

# CRIMINALIZING THE DENIAL OF HONEST SERVICES AFTER *SKILLING*

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This Article analyzes the U.S. Supreme Court’s recent and groundbreaking decision in *Skilling v. United States*, which limited the application of the honest-services-fraud statute to schemes to defraud involving bribes or kickbacks. Most significantly, the Court rejected the notion that the statute applied 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.” The *Skilling* Court called on Congress to “speak more clearly” if it desired the statute “to go further.”

Further, this Article strives to provide an outline of the new honest-services statute that Congress should enact to replace the current, eviscerated statute. In doing so, it first traces the development of the intangible-rights theory from its inception until present day. Then, it analyzes the Court’s decision in *Skilling*. In light of *Skilling*, this Article examines the potential alternative means through which the government can pursue criminal conduct relating to the denial of honest services. Finally, this Article evaluates the cases that the new honest-services-fraud statute should address, provides recommendations for reform of the statute, and applies these recommendations to a recently proposed statute—the Honest Services Restoration Act.

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## INTRODUCTION

The U.S. Supreme Court's recent decision in *Skilling v. United States*<sup>1</sup> is only the latest in a series of blows that the Court has dealt to the intangible-rights theory of mail fraud (also known as honest-services fraud).<sup>2</sup> In *Skilling*, the Court considered the constitutionality of the so-called honest-services statute,<sup>3</sup> which criminalizes “scheme[s] or artifice[s] [designed] to deprive another of the intangible right of honest services,”<sup>4</sup> and narrowed its scope considerably. The Court limited the application of the statute to schemes to defraud involving bribes or kickbacks.<sup>5</sup> Most significantly, the Court rejected the notion that the statute applied 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.”<sup>6</sup> The *Skilling* Court called on Congress to “speak more clearly” if it desired the statute “to go further.”<sup>7</sup>

To address criminal conduct that would no longer be penalized following the Court's drastic narrowing of the honest-services statute, this Article provides recommendations concerning what the new honest-services statute, which Congress would enact to replace the current, eviscerated statute, should look like. The considerations advanced in this Article aim to ensure that the new statute avoids potential federalism concerns, as well as the charges of vagueness that plagued the previous iterations of the honest-services statute. Additionally, they provide a means of punishing truly criminal conduct that would otherwise fall outside the scope of the honest-services statute (as it currently stands), the mail- and wire-fraud statutes, and 18 U.S.C. § 666.<sup>8</sup>

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

2. Put simply, pursuant to this theory, federal fraud statutes were extended “to cover breaches of fiduciary duties that caused no tangible injury to their victims.” William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 563 (2001).

3. See 18 U.S.C. § 1346 (2006).

4. *Id.*

5. See *Skilling*, 130 S. Ct. at 2931.

6. *Id.* at 2932 (quoting Brief of Appellee-Respondent at 43-44, *Skilling*, 130 S. Ct. 2896 (No. 08-1394)).

7. *Id.* at 2933 (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987)).

8. This statute “applies when governmental or other entities receive more than ten thousand dollars in federal benefits within one year” and prohibits

[E]mbezzling, stealing, and similar misappropriations of five thousand dollars or more worth of property of the recipient entity; corrupt solicitation

Part I of this Article traces the development of the intangible-rights theory from its inception until present day, with Section A generally discussing the mail-fraud statute and Section B specifically examining the intangible-rights theory of mail fraud. Part II provides an overview of the Supreme Court's recent decision in *Skilling v. United States*. Part III analyzes the means through which the government can pursue criminal conduct relating to the denial of honest services after *Skilling*. Finally, Part IV describes what the new honest-services statute should do and say, with Section A describing the cases that the new honest-services-fraud statute should address, Section B providing recommendations for reform of the statute, and Section C applying these recommendations to a recently proposed honest-services statute—the Honest Services Restoration Act.

## I. THE INTANGIBLE-RIGHTS THEORY OF MAIL FRAUD

To provide the necessary background and context for recommendations concerning a replacement honest-services statute, this Part outlines the respective histories of the mail-fraud statute and of the intangible-rights (honest-services) theory of mail fraud.

### A. Mail-Fraud Statute

The mail-fraud statute was originally enacted in 1872.<sup>9</sup> Through the use of this statute, Congress apparently sought to address the “sale of counterfeit currency”<sup>10</sup> by the postal system and to stop “lottery

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or acceptance by entity agents of anything of value in connection with matters involving five thousand dollars or more; and, corrupt offers to such agents in connection with such matters.

George D. Brown, *Stealth Statute—Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666*, 73 NOTRE DAME L. REV. 247, 248 (1998). Section 666 has been called the “stealth statute” by some commentators because it has the potential of reaching “the status of a general federal prohibition of corruption at the state and local levels.” *Id.*

9. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323. The statute was preceded by legislation, enacted by Congress in 1868, that was designed “to prohibit use of the mails to send letters or circulars for lotteries.” Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 441 (1995); see also Act of July 27, 1868, ch. 246, § 13, 15 Stat. 194, 196 (“[I]t shall not be lawful to deposit in a post-office, to be sent by mail, any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever.”).

10. Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch over Us*, 31 HARV. J. ON LEGIS. 153, 158-59 (1994).

swindlers.”<sup>11</sup> As a result, the statute made it a crime for any person “to devise any scheme or artifice to defraud . . . by means of the post-office establishment of the United States.”<sup>12</sup> The specific intent element of the statute was therefore the intent to use the mail to carry out the scheme or artifice to defraud.<sup>13</sup>

In *Durland v. United States*,<sup>14</sup> the Supreme Court first examined the mail-fraud statute. Durland had used the postal service to send solicitations encouraging investors to buy bonds.<sup>15</sup> Although Durland did not make any misrepresentations with respect to the bonds themselves, he never intended to make payment on the redeemed bonds.<sup>16</sup> In this respect, Durland failed to make a good-faith effort to invest the funds paid in exchange for the bonds and made false statements regarding promised future returns.<sup>17</sup> Durland argued that his actions constituted a breach of contract; nevertheless he was convicted of mail fraud.<sup>18</sup>

On appeal, Durland argued that his false statements regarding promises of future payment did not constitute fraud.<sup>19</sup> The Court disagreed with Durland, however, stating that the mail-fraud statute “is broader than is claimed.”<sup>20</sup> It looked to the statute’s purpose, rather than to its intent, and held that it “must be read . . . [to] include[] *everything* designed to defraud by representations as to the past or present, or suggestions and promises as to the future.”<sup>21</sup> In this way, the Supreme Court opened the door to the notion of intangible rights.

Following the decision in *Durland*, in 1909 Congress modified the mail-fraud statute to proscribe “any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.”<sup>22</sup> Additionally, Congress eliminated the requirement of intent to use the postal service, instead

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11. Stacy Jaye Kanter, *Mail Fraud and the De Facto Public Official: The Second Circuit Protects Citizens’ Rights to Honest Government*, 49 BROOK. L. REV. 933, 935 (1983).

12. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323.

13. *See id.*; Moohr, *supra* note 10, at 158-59.

14. 161 U.S. 306 (1986).

15. *See id.* at 309-10.

16. *See id.* at 314.

17. *See id.*

18. *See id.* at 312-13.

19. *See id.*

20. *Id.* at 313.

21. *Id.* (emphasis added).

22. Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130.

simply requiring use of the mails.<sup>23</sup> The Court subsequently held, in *Badders v. United States*,<sup>24</sup> that Congress could prohibit any acts done in furtherance of schemes that it considered to be contrary to public policy regardless of whether it could prohibit the schemes themselves.<sup>25</sup>

The present mail-fraud statute is codified at 18 U.S.C. § 1341. In substance, it remains very similar to the original statute, as, pursuant to the current statute, the crime of mail fraud requires (1) a scheme or artifice to defraud, (2) specific intent to defraud, and (3) use of the mails in connection with the scheme. Because the statute was designed—and was typically used—to prosecute traditional frauds, or frauds involving money or tangible property,<sup>26</sup> a narrow reading of the statute would not cover deprivations of intangible rights.

### *B. Intangible Rights (Honest Services)*

Moving away from the narrow understanding of the mail-fraud statute, the U.S. Courts of Appeals gradually began to adhere to the theory of intangible rights. In other words, they began to hold that “schemes to defraud include those designed to deprive individuals, the people, or the government of intangible rights, such as the right to have public officials perform their duties honestly.”<sup>27</sup> Reasoning that the phrases “any scheme or artifice to defraud” and “for obtaining money or property by means of false or fraudulent pretenses, representation, or promises . . .” appeared “in the disjunctive,” courts concluded that they were “to be construed independently and that the money-or-property requirement of the latter phrase d[id] not limit schemes to defraud to those aimed at causing deprivation of money or property.”<sup>28</sup>

The idea of intangible rights likely originated with the Fifth Circuit’s decision in *Shushan v. United States*.<sup>29</sup> Although *Shushan*

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23. See *id.*; see also *United States v. Young*, 232 U.S. 155, 161 (1914) (“[I]t is only necessary that the scheme should be devised . . . and a letter be placed in the post office for the purpose of executing the scheme . . .”).

24. 240 U.S. 391 (1916).

25. See *id.* at 393; see also Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367, 478 n.419 (1989).

26. Elizabeth Wagner Pittman, *Mail and Wire Fraud*, 47 AM. CRIM. L. REV. 797, 811 & n.85 (2010).

27. *McNally v. United States*, 483 U.S. 350, 358 (1987).

28. *Id.*

29. 117 F.2d 110 (5th Cir. 1941); see also Sara Sun Beale, *Comparing the Scope of the Federal Government’s Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal*, 51 HASTINGS L.J. 699, 711-12 (2000) (describing the courts’ understanding and application of the

principally concerned allegations of “traditional fraud,” the court also advanced an alternative theory of liability under the mail-fraud statute, stating:

But there may be a scheme to defraud by other means than express false representations. A scheme to get money unfairly by obtaining and then betraying the confidence of another, or by corrupting one who acts for another or advises him, would be a scheme to defraud though no lies were told. A scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public.<sup>30</sup>

Following *Shushan*, prosecutors began to address corruption by using the theory of intangible rights. Most such cases were based on the principle that federal, state, and local public officials had a fiduciary duty to their constituents to provide “honest, faithful and disinterested service,”<sup>31</sup> although, over time, all of the courts of appeals extended the application of the intangible-rights theory to private actors.<sup>32</sup> Additionally, the courts of appeals “expanded the intangible rights doctrine to reach breaches of fiduciary duties by employees and professionals who owe[d] clients a duty of loyalty and candor.”<sup>33</sup>

With its decision in *McNally v. United States*,<sup>34</sup> the Supreme Court halted (at least temporarily) the development of the intangible-rights theory. The Court concluded, contrary to the holdings of numerous courts of appeals, that with respect to the mail-fraud statute, the phrase “any scheme or artifice” could not be construed separately from the

intangible-rights theory after it was first used in *Shushan*); Henning, *supra* note 9, at 461 n.128.

30. *Shushan*, 117 F.2d at 115.

31. *United States v. Mandel*, 591 F.2d 1347, 1362 (4th Cir. 1979); *see also United States v. Bohonus*, 628 F.2d 1167, 1171 (9th Cir. 1980); *United States v. Brown*, 540 F.2d 364, 374 (8th Cir. 1976).

