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Bribery, Kickbacks, and Self-Dealing: An Overview of Honest Services Fraud and Issues for Congress

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SUMMARY

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Bribery, Kickbacks, and Self-Dealing: An Overview of Honest Services Fraud and Issues for Congress

As the trials of Sheldon Silver and Dean Skelos illustrate, corruption among high-profile public officials continues to be a concern in the United States. Likewise, recent examples abound of powerful executives in the private sector abusing positions of trust for personal gain. Faced with this reality, Congress has shown consistent interest in policing public- and private-sector corruption, enacting a number of criminal provisions aimed at holding corrupt officials accountable for their actions under federal law. However, one of federal prosecutors' most potent existing tools for combating such corruption—18 U.S.C. § 1346, which defines the crimes of mail and wire fraud as including so-called "honest services" fraud—has been a source of contention between the courts and Congress for years.

18 U.S.C. § 1346 defines the term "scheme or artifice to defraud," as used in the general statutes prohibiting use of the mails or wires to commit fraud, to include a scheme or artifice to deprive another of the *intangible* right of honest services. Congress enacted this provision in the late 1980s in response to the U.S. Supreme Court's holding in *McNally v. United States* that the mail fraud statute was limited in scope to only the protection of *tangible property* rights. The *McNally* decision was grounded in concerns that a broader construction of the statute could leave its outer boundaries ambiguous and unjustifiably involve the federal government in setting standards for good government at the local level. Nevertheless, Section 1346 abrogates *McNally*'s holding, codifying the understanding of some of the lower federal courts that the mail and wire fraud statutes extend to conduct that deprives a person or group of the right to have another act in accordance with some externally imposed duty or obligation, regardless of whether the victim so deprived has suffered or would suffer a pecuniary harm.

Recognizing that this lower court understanding in fact evinced considerable disarray as to the kinds of schemes that would qualify as honest services fraud, however, the Supreme Court subsequently read a limiting principle into Section 1346 in *Skilling v. United States* in order to avoid invalidating the statute as unconstitutionally vague. After *Skilling*, mail and wire fraud prosecutions under an honest services theory may extend only to those who, in violation of a fiduciary duty, participate in bribery or kickback schemes. Notably, the *Skilling* decision withdrew from the reach of Section 1346 a significant category of cases that had been prosecuted as honest services fraud up to that point: cases involving more general financial self-dealing or conflicts of interest, where no bribes or kickbacks are given. Congress has considered legislation on more than one occasion that would reinstate the self-dealing category of honest services fraud rejected in *Skilling*, though the law remains unchanged as of this writing.

The conversation between the Court and Congress regarding the scope of honest services fraud and its culmination in *Skilling* have presented more questions that lower courts have been tasked with answering, including the source of the requisite fiduciary duty and the conduct that qualifies as bribery or kickbacks. Courts have looked to a variety of sources to give content to the fiduciary duty requirement, including federal, state, and common law. Likewise, in fleshing out the contours of the bribery or kickbacks called for in *Skilling*, lower courts have relied on anti-bribery and anti-kickback provisions found in federal statutes. In the recent case of *McDonnell v. United States*, the Supreme Court limited the reach of one of those statutes—18 U.S.C. § 201, which makes it a crime to offer or solicit anything of value to influence an "official act"—by construing the term "official act" narrowly. Nevertheless, alternate routes appear to be available to prosecute bribery schemes involving conduct that may be beyond the scope of *McDonnell*.

Should Congress seek to alter the scope of honest services fraud, it will likely need to be attuned to the concerns that federal courts interpreting 18 U.S.C. § 1346 have voiced over the years. Chief among these have been the concerns that—as written—the statute has the potential to sweep too broadly and regulate ethically dubious conduct of state and local officials in a way that conflicts with the Constitution.

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Introduction

As the trials of Sheldon Silver and Dean Skelos[1] illustrate, corruption among high-profile public officials continues to be a concern in the United States.[2] Likewise, recent examples abound of powerful executives in the private sector abusing positions of trust for personal gain.[3]

Faced with this reality, Congress has shown consistent interest in policing public- and private-sector corruption,[4] enacting a number of criminal provisions aimed at holding corrupt officials accountable for their actions under federal law. However, one of federal prosecutors' most potent existing tools for combating such corruption—18 U.S.C. § 1346, which defines the crimes of mail and wire fraud as including so-called "honest services" fraud—has been a source of contention between the courts and Congress for years. While Congress has manifested its intent[5] that the mail and wire fraud statutes should broadly cover the self-interested actions of federal, state, local, and private-sector officials, the Supreme Court and lower federal courts have repeatedly limited the scope of 18 U.S.C. § 1346 out of concern that a broad construction would render the statute unconstitutionally vague (and, with respect to state and local officials, potentially raise federalism concerns).[6] This report thus provides an overview of the still-developing federal crime of honest services fraud and highlights certain legal issues that Congress may consider if it seeks to address the scope of the crime legislatively.

Chapter 63 of Title 18 of the U.S. Code broadly criminalizes the use of the mails or wires in furtherance of "any scheme or artifice to defraud," or "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[7] A core category of conduct reached by these mail and wire fraud statutes concerns misrepresentations or omissions that would deprive a victim of his or her money or property. In such cases, "the victim's loss of money or property supplie[s] the defendant's gain, with one the mirror image of the other."[8] A straightforward example is the filing of an insurance claim for a car accident that never happened in order to obtain a payout from the insurance company.[9]

Yet 18 U.S.C. § 1346 establishes that the term "scheme or artifice to defraud" as used in Chapter 63 also "includes a scheme or artifice to deprive another of the intangible right of honest services."[10] This provision was enacted in the late 1980s, in response to the U.S. Supreme Court's holding in *McNally v. United States*[11] that the mail fraud statute was "limited in scope" to *only*

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[1] *See* Benjamin Weiser, *Sheldon Silver, Ex-New York Assembly Speaker, Gets 7-Year Prison Sentence*, N.Y. TIMES (Jul. 27, 2018), https://www.nytimes.com/2018/07/27/nyregion/sheldon-silver-sentencing-prison-corruption.html.

[2] *See* Coralie Pring, *Corruption in the USA: The Difference a Year Makes*, TRANSPARENCY INT'L (Dec. 12, 2017), https://www.transparency.org/news/feature/corruption_in_the_usa_the_difference_a_year_makes (describing survey in which almost seven out of 10 people communicated belief that government is failing to fight corruption).

[3] *E.g.*, Doha Madani, *Fyre Festival organizer Billy McFarland sentenced to 6 years on fraud charges*, NBC NEWS (Oct. 11, 2018), https://www.nbcnews.com/news/us-news/fyre-festival-organizer-billy-mcfarland-sentenced-6-years-fraud-charges-n919086.

[4] *E.g.*, H.R. 1, 116th Cong. (2019) (proposing various ethics and conflict-of-interest reforms for federal officials).

[5] *See infra* § McNally v. United States and Congressional Response.

[6] *See infra* §§ Honest Services Fraud After Enactment of 18 U.S.C. § 1346, United States v. Skilling.

[7] 18 U.S.C. §§ 1341, 1343.

[8] Skilling v. United States, 561 U.S. 358, 400 (2010) (citing Unites States v. Starr, 816 F.2d 94, 101 (2d Cir. 1987)).

[9] *See* United States v. Collins, 774 F.3d 256, 259, 262-63 (5th Cir. 2014).

[10] 18 U.S.C. § 1346.

[11] 483 U.S. 350 (1987), *superseded by statute*, 18 U.S.C. § 1346.

"the protection of property rights."[12] Section 1346 abrogates *McNally*'s holding, codifying the understanding of some of the lower federal courts that the mail and wire fraud statutes extend to conduct that deprives a person or group of the right to have another act in accordance with some externally imposed duty or obligation, regardless of whether the victim so deprived has suffered or would suffer a pecuniary harm. Recognizing that this lower court understanding in fact evinced "considerable disarray" as to the kinds of schemes that would qualify as "honest services" fraud, however, the Supreme Court subsequently read a limiting principle into Section 1346 in *Skilling v. United States* in order to avoid invalidating the statute as unconstitutionally vague.[13] After *Skilling*, mail and wire fraud prosecutions under an honest services theory may extend only to "offenders who, in violation of a fiduciary duty, participate[] in bribery or kickback schemes."[14]

The conversation between the Court and Congress regarding the scope of honest services fraud and its culmination in *Skilling* have presented more questions that lower courts have been tasked with answering, including the sources of fiduciary duties and the types of conduct that qualify as bribery and kickback schemes. This report provides an overview of the mail and wire fraud statutes and the pre-*Skilling* development of the "honest services" theory of fraud. The report then examines the theory's codification in 18 U.S.C. § 1346 and subsequent limitation in *Skilling*, and surveys post-*Skilling* judicial elaboration of the requirements for honest services fraud. Finally, this report briefly addresses some issues Congress may consider if it seeks to alter the scope of honest services fraud through legislation.

Overview of Mail and Wire Fraud Statutes[15]

18 U.S.C. § 1341 prohibits use of the mails (including the United States Postal Service and "any private or commercial interstate carrier") for the purpose of executing "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[16] 18 U.S.C. § 1343 likewise prohibits transmissions "by means of wire, radio, or television communication in interstate or foreign commerce" for the purpose of executing such schemes or artifices.[17] These federal crimes, commonly known as "mail fraud"

[12] *Id.* at 360.

[13] *Skilling*, 561 U.S. at 405.

[14] *Id.* at 407.

[15] This report focuses specifically on "honest services" fraud, a subcategory of fraudulent conduct covered by the mail and wire fraud statutes. For a more fulsome overview of the statutes and related provisions, see CRS Report R41930, *Mail and Wire Fraud: A Brief Overview of Federal Criminal Law*, by Charles Doyle.

[16] 18 U.S.C. § 1341. The statute also prohibits use of the mails in relation to "any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article[.]" *Id.*

[17] 18 U.S.C. § 1343. Other sections of Chapter 63 of Title 18 of the U.S. Code mirror this language in proscribing frauds involving certain institutions and industries. 18 U.S.C. Section 1344 proscribes defrauding financial institutions. Section 1347 proscribes defrauding health care benefit programs. Section 1348 proscribes frauds in connection with commodities and securities.

