THE HONEST-SERVICES DOCTRINE IN WHITE-COLLAR CRIMINAL LAW

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I. INTRODUCTION

In a trilogy of decisions handed down in June 2010, the Supreme Court narrowed the application of the honest-services doctrine, codified at 18 U.S.C. § 1346, to bribery and kickbacks—resulting in one of the most anticipated developments in white-collar criminal law.[1] Although several Justices would have voided the statute as unconstitutionally vague,[2] the majority salvaged § 1346 by narrowing its application.[3]

The Court's trilogy has impacted one of the most powerful tools possessed by prosecutors—a twenty-eight-word provision[4] in the federal mail- and wire-fraud statutes[5] that has led to the conviction of many white-

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

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

3 *Id.* at 2931 (majority opinion).

4 The honest-services provision provides: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346 (2006).

5 18 U.S.C. §§ 1341, 1343 (2006 & Supp. III 2009).

collar defendants, ranging from Illinois Governor George H. Ryan, Sr.[6] to Enron's Jeffrey Skilling.[7] Given the breadth of the resulting indictments, it is not entirely surprising that the majority of the Court viewed an unrestricted § 1346 as unconstitutionally vague, while Justices Scalia, Kennedy, and Thomas viewed § 1346 as unsalvageable.

Prior to this series of cases, federal prosecutors used the honest-services statute to target schemes to defraud people of their right to fair, honest, and impartial services.[8] The honest-services statute, which encompasses defendants in both the private and public sectors, including those in state and federal governments, often served as a favorable prosecutorial alternative to the narrower federal bribery and gratuities law, which applies only to federal public officials.[9]

For decades, however, many commentators have clamored against the statute, which, according to them, served as a catchall for all fraudulent schemes, even when the defendant's direct financial benefit could not readily be proven.[10] In fact, the split between the Justices in the majority and those concurring in the trilogy was representative of the greater debate on the topic,[11] which has spanned many commentators[12] and circuit courts,[13] as well

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[6] *See generally* United States v. Warner, 498 F.3d 666 (7th Cir. 2007) (affirming the district court judgment convicting Governor George H. Ryan, Sr. of, *inter alia*, mail fraud under the honest-services provision of § 1346).

[7] *See Skilling*, 130 S. Ct. at 2907.

[8] Generally, the federal mail- and wire-fraud statutes prohibit the use of the mail or interstate wire or radio transmissions in furtherance of a "scheme or artifice to defraud," §§ 1341, 1343, which includes a "scheme or artifice to deprive another of the intangible right of honest services." § 1346; *see also infra* notes 22–23. The legal analyses for both wire and mail fraud are nearly the same. *See, e.g.*, United States v. Mills, 199 F.3d 184, 188 (5th Cir. 1999) (noting that the mail- and wire-fraud statutes have common language in relevant part).

[9] Randall D. Eliason, *Surgery With a Meat Axe: Using Honest Services Fraud to Prosecute Federal Corruption*, 99 J. CRIM. L. & CRIMINOLOGY 929, 932 (2009) (citing 18 U.S.C. § 201).

[10] *E.g.*, Calfee, Halter & Griswold LLP, *U.S. Supreme Court Limits "Honest Services" Prosecutions*, CALFEE (July 29, 2010), http://www.calfee.com/ArticleView.aspx?ArticleID=889.

[11] *Skilling*, 130 S. Ct. at 2935 (Scalia, J., concurring) (opining that § 1346 is unconstitutionally vague). Cynthia Hujar Orr, President of the National Association of Criminal Defense Lawyers, noted the division of opinion on the meaning of honest services: "We are nonetheless disappointed that the Court has held that there remains a place in our criminal justice system for a statute on whose meaning few can agree." Press Release, Nat'l Ass'n Criminal Def. Lawyers, Supreme Court Rejects Expansive Interpretation of 'Honest Services' Fraud Statute (June 24, 2010), http://www.nacdl.org/public.nsf/NewsReleases/2010mn20?OpenDocument.

[12] *See, e.g.*, Marc Martin, *The Dilemma of the Honest Services Statute: Honest Services and Common Sense*, 24 CBA REC., Jan. 2010, at 34.

[13] *See* 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, 1714–18 (2010) (discussing the circuit split on the constitutionality of § 1346); James T. Van Strander, Comment, *A Potent Federal Prosecutorial Tool:* Weyhrauch v. United States, 5 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 80, 80–81 (2009), http://www.law.duke.edu/journals/djclpp/index.php?action=showitem

as both the United States Supreme Court and Congress.[14] The Supreme Court's most recent concerns with the honest-services doctrine were foreshadowed by Justice Scalia's dissent from a 2009 denial of certiorari, wherein he noted the constitutional problems with the doctrine.[15]

Even following the Court's recent trilogy of decisions on honest services, the doctrine remains unsettled because Congress might endeavor to circumvent the Court's ruling, as it has done previously on this very topic.[16] Alternatively, Congress may legislate a different interpretation of the honest-services doctrine, albeit within the boundaries of the Court's rulings.[17] As the doctrine continues its development in the legislatures and courts, it is important to understand the implications of the Supreme Court's trilogy of cases.

Part II of this Article therefore begins by reviewing the honest-services doctrine and the Supreme Court rulings narrowing it, considering the future of honest-services cases and their context in white-collar crime. Part III then analyzes the void-for-vagueness doctrine and the checks and balances implicated, concluding with considerations for any future legislation on honest services.

II. THE HONEST-SERVICES LEGAL FRAMEWORK

The honest-services doctrine has a tumultuous history.[18] Both Congress and the federal courts have attempted to define its contours, which has resulted in several incarnations of the doctrine. The most recent milestone in the doctrine's development was the Supreme Court's trilogy of cases, but the doctrine has a long history that illuminates its meaning.

A. The Background on the Honest-Services Doctrine

The honest-services doctrine is an outgrowth of the mail-fraud statutes. The original mail-fraud provision was enacted in 1872 and "proscribed . . . use of the mails to advance any scheme or artifice to

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&id=155 (noting the circuit split on the interpretation of § 1346).

[14] *See infra* Part III.B.1.

[15] Sorich v. United States, 129 S. Ct. 1308, 1311 (2009) (mem.) (Scalia, J., dissenting).

[16] *See infra* text accompanying notes 33–39 (In *McNally v. United States*, the Court excluded the defrauding of citizens of their right to "good government" from the reach of § 1341; Congress reversed *McNally* through its enactment of § 1346.).

[17] *See* Ellie Neiberger, *Honest Services Fraud: Federal Prosecution of Public Corruption at the State and Local Levels*, FLA. BAR J., June 2010, at 82, 85 ("[E]ven if the statute is held to be unconstitutional, it is likely that Congress and/or the [state] Legislature will move quickly to fill the gap."); *see also infra* Part III.

[18] *See* Eliason, *supra* note 9, at 960 ("It is probably safe to say that no area of federal criminal law has led to greater confusion and turmoil.").

defraud."[19] Congress amended the statute in 1909, prohibiting "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[20]

The circuit courts, noting the statute's disjunctive phrasing, interpreted "'scheme or artifice to defraud' to include deprivations not only of money or property, but also of intangible rights," such as the right to honest services.[21] Therefore, in the decades leading up to *McNally v. United States* in 1987—the first intervention by the Supreme Court on the issue—federal prosecutors broadly used § 1341[22] and § 1343,[23] the substantively similar wire-fraud statute, to charge defendants for defrauding others of both their tangible and intangible rights, including the right to honest services.[24]

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[19] Skilling v. United States, 130 S. Ct. 2896, 2926 (2010) (internal quotation marks omitted) (citing McNally v. United States, 483 U.S. 350, 356 (1987)).

