering such acts federal crimes subject to substantial prison time throws our federal system out of whack in a myriad of ways.[70] On the federal side, do we want our limited resources to be used to prosecute individual violations of state and local ethics rules? The risk of politically retributive charges is simply too great,[71] and the use of resources suspect. On the state and local side, would federal intrusion remove the incentive to self-police such violations?[72]

Yes, on occasion, local law enforcement agencies may be too entwined with local politics to be able to do the job effectively. And in cases of large-scale corruption, the balance might tip towards federal involvement. In such cases, however, it is almost inconceivable that the corrupt officials have not violated federal law more directly appli-

eral intervention is necessary in both public and private sector state and local fraud cases).

66. *See, e.g.*, Rowe, *supra* note 65, at 438.

67. *See supra* note 1.

68. *See* United States v. Weyhrauch, 548 F.3d 1237, 1239 (2008), *vacated*, 130 S. Ct. 2971 (2010).

69. *Id.* at 1239–40.

70. *See* Beale, *Honest Services*, *supra* note 65, at 260 ("[I]t's the federal government setting the standards for good government on the part of state and local officials. That's a terrible idea.").

71. For a highly-publicized case, consider the prosecution of former Alabama governor Don Siegelman, who was charged with various crimes, including honest services fraud. For the latest decision in this ongoing saga, see *United States v. Siegelman*, 640 F.3d 1159 (11th Cir. 2011). For additional background to this controversial case, which many consider to have been politically motivated, see John Schwartz, *Judges Take Another Look at Ex-Alabama Governor's Conviction*, N.Y. TIMES, Jan. 20, 2011, at A16.

72. *See, e.g.*, John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673, 712 (1999) (arguing that the overfederalization of criminal law has had the effect of consolidating power in the federal government at the expense of the states); Beale, *Honest Services*, *supra* note 65, at 265 (arguing that the threat of the rare federal prosecution may reduce incentives for state and local governments to clean up their own houses); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1172–74 (1995) (arguing that overfederalization damages state and local law enforcement).

cable to their actions. State bribery laws, for example, are RICO predicates.[73] The federal extortion statute applies to state and local officials who use the power of their office to extract bribes.[74] If the feds need to get involved because of enforcement barriers at the local level, then they will almost surely have a way to do so without resorting to a vague, concocted crime such as honest services fraud. With respect to corrupt federal officials, the wide reach of extortion, bribery, and gratuities statutes covers the gamut of serious wrongdoing.[75]

All in all, in a substantial majority of cases, any serious corruption scheme will fall within of the ambit of one or more federal criminal statutes. For federal public officials, these are, explicitly, anti-corruption statutes. Some argue the high-profile state and local corruption cases, such as that against former Illinois governor Rod Blagojevich, demonstrate the need for the honest services statute.[76] Yet, in the vast majority of these cases, an honest services charge is unnecessary.

The Blagojevich case provides a telling example. The government charged that he committed a number of crimes, including federal program bribery, false statements, and extortion, arising out of his attempt to sell President Obama's senate seat.[77] The indictment also included a RICO charge, with federal law extortion and state law

73. 18 U.S.C. § 1961 (2006).

74. *Id.* § 1951. The leading Supreme Court cases interpreting this statute in the public corruption context are *McCormick v. United States*, 500 U.S. 257 (1991), and *Evans v. United States*, 504 U.S. 255 (1992). For criticism of the broad reading of the statute utilized in the *Evans* decision, see Thomas A. Secrest, *Criminal Law: Bribery Equals Extortion: The Supreme Court Refuses to Make Inducement a Necessary Element of Extortion "Under Color of Official Right" Under the Hobbs Act, 18 U.S.C. § 1951(b):* Evans v. United States, 19 U. DAYTON L. REV. 251, 277 (1993) ("The courts' expansion of the Hobbs Act, as evidenced in *Evans,* results in granting federal prosecutors 'virtually unlimited discretion to define both the meaning of the Hobbs Act as well as whom it should reach.'").

75. Although the Supreme Court limited the reach of the gratuities statute in *United States v. Sun-Diamond Growers*, 526 U.S. 398, 409–12 (1999), it has continually expanded the reach of the federal bribery statutes to cover, for example, remote connections to the federal government. *See, e.g.*, Dixson v. United States, 465 U.S. 482 (1984). The Supreme Court has exhibited a similar tendency by expanding the federal extortion statute to reach receipt of bribes by state and local officials. *See, e.g.*, Evans v. United States, 504 U.S. 255 (1992). This expanded federal reach has its own critics. *See, e.g.*, Baker, *supra* note 72, at 712; Brickey, *supra* note 72, at 1172–74; Secrest, *supra* note 74, at 277. But these statutes, at least, have the virtue of criminalizing a defined scope of activities.

76. *See, e.g.*, Beale, *Honest Services*, *supra* note 65, at 265.

77. Second Superseding Indictment, United States v. Blagojevich, No. 08 CR888 (N.D. Ill.), *available at* http://www.justice.gov/usao/iln/pr/chicago/2010/pr0204_02a.pdf.

bribery as the principal predicates. Blagojevich was convicted of those crimes, in addition to honest services fraud.[78] The honest services fraud charge was therefore simply unnecessary to punish Blagojevich for his actions.

It is true that these other statutes have their own overbreadth problems. The RICO statute, for example, itself is notoriously laden with unclear terms, such as "pattern" and "enterprise."[79] But RICO prosecutions are limited by Department of Justice policies,[80] and the statute usually is employed to attack wide scale criminal wrongdoing, not individual ethics breaches by state and local officials.

In private sector cases, the *Skilling* case itself shows the redundancy of the honest services statute. Skilling's crime was, fundamentally, securities fraud–conspiring to mislead investors into believing that Enron was financially sound when in fact the company's fortunes were spiraling downward.[81] The federal government has a valid interest in large scale fraud, either because of the far-reaching impact of such fraud schemes (like Enron), or because a state or local prosecutor might lack the resources to take on such a case (Enron), or both.[82] Such large-scale fraud will nearly always (and maybe even always) entail other crimes, such as securities fraud, bank fraud, and many other crimes.[83] Providing prosecutors with the ability to pile on charges, perhaps in an effort to coerce a plea, should not be a justification for a duplicative federal anti-fraud statute.[84] And more mundane fraud cases—a store buyer taking a kickback from a supplier, for example[85]—really do not merit federal action; indeed, such cases divert resources from the cases that more urgently require the federal government's attention.