32. *United States v. McNeive*, 536 F.2d 1245, 1249 (8th Cir. 1976) (stating that, over time, “[a]n increasing number of courts” recognized that “a recreant employee”—public or private—“c[ould] be prosecuted under [the mail-fraud statute] if he breache[d] his allegiance to his employer by accepting bribes or kickbacks in the course of his employment”); Daniel J. Hurson, *Limiting the Federal Mail Fraud Statute—A Legislative Approach*, 20 AM. CRIM. L. REV. 423, 456 & n.268 (1983) (indicating that by 1982, all of the circuit courts had embraced the honest-services theory of fraud).

33. Henning, *supra* note 9, at 461.

34. 483 U.S. 350, 356 (1987).

“money-or-property requirement.”<sup>35</sup> *McNally* concerned a self-dealing patronage scheme by a private individual (McNally) and two public officials (Gray and Hunt).<sup>36</sup> Gray and Hunt used their authority to obtain unearned insurance commissions for Seton, an investment company that was nominally headed by McNally and in which Gray had an undisclosed interest.<sup>37</sup> Since payments to Seton came from commissions that would have been paid regardless of the scheme, the state was not deprived of any money it would not have otherwise spent. Moreover, the scheme—including Gray’s failure to disclose his interest in Seton—did not violate state or federal law.<sup>38</sup> As a result, McNally and Gray were convicted based on the premise that their actions were a scheme “to defraud the citizens of their intangible rights to honest and impartial government.”<sup>39</sup>

Justice John Paul Stevens, writing in dissent, questioned whether it was logical for Congress to criminalize schemes to defraud involving even the pettiest sums of money, and yet to ignore schemes to deprive citizens of honest government or unbiased public officials.<sup>40</sup> Stevens also suggested that the term “defraud” was broad enough to encompass honest-services fraud.<sup>41</sup> Finally, Stevens pointed out that the fact that numerous circuit court decisions had approved the application of the mail-fraud statute to honest-services fraud negated the argument that the statute was vague.<sup>42</sup> Nevertheless, the *McNally* majority concluded that, rather than construing the mail-fraud statute in a way that would leave “its outer boundaries ambiguous and involve[] the Federal Government in setting standards of disclosure and good government for local and state officials, [it would] read § 1341 as [being] limited . . . to the protection of property rights.”<sup>43</sup> Further, it stated that “[i]f

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35. *See id.* at 358.

36. *See id.* at 352.

37. *See id.* at 352-53. “The men allegedly directed one of the state’s primary insurance agents—chosen to purchase its workers’ compensation policies—to pay a share of the commissions to Seton in exchange for a continued agency relationship with the state.” Joseph E. Huigens, Note, *If All Politicians Are Corrupt, but All Defendants Are Presumed Innocent, Then What? A Case for Change in Honest Services Fraud Prosecutions*, 85 NOTRE DAME L. REV. 1687, 1702 (2010).

38. *McNally*, 483 U.S. at 361.

39. *Id.* at 355.

40. *Id.* at 366 (Stevens, J., dissenting).

41. *See id.* at 368-74 (Stevens, J., dissenting) (“Examination of the way the term ‘defraud’ has long been defined, and was defined at the time of the statute’s enactment, makes it clear that Congress’ use of the term showed no intent to limit the statute to property loss.”).

42. *See id.* at 375-76 (Stevens, J., dissenting).

43. *Id.* at 360 (majority opinion).

Congress desires to go further, it must speak more clearly than it has.”<sup>44</sup>

Congress’s response to *McNally* was swift. Several bills introduced shortly after the Court issued its opinion were designed to overturn *McNally* and to put into place specific anti-corruption legislation. The Mail Fraud Amendment Act of 1987,<sup>45</sup> for example, characterized “good government” as “public business conducted honestly, impartially, free from bribery, corruption, bias, dishonesty, deceit, official misconduct, and fraud.”<sup>46</sup> Another bill, proposed by Representative John Conyers, Jr., defined “fraud” to include depriving another of intangible rights.<sup>47</sup>

The following year, several pieces of legislation addressing denial of honest services in the public and private spheres were introduced in response to *McNally*.<sup>48</sup> Then-Senator Joe Biden proposed legislation which would have defined a “scheme or artifice to defraud” to include: “a scheme or artifice to deprive an organization of the intangible right of honest services in which the defendant received or attempted to receive, for the defendant or another person, anything of value or in which the defendant intended or contemplated loss or harm to the organization.”<sup>49</sup> Biden’s bill was designed to avoid the use of the statute as a tool for prosecuting “mere breaches of fiduciary duty, or private confidence, or violations of [f] ordinary rules of the workplace.”<sup>50</sup> Thus, “the codification of pre-*McNally* law in the bill [was] specifically limited to situations where the defendant [acted] to obtain a thing of value, or to harm the organization.”<sup>51</sup> Other Senators introduced bills dealing only with honest-services fraud as related to public officials.<sup>52</sup> None of the above-mentioned bills were signed into law.<sup>53</sup>

Although it was unable to enact any comprehensive anti-corruption legislation, Congress did eventually pass the Anti-Drug Abuse Act of 1988, which included a provision that subsequently became 18 U.S.C. § 1346. In its entirety, the provision stated: “For purposes of this chapter [18 U.S.C. §§ 1341-50], the term ‘scheme or artifice to

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44. *Id.*

45. H.R. 3050, 100th Cong. (1st Sess. 1987), *in* 133 CONG. REC. 21,469 (1987).

46. 133 CONG. REC. 21,466 (1987).

47. 133 CONG. REC. 22,339-41 (1987).

48. *See* Lisa L. Casey, *Class Action Criminality*, 34 J. CORP. L. 153, 187 (2008).

49. 134 CONG. REC. 23,954 (1988).

50. 134 CONG. REC. 31,073 (1988).

51. *Id.* (italics added).

52. *See* Casey, *supra* note 48, at 187.

53. *See id.*

defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."<sup>54</sup> Representative Conyers inserted this language the same day that the Act passed in both chambers of Congress.<sup>55</sup> It was not discussed prior to the vote,<sup>56</sup> but Conyers indicated that the intent of the language was to "restore[] the mail fraud provision to where that provision was before the *McNally* decision."<sup>57</sup> A report submitted by the Senate Judiciary Committee after § 1346 was enacted similarly stated that this provision was designed to "overturn[] the decision in *McNally*" and "reinstate all of the pre-*McNally* case law pertaining to the mail and wire fraud statutes without change."<sup>58</sup>

Despite its apparent intent, it is doubtful that § 1346 actually restored all pre-*McNally* case law.<sup>59</sup> For example, when the Supreme Court examined this statute in *Cleveland v. United States*<sup>60</sup> while analyzing whether making false statements to government officials to obtain video-poker licenses constituted mail fraud,<sup>61</sup> the Court held that cases involving licensing fraud were not reinstated by § 1346.<sup>62</sup> Echoing the *McNally* court, the *Cleveland* court held that "§ 1341 d[id] not reach fraud in obtaining a state or municipal [video-poker] license . . . for such a license [was] not 'property' in the government regulator's hands. . . . '[I]f Congress desires to go further, it must speak more clearly than it has.'"<sup>63</sup> Informing the Court's decision in *Cleveland* was the fear that the government's desired outcome would

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54. Act of Nov. 18, 1988, Pub. L. No. 100-690, Title VII, § 7603(a), 102 Stat. 4181, 4508 (1988).

55. See *United States v. Brumley*, 116 F.3d 728, 742 (5th Cir. 1997) (en banc).

56. See *id.*

57. 134 CONG. REC. 33,296-97 (1988) (italics added).

58. 134 CONG. REC. S17,360, S17,376 (daily ed. Nov. 10, 1988) (italics added); see also *Cleveland v. United States*, 531 U.S. 12, 19-20 (2000); Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. CIN. L. REV. 1, 15 (1998) (citing *United States v. Carpenter*, 484 U.S. 19, 25 (1987) (holding that an interest in confidential information was property for purposes of mail fraud)) ("By passing the honest services amendment, Congress forestalled the development of the potential tension between *Carpenter* and *McNally*, which resulted from the practice of characterizing honest services frauds as intangible property frauds.").

59. See Casey, *supra* note 48, at 188.

60. 531 U.S. 12 (2000).

61. *Id.* at 15.

62. See *id.* at 20.

63. *Id.* (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987)); see also Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 KY. L.J. 75, 141 (2003) ("The Court held that unissued licenses held by the state were not property within the meaning of the statute, thus reaffirming the position it took in *McNally* that schemes to obtain property are limited to property that has an economic value in the hands of the victim.").

“approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress” and “subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities.”<sup>64</sup> After deciding *Cleveland*, the Supreme Court did not seriously examine the meaning and application of § 1346 until ten years later, when it granted certiorari in *Skilling*.<sup>65</sup>

## II. *SKILLING V. UNITED STATES*

*Skilling v. United States* examined issues arising from the prosecution of Jeffrey Skilling, a longtime and high-level Enron Corporation executive, for crimes he allegedly committed before Enron’s collapse.<sup>66</sup> Skilling was convicted of honest-services fraud, among other crimes. The Supreme Court took the opportunity presented in *Skilling* to overturn § 1346.

Skilling began his career at Enron in 1990, rising through its ranks to eventually become Enron’s chief executive officer in 2001.<sup>67</sup> On August 14, 2001, Skilling resigned from Enron and the company declared bankruptcy less than four months after his departure.<sup>68</sup> In January 2002, the U.S. Department of Justice formed an Enron Task Force (“Task Force”), which brought together prosecutors and FBI agents from around the United States in an attempt to understand Enron’s sudden collapse.<sup>69</sup> Following an investigation, the Task Force

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64. *Cleveland*, 531 U.S. at 24.

65. In the meantime, the federal courts of appeals continued to develop their own, often conflicting interpretations, of the statute. See *United States v. Brown*, 459 F.3d 509, 519 (5th Cir. 2006) (“[Section] 1346 was clearly meant specifically to overturn *McNally*, at least with respect to the particular intangible right named in the statute, i.e., the right to honest services. Thus, the meaning of honest services—given that the statute provides no perimeters—is to be found in the pre-*McNally* case law.” (citations omitted)); *United States v. Rybicki*, 354 F.3d 124, 135 (2d Cir. 2003) (stating that one would “labor long and with difficulty” to try to discern the “plain” meaning of § 1346).

66. See *Skilling v. United States*, 130 S. Ct. 2896, 2907 (2010).

67. See Bethany McLean, *Why Enron Went Bust*, FORTUNE, Dec. 24, 2001, at 61.

68. See John C. Hueston, *Behind the Scenes of the Enron Trial: Creating the Decisive Moments*, 44 AM. CRIM. L. REV. 197, 198 (2007).

