Honest Services and Dishonest Prosecutions

William D Corriher, Georgia State University
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William Corriher

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Introduction

The United States is in the midst of a severe economic downturn, with many parts of the country struggling with double-digit unemployment. The crisis began in 2007, when the number of American homeowners defaulting on their mortgages skyrocketed. Many of the largest financial institutions in the United States invested heavily in securities backed by the value of these mortgages. As homeowners defaulted, the value of these mortgage-backed securities collapsed, taking many of the banks down with them. The financial markets froze, and the U.S. economy went into a tailspin. With the economy rapidly deteriorating, Congress and the Bush administration rushed to shore up large financial institutions that were at risk of going under. In a rare show of bipartisanship, Congress voted to give the administration $700 billion to help the ailing financial industry.

For many Americans, the government’s “bailouts” added insult to economic injury. The bailouts created a perception among some citizens that the federal government is in cahoots with big business, and this perception has fueled populist anger against politicians and corporate executives. A March 2010 poll found that 75 percent of Americans are “angry” about “the current policies of the federal government.” The dire economy has inspired a populist sentiment that has frustrated both political parties.
Some politicians are exploiting or encouraging populist rage against corporate America.\textsuperscript{10} The public has demanded limits on executive pay, and Congress has responded.\textsuperscript{11} Just as author John Steinbeck perceived during the Great Depression, America’s current economic plight may be sowing the seeds of the Grapes of Wrath,\textsuperscript{12} but outrage against corporate profligacy is nothing new.

Stories of corporate extravagance have grabbed headlines for the past decade, often accompanied by stories of corporate corruption.\textsuperscript{13} Managers and CEOs of large companies have been accused of a range of crimes, and a number of them are serving jail sentences.\textsuperscript{14} The abundance of such stories suggests that America has experienced an epidemic of corporate corruption.

**Background**

The current “epidemic” of corruption emerged at the beginning of the twenty-first century. At the time, the American public was exhibiting a deep mistrust of institutions,
due to a variety of causes. The country’s attention turned to corporate corruption in the fall of 2001, after Jeffrey Skilling resigned from his position as Chief Executive Officer (CEO) of Enron Corporation. A few months later, the renowned corporation “crashed into sudden bankruptcy.” President Bush appointed a team of investigators to examine the company’s downfall, and the inquiry resulted in criminal charges against Skilling and other Enron executives. A seemingly endless stream of corporate scandals came to light. The former CEO of Tyco, Dennis Kozlowski, was convicted of fraud and grand larceny for arranging corporate “loans” to Tyco executives. Former Worldcom CEO Bernard Ebbers was convicted of fraud, conspiracy, and filing false documents with federal regulators after he used accounting gimmicks to hide his company’s losses.

Just as the wave of corporate scandals seemed to subside, tales of corruption in state and local governments emerged throughout the United States. In North Carolina, Commissioner of Agriculture Meg Scott Phipps was found guilty of perjury, conspiracy, extortion, and other crimes. In 2006, a Wisconsin procurement officer was convicted of fraud for awarding a contract to a travel agency whose director contributed money to Governor Jim Doyle. Former Alabama Governor Don Siegelman and Healthsouth CEO Richard Scrushy were convicted in a corruption case involving the exchange of campaign contributions for political favors.

The public’s outrage at institutional corruption was manifested in the enactment of anti-corruption laws. Some state legislatures have tightened ethics rules for legislators, but others have fallen short. In 2002, Congress passed the Sarbanes-Oxley Act, which established stricter standards for corporate governance. The executive branch also responded to pressure to root out corruption. In 2007, the National Journal quoted Bush Administration officials stating that “cases involving corrupt government officials are

16 United States v. Skilling, 554 F.3d 529, 534 (5th Cir. 2009).
17 Id.
19 United States v. Ebbers, 458 F.3d 110, 112 (2d. Cir. 2006).
21 See United States v. Thompson, 484 F.3d 877 (7th Cir. 2007).
22 See U.S. v. Siegelman, 561 F.3d 1215 (11th Cir. 2009).
now the bureau's top criminal priority.”

The officials noted that, between 2001 and 2007, the number of FBI agents focused on public corruption increased by more than 40 percent.

In recent years, federal prosecutors have turned to 18 U.S.C. § 1346 to crack down on private and public corruption. Section 1346 is part of the statutory scheme establishing the elements of wire fraud and mail fraud. Section 1346 defines one type of fraud as “a scheme or artifice to deprive another of the intangible right of honest services.” Bush administration officials described the use of § 1346 as “a key strategy” in its escalation of public corruption prosecutions. The statute has been in place since 1988, but this form of fraud predates the statute.

Before § 1346 was enacted, courts had interpreted the term “defraud” in other provisions of the federal fraud statutes to include schemes which sought to deprive others of intangible rights like honest services. In traditional fraud cases, the victim is deprived of money or property by the defendant. The victims of honest services fraud are not deprived of tangible rights, and the defendant’s gain often comes at the expense of a third party. The Supreme Court considered this broad reading of the federal fraud statute in the case of public officials convicted for “a self-dealing patronage scheme [that] defrauded the citizens and government of Kentucky of certain ‘intangible rights,’ such as the right to have the Commonwealth’s affairs conducted honestly.” The Governor of Kentucky was accused of retaining a particular state vendor in exchange for “commissions” paid by the vendor to certain companies specified by the Governor.

The McNally Court overturned some of the fraud convictions because the statute “does not refer to the intangible right of the citizenry to good government.” The Court noted that the legislative history suggests that the statute was concerned with deprivations of tangible things like money. As there was no evidence that the scheme resulted in

26 Id. The National Journal story focused on federal prosecutions of Republican members of Congress, but it noted that the vast majority – nearly three fourths – of political corruption prosecutions in 2005 and 2006 involved local officials and police. *Id.*
27 See Complaint at 75, United States v. Blagojevich, 08cr888 (S.D.N.Y. 2008) (charging a former Illinois governor with honest services fraud); Black v. United States, 530 F.3d 596 (7th Cir. 2008) (considering the appeal of a CEO charged with fraud for failing to disclose certain payments to executives).
30 Pub. L. 100-690, Title VII, § 7603(a), 102 Stat. 4508 (1988) (adding this provision to the scheme of federal fraud statutes).
31 See, e.g., United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979); United States v. Von Barta, 635 F.2d 999 (2d Cir. 1980).
32 See Shushan v. United States, 117 F.2d 110 (5th Cir. 1941); Skilling v. United States, slip op. at 35-36 (2010). Courts divided over whether the victim of honest services fraud must suffer some detriment. Compare United States v. O’Malley, 535 F.2d 589, 592 (10th Cir. 1976) (rejecting the proposition that the victim of honest services fraud must suffer some loss), with United States v. Ballard, 663 F.2d 534, 541-42 (5th Cir. 1981) (“a breach of fiduciary duty can constitute an illegal fraud under § 1341 only when there is some detriment to the employer.”).
34 *Id.* at 352-53.
35 *Id.* at 356-58.
fiscal loss, the Court held that the alleged conduct fell outside the prohibitions of the statute.\(^\text{36}\) The Court said that if Congress wished to criminalize the deprivation of intangible rights, it should do so in more explicit language.\(^\text{37}\)

A year after \textit{McNally}, Congress took the Court’s advice and criminalized the fraudulent deprivation of the intangible right of honest services.\(^\text{38}\) Courts have said that, in passing 18 U.S.C. § 1346, Congress intended to restore “the honest-services doctrine developed in the years leading up to \textit{McNally}.”\(^\text{39}\) After recent corruption scandals, prosecutors turned to § 1346 to hold public and private officials accountable.\(^\text{40}\) Some of those defendants challenged the government’s use of the “honest services” statute, and many have argued that the statute is unconstitutionally vague.\(^\text{41}\) Some Judges agree.\(^\text{42}\) In response to these challenges, the Supreme Court recently limited the scope of conduct prohibited by the statute.

The public is clamoring for the government to crack down on corruption among public and private officials. Although the honest services statute has been a useful tool for prosecutors, our country’s experience with the statute shows that it can be counterproductive and has the potential for abuse. The next two sections of this paper will discuss some problematic prosecutions under the honest services statute. The introductory section concludes by discussing the new formulation of honest services fraud crafted by the \textit{Skilling} Court.\(^\text{43}\) The first part of the analysis section will then ask whether the \textit{Skilling} Court reached the right decision. The second part of the analysis section will discuss the policy implications of the statute and of the Court’s approach to the vagueness issue in \textit{Skilling}. The paper concludes by arguing that \textit{Skilling} did not alleviate all of the constitutional concerns surrounding § 1346, and it concludes the \textit{Skilling} Court’s approach to vagueness is bad policy.

\(^{36}\) \textit{Id.} at 360-61.

\(^{37}\) \textit{Id.} at 360.


\(^{41}\) Skilling argued that the law is unconstitutionally vague because the government’s interpretation of the statute could “convert almost any workplace lie into a Federal felony.” Transcript of Oral Argument at 28, \textit{United States} v. \textit{Skilling}, 130 S.Ct. 393 (2009). Another defendant argued that the law is unconstitutionally vague because it fails to give notice of what conduct is prohibited and because the law’s ambiguity confers discretion on prosecutors “to select the defendant.” Transcript of Oral Argument at 28, \textit{Black} v. \textit{United States} (2009) (No. 08-876). Another defendant’s argument centered on whether honest services fraud requires that the defendant violate a duty imposed by state law. Brief for Petitioner, \textit{Weyhrauch} v. \textit{U.S.}, No. 08-1196, slip op. (March 25, 2009).