78. *See* Bob Secter & Jeff Coen, *Blagojevich on Guilty Verdict: 'I, Frankly, Am Stunned*,' CHI. TRIB. (June 27, 2011), http://articles.chicagotribune.com/2011-06-27/news/chi-blagojevich-jurors-going-into-their-10th-day-20110627_1_political-corruption-crime-spree-abraham-lincoln-roll-new-jury.

79. *See* STRADER, UNDERSTANDING, *supra* note 24, at 321–26, 335–41.

80. *Id.* at 316–17.

81. Skilling was convicted of one count of conspiracy, one count of insider trading, five counts of making false statements to auditors, and twelve counts of securities fraud. United States v. Skilling, 638 F.3d 480, 481 (5th Cir. 2011). Weyhrauch was indicted for honest services fraud. United States v. Weyhrauch, 548 F.3d 1237, 1243 (9th Cir. 2008), *vacated*, 130 S. Ct. 2971 (2010). Black was convicted of mail and wire fraud in violation of § 1341 and of obstruction of justice in violation of § 1512(c). Black v. United States, 130 S. Ct. 2963, 2967–68 (2010).

82. *See* STRADER, UNDERSTANDING, *supra* note 24, at 5–7.

83. *See, e.g.*, STRADER, UNDERSTANDING, *supra* note 24, at 89–93.

84. *See* Dervan, *supra* note 11, at 645.

85. *See* United States v. George, 477 F.2d 508, 510–11 (1973).

In public sector cases, it is true that the need for a broad anti-corruption statute may be greater in some ways because of overt and subtle conflicts of interest that state and local law enforcement agencies may face when confronted with corruption by state and local officials with whom the agencies may have close contacts. But, once again, the federal government must face decisions concerning resource allocations. If federal law enforcement addressed all actual and potential conflicts of interest, such as the one discussed at the beginning of this Article, then federal prosecutors would have no time for anything else.

In addition, an honest services statute focused on bribes and kickbacks could have the effect of directing prosecutors' energy at the most egregious cases, leaving less important cases to state and local law enforcement and to regulatory agencies. For example, as one commentator has argued in the particular context of health care fraud, "while *Skilling* is widely considered to have narrowed the scope of honest services fraud overall, it may turn out to have the paradoxical effect of inviting additional prosecutions of physicians and others in the health care industry."[86] Because kickbacks are such a widespread practice in the health care industry, an honest services fraud statute focused on this practice could energize prosecutors to use honest services fraud in such cases.[87]

Similar benefits could occur in public sector corruption cases. Limiting honest services fraud to bribes and kickbacks directs the statute to the kind of wrongdoing that most directly affects the public's interests. More subtle forms of political self-dealing, including undisclosed conflicts of interest, simply appear in too many shades of gray to fall comfortably within a single federal criminal fraud statute.

At a minimum, Congress should recognize that not every instance of public malfeasance is appropriately addressed by the criminal law. Yes, politicians are eager to appear to be tough on crime, particularly where they can appear to be acting to punish their own. But this motivation runs the risk of sliding into sanctimonious and ill-considered legislation. Not every shady political dealing should be a crime, for if it were prosecutors would have no time to pursue other matters. And not every politician's crime should be dealt with at the federal level.

86. Joan H. Krause, Skilling *and The Pursuit of Health Care Fraud*, 66 U. Miami L. Rev. 363, 364–65 (2012).

87. *Id.*

B. The Court's Decision to Narrow Rather Than Void the Honest Services Statute Was a Reasonable Response to Overcriminalization

Both the *Skilling* concurring justices and a number of commentators have opined that the Court overstepped its bounds in narrowing the honest services statute rather than holding the statute void in its entirety. Justice Scalia stated that, "in transforming the prohibition of 'honest-services fraud' into a prohibition of 'bribery and kick-backs' [the Court] is wielding a power we long ago abjured: the power to define new federal crimes."[88] Others flatly stated that the Court "stepped over the separation of powers line."[89]

Although there is a certain purity to this criticism, it ignores reality. Courts are frequently confronted with unclear statutes, and a key part of a court's job is to interpret such statutes. In particular, the United States Supreme Court has done this over and over again.[90] Given this reality, a strict separation of powers doctrine that severely limits judicial statutory interpretation is largely theoretical. As Professor John Jeffries has written, under the traditional view,

> the legislature . . . was the only legitimate institution for enforcing societal judgments through the penal law. Judicial innovation was politically illegitimate . . . . Although doubtless less central than in the past, [separation of powers] remains an established feature of American political ideology. As a guide for judicial action in the field of criminal law, however, separation of powers is not very helpful.[91]

Why does Jeffries reach this conclusion? Because of the problem of vague statutes. Simply put, "interstitial judicial lawmaking is at least tolerated and perhaps affirmatively authorized. More to the point, it is inevitable. Any resolution of statutory ambiguity involves judicial choice. The resulting 'gloss' on the legislative text is both politically legitimate and institutionally unavoidable."[92]

88. Skilling v. United States, 130 S. Ct. 2896, 2935 (2010) (Scalia, J., concurring) (alteration in original).

89. Beale, *Honest Services*, *supra* note 65, at 254 (describing uncertainties post-*Skilling*).

90. *See* J. Kelly Strader, *Lawrence's Criminal Law*, 16 BERKELEY J. CRIM. L. 41, 63 (2011) ("[T]he Supreme Court frequently interprets federal criminal statutes and has created a large body of case law from which to draw basic principles of statutory interpretation.").

91. John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 202 (1985).

92. *Id.* at 204.

In this context, the *Skilling* concurrence was simply unrealistic in its insistence on judicial purity in construing ambiguous statutes.[93] The *Skilling* reading of the honest services statute no more constituted legislation than did the Court's reading, for example, of RICO's "pattern" requirement to mean "continuity plus relationship,"[94] an interpretation with which Justice Scalia concurred, albeit reluctantly.[95] There are many similar examples, and so the *Skilling* critics really are crying wolf when complaining that the Court has overstepped its bounds.