Though the text of Sections 1341 and 1343 would appear to comprehend two separate categories of conduct—schemes or artifices "to defraud" and schemes or artifices "for obtaining money or property" by certain means—this is not the case. Rather, the addition of the second clause simply codifies an early Supreme Court holding that a "scheme or artifice to defraud" extends beyond "misrepresentation[s] as to some existing fact" to reach "false promises and misrepresentations *as to the future*." McNally v. United States, 483 U.S. 350, 357-59 (1987) (quoting Durland v. United States, 161 U.S. 306, 312 (1896)) (emphasis added), *superseded by statute on other grounds as stated in* Skilling v. United States, 561 U.S. 358 (2010); *see also* United States v. Sadler, 750 F.3d 585, 590 (6th Cir. 2014) ("While on a first reading one might think the statute contains two distinct crimes—a 'scheme to defraud' or a 'scheme . . . for obtaining money or property'—that is not the case."). Thus, the operative language in the statutory provisions is

and "wire fraud," encompass multiple forms of fraudulent conduct using jurisdictional hooks that reach practically all forms of communication.[18] Because the two statutes (save for the medium used in connection with the offense) essentially mirror each other, interpretations and analyses of one statute will typically apply to the other.[19]

To secure a mail or wire fraud conviction, the government must prove beyond a reasonable doubt four elements, each of which is discussed in more detail below:

1. a scheme to defraud involving a material deception;
2. foreseeable use of the mail, a private commercial carrier, or a wire or radio communication in furtherance of said scheme; and
3. intent to defraud another of
4. money, property, or honest services.[20]

Scheme to Defraud

The requisite "scheme to defraud" has been framed broadly, sometimes as broadly as "a departure from fundamental honesty, moral uprightness and candid dealings in the general life of the community."[21] Generally, what the scheme to defraud element contemplates is conduct reasonably calculated to deceive.[22] Because the mail and wire fraud statutes criminalize the "scheme" to defraud, and not the fraud itself, the government need not prove that the scheme was

"any scheme or artifice to defraud," which broadly embraces "any plan or course of action by which someone uses false, deceptive, or fraudulent pretenses, representations, or promises to deprive someone else of" something of value. United States v. Smith, 749 F.3d 465, 477 (6th Cir. 2014); *see also McNally*, 483 U.S. at 358 ("[T]he words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'" (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924))). Schemes involving both affirmative misrepresentations and omissions are included. *See* Neder v. United States, 527 U.S. 1, 22 (1999) (referencing "the well-settled meaning of 'fraud'" as requiring "a misrepresentation or concealment of material fact" (emphasis omitted)).

[18] *See* United States v. Sawyer, 85 F.3d 713, 723 n.5 (1st Cir. 1996) (noting that the statutes "are increasingly used effectively to convict and punish for the substantive fraud," with "the use of the mails or wires [being] merely a 'jurisdictional hook'"); United States v. Maze, 414 U.S. 395, 405 (1974) (Burger, C.J., dissenting) (explaining that the mail fraud statute "has traditionally been used against fraudulent activity as a first line of defense," a "stopgap device to deal on a temporary basis" with "a 'new fraud' . . . until particularized legislation can be developed"), *superseded by statute as stated in* Loughrin v. United States, 473 U.S. 351 (2014).

[19] *See, e.g.*, Pasquantino v. United States, 544 U.S. 349, 355 n.2 (2005) ("[W]e have construed identical language in the wire and mail fraud statutes *in pari materia*."); United States v. Mullins, 613 F.3d 1273, 1281 n.2 (10th Cir. 2010) (deeming interpretations of mail fraud statute to be "authoritative on questions of wire fraud" (quoting United States v. Wittig, 575 F.3d 1085, 1099 n.3 (10th Cir. 2009))); United States v. Reifler, 446 F.3d 65, 95 (2d Cir. 2006) ("In interpreting § 1343, we look . . . also to cases involving 18 U.S.C. § 1341, the mail fraud statute, as § 1341 uses the same relevant language[.]").

[20] *See* United States v. Faulkenberry, 614 F.3d 573, 581-83 (6th Cir. 2010) (discussing elements); *see also* Pereira v. United States, 347 U.S. 1, 8 (1954) (requiring that use of the mails be "reasonably . . . foreseen"); *Neder*, 527 U.S. at 25 (holding that materiality is an element).

[21] United States v. Henningsen, 387 F.3d 585, 589 (7th Cir. 2004).

[22] *See* United States v. Takhalov, 827 F.3d 1307, 1312-14 (11th Cir. 2016) (discussing nature of scheme to defraud). It is not altogether clear whether deception is considered objectively or subjectively. *Compare* Eclectic Props. East, LLC v. Marcus & Millichap Co., 751 F.3d 990, 997 (9th Cir. 2014) (holding that scheme must be calculated to deceive "persons of ordinary prudence and comprehension"), *with* United States v. Coffman, 94 F.3d 330, 334 (7th Cir. 1996) (noting that the "reasonable person" standard merely provides evidence of fraudulent intent and distinguishes "sharp dealing," and declining to "invite con men to prey on people of below-average judgment or intelligence").

successful.[23] However, the Supreme Court has established that the deception contemplated by a scheme to defraud must be "material," that is, the misrepresentation or concealment at issue must have "a natural tendency to influence, or [be] capable of influencing," the person "to [whom] it was addressed."[24]

Use of Mail or Wire

The second element of mail or wire fraud requires proof that the defendant used or caused to be used the U.S. mail; any private or commercial interstate carrier; or a "wire, radio, or television communication in interstate or foreign commerce."[25] The defendant need not have personally dispatched the offending mail or communication, so long as use of the mails or wires could reasonably be foreseen.[26]

The statutory text contemplates use of the mails or wires "for the purpose of executing" the scheme or artifice to defraud,[27] which courts typically frame as use "in furtherance of" the fraudulent scheme.[28] The mailing or wire communication does not have to be "inherently criminal" or "essential" to the scheme in order to qualify[29]—rather, it must only be "part of the execution of the scheme as conceived by the perpetrator at the time."[30] As a result, illicit conduct under the statutes can include mailings or transmissions "designed to lull the victims into a false sense of security," postpone an investigation by authorities, or otherwise conceal the fraud.[31]

Intent

The government must also prove that the defendant in a mail or wire fraud prosecution had the intent to defraud, meaning "the specific intent to deceive or cheat, usually for the purpose of getting financial gain for one's self or causing financial loss to another."[32] A person who merely expresses an opinion or, in good faith, makes a statement of fact that turns out to be inaccurate

[23] *See* Pasquantino v. United States, 544 U.S. 349, 371 (2005) (acknowledging that "the wire fraud statute punishes the scheme, not its success"); United States v. Pimental, 380 F.3d 575, 585 (1st Cir. 2004) (rejecting argument that "goes only to the success of [the] fraudulent scheme, not to its existence").

[24] *Neder*, 527 U.S. at 16 (quoting United States v. Gaudin, 515 U.S. 506, 509 (1995)) (internal quotations omitted). This requirement does not mean, however, that a deception need be aimed at the person defrauded. *See* United States v. Seidling, 737 F.3d 1155, 1161 & n.2 (7th Cir. 2013) (collecting cases).

[25] 18 U.S.C. §§ 1341, 1343. Communication by "wire" encompasses most modern forms of remote communication, including telephone, *e.g.*, United States v. Foley, 683 F.2d 273, 279 (8th Cir. 1982), facsimile, United States v. Arledge, 553 F.3d 881, 892 (5th Cir. 2008), and e-mail, *e.g.*, United States v. Corrigan, 912 F.3d 422, 427 (7th Cir. 2019).

[26] *Pereira*, 347 U.S. at 8-9 (requiring only "knowledge that the use of the mails will follow in the ordinary course of business" or that "such use can reasonably be foreseen, even though not actually intended"); United States v. Zander, 794 F.3d 1220, 1226 (10th Cir. 2015) (recognizing that the defendant does not "need to use the mails himself").

[27] 18 U.S.C. §§ 1341, 1343.

[28] United States v. Nguyen, 829 F.3d 907, 921 (8th Cir. 2016); United States v. Faulkenberry, 614 F.3d 573, 582 (6th Cir. 2010); United States v. Henningsen, 387 F.3d 585, 589 (7th Cir. 2004).

[29] *Nguyen*, 829 F.3d at 921.

[30] Schmuck v. United States, 489 U.S. 705, 715 (1989).

[31] United States v. Lane, 474 U.S. 438, 451 (1986).

[32] United States v. White, 737 F.3d 1121, 1130 (7th Cir. 2013) (quoting United States v. Britton, 289 F.3d 976, 981 (7th Cir. 2002)).

cannot have the specific intent to defraud.[33] However, deliberate disregard for (or conscious avoidance of) the truth is no defense,[34] nor is the belief that a victim will be unharmed.[35]

The government may prove intent through circumstantial evidence, such as evidence that the defendant attempted to conceal his activity or profited from the fraudulent endeavor.[36]

Money, Property, or Honest Services

The final element of mail or wire fraud focuses on the object of the fraud. It is clear that the mail and wire fraud statutes contemplate schemes aimed at obtaining victims' money or property.[37] In addition to tangible property, the statutes apply to intangible interests, such as confidential business information, that have "long been recognized as property."[38] If an interest lacks value in the hands of the ostensible victim, however, it is not protected by the statutes as "property."[39]

Beyond money or property, 18 U.S.C. § 1346 establishes that a scheme or artifice to defraud includes "a scheme or artifice to deprive another of the intangible right of honest services."[40] It is the history and interpretation of this provision that are the focus of this report.

Development of "Honest Services" Theory of Fraud

Origins

The original mail fraud statute was enacted in 1872 and merely prohibited "any scheme or artifice to defraud."[41] Congress amended the statute in 1909 to add the second clause, "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[42] Mirroring this language, the wire fraud statute became law in 1952. Though the legislative history of the mail fraud provision, and the inclusion of the "obtaining money or property" clause,

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[33] *See* United States v. Tarallo, 380 F.3d 1174, 1191 (9th Cir. 2004); *see also* United States v. Phipps, 595 F.3d 243, 245-46 (5th Cir. 2010) (recognizing that government must "prove that a defendant knew the scheme involved false representations").

[34] *See* United States v. Dearing, 504 F.3d 897, 903 (9th Cir. 2007) ("We have repeatedly held that the intent to defraud may be proven through reckless indifference to the truth or falsity of statements."); United States v. Carlo, 507 F.3d 799, 802 (2d Cir. 2007) (finding "nothing inappropriate" in the government's argument that the defendant "was aware of a high probability that [his statements] were false, but consciously avoided confirming that suspicion").

[35] *See* United States v. Hamilton, 499 F.3d 734, 737 (7th Cir. 2007) (holding that an intention to put a victim "at risk of loss" by deceptive means "is all that is required to prove mail or wire fraud").

[36] *See, e.g.*, United States v. Welch, 327 F.3d 1081, 1105 (10th Cir. 2003) (quoting United States v. Prows, 118 F.3d 686, 692 (10th Cir. 1997)).

[37] *See* 18 U.S.C. §§ 1341, 1343. As noted above, the victim need not actually have suffered such a deprivation, as the criminalized "scheme" may not have been successful. United States v. Williams, 527 F.3d 1235, 1245 (11th Cir. 2008).

[38] Carpenter v. United States, 484 U.S. 19, 26 (1987).

[39] *See* Cleveland v. United States, 531 U.S. 12, 20 (2000) (holding that the mail fraud statute does not reach fraud in obtaining certain state or municipal licenses, as the licenses are "not 'property' in the government regulator's hands"); United States v. Sadler, 750 F.3d 585, 591 (6th Cir. 2014) (rejecting proposition that "the right to accurate information amounts to an interest" long recognized as property).

[40] 18 U.S.C. § 1346.

[41] McNally v. United States, 483 U.S. 350, 356 (1987), *superseded by statute on other grounds as stated in* Skilling v. United States, 561 U.S. 358 (2010).

