HONEST SERVICES FRAUD: CONSTANCY IN CHANGE*

I. INTRODUCTION

"The real facts do not change, whatever names we give them."[1]

In 1927, Richard Wilhelm, a professor of Chinese studies at the University of Frankfurt in Germany,[2] delivered a series of lectures entitled *Constancy in Change*.[3] In the lecture series, Professor Wilhelm explained possible interpretations and applications of certain passages within the *I Ching*,[4] an ancient Chinese philosophical text whose meaning is often difficult to extract from its obscure and mysterious sayings.[5] Wilhelm pointed to the following passage to express the overarching theme of his lectures: "The town may be changed, but the well cannot be changed. It neither decreases nor increases. They come and go and draw from the well."[6] The history of mankind has been one of continual change, yet underneath the movement, explained Wilhelm, the "ultimate bases of life remain unchanging," like the well in the center of the ever expanding and contracting town.[7]

Several decades later the Swiss psychiatrist Carl G. Jung, a one-time collaborator of Wilhelm's,[8] approached a theological problem from a similar vantage point.[9] One of Jung's observations was that the labels individuals place on certain experiences do not actually change the nature of the experience itself, but rather, only affect the individual's relationship to it.[10]

This Comment contends that the concept of outward change and inner consistency, exemplified by the work of these two European scholars, is helpful in

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1. C.G. JUNG, MEMORIES, DREAMS, REFLECTIONS 347 (Aniela Jaffé ed., Richard Winston & Clara Winston trans., Pantheon Books 1961).

2. Irene Eber, *Introduction* to RICHARD WILHELM, LECTURES ON THE I CHING: CONSTANCY AND CHANGE xii, xiv (Irene Eber trans., Princeton University Press 1979) (1956).

3. WILHELM, *supra* note 2, at 85–134. Professor Wilhelm devoted much of his life towards the understanding of Eastern thought and wisdom, and attempted to translate those ideas in a way that made them accessible to Western minds. Eber, *supra* note 2, at xiv-xvi.

4. *See* WILHELM, *supra* note 2, at 85–86, 101, 116 (using three hexagrams found in I Ching—patience, shaping, and depersonalization—to explain the "steps of constancy in change").

5. *See generally* Eber, *supra* note 2, at xix–xxii.

6. WILHELM, *supra* note 2, at 90 (internal quotation marks omitted).

7. *Id.* at 90–91.

8. JUNG, *supra* note 1, at 208.

9. *See id.* at 346–48 (discussing conceptions of "God").

10. *See id.* at 347–48 (stating that positive or negative relationship to concepts such as "God" have psychological effects on an individual regardless of the actual existence or non-existence of "God").

understanding the past, present, and future of a specific area within federal criminal law: honest services mail fraud.[11] Honest services fraud is not, of course, steeped in the type of philosophical discussions that Wilhelm and Jung were engaged in, but its legal and factual history nonetheless demonstrate the concepts of constancy and change that they observed in their respective fields.[12]

Honest services fraud has often been used by the federal government to charge state and local public officials and employees with depriving their respective government entities and constituents of an intangible right to honest services.[13] In order to charge and convict an individual for violating this statute, the federal government does not have to prove a tangible loss to the victim, or even the contemplation of a tangible loss. For example, in 2007, Bruce Weyhrauch, an attorney and member of Alaska's House of Representatives, was charged with honest services fraud.[14] Specifically, the government's indictment said Weyhrauch had "devis[ed] a scheme and artifice to defraud and deprive the State of Alaska of its intangible right to [his] honest services . . . performed free from deceit, self-dealing, bias, and concealment."[15] The alleged crime occurred when Weyhrauch was negotiating his own future legal work with an Alaskan oil company while also taking legislative steps favorable to the company, without publicly disclosing this relationship and/or recusing himself.[16]

The potentially ambiguous nature of this type of fraud has troubled many over the years.[17] How can a victim be defrauded without losing any money or property?[18] What

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11. Like traditional mail fraud, honest services fraud generally involves a "scheme or artifice to defraud" another of money or property. 18 U.S.C. §§ 1341, 1346 (2006). Honest services fraud, however, does not require the aim of the "scheme" to involve a tangible loss. *See* 18 U.S.C. § 1346 ("[T]he term 'scheme or artifice to defraud' includes a scheme or artifice *to deprive another of the intangible right of honest services*." (emphasis added)).

12. See *infra* Part III for a discussion of the changing legal challenges, similar fact patterns, and common elements comprising the history of this federal crime.

13. This Comment focuses mainly on honest services fraud in the public sector; however, the theory and corresponding statute have been applied to numerous private sector situations. *See, e.g.*, United States v. Rybicki, 354 F.3d 124, 127 (2d Cir. 2003) (involving kickbacks between personal injury attorneys and insurance company representatives for favorable settlements); United States v. Bohonus, 628 F.2d 1167, 1169 (9th Cir. 1980) (charging insurance manager with mail fraud under theory he was disloyal as an employee when he forced pre-existing insurance client to kickback portion of its profits to remain a client). The private "honest services" theory has its own storied past and lively academic discussion. *See, e.g.*, David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 STAN. L. REV. 1371 (2008) (detailing long history of federal white-collar prosecutions and current use of honest services fraud to criminally charge individuals in areas such as private securities industry).

14. United States v. Weyhrauch, 548 F.3d 1237, 1239–40 (9th Cir. 2008), *vacated*, 130 S. Ct. 2971 (2010) (mem.). See *infra* notes 112–27 and accompanying text for a discussion of this case.

15. *Id.* at 1239 (internal quotation marks omitted).

16. *Id.*

17. *See, e.g.*, Brief for Petitioner at 38–39, *Skilling*, 130 S. Ct. 2896 (No. 08-1394) (arguing statute is unconstitutionally vague); Jack D. Arseneault & Joshua C. Gillette, *Federal Honest Services Mail Fraud: The Defining Role of the States*, N.J. LAWYER, Oct. 2008, at 37 (describing honest services fraud as "corked Louisville Slugger" that allows federal criminal law to reach conduct "otherwise inside the ballpark of legality"); Adam Liptak, *An Elusive Line Between 'Obnoxious' Dishonesty and the Criminal Kind*, N.Y. TIMES, Oct. 13, 2009, at A14 (pointing to vagueness and federalism concerns as two main "flaws" noted by critics of honest services fraud).

does it mean to deprive someone of their right to honest services?[19] Does a state official have to violate a state law to commit honest serves fraud, or does the federal statute impose its own code of conduct on state and local officials?[20] If so, how? These are some of the questions and concerns that have cropped up time and time again throughout the history of the crime. Most recently, the Supreme Court, in *Skilling v. United States*,[21] weighed in on the discussion by holding that honest services fraud only consists of "bribes and kickbacks."[22] But exactly what conduct constitutes a bribe or kickback? Does a state law violation still matter?[23] Should it? And on and on.[24]

The purpose of this Comment is to help (partially) shift the honest services fraud discussion away from criticizing the possible reach of this federal crime[25] or providing policy reasons to justify its use by federal prosecutors,[26] towards a discussion about the underlying values that have enabled prosecution of the offense to find such a broad base of support—executive, legislative, judicial, and public—over the years. More specifically, by re-telling the story of honest services fraud to include case facts from the early, not just recent, years and then identifying the consistent facts amidst the changing legal landscape, this Comment will demonstrate that a shared sense of what constitutes public corruption is the true guiding force in this area of federal criminal law.[27]

18. See *infra* Part III.A.1 for a discussion of appellate arguments waged by those convicted of honest services fraud during the time when the crime was built on an interpretation of the traditional mail fraud statute.