C. The *Skilling* Decision Substantially Reduced the Risks Inherent in a Vague Criminal Statute

One of the most frequent criticisms of *Skilling* is that it raises as many questions as it answers.[96] Most significantly perhaps, courts are already expressing uncertainty concerning whether honest services fraud based on an omission must include proof that the defendant owed a fiduciary duty.[97] This is one of the most potent criticisms that has been leveled at the decision, and it has some validity.

The Court in *Skilling* apparently concluded that issues of interpretation would rarely arise under its limited definition of honest services.[98] The Court was mistaken.[99] Many interpretation issues remain, including: the definitions of "bribe" and "kickback;" the source (state or federal law or statutes) of those definitions;[100] whether the

93. *Skilling*, 130 S. Ct. at 2939.

94. H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 239 (1989).

95. *Id.* at 251–56 (Scalia, J., concurring).

96. Beale, *Honest Services*, *supra* note 65, at 254; *see also Skilling*, 130 S. Ct. at 2938–39 (Scalia, J., concurring).

97. United States v. Milovanovic, 627 F.3d 405, 408–10 (9th Cir. 2010) (holding that such a duty is not required).

98. *Skilling*, 130 S. Ct. at 2931 n.41 (issues of ambiguity are "rare in bribe and kickback cases. The existence of a fiduciary relationship, under any definition of that term, usually [has been] beyond dispute; examples include public official-public, employee-employer, and union official-union members.") (citations omitted).

99. *See, e.g.*, *Milovanovic*, 627 F.3d at 409; Brief for the United States at 27, United States v. Scanlon, No. 11-3024, 2011 WL 3440447 (D.C. Cir. Jan. 20, 2012) ("[A]t no point did *Skilling* hold that these three fiduciary relationships marked the outer boundaries of § 1346"). *See generally* STRADER, UNDERSTANDING, *supra* note 24, at 87–88.

100. United States v. Rybicki, 354 F.3d 124, 163 (2d Cir. 2003) (Jacobs, J., dissenting); *see* United States v. Carbo, 572 F.3d 112, 115 (3d Cir. 2009) (holding that the most obvious form of honest services fraud is outright bribery of a public official); Memorandum of Robert Geddie In Support of Motion to Dismiss Count Three (3) and Counts Twenty-Three (23) Through Thirty-Three (33) Or In the Alternative, For

bribe or kickback must violate the law; whether that law must provide for criminal sanctions in order to qualify; whether honest services fraud extends beyond public officials and agents of public entities to reach private persons; whether, if the statute reaches private persons, the same standards apply as for public officials and agents; in the case of a private party, whether an intended harm is required and, if so, whether economic harm is required or some other sort of harm would suffice;[101] whether, in a case of undisclosed self-dealing, the government could instead argue the deprivation of an intangible property right.[102]

To understand the uncertainties that courts still must confront post-*Skilling*, take the recent decision in *United States v. Milovanovic*.[103] In that case, the defendants were charged in connection with a bribery scheme involving a state's issuance of commercial drivers' licenses. The state hired a company to provide translating services in connection with the issuance of those licenses.[104] The defendants schemed to take bribes in exchange for assisting particular license applicants.[105] The defendants moved to dismiss the honest services charge, arguing that they owed no fiduciary duty to the victim of the scheme, the state.[106] The district court agreed and dismissed the honest services charges.[107] On appeal, the Ninth Circuit reversed, holding that a breach of a fiduciary duty is not required in an honest services case.[108] In place of this requirement, the court found that an honest services case must be based upon "a legally enforceable right to have another provide honest services."[109]

a Bill of Particulars at 10, United States v. Geddie, 2:10-CR-00186, 2011 WL 2278910 (M.D. Ala. Apr. 22, 2011) (citing *Skilling* for the proposition that "§ 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law . . . involving public officials in terms of under-the-table cash or gratuities.") (citation omitted) (alteration in original).

101. *See* United States v. Black, 530 F.3d 596, 600–02 (7th Cir. 2008), *vacated*, 130 S. Ct. 2963 (2010), *remanded to* 625 F.3d 386, 391–92 (7th Cir. 2010) (reversing honest services fraud conviction).

102. *See* Dane C. Ball, *Repacking* Skilling*-Barred Fraud Theories: A Form of Damage Control that Goes Too Far*, 5 WHITE COLLAR CRIME REP. (BNA) 22, 741 (2010).

103. 627 F.3d 405 (9th Cir. 2010).

104. *Milovanovic*, 627 F.3d at 407.

105. *Id.*

106. *Id.* at 407–08.

107. *Id.* at 407.

108. *Id.* at 413.

109. *Id.* at 412 (citing United States v. Rybicki, 354 F.3d 124, 155 (2d Cir. 2003) (Raggi, J., concurring)). The dissent argued that, "[w]ithout some kind of limiting

In this light, the *Skilling* decision has not resolved the many open questions regarding the scope of honest services fraud.[110] Still, limiting the statute to bribes and kickbacks surely does make it far more likely that a potential defendant is on notice of the consequences of such unethical actions.[111] Also, as the Court has noted, the fair notice aspect of the vagueness doctrine ultimately is not the most important aspect of the doctrine.[112] Although many, if not most, commentators tend to focus on the notice provision of the doctrine,[113] fair notice

principle, honest services wire fraud could potentially make relatively innocuous conduct subject to criminal sanctions." *Milovanovic*, 627 F.3d at 414 (Fernandez, J., dissenting) (quoting United States v. Kincaid-Chauncey, 556 F.3d 923, 940 (9th Cir. 2009)).

110. In *Skilling*, the Court referred to *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003), as a "leading" honest services case. Skilling v. United States, 130 S. Ct. 2896, 2929 (2010). The Second Circuit in *Rybicki* rejected a vagueness challenge to § 1346. The *Rybicki* dissent, however, responded by noting the myriad ways in which the statute remains unclear. *See* United States v. Rybicki, 354 F.3d 124, 162–63 (2d Cir. 2003) (Jacobs, J., dissenting). For a more detailed discussion of *Rybicki*, see STRADER, UNDERSTANDING, *supra* note 24, at 87.