[42] 18 U.S.C. § 1341.

arguably suggest that Congress initially contemplated *only* frauds involving money or property,[43] lower federal courts by the 1980s had interpreted the mail and wire fraud statutes to cover deprivations of intangible rights.[44]

"Most" of these cases involved public officials who "made governmental decisions with the objective of benefitting themselves or promoting their own interests, instead of fulfilling their legal commitment to provide the citizens of the State or local government with their loyal service and honest government."[45] Regardless of whether the betrayed party (the citizenry) was or would be financially harmed, under this theory, the violation lay in the deprivation of that party's intangible right to the official's "honest services."[46] This is not to say that the doctrine extended only to public officials, however—courts came to recognize that a private employee could also be guilty of mail or wire fraud for breaching a fiduciary duty to the employer.[47] So-called "honest services" fraud often arose in the context of an official's or employee's receipt of a bribe or kickback in exchange for some veritable benefit.[48] Yet the doctrine was not limited to bribery and

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[43] *See* Cong. Globe, 41st Cong., 3d Sess. 35 (1870) (statement of Rep. Farnsworth) (describing a scheme to solicit the purchase of counterfeit bills and noting the need to prevent frauds "for the purpose of deceiving and fleecing the innocent people in the country"); *McNally*, 483 U.S. at 356 ("Insofar as the sparse legislative history reveals anything, it indicates that the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property.").

[44] *See* United States v. Silvano, 812 F.2d 754, 759 (1st Cir. 1987) ("At least four other courts of appeals have held that the mail fraud statute proscribes use of the United States mails in furtherance of schemes to defraud citizens of their intangible rights[.]"); United States v. McNeive, 536 F.2d 1245, 1249 (8th Cir. 1976) (acknowledging that an "increasing number of courts" had endorsed the application of Section 1341 to schemes "which operate to deprive individuals of intangible rights or interests").

[45] *McNally*, 483 U.S. at 362-63 (Stevens, J., dissenting). Both public officials and private individuals who participated in public decisions could be prosecuted for breaching a duty to the public. *E.g.*, United States v. Gray, 790 F.2d 1290, 1295 (6th Cir. 1986) ("[A]n individual who has no formal employment relationship with government may nonetheless substantially participate in government operations so as to assume a fiduciary duty to the general citizenry.").

[46] *See, e.g.*, United States v. Brown, 540 F.2d 364, 374 (8th Cir. 1976) (recognizing that "a public official may be prosecuted" based on "conduct [that] operates to defraud the citizens of his government of their right to his honest and faithful services"); *Silvano*, 812 F.2d at 760 ("It is immaterial whether [the official] personally profited from the scheme or whether the City suffered a financial loss from it. The loss to the City of [the official's] good faith services alone establishes the breach." (internal citations omitted)); *but see* United States v. Lemire, 720 F.2d 1327, 1337 (D.C. Cir. 1983) (holding, in private employer context, that conduct must foreseeably pose an "independent business risk to the employer").

[47] *McNeive*, 536 F.2d at 1249; *see also* United States v. Procter & Gamble Co., 47 F. Supp. 676, 678 (D. Mass. 1942) ("When one tampers with [the employment] relationship for the purpose of causing the employee to breach his duty [of loyalty and honesty] he in effect is defrauding the employer of a lawful right."). Courts tended to recognize that a fiduciary duty for purposes of private-sector honest services fraud did not have to "arise from state or federal law," but could instead stem from the nature of the employment relationship itself. *See* United States v. Lemire, 720 F.2d 1327, 1335-36 (D.C. Cir. 1983) (describing the "judicial consensus" that a duty may "stem from an employment relationship of the sort that imposes discretion and consequently obligations of loyalty and fidelity on the employee"). Indeed, two courts held that the existence of a fiduciary relationship was not required at all, though those holdings appear to have been undermined by subsequent precedent. *See* United States v. McGeehan, 584 F.3d 560, 573 n.11 (3d Cir. 2009), *vacated*, 625 F.3d 159 (3d Cir. 2010). As described *infra*, some courts subsequently recognized a limitation that duties should be defined by reference to state law, in order to cabin the expansive scope of the mail and wire fraud statutes.

With respect to both public officials and private employees, non-duty-owing participants in a scheme to deprive the public or an employer of honest services could also be found guilty. *E.g.*, United States v. Alexander, 741 F.2d 962, 964 (7th Cir. 1984) ("There can be no doubt that a non-fiduciary who schemes with a fiduciary to deprive the victim of intangible rights is subject to prosecution under the mail fraud statute."), *overruled on other grounds*, United States v. Ginsburg, 773 F.2d 798 (7th Cir. 1985).

[48] *See* United States v. Bohonus, 628 F.2d 1167, 1171 (9th Cir. 1980) (noting that cases charging schemes to deprive others of intangible rights have "[m]ost often" involved "bribery of public officials").

kickback schemes; other forms of self-dealing, such as concealing material conflicts of interest, also gave rise to honest services mail and wire fraud prosecutions.[49]

Neither were the intangible rights protected by the mail and wire fraud statutes confined to honest services. Rather, courts broadly applied the statutes to deprivations of other intangible rights like the right to privacy and the right to honest elections.[50]

While the fluid scope of liability under the mail and wire fraud statutes caused some to worry that the federal courts were effectively "develop[ing] a common law crime of unethical conduct,"[51] federal prosecutors appeared to view the flexibility and expansive reach of the statutes as a benefit.[52] Then, in 1987, the Supreme Court's decision in *McNally v. United States* "stopped the development of the intangible-rights doctrine in its tracks."[53]

McNally v. United States and Congressional Response

McNally involved a scheme among public officials and a private individual in Kentucky to funnel kickbacks received from an insurance company, which the defendants had given an agency contract, to companies owned and controlled by them.[54] The defendants were convicted of mail fraud on the theory that the officials deprived the citizens of Kentucky of "their intangible rights to honest and impartial government" by misusing their offices "for private gain."[55]

The Supreme Court reversed, however, examining the text and legislative history of the mail fraud statute to conclude that the provision was "limited in scope to the protection of property rights."[56] In the Court's view, a broader reading would "leave [the statute's] outer boundaries ambiguous and involve[] the Federal Government in setting standards of disclosure and good government for local and state officials."[57] In other words, the Court's decision was driven by two constitutional concerns that have underlain much of the subsequent commentary on the scope of the honest services doctrine: first, a criminal statute may violate the Due Process Clauses of the Fifth and Fourteenth Amendments if it is so vague that "ordinary people can[not] understand what

[49] *E.g.*, United States v. Bush, 522 F.2d 641, 647-48 (7th Cir. 1975) (affirming conviction of public official who concealed interest in business that contracted with the City of Chicago). Courts regularly disagreed about the scope and content of the honest services doctrine, and the disagreements continued after the doctrine was codified in 18 U.S.C. § 1346. *See* Skilling v. United States, 561 U.S. 358, 420 n.2 (2010) (Scalia, J., concurring in part and concurring in judgment) (noting that courts after Section 1346's enactment "reproduc[ed] some of the same disputes" that had existed previously). These disagreements are discussed in more detail *infra*.

[50] *See* United States v. Girdner, 754 F.2d 877, 880 (10th Cir. 1985) (affirming mail fraud conviction based on deprivation of "intangible political rights" through absentee ballot fraud scheme); United States v. Louderman, 576 F.2d 1383, 1387-88 (9th Cir. 1978) (affirming wire fraud conviction where scheme to defraud sought to obtain confidential telephone subscriber information, causing "a loss to the subscribers of their right to privacy").

[51] 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, 57 (2010).

[52] *See* Nicholas C. Johnson, *Legal Public Corruption: How and Why Congress Needs to Reinstate Honest Services Fraud*, 13 APPALACHIAN J.L. 105, 106 (2013) (noting that prior to 2010, "[f]ederal prosecutors relied heavily on these statutes").

[53] Skilling v. United States, 561 U.S. 358, 401 (2010).

[54] McNally v. United States, 483 U.S. 350, 352-53 (1987), *superseded by statute on other grounds as stated in* Skilling v. United States, 561 U.S. 358 (2010).

[55] *Id.* at 355.

[56] *Id.* at 360.

[57] *Id.*

conduct is prohibited."[58] Thus, by alluding to the potentially "ambiguous" "outer boundaries" of the mail fraud statute, the Court was signaling that, if not construed more narrowly, the statute could be considered unconstitutionally vague. Second, courts are hesitant to read federal criminal statutes in a way that intrudes on areas of traditionally state-exclusive interest in light of the Constitution's reservation to the states of powers not expressly given to the federal government.[59] This concept of federalism inherent in the Constitution has animated the Court's hesitancy to involve the federal government in policing the ethicality of state and local officials.[60]

Ultimately, the Court in *McNally* declined to adopt a reading of the mail fraud statute that would risk contravening the constitutional principles described above absent a decision by Congress to "speak more clearly than it has."[61] Within a short time, however, Congress had accepted the Court's invitation to speak by passing legislation, now codified at 18 U.S.C. § 1346, which clarified that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[62] There is some indication in the legislative history that this provision was intended to "overturn the *McNally* decision"[63] in full, "reinstat[ing] all of the pre-*McNally* case law pertaining to the mail and wire fraud statutes without change."[64] Nonetheless, it is doubtful that Section 1346 restored *all* pre-*McNally* case law, as the "intangible rights" that courts had viewed the mail and wire fraud statutes to cover were not necessarily limited to honest services. As noted above, cases prior to *McNally* had recognized that deprivations of other intangible rights like the right to privacy and the right to honest elections could be covered.[65] Thus, by limiting 18 U.S.C. § 1346 to the "right of honest services,"[66] "Congress amended the law to cover [only] *one* of the 'intangible rights' that lower courts had protected under § 1341 prior to *McNally*."[67]

Honest Services Fraud After Enactment of 18 U.S.C. § 1346

Following the enactment of 18 U.S.C. § 1346, the lower federal courts continued to apply the mail and wire fraud statutes to a range of fraudulent conduct on the part of both public officials and private parties implicating the deprivation of an intangible right of honest services.[68]

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[58] Kolender v. Lawson, 461 U.S. 352, 357 (1983).

[59] *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); Cleveland v. United States, 531 U.S. 12, 25 (2000) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes.").

[60] *McNally*, 483 U.S. at 360; *see also* McDonnell v. United States, 136 S.Ct. 2355, 2373 (2016) (construing bribery statute narrowly in honest services case out of concern for state authority to "regulate the permissible scope of interactions between state officials and their constituents").

[61] *Id.*

[62] Pub. L. No. 100-690, § 7603, 102 Stat. 4181 (1988) (codified at 18 U.S.C. § 1346).

[63] *See* 134 CONG. REC. H11, 108-01 (daily ed. Oct. 21, 1988) (statement of Rep. Conyers) ("This amendment restores the mail fraud provision to where that provision was before the *McNally* decision.").

[64] 134 CONG. REC. S17, 360-02 (daily ed. Nov. 10, 1988) (statement of Sen. Biden on behalf of Senate Judiciary Committee).

[65] *See supra* note 50 and accompanying text.

[66] 18 U.S.C. § 1346.

[67] Cleveland v. United States, 531 U.S. 12, 19-20 (2000) (emphasis added); *see also* 134 CONG. REC. S17, 360-02 (daily ed. Nov. 10, 1988) (statement of Sen. Biden on behalf of Senate Judiciary Committee) ("Under the amendment, those statutes will protect any person's intangible right to the honest services of another, including the right of the public to the honest services of public officials.").