69. See Kathleen L. Brickey, *Enron’s Legacy*, 8 BUFF. CRIM. L. REV. 221, 230 (2004); see also Mary Kreiner Ramirez, *Prioritizing Justice: Combating Corporate Crime from Task Force to Top Priority*, 93 MARQ. L. REV. 971, 985-86 (2010) (stating that the Enron Task Force “was part of the Corporate Fraud Task Force” and that it “was formed to investigate and prosecute allegations of fraud and corruption in connection with the collapse of Enron, a multinational energy corporation based in Houston, Texas, which filed for bankruptcy in 2001. At the time, the Enron bankruptcy was the most extensive and expensive bankruptcy ever filed.” (footnotes omitted)).

discovered the existence of “an elaborate conspiracy to prop up Enron’s short-run stock prices by overstating the company’s financial well-being.”<sup>70</sup> Subsequently, the government prosecuted a number of employees, including Enron’s senior officers, who had allegedly participated in the conspiracy.<sup>71</sup>

On July 7, 2004, a grand jury indicted Skilling, Kenneth Lay (Enron’s chairman),<sup>72</sup> and Richard Causey (Enron’s former chief accounting officer).<sup>73</sup> According to the indictment, Skilling and his co-conspirators had “engaged in a wide-ranging scheme to deceive the investing public, including Enron’s shareholders, . . . about the true performance of Enron’s businesses by: (a) manipulating Enron’s publicly reported financial results; and (b) making public statements and representations about Enron’s financial performance and results that were false and misleading.”<sup>74</sup> Furthermore, these individuals allegedly “enriched themselves as a result of the scheme through salary, bonuses, grants of stock and stock options, other profits, and prestige.”<sup>75</sup> The first count of the indictment charged Skilling with conspiracy to commit securities and wire fraud and specifically alleged that he had sought to “depriv[e] Enron and its shareholders of the intangible right of [his] honest services.”<sup>76</sup> The indictment also charged Skilling with “more than 25 substantive counts of securities fraud, wire fraud, making false representations to Enron’s auditors, and insider trading.”<sup>77</sup>

Three weeks prior to the start of the co-conspirators’ trial, on December 28, 2005, Causey pleaded guilty to a single count of securities fraud.<sup>78</sup> Following a continuance, Skilling’s trial began in January 2006,<sup>79</sup> lasting for four months. On May 25, 2006, a Houston

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

71. *See id.*; *see also* Peter J. Henning, *Targeting Legal Advice*, 54 AM. U. L. REV. 669, 671 n.11 (2005) (“[I]ndictments of senior officers of Enron did not occur until over two years after the company’s bankruptcy, and the first criminal trial involving an Enron transaction only began in September 2004.”).

72. Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1187 (2003).

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

74. *Id.* at 2908 (quoting the indictment).

75. *Id.* (quoting the indictment).

76. *Id.* (quoting the indictment).

77. *Id.*

78. *See* Kurt Eichenwald, *In Enron Case, a Guilty Plea but No Certainties*, N.Y. TIMES, Dec. 29, 2005, at A1.

79. *See* Jean Galbraith, *The Pace of International Criminal Justice*, 31 MICH. J. INT’L L. 79, 100 (2009).

federal-district-court jury found Skilling guilty of nineteen counts,<sup>80</sup> including one count of conspiracy to commit honest-services wire fraud.<sup>81</sup> Skilling was found not guilty of nine insider-trading counts.<sup>82</sup> “The District Court sentenced Skilling to 292 months’ imprisonment, 3 years’ supervised release, and \$45 million in restitution.”<sup>83</sup>

On appeal before the Fifth Circuit, Skilling raised two questions: (1) whether “pretrial publicity and community prejudice prevented him from obtaining a fair trial”; and (2) whether “the jury improperly convicted him of conspiracy to commit honest-services wire fraud.”<sup>84</sup> The Fifth Circuit answered no to both questions and affirmed Skilling’s conviction.<sup>85</sup> Skilling then appealed the Fifth Circuit’s decision and the Supreme Court granted a writ of certiorari.<sup>86</sup>

The Supreme Court agreed with the Fifth Circuit regarding the failure of Skilling’s fair trial argument.<sup>87</sup> However, it disagreed with the Fifth Circuit regarding that court’s rejection of Skilling’s honest-services argument.<sup>88</sup> The Supreme Court held that § 1346, which states that the term “‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services,”<sup>89</sup> should not be construed to extend beyond schemes to defraud involving bribes and kickbacks, as such an extension “would encounter a

80. See Alexei Barrionuevo, *2 Enron Chiefs are Convicted in Fraud and Conspiracy Trial*, N.Y. TIMES, May 25, 2006, at A1.

81. See *Skilling*, 130 S. Ct. at 2911. The honest-services wire-fraud charge was based on 18 U.S.C. §§ 371, 1343, 1346 (2000). Section 371 states in part that if two or more persons conspire to defraud the United States or any agency thereof “and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.” Section 1343 provides in part that anyone who has devised “any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representation, or promises,” and who “transmits . . . by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both.” Finally, § 1346 states that “[f]or the purposes of this chapter, the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.”

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

83. *Id.* Kenneth Lay was indicted in July 2004 and was tried with Skilling, but he died after the trial and before sentencing. See Kate Murphy, *Judge Throws Out Kenneth Lay’s Conviction*, N.Y. TIMES, Oct. 18, 2006, at C3; see also Kurt Eichenwald, *Ex-Chief of Enron Pleads Not Guilty to 11 Felony Counts*, N.Y. TIMES, July 9, 2004, at C1.

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

85. See *id.* at 2912.

86. *Id.*

87. *Id.* at 2925.

88. See *id.* at 2935.

89. *Id.* at 2927 (quoting 18 U.S.C. § 1346 (2006)).

vagueness shoal.”<sup>90</sup> Thus, the Court vacated the Fifth Circuit’s decision in part, determining that “[b]ecause Skilling’s alleged misconduct entailed no bribe or kickback, it d[id] not fall within §1346’s proscription.”<sup>91</sup>

As noted above, Skilling advanced two arguments in appealing his conviction before the Fifth Circuit and the Supreme Court. As this Article concerns the honest-services statute, it focuses on the second of these two arguments, which relates to the constitutionality of the honest-services statute and to the propriety of the application of this statute to Skilling’s conduct.

In addressing Skilling’s contentions, the Supreme Court first traced the origins of the honest-services doctrine from its inception until the Court’s decision in *McNally*.<sup>92</sup> The Court then examined whether the honest-services statute was unconstitutionally vague, as Skilling alleged.<sup>93</sup> To satisfy the requirements of due process, a statute like the honest-services provision must “define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”<sup>94</sup> The Court stated that, according to its precedent, the honest-services statute should be narrowly construed, rather than invalidated.<sup>95</sup> It then went on to limit the statute’s application by holding that it could apply only to conduct most frequently involved in pre-*McNally* cases: “fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived.”<sup>96</sup>

In reaching this conclusion, the Court first observed that Congress undoubtedly intended § 1346 to protect the right to honest services as it was understood before “*McNally* derailed the intangible-rights theory of fraud”<sup>97</sup> because Congress enacted this statute soon

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90. *Id.* at 2907.

91. *Id.*

92. *See id.* at 2926-27.

93. *See id.* at 2927-31.

94. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see also* Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 356 (2005) (describing the void-for-vagueness doctrine).

95. *Skilling*, 130 S. Ct. at 2928; *see also U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 571 (1973) (“As we see it, our task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations.”); *United States v. Nat’l Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963) (noting “[t]he strong presumptive validity that attaches to an Act of Congress”).

96. *Skilling*, 130 S. Ct. at 2928.

97. *Id.*

after *McNally* was decided and used *McNally*'s terminology to do so.<sup>98</sup> It further noted that the “‘vast majority’ of [pre-*McNally*] honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes.”<sup>99</sup> Thus, the Court concluded that “Congress’ reversal of *McNally* and reinstatement of the honest-services doctrine . . . c[ould] and should be salvaged by confining its scope to the core pre-*McNally* applications.”<sup>100</sup> These “core” applications, according to the Court, were limited to bribe and kickback schemes.<sup>101</sup>

The Court rejected the government’s argument that § 1346 should be extended to another category of conduct: “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.”<sup>102</sup> Although some circuit courts had upheld convictions for certain conflict-of-interest non-disclosure schemes before *McNally* was decided, the Court stated that these cases were infrequent and their outcomes were inconsistent.<sup>103</sup> Thus, the Court concluded that “a reasonable limiting construction of § 1346 must exclude this amorphous category of cases.”<sup>104</sup> Just like the *McNally* Court, the *Skilling* Court called on Congress to “speak more clearly” if it desired the honest-services statute “to go further.”<sup>105</sup>

In light of its newly narrow construction, § 1346, in the Court’s opinion, was not unconstitutionally vague, as the Court’s limitation of the statute to bribes and kickbacks would provide fair notice<sup>106</sup> and would avoid the danger of arbitrary prosecutions.<sup>107</sup>

98. *See id.*; *see also United States v. Rybicki*, 354 F.3d 124, 137-38 (2d Cir. 2003) (en banc) (“The definite article ‘the’ suggests that ‘intangible right of honest services’ had a specific meaning to Congress when it enacted the statute—Congress was recriminalizing mail- and wire-fraud schemes to deprive others of *that* ‘intangible right of honest services,’ which had been protected before *McNally*, not *all* intangible rights of honest services whatever they might be thought to be.”).

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

100. *Id.* at 2931.

101. *Id.* at 2932.

102. *Id.* (quoting Brief of Appellee-Respondent, *supra* note 6, at 43-44).

103. *Id.*

104. *Id.*

105. *Id.* at 2933 (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987)).

106. *See id.* at 2933 (“[I]t has always been ‘as plain as a pikestaff’ that bribes and kickbacks constitute honest-services fraud . . . .” (quoting *Williams v. United States*, 341 U.S. 97, 101 (1951))); *see also United States v. Lanier*, 520 U.S. 259, 266 (1997) (“[C]larity at the requisite level may be supplied by judicial gloss on an

Pursuant to its understanding of the honest-services statute and of the government's case against Jeffrey Skilling, the *Skilling* majority determined that "Skilling did not commit honest-services fraud."<sup>108</sup> The government's failing was that it did not allege that Skilling had "solicited or accepted side payments from a third party in exchange for making . . . misrepresentations" regarding Enron's fiscal health—actions which caused the artificial inflation of Enron's stock price.<sup>109</sup> Suggesting that its decision did not necessarily require the reversal of Skilling's conviction under harmless-error analysis, the Court remanded the case to the district court.<sup>110</sup>

Justice Antonin Scalia, along with Justice Clarence Thomas, agreed with the majority's decision to reverse Skilling's conviction for honest-services fraud, but not with its reasoning.<sup>111</sup> Scalia attacked the majority's transformation of the "prohibition of 'honest-services fraud' into a prohibition of 'bribery and kickbacks.'"<sup>112</sup> According to Scalia, the majority's analysis was impermissible, as it was effectively defining a new federal crime without having the power to do so.<sup>113</sup> Instead, Scalia argued that Skilling's conviction should be reversed because the honest-services statute, specifically the phrase "a scheme or artifice to deprive another of the intangible right of honest services," was vague and therefore violated the Due Process Clause of the Fifth

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otherwise uncertain statute."); *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973) ("[E]ven if the outermost boundaries of [a statute] may be imprecise, any such uncertainty has little relevance . . . where appellants' conduct falls squarely within the 'hard core' of the statute's proscriptions.").

107. In this respect, the Court pointed out that § 1346's

[P]rohibition on bribes and kickbacks draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing—and defining—similar crimes. See, e.g., [sic] 18 U.S.C. §§ 201(b), 666(a)(2) (2006); 41 U.S.C. § 52(2) (2006) ("The term 'kickback' means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to [enumerated persons] for the purpose of improperly obtaining or rewarding favorable treatment in connection with [enumerated circumstances].").

*Skilling*, 130 S. Ct. at 2933-34.

108. *Id.* at 2934.

109. *Id.*

110. *See id.*

111. *Id.* at 2935 (Scalia, J., concurring).