19. See *infra* Part III.A.2 for a discussion of the difficulties courts have had in coming up with a uniform definition of honest services fraud after its codification.

20. See *infra* Part II.D for a discussion of the circuit split over the proper role of state law in honest services fraud cases.

21. 130 S. Ct. 2896 (2010).

22. *Skilling*, 130 S. Ct. at 2907. See *infra* Part II.E for an overview of *Skilling*.

23. See *infra* Part III.A.3 for a discussion of post-*Skilling* legal questions and concerns.

24. When courts settle one question another one seems to arise in its place, oftentimes consisting of the same subject matter being examined in a slightly different light—a growth process, interestingly enough, not too unlike that of other disciplines. *See, e.g.*, MARTIN HEIDEGGER, BEING AND TIME 43–44 (John Macquarrie & Edward Robinson trans., Harper & Row, Publishers 1962) (1927) (explaining how present understanding of "being," which began in ancient Greece, had become obscured, largely through "tradition," so that old questions required new formulations).

25. *See, e.g.*, John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 464 (1998) (recommending more specific definition of honest services fraud to stop law from "degenerating into an impermissible common law crime").

26. *See, e.g.*, Michael K. Avery, Note, *Whose Rights? Why States Should Set the Parameters for Federal Honest Services Mail and Wire Fraud Prosecutions,* 49 B.C. L. REV. 1431, 1450–54 (2008) (arguing federal prosecution of local officials is justified because of wholesale corruption in certain areas of state and local government).

27. While it is beyond the scope of this Comment to actually demonstrate what the shared values are that underlie this area of the law, the Supreme Court's notion that "criminal punishment usually represents the moral condemnation of the community," United States v. Bass, 404 U.S. 336, 348 (1971), may be a good starting point. For instance, when Alexis de Tocqueville published the first volume of his classic commentary on nineteenth-century American life and government, he noticed certain values and ideas that seemed to form part of the foundation of many American laws and customs, such as equality among men and the notion that, unlike in an aristocracy, public officials were not seen as inherently better than the masses. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 3, 214 (Phillips Bradley ed., Vintage Books 1945) (1835). The

The Comment is organized as follows: Part II.A provides a general overview of the federal mail fraud statute. Part II.B is a brief chronicle of mail fraud cases involving public officials that did not always result in tangible losses, but which, nevertheless, federal district and appellate courts across the nation concluded were properly charged as federal crimes. Part II.C describes the interaction between the Supreme Court and Congress in 1987 and 1988 that gave birth to 18 U.S.C. § 1346, i.e. the "honest services" fraud statute. Part II.D provides an overview of the federal circuit split that arose over exactly how to define the deprivation of "honest services." Part II.E is a synopsis of *Skilling*, the Supreme Court decision that pared the honest services fraud statute down to only bribes and kickbacks, excluding the undisclosed conflict-of-interest theory.

Part III.A details the evolution of legal challenges to honest services fraud—past, present, and future—to demonstrate the continual change in this area of criminal law. Part III.B shows that, despite changes to the law, and despite theoretical concerns about the crime's near limitless reach, the crime of honest services fraud has consistently been applied to convict legitimately corrupt public officials. Finally, Part III.C argues that regardless of the precise legal terminology used in defining the crime, when a public official deceives the people or government he serves about a thing of value he received solely because of his public position, a prosecution and conviction for honest services fraud will find support from federal prosecutors, juries, courts, and Congress alike.

II. Overview

The following overview addresses the genesis, growth, and current state of honest services jurisprudence as it has been applied in the public sector.

A. *The Roots of the Tree*

Since honest services fraud is a sub-species of traditional mail fraud, an overview of mail fraud generally is instructive.[28] The federal mail fraud statute was enacted in 1872, and although it has been amended numerous times, the violation has essentially remained unchanged.[29] The most current version of the federal mail fraud statute reads as follows:

> Whoever, having devised or intending to devise *any scheme or artifice to defraud*, or for obtaining money or property by means of false or fraudulent pretenses . . . for the *purpose of executing such scheme or artifice or attempting so to do*, places in any post office or authorized depository for mail matter, any matter or thing whatever *to be sent or delivered by the*

successful prosecution of a public official may well rest, therefore, on the anger jurors feel when they learn that their neighbor—who they allowed to hold a public position—tricked them into believing he was serving the public good when he was really receiving things of value behind their backs that were only given to him because of the very position they gave him.

28. See *infra* Part II.C.2 for the specific statutory basis of the "honest services" language.

29. *See* United States v. Mandel, 591 F.2d 1347, 1360 (4th Cir.) (providing brief history of federal mail fraud statute), *aff'd by an equally divided court*, 602 F.2d 653 (4th Cir. 1979).

> *Postal Service* . . . or causes to be deposited . . . shall be fined under this title or imprisoned . . . .[30]

The mail fraud statute has two main elements: "(1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme."[31] Additionally, the Supreme Court has determined that the misrepresentation or concealment must be of a *material* fact.[32] The scheme does not, however, have to be successful for a crime to have taken place.[33]

In its over 100-year history, the mail fraud statute has been used to criminally charge individuals in a variety of situations,[34] and many courts have noted that Congress has purposely maintained the statute's broad reach "to further the purpose of the statute; namely, to prohibit the *misuse of the mails* to further fraudulent enterprises."[35]

But, despite the far-reaching scope of the statute, courts have developed certain limiting principles around each of the elements.[36] First, while a "scheme to defraud" typically includes any deceptive scheme contrary to the generally accepted moral standards of society, such as particular beliefs about honesty or fairness,[37] the government must also prove that a defendant had a "specific intent" to engage in a scheme "reasonably calculated to deceive persons of ordinary prudence and comprehension."[38] Second, the United States mails[39] must be used in execution of the

30. 18 U.S.C. § 1341 (2006) (emphases added). Many federal crimes are laid out in Title 18 of the United States Code; mail fraud falls within chapter sixty-three, entitled "Mail Fraud and Other Fraud Offenses," and includes, among other things, interstate wire fraud. *See* 18 U.S.C. §§ 1341–1351 (Supp. 2008) (defining numerous crimes of fraud). The language of the wire fraud statute is nearly identical to the mail fraud statute, except the fraud is perpetrated through the use of "wire, radio, or television communication in interstate or foreign commerce." 18 U.S.C. § 1343 (2006). For purposes of this Comment, therefore, all references to mail fraud are essentially interchangeable with wire fraud.

31. Pereira v. United States, 347 U.S. 1, 8 (1954).

32. Neder v. United States, 527 U.S. 1, 25 (1999).

33. *See, e.g.*, Blachly v. United States, 380 F.2d 665, 673 (5th Cir. 1967) (holding materiality of victims' loss was irrelevant because government was not even required to prove victims suffered actual damage or monetary loss).