[68] United States v. Garrido, 713 F.3d 985, 993 (9th Cir. 2013) ("Following the enactment of § 1346, courts around the

"[T]ypical[]" cases involved "either bribery . . . or [the] failure to disclose a conflict of interest, resulting in personal gain."[69]

In light of Section 1346's expansive language and the federalism and overbreadth concerns voiced by the Supreme Court in *McNally*,[70] however, courts recognized that some "limiting principle" was needed in cases implicating an honest services theory of fraud.[71] Yet beyond general pronouncements that Section 1346 "does not encompass every instance of official misconduct"[72] and is "not violated by every breach of contract, breach of duty, conflict of interest, or misstatement made in the course of dealing,"[73] the lower courts failed to reach a consensus on what the substance and scope of an effective limiting principle should be.[74]

For example, some courts recognized a limitation that to be guilty of mail or wire fraud on an honest services theory, a defendant must have participated in a scheme involving conduct that violated or would violate state law.[75] These courts expressed concern that leaving federal judges free to define the duties and breaches that would constitute a violation of the mail and wire fraud statutes would amount to unmoored federal imposition of "an ethical regime for state employees."[76] However, several other courts rejected the state-law limitation as inconsistent with the intent of the statute.[77]

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country interpreted the statute to encompass various types of schemes and to make criminal a wide variety of acts."); *see* United States v. Waymer, 55 F.3d 564, 572 (11th Cir. 1995) (concluding that Atlanta Board of Education member violated Section 1346 by failing to disclose receipt of portion of school board payments to sanitation and pest control companies); United States v. deVegter, 198 F.3d 1324, 1327-28 (11th Cir. 1999) (noting that Section 1346 "extends to the defrauding of some private sector duties of loyalty"). The *deVegter* court distinguished between public officials, who "inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest," and "private sector relationships" in which such a duty does not always exist. *Id.* The court used this distinction to recognize a requirement of reasonably foreseeable employer harm in private-sector honest services fraud cases. *Id.* at 1329. As discussed *infra*, post-*McNally* interpretations of Section 1346 split on whether such a requirement should apply in private-sector cases, all honest services cases, or none of them.

[69] United States v. Sawyer, 85 F.3d 713, 724 (1st Cir. 1996).

[70] *See McNally*, 483 U.S. at 360.

[71] *See* Sorich v. United States, 555 U.S. 1204, 129 S.Ct. 1308, 1309-10 (2009) (Scalia, J., dissenting from denial of petition for writ of certiorari) ("[T]he [c]ourts of [a]ppeals have spent two decades attempting to cabin the breadth of § 1346 through a variety of limiting principles.").

[72] *Sawyer*, 85 F.3d at 725.

[73] United States v. Welch, 327 F.3d 1081, 1107 (10th Cir. 2003).

[74] The disputes among the courts of appeals after enactment of Section 1346 were largely a continuation of disagreements over the scope of the honest services doctrine that had festered prior to *McNally*. *See* Skilling v. United States, 561 U.S. 358, 419-20 & n.2 (2010) (Scalia, J., concurring in part and concurring in judgment) (discussing disagreements prior to *McNally* and noting that courts "since § 1346's enactment have fared no better, reproducing some of the same disputes that predated *McNally*").

[75] *See* United States v. Brumley, 116 F.3d 728, 734 (5th Cir. 1997) (en banc) ("We decide today that services must be owed under state law and that the government must prove in a federal prosecution that they were in fact not delivered."); United States v. Murphy, 323 F.3d 102, 117 (3d Cir. 2003) ("We thus endorse (and are supported by) the decisions of other [c]ourts of [a]ppeals that have interpreted § 1346 more stringently and required a state law limiting principle for honest services fraud[.]").

[76] *Brumley*, 116 F.3d at 734.

[77] *See* United States v. Martin, 195 F.3d 961, 967 (7th Cir. 1999) (expressing skepticism that the mail fraud statute was "intended merely to back up state criminal law"); *see also* United States v. Weyhrauch, 548 F.3d 1237, 1245-46 (9th Cir. 2008) ("We also cannot find any basis in the text or legislative history of § 1346 revealing that Congress intended to condition the meaning of 'honest services' on state law."), *vacated and remanded*, 561 U.S. 476 (2010); United States v. Walker, 490 F.3d 1282, 1299 (11th Cir. 2007) ("[A]n honest services mail fraud . . . conviction does not require proof of a state law violation."); United States v. Frost, 125 F.3d 346, 366 (6th Cir. 1997) ("Federal law governs the existence of fiduciary duty under the mail fraud statute."). Regardless of whether a violation of state law was

Taking a different tack, a few courts imposed a "foreseeable harm" requirement in honest services cases. As the U.S. Court of Appeals for the Sixth Circuit[78] enunciated the limitation, conviction for honest services fraud in these jurisdictions required proof that the defendant "foresaw or reasonably should have foreseen that [the victim] might suffer an economic harm as a result of the breach" of fiduciary duty.[79] In *Frost*, for instance, the Sixth Circuit applied the foreseeable harm limitation to conclude that university professors committed honest services fraud by entering into a scheme with their students to submit plagiarized dissertations, as they could have "reasonably contemplated" that the breach of their duty to the university would cause it to "suffer a concrete business harm by unwittingly conferring an undeserved advanced degree" on each student.[80]

Courts recognizing the foreseeable harm requirement appeared to apply it only in private-sector cases,[81] where the "meaning of the 'intangible right of honest services' has different implications" given that "a strict duty of loyalty ordinarily is not part of" commercial and employment relationships.[82] On occasion, however, the requirement was stated broadly enough to potentially encompass public-sector cases, as well.[83] According to the Fourth and Sixth Circuits, the merits of the foreseeable harm requirement were twofold: (1) it kept "the focus of the analysis on employee intent rather than employer response," and (2) it "limit[ed] the scope of § 1346 to serious harms."[84] Yet as with the state-law limitation, multiple other courts refused to apply the foreseeable harm limitation, rejecting it as "something of an *ipse dixit* designed simply to limit the scope of section 1346."[85]

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required, courts could and did consider such violations as evidence of intent. *E.g.*, United States v. Woodward, 149 F.3d 46, 62 (1st Cir. 1998) (finding defendant's failure to report financial interest when required by statute to do so provided "a solid basis for the jury to find that [he] had the requisite intent to deprive the public of his honest services").

[78] This report references a significant number of decisions by federal appellate courts of various regional circuits. For purposes of brevity, references to a particular circuit in the body of this report (e.g., the Second Circuit) refer to the U.S. Court of Appeals for that particular circuit.

[79] *Frost*, 125 F.3d at 368. Some courts adopting this foreseeable harm requirement took the view that economic harm did not have to be *intended*, so long as it was reasonably foreseeable. United States v. Sun-Diamond Growers, 138 F.3d 961, 974 (D.C. Cir. 1998), *aff'd on other grounds*, 526 U.S. 398 (1999); *but see Frost*, 125 F.3d at 368-69 (noting that one benefit of the foreseeable harm limitation is that it "focuses on the intent of the employee").

[80] *Frost*, 125 F.3d at 369.

[81] *Id.* (stressing that only "the intangible right to honest services in the private sector" was under consideration and suggesting that foreseeable economic harm standard might not be needed in cases involving public officials); United States v. Vinyard, 266 F.3d 320, 327 (4th Cir. 2001) (considering "the reach of the honest services doctrine in the private employment context" and applying foreseeable harm test).

[82] United States v. deVegter, 198 F.3d 1324, 1328 (11th Cir. 1999); *see also Sun-Diamond Growers*, 138 F.3d at 973 (noting that "[i]n the private sector context, § 1346 poses special risks," as any "material act of dishonesty by an employee deprives the employer of that worker's 'honest services,' yet not every such act is converted into a federal crime by the mere use of the mails or interstate phone system").

[83] *See* United States v. Rybicki, 287 F.3d 257, 265 (2d Cir. 2002) (adopting requirement that "the scheme at issue created a foreseeable risk of economic or pecuniary harm to the victim, which is consistent with traditional notions of fraud and fraudulent harm," and stating requirement as one of the "elements necessary to establish the offense of honest services fraud pursuant to 18 U.S.C. § 1346" without regard for public/private distinction). The Second Circuit subsequently backed away from the foreseeable harm test, suggesting that it might be limited to cases involving self-dealing, United States v. Rybicki, 354 F.3d 124, 142 (2d Cir. 2003) (en banc), though other circuits do not appear to have adopted this approach. *E.g.*, *Frost*, 125 F.3d at 368 (broadly stating that "the intangible right to honest services in the private sector [is] ultimately dependent upon the property rights of the victim").

[84] *Vinyard*, 266 F.3d at 328-29; *Frost*, 125 F.3d at 368-69.

[85] *Rybicki*, 354 F.3d at 146; *see also* United States v. Black, 530 F.3d 596, 600 (7th Cir. 2008) (rejecting proposition that gain must "be at the expense of the persons (or other entities) to whom the defendants owed their honest services"

A competing, and less stringent, alternative to the court-created "foreseeable harm" requirement was the "materiality test,"[86] which merely emphasized the inherent constraint that a misrepresentation must have "the natural tendency to influence or [be] capable of influencing" the employer to change its behavior.[87] In the view of courts employing this test, it allowed honest services fraud to encompass "some cases of non-economic, yet serious, harm in the private sphere."[88] Proponents of the more stringent foreseeable harm requirement, however, pointed out that although the materiality test was "similar in many respects,"[89] it might apply too broadly to cases where an employer "overreacted to an insignificant fraud" or "changed [its] business practices to avoid the mere appearance of impropriety."[90]

In still another variation, the Seventh Circuit established the limiting principle that a scheme participant must have misused his position *for private gain*.[91] One panel in the circuit viewed the limitation as "cabin[ing] zealous prosecutors by insuring that not every violation of a fiduciary duty becomes a federal crime" and reducing "the risk of creating federal common law crimes."[92] Nevertheless, given the Seventh Circuit's acknowledgment that its private gain limitation was created out of expediency, other circuits denounced it as "substituting one ambiguous standard for another"[93] or as an attempt "to judicially legislate by adding an element to honest services fraud which the text and the structure of the fraud statutes do not justify."[94]

Finally, at least two courts appeared to reject any reliance on judicially crafted special tests or limiting principles in honest services cases, concluding instead that existing elements—such as the requirement that the defendant possessed a specific intent to defraud—were sufficient to cabin Section 1346's breadth.[95] These courts did, however, acknowledge that the existence of one or more of the elements required in other circuits, such as private gain, could "bolster a showing of deceptive intent," among other things.[96]

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as "a no harm-no foul argument"), *vacated and remanded*, 561 U.S. 465 (2010); United States v. Welch, 327 F.3d 1081, 1104-05 (10th Cir. 2003) ("The notion of harm in a mail or wire fraud prosecution is important only in the sense that proof of contemplated or actual harm to the victim or others is one means of establishing the necessary intent to defraud.").

[86] *Vinyard*, 266 F.3d at 327.

[87] United States v. Cochran, 109 F.3d 660, 667 n.3 (10th Cir. 1997); *see also Rybicki*, 354 F.3d at 146 (overruling, en banc, panel reliance on foreseeable harm and expressing preference for "the 'materiality' test because it has the virtue of arising out of fundamental principles of the law of fraud"); United States v. Gray, 96 F.3d 769, 775 (5th Cir. 1996).

[88] *Rybicki*, 354 F.3d at 146.

[89] *Vinyard*, 266 F.3d at 328.

[90] *Id.*; *see also Frost*, 125 F.3d at 368-69.

[91] United States v. Sorich, 523 F.3d 702, 707-08 (7th Cir. 2008); United States v. Thompson, 484 F.3d 877, 881 (7th Cir. 2007); United States v. Bloom, 149 F.3d 649, 656-57 (7th Cir. 1998).