[20] *Id.* (quoting 18 U.S.C. § 1341) (internal quotation marks omitted). Many of these changes were mindful of the Supreme Court's ruling in *Durland v. United States*, 161 U.S. 306 (1896). *See* George E.B. Holding, Dennis M. Duffy & John Stuart Bruce, *Federal Prosecution of State and Local Officials Using Honest Services Mail Fraud: Where's the Line?*, 32 CAMPBELL L. REV. 191, 198 (2010).

[21] *Skilling*, 130 S. Ct. at 2926.

[22] The mail-fraud statute 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, representations, or promises . . . 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 there from, any such matter or thing . . . shall be fined under this title or imprisoned not more than 20 years, or both. If the violation . . . 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. § 1341 (2006 & Supp. III 2009).

[23] The wire-fraud statute 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, 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 . . . 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 (2006 & Supp. III 2009).

[24] One commentator posited that:

> In the early 1970s, creative federal prosecutors in the Northern District of Illinois[] theorized that the "intangible right to honest services" could be a "property" right protected by the mail fraud statute. That theory was first accepted in a case in which a company employee accepted secret kickbacks—the employer was deprived of its right to "honest services" of the employee . . . . This theory spread to public corruption cases, and was

Until *McNally* in 1987, the federal appellate courts seemed to approve the broad use of the statutes. Prosecutors therefore successfully used the statutes to prosecute defendants in both the private sector, typically in the corporate setting,[25] and the public sector, typically in local and state governments.[26] For example, under a particular line of cases dealing with public sector employees, it was determined that a public official owed a fiduciary duty to the public and that misuse of his office for private gain constituted fraud.[27] Furthermore, an individual without formal office would be held to be a public fiduciary if others relied on him "because of a special relationship in the government" and if he in fact made "governmental decisions."[28] The statutes were applied broadly to those who did not hold public office, as well.

Many commentators blasted the prosecution of individuals at the outer boundaries of the statutes.[29] For instance, in *United States v. Bronston*, a lawyer was convicted of mail fraud for breaching his duty of loyalty to his firm's clients.[30] In *United States v. Margiotta*, a local chairman of a political party committee was convicted of mail fraud for exchanging county jobs for political contributions.[31]

Critics were vindicated in 1987, when the Supreme Court disapproved of the sweeping application of the mail- and wire-fraud statutes in *McNally v. United States*.[32] Paring back the federal mail-fraud statute, the Court held that the statute applied only to the schemes and artifices

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used to prosecute politicians throughout the country.

Martin, *supra* note 12, at 35 (citing United States v. George, 477 F.2d 508 (7th Cir. 1973)).

[25] *See infra* Part II.B.

[26] *See infra* notes 32, 77, 143. It is in the public sector that federalism concerns arise. *See infra* Part III.B.2.

[27] *See, e.g.*, United States v. Mandel, 591 F.2d 1347, 1353 (4th Cir.), *aff'd in relevant part en banc*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980). Professor Buell would describe "fiduciary duty" as "a label to designate relationships in which one party's expectations about disclosure make nondisclosure more likely to produce a deception that the law of fraud might want to sanction as wrongful." Samuel W. Buell, *The Court's Fraud Dud*, 6 DUKE J. CONST. L. & PUB. POL'Y 31, 38 (2010) [hereinafter Buell, *The Court's Fraud Dud*], *available at* http://ssrn.com/abstract=1656350 (discussing the concept of fiduciary duty). "As Justice Scalia pointed out in his concurrence in *Skilling*, it is not a particularly helpful label because it only begins the inquiry." *Id.*

[28] United States v. Gray, 790 F.2d 1290, 1296 (6th Cir. 1986) (quoting United States v. Margiotta, 688 F.2d 108, 122 (2nd Cir. 1982)).

[29] *See, e.g.*, Buell, *The Court's Fraud Dud*, *supra* note 27, at 34.

[30] United States v. Bronston, 658 F.2d 920, 922 (2d Cir. 1981).

[31] *Margiotta*, 688 F.2d at 111–12.

[32] McNally v. United States, 483 U.S. 350, 360 (1987), *overruled by* Pub. L. No. 100-690, Title VII, § 7603(a), 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346); *see also* Eliason, *supra* note 9, at 956–59. "*McNally* was a classic political self-dealing scheme: the defendants used their positions of power and influence to line their own pockets while concealing their activities from the public." *Id.* at 957; *see also infra* note 77 and accompanying text.

defrauding victims of money or property, as opposed to those defrauding citizens of their rights to good government.[33] Specifically, the Court stated:

> 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 § 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.[34]

The Supreme Court therefore narrowed the application of § 1341 because the concept of honest-services fraud could not exist if it did not appear explicitly or implicitly in the statute.[35]

The following year, Congress responded by enacting § 1346, which took the opposite approach of *McNally* and broadly defined "scheme or artifice" to include depriving a person of honest services. Section 1346, enacted by a provision of the Anti-Drug Abuse Act of 1988, was just twenty-eight words: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[36] The new statute explicitly included, as mail and wire fraud, schemes to deprive a person of honest services,[37] being the first statutory introduction of the term "honest services."[38] Thereafter, the elements of a mail- or wire-fraud offense under § 1346 became: 1) a scheme to defraud, including a material deception, 2) with the intent to defraud, 3) using the mails, private commercial carriers, and/or wires in furtherance of the scheme, 4) that resulted or would have resulted in the victim's deprivation of money, property, or honest services.[39]

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[33] *McNally*, 483 U.S. at 360; *see also* Abbe David Lowell, Christopher D. Man & Paul M. Thompson, *"Not Every Wrong is a Crime": The Legal and Practical Problems with the Federal "Honest-Services" Statute*, 63 VAND. L. REV. EN BANC 11, 13 (2010), http://www.vanderbiltlawreview.org/2010/03/ ("The Supreme Court did not decide *McNally* on constitutional grounds, although it noted both vagueness and federalism concerns. Instead, the Court decided *McNally* on the narrower statutory ground that the mail- and wire-fraud statutes should be interpreted in accordance with the common law definition of fraud, which was limited to deprivations of property and not the deprivation of 'intangible rights.'").

[34] *McNally*, 483 U.S. at 360.

[35] *See* Buell, *The Court's Fraud Dud*, *supra* note 27, at 33.

[36] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VII, § 7603(a), 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346); *see also* Holding, Duffy & Bruce, *supra* note 20, at 207.

[37] 18 U.S.C. § 1346 (2006).

[38] *See* Buell, *The Court's Fraud Dud*, *supra* note 27, at 46 ("This is not a problem that arose accidentally just because some federal courts, and a later Congress, chose to use the verbal formulation 'honest services' with the mail- and wire-fraud statutes. It is a general problem for the law of fraud. Arguably it is the concept of fraud itself, not the modern formulation of 'honest services,' that presents the vagueness difficulty.").

[39] 18 U.S.C. §§ 1341, 1343 (2006 & Supp. III 2009); § 1346; *see also* Christopher J. Stuart, *Mail and Wire Fraud*, 46 AM. CRIM. L. REV. 813, 816–32 (2009) (analyzing the elements of these offenses). For a discussion of the defenses to mail or wire fraud, see *id.* at

Following the introduction of this provision in 1988, prosecutors used the honest-services statute to target acts by private and public actors that ranged from undisclosed self-dealing to the breach of fiduciary duties. Often times, defendants' schemes to defraud involved intangible rights, not just property rights.[40]

Over these years, hundreds of defendants received federal jail terms under the statute, even if they fell at its margins.[41] The penalties for white-collar crime were intentionally stiff,[42] increasing over the years[43] and provoking criticism.[44]

Furthermore, the acts targeted by prosecutors under the statute were many and varied. For example, in *United States v. Frost*, defendant professors at the University of Tennessee were convicted of mail fraud for allowing defendant students to plagiarize their theses or dissertations. The court determined that, as a result of this fraud, the University was deprived of its right to the honest services of its employees.[45] In *United States v. Gray*,

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832–33.