34. *See, e.g.*, United States v. Diggs, 613 F.2d 988, 991–92 & n.4 (D.C. Cir. 1979) (mailing inflated paychecks to congressional staffers to pay staffers for doing personal work on behalf of defendant); Abbott v. United States, 239 F.2d 310, 311–12 (5th Cir. 1956) (mailing privileged geophysical maps listing a private company's oil interests to businessman who used maps to procure leases); Alexander v. United States, 95 F.2d 873, 875–76 (8th Cir. 1938) (mailing fictitious medical and chiropractic certificates to individuals who practiced medicine with false credentials).

35. United States v. Mandel, 591 F.2d 1347, 1360 (4th Cir.) (emphasis added) (quoting United States v. States, 488 F.2d 761, 764 (8th Cir. 1973)), *aff'd by an equally divided court*, 602 F.2d 653 (4th Cir. 1979).

36. *See, e.g.*, *id.* at 1360–61 (reviewing judicial interpretation of mail fraud elements); *see also* Christopher J. Stuart, *Mail and Wire Fraud*, 46 AM. CRIM. L. REV 813 (2009) (summarizing mail and wire fraud elements, defenses, and sentencing).

37. *Mandel*, 591 F.2d at 1360–61 (citing Parr v. United States, 363 U.S. 370, 389 (1960); Badders v. United States, 240 U.S. 391, 393 (1916); United States v. Edwards, 458 F.2d 875, 880 (5th Cir. 1972); Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958)); *see also* Fasulo v. United States, 272 U.S. 620, 628 (1926) ("[T]he phrase ['scheme or artifice to defraud'] is a broad one and extends to a great variety of transactions.").

38. United States v. Bohonus, 628 F.2d 1167, 1172 (9th Cir. 1980) (quoting Irwin v. United States, 338 F.2d 770, 773 (9th Cir. 1964)).

scheme to defraud, which means the defendant "does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended."[40] Further, the connection between the scheme to defraud and the mailings themselves must have actual substance;[41] the mailings should essentially be a "step toward receipt of the fruits of the scheme."[42]

The statutory elements of traditional mail fraud, and their corresponding common-law definitions, while admittedly broad, have proven capable of limiting the reach of federal prosecutors over the decades.[43]

B. *A Long, Slow Growth*

The road from traditional to honest services mail fraud stretches back many decades and is comprised of a rich array of factual scenarios worth surveying for a more complete picture of this area of criminal law.

1. The Seeds are Sown: 1930s and 1940s

In 1926, after the Kansas City College of Medicine went out of business, Date Alexander, the former custodian of records, started selling medical diplomas on his own to individuals who never went to the college.[44] The purchasers used the fake medical diplomas to practice medicine, perform surgeries, and give chiropractic care to unsuspecting members of towns and cities across the country.[45] This fraudulent scheme

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39. The mail fraud statute also makes it a crime to further the scheme using an interstate private or commercial carrier, such as FedEx. 18 U.S.C. § 1341 (2006). This Comment, for the sake of simplicity, will only make reference to "mail" fraud.

40. Pereira v. United States, 347 U.S. 1, 8–9 (1954) (citing United States v. Kenofskey, 243 U.S. 440 (1917)). The mail fraud statute also makes it a crime to further the scheme using an interstate private or commercial carrier, such as FedEx. This Comment, for the sake of simplicity, will only make reference to "mail" fraud.

41. *See* United States v. Buckner, 108 F.2d 921, 925 (2d Cir. 1940) (emphasizing that lexus must exist between scheme to defraud and use of mails).

42. United States v. Staszcuk, 502 F.2d 875, 880 (7th Cir. 1974) (citing United States v. Maze, 414 U.S. 395, 396–98 (1974) (holding invoices mailed by motels to credit card company were not sufficiently related to defendant's scheme to defraud, which involved using a stolen credit card at these same motels)).

43. *See, e.g.*, United States v. Thompson, 484 F.3d 877, 878, 882–83 (7th Cir. 2007) (overturning state employee's conviction because her potentially nefarious motives for selecting certain company for state contract was not "scheme to defraud" based on statutory language or case law); United States v. McNeive, 536 F.2d 1245, 1251 (8th Cir. 1976) (reversing city plumbing inspector's mail fraud conviction because his unsolicited acceptance of small gratuities from single plumbing contractor were never purposely hidden, did not effect his official acts, and were therefore not a "scheme to defraud" within meaning of statute); *Staszcuk*, 502 F.2d at 880–81 (overturning mail fraud conviction because mailings actually conflicted with defendant's scheme to defraud, and so could not possibly have furthered his scheme as required by law).

44. Alexander v. United States, 95 F.2d 873, 876 (8th Cir. 1938). While the defendants in *Alexander* were not public officials or employees, the case is helpful in demonstrating that long before the honest services fraud doctrine was officially adopted the theory existed that a criminal fraud could take place even where the victims did not suffer a provable tangible loss of money or property.

45. *Id.* at 875–76. The Eighth Circuit did not mention whether these con men actually hurt any unsuspecting patients with faulty medical treatment.

was carried out through the U.S. mail; in turn, Alexander and several others were charged with eight counts of mail fraud in the mid-1930s.[46]

On appeal, Alexander challenged the sufficiency of the indictment by claiming that he (1) did not defraud the unqualified practitioners because they knew they were paying for false diplomas, and (2) did not defraud the "public" because it was not clear that they had even seen or relied upon the bogus diplomas.[47] The court, however, disagreed and held that the scheme "had for its direct object the defrauding of the public," and that this was acceptable to support a federal mail fraud conviction.[48] Specifically, Alexander and his co-defendants devised a plan which lured members of the public into the offices of incompetent, potentially harmful, pseudo-doctors for sensitive medical procedures, and although Alexander did not directly deal with the public during the fraudulent scheme, the plan to issue fake diplomas would not have occurred without a "public" to victimize.[49]

In *Shushan v. United States*,[50] the Louisiana "public" suffered harm through the corrupting influence of kickbacks to some of its public officials in the early part of the 1940s. Abraham Shushan and several others were charged with mail fraud in connection with a scheme to inflate the price of municipal bonds purchased by the Orleans Levee District.[51] Shushan, a member of the Levee Board, was tasked with convincing the Governor of Louisiana to approve the purchase of the bonds; a co-defendant was a member of the Finance Committee that approved the purchase; and two other co-defendants sold the overpriced bonds.[52]

Shushan and his co-defendants challenged the mail fraud convictions on several grounds, claiming, among other things, that there was no "scheme to defraud" because they were not solely responsible for awarding the contracts, but instead were merely part of a larger process.[53] The court was not convinced, however, and stated that "[n]o trustee has more sacred duties than a public official and any scheme to obtain an advantage by corrupting . . . [must] be considered a scheme to defraud" within the meaning of the mail fraud statute.[54]

2. The "Honest Services" Language Emerges: 1970s

In the early 1970s, the former Governor of Illinois, Otto Kerner, and the former Illinois Director of Revenue, Theodore Isaacs, were convicted of numerous federal

46. *Id.* at 876.