[92] *Sorich*, 523 F.3d at 707-08. The court in *Sorich* clarified that the anticipated gain need not have been to the defendant or other participant in the scheme to defraud; thus, a scheme to dole out city civil service jobs based on political patronage and nepotism still, in the court's view, came within the statute's prohibition. *Id.* at 709.

[93] United States v. Panarella, 277 F.3d 678. 692 (3d Cir. 2002).

[94] United States v. Welch, 327 F.3d 1081, 1107 (10th Cir. 2003).

[95] *See* United States v. Inzunza, 580 F.3d 894, 905 (9th Cir. 2009) (agreeing that "careful attention to the intent element dispels concerns about the statute's overbreadth"); *Welch*, 327 F.3d at 1107 ("[A]t this stage we need not define the exact contours of honest services fraud or the proof necessary to sustain it.").

[96] *Inzunza*, 580 F.3d at 905; *Welch*, 327 F.3d at 1105 (noting that courts had "long permitted fact finders" to rely on circumstantial evidence, "including evidence of actual or contemplated harm, to infer [fraudulent] intent").

In 2009, Justice Scalia dissented from the denial of certiorari in an honest services case,[97] arguing that the lack of a "coherent limiting principle" to "separate[] the criminal breaches, conflicts and misstatements from the obnoxious but lawful ones" invited "abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct."[98] The following year, the Supreme Court granted certiorari in three cases that seemed poised to settle the various disagreements among the federal appellate courts over the requirements for honest services fraud. First, in *United States v. Weyhrauch*, a state legislator had voted on a bill regarding taxation of oil production while failing to disclose a prospective interest in an oil field services company that had taken an active stance on the legislation.[99] The Supreme Court agreed to review whether, in such a circumstance, the state-law limitation (i.e., that the defendant must have violated a duty imposed by state law) should apply.[100] Second, in *United States v. Black*, corporate executives allegedly transferred millions of dollars from a subsidiary to themselves through fraudulent non-compete agreements.[101] The appellate court affirmed the defendants' convictions for honest services fraud, in part, on the ground that the government was not required to prove that the scheme sought to financially harm the company,[102] presenting the Supreme Court with an opportunity to address the so-called "foreseeable harm" limitation. Third, in *United States v. Skilling*, a former executive of the energy-trading and utilities company Enron was convicted of participating in a conspiracy to boost the company's stock price by misstating the company's financial situation.[103] The Fifth Circuit affirmed, and the defendant then argued in part in his petition for certiorari that the appellate court should have applied the Seventh Circuit's "private gain" requirement to save Section 1346 from unconstitutional vagueness,[104] giving the Supreme Court occasion to consider the merits of that limitation.

Ultimately, the Supreme Court did not expressly endorse any of the limiting principles propagated by the courts of appeals and presented for review in *Weyhrauch*, *Black*, and *Skilling*. However, the Court did use *Skilling* as a vehicle to drastically limit the scope of honest services fraud in another way.

United States v. Skilling

As noted above, Jeffrey Skilling, the one-time CEO of Enron, was convicted of (among other things) wire fraud on the theory that he deprived the company and its shareholders of his honest services by manipulating financial results and making false and misleading statements about the company's performance in order to "prop up Enron's short-run stock prices."[105] On appeal, the Fifth Circuit upheld Skilling's honest services fraud conviction, rejecting Skilling's argument that his conduct could not fall within the meaning of Section 1346 because it "was in the corporate

[97] *See* Sorich v. United States, 555 U.S. 1204, 129 S.Ct. 1308, 1309-10 (2009) (Scalia, J., dissenting from denial of petition for writ of certiorari) (citing "the longstanding confusion over the scope of the statute" and "the serious due process and federalism interests affected by the expansion of criminal liability" as reasons for the Court to "squarely confront both the meaning and the constitutionality of § 1346").

[98] *Id.* at 1310.

[99] 548 F.3d 1237, 1239 (9th Cir. 2008).

[100] Weyhrauch v. United States, 557 U.S. 934 (2009).

[101] 530 F.3d 596, 599 (7th Cir. 2008).

[102] *Id.* at 600-01.

[103] 554 F.3d 529, 534-37 (5th Cir. 2009).

[104] Petition for a Writ of Certiorari at 23-24, Skilling v. United States, 561 U.S. 358 (2010) (No. 08-1394).

[105] Skilling v. United States, 561 U.S. 358, 368-69 (2010).

interest and therefore was not self-dealing."[106] Skilling then argued to the Supreme Court that the statute should be struck down as unconstitutionally vague.[107]

The Supreme Court agreed with Skilling that Section 1346, as written, could raise "due process concerns underlying the vagueness doctrine"[108] given the breadth of its language.[109] However, the Court declined to strike down the statute as irremediably vague, opting instead to construe it narrowly in a way that avoided the problem.[110] The Court began by "survey[ing]" the "body of pre-*McNally* honest-services" case law, a corpus that, in the Court's view, Section 1346 was clearly intended "to refer to and incorporate."[111] The Court's survey yielded two conclusions: (1) that "honest-services decisions preceding *McNally* were not models of clarity or consistency"; and (2) that despite the inconsistency, the honest services doctrine encompassed a "solid core" of cases "involving offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes."[112] Therefore, to steer clear of a "vagueness shoal," the Supreme Court read Section 1346 as being limited *only* to this "core" of bribery and kickback cases.[113] Regarding the precise definitions of bribery and kickbacks, the Court cited to existing federal bribery statutes and the definition of "kickback" contained in Title 41 of the U.S. Code, opining that Section 1346 would "draw[] content not only from the pre-*McNally* case law, but also from [these] federal statutes proscribing—and defining—similar crimes."[114] The Court also clarified that its holding would not render Section 1346 "superfluous" in light of its now-substantial overlap with these "similar crimes"—as an example, the Court noted that 18 U.S.C. § 201, the "principal federal bribery statute," applies only to federal public officials, meaning that Section 1346 would continue to reach "state and local corruption and . . . private-sector fraud" that "might otherwise go unpunished."[115]

Significantly, the Court in *Skilling* rejected the argument, advanced by the government, that Section 1346 should be construed to extend as well to "undisclosed self-dealing by a public official or private employee—i.e., the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty."[116] Although courts prior to *Skilling* had recognized bribery and

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[106] *Skilling*, 554 F.3d at 545.

[107] *Skilling*, 561 U.S. at 402. Skilling alternatively argued for adoption of the Seventh Circuit's "private gain" limitation and maintained that his conduct did not meet this limitation because the only gain he received (in the form of compensation) would not qualify under Seventh Circuit case law. *See* Petition for a Writ of Certiorari at 20, 23-24, Skilling v. United States, 561 U.S. 358 (2010) (No. 08-1394) (noting Seventh Circuit requirement that "any private benefit [be] distinct from the benefits awarded by the employer for pursuing the employer's goals").

[108] *Skilling*, 561 U.S. at 408.

[109] The "void-for vagueness doctrine embraces" the requirements that a criminal statute must define the offense (1) with sufficient clarity that ordinary people can understand what conduct is proscribed, and (2) in a way that does not allow for arbitrary enforcement. *Id.* at 402-03.

[110] As the Court in *Skilling* explained, "[i]t has long been [the Court's] practice, . . . before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction." *Id.* at 405.

[111] *Id.* at 404-05.

[112] *Id.* at 405, 407.

[113] *Id.* at 368, 409.

[114] *Id.* at 412 (citing 18 U.S.C. §§ 201(b), 666(a)(2); 41 U.S.C. § 52(2)).

[115] *Id.* at 413 n.45. Likewise, though 18 U.S.C. § 666 criminalizes bribery of state and local officials, that statute contains certain jurisdictional and monetary-value requirements that would not need to be met in an honest services prosecution. *See* 18 U.S.C. §§ 666(a)(1)(B), (b) (requiring that a "thing of value of $5,000 or more" be involved and that the state or local government at issue receive federal benefits in excess of $10,000 in any one-year period).

[116] *Id.* at 409 (quoting Brief for United States at 2930-2931).

undisclosed conflicts of interest as the two "typical[]" scenarios giving rise to honest services fraud prosecutions,[117] the Supreme Court viewed an undisclosed self-dealing or conflict-of-interest category of honest services fraud as "amorphous" given that lower courts had "reached no consensus on which schemes qualified."[118] The Court thus refused to adopt the government's "less constrained construction," that is, one that would include undisclosed self-dealing, "absent Congress' clear instruction otherwise."[119] In a footnote, the Court went on to provide guidance to Congress should it decide "to take up the enterprise of criminalizing" such conduct, noting that legislation "would have to employ standards of sufficient definiteness and specificity to overcome due process concerns."[120] In the Court's view, the formulation proposed by the government—a prohibition on the "taking of official action by the employee," with the specific intent to deceive, "that furthers his own [material] undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty"—would "leave[] many questions unanswered," including (1) how significant the conflicting interest would have to be, (2) the extent to which official action would have to further the interest, and (3) what (and to whom) information should be conveyed in order for disclosure to be adequate.[121]

Justice Scalia wrote separately in *Skilling* to make clear that he viewed Section 1346 as unconstitutionally vague and did not find the Court's limiting construction sufficient to address his concerns. Specifically, Justice Scalia pointed out that (1) not a single court's version of the pre-*McNally* honest services doctrine limited it *only* to bribery and kickbacks, rendering the Court's supposition that it was respecting the intent of Congress dubious; and (2) even limited to bribery and kickbacks in breach of a fiduciary duty, Section 1346 (and the majority opinion) left the nature, content, and source of the requisite duty hopelessly unclear and subject to conflicting conceptualizations by the lower courts.[122] On this latter point, the majority addressed Justice Scalia's critique by maintaining in a footnote that "debates" over "the source and scope of fiduciary duties" were "rare in bribe and kickback cases," with the existence of a fiduciary relationship usually being "beyond dispute." The Court also provided several "examples" of such relationships: (1) the relationship between a public official and the public at large, (2) the relationship between an employee and his employer, and (3) the relationship between a union official and union members.[123]

In light of the Supreme Court's decision in *Skilling*, the two other honest services cases in which the Court granted certiorari—*Weyhrauch* and *Black*—proved to be anticlimactic. *Weyhrauch*, which had presented the Court with an opportunity to pass on the "state-law" limitation, was simply vacated and remanded for further consideration in light of *Skilling*;[124] and the Court in

[117] United States v. Antico, 275 F.3d 245, 262-63 (3d Cir. 2001) ("Honest services fraud typically occurs in two scenarios: (1) bribery . . .; or (2) failure to disclose a conflict of interest resulting in personal gain."); United States v. Sawyer, 85 F.3d 713, 724 (1st Cir. 1996) ("The cases in which a deprivation of an official's honest services is found typically involve either bribery of the official or her failure to disclose a conflict of interest, resulting in personal gain.").

[118] *Skilling*, 561 U.S. at 410.

[119] *Id.* at 411.

[120] *Id.* at 411 n.44.

[121] *Id.*

[122] *See id.* at 417-22 (Scalia, J., concurring in part and concurring in judgment) (arguing that Court's construction did not "solve the most fundamental indeterminacy: the character of the 'fiduciary capacity' to which the bribery and kickback restriction applies").

[123] *Id.* at 407 n.41 (internal citations omitted).