[40] *See infra* notes 45–50 and accompanying text.

[41] Buell, *The Court's Fraud Dud*, *supra* note 27, at 34. "The controversy over honest services fraud prosecutions, of course, has the major added element of being a controversy over whether the deceptive party ought to go to prison rather than simply pay damages." *Id.* at 42.

[42] "For traditional violations of §§ 1341 and 1343, sentencing is subject to the 'Offenses Involving Fraud and Deceit' provisions of the Guide-lines. Each mailing constitutes a separate count of mail fraud." Stuart, *supra* note 39, at 834.

[43] *See, e.g.*, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 903(a)-(b), 116 Stat. 745, 805 (codified as amended at 18 U.S.C. §§ 1341, 1343); *see also* Eliason, *supra* note 9, at 974 n.198 ("In 2002, as part of the Sarbanes-Oxley legislative reforms, the maximum penalty for [mail and wire fraud] was increased to twenty years [in prison]."); Note, *Go Directly to Jail: White Collar Sentencing After the Sarbanes-Oxley Act*, 122 HARV. L. REV. 1728, 1732 n.27 (2009) (noting higher fraud sentences following the passage of the Sarbanes-Oxley Act). In fact, the Federal Sentencing Guidelines initially arose, in large part, to remedy the previously lenient treatment of white-collar criminals. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 22 (1988). *But see* Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 426 (2009) [hereinafter Beale, *Rethinking the Identity and Role of United States Attorneys*] (noting that, since the introduction of the Guidelines, sentences in some districts have generally been lighter than the national averages). For an excellent discussion of the development of the Sentencing Guidelines on white-collar crime, see generally Derick R. Vollrath, Note, *Losing the Loss Calculation: Toward a More Just Sentencing Regime in White-Collar Criminal Cases*, 59 DUKE L.J. 1001 (2010).

[44] *See, e.g.*, United States v. Ebbers, 458 F.3d 110, 129 (2d Cir. 2006) ("Twenty-five years is a long sentence for a white collar crime, longer than the sentences routinely imposed by many states for violent crimes, including murder, or other serious crimes such as serial child molestation."); Sandeep Gopalan, *Skilling's Martyrdom: The Case for Criminalization Without Incarceration*, 44 U.S.F. L. REV. 459 (2010); Ellen S. Podgor, *The Challenge of White Collar Sentencing*, 97 J. CRIM. L. & CRIMINOLOGY 731, 741–52 (2007).

[45] United States v. Frost, 125 F.3d 346, 369 (6th Cir. 1997). *But see* United States v. Walters, 997 F.2d 1219 (7th Cir. 1993) (The court reversed a mail-fraud conviction against a sports agent who had caused universities to pay scholarship money to athletes who had become ineligible. The defendant made legitimate money in the market due to the fraud

basketball coaches at Baylor University were convicted of mail fraud for helping five players commit academic dishonesty in order to obtain credits required for academic eligibility and potential scholarships.[46] In *United States v. Rybicki*, personal injury lawyers were convicted of mail fraud for arranging payment to insurance claims adjusters to expedite clients' settlement of claims.[47] In *United States v. Hausmann*, a Wisconsin personal injury lawyer who referred his clients to a chiropractor in return for payment from the chiropractor[48] was convicted of conspiracy to commit mail and wire fraud.[49] In *United States v. Sun-Diamond Growers of California*, an agricultural cooperative was convicted under § 1343 when one of its vice-presidents convinced a partner at the cooperative's law firm to funnel illegal contributions to a political candidate.[50]

Criticism of the continued broad use of the mail- and wire-fraud statutes began to mount again, but the Supreme Court did not take any relevant cases immediately after *McNally*.[51] In 2009, however, in his dissent from the denial of certiorari in a case that would have addressed the breadth of § 1346, Justice Scalia noted that the honest-services doctrine needed to be addressed.[52] The following year, the Court granted certiorari to three cases dealing with the honest-services doctrine, resulting in the highly anticipated trilogy of decisions handed down by the Supreme Court that again narrowed the honest-services doctrine.

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scheme, but the court held that "only a scheme to obtain money or other property from the victim by fraud violates § 1341. . . . Losses that occur as byproducts of a deceitful scheme do not satisfy the statutory requirement.").

[46] United States v. Gray, 96 F.3d 769, 771–72 (5th Cir. 1996).

[47] United States v. Rybicki, 354 F.3d 124, 127 (2d Cir. 2003).

[48] United States v. Hausmann, 345 F.3d 952, 952 (7th Cir. 2003).

[49] *Id.* at 954.

[50] United States v. Sun-Diamond Growers of California, 138 F.3d 961, 969–70 (D.C. Cir. 1998). The D.C. Circuit noted with concern that each act of an employee's dishonesty could be transformed into a federal crime by the use of the mails or wires. *Id.* at 973. Of course, over the years the definition of mails and wires has greatly expanded to include transmissions through facsimile, telex, modem, and the Internet. *See, e.g.*, United States v. Ross, 210 F.3d 916, 920 (8th Cir. 2000) (involving facsimile); United States v. Morrison, 153 F.3d 34, 57 (2d Cir. 1998) (involving telephone calls); United States v. Carrington, 96 F.3d 1, 4 (1st Cir. 1996) (involving facsimile and computer modems); *see also* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 250006(1), 108 Stat. 1796 (codified as amended at 18 U.S.C. § 1341) (broadening application of the mail-fraud statute to "any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier").

[51] McNally v. United States, 483 U.S. 350 (1987), *overruled by* Pub. L. No. 100-690, Title VII, § 7603(a), 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346).

[52] Sorich v. United States, 129 S. Ct. 1308, 1311 (2009) (mem.) (Scalia, J., dissenting) ("I would grant the petition for certiorari and squarely confront both the meaning and the constitutionality of § 1346.").

B. The Supreme Court's Trilogy of Honest-Services Cases

The Supreme Court's trilogy included *Skilling v. United States*,[53] *Black v. United States*,[54] and *Weyhrauch v. United States*.[55] All three cases raised questions regarding federal fraud law and presented challenges to the honest-services doctrine. Two of the cases related to the activities of executives of public companies,[56] while the third case related to an Alaska state legislator.[57]

United States v. Skilling dealt with the conviction of Jeffrey Skilling, an Enron executive.[58] In 2001, Enron Corporation famously shocked its shareholders and 22,000 employees by crashing into bankruptcy, despite being the seventh highest-revenue-grossing company in the United States at that time. The crash followed the revelation of vast corporate fraud, which extended to the corporate books.[59]

The indictment of Skilling accused him of contributing to the fraud by attempting to hide Enron's true financial condition by "manipulating Enron's publicly reported financial results; . . . making public statements and representations about Enron's financial performance and results that were false and misleading."[60] Skilling benefited from this scheme through enhancements to his compensation package, including his salary, bonuses, and various stock options.[61] The indictment charged Skilling with, among other things, seeking to "depriv[e] Enron and its shareholders of the intangible right of [his] honest services."[62] Skilling was ultimately found guilty of nineteen counts, including the charge of conspiracy to commit honest-services fraud.[63] He was sentenced to 292 months in prison, 3 years of supervised release, and payment of $45 million in restitution to his victims.[64]

On appeal to the Fifth Circuit Court of Appeals,[65] Skilling challenged his convictions on several grounds, arguing, *inter alia*, that the honest-services doctrine was unconstitutionally vague and that he was denied

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

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

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

56 *Skilling*, 130 S. Ct. 2896; *Black*, 130 S. Ct. 2963.