112. *Id.* (Scalia, J., concurring).

113. *Id.* (Scalia, J., concurring). The power to define federal crimes and to determine appropriate punishment rests solely with Congress. See *United States v. Evans*, 333 U.S. 483, 486 (1948); *United States v. Smith*, 686 F.2d 234, 239 (5th Cir. 1982).

Amendment.<sup>114</sup> He contended that the pre-*McNally* honest-services cases were just as vague and unclear regarding what constituted a denial of the right of honest services as the post-*McNally* honest-services cases.<sup>115</sup> Moreover, Scalia indicated that adherence to the pre-*McNally* doctrine would not, in his estimation, address the vagueness of the honest-services statute:

It would solve (perhaps) the indeterminacy of what acts constitute a breach of the “honest services” obligation under the pre-*McNally* law. But it would not solve the most fundamental indeterminacy: the character of the “fiduciary capacity” to which the bribery and kickback restriction applies. Does it apply only to public officials? Or in addition to private individuals who contract with the public? Or to everyone, including the corporate officer here? The pre-*McNally* case law does not provide an answer. Thus, even with the bribery and kickback limitation the statute does not answer the question “What is the criterion of guilt?”<sup>116</sup>

Justice Samuel A. Alito concurred with the majority’s decision, writing separately only to address Skilling’s argument regarding his jury trial right.<sup>117</sup> Justices Sonia M. Sotomayor, John Paul Stevens, and Stephen G. Breyer, on the other hand, concurred in part and dissented in part, arguing that they would “grant Skilling relief on his fair-trial claim.”<sup>118</sup>

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114. *Skilling*, 130 S. Ct. at 2935 (Scalia, J., concurring) (quoting 18 U.S.C. § 1346 (2006)).

115. *Id.* (Scalia, J., concurring) (“At the time § 1346 was enacted there was no settled criterion for choosing among these options, for conclusively settling what was in and what was out.”).

116. *Id.* at 2938-39 (Scalia, J., concurring); *see also* Ellen S. Podgor, *Corporate and White Collar Crime: Simplifying the Ambiguous*, 31 AM. CRIM. L. REV. 391, 399-400 (1994) (“In passing [§ 1346], Congress intended to reinstate mail fraud to its pre-*McNally* status. The vagueness of this new provision, coupled with the fluctuating legal history surrounding it, creates a legal quagmire.”). Scalia goes on to state that “[i]t is entirely clear (as the Court and I agree) that Congress meant to reinstate the body of pre-*McNally* honest-services law; and entirely clear that that prohibited much more (though precisely what more is uncertain) than bribery and kickbacks.” *Skilling*, 130 S. Ct. at 2939 (Scalia, J., concurring). But he notes that it does not follow, “as the Court now holds, that ‘§ 1346 criminalizes *only*’ bribery and kickbacks.” *Id.* (Scalia, J., concurring) (quoting *id.* at 2931 (majority opinion)).

117. *Id.* at 2941-42 (Alito, J., concurring).

118. *Id.* at 2942 (Sotomayor, J., concurring in part and dissenting in part).

III. PURSUING CRIMINAL CONDUCT AFTER *SKILLING*

Following the Supreme Court's decision in *Skilling*, the government has been limited in its pursuit of financial crimes,<sup>119</sup> whereas previously it had "aggressively used the honest services law to bring fraud charges against an array of defendants, like local politicians accused of graft and corporate executives charged with looting their companies."<sup>120</sup> Additionally, many honest-services-fraud convictions have been reviewed or are in the process of being overturned after *Skilling*,<sup>121</sup> and the government has even stopped pursuing some prosecutions due to a lack of evidence supporting the Court's more stringent interpretation of the honest-services-fraud statute.<sup>122</sup>

The government does have several potential means through which it can punish honest-services fraud after *Skilling*. First, it can utilize the honest-services statute in its current form, which is limited in application to bribes and kickbacks.<sup>123</sup> In its opinion, the *Skilling* Court defined bribery by referencing pre-*McNally* case law and the Second Circuit's opinion in *United States v. Ganim*,<sup>124</sup> which held that a bribe is "a corrupt payment that a public official accepted or agreed to accept with the intent to be influenced in the performance of his or her public duties"<sup>125</sup> and that bribery "requires a quid pro quo."<sup>126</sup> It also utilized

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119. See Peter Lattman, *Fraud Ruling Is Reshaping Federal Cases*, N.Y. TIMES, Aug. 26, 2010, at B1 ("[T]he Supreme Court decision [in *Skilling*] has thrown a large wrench into the system, and the Justice Department finds itself with the prospect of reversals and abandoned cases." (quoting Daniel C. Richman, a professor at Columbia Law School)).

120. *Id.*

121. See *Conrad Black Is Given Bail in Fraud Case*, N.Y. TIMES, July 20, 2010, at B8 (explaining that Black, a former newspaper magnate who was convicted with other executives "from the media empire Hollinger International . . . of swindling shareholders out of \$6.1 million," was released on bail after the Court's decision in *Skilling* "weakened the 'honest services' law that was central to Mr. Black's fraud conviction. The justices left it up to a lower court to decide whether the conviction should be overturned"); Michael Rothfeld, *Fraud Cases Get Rehashed After Court Ruling*, WALL ST. J., Sept. 25, 2010, at A6 ("A New Jersey judge tossed out the conviction of Joseph Ferriero, the former Bergen County Democratic chairman; prosecutors haven't said whether they would seek a new indictment in the case.").

122. See Lattman, *supra* note 119 (noting that the government decided to stop pursuing "a seven-year-old corporate-fraud prosecution against two former top executives at Westar Energy, [Kansas's] largest electric utility," because "the law no longer supported [the government's] position" (quoting Barry R. Grissom, the U.S. Attorney for Kansas)).

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

124. *Id.* at 2933-34 (citing 510 F.3d 134 (2d Cir. 2007)).

125. *Ganim*, 510 F.3d at 149.

126. *Id.* at 148-49 ("[T]he government need not show that the defendant intended for his payments to be tied to specific official acts (or omissions). . . .

as an example the federal bribery statute, 18 U.S.C. § 201.<sup>127</sup> The Court indicated that “kickbacks” were defined by reference to pre-*McNally* case law and several federal statutes.<sup>128</sup> Before *McNally*, a bribery or kickback case typically involved “a defendant who ha[d] or [sought] some sort of business relationship or transaction with the victim secretly pa[id] the victim’s employee (or cause[d] such a payment to be made) in exchange for favored treatment.”<sup>129</sup>

Applying the narrowed honest-services statute may be difficult, however, as the *Skilling* Court’s approach has left several important questions unanswered.<sup>130</sup> First, it is unclear whether state law can be used to determine what constitutes bribery or a kickback, as the Court declared that its construction of § 1346 “establish[ed] a uniform national standard.”<sup>131</sup> Causing additional confusion, although the Court noted that the lower courts disagree regarding whether “§ 1346

[B]ribery can be accomplished through an ongoing course of conduct, so long as evidence shows that the ‘favors and gifts flowing to a public official [are] *in exchange for a pattern of official actions favorable to the donor.*’”) (quoting *United States v. Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998) (citations omitted)).

127. See *Skilling*, 130 S. Ct. at 2933. Although *Skilling* does generally reference 18 U.S.C. § 201, it lists § 201(b) specifically as an example of a statute that proscribes and defines bribery. See *id.* at 2933-34.

128. See, e.g., 18 U.S.C. §§ 201(b), 666(a)(2) (2006); 41 U.S.C. § 52(2) (2006) (“The term ‘kickback’ means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to [enumerated persons] for the purpose of improperly obtaining or rewarding favorable treatment in connection with [enumerated circumstances].”).

129. *United States v. Rybicki*, 354 F.3d 124, 139 (2d Cir. 2003); see also *United States v. Conner*, 752 F.2d 566, 569-72 (11th Cir. 1985) (upholding the mail- and wire-fraud convictions of employees of two corporations and their co-conspirators, who secretly engaged in a variety of schemes in which they took secret kickbacks from real-estate brokers doing business with their employers or secretly acquired interests in land their employers sought to acquire), *cert. denied sub nom. Taylor v. United States*, 474 U.S. 821 (1985); *United States v. Hasenstab*, 575 F.2d 1035, 1036-38 (2d Cir. 1978) (describing the mail and wire-fraud conviction of a buyer for an airline who received kickbacks from a supplier of business forms and computer paper in return for the buyer routing orders to the supplier and giving the supplier advance information regarding its competitors’ bids on contracts offered by the employer), *cert. denied*, 439 U.S. 827 (1978); *United States v. Bryza*, 522 F.2d 414, 422 (7th Cir. 1975) (“The fraud consisted in [the defendant’s] holding himself out to be a loyal employee, acting in [the employer’s] best interests, but actually not giving his honest and faithful services, to [the employer’s] real detriment.”), *cert. denied*, 426 U.S. 912 (1976).

130. See *Open Questions Post Skilling Related to the Honest Services Issue*, WHITE COLLAR CRIME PROF BLOG (June 29, 2010), [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/2010/06/post-skilling-questions.html](http://lawprofessors.typepad.com/whitecollarcrime_blog/2010/06/post-skilling-questions.html) (enumerating, albeit not addressing, many of these questions).

131. *Skilling*, 130 S. Ct. at 2933 (quoting Brief of Albert W. Alschuler as Amicus Curiae in Support of Neither Party at 28, *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010) (No. 08-1196)).

prosecutions must be based on a violation of state law . . . and whether the defendant must act in pursuit of private gain,”<sup>132</sup> it did not indicate whether this is still a relevant question (which the lower courts should continue to ask).

Second, although the Court stated that the lower courts should refer to pre-*McNally* case law to determine the meaning of “bribe” and “kickback,”<sup>133</sup> it did not instruct them how to resolve conflicts and inconsistencies found in pre-*McNally* opinions. Third, the Court’s references regarding the federal bribery statute were ambiguous—it specifically mentioned § 201(b)<sup>134</sup> and not § 201(c)<sup>135</sup>—thereby

132. *Id.* at 2928 n.36 (citations omitted).

133. *Id.* at 2931.

134. This provision states that whoever

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any [such person] . . . to give anything of value to any other person or entity, with intent—

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

(3) directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom; or

(4) directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for being influenced in testimony under oath or

suggesting that the definition of bribery, as it pertains to honest services, may not extend to illegal gratuities.<sup>136</sup> Fourth, the Court stated

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affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom;

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

18 U.S.C. § 201(b) (2006).

135. *Skilling*, 130 S. Ct. at 2933; This provision states that whoever

(1) otherwise than as provided by law for the proper discharge of official duty—

(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person;

(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom; or

(3) directly or indirectly, demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon any such trial, hearing, or other proceeding, or for or because of such person's absence therefrom;

shall be fined under this title or imprisoned for not more than two years, or both.

18 U.S.C. § 201(c).

136. *See United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404-05 (1999) (stating that § 201(b) defines bribery and § 201(c) defines an illegal gratuity).

The distinguishing feature of each crime is its intent element. Bribery requires intent 'to influence' an official act or 'to be influenced' in an official act, while illegal gratuity requires only that the gratuity be given or accepted 'for or because of' an official act. . . . [F]or bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.

in a footnote that the honest-services statute, in its current form, would not overlap with other statutes proscribing “state and local corruption,” but did not explain which statutes it was referring to.<sup>137</sup> Fifth and finally, the Court posited that its definition of honest-services fraud would only reach “serious[] culpable conduct”<sup>138</sup> without defining the term “serious” or explaining whether “minor” frauds could be prosecuted under the honest-services statute.