47. *Id.* at 877.

48. *Id.* at 878.

49. *Id.*

50. 117 F.2d 110 (5th Cir. 1941), *rev'd on other grounds*, United States v. Cruz, 478 F.2d 408, 412 n.8 (5th Cir. 1973).

51. *Shushan*, 117 F.2d at 114.

52. *Id.*

53. *Id.* at 115.

54. *Id.*; *see also* United States v. Classic, 35 F. Supp. 457, 458 (E.D. La. 1940) (denying motion to dismiss mail fraud counts where local election commissioners were charged with election fraud because Congress has right to keep individuals from using mail to carry out fraudulent schemes, regardless of fact that such elections are matters left to state).

violations, including several counts of mail fraud.[55] The government's indictment specifically charged Kerner and Isaacs with "defrauding the State of Illinois and its citizens of . . . honest and faithful services" while performing their respective duties.[56]

Kerner and Isaacs were heavily involved, throughout the 1960s, with state regulation of the horse racing industry, including the allocation of racing dates to certain companies at specific race tracks.[57] During this same time period, Kerner and Isaacs were secretly given stock in a specific racing company, and used the influence of their public positions, both formally and informally, to advance the company's interests against its competitors in the racing industry.[58]

The fraudulent scheme in *Isaacs* was not so different from the scheme carried out in *Shushan* thirty years before (i.e., public officials, private businessmen, and official government actions coalescing to create a financial relationship hidden from public view), although, unlike *Shushan*, prosecutors in *Isaacs* specifically used the phrase "honest and faithful services" when describing the fraud perpetrated on Illinois *and* its citizens.[59]

In *Isaacs*, one of the challenges on appeal was that, without proof the "public" actually suffered a tangible loss from the actions of Kerner and Isaacs, the scheme was merely "constructive" and not actual fraud.[60] The Seventh Circuit, however, did not find any case law to support the notion that a "scheme to defraud" *must* result in tangible losses. It rejected the appellants' argument, therefore, and held that the potentially corrupting influence that purposely hidden financial relationships can have on public officials is a sufficient basis for finding a scheme fraudulent under the mail fraud statute.[61]

Although this "intangible rights" theory had been endorsed by courts throughout the country, the 1975 case of *United States v. Bush*[62] presented a fact pattern slightly different from all others. Earl Bush, former Press Secretary and Director of Public Relations for Chicago Mayor Richard J. Daley, was charged with mail fraud for an undisclosed financial relationship he maintained with an advertising company that had contracts with Chicago O'Hare International Airport. There were, however, no allegations of bribery, kickbacks, extortion, or any other violation of state law.[63]

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55. United States v. Isaacs, 493 F.2d 1124, 1131 (7th Cir. 1974).

56. *Id.* at 1149.

57. *Id.* at 1133–35.

58. *Id.*

59. *Compare id.* at 1149 (charging document specifically referenced "defrauding the State of Illinois and its citizens of the honest and faithful services of Kerner as governor"), *with Shushan*, 117 F.2d at 114–15 (prosecuting fraud to obtain "money and property" from Board of Levee Commissioners, with appellate court adding that "public" can be victim of scheme to defraud).

60. *Isaacs*, 493 F.2d at 1149. Constructive fraud is defined as an unintentional misrepresentation that causes another injury. By contrast, actual fraud requires a knowing misrepresentation. BLACK'S LAW DICTIONARY 685–66 (8th ed. 2004).

61. *Isaacs*, 493 F.2d at 1150; *see also* United States v. States, 488 F.2d 761, 763–66 (8th Cir. 1973) (upholding convictions of St. Louis political ward leaders who stuffed ballots at local elections by mailing in fictitious absentee votes because plain reading of mail fraud statute and case law affirmed "scheme to defraud" included deprivation of intangible rights).

62. 522 F.2d 641 (7th Cir. 1975).

63. *Bush*, 522 F.2d at 643, 646.

Again, the Seventh Circuit upheld the conviction, finding that Bush's concealment of his financial relationship was more than mere nondisclosure; he had a specific intent to defraud the Mayor and the City.[64] For years, Bush was simultaneously receiving his City of Chicago salary and his share of the profits from the advertising company with a City contract.[65] Bush was also an important advocate for the company with key people close to the Mayor, specifically those who were in charge of awarding the airport contracts.[66] The court emphasized that Bush's conduct did not end with these deceptive practices. In two consecutive years, when filling out his required personal financial disclosure forms with the Mayor's Office, Bush purposely left off his ownership interest in the advertising company.[67] In turn, the Seventh Circuit held Bush's actions were sufficient to constitute a "scheme to defraud" under the federal mail fraud statute because he had the requisite specific intent to defraud.[68]

Overall, the 1970s saw courts around the country upholding mail fraud convictions with similar fact patterns, where public officials deprived government entities and citizens of an intangible right to their honest and faithful services, irrespective of whether the government entities and general public suffered any tangible losses.[69]

3. The Affirmation: 1980s

During the 1980s, although defendants around the country were still challenging the "intangible rights" theory underlying their convictions, appellate courts continued to routinely affirm the convictions and approve the rationale on which the prosecutions were built.

For example, in *United States v. Barber*,[70] the former West Virginia Alcoholic Beverage Control Commissioner, J. Richard Barber, was convicted on numerous counts of mail fraud for his activities during the two years he held the position.[71] The West Virginia Alcoholic Beverage Control Commission owned and stocked a

64. *Id.* at 647–49.

65. *Id.* at 647–48.

66. *Id.*

67. *Id.* at 645.

68. *Id.* at 648–49.

69. *See, e.g.*, United States v. Mandel, 591 F.2d 1347, 1353–57, 1362–63 (4th Cir.) (upholding conviction of former Maryland Governor who deliberately concealed his financial interest in racetrack company while actively lobbying on company's behalf for racetrack-related legislation), *aff'd by an equally divided court*, 602 F.2d 653 (4th Cir. 1979); United States v. Brown, 540 F.2d 364, 375 (8th Cir. 1976) (finding St. Louis Building Commissioner deprived city of honest and faithful services by approving demolition contracts in exchange for kickbacks, disguised as rental payments, from construction company), *abrogated by* Dalton v. United States, 862 F.2d 1307, 1310 (8th Cir. 1988) (noting "intangible rights" theory was no longer viable based on Supreme Court holding in *McNally*, despite fact that "every federal court of appeals to consider the issue . . . had approved" the theory); United States v. Keane, 522 F.2d 534, 538, 551 (7th Cir. 1975) (holding Chicago Alderman's pressure on other City officials to buy certain properties which he secretly owned was "scheme to defraud"); *see also* United States v. Clapps, 732 F.2d 1148, 1153 (3d Cir. 1984) (listing federal appellate decisions from 1940s to early 1980s that upheld sufficiency of "scheme to defraud" others of "intangible rights").

70. 668 F.2d 778 (4th Cir. 1982).