111. *See* Beale, *Honest Services*, *supra* note 65, at 259 (citing the *Weyhrauch* case and noting that, since the defendant's actions violated ethical rules but not state law, it would be difficult for a defendant to be on notice that his actions constituted a federal felony).

112. *See* Kolender v. Lawson, 461 U.S. 352, 357–58 (1983) ("[A]lthough the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'") (citation omitted). Many consider the fair warning prong actually to be something of a myth. *See* Jeffries, *supra* note 91, at 210 ("[T]he continuing strength of 'ignorance of the law is no excuse' is telling evidence of the abstracted and artificial character of the rhetoric of 'fair warning.'"). The Court has stated, in any event, that "[v]agueness may invalidate a criminal law for either of [the] two independent reasons." Chicago v. Morales, 527 U.S. 41, 56 (1999).

113. This Article does not undertake an exploration of the complicated, and unsettled, law of facial versus as-applied statutory challenges. As others have noted, the Court applies the distinction in inconsistent, result-driven ways. *See, e.g.*, Beale, *Honest Services*, *supra* note 65, at 257 (the Court "hasn't articulated a clear standard for when it will permit facial challenges and its decisions have been inconsistent"); Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 964 (2011) ("With the distinction between as-applied and facial challenges being less fundamental than courts and commentators have often assumed, it should occasion no surprise that the Supreme Court does not always labor self-consciously to draw that distinction . . . ."); David L. Franklin, *Looking Through Both Ends of the Telescope: Facial Challenges and the Roberts Court*, 36 HASTINGS CONST. L.Q. 689, 690 (2008) ("[S]everal of the Roberts Court's decisions adopt the language of the as-applied model even as their reasoning pursues the logic of the facial model."); Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657, 665 (2010) ("[N]o single consideration governed the use of facial chal-

does not require actual notice or understanding, just the potential for notice. And in construing statutes for this purpose, courts generally take judicial interpretations of statutes into account.[114] Under these standards, in a substantial majority of honest services cases, the defendants almost certainly knew that their actions were unethical and potentially unlawful.

Far more significant, though, is the potential that a vague statute will lead prosecutors to stretch laws in ways in which they have never before been used,[115] often for improper reasons such as career enhancement or political bias.[116] As Professor Jeffries has written, the "rule of law" is the grounding principle of the vagueness doctrine. The rule of law in the enforcement of criminal laws seeks to limit "caprice and whim, the misuse of government power for private ends, and the unacknowledged reliance on illegitimate criteria of selection. The goals to be advanced are regularity and evenhandedness in the administration of justice and accountability in the use of government power."[117]

It is difficult to deny that the honest services statute, pre-*Skilling*, was subject to the "caprice and whim" of federal prosecutors. Although uncertainties exist concerning post-*Skilling* honest services fraud, they are certainly fewer, and less complex, than those under the previous incarnation of honest services fraud.

There is one significant caveat to this conclusion, however. Federal prosecutors, in search of ways to resurrect honest services charges post-*Skilling*, may be tempted to try to stretch the mail and wire fraud

lenges, which . . . involves a mixture of substantive constitutional law, institutional competence and statutory interpretation.").

114. *See, e.g.*, Beale, *Honest Services*, *supra* note 65, at 258 ("[H]ow can a statute be unconstitutionally vague on its face when the text plus the relevant case law provide adequate notice to many defendants of the prohibited conduct and accompanying penalties?").

115. *See* Strader, *White Collar Crime*, *supra* note 3, at 49–52.

116. *See, e.g.*, Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 386 (2009) [hereinafter Beale, *Rethinking*] ("The criticism of the Siegelman prosecution generally focuses on . . . a claim that Siegelman was targeted by the Bush White House and U.S. Attorney's Office because he was a successful Democratic politician . . . .").

117. Jeffries, *supra* note 91, at 212–13; *see also Kolender*, 461 U.S. at 352 (a statute is unconstitutionally vague when it "vests virtually complete discretion in the hands of police to determine whether the suspect has satisfied the statute"). For an analysis of the breadth of the honest services statute, see Randall D. Eliason, *Surgery with a Meat Axe: Using Honest Services Fraud to Prosecute Federal Corruption,* 99 J. CRIM. L. & CRIMINOLOGY 929, 933, 956–57 (2009).

statutes in other ways.[118] It is the nature of prosecutorial power that those who make charging decisions will attempt to take criminal statutes to their limits.[119] Thus, if a federal prosecutor has determined that a particular individual merits prosecution, then the prosecutor is likely to try to find a law to fit the person. In the absence of an honest services theory or other applicable statute, however, what is a prosecutor to do?

Unfortunately for those looking for predictability in the enforcement of criminal law, the Supreme Court has left the door open for another theory. In perhaps its most important post-*McNally*, pre-*Skilling* mail/wire fraud case, *Carpenter v. United States*, the Court adopted an expansive version of property rights that creative prosecutors may be able to use to fill the void left by *Skilling*.[120] Although the Court held in *McNally* that a mail or wire case may not be based upon the "intangible" right to honest services, the Court held in *Carpenter* that such a case may be based upon "intangible" *property* rights. In that case, the right at issue was a newspaper's right to the confidentiality and exclusive use of information gathered by its reporters.[121]

The problem with the *Carpenter* decision is that, even more than with *Skilling*, the Court left the boundaries of its rule unclear. The Court never defined the nature or source of the duties that employees owe employers that might give right to "intangible" property rights.[122] As Professor John Coffee has noted, the decision potentially criminalized all breaches of fiduciary duties owed by employees to employ-

118. 18 U.S.C. §§ 1341, 1343 (2008).

119. *See* Beale, *Rethinking*, *supra* note 116, at 438 ("In the case of the more amorphous argument that a state or local official deprived the citizens of his or her honest services, however, the prosecutor is not merely assessing the strength of the evidence, but in many cases is also seeking to expand the definition of the conduct that constitutes a crime."); Eliason, *supra* note 117, at 972–73; Strader, *White Collar Crime*, *supra* note 3, at 52.