[124] Weyhrauch v. United States, 561 U.S. 476 (2010) (per curiam). On remand, the Ninth Circuit issued a short order affirming the underlying district court decision on the ground that *Skilling* made nondisclosure of a conflict of interest

Black—a case involving the "foreseeable harm" limitation—cursorily ruled that the jury instructions in the case were incorrect because they did not reflect *Skilling*'s construction of Section 1346, that is, that honest services fraud encompasses only participation in a bribery or kickback scheme in violation of a fiduciary duty.[125]

Honest Services Fraud After *Skilling*

The Supreme Court's decision in *Skilling* makes clear that honest services mail or wire fraud must involve "offenders who, in violation of a fiduciary duty, participate[] in bribery or kickback schemes."[126] In light of that holding, lower courts in recent years have had to reconsider the (1) vitality of the "limiting principles" they adopted prior to *Skilling*, (2) the source and scope of fiduciary duties, and (3) the definition and application of the terms "bribery" and "kickbacks."

Status of Lower-Court Limiting Principles

Given that the Supreme Court in *Skilling* neither explicitly endorsed nor rejected any of the Section 1346 "limiting principles" developed by the lower courts, the decision's impact on the disputes among the courts of appeals was not immediately clear.[127] Indeed, one of Justice Scalia's complaints was the Court's failure to address the "fundamental indeterminacy" of the requisite fiduciary obligation, including its source and application to private-sector and public-official defendants.

That said, the opinion in *Skilling* offered some clues as to the continuing vitality of the limiting principles discussed above. First, by limiting honest services fraud to schemes involving bribery or kickbacks, *Skilling* appeared to indirectly validate the Seventh Circuit's "private gain" limitation, as any bribe or kickback would necessarily seem to constitute such a gain.[128] The Seventh Circuit, which was the only circuit to have squarely adopted the private gain limitation prior to *Skilling*, recognized as much in a 2014 opinion, noting that its "general approach" of "focus[ing] on the defendant's benefit from the fraud . . . was vindicated" in *Skilling* (though "[n]ow, only bribery or kickbacks, rather than any private gain whatsoever, can be used to show honest-services fraud").[129] Thus, after *Skilling*, actual or contemplated private gain appears to be a

an improper basis for prosecution. United States v. Weyhrauch, 623 F.3d 707, 708 (9th Cir. 2010). The panel expressed "no opinion" on whether the government "alleged facts sufficient to pursue a § 1346 prosecution consistent with *Skilling*." *Id.* Weyhrauch subsequently pleaded guilty to state-law charges in exchange for the Justice Department's agreement to dismiss the federal charges. *See* Kim Murphy, *Corruption Case Against Former Alaska Legislator Crumbled*, L.A. TIMES (Oct. 22, 2011), http://articles.latimes.com/2011/oct/22/nation/la-na-alaska-corruption-weyhrauch-20111023.

[125] Black v. United States, 561 U.S. 465, 471 (2010).

[126] *Skilling*, 561 U.S. at 407.

[127] Sara Sun Beale, *An Honest Services Debate*, 8 OHIO ST. J. CRIM. L. 251, 252 (2010) ("The Court did not resolve-or even discuss-whether a state law violation, economic harm, and/or private gain were necessary elements[.]").

[128] *See* Ryan v. United States, 759 F. Supp. 2d 975, 979 (N.D. Ill. 2010) (recognizing that "steering contracts, leases, and other governmental benefits in exchange for private gain . . . was identified by the Court in *Skilling* as the proper target of § 1346"), *aff'd*, 645 F.3d 913 (7th Cir. 2011), *vacated and remanded on other grounds*, 566 U.S. 972 (2012); Beale, *supra* note 127, at 252 (noting that although the Court in *Skilling* did not address private gain, "bribery and kickbacks by their nature involve gain to the defendant").

[129] United States v. Nayak, 769 F.3d 978, 981 (7th Cir. 2014) (citation and internal quotation marks omitted).

necessary but not sufficient[130] condition for imposition of criminal liability on an honest services fraud theory.[131]

Second, dictum from *Skilling* may be read as calling into question the "foreseeable harm" limitation adopted by some circuits. In describing the development of the honest services theory of fraud, the Court in *Skilling* explained that the theory targets corruption where "the betrayed party [has] suffered no deprivation of money or property," noting that "[e]ven if the scheme occasion[s] a money or property *gain* for the betrayed party, . . . actionable harm [lies] in the denial of that party's right to the offender's 'honest services.'"[132] The opinion used as an example a mayor who accepts a bribe from a third party in exchange for awarding that party a city contract, where "the contract terms [are] the same as any that could have been negotiated at arm's length."[133] Based on this dictum, at least one district court after *Skilling* has, in a case involving a public official, rejected the argument that honest services fraud requires "an actual or intended economic loss to the victim."[134] Of course, as described above, the circuits that recognized a foreseeable harm limitation prior to *Skilling* mostly applied it only in *private-sector* cases, leading a different post-*Skilling* district court to "follow the clear precedent from the Fourth Circuit . . . and apply the reasonably foreseeable harm test in the context of . . . [an] alleged private-sector honest-services offense."[135] By contrast, the Seventh Circuit has held that the government need not show "actual or intended tangible harm" in either public- *or* private-sector cases,[136] while the Ninth Circuit in a post-*Skilling* decision has rejected a foreseeable-economic-loss requirement for public officials but left for "another day" the question of whether "economic damages need be shown" in private-sector cases.[137]

Finally, with respect to the "state law" limitation adopted by the Third and Fifth Circuits—that is, the requirement that a defendant must have violated some affirmative duty recognized under state law—one might read the *Skilling* Court's brief discussion of "the source and scope of fiduciary duties" as calling the limitation into question.[138] In dismissing Justice Scalia's concerns regarding the indeterminacy of such duties, the majority in *Skilling* averred that the existence of a fiduciary relationship was "usually beyond dispute" in bribe and kickback cases, citing several examples of

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[130] As discussed *infra*, a mere gratuity does not come within the definition of bribery or a kickback for purposes of honest services fraud.

[131] Several district court decisions after *Skilling* have addressed private gain in the context of campaign contributions, with public-official-defendants contending that such contributions cannot support an honest services conviction because they do not personally enrich the official. United States v. Terry, No. 1:10-CR-390, 2011 WL 5008415, at *4 (N.D. Ohio Oct. 19, 2011); United States v. McGregor, No. 2:10-CR-186, 2011 WL 1576950, at *3 (M.D. Ala. Apr. 4, 2011); *Ryan*, 759 F. Supp. 2d at 993 n.9. Courts have uniformly rejected the argument, concluding that even if "honest-services bribery must involve a personal benefit to the 'offender,'" such "benefit would not have to be in the form of a direct payment of cash to the individual in question." *McGregor*, 2011 WL 1576950, at *4; *see also Terry*, 2011 WL 5008415, at *5 (concluding that jury could "certainly have concluded that the defendant personally benefitted" from contributions that were "instrumental" in retaining defendant's seat as judge).

[132] Skilling v. United States, 561 U.S. 358, 400 (2010).

[133] *Id.*

[134] United States v. Grace, 843 F. Supp. 2d 651, 652-53 (M.D. La. 2011).

[135] United States v. Lusk, No. 2:15-CR-00124, 2017 WL 508589, at *11 (S.D.W. Va. Feb. 7. 2017).

[136] United States v. Nayak, 769 F.3d 978, 982 (7th Cir. 2014) (concluding that a "proposed distinction between private and public corruption has no textual basis in § 1346").

[137] United States v. Milovanovic, 678 F.3d 713, 726-27 (9th Cir. 2012). In a subsequent case, the Ninth Circuit characterized its holding in *Milovanovic* as being that "intent to cause pecuniary harm is not required" and upheld the mail fraud conviction of an Indian casino employee. United States v. Livingston, 725 F.3d 1141, 1148 (9th Cir. 2013).

[138] *Skilling*, 561 U.S. at 407 n.41.

public and private duties arising from "specific relationship[s] between two parties."[139] This apparent endorsement of a broad conception of fiduciary relationships in the context of honest services fraud would seem to be inconsistent with a requirement that any breach of duty be grounded in positive state law. Nevertheless, and perhaps bearing out Justice Scalia's concerns, the source and scope of fiduciary duties have, as discussed below, continued to be a source of considerable confusion among lower courts following *Skilling*.[140]

Fiduciary Duty

The courts of appeals have recognized that under *Skilling*, honest services fraud requires the existence and breach of a "fiduciary duty."[141] Yet the details of the requirement implicate, as one district court recently put it, "a troubling analysis that has divided federal courts throughout the country."[142] The analysis focuses on at least "three discrete questions:

- [W]hat types of relationships potentially give rise to the requisite fiduciary duty?;
- [W]hat are the permissible legal sources of the fiduciary duty?; and
- [W]hat is the nature or scope of the fiduciary duty, such that a defendant's breach of this obligation would satisfy the fiduciary duty requirement of honest services fraud?"[143]

With respect to the first question, a logical starting point is the *Skilling* footnote that provides three "examples" of fiduciary relationships that lower courts had previously found to be "beyond dispute": "public official-public, employee-employer, and union official-union members."[144] Courts have recognized that this footnote does not "represent an exhaustive list of the fiduciary relationships that can support an honest-services fraud prosecution," meaning that other relationships sharing similar characteristics, "such as attorney-client, doctor-patient, or stockbroker-customer," may also be included.[145] And one appellate court has determined that the term "fiduciary" may encompass even "informal" relationships of trust where "one party acts for the benefit of another and induces the trusting party to relax the care and vigilance which it would ordinarily exercise."[146] Not all courts agree with this broader conception of a fiduciary relationship, however.[147]

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[139] *Id.* (quoting Chiarella v. United States, 445 U.S. 222, 233 (1980)).

[140] *See infra* § Fiduciary Duty.

[141] *See* United States v. Halloran, 821 F.3d 321, 337 (2d Cir. 2016) (identifying "a violation of a fiduciary duty" as an "element of honest-services fraud"); United States v. Nayak, 769 F.3d 978, 980 (7th Cir. 2014) (recognizing that *Skilling* "held that 'the violation of a fiduciary duty' was a prerequisite to an honest-services fraud conviction"); *Milovanovic*, 678 F.3d at 722 (acknowledging "implication" in *Skilling* of need for fiduciary duty). Both the person owing such a duty, and anyone else who participates in a scheme involving breach of the duty (e.g., the bribe payer, who himself owes no duty to the victim), may be prosecuted. *See* United States v. Urciuoli, 613 F.3d 11, 18 (1st Cir. 2010) ("[D]istinguishing between the fiduciary who received the bribe and the non-fiduciary who gave it . . . would conflict with the statute's language[.]").

[142] United States v. Lusk, No. 2:15-CR-00124, 2017 WL 508589, at *9 (S.D.W. Va. Feb. 7. 2017).

[143] *Id.*

[144] *Skilling*, 554 F.3d at 407 n.41.

[145] United States v. Scanlon, 753 F. Supp. 2d 23, 25 (D.D.C. 2010); United States v. Evans, No. 2:14-CR-00113, 2015 WL 1808904, at *5 (S.D.W. Va. Apr. 21, 2015).

[146] *Milovanovic*, 678 F.3d at 724 (holding that an independent contractor could be a fiduciary).

[147] *See Evans*, 2015 WL 1808904, at *5 n.3 (concluding that the analysis in *Milovanovic* "substantially deviates from the 'specific relationship' nexus provided by the Supreme Court in *Skilling*").