57 *Weyhrauch*, 130 S. Ct. 2971.

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

59 *Id. See generally* BETHANY MACLEAN & PETER ELKIND, SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON (Penguin 2003).

60 *Skilling*, 130 S. Ct. at 2908 (internal quotation marks omitted).

61 *Id.*

62 *Id.* (internal quotation marks omitted). *See generally* Gopalan, *supra* note 44, at 486–503; Nancy J. King, *Introduction:* Skilling v. United States, 63 VAND. L. REV. EN BANC 1 (2010), http://www.vanderbiltlawreview.org/2010/03/.

63 *Skilling*, 130 S. Ct. at 2911.

64 *Id.*

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

a fair trial.[66] The Fifth Circuit upheld Skilling's conviction, neglecting to address the argument that the honest-services doctrine was unconstitutionally vague.[67] The Supreme Court granted certiorari, making *Skilling* the first case in the honest-services trilogy.

United States v. Black, the second case in the trilogy, addressed the prosecution of Conrad Black, a top executive of Hollinger International.[68] Black was convicted of mail fraud based on the government's charges that he deprived the company of his honest services by stealing millions of dollars from the company by fraudulently paying himself phony "noncompetition fees" without disclosing his receipt of those fees.[69] On appeal, Black challenged the validity of the jury instructions on the charge of honest-services fraud.[70] The Seventh Circuit upheld his conviction, as well as those of the other Hollinger executives.[71] The Supreme Court granted review on the question of whether 18 U.S.C. § 1346 applied wherein a private individual's scheme to defraud did not contemplate economic or other property harm to the person to whom honest services were owed.[72]

Finally, the Court's review of *United States v. Weyhrauch*[73] concerned Bruce Weyhrauch's conviction arising out of his activities as a member of the Alaska House of Representatives in 2006.[74] During this time, while Alaska's legislature was considering altering the state's practice of oil production taxation, Weyhrauch solicited future legal work from an oil field services company in exchange for voting in that company's favor.[75] Federal prosecutors charged Weyhrauch with violating § 1346, alleging that his relationship with VECO deprived Alaska citizens of their intangible right to his honest services as a government official.[76] Weyhrauch typified an honest-services defendant in the context of the public sector.[77]

In Weyhrauch's case, the government initiated an interlocutory appeal to the Ninth Circuit Court of Appeals on an evidentiary ruling subject to a circuit split: Whether an honest-services mail fraud prosecution required proof of a violation of applicable state law.[78] The Ninth Circuit decided that

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66 *Skilling*, 130 S. Ct. at 2911.

67 *Id.* at 2912.

68 United States v. Black, 130 S. Ct. 2963, 2966 (2010).

69 *Id.* at 2967.

70 *Id.* at 2968.

71 *Id.* at 2970.

72 Petition for Writ of Certiorari, *Black*, 130 S. Ct. 2963 (No. 08-876); *see also* Buell, *The Court's Fraud Dud*, *supra* note 27, at 35.

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

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

75 *Id.* at 1239.

76 *Id.* at 1239–40.

77 Buell, *The Court's Fraud Dud*, *supra* note 27, at 34–35; *see also supra* note 32 and accompanying text (discussing *McNally* as an example of a classic political, self-dealing scheme).

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

it did not.[79] The Supreme Court subsequently granted certiorari on the question of whether 18 U.S.C. § 1346 applied when a private individual's scheme to defraud did not contemplate economic or other property harm to the person to whom honest services were owed.[80]

Although each of these cases implicated some aspect of the honest-services doctrine, the Court only addressed the honest-services fraud question on its merits in *Skilling v. United States*, remanding the others to be decided in light of *Skilling*. Choosing to narrow § 1346's breadth rather than invalidating it, the Court relied on the void-for-vagueness doctrine, which only Skilling raised in his appeal.[81] However, the Court refrained from extensively addressing mail- and wire-fraud law even in *Skilling*, focusing more on the jury questions also raised in the case.[82] Some commentators have expressed disappointment that the Supreme Court did not utilize this opportunity to substantively address criminal fraud law.[83]

In *Skilling*, the Supreme Court principally considered what conduct Congress criminalized by "proscribing fraudulent deprivations of the intangible right of honest services."[84] If too broad and unclear, § 1346 risked being unconstitutionally vague. The Court began its void-for-vagueness analysis by determining that Congress, in enacting § 1346, intended to reinstate the pre-*McNally* meaning of honest-services fraud.[85] The Supreme Court held that this meant only the core of honest-services cases before

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[79] *Id.* at 1248.

[80] Petition for Writ of Certiorari, *Weyhrauch*, 130 S. Ct. 2971 (No. 08-1196); *see also* Buell, *The Court's Fraud Dud*, *supra* note 27, at 34.

[81] Skilling v. United States, 130 S. Ct. 2896, 2925–35 (2010).

[82] *See id.* at 2912–25.

[83] *See, e.g.*, Buell, *The Court's Fraud Dud*, *supra* note 27, 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 opportunity to grapple seriously with the relationship and context problem in the law of fraud."). Buell notes that the Court did not even significantly address mens rea in *Skilling*, one of the starting points in substantive criminal law. *Id.* at 47. Buell suggests that the Court's analysis could have been more helpful, although not necessarily complete, if the Court elaborated on several relevant points:

> First, the Court could have said that not everyone owes this special duty that Congress chose to designate with the term "honest services." Second, the Court could have said that, even among those who owe such a duty, the content of that duty is not uniform—it may demand a little extra of the actor bearing it or a lot. Third, the Court could have said that there is no actionable fraud unless the person to whom that duty is owed is not only deceived but suffers some harm—in the form of direct loss, being placed at a risk the person has a right to be free of, or being deprived of the ability to exit a relationship in circumstances in which exit likely would have been chosen.

Id. at 46. Buell recognizes that these shortcomings were likely the result of the Court's limits as "a voting body with nine members," with a majority necessary to make law. *Id.* at 47.

[84] *Skilling*, 130 S. Ct. at 2907 (quoting 18 U.S.C. § 1346) (internal quotation marks omitted); *see also* United States v. Brumley, 116 F.3d 728, 739 (5th Cir. 1997) (Jolly & DeMoss, J.J., dissenting) (noting the scant legislative history surrounding 18 U.S.C. § 1346).

[85] *Skilling*, 130 S. Ct. at 2928.

McNally "derailed the intangible-rights theory of fraud"[86]—bribery or kickback schemes in violation of a fiduciary duty.[87] The Court therefore held that the statute was intended to encompass only kickbacks and bribes.[88] By limiting the statute in this way, the Court determined that the statute was not unconstitutionally vague.[89]

Justice Scalia's concurrence noted that there was no discernable core of pre-*McNally* honest-services cases.[90] No case prior to *Skilling*, including *McNally*, mentioned such an abundance of cases dealing specifically with bribery and kickback schemes.[91] Justice Scalia also noted that even if such a core of cases did exist, it would not necessarily be free of unconstitutional vagueness problems.[92] Justice Scalia would have found the statute unconstitutionally vague, and he objected to the majority's notion that the broad and unconstitutionally vague parts of the law could be pared down to a more narrow, less vague, and, therefore, constitutional interpretation of § 1346.[93] The substance of this concurrence was hardly surprising, having been foreshadowed a year earlier by Justice Scalia in another case.[94]

The majority's interpretation of the statute, however, seems to have been influenced by an amicus curiae brief filed in *Weyhrauch* that advocated that the Court limit the statute to "cases of bribes and kickbacks."[95] In its

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[86] *Id.* at 2928, 2931.