120. 484 U.S. 19, 26–28 (1987).

121. In *Carpenter*, a Wall Street Journal reporter wrote a regular financial column that often affected stock prices. Carpenter v. United States, 484 U.S. 19, 19–20 (1987). The reporter and his co-conspirators traded on stocks discussed in the column before the column was published, reaping substantial profits and violating the terms of the reporter's employment agreement. *Id.*

122. *See* John C. Coffee Jr., *Hush!: The Criminal Status of Confidential Information After* McNally *and* Carpenter *and the Enduring Problem of Overcriminalization*, 26 AM. CRIM. L. REV. 121, 122–23 (1988) (arguing that the decision is "(a) historically unsound, (b) inconsistent with most statutory law dealing with the subject of trade secrets, and (c) capable of trivializing the Court's decision only months earlier in *McNally v. United States*, which clearly sought to cut back on the amoeba-like growth of the mail and wire fraud statutes").

ers.[123] In addition, *Carpenter* allowed federal prosecutors to bring cases that would ordinarily be left to state civil and criminal law.[124]

We can already see the ricochet effect that *Skilling* will have on cases where prosecutors seek to overcome *Skilling*'s holding by creatively defining deprivations of "intangible" property rights. This development will simply require the courts to be vigilant in restricting prosecutors' attempts to expand the definition of property under the mail and wire fraud statutes.[125]

D. The Court in *Skilling* Properly Declined to Engage in a More Detailed Rewriting of the Honest Services Statute

One criticism of *Skilling* is that it did not address the underlying theoretical and conceptual challenges of the federal law of honest services fraud.[126] There are many such challenges, but several stand out: In the case of an omission to disclose a bribe or kickback, must the defendant owe a fiduciary duty to the victim? If so, to what body of law do we look to ascertain the presence of such a duty?[127] In the case of a private sector defendant, must the victim be deprived on some sort of tangible harm? If so, what sorts of harm qualify?[128]

But to respond to these questions in a meaningful way, the Court would have had to undertake a far more drastic rewriting of the honest services statute than it did. . This process would necessarily have involved describing the reaches of duties giving rise to fraud charges, among other issues. Further, the Court would have been required to define the terms "bribe" and "kickback" in the context of a case that involved neither.[129] Does the definition of bribery under the federal

123. *Id.*

124. *See* STRADER, UNDERSTANDING, *supra* note 24, at 79–80. The Court did later attempt to limit the definition of "property" to traditional property rights, holding in *Cleveland v. United States*, 531 U.S. 12, 15 (2000), that unissued permits or licenses are not "property" under § 1341. *See id.* at 81. The pending legislation, reproduced in the Appendix, would reverse this decision. *See infra* pp. 339–41.

125. *See* Beale, *Rethinking*, *supra* note 116, at 438.

126. Buell, *supra* note 4, at 43.

127. Skilling v. United States, 130 S. Ct. 2896, 2938–39 (2010) (Scalia, J., concurring).

128. *See* Black v. United States, 130 S. Ct. 2963 (2010); James Lockhart, *Validity, Construction and Application of 18 U.S.C.A. § 1346, Providing that, for Purposes of Some Federal Criminal Statutes, Term "Scheme or Artifice to Defraud" Includes Scheme or Artifice to Deprive Another of Intangible Right to Honest Services,* 172 A.L.R. FED. 109 (2001).

129. *See Skilling*, 130 S. Ct. at 2935 (Scalia, J., concurring); Buell, *supra* note 4, at 45 ("Supreme Court opinions, of course, almost always open up new issues and fail to resolve old ones. The more serious deficit in the *Skilling* opinion is the missed oppor-

bribery law apply, thus requiring a quid pro quo? Some even argue that the Court should have used the opportunity to provide us with a black letter exegesis on the very nature of fraud itself.[130] But for the Court to have undertaken this task would have been unprecedented and probably beyond the Court's capacity.

It is true that the Court has expounded upon certain forms of fraud, such as securities fraud, in attempts to clarify particular theories of such fraud.[131] Using insider trading as an example, courts have long held that corporate insiders who possess material non-public information must either disclose that information or abstain from trading.[132] The theoretical basis for such fraud is the insider's breach of duty, when engaging in such self-dealing, to the corporation and its shareholders.[133] But what if the information is stolen not by a corporate insider, but instead by a lawyer who is working on a client's acquisition of a target company and who trades in the target company's stock? That lawyer is not a corporate insider of the target company, and so the traditional rule of insider trading does not apply.[134]

Resolving a circuit split and much uncertainty over this issue, the Court held in *United States v. O'Hagan* that the lawyer's breach of fiduciary duty to the firm and the firm's client— parties that expected the information to be kept confidential—is actionable as securities fraud under the "misappropriation" theory.[135] Although subject to substantial criticism because of its own definitional problems,[136] this theory has developed in the context of a substantial body of case law that does, arguably, fairly define its boundaries. The federal law of fraud in general, and the post-*Skilling* law of honest services fraud in particular, can similarly be left to the sort of natural evolution that securities fraud has undergone.

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tunity to grapple seriously with the relationship and context problem in the law of fraud.").

130. *See* Buell, *supra* note 4, at 45.

131. *See, e.g.*, United States v. O'Hagan, 521 U.S. 642 (1997).

132. *Id.*

133. *Id.* at 643.

134. *Id.* at 653 n.5.

135. *Id.* at 647.

136. *See* David M. Brodsky & Daniel J. Kramer, *A Critique of the Misappropriation Theory of Insider Trading*, 20 CARDOZO L. REV. 41, 80 (1998) ("By injecting unclear notions of unfairness into the federal securities laws, the misappropriation theory fails to provide a clear or rational standard."); Steve Thel, *Statutory Findings and Insider Trading Regulation,* 50 VAND. L. REV. 1091, 1120–21 (1997) (noting that the boundaries of the theory are unclear).