In light of all of the questions left open regarding the narrowed honest-services statute and the statute’s inherent limitations, the government may attempt to address honest-services fraud that does not clearly involve bribes or kickbacks by using the mail- and wire-fraud statutes. To prosecute a defendant for either mail or wire fraud, the government must prove that the defendant: (1) intentionally participated in a scheme or artifice to defraud, and (2) used the mails or wire to execute the scheme.<sup>139</sup> Unlike the mail-fraud statute, which requires only the use of the mails (whether intrastate or interstate), the wire-fraud statute requires that *interstate* “wire, radio, or television communication” be used to “further the scheme or artifice to defraud.”<sup>140</sup> These statutes, however, will likely not reach conduct such as undisclosed self-dealing that does not involve bribes or kickbacks. Prosecutors would need to use a deprivation of money or property as a “hook” before a breach of fiduciary duty or undisclosed self-dealing-

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*Id.*; Peter J. Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 ARIZ. J. INT’L & COMP. L. 793, 831 (2001) (“Section 201(c), is part of the bribery statute, but it expands the scope of the anti-corruption law. . . . [B]y prohibiting the offer and receipt of an item related to the performance of a public duty even though the official act is not conditioned on the payment. Unlike a bribe, which can only be given before an official act . . . a gratuity can be either before or after the official act because the crime is providing the reward regardless of when the act occurred. One cannot bribe an official for a decision already reached, but one can certainly reward an official for previous conduct.” (footnotes omitted)).

137. *See Skilling*, 130 S. Ct. at 2934 n.45 (“Overlap with other federal statutes does not render § 1346 superfluous. The principal federal bribery statute, § 201, 831 (2001), generally applies only to federal public officials, so § 1346’s application to state and local corruption and to private-sector fraud reaches misconduct that might otherwise go unpunished.”).

138. *Id.* at 2933 (quoting Brief of Albert W. Alschuler as Amicus Curiae in Support of Neither Party, *supra* note 131, at 28-29).

139. *See* 18 U.S.C. §§ 1341, 1343 (2006); *Neder v. United States*, 527 U.S. 1, 20, 25 (1999) (setting out the elements of mail fraud); *United States v. Suba*, 132 F.3d 662, 675 (11th Cir. 1998) (outlining the elements of mail and wire fraud); Miriam H. Baer, *Linkage and the Deterrence of Corporate Fraud*, 94 VA. L. REV. 1295, 1322 n.99 (2008).

140. *See* §§ 1341, 1343 (2006); *see also* Baer, *supra* note 139, at 1322.

type conduct could be addressed on any level. Alternatively, they could try to shoehorn this conduct into the “bribe” or “kickback” paradigm.

Additionally, the government could attempt to rely on statutes like 18 U.S.C. § 666 and the Hobbs Act in confronting conduct potentially left uncovered by the *Skilling* Court’s narrowing of the honest-services statute. Section 666 proscribes bribery of state, local, and tribal officials of entities that receive at least \$10,000 in federal funds.<sup>141</sup> The Hobbs Act imposes federal criminal penalties on anyone who “obstructs, delays, or affects commerce . . . by robbery or extortion.”<sup>142</sup> Some commentators have argued that such statutes, which are part of an “intricate web of overlapping federal provisions governing federal, state, and local corruption,” fill any void created by the limitations imposed on the honest-services statute.<sup>143</sup> These existing statutes, however, would likely not address the type of conduct left uncovered by the narrowing of the honest-services statute, such as conduct not involving money or property (essentially breaches of fiduciary duty or undisclosed self-dealing).<sup>144</sup>

In an attempt to remedy these issues, Senator Patrick J. Leahy recently introduced a bill entitled the Honest Services Restoration Act (“Act”).<sup>145</sup> The broad goal of the Act is “[t]o expand the definition of scheme or artifice to defraud with respect to mail and wire fraud.”<sup>146</sup> Practically, the Act would amend chapter 63 of title 18, United States

141. See § 666 (2006); *Sabri v. United States*, 541 U.S. 600, 602 (2004).

142. § 1951(a) (2006); see also *Evans v. United States*, 504 U.S. 255, 258-59 (1992) (endorsing the view that the Hobbs Act reaches official bribery, even where the official passively accepts a contribution and the contribution is not accompanied by any demand or threat); Beale, *supra* note 29, at 708 (“[A]s long as a bribe paid to a state or local official is sufficient minimally to deplete the assets of the payor and reduce its ability to purchase goods and services in interstate commerce, it is subject to federal jurisdiction under the Hobbs Act.”).

143. 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, 62 (2010), <http://www.vanderbiltlawreview.org/2010/03/the-honest-services-surplus-why-theres-no-need-or-place-for-a-federal-law-prohibiting-criminal-esque-conduct-in-the-nature-of-bribes-and-kickbacks/>. For example, O’Toole points out that federal prosecutors who initially sought to charge former Illinois Governor Rod Blagojevich with honest-services fraud were able to file a superseding indictment charging Blagojevich with violations of the Hobbs Act and § 666 “after it became clear that the [honest-services] statute [could] be struck down by the Supreme Court.” *Id.*

144. See *Restoring Key Tools to Combat Fraud and Corruption After the Supreme Court’s Skilling Decision: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 4 (2010) (statement of Professor Samuel Buell, Duke University School of Law) (arguing that the securities, mail, and wire-fraud statutes do not reach “serious, novel forms of intangible harm” such as self-dealing).

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

146. *Id.*

Code, by inserting a new section (1346A) following § 1346. Section 1346A states that the term “scheme or artifice to defraud” also includes “(1) a scheme or artifice by a public official to engage in undisclosed self-dealing;” and “(2) a scheme or artifice by officers and directors to engage in undisclosed private self-dealing.”<sup>147</sup>

For purposes of the Act, “undisclosed self-dealing” is defined as a public official<sup>148</sup> performing an official act<sup>149</sup> for the purpose of benefitting or furthering a financial interest of any of the following:

- (I) the public official;
- (II) the public official’s spouse or minor child;
- (III) a general 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) a person, business, or organization from whom the public official has received a thing of value or a series of things of value, otherwise than as provided by law for the proper discharge of official duty, or by rule or regulation . . .<sup>150</sup>

In addition to performing an official act in the manner described above, pursuant to the Act the public official must also knowingly falsify, conceal, cover up, or fail to disclose “material information that is

147. *Id.* § 2(a).

148. Under the Act, a public official is defined as an “officer, employee, or elected or appointed representative, or person acting for or on behalf of the United States, a State, or subdivision of a State, or any department, agency, or branch thereof, in any official function, under or by authority of any such department agency or branch of Government.” *Id.*

149. Pursuant to the Act, the term “official act”:

- (i) includes any act within the range of [the public official’s] official duty, and any decision, recommendation, or action on any question, matter, cause, suit, proceeding, or controversy, which may . . . 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;
- (ii) can be a single act, more than one act, or a course of conduct; and
- (iii) includes a decision or recommendation that the Government should not take action . . . .

*Id.*

150. *Id.*

required to be disclosed” regarding the financial interest in question “by any Federal, State, or local statute, rule, regulation, or charter applicable to the public official.”<sup>151</sup>

Under the Act, “undisclosed private self-dealing” is defined as an officer or director performing an official act which causes or intends “to cause harm to the officer’s or director’s employer, and which is undertaken in whole or in part to benefit or further by an actual or intended value of \$5,000 or more a financial interest of”<sup>152</sup> any of the following:

- (I) the officer or director;
- (II) the officer or director’s spouse or minor child;
- (III) a general partner of the officer or director;
- (IV) another business or organization in which the public official is serving as an employee, officer, director, trustee, or general partner; or
- (V) an individual, business, or organization with whom the officer or director is negotiating for, or has any arrangement concerning, prospective employment or financial compensation.<sup>153</sup>

For undisclosed private self-dealing to have occurred, in addition to performing the requisite act, the officer or director must also knowingly falsify, conceal, cover up, or fail to disclose “material information” that is required to be disclosed regarding the above described financial interests “by any Federal, State, or local statute, rule, regulation, or charter applicable to the officer or director.”<sup>154</sup>

As is true of any proposed piece of legislation, it remains to be seen whether the Act will be signed into law.<sup>155</sup> While the Act does

151. *Id.*

152. Under the Act, an official “act” is defined as “a single act, more than one act, or a course of conduct,” which includes “a decision or recommendation to take, or not to take action,” and “publicly traded corporations, and private charities under section 501(c)(3) of the Internal Revenue Code of 1986” are included in the definition of “employer.” *Id.* § 2(a).

153. *Id.*

154. *Id.*

155. During a hearing on the bill, Assistant U.S. Attorney General Lanny A. Breuer told the Senate Judiciary Committee that “a public official who conceals his financial interests and then takes official action to advance those interests engages in behavior every bit as corrupt as if he accepts a clear bribe from a third party” and urged “Congress to act quickly to restore our ability to prosecute individuals for this kind of undisclosed self-dealing.” Ashley Southall, *Justice Department Seeks a Broader Fraud Law to Cover Self-Dealing*, N.Y. TIMES, Sept. 29, 2010, at B3. By contrast, Senator Jeff Sessions of Alabama, the ranking Republican on the panel, “argued for [the] legislation to be specific.” *Id.*

address conduct that was left uncovered by the narrowing of the honest-services statute and that is unlikely to be reached by existing statutes, it is also not without its problems.

First, the Act's liability predicate is the falsification of, or failure to disclose, material information that is otherwise required to be disclosed "by any Federal, State, or local statute, rule, regulation, or charter."<sup>156</sup> Thus, the Act does not appear to promote a uniform standard for determining what constitutes honest-services fraud.<sup>157</sup> Second, the Act fails to define "officers and directors," although it defines the term "public official."<sup>158</sup> Third, the Act does not make clear what level of intent it requires. Although it states that the falsification, concealment, cover up, or failure to disclose material information must be done "knowingly," the Act does not define this term,<sup>159</sup> and the meaning of "knowingly" can vary based on the federal statute in which this term is used.<sup>160</sup> For example, Congress has indicated that the state of mind necessary for the imposition of liability for securities fraud is actual knowledge,<sup>161</sup> while some courts have suggested that pleading motive and opportunity to commit securities fraud, either alone or with an accompanying showing of recklessness, is enough.<sup>162</sup>

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156. S. 3854, § 2(a).

157. See *Litigation Law Alert: Congress and DOJ Move to Restore Breadth of Honest Services Fraud Statute*, STOEL RIVES LLP (Oct. 4, 2010), <http://www.stoel.com/showalert.aspx?Show=7088>.

158. See *id.*

159. See *id.* (internal quotations omitted).

160. See Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 656 (2006) ("[T]erms most frequently used in federal legislation—"knowing" and "willful"—have, according to judges, different meanings in different contexts; judges adjust the definitions according to what *they* believe is the correct level of *mens rea* given the conduct at issue and are able to do so because of congressional inaction.").