[87] *Id.* at 2930 (citing United States v. Runnels, 833 F.2d 1183, 1187 (6th Cir. 1987)); *see also* Eliason, *supra* note 9, at 968 ("The heartland of public sector honest services fraud therefore involves cases where the wrongful conduct at issue amounts to bribery or self-dealing: the official's performance of his or her official duties is influenced in exchange for some personal gain.").

[88] *Skilling*, 130 S. Ct. at 2931.

[89] *Id.*

[90] *See id.* at 2935–39 (Scalia, J., concurring). However, the majority did concede that the pre-*McNally* honest-services cases had "occasioned disagreement among the Courts of Appeals." *Id.* at 2930 (majority opinion).

[91] *See id.* at 2936 (Scalia, J., concurring).

[92] *Id.* at 2938. Some commentators have also suggested that paring back the statute to bribery and kickbacks would still not be workable. *See* Timothy P. O'Toole, *The Honest-Services Surplus: Why There's No Need (or Place) for a Federal Law Prohibiting "Criminal-esque" Conduct in the Nature of Bribes and Kickbacks*, 63 VAND. L. REV. EN BANC 49, 50 (2010), http://www.vanderbiltlawreview.org/2010/03/ ("In the end, there is simply no textual basis in the law for limiting [the statute's] scope to bribery and kickbacks.").

[93] *See Skilling*, 130 S. Ct. at 2938–39 (Scalia, J., concurring). *But see* Martin, *supra* note 12, at 37 ("The hitch in declaring the honest services statute unconstitutional is the judge-made exception that, outside the First Amendment, a law should not be declared facially vague unless it is vague in all its applications."). Further, Justice Scalia opined that the majority's assertion that, in enacting § 1346, Congress intended to only proscribe bribery or kickback schemes was "false." *Skilling*, 130 S. Ct. at 2939 (Scalia, J., concurring) (citation omitted).

[94] *See supra* note 52 and accompanying text.

[95] Brief of Albert W. Alschuler as Amicus Curiae in Support of Neither Party at 3, Weyhrauch v. United States, 130 S. Ct. 2971 (2010) (No. 08–1196), 2009 WL 3052480.

brief in the *Skilling* case, the government adopted the same position, with none of the parties strongly protesting it.[96]

As Skilling's alleged misconduct did not include bribery or kickbacks, the Supreme Court vacated the Fifth Circuit's ruling on the honest-services conspiracy conviction, remanding the case for further proceedings.[97] The Court also remanded *Black* and *Weyhrauch* to be decided in light of *Skilling*. In the process, the Court changed the legal landscape of white-collar crime, but left the future of the honest-services doctrine far from certain given the potential for renewed Congressional action.

C. The Future of the Honest-Services Doctrine

The Supreme Court's trilogy of decisions has left the honest-services law in its pre-*McNally* form, as interpreted by the Court and within the restrictions of the void-for-vagueness doctrine. As such, the honest-services doctrine is now limited to activities involving bribery and kickbacks.[98]

From here, the honest-services doctrine might develop in one of two main ways. First, § 1346 might remain applicable only to bribery and kickbacks, as interpreted by the Supreme Court in the absence of Congressional action,[99] although prosecutors may decide to push the limits of the terms "bribery," "kickbacks," and "property" in the circuit courts.[100] Alternatively, Congress might respond to the Supreme Court's trilogy of decisions with new legislation.

If the Supreme Court's interpretation of the honest-services doctrine remains in the absence of Congressional action, some, but not all, aspects of white-collar criminal prosecution may change. For example, soon after the Supreme Court's trilogy of decisions, mail-fraud prosecutions involving a deprivation of money or property continued.[101] However, prosecutors might now attempt, with some success, to expand the definition of "bribery" and "kickbacks."[102] Prosecutors might also push the boundaries of the meaning

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96 O'Toole, *supra* note 92, at 50.

97 *See Skilling*, 130 S. Ct. at 2934–35.

98 *See supra* Part II.B.

99 *See supra* Part II.B.

100 *See infra* notes 102–103 and accompanying text.

101 Ellen S. Podgor, *Mail Fraud Prosecutions Continue Despite Skilling Decision - Univision Services, Inc. to Pay One Million*, WHITE COLLAR CRIME PROF BLOG (July 27, 2010), http://lawprofessors.typepad.com/whitecollarcrime_blog/2010/07/mail-fraud-prosecutions-continue-despite-skilling-decision-univision-services-inc-to-pay-one-million.html ("Many believed that there would be difficulty in bringing mail fraud cases if the Supreme Court removed honest services from the statute. . . . But what often goes unnoticed, is that most mail fraud cases are not prosecuted under section 1346, the honest services statute. Most involve a deprivation of money or property, and these cases continue to be allowed.").

102 *See* Press Release, Nat'l Ass'n Criminal Def. Lawyers, *supra* note 11 (Cynthia Hujar Orr, President of the National Association of Criminal Defense Lawyers, expects "to see future litigation surrounding efforts by prosecutors to wedge their cases into the 'bribe or

of property, hoping to encompass intangible property rights.[103] Finally, the circuit courts might expand the contours of honest services in the numerous cases they will hear on remand in light of *Skilling*.[104]

Alternatively, Congress may further alter the honest-services doctrine by legislating in response to the Court's trilogy. For example, Congress might determine that the pre-*McNally* core of cases were not just limited to bribery and kickbacks, as the Supreme Court held. Congress might also speak clearly in proscribing fraud schemes beyond bribery and kickbacks, determining that such action is constitutionally sound. In such a case, Congress might broaden the definition of "property" under the statute or define aspects of fiduciary duties differently from the current interpretation of honest services.[105] Or, Congress might decide to criminalize undisclosed self-dealing. However, in an unusual type of instructive footnote,[106] the Supreme Court suggested the difficulties with criminalizing undisclosed self-dealing:

> 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

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kickback' paradigm to which the Court has now limited this statute.").

[103] Buell, *The Court's Fraud Dud*, *supra* note 27, at 46.

[104] *See, e.g.*, Siegelman v. United States, 561 F.3d 1215 (11th Cir. 2009), *vacated*, 130 S. Ct. 3542 (2010) (mem.); Hargrove v. United States, 579 F.3d 752 (7th Cir. 2009), *vacated*, 130 S. Ct. 3543 (2010) (mem.); Hereimi v. United States, 357 F. App'x 82 (9th Cir. 2009), *vacated*, 130 S. Ct. 3543 (2010) (mem.); Harris v. United States, 313 F. App'x 969 (9th Cir. 2009), *vacated*, 130 S. Ct. 3542 (2010) (mem.); Redzic v. United States, 569 F.3d 841 (8th Cir. 2009), *vacated*, 130 S. Ct. 3543 (2010) (mem.); *see also* Ellen S. Podgor, *Skilling Decision Brings Down Scrushy, Siegelman, Hargrove, and Hereimi*, WHITE COLLAR CRIME PROF BLOG (June 29, 2010), http://lawprofessors.typepad.com/whitecollarcrime_blog/2010/06/skilling-decision-brings-down-scrushy-siegelman-hargrove-and-hereimi.html.

[105] Buell, *The Court's Fraud Dud*, *supra* note 27, at 46.

[106] *See id.* at 36 ("[T]he majority went so far as the extraordinary step of warning Congress in a footnote that any effort to expand the mail fraud statute further would have to navigate through perilous constitutional shoals.").