And there is an additional cautionary tale here. The Court in *O'Hagan* would have been well within its bounds to reject the misappropriation theory, as the dissent argued so vehemently that it should have done.[137] This would have left the hard work of defining this prosecutorially-created and judicially-sanctioned crime—the misappropriation theory appears nowhere in the securities fraud statutes—to Congress and the Securities and Exchange Commission.[138] But assuming the Court appropriately endorsed the misappropriation theory, it also made sense for the Court not to attempt to define the outer boundaries of that theory, but to leave the task to lower courts when applying particular sets of facts. Likewise, it was reasonable for the Court to remand the Skilling companion cases—*Weyhrauch* and *Black*—without deciding the important issues that those cases raised. If the cases turned out, on remand, not to be viable because *Skilling*'s holding, then the Court would have been overstepping its bounds to reach those issues.[139]

III. THE COURT'S OPTIONS IN *SKILLING*

As discussed above, the *Skilling* decision leaves many questions unanswered, but the decision does make the reach of honest services fraud more certain.[140] In broader terms, what lessons can we glean from *Skilling*'s approach to the task of interpreting complex criminal laws? Given the inevitability of the judicial construction of penal statutes, are there governing principles that courts usually employ, or should employ, when construing ambiguous statutes? Many commentators have attempted to provide guidelines,[141] but for present

137. *O'Hagan*, 521 U.S. at 680.

138. *See* STRADER, UNDERSTANDING, *supra* note 24, at 108–09.

139. United States v. Black, 625 F.3d 386, 394 (7th Cir. 2010); United States v. Weyhrauch, 623 F. 3d 707, 708 (9th Cir. 2010).

140. As Professor Jeffries has written, "a judge confronting ambiguity in a penal statute might usefully ask whether a proposed resolution makes the law more or less certain." Jeffries, *supra* note 91, at 220.

141. *See, e.g.*, Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2032 (2002) (positing a "Preference-Estimating" theory, which argues that courts should interpret statutes to match what Congress would enact in the current legislative environment); William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 415 (1991) (positing a "Dynamic Statutory Interpretation" theory, which argues that courts should interpret statutes in conformity with social changes); John Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2388, 2486 (2003) (arguing in favor of textualism, which requires that judges enforce the plain meaning of the statute, even if it leads to absurd results); *see also* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L.

purposes the focus is on the practical realities that the Court faced in *Skilling*.

Given the attacks the Court took from all sides, what were the Court's options in the case? There appear to have been four obvious courses of action: (1) do nothing, and leave the uncertainty over honest services fraud in place;[142] (2) invalidate the entire statute, leading almost inevitably to a Congressional response that would, given Congress's track record, make matters worse;[143] (3) undertake a complete reworking of mail fraud and honest services fraud, a task the Court is ill-equipped to undertake and has rarely, if ever, successfully undertaken in analogous circumstances; or (4) attempt to provide some clarity to the statute by narrowing its focus, which is what the bribery and kickback limitation arguably does. It is not irrational to conclude that the fourth option was the best, or least bad, alternative. Despite what some have claimed, the honest services statute pre-*Skilling* was truly ambiguous.[144] Indeed, many would argue that the Court's job is to clarify such ambiguity.[145] A pragmatic approach to the problem is, in this context, largely defensible.

Justice Ginsburg, who wrote the *Skilling* majority opinion, appears to be, at heart, a pragmatist when confronted with complex federal criminal law issues. Her majority opinion in *O'Hagan*, for example, upheld the misappropriation theory on practical grounds, finding the theory necessary to safeguard confidence in the fairness of the securities markets.[146] The Court reached this conclusion without defining the boundaries of the fiduciary duty that a misappropriating party must owe to a wronged party, leaving it to the SEC and the lower courts to define these boundaries.[147]

REV. 505, 565 (2001) (describing the role of courts in filling in the content of criminal statutes).

142. Sorich v. United States, 129 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting) (noting the confusion among circuit courts).

143. *See infra* pp. 339–41.

144. United States v. Rybicki, 354 F.3d 124, 163 (2d Cir. 2003) (Jacobs, J., dissenting).

145. Jeffries, *supra* note 91, at 207 ("Facial uncertainty may be cured by judicial construction. Indeed, judicial specification will be accepted as sufficient even where it amounts to a wholesale rewriting of the statutory text.").

146. United States v. O'Hagan, 521 U.S. 642, 653 (1997).

147. In 2000, the SEC adopted Rule 10b5-2, entitled "Duties of trust or confidence in misappropriation insider trading cases," 17 C.F.R. § 240.10b5-2, in an attempt to provide some clarity to this theory. *See* STRADER, UNDERSTANDING, *supra* note 24, at 112–13. Interestingly, Justice Ginsburg also wrote the unanimous decision in *Cleveland v. United States*, 531 U.S. 12 (2000), which narrowly construed the definition of property under the mail and wire fraud statutes. Although not explicit in her

Even more telling, perhaps, was Justice Ginsburg's vote in *United States v. Booker*.[148] In that case, the five-member majority held that a sentence enhancement based on the judge's determination of a fact—other than a prior conviction, not found by the jury or admitted by the defendant—violated the defendant's Sixth Amendment right to a jury trial.[149] A separate five-member majority held that the appropriate remedy for this violation is not to require that the jury determine all the relevant facts.[150] Instead, this opinion held, the Sixth Amendment infirmity could be cured by holding that the federal sentencing guidelines are advisory rather than mandatory.[151] Justice Ginsburg, who did not write an opinion in *Booker*, provided the swing vote, siding with both the majority merits opinion[152] and the remedial decision.[153] She was the only member of the merits majority to join in the remedial opinion.[154] The result was very pragmatic; instead of a complex and potentially cumbersome system requiring that juries engage sentencing-related fact-finding, *Booker*'s effect is to follow the existing system of judicial fact-finding while allowing trial judges some discretion under the now-advisory guidelines scheme.[155] The Court—perhaps unanimously—may well have also concluded that this practical solution would be preferable to an attempt by Congress to remedy the situation.

The result in *Skilling* was similarly pragmatic—to confine prosecutors' discretion in honest services cases, while also providing far more notice to potential defendants of the statute's reach. Presumably, the *Skilling* majority also hoped that this approach would assuage Congress from responding with a revised and expanded honest services statute; the Court's footnote outlining the challenges in constructing such a statute supports this conclusion.[156] As the next Part shows,

Skilling opinion, overfederalization seems to be a serious concern for Justice Ginsburg, who wrote in *Cleveland* that the Court would reject a "sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." Cleveland v. United States, 531 U.S. 12, 24 (2000).