\(^{42}\) \textit{See, e.g.,} \textit{Rybicki} v. \textit{United States}, 354 F.3d 124, 157 (2d Cir. 2003) (Jacobs, J., dissenting) (concluding that the statute is unconstitutionally vague on its face because it “imposes an insufficient constraint on prosecutors, gives insufficient guidance to judges, and affords insufficient notice to defendants”); \textit{Sorich} v. \textit{United States}, 129 S.Ct. 1308, 1311 (2009) (mem) (Scalia, J., dissenting) (“In light of the conflicts among the Circuits; the longstanding confusion over the scope of the statute; and the serious due process and federalism interests affected by the expansion of criminal liability that this case exemplifies, I would grant the petition for certiorari and squarely confront . . . the constitutionality of § 1346.”).

\(^{43}\) \textit{Skilling} v. \textit{United States}, No. 08-1394 (December 11, 2009).
Corporate Corruption

Before the McNally Court rejected the honest services fraud doctrine, U.S. Attorneys expanded the use of § 1346 to prosecute officers of private corporations. Since Congress resurrected honest services fraud in 1988, prosecutions of private officials have involved a range of misconduct. For example, the Second Circuit upheld the convictions of lawyers who paid kickbacks to insurance claims adjusters in exchange for “expediting” the settlement of their clients’ claims. Considering the defendants’ vagueness challenge, the Second Circuit explained that honest services prosecutions of private officials had fallen into two categories. In the “bribery or kickback cases,” the defendant is engaged in some transaction with the victim and secretly pays the victim’s employee in exchange for some benefit. “In the self-dealing cases, the defendant typically causes his or her employer to do business with a corporation or other enterprise in which the defendant has a secret interest, undisclosed to the employer.”

Several executives have been convicted for using accounting tricks and legal formalities to hide losses. After the rapid collapse of the Enron Corporation, a jury convicted former CEO Jeffrey Skilling of conspiracy, insider trading, five counts of making false statements, and twelve counts of securities fraud. The government charged that Skilling and other executives conspired to commit some type of fraud, but it was unclear which type of fraud formed the basis of the jury’s conviction. Skilling appealed his conviction to the Fifth Circuit Court of Appeals, arguing that his verdict must be set aside because the prosecutors’ theory of honest services fraud was invalid. The Fifth Circuit described the “applicable” elements of honest services fraud as: “(1) a material breach of a fiduciary duty imposed under state law, including duties defined by the employer-employee relationship (2) that results in a detriment to the employer.”

In a previous case involving “honest services” fraud, the Fifth Circuit had ruled that the defendants’ “intent to help” their employer was immaterial, but in a case

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44 See, e.g., United States v. McNeeve, 536 F.2d 1245, 1249 (8th Cir. 1976).
46 Id. at 139.
47 Id. at 140-41.
48 United States v. Skilling, 554 F.3d 529, 542 (5th Cir. 2009).
49 Id. The prosecutors’ theory allowed the jury to convict Skilling based on a conspiracy “to commit (1) securities fraud, (2) wire fraud to deprive Enron and its shareholders of money and property, and (3) wire fraud to deprive Enron and its shareholders of honest services owed by its employees.” The jury returned a “general verdict” which did not specify which theory of fraud the jury accepted. Id.
50 Id. at 542-43. The Fifth Circuit applied Supreme Court precedent holding that when a jury’s verdict could rest on multiple legal theories, the verdict must be set aside if one of the legal theories is “insufficient in law.” Id. at 543 (applying Yates v. United States, 354 U.S. 298, 312 (1957)).
51 Id. at 547. Although the Fifth Circuit did not discuss the different formulations of honest services fraud, the United States argued to the Supreme Court that Skilling’s conviction should be affirmed as a form of the “undisclosed self-dealing” category of honest services fraud. United States v. Skilling, No. 08-1394, slip op. at 49 (2010); Brief for the United States at 43-50, United States v. Skilling, No. 08-1394, (August 2009).
52 United States v. Gray, 96 F.3d 769, 774-75 (5th Cir. 1996). The Fifth Circuit upheld the convictions of several coaches of the Baylor University men’s basketball team charged with violating § 1346. Id. The coaches were convicted of conspiring to obtain credits and scholarships for players in violation of NCAA rules. Id. at 772. The coaches argued that they did not violate the statute because “their scheme was not intended to harm Baylor but rather to help Baylor by ensuring a successful basketball team.” Id. at 774.
related to *Skilling*, the court carved out an exception to this rule. In *Brown*, the court considered an appeal from four Merrill Lynch employees who were convicted of honest services fraud based on a deal between Merrill Lynch and Enron.\(^{53}\) The court held that the government’s theory of “honest services” fraud was flawed and overturned the convictions.\(^{54}\) The *Brown* court distinguished the previous case by noting that the defendant’s superiors at Enron had both sanctioned the scheme and shared the goal of a higher stock price with the defendants.\(^{55}\) In considering Skilling’s appeal, the Fifth Circuit summarized the *Brown* holding as:

> When an employer (1) creates a particular goal, (2) aligns the employees’ interests in achieving that goal, and (3) has higher-level management sanction improper conduct to reach the goal, then lower-level employees following their boss’s direction are not liable for honest services fraud.\(^{56}\)

The Fifth Circuit that Enron aligned its interests with Skilling’s interests when it made part of Skilling’s compensation dependent on the company’s stock price.\(^{57}\) The court found, however, that Skilling’s misconduct was not sanctioned by the Enron Board of Directors or any other higher authority.\(^{58}\) “Skilling never alleged that he engaged in his conduct at the explicit direction of anyone, and therefore he cannot avail himself of the exception from *Brown*.”\(^{59}\) Therefore, the Fifth Circuit held that the prosecutors’ theory of “honest services” fraud was valid in Skilling’s case, and his conviction was affirmed.\(^{60}\)

Other corporate corruption cases have centered on improper payments to corporate executives. For example, the Seventh Circuit recently affirmed the conviction of CEO Conrad Black of Hollinger International for honest services fraud.\(^{61}\) Black and other Hollinger executives were charged with fraud after arranging payments of large sums of money to themselves and failing to disclose the payments to shareholders and

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\(^{53}\) *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006). The charges in *Brown* stemmed from a transaction in which Enron “sold” some assets to Merrill Lynch. *Id.* at 513. The trial court found that Enron reported the transaction as a sale, when it should have booked it as a loan. *Id.* at 513-516. The transaction allowed Enron to claim the “revenue” from the “sale” as earnings, thus inflating the company’s financial position. *Id.*

\(^{54}\) *Id.* at 523.

\(^{55}\) *Id.* at 522. The court noted that Enron had linked executive compensation to corporate earnings targets. *Id.* “In other words, this case presents a situation in which the employer itself created among its employees an understanding of its interest that, however benighted that understanding, was thought to be furthered by a scheme involving a fiduciary breach.” *Id.* “Enron’s legitimate interests were not so clearly distinguishable from the corporate goals communicated to the Defendants (via their compensation incentives) that the Defendants should have recognized, based on the nature of our past case law, that the ‘employee services’ taken to achieve those corporate goals constituted a *criminal* breach of duty to Enron.” *Id.*

\(^{56}\) *United States v. Skilling*, 554 F.3d 529, 545 (5th Cir. 2009) (*emphasis in original*).

\(^{57}\) *Id.* at 546.

\(^{58}\) *Id.*

\(^{59}\) *Id.*

\(^{60}\) *Id.* at 547.

\(^{61}\) *Black v. United States*, 530 F.3d 596 (7th Cir. 2008).
regulators. The jury instructions stated that the defendants were guilty of honest services fraud if they “had deliberately failed to render honest services to Hollinger and had done so to obtain a private gain.” Judge Posner described the “private gain” element as “the essence of honest services fraud.” The defendants argued that this element was not satisfied because the “private gain” came from a third party, not from the corporation. Posner described the defendant’s position as “a no-harm, no-foul argument” and affirmed the convictions.

Appealing the Seventh Circuit’s decision, Black asked the Supreme Court to resolve a split among circuits over the “private gain” element. Black argued that “at least five courts of appeals would preclude conviction on an ‘honest services’ theory unless the defendant contemplated, or reasonably should have foreseen, some substantial risk of economic harm to the party who was owed the ‘honest services.’” Black noted that, in attempted to discern the meaning of § 1346, courts have sought limits on the application of the statute to private corruption because “private individuals, unlike public servants, ordinarily work for money, not out of a pristine desire to advance the public weal.” Opposing Black’s petition for certiorari, the government dismissed the overbreadth argument by noting that the reach of § 1346 is limited by the “materiality” element of fraud. The government’s brief construed the rule, utilized by some circuits, that requires harm or detriment to a defendant’s employer as one articulation of this materiality element.

While Black’s petition for certiorari only discussed the issue tangentially, Skilling’s appeal to the Supreme Court asserted that the honest services statute is unconstitutional for vagueness. Skilling quoted one court complaining that the statutory language provides “no clue to the public or the courts as to what conduct is prohibited under the statute.” Skilling argued that courts have issued conflicting and confusing interpretations of “honest services” fraud. In arguing that the statute is irreparably

62 Id. at 598-99. The defendants arranged for payments to corporate executives in exchange for contractually agreeing not to compete with a small newspaper that Hollinger had owned. Id. at 599. Because the newspaper was located in town of 7,000 residents, Judge Posner described the non-compete agreements as “ridiculous.” Id. at 600. The defendants said the “management fees” were disguised as payments for non-compete agreements to avoid having the payments categorized as income for tax purposes. Id. at 599. Thus, the “private gain” came at the expense of the government, not the corporation. Id.
63 Id. at 600.
64 Id.
65 Id. at 600-601.
67 Id. at 14-15. For example, Black’s petition for certiorari noted that, in cases involving “self-dealing” by employees, the Second Circuit requires “some detriment—perhaps some economic or pecuniary detriment—to the employer.” Id. at n.8 (quoting United States v. Rybicki, 354 F.3d 124, 141 (2003)).
68 Id. at 19.
69 Brief for the United States in Opposition at 12-14, Black v. United States, No. 08-876 (September 2009).
70 Id. at 13-14.
71 Id. at 17-19, Black v. United States (No. 08-876).
72 Brief for Petitioner at 38-48, Skilling v. United States, 561 U.S. ____., (No. 08-1394).
73 Id. at 38 (quoting United States v. Handakas, 286 F.3d 92, 104 (2d Cir. 2002)).
74 Id. at 39.
vague, Skilling noted that the government has been inconsistent in how it applies the statute to “public officials who act for political motives.”