71. *Barber*, 668 F.2d at 780–81.

warehouse of alcohol, which liquor company representatives used for promotional purposes; after "withdrawing" from the warehouse, the liquor companies would replenish the stock.[72] Barber, like other commissioners before him, used the warehouse for his own fraudulent purposes by withdrawing liquor for himself and sending false bills to liquor companies to replenish the warehouse stock.[73]

Barber challenged the mail fraud convictions on numerous grounds, including the vagueness of the "citizens' right to [his] honest and faithful performance of . . . duties" and the sufficiency of the evidence to support his "scheme to defraud."[74] The Fourth Circuit rejected his contentions. It noted that courts had routinely held the "honest services" language to be "clearly and unambiguously spelled out," and that the language certainly included sending false bills to liquor companies effectively limiting the public's ability to monitor the activities of a state enterprise.[75] The *Barber* court thus efficiently disposed of the defendant's appellate challenges using the routine methods and rationales from other courts around the country.[76]

C. *The Pruning Begins*

1. The Supreme Court Makes the First Move: *McNally v. United States*

Prior to 1987, federal mail fraud cases fell within two broad categories: fraudulent schemes that sought to deprive another of tangible property, and deceptive schemes that sought to deprive another of intangible rights (e.g., political rights).[77] In *McNally v. United States*,[78] the Supreme Court abruptly ended the ability of federal prosecutors to charge individuals with mail fraud where the scheme sought to deprive another of intangible rights or interests (i.e., where the victim of the fraudulent scheme suffered no tangible loss of money or property).[79]

McNally arose from conduct committed by high-ranking members of the Kentucky state government during the 1970s.[80] James Gray, Secretary of Public Protection and Regulation and later Secretary of the Governor's Cabinet, along with Charles McNally, a private businessman, were charged with conspiracy and mail fraud for a scheme "to defraud the citizens and government of Kentucky of their right to have

72. *Id.* at 781.

73. *Id.*

74. *Id.* at 784–85.

75. *Id.* at 785.

76. *See id.* at 784–85 (dispensing with appellant's argument after brief recitation of law and facts).

77. United States v. McNeive, 536 F.2d 1245, 1248–49 (8th Cir. 1976).

78. 483 U.S. 350 (1987), *superseded by statute*, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (1988) (codified as amended at 18 U.S.C. § 1346 (2006)).

79. *See McNally*, 483 U.S. at 360 ("[W]e read [the mail fraud statute] as limited in scope to the protection of property rights."). Interestingly, seven years prior to *McNally*, a law student from the University of Chicago argued for the position ultimately adopted by the Court. *See* W. Robert Gray, Comment, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. CHI. L. REV. 562, 584, 587 (1980) (arguing mail fraud statute should be "limited to fraudulent conduct that results in the acquisition of money or property from the victim").

80. *McNally*, 483 U.S. at 352–53.

the Commonwealth's affairs conducted honestly."[81] A prominent Kentucky Democrat, Howard Hunt,[82] was given "*de facto* control" over the Commonwealth's choice of outside insurance agencies. Without the knowledge of most Commonwealth officials, and the citizens themselves, Hunt entered into a secret agreement with a particular insurance company which required funneling a certain amount of the Commonwealth's insurance commissions to other companies of his choosing.[83] Over the course of four years, $851,000 of the Commonwealth's insurance commissions were directed by Hunt to twenty-one different companies, including a shell company that Hunt, Gray, and McNally had created for the *sole* purpose of receiving the commissions.[84]

While the Supreme Court found no problem with the evidence presented by the government at trial, it disagreed—contrary to numerous circuits throughout the country[85]—that the mail fraud statute could protect the rights of citizens from dishonest and unfair dealings carried out by their public servants.[86] Specifically, the Court stated that the intangible rights theory "leaves [the mail fraud statute's] outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials."[87] Accordingly, the Court noted that "[i]f Congress desires to go further, it must speak more clearly than it has."[88]

2. Congress Responds: 18 U.S.C. § 1346

On November 18, 1988, approximately one year after the *McNally* decision was issued, Congress took up the Supreme Court's challenge, and passed legislation codifying the "honest services" fraud theory.[89] The language of the statute has remained unchanged since its enactment, and states the following: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[90]

When Congress passed § 1346, there were various contemporaneous statements made that indicated the legislation was enacted to return the case law to pre-*McNally* days.[91] In a way, therefore, the *McNally* holding was an anomaly, a one-year interruption in the prosecution of individuals for depriving the public of their right to honest and fair government dealings. On the other hand, § 1346 changed the question presented by defendants on appeal, from *how* could the mail fraud statute reach a

81. *Id.* at 353.

82. Howard Hunt was not part of the case before the Supreme Court because he had already pled guilty to mail and tax fraud charges. *Id.*

83. *Id.* at 352.

84. *Id.* at 353.

85. *See id.* at 362–63 & n.1 (Stevens, J., dissenting) (citing cases from First, Second, Fourth, Seventh, and Eighth circuits upholding "intangible rights" theory for prosecution of government officials).

86. *Id.* at 360–61 (majority opinion).

87. *Id.* at 360.

88. *Id.*

89. Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (1998) (codified as amended at 18 U.S.C. § 1346 (2006)).

90. 18 U.S.C. § 1346 (2006).

91. *See* United States v. Brumley, 116 F.3d 728, 742–43 (5th Cir. 1997) (Jolly, J., dissenting) (discussing legislative history to discern Congress's intent in enacting § 1346).

deceptive scheme where the victims suffered no tangible loss, to how are a victim's intangible right to honest services *actually deprived*[92]—a question that would dominate the discussion for over twenty years.

D. The Pruning Continues

The principle of legality is part of the foundation of American criminal law.[93] The principle essentially means "no punishment without law."[94] Specifically, it demands fair warning (i.e., notice) of the conduct necessary to violate a criminal law, and requires limits on the discretion available to law enforcement, prosecutors, and the judiciary in enforcing criminal laws.[95] The legality of honest services fraud convictions dominated the discussion from the time § 1346 was enacted until 2010.[96] The circuit split that emerged on when a conviction for honest services fraud is justified was represented by the differing positions of the Fifth and Ninth Circuits.

1. State-Law Limiting Principle: Fifth Circuit and Its Ally

In *United States v. Brumley*,[97] the Regional Associate Director for the Texas Industrial Accident Board (TIAB), Michael Brumley, was charged with various federal crimes, including three counts of honest services wire fraud, all resulting from his relationship with a local attorney.[98] Brumley, in his role at the TIAB, was part of the decisionmaking process concerning the validity of worker compensation claims and damage awards arising therefrom; he dealt primarily with claimants, lawyers, and different insurance carriers.[99] Over the course of five years, Brumley received seventy wire transfers totaling $86,730 from a workers' compensation attorney; the attorney and his staff appeared regularly in front of Brumley and other members of the TIAB, but neither Brumley nor the attorney ever publicly disclosed their financial relationship.[100]

While the government proved the monies received by Brumley were not "loans," as originally claimed, there was no evidence that the TIAB or the citizens of Texas

92. *Compare* United States v. Bush, 522 F.2d 641, 648 (7th Cir. 1975) (challenging theory that mail fraud could include situation where City of Chicago employee purposely hid his financial interest in company doing business with City without first showing City lost money on contracts), *with Brumley*, 116 F.3d at 730 (claiming hidden financial relationship between Texas employee and private attorney was merely an "ethical lapse[]" in judgment, not criminal conduct).

93. SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 135 (8th ed. 2007).

94. *Id.*

95. *Id.* at 136; *see also* Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966) ("It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . . .").

96. See *infra* Part II.E for a discussion of *Skilling v. United States*, 130 S. Ct. 2896 (2010), the most recent Supreme Court decision to change the nature of the honest services fraud discussion.

97. 116 F.3d 728 (5th Cir. 1997).

98. *Brumley*, 116 F.3d at 730–31.

99. *Id.*

100. *Id.* at 731.

actually lost any money because of the undisclosed financial relationship, or that any of Brumley's decisions were actually affected by the hidden transactions.[101]

On appeal, Brumley challenged the validity of the intangible rights theory, but was quickly struck down by the court, which reasoned that Congress clearly gave its approval of the doctrine when it passed § 1346.[102] The court, however, went further. Partly in response to the dissent, the court stated that when an individual is charged with "honest services" fraud, the government must prove the individual's conduct violated a state law.[103] This position—which the Third Circuit adopted as well[104]—was representative of the more conservative view of honest services fraud, namely, that a public official only has a fiduciary duty to the public (i.e., a duty to provide "honest services") when state law imposes that duty upon him.[105]

United States v. Murphy[106] represented a more nuanced example of the state-law limiting principle. In *Murphy*, the former Chairman of New Jersey's Passaic County Republican Party, Peter Murphy, was convicted of three counts of honest services fraud, along with Travel Act violations.[107] The allegedly fraudulent scheme was carried out when Murphy used his political influence over County officials to arrange approximately $1.2 million in service contracts for a private company, which in turn funneled $72,879 of its contract revenue to a group of four individuals, selected by Murphy, who performed no work.[108]

The government prosecuted Murphy under several theories, one of which alleged Murphy *himself* deprived Passaic County of its right to his "honest services."[109] Chief Judge Becker, writing for the court, disagreed with the prosecution's theory, however, and found reversible error in the jury instructions, because there was no state or local

101. *Id.* at 735.

102. *Id.* at 732.

103. *Id.* at 734. Since Brumley did violate state law, the legality of his actual conduct was not a real issue in this case; the Fifth Circuit instituted the state-law-limiting principle with future cases in mind. *See id.* at 735 (noting Brumley's conduct was criminal offense in Texas, and so "[t]he tension inherent in federal criminalization of conduct by state officials innocent under state law is absent here").

104. The Third Circuit has held on numerous occasions that when a public official fails to disclose a financial conflict of interest required by state law and takes official action on behalf of the undisclosed party, the conduct is sufficient for an honest services fraud violation. Unlike *Brumley*, however, it has not explicitly held that a violation of state law is necessary. *E.g.*, United States v. Kemp, 500 F.3d 257, 283 (3d Cir. 2007); United States v. Murphy, 323 F.3d 102, 117 (3d Cir. 2003); United States v. Panarella, 277 F.3d 678, 693, 699 n.9 (3d Cir. 2002).

105. *See id.* at 733–34 (explaining that "uncertainty" exists as to how honest services fraud statute defines duties owed by state officials to their respective states, and concluding that duty is appropriately derived from state law).

106. 323 F.3d 102 (3d Cir. 2003).

107. *Murphy*, 323 F.3d at 103–04. In this instance, the Travel Act counts were based on interstate mailings of proceeds obtained in violation of a New Jersey bribery statute. *Murphy*, 323 F.3d at 108. The Travel Act is codified at 18 U.S.C. § 1952 (2006).

108. *Murphy*, 323 F.3d at 107–08. The four individuals were technically an advisory panel to the private company doing the actual work with the county. In reality, however, the only "work" they did was meet to collect their checks. Id.

109. *Id.* at 104.

law which gave the public a "right" to have Murphy (a non-public official) conduct his affairs in a certain manner.[110]

By relying upon state and local governments to establish the requisite duties for their public officials, the Third and Fifth Circuits attempted to address the oft-repeated worry that, because the text of § 1346 is extremely vague, public officials do not have "fair warning" of potentially criminal conduct.[111]

2. Federal Law Is Sufficient: The Other Circuits

The Ninth Circuit was representative of the other end of the spectrum. In *United States v. Weyhrauch*,[112] the court explicitly held that a state-law violation was not required for a public official to be convicted of honest services fraud.[113] Bruce Weyhrauch, an Alaskan attorney and state representative, was charged with honest services fraud relating to an undisclosed financial relationship with two Alaskan oil executives of the VECO Corporation.[114] While Weyhrauch was a member of the state legislature, negotiations took place to change the way Alaska taxed oil production within its borders.[115] The government alleged that Weyhrauch took official actions at the direction of the VECO executives, such as "maneuvering the legislation" and giving the executives inside information about the legislative process, in exchange for the promise of future legal work from the company.[116]

The Ninth Circuit went through several steps before reaching its conclusion that a state law violation was not required for an individual to be convicted of honest services

110. *Id.* at 104–05, 117.

111. *See* United States v. Brumley, 116 F.3d 728, 733–34 (5th Cir. 1997) (acknowledging some defendants may complain "they were not on notice that Congress criminalized their conduct when it revived the honest-services doctrine," and addressing this complaint by grounding violation in state law); *see also* George D. Brown, *Should Federalism Shield Corruption? Mail Fraud, State Law and Post-*Lopez *Analysis*, 82 CORNELL L. REV. 225, 277 (1997) (noting broad definition of "honest services" has led to "a kind of federal common law" that may be problematic with pro-federalist Supreme Court); Avery, *supra* note 26, at 1457–58 (arguing *Brumley* court's requirement is most effective means of ensuring federal prosecutors respect due process and federalism concerns inherent in honest services fraud prosecutions).

112. 548 F.3d 1237 (9th Cir. 2008), *vacated per curiam*, 130 S. Ct. 2971 (2010) (mem.).

113. *Weyhrauch*, 548 F.3d at 1245–46.

114. *Id.* at 1239.

115. *Id.*

116. *Id.* Mr. Weyhrauch's case never made it to trial because of a series of intervening events. First, the government initiated an interlocutory appeal because of the district court's pretrial ruling disallowing the government from presenting evidence relating to Alaskan conflict-of-interest laws (since those laws did not explicitly prohibit Weyhrauch's conduct). *Id.* at 1240. The relevancy, and therefore admissibility, of evidence concerning state law violations has often been a pretrial issue in these types of cases. *See, e.g.*, United States v. Monaghan, 648 F. Supp. 2d 658, 659–61 (E.D. Pa. 2009) (challenging proposed testimony of Pennsylvania legal ethics expert in case where public transit employee received undisclosed cash certificates from salesman doing business with public entity). The *Weyhrauch* case then went to the Supreme Court on the state law issue, and, although the Court never directly answered the state law question, was eventually remanded to the Ninth Circuit, 130 S. Ct. 2971 (2010) (mem.), for further evaluation in light of the Court's holding in *Skilling v. United States*, 130 S. Ct. 2896 (2010). Mr. Weyhrauch ultimately pled guilty to a misdemeanor. Kim Murphy, *Corruption Case Against Former Alaska Legislator Crumbled*, L.A. TIMES (Oct. 22, 2011), http://articles.latimes.com/2011/oct/22/nation/la-na-alaska-corruption-weyhrauch-20111023.