148. 543 U.S. 220, 225 (2005).

149. *Id.* at 244.

150. *Id.*

151. *Id.* at 245.

152. *Id.* at 225.

153. *Id.* at 244.

154. *Id.* at 225 (Justices Stevens, Scalia, Souter, Thomas, and Ginsburg in the merits opinion; Justices Breyer, Rehnquist, O'Connor, Kennedy, and Ginsburg in the remedial opinion).

155. *See* STRADER, UNDERSTANDING, *supra* note 24, at 390.

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

however, the Court may have overestimated Congress's willingness to cede power to the Court in defining the scope of federal criminal law.[157]

IV. THE CONGRESSIONAL RESPONSE TO *SKILLING*

In 2010 and 2011, Congress quickly took up the challenge that *Skilling* posed.[158] In fact, in the "Clean Up Government Act of 2011," under consideration as this Article goes to press, Congress takes aim not just at *Skilling*, but also at a number of judicial decisions that attempted to clarify the scope of federal anti-corruption statutes.[159] Among other things, the bill would overturn the Supreme Court's decision limiting the scope of the federal gratuities statutes,[160] the Supreme Court's decision limiting the definition of "property" under the mail and wire fraud statutes,[161] and the D.C. Circuit's decision limiting the scope of the federal bribery statute.[162] The bill would also vastly expand federal jurisdiction over state and local bribery cases by lowering the amount required for federal program bribery from $5000 to $1000[163] and by adding this crime as a RICO predicate.[164] And just in case we did not get the message that Congress is really, really tough on crime, the bill expands venue provisions for certain offenses,[165] increases the limitations period for bringing certain charges,[166] and expands certain sentences, sometimes dramatically.[167] A student of the judicial-legislative dynamic in the adoption and construction of penal statutes could well write a treatise based solely on this proposed legislation.

For present purposes, the honest services provision merits close examination. The proposed honest services amendment, to be codi-

157. *See infra* Part IV.

158. Leahy Introduces Bill To Address Supreme Court's *Skilling* Decision, Fed. Info. & News Dispatch, Sept. 28, 2010, *available at* WLNR 19343461.

159. Clean Up Government Act of 2011, H.R. 2572, 112th Cong. (2011).

160. *Id.* § 8; *see also* United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 414 (1999) (requiring connection between the gratuity received and performance of a specific past, present, or future "official" act).

161. Clean Up Government Act of 2011 § 2; *see also* Cleveland v. United States, 531 U.S. 12 (2000) (holding that unissued licenses do not constitute property).

162. Clean Up Government Act of 2011 § 9; *see also* Valdes v. United States, 475 F.3d 1319 (D.C. Cir. 2007) (en banc) (limiting the definition of an official act).

163. Clean Up Government Act of 2011 § 4.

164. *Id.* § 13.

165. *Id.* §§ 3, 15.

166. *Id.* § 11.

167. *Id.* §§ 4, 5, 11.

fied as Section 1346A of the federal criminal code, is entitled "Undisclosed self-dealing by public officials."[168] The bill states: "For purposes of this chapter, the term 'scheme or artifice to defraud' also includes a scheme or artifice by a public official to engage in undisclosed self-dealing."[169] The bill further defines the term "undisclosed self-dealing"[170] in ways that appear to respond to the Court's preemptive challenge to such a law in *Skilling*.[171]

This proposed legislation truly seems to be a knee-jerk response to courts' attempts to (1) provide clarity to criminal statutes, (2) reign in the rush to overcriminalization, and (3) reign in the rush to overfederalization. It seems that Congress has reached the point where any judicial limitation on federal criminal laws is seen as a power grab by courts that needs a slapping down. A critic of these trends could see this bill as the culmination of everything wrong with criminalization in the current environment.

Take a few examples from the bill. The law would penalize "a public official [who] performs an official act for the purpose, in whole or in material part, of furthering or benefitting a financial interest of . . . an individual, business, or organization with whom the public official is negotiating for, or has any arrangement concerning, prospective

168. *Id.* § 16(a).

169. *Id.*

170. The bill defines undisclosed self-dealing as follows:

> (A) a public official performs an official act for the purpose, in whole or in material part, of furthering or benefitting a financial interest of—
> (i) the public official;
> (ii) the spouse or minor child of a public official;
> (iii) a general business partner of the public official;
> (iv) a business or organization in which the public official is serving as an employee, officer, director, trustee, or general partner;
> (v) an individual, business, or organization with whom the public official is negotiating for, or has any arrangement concerning, prospective employment or financial compensation; or
> (vi) an individual, business, or organization from whom the public official has received any thing or things of value, otherwise than as provided by law for the proper discharge of official duty, or by rule or regulation; and
> (B) the public official knowingly falsifies, conceals, or covers up material information that is required to be disclosed by any Federal, State, or local statute, rule, regulation, or charter applicable to the public official, or the knowing failure of the public official to disclose material information in a manner that is required by any Federal, State, or local statute, rule, regulation, or charter applicable to the public official.

Id.

171. Skilling v. United States, 130 S. Ct. 2896, 2933 n.45 (2010).

employment or financial compensation."[172] What does it mean to have "any arrangement?" The bill does not say. The bill also covers "an individual, business, or organization from whom the public official has received any thing or things of value."[173] How far does this reach? Would it, as the Court posited in *Sun-Diamond Growers* in connection with the federal gratuities statute, "criminalize a high school principal's gift of a school baseball cap to [a public official], by reason of his office, on the occasion of the latter's visit to the school?"[174]

Most importantly, what would be the practical impact of criminalizing the failure to "disclose material information in a manner that is required by any Federal, State, or local statute, rule, regulation, or charter applicable to the public official?"[175] On its face, this bill would provide disparate outcomes depending purely on the location of the alleged crime; acts that would be criminal in one locality, for example, would not be criminal in an adjacent locality with different disclosure laws. And this is not minor criminal liability; the statute provides for a twenty-year prison sentence.[176]

To return to the scenario at the beginning of this Article, the local official appears, on the face of the matter, to have possibly threatened to hold up a project unless the developer paid the official's wife for work she had previously done for an overseas affiliate of the developer on an unrelated matter. Yes, this looks suspicious on its face. But should it really be a federal crime meriting a sentence of up to twenty years?[177] And if a neighboring state had no such disclosure law, would it be fair or appropriate to criminalize this act?