**Political Prosecutions**

In the waning days of the President George W. Bush’s second term, evidence emerged suggesting that his administration asked many executive branch officials to make decisions based on political considerations. The administration’s effort to enlist the executive branch in political matters included the Department of Justice. Joseph D. Rich, chief of the voting section in the Department’s Civil Rights Division from 1999 to 2005, asserted that the Bush Department of Justice engaged in a “destructive pattern of partisan political actions,” including political prosecutions for voter fraud and other alleged infractions.

Questions about the politicization of the Department of Justice emerged after the Bush administration’s firing of nine U.S. Attorneys in 2006. It is now clear that the firings were part of a Bush administration effort to encourage federal prosecutors to use political considerations in deciding whether to pursue certain prosecutions. A Department official asked each of the nine U.S. Attorneys to resign on December 7, 2006. The official explained that the Bush administration “was looking to move in another direction and give somebody else a chance to serve.” One of the U.S. Attorneys, David Iglesias, publicly suggested that he was removed because Republican politicians complained to the White House that he was not prosecuting certain Democrats for voter fraud and corruption.

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76 Brief for Petitioner at 43, *Skilling v. United States*, 561 U.S. ____ (No. 08-1394).
81 *Id.*
Federal law prohibits political prosecutions, but modern U.S. Attorneys have considerable discretion in bringing prosecutions. Notwithstanding some modest statutory limits, the President exercises a great deal of control over the Attorney General and other government lawyers. Attorneys General have been closely associated with the Presidents they served, and “the mechanisms for encouraging or enforcing independence have been decidedly informal, interstitial, and indirect.” This lack of formal mechanisms for ensuring independence means that control over the Department of Justice is largely vested in the office of the President.

Two features of the executive branch – the vesting of prosecutorial discretion in the executive branch and the President’s obligation to faithfully execute the laws – mean that federal prosecutors play a special role in our constitutional system. Although U.S. Attorneys are subject to removal by the President, the Supreme Court has said that federal prosecutors have responsibilities beyond the White House:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is . . . that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

After President Bush’s removal of the federal prosecutors caused a national controversy, the Office of the Inspector General at the Department of Justice (OIG) investigated the firings for impermissible political motivations. Although Bush administration officials claimed that the U.S. Attorneys were fired because of performance

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83 The Hatch Act states that a federal employee cannot “use his official authority or influence for the purpose of interfering with or affecting the result of an election.” 5 U.S.C. § 7323(a)(1). Federal regulations prohibit government lawyers from participating in a criminal prosecution if the lawyer “has a personal or political relationship with . . . [a]ny person or organization which he knows has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution.” 28 C.F.R. § 45.2 (a)(2).
84 Department of Justice, U.S. Attorneys’ Manual 9-2.001 (updated May 2009), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/. “The statutory duty to prosecute for all offenses against the United States . . . carries with it the authority necessary to perform this duty. The USA is invested by statute and delegation from the Attorney General with the broadest discretion in the exercise of such authority.” Id.
85 The President needs the Senate’s consent to appoint U.S. Attorneys but can remove them at will. 28 U.S.C. §§ 541(a) and 541(c). Early statutes vested control over the Attorney General in the President. In drafting the Judiciary Act of 1789, Congress considered granting the Supreme Court the power to appoint the Attorney General, “an approach that would have reinforced substantially the Attorney General’s independent status as an officer of the court.” Norman Spaulding, Professional Independence in the Office of the Attorney General, 60 Stan. L. Rev. 1931, 1956 (2008) (citing Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 108-09 (1923)). The decision to vest appointment power in the President “suggests that Congress endorsed political accountability (to the President for appointment and removal, and to Congress for confirmation, salary, budget and oversight) as the primary method of ensuring faithful execution of the office.” Id.
problems, the OIG report confirmed that Iglesias was removed because of complaints from Republicans “about Iglesias’s handling of voter fraud and public corruption cases.”88 The Inspector General dismissed the Department’s proffered reasons for Iglesias’ firing as “after-the-fact rationalizations.”89 Because key witnesses refused to cooperate in its investigation, OIG could not conclusively determine whether federal law was violated.90 The OIG said the firings and the ensuing controversy “severely damaged the credibility of the Department and raised doubts about the integrity of Department prosecutive decisions.”91 Attorney General Alberto Gonzales resigned in the wake of criticism for the firings and doubts about whether he had offered misleading testimony to Congress.92

The controversy led many to conclude that the Bush administration used the nation’s law enforcement apparatus for political purposes.93 The U.S. Attorneys who remained in their jobs after the firings were described by Department officials as “loyal Bushies.”94 Several members of the House of Representatives’ Committee on the Judiciary found that “serious allegations were made that some U.S. Attorneys who were not terminated engaged in selective and improper targeting of Democrats for prosecution.”95

The politicization of federal prosecutions likely began before the nine U.S. Attorneys were fired.96 In a letter to Attorney General Alberto Gonzales on the subject, Rep. John Conyers mentioned the plight of Don Siegelman, former Democratic Governor of Alabama.97 Siegelman was convicted of bribery, conspiracy, obstruction of justice,

89 Id. at 187.
93 See David Weiss, Nothing Improper? Examining Constitutional Limits, Congressional Act, Partisan Motivation, and Pretextual Justification in the US Attorney Removals, 107 Mich. L. Rev. 317, 363 (2008) (“[T]he USAs were likely removed because they failed to follow not just political, but partisan, goals that the White House sought to implement through the DOJ.”).
94 Id. at 323 (quoting Email from Kyle Sampson, Deputy Chief of Staff & Counselor to the Att’y Gen., to David G. Leitch, Deputy White House Counsel (Jan. 9, 2005, 19:34 EST), available at http://online.wsj.com/public/resources/documents/WSJ_5DOJ20070313_p1.pdf).
96 Starting in 2001, the Bush administration sharply increased the resources devoted to public corruption prosecutions. Peter Stone, The Abramoff Wave, National Journal, August 11, 2007, available at http://www.nationaljournal.com/njmagazine/nj_20070811_7.php. Bush administration officials said the use of § 1346 was “a key strategy” in this effort to increase public corruption prosecutions. Id.
and several counts of honest services mail fraud in 2006. The convictions for bribery and honest services fraud were based on accusations that Siegelman and former HealthSouth CEO Richard Scrushy entered into an agreement to exchange a campaign contribution to Siegelman for the appointment of Scrushy to a state board.

The Eleventh Circuit Court of Appeals, in a per curiam opinion, reversed two of Siegelman’s convictions for honest services mail fraud, finding an “absolute lack of any evidence” to support the charges. In considering the two honest services convictions, the court noted that the indictment charged Siegelman with participating in a broad scheme that included Scrushy’s bribing of a fellow member of the Board to which he was appointed. The court asked whether the evidence showed that the agreement between Siegelman and Scrushy included the goal of Scrushy’s “self-dealing while on the Board.” The court could not find “any testimony” or other evidence to support this allegation. The Eleventh Circuit reversed the two honest services counts, affirmed the other convictions, vacated Siegelman’s sentence, and remanded the case for resentencing.

Conyers’ letter to Gonzales said that some questioned the integrity of the Siegelman prosecution because of several irregularities. Siegelman’s conviction was...
recently vacated by the Court and remanded to the Eleventh Circuit. Seventy-five former state Attorneys General signed a letter asking Attorney General Eric Holder to investigate the Siegelman case for prosecutorial misconduct. The letter to Holder said there were “gravely troublesome facts” about the Siegelman prosecution that warranted an investigation.

Georgia Thompson, a Democratic procurement officer for the state of Wisconsin, was also charged with abusing her official authority for political gain. Thompson was found guilty of various corruption charges, including a conviction for depriving the state of honest services. Prosecutors alleged that she steered a state contract to a specific vendor for “political” reasons. Thompson was sentenced to 18 months’ imprisonment, and, like Siegelman, she was required to begin serving her term while her appeal was pending.

The Seventh Circuit held that the evidence did not justify the charges against Thompson. Reversing the conviction, Judge Easterbrook noted that the prosecutor did not allege that any campaign contribution resulted in a quid pro quo, nor was there “so much as a whiff of a kickback or any similar impropriety.” Judge Easterbrook’s opinion described Thompson’s conduct as “logrolling” and “[h]orse-trading,” and he stated that it was even possible that Thompson favored the vendor because “it was cheaper.” Easterbrook warned of the dangers of the government’s broad reading of the honest services statute. “In other words, the prosecutor’s argument is that any public employee’s knowing deviation from state procurement rules is a federal felony, no matter why the employee chose to bend the rules, as long as the employee gains in the process.”