fraud for non-disclosure of material information.[117] The court noted that prior to *McNally* the Ninth Circuit had accepted the "intangible rights" mail fraud theory; *McNally* only briefly interrupted the case law before Congress reinstated the doctrine through § 1346.[118] The *Weyhrauch* court acknowledged, however, that the main difficultly in these cases was "'that the concept of 'honest services' is vague and undefined by the statute. So, as one moves beyond core misconduct covered by the statute (e.g., taking a bribe for a legislative vote), difficult questions arise giving coherent content to the phrase through judicial glosses.'"[119] The court noted that other federal circuits had attempted to define the concept by either requiring a state law violation to prove fraud under § 1346,[120] or not requiring a direct link between state and federal law and allowing the "uniform federal standard inherent in § 1346" to define the violation.[121] Even among the circuits rejecting the state-law requirement, there were differing positions with respect to the appropriate outer limits of the offense.[122]

After acknowledging the circuit split, the *Weyhrauch* court discussed the reasons why limiting the reach of § 1346 is desirable. As the court noted, these include: (1) preventing federal prosecutors from exerting too much influence over the ethics of state and local government; (2) ensuring that public officials have "fair warning" of what constitutes criminal conduct; (3) establishing firm boundaries so that every unethical act committed by a public official does not lead to a criminal prosecution; and (4) limiting selective, possibly partisan, enforcement against public officials.[123] The court readily admitted that the state-law violation principle essentially sat each of these concerns, but, in analyzing pre-*McNally* Ninth Circuit case law and the legislative history behind § 1346, it found no real support for limiting a *federal* criminal statute by requiring reliance on various *state* regulations, and thereby limiting the congressional right to uniformly regulate and enforce fraudulent use of the U.S. Postal Service across all fifty states.[124]

The *Weyhrauch* court also added another, often overlooked, rationale for allowing federal honest services fraud to remain self-defining: the legitimate federal interest in the honest and fair operation of state and local governments.[125] Federal and state

117. *Id.* at 1243–47. Since Weyhrauch's actions were not expressly excused by Alaskan law, the court refrained from opining on the effect a state law would have if it actually "condone[d] or excuse[d]" the conduct at issue. *Id.* at 1245 n.5.

118. *Id.* at 1243.

119. *Id.* (quoting United States v. Urciuoli, 513 F.3d 290, 294 (1st Cir. 2008)).

120. *Id.* at 1243–44. See *supra* Part II.D.1 for a discussion of the Third and Fifth Circuits' adoption of this approach.

121. *Weyhrauch*, 548 F.3d at 1244 (citing United States v. Sorich, 523 F.3d 702, 712 (7th Cir. 2008); United States v. Urciuoli, 513 F.3d at 298–99; United States v. Walker, 490 F.3d 1282, 1299 (11th Cir. 2007); United States v. Bryan, 58 F.3d 933, 942 (4th Cir. 1995)).

122. *Id.* (citing *Sorich*, 523 F.3d at 708 (holding fraudulent scheme must involve public official who intended to personally gain from undisclosed conflict of interest); United States v. Cochran, 109 F.3d 660, 667 (10th Cir. 1997) (stating there must be material breach of public official's duty, with specific intent to defraud, for conduct to support § 1346 violation)).

123. *Id.*

124. *Id.* at 1245–46.

125. *Id.* at 1246.

governments do not operate in mutually exclusive domains; state regulations often affect national and international industries, such as banking, transportation, oil, and gas. How the states encourage or limit these industries, therefore, has an indirect effect on federal tax revenues and budgeting.[126]

In the end, the *Weyhrauch* court officially adopted the two broad definitional categories which other circuits had used for honest services fraud where the state law limiting principle was rejected: (1) bribery of a public official or (2) an undisclosed financial relationship between a public official and an individual or entity, where the public official has some type of official relationship with that same individual or entity, (i.e., a hidden and material conflict of interest).[127]

E. The Pruning Is Complete (For Now)

In 2009, honest services fraud jurisprudence took another momentous turn when the Supreme Court granted certiorari to resolve questions posed by three honest services fraud cases—two originating in the private-sector[128] and one involving a public official.[129] Although the Court began the term with the intention, presumably, of answering the question posed by the circuit split—whether a state law violation is required for a public official to be convicted of honest services fraud for non-disclosure of material information[130]—it ended by answering the much broader question, posed by the petitioners in *Skilling v. United States*,[131] of whether § 1346 was void for vagueness.

While the *Skilling* Court held that the honest services fraud statute was "not unconstitutionally vague," it limited its definition to include "only bribery and kickback schemes."[132] The Court did not enter into a lengthy discussion to precisely

126. *Id.* This type of rationale, while not often utilized in honest services fraud jurisprudence, has been employed by the Supreme Court when discussing other federal criminal statutes arising, for example, under Congress's spending power, which effect state and local officials. *See, e.g.*, Sabri v. United States, 541 U.S. 600, 600 (2004) ("Congress has Spending Clause authority . . . to assure that taxpayer dollars appropriated under that power are in fact spent for the general welfare, rather than frittered away in graft or upon projects undermined by graft.").

127. *Weyhrauch*, 548 F.3d at 1247.

128. United States v. Skilling, 130 S. Ct. 393 (2009) (mem.), *granting cert. to* 554 F.3d 529 (5th Cir. 2009); United States v. Black, 129 S. Ct. 2379 (2009) (mem.), *granting cert. to* 530 F.3d 596 (7th Cir. 2008). *See generally The Supreme Court, 2009 Term—Leading Cases, Federal Statutes and Regulations: Honest Services Fraud, Covered Offenses*, 124 HARV. L. REV. 360 (2010) [hereinafter *The Supreme Court, 2009 Term*] (providing brief background on facts leading to conviction of Jeffrey Skilling, former Enron CEO, and Conrad Black, former Hollinger International CEO, and analyzing Court's holdings).

129. United States v. Weyhrauch, 129 S. Ct. 2863 (2009) (mem.), *granting cert. to* 548 F.3d 1237 (9th Cir. 2008).

130. *Id.* at 2863. The Court ultimately vacated and remanded Weyhrauch's case to the Ninth Circuit in light of its *Skilling* decision. Weyhrauch v. United States, 130 S. Ct. 2971 (2010) (per curiam).