Regarding the second question, courts have turned to "a smorgasbord of sources" to find the requisite fiduciary duty, and appear to be divided into three general camps: "those that permit the fiduciary duty to be derived from various sources, including state, federal, and common law; those that require the fiduciary duty to be derived from state law; and those that require the fiduciary duty to be derived from federal law."[148] Among the courts that look to "various sources," state law is apparently a sufficient, but not necessary, basis for a fiduciary duty,[149] and decisions may also rely on sources as disparate as common-law agency principles or merely "inherent" duties arising from the relationship at issue.[150] Indeed, some courts have seemingly treated the existence of the relationship as synonymous with the existence of a fiduciary duty without analyzing the source of the duty at all.[151] It is also unclear to what extent courts that rely on multifarious sources can be distinguished from the courts that purport to apply a federal standard, as in both circumstances the court may end up relying on common-law principles that are not grounded in positive law.[152]

With respect to those courts that require a state-law duty, post-*Skilling* jurisprudence is somewhat muddled. In a 2012 decision, one Fifth Circuit panel announced that *Skilling* did not "obviate the requirement that a state official, when prosecuted under § 1346, owe a state-law duty."[153] However, that decision, as well as an earlier Fifth Circuit opinion on which it relied, may have conflated the notion of a state-law duty with a question discussed in more detail below: whether bribery and kickbacks may be defined under state law.[154] And one district court in the Fifth Circuit has subsequently relied on the same precedent to conclude that "[t]here is no requirement that the actions taken by [the defendants] in exchange for the payments and kickbacks be a violation of state law."[155] The legal basis for the *relationship* that must exist and the obligation that relationship creates thus remain unclear.[156]

Regarding the third question—the nature and scope of the requisite fiduciary duty—the outcome will likely depend on what source of authority is relied upon and how it is framed.[157] As noted

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[148] United States v. Smith, 985 F. Supp. 2d 547, 597-98 (S.D.N.Y. 2014); *see also Lusk*, 2017 WL 508589, at *10 ("[N]umerous courts have addressed this issue . . . and reached wildly different determinations as to the permissible sources of fiduciary duties that can sustain an honest-services offense.").

[149] *See* United States v. Urciuoli, 513 F.3d 290, 298 (1st Cir. 2008) (indicating that state law "might bear on what 'services' are owed"); *Smith*, 985 F. Supp. 2d at 599 (finding it unnecessary to decide whether fiduciary duty was grounded in state or federal law, as duty was owed under either).

[150] *See Milovanovic*, 678 F.3d at 724-25 (referencing common-law agency principles); United States v. Nelson, 712 F.3d 498, 509 (11th Cir. 2013) (noting that public officials "inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest" (quoting United States v. deVegter, 198 F.3d 1324, 1328 (11th Cir. 1999))).

[151] *E.g.*, United States v. Nouri, 711 F.3d 129, 137 n.1 (2d Cir. 2013) (rejecting challenge to jury instruction on fiduciary duty as "meritless," because existence of employment relationship made fiduciary duty indisputable).

[152] *See Skilling*, 554 F.3d at 418 (Scalia, J., dissenting) ("This indeterminacy does not disappear if one assumes that the pre-*McNally* cases developed a federal, common-law fiduciary duty; the duty remained hopelessly undefined."); United States v. Weyhrauch, 548 F.3d 1237, 1244 (9th Cir. 2008) (referring to a "uniform federal standard inherent in § 1346" and noting that courts "have not uniformly defined the contours of that standard").

[153] United States v. Sanchez, 502 F. App'x 375, 381 (5th Cir. 2012) (per curiam).

[154] *See* United States v. Teel, 691 F.3d 578, 583 (5th Cir. 2012) (rejecting argument that *Skilling* established federal law "as the uniform national standard for the elements of bribery and kickbacks in § 1346 prosecutions"); *see infra* § Definitions of Bribery and Kickbacks.

[155] United States v. Johnson, No. 14-CR-238, 2016 WL 930947, at *7 (E.D. La. Mar. 11, 2016).

[156] *See* United States v. Terry, 707 F.3d 607, 611-12 (6th Cir. 2013) (declining to "wade into the debate over whether a state-law violation is a precondition of honest services fraud").

[157] *E.g.*, United States v. Halloran, 821 F.3d 321, 338 (2d Cir. 2016) (analyzing duty and breach under federal and New

above, some courts have treated the existence of an employment relationship, for example, in the context of a bribe or kickback scheme as a conclusive indication that a fiduciary duty has been breached in a way that constitutes honest services fraud,[158] while other courts have focused more specifically on the "type of fiduciary duty" at issue and whether it "falls within the core" of the term as applied in honest services cases.[159]

Definitions of Bribery and Kickbacks

As noted above, the Supreme Court in *Skilling* indicated that the prohibition on bribes and kickbacks should "draw[] content not only from the pre-*McNally* case law, but also from federal statutes proscribing—and defining—similar crimes."[160] The Court then cited 18 U.S.C. § 201(b), which criminalizes bribery of federal public officials;[161] 18 U.S.C. § 666(a)(2), which criminalizes bribery in programs receiving federal funds;[162] and 41 U.S.C. § 8701(2), which defines the term "kickback" for purposes of the statutory provisions prohibiting kickbacks in connection with public contracts.[163] Relying on this portion of the Supreme Court's opinion, courts after *Skilling* have tended to look to the federal anti-bribery and anti-kickback statutes cited by the Court to "give substance to the prohibition on honest-services fraud,"[164] though some courts have also relied on state-law definitions of bribery[165] or simply on prior honest services case law.[166]

In general, bribery requires a *quid pro quo*, meaning a specific intent to "give or receive something of value *in exchange for* an official act."[167] This requirement distinguishes a bribe from a "gratuity," which "may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already

York law to determine whether outcome would differ).

[158] United States v. Seabrook, No. 16-CR-467, 2017 WL 3995630, at *2 (S.D.N.Y. Sept. 11, 2017) (concluding that because the defendant was a union official, he owed a duty and "no further inquiry in[to] the scope and nature of that relationship is necessary").

[159] *Smith*, 985 F. Supp. 2d 547, 592-95.

[160] *Skilling*, 561 U.S. at 412.

[161] 18 U.S.C. § 201(b) makes it a crime for any person to "corruptly give[], offer[] or promise[] anything of value to any [federal] public official . . . with intent" to "influence any official act," to influence the public official to commit a fraud on the United States, or to "induce" the public official "to do or omit to do any act in violation of the lawful duty of such official or person." 18 U.S.C. § 201(b)(1). The statute also criminalizes parallel conduct on the part of the public-official bribe recipient. *Id.* § 201(b)(2).

[162] 18 U.S.C. § 666 criminalizes the solicitation or acceptance (as well as the offer or provision) of "anything of value" with intent to influence or be influenced "in connection with any business, transaction, or series of transactions of" an "organization or of a State, local or Indian tribal government" "involving anything of value of $5,000 or more," provided that the organization or government at issue receives in excess of $10,000 in federal funds in any one-year period. 18 U.S.C. §§ 666(a)(1)-(2), (b).

[163] The statute defines "kickback" as "any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind that is provided to a prime contractor, prime contractor employee, subcontractor, or subcontractor employee to improperly obtain or reward favorable treatment in connection with a prime contract or a subcontract relating to a prime contract." 41 U.S.C. § 8701(2).

[164] United States v. Nagin, 810 F.3d 348, 351 (5th Cir. 2016).

[165] United States v. Teel, 691 F.3d 578, 582 (5th Cir. 2012).

[166] *See* United States v. DeMizio, 741 F.3d 373, 381-82 (2d Cir. 2014) (relying on definition of "kickback" from Black's Law Dictionary and Second Circuit precedent).

[167] United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 404-05 (1999) (emphasis in original); United States v. Bryant, 655 F.3d 232, 245 (3d Cir. 2011) (citation omitted).

taken."[168] Thus, although the text of the federal bribery statutes appears to criminalize it,[169] payment or receipt of a mere gratuity does not constitute honest services fraud.[170]

The *quid pro quo* required for bribery need not be explicit in most cases,[171] though in light of the First Amendment concerns that arise when an alleged bribe is a political contribution, an explicit *quid pro quo* may be required under those circumstances.[172] The person offering a bribe also need not "spell out which payments control which particular official acts"[173]—rather, proof of a "stream of benefits" coinciding with a pattern of official acts is sufficient.[174] Additionally, there is no requirement that a bribe payor and payee come to a meeting of the minds. One who offers a bribe may be convicted of honest services fraud even if the offer is rejected,[175] and one who intends to accept a bribe may be convicted even absent proof that the payor had the requisite intent.[176] There does appear to be some disagreement, however, as to whether a bribe recipient may be prosecuted for honest services fraud when he has *no* intent to take official action but falsely suggests to the payor that he will do so.[177]

In 2016, the Supreme Court narrowly construed the scope of conduct that may be considered an "official act" supporting bribery, thus potentially narrowing the scope of honest services fraud once again as well. In *McDonnell v. United States*,[178] the former governor of Virginia was charged with honest services fraud, among other things, for accepting benefits from a nutritional supplement company in exchange for his influence in organizing university studies of the company's product.[179] Importantly, the parties agreed that "bribery" for purposes of honest services fraud should be defined by reference to 18 U.S.C. §§ 201(b)(1)(A) and (b)(2)(A), which

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[168] *Sun-Diamond Growers*, 526 U.S. at 405.

[169] *See* 18 U.S.C. § 201(c) (prohibiting the provision or receipt of anything of value "for or because of any official act"); 18 U.S.C. § 666(a)(2) (prohibiting provision of anything of value "with intent to influence or reward"). There is some dispute as to whether Section 666 reaches gratuities. *Compare* United States v. Bahel, 662 F.3d 610, 636 (2d Cir. 2011) (concluding that Section 666 criminalizes receipt of gratuities), *with* United States v. Fernandez, 722 F.3d 1, 26 (1st Cir. 2013) (concluding that Section 666 does not cover gratuities).

[170] United States v. Hawkins, 777 F.3d 880, 884 (7th Cir. 2015) ("[S]ecret receipt of a gratuity . . . does *not* violate § 1341, for a payment that does not entail a plan to change how the employee or agent does his job is neither a bribe nor a kickback.").

[171] United States v. Terry, 707 F.3d 607, 612 (6th Cir. 2013) (collecting cases).

[172] *See* United States v. Ring, 706 F.3d 460, 466 (D.C. Cir. 2013) (assuming without deciding that explicit *quid pro quo* requirement for campaign contributions extends to honest services fraud); United States v. Menendez, 291 F. Supp. 3d 606, 613 (D.N.J. 2018); *cf.* McCutcheon v. FEC, 572 U.S. 185, 192 (2014) (recognizing that for a regulation of campaign contributions to comport with the First Amendment, it must target "'*quid pro quo*' corruption or its appearance"). Even then, however, it need not be *express*. United States v. Siegelman, 640 F.3d 1159, 1171 (11th Cir. 2011) ("The official must agree to take or forego some specific action . . . [b]ut . . . an explicit agreement may be implied from the official's words and actions." (internal alterations and quotation marks omitted)).

[173] *Terry*, 707 F.3d at 612.