Imagine a governor who throws support (and public funding) behind coal-fired power plants because people fear nuclear power rather than because of a cost-benefit analysis; that may be a blunder but is not a crime even if the governor privately thinks that nuclear power would be superior. Similarly, supporting local vendors, a form of ‘pork,’ may or may not be good government but is not a ‘misuse of office’ in the criminal sense. The

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106 Siegelman v. United States, 561 U.S. ___, No. 09-182 (June 29, 2010), cert. granted, judgment vacated; Scrushy v. United States, 561 U.S. ___, No. 09-167 (June 29, 2010), cert. granted, judgment vacated. The convictions of Scrushy and Siegelman were vacated in light of the Court’s decision in Skilling. Id.
108 The letter referred to “gravely troublesome facts” alleged in a letter from Siegelman’s attorney. Id. The Attorneys General said the issues mentioned in the attorney’s letter “require an immediate investigation because they go to the core concepts of fairness and due process -- which are at the foundation of our criminal justice and legal system.” Id.
109 United States v. Thompson, 484 F.3d 877 (7th Cir. 2007).
110 Id. at 878-79.
111 Id.
112 Id. at 878.
113 Id. The Seventh Circuit reversed Thompson’s conviction and remanded the case “with instructions to enter a judgment of acquittal.” Id. at 884.
114 Id. at 879.
115 Id. at 879.
116 Id. at 880.
idea that it is a federal crime for any official . . . to take account of political considerations when deciding how to spend public money is preposterous. 117

In his letter to Gonzales, Conyers noted that the name of the U.S. Attorney who prosecuted Thompson appeared on a list of U.S. Attorneys that might be replaced, but the prosecutor’s name was removed from the list in January 2006, the same month that Ms. Thompson was indicted. 118 In a letter to Conyers, the Department of Justice noted that the Department’s Office of Professional Responsibility (OPR) cleared the prosecutor of any wrongdoing. 119 The OPR concluded that the prosecutor “acted appropriately” and “took special measures to ensure that politics did not play a role in the case . . . .” 120

Some may argue that, given the political pressure to root out corruption, some overreaching by prosecutors is inevitable. After all, prosecutors are trying to crack down on sophisticated fraudsters, and the honest services fraud statute has been a “key strategy” in the effort to crack down on public corruption. 121 Others may point out that politicians of both parties have found themselves the victims of overzealous federal prosecutors in recent years. Republican Senator Ted Stevens was convicted of lying on Senate ethics forms in October 2008, just before losing his reelection bid. 122 The Department of Justice later dropped the charges against Stevens and acknowledged that federal prosecutors denied Stevens access to evidence that contradicted the testimony of a key government witness. 123 In throwing out the charges, Judge Emmet Sullivan also appointed a non-government attorney to investigate possible misconduct by the federal prosecutors. “In nearly 25 years on the bench, I’ve never seen anything approaching the mishandling and misconduct that I’ve seen in this case,” Sullivan said. 124 Stevens commented that he would advocate for legislation “to reform laws relating to the responsibilities and duties of those entrusted with the solemn task of enforcing federal criminal laws.” 125 Despite these allegations of prosecutorial misconduct, there has been no evidence that Stevens’ prosecution was politically motivated, and any suggestion that

117 Id. at 883.
120 Id. at 2.
123 Id. See also Letter from State Attorneys General to Attorney General Eric Holder, Re: United States of America v. Don E. Siegelman, et al., In the United States Court of Appeals for the Eleventh Circuit, No. 07-
124 Id. See also Letter from State Attorneys General to Attorney General Eric Holder, Re: United States of America v. Don E. Siegelman, et al., In the United States Court of Appeals for the Eleventh Circuit, No. 07-
126 Id.
Republicans were targeted for political prosecutions by the Bush Department of Justice is belied by statistical evidence.\footnote{Sanford C. Gordon, Assessing Partisan Bias in Federal Public Corruption Prosecutions, 103 American Political Science Review 534 (2009) (finding statistical evidence of a bias against Democrats in the Bush administration’s public corruption prosecutions).}

**A New Definition of Honest Services Fraud**

In his appeal to the Court, Skilling argued that § 1346 was unconstitutionally vague. His petition for certiorari argued that the statute’s reference to “the intangible right of honest services” did not codify “some specific, pre-existing right whose meaning could be easily discerned from pre-McNally lower court decisions.”\footnote{Brief for Petitioner at 43, Skilling v. United States, No. 08-1394 (December 11, 2009).} Skilling’s petition referred to pre-McNally caselaw as “a hodgepodge of oft-conflicting holdings, statements, and dicta.”\footnote{Id.} The Court’s analysis begins by quoting the statute and then framing the issue using the two-pronged test for vagueness.\footnote{Id.} The Court acknowledges that Skilling’s argument “has force” because the pre-McNally cases “were not models of clarity or consistency.”\footnote{Id. at 39.} There was “considerable disarray” regarding many of the forms of honest services fraud.\footnote{Id. at 43.}

After framing the issue in this manner, however, the Court avoids the vagueness question altogether by construing the statute to prohibit only one specific type of misconduct. “It has long been our practice . . . , before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction.”\footnote{Id.} With its task in hand, the Skilling Court set off to find a definition of “honest services fraud” that would not violate the Due Process Clause.

Since Congress’ intent in enacting § 1346 was to reinstate pre-McNally case law, the Court looked to that body of law for a definition of honest services fraud:

> Although some applications of the pre-McNally honest services doctrine occasioned disagreement among the Courts of Appeals, these cases do not cloud the doctrine’s solid core: The ‘vast majority’ of the honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes.\footnote{Id. at 43.}

The Court noted that the crime “had its genesis” in bribery prosecutions, and McNally was described as the “paradigmatic” kickback case.\footnote{Id. at 43-44.} The Court was satisfied that, given this history, “Congress intended § 1346 to reach at least bribes and kickbacks.”\footnote{Id.} The Court acknowledges that without this limitation, the statute would give rise to vagueness concerns.\footnote{Id. at 44-45.} “Apprised that a broader reading of § 1346 could render the

\footnote{Id.}
statute impermissibly vague, Congress, we believe, would have drawn the honest-services line, as we do now, at bribery and kickback schemes.”

The Court held that the statute, thus construed, was not unconstitutionally vague. Since Skilling had not engaged in a scheme involving bribery or kickbacks, the Court said it was clear that “Skilling did not commit honest services fraud.”

The Court rejected the government’s argument that, in addition to bribery and kickbacks, § 1346 should be construed to prohibit “undisclosed self-dealing” schemes. Although many courts had accepted such a construction, the Court held that such schemes were less frequent than bribery and kickbacks and thus, were not “core applications of the honest services doctrine.” The Court described this form of fraud as “an amorphous category” and noted that lower courts reached no consensus on the elements of this type of fraud.

Analysis

The American public has had little tolerance for institutional corruption in recent years, and citizens have pressured the government to root out and prosecute corrupt officials. The federal government has used § 1346 to prosecute public officials and officers of private entities. These prosecutions have given rise to serious questions about the constitutionality and wisdom of the statute. Several courts have been confronted with arguments that § 1346 violates the Due Process Clause because it is too vague. While some courts found the statute unconstitutionally vague when applied to certain defendants, the Supreme Court recently saved the statute from invalidation by construing it to apply to only two types of misconduct.

The first part of the analysis section will ask whether the Court reached the right decision in Skilling. This part will argue that the Court should have refrained from construing the statute to avoid vagueness, because such an approach raises concerns about the judiciary infringing on Congress’ legislative authority. By limiting the reach of the statute, the Court redefined the crime of honest services fraud. The scope of the revised law is a far cry from the meaning of the legal term of art that Congress used when drafting the statute. Since the Court should have avoided embarking on such a venture, the statute will then be analyzed under the Court’s two-pronged test for vagueness: whether it gives notice of the prohibited conduct and whether it permits discriminatory

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137 Id. at n. 43
138 Id. at 48-49.
139 Id. at 49-50.
140 See, e.g., United States v. Skilling, 554 F.3d 529, 545 (5th Cir. 2009); United States v. Rybicki, 354 F.3d 124, 142-43 (2d Cir. 2003). Then-Judge Sonia Sotomayor joined in the Second Circuit’s opinion recognizing the “undisclosed self-dealing” form of honest services fraud. Rybicki, 354 F.3d at 142-43. Justice Sotomayor joined in the Court’s opinion that rejected this form of fraud, but she gave no hint of why this form of fraud was no longer acceptable. Skilling v. United States, 561 U.S. ___, No. 08-1394, slip op. (2010) (Sotomayor, J., concurring in the Court’s resolution of the honest services fraud issue and dissenting from its resolution of Skilling’s argument that he did not receive a fair trial).
141 Skilling, slip op. at 46.
142 Id.
143 See, e.g., United States v. Hadakas, 286 F.3d 92, 96 (2d. Cir. 2002) (holding that the statute is unconstitutional as applied to the defendant).
144 Skilling, slip op. at 39.
enforcement, an issue the *Skilling* Court ignored. The second part of the analysis section will discuss the policy implications of both the Court’s narrowing of § 1346 and its approach to addressing vagueness. In other words, this part will ask whether the Court made the right decision in so limiting the reach of the statute, and it will ask whether the Court should be making this type of decision in the first place. The paper concludes by arguing that *Skilling* did not cure all of the constitutional defects of § 1346 and that the *Skilling* Court’s approach is bad policy.

**Void for Vagueness**

A statute violates the Due Process Clause if it is so vague that it (1) gives insufficient notice of what type of conduct is prohibited or (2) affords prosecutors and police officers too much discretion in applying it. Courts require that statutes give ordinary citizens a reasonable opportunity to understand what conduct is prohibited. Statutes must provide “explicit standards” for officials who apply them, so that “arbitrary and discriminatory” enforcement is avoided. “A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” For example, the Court considered a Cincinnati statute that made it a crime for “three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . . .” The Court ruled this statute unconstitutional and said it was “vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.” In *Grayned*, the Court considered a statute prohibiting any person near a school “from willfully making a noise or diversion that disturbs . . . the peace or good order of the school session . . . .” The statute was upheld because it “is not a broad invitation to subjective or discriminatory enforcement.”

By construing § 1346 to prohibit only bribes and kickbacks, the Court managed to avoid applying this analysis to the statute until it was narrowed. After stating its preference for construing statutes, rather than invalidating them, the Court looked to pre-*McNally* case law and determined that the “core” applications of the statute involved

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147 *Id.* at 108.