161. See 15 U.S.C. §§ 78u-4(b), 78u-5(c) (2006); *Glazer Capital Mgmt., LP v. Magistri*, 549 F.3d 736, 743 (9th Cir. 2008) ("[P]laintiffs proceeding under the PSLRA can no longer aver intent in general terms of mere 'motive and opportunity' or 'recklessness,' but rather, must state specific facts indicating no less than a degree of recklessness that strongly suggests actual intent." (quoting *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 979 (9th Cir. 1999))); see also Aron Hansen, Comment, *The Aftermath of Silicon Graphics: Pleading Scienter in Securities Fraud Litigation*, 34 U.C. DAVIS L. REV. 769, 779-80 (2001).

162. See, e.g., *Robert N. Clemens Trust v. Morgan Stanley DW, Inc.*, 485 F.3d 840, 848 (6th Cir. 2007) ("[P]laintiffs may plead scienter . . . by alleging facts giving rise to a strong inference of recklessness, but not by alleging facts merely establishing that a defendant had the motive and opportunity to commit securities fraud.") (quoting *In re Comshare, Inc. Sec. Litig.*, 183 F.3d 542, 549 (6th Cir. 2000); *Rombach v. Chang*, 355 F.3d 164, 176 (2d Cir. 2004) (holding that to state a claim for securities fraud, "a complaint may (1) allege facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness, or (2) allege facts to show that

#### IV. RECOMMENDATIONS FOR A NEW HONEST-SERVICES-FRAUD STATUTE

The Sections that follow describe the cases to which the proposed new honest-services-fraud statute would pertain, provide recommendations for reform of the honest-services statute, and apply these recommendations to a recently proposed honest-services statute.

##### *A. Cases Left Uncovered by the Current Honest-Services Statute*

Several cases are emblematic of the need to enact a new honest-services statute in the wake of *Skilling*. The first such case is that of Kevin A. Ring, who was indicted in 2008 “for acts relating to his work with lobbyist Jack Abramoff.”<sup>163</sup> Ring worked as a lobbyist under the direction of Abramoff from 1999 through 2004. During this time, Ring and Abramoff “lobbied government officials, their staff, and other federal employees on behalf of their clients, which included Native American tribal governments that operated, or were interested in operating, gambling casinos.”<sup>164</sup>

Ring was charged with six counts of honest-services fraud for “devising a scheme to defraud ‘the United [States] and its citizens of their right to the honest services’ of certain legislative and executive branch officials, ‘performed free from deceit, fraud, concealment, bias, conflict of interest, self-enrichment, and self-dealing.’”<sup>165</sup> Essentially, these charges were based on the allegation that Ring treated federal officials to expensive meals and tickets to various events in return for favors for clients of Abramoff’s lobbying team.<sup>166</sup> Following Ring’s trial, the jury deadlocked because some of the jurors felt that Ring’s conduct reflected traditional lobbying methods as opposed to honest-services fraud, and the district court declared a mistrial.<sup>167</sup> *Skilling* was decided prior to the start of Ring’s second trial. The district court declined to dismiss the honest-services charges that Ring was facing,

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defendants had both motive and opportunity to commit fraud” (quoting *Rothman v. Gregor*, 220 F.3d 81, 90 (2d Cir. 2000)); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1285 (11th Cir. 1999) (siding with the Sixth Circuit and rejecting “the notion that allegations of motive and opportunity to commit fraud, standing alone, are sufficient to establish scienter in this Circuit” (citing *In re Comshare Sec. Litig.*, 183 F.3d 542 (6th Cir. 1999))); Hansen, *supra* note 161, at 779.

163. *United States v. Ring*, 628 F. Supp. 2d 195, 202 (D.D.C. 2009).

164. *Id.*

165. *Id.* at 204 (quoting the indictment).

166. *See id.* at 202.

167. *See* Nedra Picker, *Kevin Ring, Abramoff Associate, on Trial Again*, THE HUFFINGTON POST (Oct. 17, 2010), [http://www.huffingtonpost.com/2010/10/17/kevin-ring-retrial-jack-abramoff\\_n\\_765883.html](http://www.huffingtonpost.com/2010/10/17/kevin-ring-retrial-jack-abramoff_n_765883.html).

but said that the case was “‘filled with challenges’ and [would] be difficult for the jury.”<sup>168</sup>

The second case involves Jim Clark, the former chief of staff of Alaska Governor Frank Murkowski and a well-known attorney in Juneau.<sup>169</sup> Clark pleaded guilty to a charge of honest-services fraud (he was never charged with bribery).<sup>170</sup> The charge was based on Clark’s participation in a scheme through which VECO Corporation “would pay approximately \$68,550 in expenses related to [Governor Murkowski’s] re-election campaign.”<sup>171</sup> Bill Allen, VECO’s chief

168. See *id.* (quoting the U.S. District Judge for the District of Columbia).

169. Pat Forgey, *Feds to Drop Charges Against Clark*, JUNEAU EMPIRE, Oct. 10, 2010, at A1.

170. See *id.*

171. *Id.* A related case, *Weyhrauch v. United States*, 548 F.3d 1237 (9th Cir. 2008), was one of three honest-services cases (in addition to *Skilling* and *Black v. United States*) that the Supreme Court decided during the 2009-10 term. Defendant Bruce Weyhrauch, who, like Clark, was also a lawyer, “was a member of the Alaska House of Representatives in 2006 while Alaska’s legislature was considering legislation that would alter how the state taxed oil production.” *Id.* at 1239. Two of VECO’s executives contacted Weyhrauch regarding the pending legislation. *Id.* According to the indictment, Weyhrauch solicited future legal work from “VECO in exchange for voting on the oil tax legislation as VECO instructed and taking other actions favorable to VECO in Weyhrauch’s capacity as state legislator.” *Id.*

The case before the Supreme Court turned on whether the government could introduce at Weyhrauch’s trial certain evidence related to the honest-services charge:

- (1) legislative ethics publications containing excerpts of various Alaska state statutes addressing conflicts of interest and disclosure requirements;
- (2) evidence that members of the Alaska State Legislature customarily acknowledge the existence of conflicts of interests on the floor of the Legislature, and that Weyhrauch never disclosed he was negotiating for employment with VECO;
- (3) a description of the ethics training Weyhrauch had received; and
- (4) evidence that Weyhrauch served on the Legislature’s Select Committee on Ethics.

*Id.* at 1239-40.

Adopting the approach used by the Fifth Circuit in *United States v. Brumley*, 116 F.3d 728 (5th Cir. 1997) (en banc), the district court had concluded that “‘any duty to disclose sufficient to support the mail and wire fraud charges here must be a duty imposed by state law,’” and therefore it rejected the government’s argument that the evidence should be admitted because “‘proof that a legislator knowingly concealed a conflict of interest [could] be used to support an honest services fraud conviction even if state law d[id] not require disclosure of the conflict of interest.” *Weyhrauch*, 548 F.3d at 1240.

The Supreme Court “limited [its inquiry] to the following question: Whether, to convict a state official for depriving the public of its right to the defendant’s honest services through the non-disclosure of material information, in violation of the mail-fraud statute . . . the government must prove that the defendant violated a disclosure duty imposed by state law.” *Weyhrauch v. United States*, 129 S. Ct. 2863 (2009) (mem.). After *Skilling* was decided, the Court issued a per curiam opinion vacating the judgment in *Weyhrauch* and remanding the case to the Ninth Circuit for further

executive officer, had “sought support among state officials for lower oil taxes and a natural gas pipeline deal supported by Alaska’s oil and natural gas leaseholders” and the expense-related payments came after Governor Murkowski “had successfully pushed through an industry-favored oil tax bill, and was attempting to get a natural gas deal.”<sup>172</sup> After the Supreme Court decided *Skilling*, Clark argued that his case should be dismissed.<sup>173</sup> Ultimately, the U.S. Attorney for Alaska acknowledged that the charge to which Clark had pled guilty fell “outside of the Supreme Court’s new, narrowly tailored construction of [the honest-services-fraud] law.”<sup>174</sup>

The third and final case concerns Joseph A. Ferriero, who had been the chairman of the Democratic Party in Bergen County, New Jersey from 1998 through 2009.<sup>175</sup> Ferriero was charged with seven counts of mail fraud and one count of conspiracy to commit honest-services fraud.<sup>176</sup> He was acquitted on five of the mail-fraud charges and convicted of “conspiracy to defraud Bergenfield of the honest services of Dennis Oury,” who had served as chief counsel of the Bergen County Democratic Organization and was the Bergenfield borough attorney in 2002, “by use of the U.S. mails and [of] two other mail fraud counts.”<sup>177</sup> In 2001, Ferriero, Oury, and another individual founded a company called Governmental Grants Consulting (GGC), which marketed grant-writing services to towns in which Ferriero and Oury had connections.<sup>178</sup> Neither GGC nor Ferriero nor Oury disclosed their existing ownership interests in the company.<sup>179</sup> The same night that Oury was appointed borough attorney, GGC was hired to provide services to Bergenfield.<sup>180</sup> For its services in “securing more than \$1 million in public funds to preserve an historic estate,” GGC ultimately

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consideration in light of that opinion. *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010) (per curiam). The Ninth Circuit, in turn, affirmed the district court’s denial of the government’s motion. *United States v. Weyhrauch*, 623 F.3d 707, 708 (9th Cir. 2010). It reasoned that because non-disclosure of a conflict of interest was no longer actionable under § 1346 following *Skilling*, the government was not permitted to offer evidence demonstrating “a knowing concealment of a conflict of interest.” *Id.*

172. Forgy, *supra* note 169.

173. *Id.*

174. *Id.* (quoting Kevin R. Feldis, Assistant U.S. Attorney for Alaska).

175. Peter J. Sampson, *Former Dem Chief’s Conviction Thrown Out*, NORTHJERSEY.COM (July 29, 2010, 7:04 PM), [http://www.northjersey.com/news/072910\\_Judge\\_dismisses\\_charges\\_against\\_Ferriero.html](http://www.northjersey.com/news/072910_Judge_dismisses_charges_against_Ferriero.html).

176. Peter J. Sampson & Michael Gartland, *Ferriero and Oury Surrender to FBI*, RECORD (Bergen County, N.J.), Sept. 11, 2008, at A01.

177. Sampson, *supra* note 175.

178. *Id.*

179. *Id.*

180. *Id.*

received approximately \$134,000.<sup>181</sup> Oury pled guilty before Ferriero's trial, "and testified that he neither disclosed his interest in [GGC] to the Borough Council nor disqualified himself from matters involving [GGC]."<sup>182</sup>

All of these cases illustrate the types of conduct left uncovered following the narrowing of the honest-services statute, namely using gifts or services to curry favor in a manner that could arguably resemble lobbying and failing to disclose financial interests in certain entities while funneling business to those entities by virtue of particular position or status.

### *B. Recommendations for Reform*

One question arising from the above-mentioned cases is whether the described conduct should be criminalized. Some scholars do argue that "[t]he actor's conduct in honest services fraud, and in some forms of intangible property fraud, often is not clearly criminal."<sup>183</sup> With honest-services fraud, a breach of fiduciary duty would constitute the bad act.<sup>184</sup> Additionally, the requirement of deceit or misrepresentation would be "satisfied by nondisclosure of dishonest or corrupt actions."<sup>185</sup> Finally, because the loss at issue is "intangible," there would be no need to determine whether the honest-services fraud resulted in any actual economic loss.<sup>186</sup>

Strengthening the requirements of honest-services fraud will likely go a long way to legitimize the criminalization of the conduct that is the subject of the cases in the above Section, while bringing some clarity and predictability to this area of the law. The following aspects of the honest-services statute should be clarified: (1) the relationship forming the basis of fiduciary duty, (2) the level of intent required to commit honest-services fraud, and (3) whether actual economic harm is necessary to make out a claim of honest-services fraud.