> particular care in attempting to formulate an adequate criminal prohibition in this context.[107]

Whatever changes Congress decides to make to the Supreme Court's interpretation of honest services, however, it "would have to employ standards of sufficient definiteness and specificity to overcome due process concerns."[108] In other words, "If Congress desires to go further . . . it must speak more clearly than it has."[109] Two times, already, Congress has failed to speak clearly enough, but perhaps the third attempt would be successful in withstanding judicial scrutiny and more permanently changing the legal landscape of the honest-services doctrine.[110]

III. THE IMPLICATIONS OF THE TRILOGY OF HONEST-SERVICES CASES

There are several implications of the Supreme Court's trilogy that narrowed the honest-services doctrine. As lawmakers decide whether and how to further legislate on this topic, and as the doctrine continues to develop in the federal courts,[111] it is essential to analyze the implications of the trilogy, which suggest that the future of honest services depends on the application of the void-for-vagueness doctrine and the workings of governmental checks and balances.

A. The Void-for-Vagueness Doctrine

The void-for-vagueness doctrine played a central role in *Skilling*.[112] It drove the majority's decision, resulting in the narrowing of the honest-

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[107] Skilling v. United States, 130 S. Ct. 2896, 2933 n.45 (2010) (citations omitted).

[108] *Id.*

[109] *Id.* at 2933 (quoting McNally v. United States, 483 U.S. 350, 360 (1987)) (internal quotation marks omitted).

[110] Of course, the temptation continues to be to draft a broad law on the subject given the advantages of such broadness. *See infra* note 125 and accompanying text; *see also* O'Toole, *supra* note 92, at 59 ("If the Court strikes down the honest-services law, what happens next? The Department of Justice will almost certainly seek a new law with the main perceived benefit of the old one—unlimited flexibility.").

[111] *See supra* Part II.C; *infra* Part III.B.1.

[112] However, void-for-vagueness was only one aspect of the decision. In fact, the Court's decision extended well beyond strict white-collar criminal law and into federal criminal jury trial issues and statutory interpretation. The prominence of these other issues may have resulted in a more cursory exploration of the issues squarely at the center of the honest-services debate. *See, e.g.*, Sara Sun Beale, *An Honest Services Debate*, 8 OHIO ST. J. CRIM. L. 251, 271 (2010) [hereinafter Beale, *An Honest Services Debate*], *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1661433 ("Precisely because the Court did not engage these criminal justice concerns, the *Skilling* opinion prompted the debate's exploration of other issues that are less often the focus of criminal law scholarship: the doctrine of constitutional avoidance, the standards governing facial versus as-applied challenges, the proper methodology for interpreting statutes, and institutional concerns regarding the federal judiciary and its relationship to the other branches of government. These

services doctrine, and animated Justice Scalia's argument that the honest-services statute should be entirely voided. All of the Justices considered the honest-services doctrine, as argued by the government in *Skilling*, to be unconstitutionally vague.[113] The Court's majority, however, viewed the statute as salvageable when narrowed,[114] while the concurring Justices, consisting of Justices Scalia, Thomas, and Kennedy, viewed the statute as unconstitutionally vague.[115]

The void-for-vagueness doctrine is "among the most important guarantees of liberty under law."[116] For over one hundred years, the Supreme Court has invalidated statutes that were unconstitutionally uncertain.[117] Ironically, the doctrine has itself been criticized for being vague.[118] Nonetheless, in *City of Chicago v. Morales*,[119] the Court noted two circumstances in which vagueness could invalidate a criminal law: "First, [the invalid law] may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement."[120]

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issues have generally been seen as the province of scholars specializing in constitutional law, federal courts, legislation, and public choice theory.").

[113] For background on the void-for-vagueness doctrine, see generally Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279 (2003). For background on facial vagueness and vagueness as applied, see John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 DENV. U. L. REV. 241, 275–84 (2002). For a comparative treatment of the doctrine in American and French law, see Patricia Rrapi, *La Mauvaise Qualite de la Loi: Vagueness Doctrine at the French Constitutional Council*, 37 HASTINGS CONST. L.Q. 243 (2010).

[114] Skilling v. United States, 130 S. Ct. 2896, 2929 (2010) ("It has long been our practice, however, before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction." (citation omitted)).

[115] *Id.* at 2935 (Scalia, J., concurring).

[116] CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 102 (1996).

[117] *See* Cristina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 255, 263–64 (2010).

[118] Some commentators have therefore suggested changes to this doctrine. *See, e.g.*, *id.* at 257 (Lockwood argues that the sole requirement for vagueness should be that the law's language did not provide fair notice of the prohibited conduct and suggests the adoption of a strict facial review standard "such that a law must be determined to be unconstitutionally vague in all of its applications before it can be invalidated in its entirety.").

[119] City of Chicago v. Morales, 527 U.S. 41 (1999). For commentary on this case, see generally Debra Livingston, *Gang Loitering, the Court, and Some Realism about Police Patrol*, 1999 SUP. CT. REV. 141 (1999).

[120] *Morales*, 527 U.S. at 56 (citation omitted). An example of an area in which the law is argued to be unconstitutionally vague is the definition of "pornography" in the context of sentencing imposed pursuant to 18 U.S.C. § 3583(e)(2), under which defendants convicted of federal child pornography crimes are often subject to supervised release conditions that proscribe any possession of "pornographic, sexually oriented, or sexually stimulating material." *See, e.g.*, United States v. Wilkinson, 282 Fed. App'x 750, 752 (11th Cir. 2008). In this context, the Supreme Court has not determined whether the term "pornography" is unconstitutionally vague or overly broad, and the circuits are generally split on the issue. *Id.* at 754; *see also* Joseph E. Bauerschmidt, Note, *"Mother of Mercy—Is This The End of Rico?"—Justice Scalia Invites Constitutional Void-for-Vagueness Challenge to RICO "Pattern"*, 65

The doctrine is rooted in due process concerns. In *Connally v. General Construction Co.*,[121] an early case on the vagueness doctrine, the Court explained that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."[122]

During oral arguments in *United States v. Black*, the Justices uniformly noted the ambiguities in the honest-services statute, which verged on being fatal to the statute. Justice Breyer posited: "So every instance in which a worker does not provide honest services to the employer, he has met your test. I think there are 300—perhaps there are 150 million workers in the United States. I think possibly 140 of them would flunk your test."[123] Justice Breyer raised, as an example of a violation of the honest-services doctrine, an employee's compliment to a boss in order to usher the boss out of the office so that the employee may return to personal business.[124] An even more universal example is an employee's use of the Internet for personal reasons during job hours. Under a broad interpretation of the honest-services doctrine, therefore, almost every employee would become a federal criminal, and this broadness verged on ambiguity.

Before being invalidated by the Supreme Court on these grounds, § 1346's broad language had many advantages for prosecutors, allowing the honest-services statute to be molded to fit many fraudulent schemes incapable of prospective definition and prohibition.[125] Unsurprisingly, defenders of the statute argued to federal appellate courts, quite successfully, that Congress had intended the language of § 1341 to be broad and flexible in order to implicate a wide range of fraudulent schemes.[126] However, even if

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NOTRE DAME L. REV. 1106 (1990) (discussing the void-for-vagueness doctrine in the RICO context); Derrick Moore, Note, *"Crimes Involving Moral Turpitude": Why the Void-For-Vagueness Argument is Still Available and Meritorious*, 41 CORNELL INT'L L.J. 813, 839 (2008) (arguing that "crimes involving moral turpitude" are unconstitutionally vague).

[121] Connally v. Gen. Constr. Co., 269 U.S. 385 (1926).