148 *Id.* at 108-109.


150 *Id.* at 614.


152 *Id.* at 113.
bribes and kickbacks. After construing away the constitutional problem, the Court applied the two-pronged test for vagueness. Before deciding that the statute required a limiting instruction, Justice Ginsburg’s opinion came very close to making a determination that the statute, as written, is unconstitutionally vague. The Court conceded that the pre-McNally cases were “not models of clarity or consistency,” and it acknowledged “considerable disarray” in some areas of pre-McNally caselaw. Rejecting the government’s argument for a broader interpretation, the Court said, “Reading the statute to proscribe a wider range of conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine.”

The vagueness analysis utilized by the Skilling Court is easy. First, the Court concedes that the statute, as written, may be unconstitutionally vague. Then, the Court will construe the statute to eliminate the vagueness. Finally, the Court asks whether the statute, as construed to remove any vagueness, is unconstitutionally vague. Once the Court has interpreted away the constitutional defect, the vagueness analysis requires merely going through the motions. The difficult part of the analysis is not the Due Process issue; rather, it is deciding how the statute should be worded to comply with the constitution. Although this approach allows the Court to avoid striking down federal statutes, it also gives the Court a greater role in defining the substantive content of federal statutes. Some may argue that this approach infringes on Congress’ legislative authority.

Justice Scalia agreed that Skilling’s conviction should be reversed, but he vehemently criticized the Court’s effort to salvage the statute. Although the Court struck “a pose of judicial humility” by upholding the law, Scalia argued that the Court’s approach required it to define federal crimes. By limiting the reach of § 1346 to bribes and kickbacks, “[t]he Court replaces a vague criminal standard that Congress adopted with a more narrow one (included within the vague one) that can pass constitutional muster.” Scalia accused the Court of assuming a broad view of the rule that statutes should be construed to avoid constitutional problems.

The Skilling Court compared the defendant’s vagueness challenge to the argument rejected in Civil Service Comm’n v. Letter Carriers, 413 U.S. 548 (1973). In that case, federal employees challenged a statute that incorporated decisions of the Civil Service Commission into the Hatch Act. The employees argued that the rulings were “inconsistent, incapable of yielding any meaningful rules to govern . . . conduct.” The

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153 Skilling v. United States, 561 U.S. ___, 40-42, No. 08-1394, slip op. (2010). The Court said, “In the main, the pre-McNally cases involved fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived.” Id. at 40.
154 Id. at 41.
155 Id. at 44.
156 Id. at 41.
157 Id. at 43-45.
158 Id. at 48-49.
159 Id. at 41.
160 Skilling, 561 U.S. ___, No. 08-1394, slip op. (2010) (Scalia, J., dissenting). Justice Scalia’s dissent was joined by Justice Thomas and joined in part by Justice Kennedy. See also U.S. Const. art. I, § 1 (vesting the “legislative Powers” in Congress).
161 Id. at 8.
162 Id. at 9-10.
164 Id. at 571.
Court rejected the vagueness challenge, finding that the Commission’s rulings were “subject to sufficiently clear and summary statement.”

The *Skilling* Court mentioned *Civil Service Comm’n* as an example of a decision construing a federal statute to avoid vagueness concerns. The Court in *Civil Service Comm’n*, however, did not construe the statute; it merely held that it was not impermissibly vague.

The Court in *Skilling* noted that when prior Courts encountered statutes that violated the First Amendment, they did not hesitate to read restrictions into the statutes that limited their application to speech activity. These cases, however, usually result in relatively minor changes to the statute. Two 1971 cases involved challenges to federal obscenity laws. In one case, the Court read into a statute a “time limit” for judicial review of an administrative decision to censor certain materials. In the other case, the Court refused to rewrite a federal obscenity statute so that it required judicial review of censorship orders. Rejecting the proposed construction, the Court noted that, “It is for Congress, not this Court, to rewrite the statute.”

The Court also considered a D.C. ordinance that made it unlawful “to congregate within 500 feet of any [embassy, legation, or consulate] and refuse to disperse after having been ordered so to do by the police.” The Court conceded that the statute, on its face, was constitutionally “problematic.” However, a lower court had interpreted the statute to apply only when police reasonably believe that the peace or security of an embassy is threatened, and the Court found that this construction was not facially overbroad. “[T]he federal courts have the duty to avoid constitutional difficulties by doing so if such a construction is fairly possible.”

In an opinion issued days before *Skilling*, the Court considered a vagueness challenge to the federal law prohibiting the provision of “material support or resources to a foreign terrorist organization.” Before analyzing the vagueness issue, the Court rejected the plaintiffs’ argument that the Court should construe the statute as requiring, when applied to speech, an intent to aid a terrorist organization. The Court said such a construction would be inconsistent with the text of the statute, which prohibits “knowingly” providing material support. The Court stated that there is “no basis whatever in the text” of the statute to read it “as requiring intent in some circumstances

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165 *Id.* at 571-72.
166 *Skilling*, slip. op. at 42-43.
167 *Civil Service Comm’n*, 413 U.S. at 568-81.
168 *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971). The Court added the time limit to the censorship statute so that it would comport with an earlier decision requiring some time limit on judicial hearings for prior restraints on speech. *Id.* The Court said that such a limit was needed to ensure that “administrative delay does not, in itself, become a form of censorship.” *Id.* at 367 (applying *Freedman v. Maryland*, 380 U. S. 51 (1965)).
169 *Blount v. Rizzi*, 400 U.S. 410, 419 (1971). The defendants had asked the Court to construe the statute so that the censorship order would not take effect if the censored party seeks judicial review. *Id.* The Court doubted that the construction would satisfy the First Amendment. *Id.*
170 *Id.* at 419.
172 *Id.* at 330.
173 *Id.* at 330-31.
174 *Id.* at 331.
176 *Id.* at 11. The Court noted that Congress specifically designated “knowingly” as the mens rea required for the crime. *Id.* at 11-12.
but not others.” 177 Thus, the Court said, “It is therefore clear that plaintiffs are asking us not to interpret [the ‘material support’ statute], but to revise it.” 178 When it decided Skilling, the Court abandoned this posture of judicial restraint.

The Skilling Court’s version of honest services fraud is fundamentally different from the meaning of the legal term of art that Congress employed. The Court’s approach thus seems to be a far cry from other applications of the maxim requiring the Court to interpret statutes to avoid constitutionality. 179 An earlier Court said, “Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute.” 180 By construing § 1346 so that it does not apply to the kind of self-dealing in which Skilling engaged, the Court may have decriminalized conduct that Congress intended to prohibit. 181

The Skilling Court’s approach raises questions about the very nature of judicial review. 182 The Court has said that the Constitution does not permit Congress to “set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.” 183 The Court should have surveyed the pre-McNally case law and realized that it could not redefine “honest services” fraud without assuming a legislative function. The power to define criminal offenses properly belongs in the political branches. The Court once remarked, “If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate

177 Id. at 12.
178 Id. at 12. The Court then reached the vagueness issue and found that the statute was not impermissibly vague as applied to the plaintiffs. Id.
179 The Court cites Hooper v. California, 155 U.S. 648, 657 (1895) for the proposition that, “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” That case, however, involved a state statute, and the Court was without authority to authoritatively construe it. Id. The Court merely rejected the plaintiffs’ interpretation of the statute. Id. In another case cited by the Court, the Court did not find that the statutory language was unconstitutionally vague. Schneider v. Smith, 390 U.S. 17, 26 (1968). Rather, the Court rejected the broad interpretation given to the statute by the executive branch. Id. at 27 (“We would have to stretch those words beyond their normal meaning to give them the meaning the Solicitor General urges.”).
181 The Court in Skilling only said that the legislative history, consisting entirely of pre-McNally case law, proves that “Congress intended § 1346 to reach at least bribes and kickbacks.” Skilling, slip op. at 44 (2010). But the Court acknowledges the possibility that a future Congress will add the “self-dealing” category to the honest services fraud statute. Id. at n. 45. In fact, the Court warned that, in doing so, Congress would have to “employ standards of sufficient definiteness and specificity to overcome due process concerns.” Id.
182 In the case that established the power of judicial review, the Court ruled unconstitutional a statute giving the Court the authority to issue writs of mandamus to executive branch officers. Marbury v. Madison, 5 U.S. 137 (1803). Chief Justice Marshall stated, “It is emphatically the duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule. If two laws conflict with each other, the Court must decide on the operation of each.” Id. at 177. “If courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.” Id. at 178. The Court in Marbury did not attempt to construe the mandamus statute to remedy its constitutional defect.
183 United States v. Reese, 92 U. S. 214, 221 (1876).
it.”

If the Court had not rewritten the law, it would have analyzed the statute, as written, using its two-pronged vagueness test.

**Notice**

Critics of the “honest services” fraud statute argue that the statutory language does not give public or private officials sufficient notice of what conduct is prohibited. The *Skilling* Court noted that Courts of Appeals have rejected arguments that the statute is vague on its face, but the Court failed to mention that several courts have found the statute vague as applied. For example, the Second Circuit found that one defendant in an honest services case lacked notice that his conduct would violate the statute. As in *Skilling*, the court in *Handakas* began its discussion of § 1346 by conceding that the text does not offer any guidance.

The plain meaning of the words “simply provides no clue to the public or the courts as to what conduct is prohibited under the statute.”

The *Handakas* court sifted through the legislative history of the statute to discern its meaning. Asking whether a lay person (i.e., non-lawyer) of “ordinary intelligence” would understand what conduct is prohibited, the court said a person in the defendant’s position “would not know where to begin.” The court characterized the defendant’s conduct as a breach of his contractual obligations as a vendor of services to the state. Even someone who was familiar with relevant case law, the court said, “would lack any comprehensible notice that federal law has criminalized breaches of contract.”