First, it is currently unclear what relationships would give rise to a fiduciary duty for purposes of the honest-services statute. One scholar has suggested that such a relationship exists, and therefore non-disclosure constitutes wrongful deception, where:

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181. *Id.*

182. *Id.*

183. *E.g.*, Moohr, *supra* note 58, at 43.

184. *Id.*

185. Beale, *supra* note 29, at 711.

186. *Id.*

(1) the deceived party had an expectation of receiving the relevant information; and (2) the law should deem that expectation (a) reasonable, because most of us would have had the same expectation, and (b) worthy of remedy, because it will be useful to encourage disclosure in this setting or the failure to have provided it is blameworthy for imposing or risking undue harm.<sup>187</sup>

On the other hand, the Honest Services Restoration Act mentions only two relationships giving rise to fiduciary duties—those of the public official and the public,<sup>188</sup> and the officer or director and the officer or director’s employer.<sup>189</sup>

At the very least, if the new honest-services statute only recognizes the relationships mentioned in the Act—on the grounds that the more flexible approach described above is too subjective—it should provide definitions for the terms “officer” and “director.” An officer, for purposes of the statute, should be defined as “a corporate employee performing important executive duties of such character that [s]he would be likely, in discharging these duties, to obtain confidential information about the company’s affairs that would aid h[er] if [s]he engaged in personal market transactions.”<sup>190</sup> Although an individual’s title—president, vice president, secretary, treasurer or principal financial officer, and comptroller or principal accounting officer—is helpful in determining whether she is an officer, an employee’s actual duties and responsibilities determine whether she is an officer.<sup>191</sup> Under the statute, a director should be defined as “a person appointed or elected to sit on a board that manages the affairs of a corporation or other organization by electing and exercising control over its officers.”<sup>192</sup>

Second, a revised honest-services statute must contain a clear statement regarding the level of intent required to commit honest-services fraud. The statute should, consistent with the mail-, wire-, and securities-fraud statutes, require a specific intent to defraud.<sup>193</sup> In other

187. Samuel W. Buell, *The Court’s Fraud Dud*, 6 DUKE J. CONST. L. & PUB. POL’Y 31, 39 (2010).

188. See *supra* notes 148-151 and accompanying text.

189. See *supra* notes 152-154 and accompanying text.

190. *Colby v. Klune*, 178 F.2d 872, 873 (2d Cir. 1949).

191. *C.R.A. Realty Corp. v. Crotty*, 878 F.2d 562, 566 (2d Cir. 1989).

192. BLACK’S LAW DICTIONARY 492 (8th ed. 2004).

193. See *United States v. Young*, 470 U.S. 1, 32 (1985) (“[M]ail fraud and the making of false statements are specific-intent crimes . . . .”); see also Jeffrey A. Meyer, *Authentically Innocent: Juries and Federal Regulatory Crimes*, 59 HASTINGS L.J. 137, 138 (2007) (“General intent crimes differ from specific intent crimes for

words, under the new honest-services statute, the government would be required to prove that a defendant acted with the specific intent to defraud—that she “knowingly and willfully participated in the scheme or artifice to defraud, with knowledge of its fraudulent nature and with specific intent to defraud.”<sup>194</sup>

Finally, proof of actual economic harm should be a necessary prerequisite to bringing a case under the new honest-services statute. An economic harm requirement has been proposed numerous times and in various forms. For example, Senator Biden, when introducing a *McNally*-prompted proposed honest-services statute that dealt solely with the private sector, stated:

[T]he codification of the intangible rights doctrine . . . is not intended to criminalize mere breaches of fiduciary duty, or private confidence, or violations o[f] ordinary rules of the workplace. Indeed . . . the codification of pre-*McNally* law in the bill is specifically limited to situations where the defendant is acting to obtain a thing of value, or to harm the organization. This provision will foreclose the abuse of the statute to prosecute trivial, noncriminal matters.<sup>195</sup>

Several scholars have also suggested that proof of actual harm should be a necessity when demonstrating the existence of honest-services fraud. For example, Geraldine Szott Moohr has argued that “[c]onduct that is intended to achieve harm or gain involves a more culpable state of mind than conduct that does not and is a useful benchmark of the actor’s blameworthiness.”<sup>196</sup> Honest-services fraud is an inchoate offense that requires evidence of dangerousness or

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which Congress requires proof of a defendant’s intent to do something wrong or otherwise to violate the law (e.g., conspiracy, wire fraud, mail fraud, or money laundering).”).

194. 2 LEONARD B. SAND, ET AL., MODERN FEDERAL JURY INSTRUCTIONS—CRIMINAL ¶ 44.01, at 44-4 (Dec. 2009); see also *United States v. Briscoe*, 65 F.3d 576, 583 (7th Cir. 1995) (“To prove mail fraud under section 1341, the government must show: (1) a scheme to defraud; (2) committed with intent to defraud; and (3) use of the mails to further the fraudulent scheme.” (citations omitted)); *United States v. Hannigan*, 27 F.3d 890, 892 n.1 (3d Cir. 1994) (“The specific intent element may be found from a material misstatement of fact made with reckless disregard for the truth.”); *United States v. Cassiere*, 4 F.3d 1006, 1011 (1st Cir. 1993) (“To prove wire fraud the government must show: 1) a scheme to defraud by means of false pretenses, 2) the defendant’s knowing and willful participation in the scheme with the intent to defraud, and 3) the use of interstate wire communications in furtherance of the scheme.”).

195. 134 CONG. REC. 31,073 (1988) (italics added) (citations omitted).

196. Moohr, *supra* note 58, at 44.

blameworthiness in lieu of proof of harm.<sup>197</sup> However, “[a] failure to disclose one’s breach of civil duty,” which would be required by the new honest-services statute, “is a weak manifestation of either dangerousness or blameworthiness.”<sup>198</sup> On the other hand, “[e]vidence of the defendant’s purpose—the intended result of the conduct—more clearly demonstrates both dangerousness and blameworthiness.”<sup>199</sup>

In addition to stressing truly criminal conduct over immoral conduct, the actual-harm requirement would also alleviate any concerns regarding notice. “Emphasizing a result beyond the conduct of dishonest services and focusing on the harm caused by the fraud strengthens notice to citizens that certain behavior is prohibited.”<sup>200</sup> An individual who satisfies the other requirements of the new honest-services statutes and causes economic harm to another can hardly argue that she has not committed a criminal act.

The need for an actual-harm requirement is best demonstrated by the case of Conrad Black, the former chief executive officer of Hollinger International, an American company that owned a number of domestic and foreign newspapers through its subsidiaries.<sup>201</sup> Hollinger was controlled by Ravelston, a now-defunct Canadian company, “which in turn was controlled by Black, who owned 65 percent of its shares.”<sup>202</sup> Hollinger paid large management fees to Ravelston as a means of funneling income received by Hollinger into Ravelston.<sup>203</sup> Hollinger’s general counsel, one of the defendants in the case, also prepared a non-compete agreement on behalf of American Publishing Company (APC), one of Hollinger’s subsidiaries, that would pay out a total of \$5.5 million to Black and three other Hollinger executives “in exchange for their promising not to compete with APC for three years after they stopped working for Hollinger.”<sup>204</sup> At the time, APC only owned one weekly community newspaper that operated in a small town called Mammoth Lake.<sup>205</sup> As the Seventh Circuit noted, “[t]hat Black

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197. *Id.*

198. *Id.*

199. *Id.*; see also Buell, *supra* note 187, at 46 (suggesting that the Supreme Court, in deciding *Skilling*, “could have said that no actionable fraud exists unless the person to whom that duty is owed is not only deceived but suffers some harm” and could have “described actionable harm as taking the form of direct loss, being placed at a risk of loss that a person has a right to be free of, or being deprived of the ability to exit a relationship in circumstances in which exit likely would have been chosen”).

200. Moohr, *supra* note 58, at 45-46.

201. See *United States v. Black*, 530 F.3d 596, 599 (7th Cir. 2008). Black also owned some stock in Hollinger, but not nearly as much as he did in Ravelston. *Id.*

202. *Id.*

203. See *id.*

204. *Id.*

205. See *id.*

and the others would start a newspaper in Mammoth Lake to compete with APC's tiny newspaper was ridiculous."<sup>206</sup>

Black and the other defendants argued that the \$5.5 million constituted management fees that Hollinger owed Ravelston and that Hollinger's general counsel "had characterized the fees as compensation for granting covenants not to compete in the hope that Canada might not treat the fees as taxable income."<sup>207</sup> As the Seventh Circuit pointed out, however, although Hollinger was a sophisticated entity, no documents were located that indicated "that the \$5.5 million in payments was ever approved by the corporation or credited to the management-fees account on its books."<sup>208</sup> The payments were also made directly to Black and the other defendants, casting doubt on the argument that these payments "were a means of discharging a debt owed [to Ravelston] by Hollinger."<sup>209</sup> Moreover, the defendants did not disclose the payments "in the 10-K reports that they were required to file annually with the Securities and Exchange Commission," and falsely represented the purpose of the payments to Hollinger's shareholders.<sup>210</sup>

At trial, the jury was instructed that it could convict Black and the other defendants if the government proved that they had executed a scheme to deprive Hollinger and its shareholders "of their intangible right to the honest services of the corporate officers, directors or controlling shareholders of Hollinger," as long as the government also demonstrated that the objective of the scheme was "private gain."<sup>211</sup> The defendants had argued that although they did seek a private gain, this gain was at the expense of the Canadian government and not at the expense of those to whom they owed their honest services.<sup>212</sup> As a result, the defendants objected to the jury instruction and contended that they did not commit honest-services fraud.

The Seventh Circuit rejected this argument, stating that proof of economic harm or contemplated economic harm was not required.<sup>213</sup> It concluded by stating that even if its analysis of honest-services fraud

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206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 600 (internal quotations omitted); see also *Conrad Black's Revenge*, WALL ST. J., June 25, 2010, at A16 ("A Chicago jury had dismissed nine of the 13 counts against Mr. Black, inviting the question of whether the honest services statute could be applied even if the jury did not find that the defendants 'reasonably contemplated economic harm.'").

212. See *Black*, 530 F.3d at 600.

213. See *id.*

was wrong, the defendants' convictions should be upheld because there was "no doubt that the defendants received money from APC and very little doubt that they deprived Hollinger of their honest services."<sup>214</sup> Following *Skilling*, Black and the other defendants appealed the Seventh Circuit's decision to the Supreme Court, which granted certiorari. The Court concluded that in light of *Skilling*, the honest-services jury instruction given in *Black* was incorrect, but left unresolved the "question whether the error was ultimately harmless."<sup>215</sup>

On remand, the Seventh Circuit found that Black and the other defendants were entitled to a new trial on two fraud counts related to the \$5.5 million in payments from APC to the defendants.<sup>216</sup> The court explained that the question left open after *Skilling* was "whether a reasonable jury might have convicted the defendants of depriving the company of their honest services for private gain but not have convicted them of pecuniary fraud."<sup>217</sup> It pointed out that the defendants did not deny that they sought a private gain, but instead argued that the gain would be "at the expense of the Canadian government, not at the expense of Hollinger."<sup>218</sup> The evidence regarding whether Hollinger owed the defendants \$5.5 million in management fees was inconclusive; it was enough to convict the defendants under the pre-*Skilling* honest-services statute, but not under the post-*Skilling* honest-services statute.<sup>219</sup> Ultimately, the court recommended that the government should, in an effort to conserve its resources, dismiss the fraud counts at issue and proceed directly to resentencing, rather than retrying the defendants.<sup>220</sup> At resentencing, the trial judge would be able to consider evidence presented at trial regarding these counts.<sup>221</sup>

*Black* demonstrates that if the actual-harm requirement had been part of the honest-services statute, Black's conviction on the two

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214. *Id.* at 602.