The question is whether the scope of the honest services statute, post-*Skilling,* so hampers anti-corruption efforts that a replacement honest services statute is necessary. The real question, in this context, is whether a broad range of public conflicts of interest needs to be criminalized and federalized. Where the scheme involves an intended deprivation of money or property, we are within the realm of traditional fraud,[178] though the intangible property rights door opened by

172. Clean Up Government Act of 2011 § 16(a).

173. *Id.*

174. United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 407 (1999).

175. Clean Up Government Act of 2011 § 16(a).

176. 18 U.S.C. § 1341 (2006); 18 U.S.C. § 1343 (2008). Of course, the particular sentence would depend upon the application of the U.S. sentencing guidelines to the particular case.

177. Clean Up Government Act of 2011 § 6.

178. McNally v. United States, 483 U.S. 350, 356–57 (2008).

Carpenter invites mischief in defining property rights.[179] But it is truly difficult to conceive of an honest services statute that would not lead to the real danger underlying vague crimes, which invite prosecutors to expand criminal statutes and target individuals unguided by the terms of the underlying statutes.[180]

CONCLUSION

The courts have not proved to be an effective bulwark against over-reaching criminal statutes. After all, it took the Court over twenty years to limit the scope of the honest services statute;[181] it is difficult to determine the harm—the lives and careers affected, the millions of dollars in legal fees spent—wrought during that time by a statute that created an indefinable offense. Congress now faces a choice: enact a broad honest services statute that similarly invites law enforcement abuse, or leave in place a narrower construction of the existing statute that will leave to state and local authorities the pursuit of those operating at the margins of federal law.[182] If attempts to resurrect a broad-reaching form of honest services fraud succeed, then we can all watch to see if the courts are up to the task of applying constitutional limitations to that new offense.

179. Carpenter v. United States, 484 U.S. 19 (1987) (holding that intangible property rights are sufficient). As noted above, even the fairly narrow limitation that the Court imposed in *Cleveland*, that unissued licenses are not property interests, would be removed by the proposed Congressional response to *Skilling*. *See infra* pp. 339–41.

180. Jeffries, *supra* note 91, at 223 ("[T]he result [of vague criminal statutes] is that lawmaking devolves to law enforcement, and police and prosecutors are invited to play too large a role in deciding what to punish.").

181. 18 U.S.C. § 1346 (1988).

182. Jeffries, *supra* note 91, at 218 n.81 ("[T]he choice would be between upholding the statute, in the certain knowledge that it invites abusive enforcement, or striking the statute at some cost to the effectiveness of legitimate law enforcement.").

APPENDIX

United States Library of Congress

HR 2572

Introduced in House

July 15, 2011

To amend title 18, United States Code, to deter public corruption, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

July 15, 2011

Mr. Sensenbrenner (for himself and Mr. Quigley) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 18, United States Code, to deter public corruption, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Clean Up Government Act of 2011'.

* * *

SEC. 16. PROHIBITION ON UNDISCLOSED SELF-DEALING BY PUBLIC OFFICIALS.

(a) In General. Chapter 63 of title 18, United States Code, is amended by inserting after section 1346 the following new section:

'Sec. 1346A. Undisclosed self-dealing by public officials

'(a) Undisclosed Self-Dealing by Public Officials. For purposes of this chapter, the term 'scheme or artifice to defraud' also includes a scheme or artifice by a public official to engage in undisclosed self-dealing.

'(b) Definitions. As used in this section:

'(1) Official act. The term 'official act'—

'(A) includes any act within the range of official duty, and any decision, recommendation, or action on any question, matter, cause, suit,

proceeding, or controversy, which may at any time be pending, or which may by law be brought before any public official, in such public official's official capacity or in such official's place of trust or profit;

'(B) may be a single act, more than one act, or a course of conduct; and

'(C) includes a decision or recommendation that a government should not take action.

'(2) Public official. The term 'public official' means an officer, employee, or elected or appointed representative, or person acting for or on behalf of the United States, a State, or a subdivision of a State, or any department, agency or branch of government thereof, in any official function, under or by authority of any such department, agency, or branch of government.

'(3) State. The term 'State' includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

'(4) Undisclosed self-dealing. The term 'undisclosed self-dealing' means that—

'(A) a public official performs an official act for the purpose, in whole or in material part, of furthering or benefitting a financial interest of—

'(i) the public official;

'(ii) the spouse or minor child of a public official;

'(iii) a general business partner of the public official;

'(iv) a business or organization in which the public official is serving as an employee, officer, director, trustee, or general partner;

'(v) an individual, business, or organization with whom the public official is negotiating for, or has any arrangement concerning, prospective employment or financial compensation; or

'(vi) an individual, business, or organization from whom the public official has received any thing or things of value, otherwise than as provided by law for the proper discharge of official duty, or by rule or regulation; and

'(B) the public official knowingly falsifies, conceals, or covers up material information that is required to be disclosed by any Federal, State, or local statute, rule, regulation, or charter applicable to the public official, or the knowing failure of the public official to disclose material information in a manner that is required by any Federal, State, or local statute, rule, regulation, or charter applicable to the public official.

'(5) Material information. The term 'material information' includes information—

'(A) regarding a financial interest of a person described in clauses (i) through (iv) paragraph (4)(A); and

'(B) regarding the association, connection, or dealings by a public official with an individual, business, or organization as described in clauses (iii) through (vi) of paragraph 4.'.

(b) Conforming Amendment. The table of sections for chapter 63 of title 18, United States Code, is amended by inserting after the item relating to section 1346 the following new item:

'1346A. Undisclosed self-dealing by public officials.'.

(c) Applicability. The amendments made by this section apply to acts engaged in on or after the date of the enactment of this Act.