Just one year after *Handakas*, the Second Circuit backtracked somewhat on the vagueness issue and held that application of the “honest services” statute was not unconstitutionally vague. The court looked to pre-*McNally* case law to determine the meaning of “honest services” fraud. According to the *Rybicki* court, its precedents defined one category of honest services fraud as “self-dealing” schemes against a private entity. In this context, the statute prohibits a scheme that (1) involves a “material misrepresentation” or omission, and (2) enables an officer or agent of a private entity, purporting to act in the employer or principle’s interest, to secretly act in his or her own interests. The court held that the defendants’ conduct fit squarely within this category of honest services fraud.

In *Rybicki*, the majority opinion was accompanied by two concurring opinions and two dissenting opinions. One concurring judge agreed that the statute was not

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185 *United States v. Handakas*, 286 F.3d 92, 104 (2d Cir. 2002). The court noted that the statute “does not say what ‘honest services’ may be, or when they are withheld deceitfully.” *Id.*
186 *Id.*
187 *Id.* at 104-106.
188 *Id.* at 106.
189 *Id.* at 107.
190 *Id.* at 107. The court thus held the application of the statute unconstitutional for vagueness. *Id.*
192 *Id.* at 138-142.
193 *Id.* at 142.
194 *Id.* at 142-43. The defendants in *Rybicki* were lawyers accused of paying kickbacks to insurance claims adjusters considering their clients’ claims. *Id.*
195 *Id.* at 147-65.
unconstitutionally vague, but she disagreed with the majority’s reasoning. This judge argued that the text of the statute provides sufficient guidance as to its meaning. She defined the right to honest services as “a legally enforceable claim to have another person provide labor, skill, or advice without fraud or deception.”

A dissenting Judge pointed out that the Second Circuit’s pre-McNally jurisprudence was not always consistent in articulating the elements of honest services fraud. “[N]o unambiguous meaning can be assigned to a phrase that has no meaning except what can be distilled from some pre-McNally cases provided that other pre-McNally cases are ignored.” The dissenting judge criticized the court’s selective use of precedent as “arbitrary,” and he asked how a lay person was supposed to use the same process to discern the statute’s meaning.

Although the majority in Rybicki managed to find some boundaries for honest services fraud, the disagreement among the judges on the panel proves that the statute is too vague. If a panel of federal judges cannot agree on the meaning of the words, how is a lay person supposed to know what conduct is prohibited?

In addition to the disagreement within the Second Circuit, the disagreement between the various circuits is even starker. Courts have struggled to define the elements of the crime. While one circuit casually disregards the “private gain” element of honest services fraud, another circuit views it as an important limit on the statute’s reach. In Black, the Seventh Circuit held that an honest services conviction does not require that the defendant’s conduct harm the employer. Judge Posner dismissed the argument that an honest services conviction requires harm to the employer as a “no harm, no foul argument.” This argument, however, would prevail in the Fifth Circuit. “In order that not every breach of fiduciary duty owed by an employee to an employer constitute an illegal fraud, we have required some detriment to the employer.” The Seventh Circuit recently ruled that the “private gain” element does not necessarily refer to a personal benefit to the defendant. A few years earlier, the same court had referred to “personal gain” as an element of honest services fraud.

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196 Id. at 148-49 (Raggi, J., concurring).
197 Id. at 153.
198 Id. at 160 (Parker, J., dissenting).
199 Id.
200 Id. at 162-63 (Walker, J., dissenting).
201 Black v. United States, 530 F.3d 596, 601-602 (7th Cir. 2008).
202 Id. at 600-601.
203 United States v. Brown, 459 F.3d 509, 519 (5th Cir. 2006). The Fifth Circuit in Brown noted that the government’s interpretation of the honest services statute did not require any detriment to the employer. Id. at 520-21. The court warned that it would “consider such a broad theory of liability with caution,” and it threw out the defendants’ convictions. Id. at 520-23. Compare United States v. O’Malley, 535 F.2d 589, 592 (10th Cir. 1976) (rejecting the proposition that the victim of honest services fraud must suffer some loss), with United States v. Ballard, 663 F.2d 534, 541-42 (5th Cir. 1981) (“[A] breach of fiduciary duty can constitute an illegal fraud under § 1341 only when there is some detriment to the employer.”). The Court in Skilling failed to mention this disagreement when it stated that honest services fraud could occur “[e]ven if the scheme occasioned a money or property gain for the betrayed party.” Skilling, slip op. at 36 (citing United States v. Dixon, 536 F.2d 1388 (2d Cir. 1976).
204 United States v. Sorich, 523 F.3d 702, 709 (7th Cir. 2008).
205 United States v. Hausmann, 345 F.3d 952, 956 (7th Cir. 2003). The court in Sorich dismissed the distinction between “private” and “personal” gain as a “semantic difference.” United States v. Sorich, 523 F.3d 702, 709 (7th Cir. 2008). “[T]o the extent that “personal” connotes gain only by the defendant, it is
among the courts means that the statute must have been incomprehensible to ordinary citizens. Like the statute in *Coates*, the language of § 1346 is “vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.”

The *Skilling* Court’s definition of the statute will certainly provide clearer guidance than the text, and, as in *McNally*, the Court left an open invitation for Congress to recognize additional different forms of honest services fraud.207 The Court warned, however, that if Congress attempted to criminalize the “undisclosed self-dealing” category of honest services fraud, it must “employ standards of sufficient definiteness and specificity to overcome due process concerns.”208 The Court listed potential questions about the type of conflict of interest required, and the source of the duty to disclose information.209 The Court cautioned that these questions “call for particular care in attempting to formulate an adequate criminal prohibition in this context.”210 The Court also pointed out that the form of “undisclosed self-dealing” proffered by Skilling’s prosecutors “leaves many questions unanswered.”211

The same could be said of the Court’s narrower definition of honest services fraud. Justice Scalia criticized the Court’s definition because it leaves open the question of “the character of the ‘fiduciary capacity’ to which the bribery and kickback restriction applies.”212 Moreover, some courts have said that the “bribery and kickbacks” category only applies to public corruption, not corporate misconduct.213 Notwithstanding these questions, the Court’s formulation will provide much more notice of the conduct prohibited than the language of the statute. The problem with discriminatory enforcement, however, cannot be construed away as easily.

**Discriminatory Enforcement**

The honest services statute, like the ordinance in *Coates*, opens the door to selective or discriminatory enforcement. The Bush administration found the statute helpful in its effort to use its prosecutorial authority to help Republicans win elections.214

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207 *Skilling*, slip op. at 47.
208 *Id.* at n.45.
209 *Id.*
210 *Id.* But if Congress were to disregard this warning, the Court would presumably try to construe the statute to cure any vagueness.
211 *Id.* at n.45.
212 *Skilling*, slip op. at 7-8 (Scalia, J., dissenting).
213 In the Sixth Circuit opinion reversed by *McNally*, the court states that “misconduct of a fiduciary in the administration of exclusively private matters in his capacity as a private individual which does not involve the misuse of public office or public trust, is not actionable as a violation of the mail fraud statute under an intangible rights theory.” *United States v. Gray*, 790 F.2d 1290, 1295-96 (per curiam) (6th Cir. 1986). The court noted, however, that private officials who “substantially participate in government operations” can also owe a fiduciary duty to the public. *Id.*
214 Ostensibly, the statute was helpful in the Bush administration’s plan to increase its focus on public corruption. Administration officials said the use of § 1346 was “a key strategy” in this effort. Peter Stone,
A study from Professors Donald Shields and John Cragan found statistical evidence of a political bias in the Bush administration’s prosecutions. The study found that, from 2001 through 2006, “the Bush Department of Justice investigated Democratic office holders and candidates at a rate more than four times greater (nearly 80% to 18%) than they investigated Republican office holders and seekers.”

The study found that the problem was more pronounced at the local government level, where Bush’s Department of Justice investigated seven times as many Democratic officials as Republican officials. Shields acknowledged certain limitations to the study, but he asserts that email correspondence between the Department and the Bush White House provide direct evidence to support his findings. A more recent study focused on sentencing in corruption cases and found similar evidence of bias against Democrats. This study analyzed 222 prosecutions from 2004–2006 and found that the Bush administration prosecuted six times as many Democratic public officials as Republican. Many high-profile corruption prosecutions of Democratic politicians involved the honest services fraud statute.

Given these statistics, it is clear that the honest services statute constitutes “a broad invitation to subjective or discriminatory enforcement,” and it appears the Bush administration accepted the invitation. Many Judges to consider the vagueness of “honest services” fraud warned of the possibility of political prosecutions.

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217 In testimony before Congress, Professor Shields said the study “is not a legal study,” because it is based on press reports of the Department’s corruption investigations, not actual indictments or convictions. Allegations of Selective Prosecution: The Erosion of Public Confidence in our Federal Justice System: Hearing Before the Comm. On the Judiciary at 226–70, 110th Cong. (2007), (written statement by Prof. Donald Shields entitled “An Empirical Examination of the Political Profiling of Elected Officials: A Report on Selective Investigations and/or Indictments by the DOJ’s Attorneys under Attorneys General Ashcroft and Gonzales”). But Shields asserts that direct evidence proves the White House’s involvement in politically motivated prosecutions, and he notes that a “legal” study reached a similar conclusion. *Id.*

218 *Id.* Sanford C. Gordon, *Assessing Partisan Bias in Federal Public Corruption Prosecutions*, 103 American Political Science Review 534 (2009). Gordon’s study found that Democrats were “disproportionately targeted under both Clinton and Bush,” *Id.* at 549, but the Bush administration’s anti-Democratic bias was more pronounced and statistically significant, *Id.* at 543.