215. *Black v. United States*, 130 S. Ct. 2963, 2970 (2010).

216. *See United States v. Black*, 625 F.3d 386, 393-94 (7th Cir. 2010); *see also* Andrew Clark, *Conrad Black Fails in Attempt to Clear His Name*, *GUARDIAN* (London), Oct. 30, 2010, at 47 ("The disgraced media mogul Conrad Black saw his hopes of legal vindication dashed yesterday after a US appeal court expunged only two of his four criminal convictions, raising an outside chance that the former Telegraph owner could be forced to return to jail.").

217. *Black*, 625 F.3d at 392.

218. *Id.*

219. *See id.* ("There was plenty of evidence that Hollinger did not owe [Black and the other defendants] \$5.5 million in management fees, but the evidence was not conclusive, while all that the jury had to find in order to convict them of honest-services fraud was their failure to level with the board and the audit committee, which was irrefutable.").

220. *See id.* at 394.

221. *Id.*

honest-services fraud counts likely would have been upheld. At this point, it is unlikely that the government will attempt to retry Black on these counts in light of the Seventh Circuit's suggestions and the murky state of the honest-services law.

*C. Considerations in Drafting a New Proposed Honest-Services Statute*

The new proposed honest-services statute should be designed to address the Supreme Court's concerns regarding the criminalization of undisclosed private and public self-dealing as they were articulated in *Skilling*. In *Skilling*, the government argued that the Court should proscribe "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."<sup>222</sup> Although the Court did not accept this argument, it provided some guidelines to Congress in the event that it decided to criminalize the conduct at issue.

At the outset, the Court noted that Congress "would have to employ standards of sufficient definiteness and specificity to overcome due process concerns."<sup>223</sup> It evaluated the government's proposed formulation of the honest-services-fraud statute under this standard and suggested that this formulation was lacking because it left many questions unanswered, including: (1) "How direct or significant does the conflicting financial interest have to be?"; (2) "To what extent does the official action have to further that interest in order to amount to fraud?"; and (3) "To whom should the disclosure be made and what information should it convey?"<sup>224</sup> Finally, the Court called on Congress to use "particular care in attempting to formulate an adequate criminal prohibition in this context."<sup>225</sup>

Practically, the new statute would amend chapter 63 of title 18, United States Code, as it will immediately follow § 1346. Its goal would be to define the term "scheme or artifice to defraud" in the honest-services context. Further, the statute should differentiate between public and private honest-services fraud. With respect to the term "self-dealing," as the Second Circuit pointed out in *Rybicki*, a pre-*Skilling* honest-services wire-fraud case, the mere presence of a

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222. *Skilling v. United States*, 130 S. Ct. 2896, 2932 (2010) (quoting Brief for Appellee-Respondent, *supra* note 6, at 43-44).

223. *Id.* at 2933 n.44.

224. *Id.*

225. *Id.*

conflict of interest does not constitute self-dealing.<sup>226</sup> Thus, the statute should clarify that “the defendant’s behavior must . . . cause, or at least be capable of causing, some detriment—perhaps some economic or pecuniary detriment—to the employer.”<sup>227</sup>

In the case of public honest-services fraud, a scheme or artifice to defraud would be defined as a scheme or artifice by a public official to engage in undisclosed self-dealing. The term “public official” can retain the same definition that is used in the Honest Services Restoration Act.<sup>228</sup>

First, the fact that the “official act”<sup>229</sup> performed by the public official must benefit or further the financial interest of (1) the public official; (2) the public official’s spouse or minor child; (3) a general partner of the public official; (4) a business organization in which the public official is serving as an employee, officer, director, trustee, or general partner; (5) an individual, business, or organization with whom the public official is negotiating for, or has any arrangement concerning, prospective employment or financial compensation; or (6) a person, business, or organization from whom the public official has received a thing of value or a series of things of value, otherwise than as provided by law, would satisfy the Court’s requirement of showing that the conflicting financial interest is direct and significant.<sup>230</sup>

Second, beyond indicating what constitutes the relevant financial interest, the statute should include an explanation concerning the extent to which the official act must further that financial interest to constitute fraud. The best way to make such a showing is to include a requirement in the statute that the financial interest must be pursued to the actual financial or economic detriment of the public. For example, if individuals like Ferriero and Oury provide a service to the public through a company they founded without disclosing their interest in the company,<sup>231</sup> the actual economic harm to the public would be the

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226. *United States v. Rybicki*, 354 F.3d 124, 141 (2d Cir. 2003); *see also United States v. Lemire*, 720 F.2d 1327, 1336 (D.C. Cir. 1983) (“An employee’s undisclosed conflict of interest does not by itself necessarily pose the threat of economic harm to the employer.”); *United States v. Ballard*, 663 F.2d 534, 540 (5th Cir. Unit B Dec. 1981) (“[A] breach of fiduciary duty can constitute an illegal fraud under § 1341 only when there is some detriment to the employer.”); *Epstein v. United States*, 174 F.2d 754, 765 (6th Cir. 1949) (“[T]he receipt of such returns by a director without disclosure of interest to the board of directors does not constitute the perpetration of an active, intentional fraud upon his corporation where there is good faith, fair dealing, and benefit to the corporation of which he is a director.”).

227. *Rybicki*, 354 F.3d at 141.

228. *See supra* note 148.

229. *See supra* note 149.

230. *See supra* notes 149-150.

231. *See supra* notes 175-182 and accompanying text.

difference in cost between hiring an unbiased company or the company in which the public official has an undisclosed financial interest. Of course, the actual economic harm must not be *de minimis*.<sup>232</sup> Although it is difficult to determine what amount would satisfy this requirement because of the nature of the criminal act at issue, a minimum damage amount of as high as \$75,000<sup>233</sup> could be appropriate.

Third, the statute should explain to whom the public official should disclose the financial interest and what information this disclosure should convey. The Honest Services Restoration Act requires that the public official disclose material information that is required to be disclosed regarding the relevant financial interest “by any Federal, State, or local statute, rule, regulation, or charter applicable to the officer or director.”<sup>234</sup> This requirement would satisfy the Supreme Court’s directive. However, the new honest-services statute should clarify the meaning of the term “knowingly,” as it relates to the disclosure requirement. In particular, the statute should require a specific intent to defraud, meaning that the public official “knowingly and willfully participated in the scheme or artifice to defraud, with knowledge of its fraudulent nature and with specific intent to defraud.”<sup>235</sup>

With respect to private honest-services fraud, the Act defines “undisclosed private self-dealing” as an officer or director performing an act that causes or is intended to cause harm to the officer or director’s employer and which is undertaken in whole or in part to benefit or further by an actual or intended value of \$5,000 or more a financial interest of (1) the officer or director; (2) the officer or director’s spouse or minor child; (3) a general partner of the officer or director; (4) another business or organization in which the public

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232. See *Rybicki*, 287 F.3d at 266 (adopting a standard under § 1346 wherein it must be “reasonably foreseeable that the scheme could cause some economic or pecuniary harm to the victim that is more than *de minimis*”); cf. *United States v. Vinyard*, 266 F.3d 320, 329 (4th Cir. 2001) (holding that an “employee need only intend to breach his fiduciary duty and reasonably foresee that the breach would create ‘an identifiable economic risk’ for the employer,” regardless of whether actual harm resulted (quoting *United States v. Frost*, 125 F.3d 346, 369 (6th Cir. 1997))).

233. This is the required amount in controversy in cases filed in federal court on diversity of citizenship grounds, and the presence of such an amount would therefore indicate that the case has some federal significance. See 28 U.S.C. § 1332(a) (2006); see also Layne E. Kruse & Rebecca H. Benavides, *Subject Matter Jurisdiction in Federal Court in International Cases*, in *INTERNATIONAL LITIGATION: DEFENDING AND SUING FOREIGN PARTIES IN U.S. FEDERAL COURTS* 133, 157 (David J. Levy ed., 2003) (“Section 1332 provides that district courts shall have original jurisdiction of all civil actions when the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different states.”).

234. See *supra* note 154 and accompanying text.

235. See *supra* notes 193-194 and accompanying text.

official is serving as an employee, officer, director, trustee, or general partner; or (5) an individual, business, or organization with whom the officer or director is negotiating for, or has any arrangement concerning, prospective employment or financial compensation.<sup>236</sup> This definition, like that for self-dealing in the public honest-services-fraud context, may satisfy the Court's requirement that the government show that the conflicting financial interest at issue is direct and significant. However, as discussed above, it should include the meaning of the terms "officer" and "director."<sup>237</sup>

Like the section of the new statute dealing with public honest-services fraud, the section dealing with private honest-services fraud should also include a requirement that the officer or director pursue the financial interest to the actual financial or economic detriment of the officer or director's employer.<sup>238</sup> Although the Act requires that the act taken by the officer or director should cause, or intend to cause, harm to the officer or director's employer, it does not indicate how such harm should be quantified. The Act does require that the act taken by the officer or director should further the officer or director's financial interest by a value of \$5,000 or more. This amount is close to de minimus, however. Both the benefit to the officer or director and the harm to the employer should be more significant, perhaps close to the amount recommended with respect to public honest-services fraud.<sup>239</sup>

According to the Act, self-dealing in connection with private honest-services fraud also incorporates a requirement that the officer or director knowingly falsify, conceal, cover up, or knowingly fail to disclose material information that is required to be disclosed regarding the financial interest in question "by any Federal, State, or local statute, rule, regulation, or charter applicable to the officer or director."<sup>240</sup> The disclosure-related requirement explains, per the Supreme Court's request, to whom the officer or director should disclose the financial interest and what information this disclosure should convey. However, as with public honest-services fraud, the section of the new statute dealing with private honest-services fraud should make clear that a specific intent to defraud is required.<sup>241</sup>

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236. See *supra* notes 152-153 and accompanying text.

237. See *supra* notes 190-192 and accompanying text.

238. See *supra* notes 231-233 and accompanying text.

239. See *supra* note 233 and accompanying text.

240. See *supra* note 154 and accompanying text.

241. See *supra* notes 193-94 and accompanying text.

## CONCLUSION

The Supreme Court's recent decision in *Skilling* greatly narrowed the scope of the honest-services statute, which criminalizes schemes or artifices designed to deprive another of the intangible right of honest services, by limiting the statute's application to schemes to defraud involving bribes or kickbacks. Significantly, the Court rejected the notion that the statute applies to undisclosed self-dealing by a public official or private employee—such as the taking of official action by the employee that furthers her own undisclosed financial interests while purporting to act in the interests of those to whom she owes a fiduciary duty. At the same time, the *Skilling* Court told Congress to “speak more clearly” if it desired the honest-services statute “to go further” than the Court's construction of the statute. Anticipating Congress' response, this Article strives to provide an outline of what the new honest-services statute, which Congress would enact to replace the current, eviscerated statute, should look like.