[174] *Id.*; United States v. Bahel, 662 F.3d 610, 635 (2d Cir. 2011); United States v. Bryant, 655 F.3d 232, 241 (3d Cir. 2011); United States v. Silver, 184 F. Supp. 3d 33, 43 (S.D.N.Y 2016).

[175] United States v. Ring, 706 F.3d 460, 467 (D.C. Cir. 2013) ("[A] defendant may be guilty of honest-services bribery where he offers an official something of value with a specific intent to effect a quid pro quo even if that official emphatically refused to accept.").

[176] United States v. Morgan, 635 F. App'x 423, 431 (10th Cir. 2015).

[177] *Compare* United States v. Nagin, 810 F.3d 348, 351 (5th Cir. 2016) ("[A]n official may be convicted of bribery . . . even if he has no intention of actually fulfilling his end of the bargain."), *with Hawkins*, 777 F.3d at 884 (noting that if defendants "were lying" about taking action in exchange for payment, they "were scamming [the payor] rather than" the public).

[178] 136 S.Ct. 2355 (2016).

[179] *Id.* at 2357.

require an intent to influence or a promise to be influenced in the performance of an "official act."[180] Of course, the parties disputed the *definition* of "official act" and whether it encompassed the defendant's conduct.

The *McDonnell* Court ultimately construed the term "official act" narrowly. According to the Court, for there to be an official act, there must be some concrete "question, matter, cause, suit, proceeding or controversy" that involves "a formal exercise of governmental power . . . similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee."[181] Additionally, the defendant must at least agree to "make a decision or take an action" on that question, matter, cause, suit, proceeding, or controversy, which "may include using his official position to exert pressure on" or advise another to perform an official act.[182] Simply "setting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more"—is not enough.[183] The Court's decision in *McDonnell* to construe the term "official act" narrowly was animated by the same constitutional concerns that undergirded its prior decisions imposing limitations on honest services fraud prosecutions—namely, that a broader construction could leave the scope of criminal liability unclear and impinge on the states' authority to "regulate the permissible scope of interactions between state officials and their constituents."[184]

Following *McDonnell*, there has been some speculation that the "stream of benefits" theory of bribery—that is, that specific payments need not be linked to particular official acts—is dead.[185] However, at least one court has held to the contrary.[186] Furthermore, because the parties in *McDonnell* agreed that bribery should be defined by reference to Sections 201(b)(1)(A) and (b)(2)(A), the Court had no occasion to consider whether an "official act" (as it defined the term) must *always* underlie public-sector honest services fraud based on bribery. Thus, to the extent courts look to provisions beyond (b)(1)(A) and (b)(2)(A) to give content to the bribery requirement in honest services cases, *McDonnell* arguably would have no impact.[187]

That said, it does seem that *McDonnell* could potentially cabin the scope of honest services fraud liability in at least some cases where liability is premised on the definition of bribery found in Section 201. For instance, in the high-profile prosecution of Sheldon Silver, the former speaker of the New York State Assembly, the Second Circuit vacated Silver's conviction on honest services

[180] 18 U.S.C. § 201(b)(2)(A).

[181] *McDonnell*, 136 S.Ct. at 2372 (quoting 18 U.S.C. § 201(a)(3)).

[182] *Id.*

[183] *Id.* at 2370.

[184] *Id.* at 2373.

[185] *E.g.*, Bridget Vuona, *Remember Me, "Part C"? Honest Services Fraud Schemes Involving Bribery Under "Part C" of the Federal Bribery Statute Post*-McDonnell, 55 AM. CRIM. L. REV. ONLINE 35, 39 (2018) (positing that such a theory is "likely not specific enough" after *McDonnell*).

[186] United States v. Menendez, 291 F. Supp. 3d 606, 613 (D.N.J. 2018) ("*McDonnell* is not antagonistic to the stream of benefits theory.").

[187] *See* United States v. Suhl, 885 F.3d 1106, 1111 (8th Cir. 2018) (assuming that *McDonnell* applies to Section 666 but noting that the provision "does not include the term 'official act'"); Elgawhary v. United States, No. 14-CR-0068, 2018 WL 398284, at *4 (D. Md. Jan. 11, 2018) (rejecting argument in private-sector case that "honest services fraud can only be defined in reference to" Section 201 and noting that Section 666 sets out a "different definition[] for bribery"); Vuona, *supra* note 185, at 41-42 (arguing that in light of *McDonnell*, federal prosecutors should look to different portions of Section 201 that prohibit illegal agreements to perform "act[s] in violation of the lawful duty of such official or person" (quoting 18 U.S.C. §§ 201(b)(1)(C) & (b)(2)(C))).

charges because the jury instructions broadly captured conduct "such as arranging meetings or hosting events with constituents" that would be considered lawful after *McDonnell*.[188]

Though it appears that honest services fraud prosecutions since 2010 have largely focused on bribery, a few cases have involved kickback schemes. "A kickback scheme typically involves an employee's steering business of his employer to a third party in exchange for a share of the third party's profits on that business."[189] The defendant need not directly receive the profits, however—a kickback scheme may involve one who "directs the third party to share its profits with an entity designated by the [defendant] in which [he] has an interest" or with "others loyal to the defendant."[190]

Some federal prosecutors appear to have addressed the limitations imposed in *Skilling* and *McDonnell* by reframing cases that might previously have been brought on an honest services theory as traditional "money or property" wire fraud. Specifically, at least one circuit has favorably referenced a theory of intangible property that encompasses a "right to control" one's assets,[191] which may permit prosecutors to use the mail and wire fraud statutes to reach some conflict-of-interest cases that can no longer be tried on an honest services theory.[192]

Potential Options for Congress

On more than one occasion since 2010, Congress has considered legislation that would expand honest services fraud to include certain categories of conduct that 18 U.S.C. § 1346 no longer encompasses under the Supreme Court's interpretations of the statute. For instance, the Senate and House considered bills in the 112th Congress that would have restored undisclosed self-dealing as a basis for honest services fraud prosecution in public-, but not private-sector, cases.[193] The legislation would have expanded the definition of "scheme to defraud" to include a scheme by a "public official"—meaning a federal, state, or local officer, employee, or agent—to (1) perform an official act that, at least in material part, furthers his own or certain relatives' or associates' financial interests;[194] and (2) conceal or knowingly fail to disclose "material

[188] United States v. Silver, 864 F.3d 102, 118 (2d Cir. 2017). Nevertheless, Silver was retried with proper post-*McDonnell* jury instructions and was convicted again. Benjamin Weiser, *Sheldon Silver is Convicted in 2nd Corruption Trial*, N.Y. TIMES (May 11, 2018), https://www.nytimes.com/2018/05/11/nyregion/sheldon-silver-retrial-guilty.html?module=inline.

[189] United States v. DeMizio, 741 F.3d 373, 381 (2d Cir. 2014); *see also* United States v. Lusk, No. 2:15-CR-00124, 2017 WL 508589, at *8 (S.D.W. Va. Feb. 7, 2017) (describing a "classic kickback scheme" as one in which "an employee provid[es] favorable official action to a third party in exchange for monetary compensation").

[190] *Demizio*, 741 F.3d at 381-82.

[191] United States v. Baroni, 909 F.3d 550, 567 (3d Cir. 2018) ("Included within the meaning of money or property is the victim's right to control that money or property." (alteration, citations, and internal quotation marks omitted)).

[192] *See generally* Brette M. Tannenbaum, *Reframing the Right: Using Theories of Intangible Property to Target Honest Services Fraud after Skilling*, 112 COLUM. L. REV. 359 (2012).

[193] H.R. 2572, 112th Cong. § 14 (as reported by H. Judiciary Comm., Sept. 21, 2012); S. 2038, 112th Cong. § 211 (as passed by Senate, Feb. 2, 2012); CRS Report R42016, *Prosecution of Public Corruption: An Overview of Amendments Under H.R. 2572 and S. 2038*, by Charles Doyle.

[194] "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 which the public official has knowledge, 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

information" about the interest required to be disclosed "by any Federal, State, or local statute, rule, regulation, or charter applicable to the public official."[195] In short, it appears that the legislation would have expanded the scope of honest services fraud liability in public-sector cases, beyond the bribery and kickback schemes contemplated in *Skilling*, to include one additional category of conduct: failure to disclose a material financial conflict of interest. Additionally, though the bills were considered prior to the Supreme Court's decision in *McDonnell*, it appears that at least one version would have established a slightly broader definition of an "official act" than the one the Court subsequently announced.[196] Ultimately, the bills introduced in the 112th Congress did not become law, nor has any other legislation purporting to reexpand the scope of honest services fraud become law as of this writing.

Nevertheless, some commentators have continued to lament what they view as the Supreme Court's blunting of a previously sharp weapon to combat public corruption, arguing that the decisions in *Skilling* and *McDonnell* placed too little weight on "the interests of citizens in honest government" and urging Congress to find a legislative fix.[197] Other observers, however, have suggested that the deleterious impact of the decisions is overstated, pointing out that federal prosecutors still have multiple legal avenues through which to combat corruption in the public sphere.[198] In any event, should Congress revisit and reconsider the scope of 18 U.S.C. § 1346, understanding the vagueness and federalism concerns that have animated the Supreme Court's repeated limiting constructions of the statute may be beneficial to preventing further judicial limitations. One place to start would be the *Skilling* Court's identification of some questions that must be answered if Congress seeks to "take up the enterprise of criminalizing undisclosed self-dealing . . . ."[199] These questions include (1) how "direct or significant" a conflicting financial interest must be; (2) the extent to which an "official" act or action must further the conflicting financial interest in order to constitute fraud; and (3) to whom a disclosure must be made, and what information it must contain, for a conflicted official to avoid criminal liability.[200] Answering these questions in any proposed legislation may go a long way toward achieving the "definiteness

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for the proper discharge of official duty, or by rule or regulation." H.R. 2572 § 14(a); S. 2038 § 211(a).

Earlier legislation in the 111th Congress extended more broadly to private-sector officers and directors and omitted the materiality requirement for furtherance of the financial interest. *See* S. 3854, 111th Cong. (2010).

[195] "The term 'undisclosed self-dealing' means that . . . (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." H.R. 2572 § 14(a); S. 2038 § 211(a).

[196] *See* H.R. 2572 § 14(a) (bringing within the term's meaning "any act," including a "course of conduct," "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").

[197] Fred Wertheimer, *Symposium: McDonnell decision substantially weakens the government's ability to prevent corruption and protect citizens*, SCOTUSBLOG (June 28, 2016), https://www.scotusblog.com/2016/06/symposium-mcdonnell-decision-substantially-weakens-the-governments-bbility-to-prevent-corruption-and-protect-citizens/; *see also* Johnson, *supra* note 52, at 106, 122 (arguing that *Skilling* hampered the federal government's "ability to effectively prosecute state and local officials" and urging Congress to pass legislation that "would not fail the void-for-vagueness test").

[198] *See* Tannenbaum, *supra* note 192, at 363 (asserting that after *Skilling*, "prosecutors can and should continue to target the same kind of honest services misconduct using the classic mail and wire fraud statutes . . . by reframing the fraud as a deprivation of an intangible property right"); O'Toole, *supra* note 51, at 59-61 (cataloguing the various other legal mechanisms for punishing public corruption).

[199] Skilling v. United States, 561 U.S. 358, 411 n.44 (2010).

[200] *Id.*

and specificity"[201] needed to potentially avoid the vagueness and federalism concerns that the Court has repeatedly articulated.

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[201] *Id.*