219 *Id.* Gordon said this finding “echoes the discrepancy observed in the Shields/Cragan study.” *Id.* Gordon posits that the anti-Democratic bias under both Presidents was partly a result of “the concentration of Democratic public officials in urban areas” and a corresponding difference in “substantial opportunities for corruption.” *Id.* at 549.

220 *See, e.g.*, United States v. Siegelman, 561 F.3d 1215, 1231–32 (11th Cir. 2009); United States v. Thompson, 484 F.3d 877–79 (7th Cir. 2007).


223 *See, e.g.*, United States v. Margiotta, 688 F.2d 108, 144 (2d Cir. 1982) (Winter, J., dissenting) (arguing that the majority’s interpretation of the mail fraud statute “not only creates a political crime where
The politicization of law enforcement undermines the rule of law and fundamental principles of democratic government.

The abuse of prosecutorial authority for political purposes flies in the face of the Founders’ notion of democracy. John Adams said, “[T]he very definition of a republic is ‘an empire of laws and not of men. . . . [T]hat form of government which is best contrived to secure an impartial and exact execution of law, is the best of republics.”

Criticizing the Alien & Sedition Acts, Thomas Jefferson said that if prosecutions under the Acts should continue, the federal government could “place any act . . . on the list of crimes . . . .” Jefferson warned of the consequences for those who “may be obnoxious to the views, or marked by the suspicions of the President, or be thought dangerous to his or their election, or other interests . . . .” A country in which the President can prosecute his political opponents is not a country governed by the rule of law. Attorney General Robert Jackson said that “the most dangerous power of the prosecutor [is] that he will pick people that he thinks he should get, rather than cases that need to be prosecuted.” “It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies.”

The President cannot use vague statutes to prosecute members of a certain political party. Discriminatory enforcement is also a danger in private corruption cases. Given the public’s attitude toward corporations, prosecutors are undoubtedly feeling pressure to crack down on corporate corruption. Urging his colleagues to consider a vagueness challenge to § 1346, Justice Scalia warned that the vague language “invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct.”

The Skilling Court’s version of § 1346 provides more notice of the conduct prohibited, but it does not address the potential for discriminatory enforcement. The same risk, however, inheres in many political corruption statutes. Federal prosecutors, after all, are using such statutes against sophisticated fraudsters, and such prosecutions often call for “creativity.”

Congress has not acted but also lodges unbridled power in federal prosecutors to prosecute political activists”).

227 Id.
228 Robert Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940.
229 Id.
231 See Anna Stolley Persky, Aggressive Justice, ABA Journal, May 1, 2010, available at http://www.abajournal.com/magazine/article/aggressive_justice. The ABA Journal article quotes author and criminal defense attorney Harvey Silvergate arguing that federal prosecutors have used “creative” theories under vaguely worded statutes in fraud cases. Id. The article also quotes former U.S. Attorney Jeffrey Taylor saying, “Most prosecutions involve violent crime or narcotics offenses where it is very clear a crime has been committed, but the challenge is to identify the perpetrator. In white-collar cases, it is often clear who acted, but it is not clear that those actions, though perhaps not appropriate, constitute a crime.” Id. “In light of that ambiguity, the government has to tread carefully, but that ambiguity can’t mean that the government abdicates responsibility for prosecuting white-collar crime.” Id. (quoting Taylor).
definition of honest services fraud could be “stretched out of shape.”232 Prosecutors will certainly have less room for creativity, but a law against “bribery and kickbacks” will remain useful. It may be impossible to formulate public corruption statutes in a manner that completely negates the potential for political prosecutions.

Regardless of whether Skilling will curtail the risk of discriminatory enforcement, the Court should have squarely addressed the problem of political prosecutions under § 1346. If the Court had discussed political prosecutions under the statute, it may have felt an urge to rule on the Due Process concerns raised by Skilling’s appeal. While Scalia’s opinion focused on the appropriateness of the Court’s reconstruction of the statute, Justice Kennedy’s brief concurring opinion in Black focused on the Due Process concerns presented by honest services fraud.233

In another recent vagueness case, Justice Breyer expressed a similar sentiment. In Chicago v. Morales, 527 U.S. 41 (1999), the Court ruled unconstitutional a Chicago ordinance forbidding gang members from loitering in public after being ordered to disperse by a police officer.234 Notwithstanding the limits on enforcement imposed by Chicago Police Department policy, the Court found that the statute was unconstitutionally vague.235 The Justices based their decision on differing rationales, but Justice Breyer’s concurring opinion said the statute was too vague solely because it vests too much discretion in police officers:

The ordinance is unconstitutional, not because a police [officer] applied this discretion wisely or poorly in a particular case, but rather because the police [officer] enjoys too much discretion in every case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications.236

The many opinions in Chicago v. Morales demonstrate that the Court’s approach to vagueness issues is not a model of clarity. The Justices have differed over the difference between “facial” and “as applied” challenges to vague statutes.237 The Skilling Court gave short shrift to the vagueness analysis, but if it had shown the same focus on discriminatory enforcement as Justices Breyer and O’Connor showed in Chicago v. Morales,238 the Due Process concerns may have appeared more urgent.239 The Court may have resisted the urge to rewrite the statute to avoid the Due Process issue.

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232 Skilling, slip op. at 48.
233 Black v. United States, 561 U.S. ___, No. 08-876, slip op. (2010) (Kennedy, J., concurring in the judgment). Justice Kennedy stated, “To convict a defendant based on an honest-services-fraud theory, even one limited to bribes or kickbacks, would violate his or her rights under the Due Process Clause of the Fifth Amendment.” Id.
235 Id.
236 Id. at 71 (Breyer, J., concurring in the judgment).
237 Compare Id. at 71-73 (Breyer, J., concurring) with Id. at 74-83 (Scalia, J., dissenting) (arguing that the Court failed to apply the rule that a statute is not vague on its face unless it is unconstitutionally vague in all its applications).
238 Id. at 71 (Breyer, J., concurring). Id. at 65-67 (O’Connor, J., concurring) (“Chicago’s gang loitering ordinance is unconstitutionally vague because it lacks sufficient minimal standards to guide law enforcement officers.”).
After so many investors were harmed by Enron’s fraud, the public clamored for the government to take action against corrupt corporate officials. Federal prosecutors used § 1346 to crack down on perceived corporate corruption, but to what end? Skilling’s conviction will likely be overturned because the Court’s new, more definitive version of honest services fraud prohibits only bribes and kickbacks. The Skilling Court rejected every form of honest services fraud that pre-dated McNally, except for one. The conduct in which Skilling and Black engaged no longer qualifies as fraud. Both Skilling and Black involved the “undisclosed self-dealing” form of honest services fraud.\(^\text{240}\) But the Court rejected the “self-dealing” category as too “amorphous” and ruled that such cases fell outside the “core applications of the honest services doctrine.”\(^\text{241}\) Both the House and Senate are considering legislation to respond to Skilling by reinstating the “undisclosed self-dealing” form of honest services fraud.\(^\text{242}\) In deciding whether to react to the Court’s narrowing of § 1346, Congress should ask itself whether this type of conduct should be prohibited by federal law.

Although Skilling’s concealment of Enron’s losses may not have technically harmed the corporation, his schemes certainly harmed the corporation’s investors. The same could be said of Black’s conduct. Black disguised the true nature of corporate payments to executives,\(^\text{243}\) and while the payments may have been legitimate compensation, should those executives be permitted to conceal the nature of the payments? Skilling has limited the applicability of § 1346 to corporate corruption. Even if the bribery and kickbacks category is not expressly limited to public corruption, such conduct is not as likely to occur in a corporate setting.\(^\text{244}\)

In a hearing before Congress, a Department of Justice official testified that, after Skilling, “there are certain types of

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\(^{239}\) The Court in Chicago analyzed the ordinance as construed by the Chicago Police Department and the Illinois courts. \textit{Id.} at 71. The Court was without authority to construe the local statute. \textit{Id.} at 61. In \textit{Skilling}, the Court was analyzing a federal statute, which it has the power to authoritatively construe. \textit{Skilling}, slip op. at 41-42.

\(^{240}\) The United States argued to the Supreme Court that Skilling’s conviction should be affirmed as a form of the “undisclosed self-dealing” category of honest services fraud. \textit{Skilling}, slip op. at 49; \textit{United States v. Black}, 561 U.S. ____, No. 08-876, slip op. 3-6 (2010).

\(^{241}\) \textit{Skilling}, slip op. at 46.


\(^{244}\) In a hearing before the Senate on how Congress should respond to Skilling, Professor Samuel Buell discussed several high-profile prosecutions of corporate officials for honest services fraud. Restoring Key Tools to Combat Fraud and Corruption After the Supreme Court's Skilling Decision: Hearing Before the Comm. On the Judiciary at 4, 111th Cong. (September 28, 2010) (written testimony by Prof. Samuel Buell.). Professor Buell then posited that there is now “substantial doubt . . . about whether prosecutors will be able to reach serious cases of this type using deprivation of property theories under the mail and wire fraud statutes.” \textit{Id.}
selfdealing by corporate officers that existing statutes do not allow us to reach and where a new prosecutorial tool would be welcomed.”

The recent financial crisis unearthed some familiar corporate misconduct. Like Skilling, executives at Lehman Brothers used false “sales” to hide debt. Under the pressure of the public’s backlash against the bailouts, Congress passed financial reform legislation. The bill imposes stricter corporate governance standards for financial institutions. Such reforms are usually written in technical jargon that is indecipherable by laymen, but such standards would provide much more guidance for corporate officials than the vague language of § 1346. Given that prosecutions under § 1346 have not stopped corporate corruption, the public should continue to pressure Congress and state legislatures to pass legislation establishing concrete standards of conduct.