[122] *Id.* at 391 (citing Int'l Harvester Co. v. Kentucky, 234 U.S. 216, 221 (1912)).

[123] Transcript of Oral Argument at 30, United States v. Black, 130 S. Ct. 2963 (2010) (No. 08-876), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-876.pdf. For commentary on the implications of Justice Breyer's point, see generally 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), http://www.vanderbiltlawreview.org/2010/03/.

[124] Transcript of Oral Argument at 30, *Black*, 130 S. Ct. 2963 (No. 08-876).

[125] *See, e.g.*, Thomas Fredrick Rybarczyk, Comment, *Preserving a More Perfect Union: Melding Two Circuits' Approaches to Save a Valuable Weapon in the Fight against Political Corruption*, 2011 WIS. L. REV. 101 (forthcoming 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1624700.

[126] *See, e.g.*, United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982) (citing Screws v. United States, 325 U.S. 91, 101–02 (1945); United States v. Manfredi, 488 F.2d 588, 602 (2d Cir. 1973)) ("The broad language of the statute, intended by Congress to be sufficiently flexible to cover the wide range of fraudulent schemes mankind is capable of devising, is not unconstitutionally vague because § 1341 contains the requirement that the

this were the intention of Congress, such an intention could not in itself determine the constitutionality of the statute as Congress cannot intend to be ambiguous in its legislating or to create other fundamentally unconstitutional legislation.[127] Nonetheless, the Supreme Court presumed in *Skilling* that Congress operated within the same interpretation of the constitutional framework as the Court, and did not aim for ambiguity: "Apprised that a broader reading of § 1346 could render the statute impermissibly vague, Congress, we believe, would have drawn the honest-services line, as we do now, at bribery and kickback schemes."[128]

One of the most significant dangers of any vague statute, of course, is the opportunity for prosecutorial abuse.[129] This is particularly true in honest-services cases given that anyone can be targeted under the statute, including political enemies.[130] And, of course, a vague statute has due process concerns, risking invalidation at the hands of the Supreme Court, as was nearly the case in *Skilling*.[131] Therefore, although the honest-services doctrine has survived many vagueness challenges,[132] the void-for-vagueness

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defendant must have acted willfully and with a specific intent to defraud.").

[127] Skilling v. United States, 130 S. Ct. 2896, 2931 (2010). National uniformity might help decrease the ambiguity. In *Skilling*, the Supreme Court interpreted its decision as "establish[ing] a uniform national standard, defin[ing] honest services with clarity, reach[ing] only seriously culpable conduct, and accomplish[ing] Congress's goal of 'overruling' *McNally*." *Id.* at 2933 (citation omitted).

[128] *Id.* at 2931 n.43.

[129] *See* Rybarczyk, *supra* note 125, at 104. One author suggests a limit on prosecutorial discretion through prosecutorial self-policing, as guided by the United States Attorney's Manual, which states:

> Prosecutions of fraud ordinarily should not be undertaken if the scheme employed consists of some isolated transactions between individuals, involving minor loss to the victims, in which cases the parties should be left to settle their differences by civil or criminal litigation in the state courts. Serious consideration, however, should be given to the prosecution of any scheme which in its nature is directed to defraud a class of persons, or the general public, with a substantial pattern of conduct.

Mathew N. Brown, Current Development, *Prosecutorial Discretion and Federal Mail Fraud Prosecutions for Honest Services Fraud*, 21 GEO. J. LEGAL ETHICS 667, 673 (2008) (quoting U.S. Dep't of Justice, United States Attorneys' Manual § 9-43.100 (1997), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/43mcrm.htm).

[130] *See infra* Part III.B.2; *see also* Beale, *Rethinking the Identity and Role of United States Attorneys*, *supra* note 43, at 417 (noting prosecutorial discretion may be used for improper partisan reasons, such as accelerating or delaying charges so as to influence an election, or bringing charges against political opponents). *See generally* Alexa Lawson-Remer, Note, *Rightful Prosecution or Wrongful Prosecution? Abuse of Honest Services Fraud for Political Purposes*, 82 S. CAL. L. REV. 1289 (2009) (analyzing the potential for abuse of honest services in pursuit of political goals).

[131] *See supra* Part II.B.

[132] *See, e.g.*, United States v. Margiotta, 688 F.2d 108, 129 (2d Cir. 1982) ("The broad language of the statute, intended by Congress to be sufficiently flexible to cover the wide range of fraudulent schemes mankind is capable of devising, is not unconstitutionally vague because [§] 1341 contains the requirement that the defendant must have acted willfully

doctrine may remain the gravest threat to the development of the honest-services doctrine.

B. The Checks and Balances

There are many checks and balances built into American governance, between not only the branches of the Federal Government, but also between the State and Federal Governments. All of the jostling over the proper contours of the honest-services doctrine illustrates and tests these checks and balances, which form the cornerstone of the American system.

1. Between Legislatures and Courts

The development of the honest-services doctrine has resembled a match between the Supreme Court and Congress: The Court's trilogy of cases is the fourth attempt by one of the branches to determine the contours of the honest-services doctrine—the Court's second.[133] Even Congress's enactment of § 1346 in 1988 stemmed from a desire to circumvent the Court's decision in *McNally*, which limited the federal mail-fraud statute to deprivations of tangible property.[134] It would therefore be unsurprising if Congress circumvents the Supreme Court's trilogy with new legislation, further energizing the match between the branches even though, ironically, the void-for-vagueness doctrine—the grounds for the Court's most recent reform of the honest-services doctrine—has been described as the final check on legislatures and state courts.[135]

The void-for-vagueness doctrine has also been described as an opportunity for the courts to evade a full analysis of certain constitutional issues, such as permissible behavior and relationships under the Constitution, in favor of a limited strike on a law.[136] Indeed, in *Skilling*, the Court came close to voiding § 1346, though it ultimately decided to narrow the statute instead.[137] The Court was also able to largely avoid addressing the substance of fraud law by relying on vagueness, even though such a substantive discussion could have better guide legislators.[138]

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and with a specific intent to defraud."); United States v. Louderman, 576 F.2d 1383, 1388 (9th Cir. 1978); *see also* Martin, *supra* note 12, at 37 ("The lower courts have struggled to save the 'honest services' statute by engrafting various limiting principles. But the limiting principles have been far from uniform.").

[133] *See* Buell, *The Court's Fraud Dud*, *supra* note 27, 36 n.25 ("This was, after all, a third volley in an inter-branch engagement, albeit one that had seen 25 years of quiet.").

[134] *See supra* Part II.B.

[135] Gillian K. Hadfield, *Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law*, 82 CALIF. L. REV. 541, 553 (1994).

[136] *See* Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CALIF. L. REV. 491, 507 (1994).

[137] *See supra* Part II.B.

[138] *See supra* notes 83, 111 and accompanying text.

There is, however, the always-present danger of one branch's encroachment on another despite the system's checks and balances. In one of *Skilling*'s footnotes, for example, the Supreme Court seemed suspiciously anxious to guide the Congressional drafting of future relevant legislation.[139] The Court, at the very least, is likely correct in its expectation that honest services will continue to be the subject of legislation[140] and that the checks and balances inherent to the system will prevent one branch from dominating honest-services law.