Congress should respond to Skilling by supplementing the federal fraud statutes to include conduct other than bribes and kickbacks. Given the public’s unforgiving attitude toward corporate corruption, it may prove popular for a legislature to recriminalize the type of conduct in which Skilling engaged. A Department of Justice official told Congress that it should pass new legislation that forbids undisclosed self-dealing. If Congress reinstates this form of honest services fraud, it could also establish firmer limits on the category than those established in case law. Both the House and Senate versions of the Honest Services Restoration Act list several elements of undisclosed self-dealing that would provide much more clarity.

The new legislation may satisfy the Court’s concern that Congress could write new fraud statutes with the same kind of nebulous language it used in § 1346. Although the goal of reducing official corruption is always a worthy one, the application of the vague honest services statute led to some perverse results. The statute was intended to forbid corruption, but the law itself was corrupted when the Bush administration decided to use it to help the Republican Party.


251 Sanford C. Gordon, Assessing Partisan Bias in Federal Public Corruption Prosecutions, 103 American Political Science Review 534 (2009); Donald Shields and John Cragan, The Political Profiling of Elected
The Skilling Rule

Besides the immediate impact of narrowing the statute, the Skilling Court’s approach to vagueness issues could also have a far-reaching impact. Justice Scalia said the majority’s opinion “replaces a vague criminal standard that Congress adopted with a more narrow one (included within the vague one) that can pass constitutional muster.”

Scalia argues that such an approach is unprecedented. Compared to prior vagueness cases, it does appear that the Court is viewing its role in “interpreting” vague legislation as broader than in the past. It remains to be seen how this expanded role will impact future rulings.

Even with the reasoning in Skilling to guide them, courts may have difficulty determining how to limit other statutes that present vagueness concerns. Courts before Skilling upheld charges of honest services fraud for election fraud. Several union officials were recently convicted under § 1346 for rigging a union election. Some pre-McNally cases upheld fraud convictions based on a deprivation of a right to privacy. In Skilling, the Court excluded all of these interpretations of honest services fraud and limited the crime to one type of misconduct.

The result was a much narrower definition of honest services fraud. The Constitution vests the legislative power in Congress, and this power includes authority to define federal crimes. The Constitutionbestows on federal courts the judicial power – a power to interpret legislation, not compose it. The Supreme Court is not democratically accountable, so citizens have no recourse in the judiciary if we disagree with the way it “interprets” criminal statutes like § 1346. While it is entirely appropriate for the Court to strike down statutes that deprive persons of Due Process, the judiciary should have a limited role in defining criminal statutes.

Justice Scalia’s conservative colleagues voted with the majority, and in so doing, may have ensured that § 1346 no longer applies to corporate corruption. At the very least, the Court has drastically limited the ability of prosecutors to use the statute against corporate fraudsters. It remains to be seen whether the conservative wing of the Court will use the Skilling approach to limit the reach of other vague statutes. Will the Court seek to limit the reach of corporate corruption statutes, as it has recently limited the reach

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252 United States v. Skilling, 561 U.S. ____, No. 08-1394, slip op. at 8 (Scalia, J., concurring) (2010).
253 Id. at 8-10.
255 See, e.g., United States v. Louderman, 576 F.2d 1383 (9th Cir. 1978), cert. denied, 439 U.S. 896, 99 S.Ct. 257, 58 L.Ed.2d 243 (1978)
256 U.S. Const. art. I, § 1.
258 See United States v. Gray, 790 F.2d 1290, 1295-96 (per curiam) (1986) (stating that private corruption falls outside the “intangible rights” theories of fraud, unless the private officials “substantially participate in government operations”).
of political corruption statutes? The public should ask itself whether it is appropriate for the Court to assume such a role in “interpreting” legislation. It is not the responsibility of the Court to define criminal offenses in a manner that complies with Due Process. That duty belongs to Congress.

To the extent the Court has adopted a more “legislative” role, the Court has relinquished its role as the defender of criminal defendants’ Due Process rights. Under the traditional approach to vagueness, a statute is ruled unconstitutional if it fails to provide notice or allows for discriminatory enforcement. This approach vindicates the defendant’s rights under the Due Process Clause, and the Court’s decision may encourage Congress to pause before enacting vague statutes. A court using the Skilling approach will reconstruct a vague statute to cure any vagueness. As in Skilling and Black, this approach may result in a reversal of the defendant’s conviction, but the defendant’s constitutional rights are not publicly vindicated. Thus, a court using the Skilling approach assumes a lesser role as a defender of constitutional values. By avoiding the Due Process issue, the Skilling Court missed the opportunity to address concerns about discriminatory prosecutions.

Conclusion

After the Court disregarded the honest services doctrine in McNally, Congress enacted § 1346 to reinstate it. The executive branch used the statute in recent efforts to crack down on corruption. Some defendants argued that prosecutors overreached and applied an unconstitutionally vague statute. The Skilling Court sought to put these questions to rest by limiting the reach of § 1346. But the end result, a prohibition on schemes involves bribes and kickbacks, leaves many questions unanswered. Although it disagreed on why, the Court in Skilling unanimously agreed that Skilling’s convictions should be reversed. Justices Thomas and Kennedy joined in Scalia’s opinion that criticized the Court’s approach for infringing on Congress’ legislative authority. The other conservative Justices did not heed Scalia’s call for judicial restraint. The majority’s approach gives the Court broad authority to limit the reach of federal laws. Just as the Court recently limited the reach of political corruption statutes, the Court in Skilling limited the ability of prosecutors to use § 1346 to address corporate corruption.

The Skilling Court’s approach may be the result of political convenience. Had the Court asked whether the statute gave rise to discriminatory prosecutions, it may have found itself entangled in a messy political controversy. It may have been easier for the Court to sidestep the Due Process issue while still limiting the reach of the statute. Because the Court did not address the discriminatory enforcement problem inherent in § 1346, our government’s recent history of political prosecutions will remain unaddressed. Some politicians convicted of honest services fraud may find their convictions

reversed, but the ugly truth about political prosecutions will remain hidden behind this veil of comity.

The Court should have addressed the constitutionality of the statute as written. A statute is unconstitutionally vague if it does not provide sufficient notice of the conduct prohibited. The confusion among lower courts proves that § 1346 does not provide sufficient guidance as to its meaning. If federal judges could not agree on the statute’s meaning, a lay person has no chance of deciphering it. With only pre-McNally case law to guide them, officials could not possibly predict when their conduct could “deprive another of the intangible right of honest services.”

A statute can also be unconstitutionally vague if its ambiguous language invites discriminatory enforcement. The Bush administration’s record of political prosecutions makes it abundantly clear that § 1346 opens the door for such discrimination. Studies found that Bush’s Department of Justice prosecuted a vastly disproportionate number of Democratic local government officials, and § 1346 was a particularly useful tool in this effort. The potential for politicized prosecutions should concern both parties. How would Republicans react if President Obama began using the executive branch to target Republicans for corruption charges? No President should have the power to prosecute members of a particular political party. Although the statute may prove useful in efforts to crack down on official corruption, the very ambiguity that made the law useful also opens the door to abuse.

Rather than squarely addressing the Due Process issue, the Court took it upon itself to limit the statute to reach bribes and kickbacks. As Scalia’s concurring opinion noted, this construction does not cure all of the vagueness problems associated with the statute. Scalia criticized the Court’s definition because it leaves open the question of “the character of the ‘fiduciary capacity’ to which the bribery and kickback restriction applies.” The Court’s reconstruction also does not diminish the potential for political prosecutions, though it may prove difficult to draft an anti-corruption statute without the potential for such abuse.

In addition to problems with the new definition of honest services fraud, the Court’s approach gives itself a greater role in “interpreting” federal statutes. The Court’s

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261 Siegelman v. United States, 561 U.S. ___, No. 09-182 (June 29, 2010), cert. granted, judgment vacated.

262 Some members of Congress have proposed a “Truth Commission” to study some of the Bush administration’s most controversial policies. The scope of Senator Patrick Leahy’s proposed commission includes politicized prosecutions. Bobby Ghosh, Leahy’s Plan to Probe Bush-era Wrongdoings, Time, February 17, 2009, available at http://www.time.com/time/nation/article/0,8599,1879810,00.html. Rep. John Conyers’ proposal does not mention the politicization of the law enforcement. H.R. 104 2009 H.R. 104; 111 H.R. 104. One of the cosponsors of Conyers’ bill, however, suggested that the commission could investigate the politicization of the Department of Justice. 155 Cong.Rec.H. 477 (Jan. 22, 2009) (quoting Rep. Steve Cohen stating his desire that the commission “look into the activities of the Justice Department that were politicized during the days of Alberto Gonzales”). At this point, Democrats seem to be lukewarm to the idea of establishing such a commission. See Michael Isikoff, Friendly Fire at the White House, Newsweek, May 21, 2009 (quoting President Obama as rejecting the idea of Truth Commission because it would be “too time-consuming” for members of his administration).


265 United States v. Skilling, 561 U.S. ___, No. 08-1394, slip op. at 7-8 (Scalia, J., concurring) (2010).
formulation of honest services fraud is vastly different from the meaning of the legal term of art that Congress used in the statute. The Court’s definition excludes many categories of previously recognized misconduct, including the type of conduct in which Skilling and Black engaged. Congress should be responsible for defining criminal statutes and drafting them in a manner that complies with Due Process. The Court’s job is to protect constitutional values, and if that requires it to strike down a federal statute, such a move is more appropriate than rewriting it. To the extent the Court employs the Skilling approach, it assumes a lesser role in defending Due Process rights. This approach failed to squarely address the Due Process issues inherent in § 1346. By dodging the ugly truth about political prosecutions, the Court failed to definitively check Congress’ legislative excess or the executive branch’s abuse of its prosecutorial authority.