2. Between State and Federal Governments

The honest-services doctrine implicates the balance between State and Federal Governments on several points, with federalism emerging as a major theme in *Skilling*.[141] The main issue is the prosecution of state and local officials under federal fraud law, independent of state law.[142] In fact, most of the politicians prosecuted under § 1346 have been local and state, not federal, officials.[143] Such a lack of limits on the possible targets of a statute potentially creates problems in criminal law, especially when a federal statute could be used against local and state officials in an overbroad manner.[144]

This issue, however, was not resolved by the Supreme Court in its trilogy of decisions. Commentators have described this omission as a missed opportunity to address an important aspect of the honest-services doctrine.[145] The Court's decisions in these cases, however, showed some consideration of an amicus curiae brief filed by Professor Albert Alschuler, which raised

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[139] *See* Skilling v. United States, 130 S. Ct. 2896, 2933 n.45 (2010); *supra* notes 107–110 and accompanying text; *see also* Beale, *An Honest Services Debate*, *supra* note 112, at 269 ("The *Skilling* decision encroached on the policymaking authority of the Department of Justice and Congress, though they may be unable or unwilling to respond effectively.").

[140] "[H]onest services fraud is the subject of legislation currently pending before Congress and the Florida Legislature. Federal S.B. 49, the Public Corruption Prosecution Improvements Act, proposes to increase the statute of limitations from five to six years and expand the statute to include schemes to obtain 'any other thing of value.'" Neiberger, *supra* note 17, at 85. The Florida legislation aimed to create a state crime of honest-services fraud, but the bill was withdrawn from legislative consideration. *Id.*

[141] *See, e.g.*, Brown, *supra* note 129, at 679 (Though such challenges have largely failed, "[f]ederalism concerns have been raised against the national intrusion into state affairs.").

[142] *See infra* notes 144, 147–150 and accompanying text.

[143] Eliason, *supra* note 9, at 969.

[144] Beale, *An Honest Services Debate*, *supra* note 112, at 260–61; *see also* Rybarczyk, *supra* note 125, at 123–24 (discussing potential determinations as to the targets of § 1346).

[145] Beale, *An Honest Services Debate*, *supra* note 112, at 262 ("After all, we are talking about a statute that is employed to prosecute state and local government officials, with all of the issues that it raises: federalism, the danger of politically motivated use of prosecutorial discretion, and the potential to chill political activity.").

the issue of federalism in criminal law and the states' abilities to prescribe criminal law.[146]

One proposed limit to the honest-services doctrine to resolve some of these federalism concerns[147] is to require a state law violation independent of the honest-services violation before commencing prosecution under the honest-services statute.[148] Without requiring a state law violation, federal law, under the guise of the honest-services statute, defines "the ethical obligations that elected state officials and other state employees owe to their respective state governments."[149] Nonetheless, substantive federalism concerns did not plague the majority in *Skilling*, and, therefore, this issue was not extensively considered.[150]

There is also the issue of federal common law crimes.[151] In his concurrence, Justice Scalia noted 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."[152] Again, however, the majority was not inclined to substantively resolve this point.

In addition to the determinations of the appropriate contours of federal and state criminal law, there remains the unanswered question of the boundaries of criminal law generally.[153] This is especially true given some commentators' recognition of the general penchant for

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[146] *See supra* note 95 and accompanying text.

[147] One author proposes another solution to federalism concerns: "[I]f § 1346 were drafted using more precise, definite language—without micromanaging state affairs—then federalism-based criticisms of honest services fraud might be quieted to a large extent." Huigens, *supra* note 13, at 1714.

[148] *See, e.g.*, Van Strander, *supra* note 13, at 81 (describing the issue before the Supreme Court in *Weyhrauch*). However, "the Fourth, Ninth, and Eleventh Circuits have all rejected the principle that in order to sustain an honest services fraud charge, an underlying state statute must be shown to have been violated." Matthew Modell, *(Dis)honest Services Fraud: "Bad Men, Like Good Men, Are Entitled to Be Tried and Sentenced in Accordance with Law"*, 32 N.C. CENT. L. REV. 131, 138 (2010).

[149] Lowell, Man & Thompson, *supra* note 33, at 19.

[150] *See also* Van Strander, *supra* note 13, at 85 ("While the Ninth Circuit ultimately declined to adopt the state-law limiting principle [in *Weyhrauch*], it noted that the *Brumley* decision addressed all of the various federalist concerns by doing so. The *Brumley* holding sets clear boundaries for federal honest-services fraud liability by limiting its scope to preexisting state law, thus preventing federal overreaching into state affairs."). "In declining to adopt the state-law limiting principle, the [Ninth Circuit] cited *United States v. Louderman*, which held that state law plays no role in a court's determination whether a federal fraud statute has been violated." *Id.* at 86.

[151] "Although the proscription of federal common-law crimes may be swaddled in the blanket of federalism, the two principles are nevertheless distinct and merit separate consideration." Huigens, *supra* note 13, at 1713.

[152] Skilling v. United States, 130 S. Ct. 2896, 2935 (Scalia, J., concurring) (citing United States v. Hudson, 11 U.S. 32, 34 (1812)); *see also* Modell, *supra* note 148, at 131 (noting the problem with honest-services fraud in the context of common law crime).

[153] *See* Beale, *An Honest Services Debate*, *supra* note 112, at 271.

"overcriminalization."[154] On the other hand, corruption is a major problem with real costs to efficiency, fairness, and transparency—whether in the context of corrupt corporations or corrupt governments.[155] It is in the pursuit of the end of corruption, however, that questions arise regarding the potential and ideal scope of relevant legislation, as well as the harshness of white-collar crime sentencing.[156] Indeed, there is no simplicity in the issues triggered by the establishment of the proper contours of the criminalization of corruption.

IV. CONCLUSION

In sum, although *Skilling* limited the honest-services statute, several concurring Justices would have invalidated it as unconstitutionally vague. This division of opinion has characterized the honest-services doctrine's entire existence, representing the greater debate on the topic among commentators, federal courts, and Congress. Nonetheless, *Skilling* and its companion cases dramatically altered the legal landscape of white-collar crime by restricting the qualifying acts under the honest-services doctrine to bribery and kickbacks. This decision comes twenty-two years after Congress enacted the honest-services statute and responds to much of the criticism regarding the doctrine's previously broad application.

The results of the trilogy remain to be seen: prosecutors may seek other avenues to prosecution, or Congress may legislatively respond to the Court on the issue, leaving even the most recent version of the honest-services doctrine vulnerable. This jostling between the Supreme Court and Congress, however, illustrates the delicate balance between the government branches in defining a federal crime, as well as the balance between the states and the Federal Government on the issue. As the balance next shifts to

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[154] *See id.*; Gopalan, *supra* note 44, at 460–61 (noting the urge to criminalize conduct previously "dealt with by other areas of the law"). *But see generally* Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491 (2008) (noting the advantages of "overbreadth" in criminal law).

[155] As President Barack Obama noted,

> No country is going to create wealth if its leaders exploit the economy to enrich themselves or if police can be bought off by drug traffickers. . . . People everywhere should have the right to start a business or get an education without paying a bribe. We have a responsibility to support those who act responsibly and to isolate those who don't, and that is exactly what America will do.

President Barack Obama, Remarks by the President to the Ghanian Parliament (July 11, 2009), http://www.whitehouse.gov/the-press-office/remarks-president-ghanaian-parliament. For this reason, among others, the Department of Justice has increased prosecutions, under the Foreign Corrupt Practices Act, of corporate bribery of foreign government officials. *See generally* Margaret Ryznar & Samer Korkor, *Bribery Legislation in the United States and United Kingdom*, 75 MO. L. REV. (forthcoming 2011).

[156] For a discussion of these issues in the context of corporate bribery of foreign government officials, see generally *id.*

Congress, legislators may choose to consider the guidance provided by the Supreme Court's recent trilogy of decisions. All the while, the development of the honest-services doctrine remains one of the most dynamic, multi-dimensional issues in the law today.