131. Brief for Petitioner at i, Skilling v. United States, 130 S. Ct. 2896 (2010) (No. 08-1394).

132. Skilling v. United States, 130 S. Ct. 2896, 2933 (2010). Because the Court did not deal directly with the necessity, or lack thereof, of a state-law violation, some commentators speculate as to what role, if any, a public official's violation of state law will have in future honest services fraud cases. *See, e.g.*, Sara Sun Beale, *An Honest Services Debate*, 8 OHIO ST. J. CRIM. L. 251, 271 (2010) (noting how, contrary to expectations of academia, federalism issue inherent in honest services fraud cases was not addressed by *Skilling* Court); Dane C. Ball, *The Post-*Skilling *Battle That Could Decide the War*, WHITE COLLAR CRIME PROF BLOG (Oct. 7,

define these terms, but it did offer some guidance by citing other statutes prohibiting bribes and kickbacks where federal officials are involved.[133] The Court reached its decision by briefly retracing the development of the honest services fraud doctrine.[134] Throughout its analysis, the Court repeatedly noted that most honest services fraud cases in the public sector have involved bribes or kickbacks.[135] It reasoned, therefore, that narrowing the statute to criminalize only that type of conduct was both appropriate[136] and faithful to congressional intent.[137]

The Court explicitly held that honest services fraud—in its current form—does not include "conflict-of-interest cases."[138] And, perhaps anticipating a congressional response similar to what happened after *McNally*, the Court strongly cautioned Congress to take great care in drafting any language that might criminalize conflict-of-interest scenarios given the inherent vagueness concerns allegedly plaguing those types of cases over the years.[139]

2010), http://lawprofessors.typepad.com/whitecollarcrime_blog/2010/10/the-post-skilling-battle-that-could-decide-the-war.html (noting that post-*Skilling*, "[p]rosecutors and criminal defense attorneys are . . . fighting over questions like: What kind of 'fiduciary duty' is required—one created by state or federal law, contract, or simply a relationship of trust?").

133. *See Skilling*, 130 S. Ct. at 2933–34 (citing federal bribery statute, 18 U.S.C. § 201(b), prohibiting individuals from "offer[ing] or promis[ing] anything of value to any public official . . . with intent to influence any official act," and 41 U.S.C. § 52(2), which defines "kickback" as "any . . . thing of value . . . which is provided . . . to [enumerated persons] for the purpose of improperly obtaining or rewarding favorable treatment in connection with [enumerated circumstances]").

134. *Id.* at 2926–29.

135. The Court, for example, characterized *Shushan v. United States*, 117 F.2d 110 (5th Cir. 1941), as a case involving "a public official who allegedly accepted bribes from entrepreneurs in exchange for urging city action beneficial to the bribe payers." *Id.* at 2926. The Court also noted the Ninth Circuit's observation that most cases up to that point had involved bribery. *Id.* (citing United States v. Bohonus, 628 F.2d 1167, 1171 (9th Cir. 1980)). It was the amicus brief filed by Northwestern Law Professor Albert W. Alschuler, however, that advocated turning this observation into the crime's defining principle. *Id.* at 2933 (citing Brief of Albert W. Alschuler as Amicus Curiae in Support of Neither Party at 28–29, *Weyhrauch*, 130 S. Ct. 2971 (No. 08-1196)). In a brief interview, Professor Alschuler pointed out that none of the parties before the Court were advocating his position—honest services fraud should encompass only bribery or kickback schemes—nor had any lower court taken this view of the honest services fraud statute despite hundreds of decisions dealing with its interpretation. Hilary Hurd Anyaso, *Friend of the Court: Law Professor Brings Clarity to Supreme Court Decision on Anti-corruption Law*, NW. U. NEWS CTR. (July 7, 2010), http://www.northwestern.edu/newscenter/stories/2010/07/alschuler.html.

136. *Skilling*, 130 S. Ct. at 2931 n.43 (explaining that "paring down" federal statutes has not only been done before but actually "respects the legislature" in certain instances).

137. *See id.* at 2931 ("[T]here is no doubt that Congress intended § 1346 to reach *at least* bribes and kickbacks.").

138. *Id.* at 2932.

139. *See id.* at 2933 n.44 (listing unanswered questions Court had in response to government's attempt at formulating conflict-of-interest clause in appellate brief). Until *Skilling*, federal circuits had held that some form of undisclosed conflict of interest on the part of a public official was sufficient to violate the honest services fraud statute. *Id.* at 2932. The following is an example of a pre-*Skilling* jury instruction, given by a New Jersey district court in a conflict-of-interest scenario involving former Newark Mayor Sharpe James:

> Since honest services mail fraud does not require a scheme to defraud another to obtain money or property, I will now instruct you on what a scheme to defraud another of honest services means . . . . [T]he right to honest services is the right that comes from a relationship of trust that one forms with another individual or with an institution. This is known in the law as a fiduciary relationship. [A]

III. DISCUSSION

Honest services fraud, in some form, has been around for a long time.[140] While federal prosecutors are solely responsible for charging violations of the statute, they are just one component of the justice system—juries comprised of local citizens issue the verdicts;[141] district court judges from around the country preside over the trials; appellate court judges affirm the convictions;[142] Supreme Court justices have largely agreed with those interpretations;[143] and Congress has never once restricted the reach of the crime.[144] While some see honest services fraud as difficult to pin down or on the verge of being abused by federal prosecutors,[145] prosecution of the offense appears to have struck a chord with a broad range of American society.

Regardless of the specific way in which honest services fraud prosecutions are characterized, this Discussion contends that when public officials deceive the public or the government about a thing of value they receive because of their public positions, the federal statute will continue to find ample support among juries, courts, and Congress, not just federal prosecutors.[146] Despite the Supreme Court's recent narrowing of the statute's reach, a factual analysis of decades of cases across changing legal frameworks suggests that corrupt public officials will continue to be rightfully

> fiduciary is prohibited from acting to enrich himself on behalf of the principal. Since the fiduciary acts and speaks for the principal, the fiduciary also owes the principal that he serves a duty of frankness and candor in matters that are of material importance to the principal . . . . A public official is a fiduciary for the public and the government he serves . . . [and] owes a duty of honest, faithful and disinterested service to the public and that official's public employer.

United States v. Riley, 621 F.3d 312, 323 n.15 (3d Cir. 2010) (alterations in original) (omissions in original).

140. See *supra* Part II.B.1 for a description of mail fraud cases dealing with honest services dating as far back as the 1930s.

141. For example, Michael Brumley was tried and convicted in the Eastern District of Texas, United States v. Brumley, 116 F.3d 728, 730 (5th Cir. 1997), Richard Barber was convicted in the Southern District of West Virginia, United States v. Barber, 668 F.2d 778, 780–81 (4th Cir. 1982), and Earl Bush was convicted in the Northern District of Illinois, United States v. Bush, 522 F.2d 641, 642 (7th Cir. 1975).

142. See *supra* note 69 and accompanying text for a discussion of the unanimity among federal appellate courts prior to 1987 that mail fraud convictions can be sustained where public officials deprive citizens of the right to honest services. *See also Skilling*, 130 S. Ct. at 2932 (observing that federal circuits had accepted some form of undisclosed conflict-of-interest theory of honest services fraud, a fairly expansive reading of the statute).

143. See *supra* Part II.E for a discussion of the *Skilling* Court's affirmance of the main theory—bribes and kickbacks—used in honest services fraud prosecutions.

144. See *supra* Part II.A for a brief overview of the relatively unchanging federal mail fraud statute enacted in 1872. See *supra* Part II.C.2 for a discussion of the codification of the honest services fraud theory in 1988.

145. *See, e.g.*, Brown, *supra* note 111, at 277 (stating that honest services fraud "knows few limits" and has become "a kind of federal common law"); Coffee, *supra* note 25, at 464 (arguing that definition of honest services fraud suffers from lack of specificity). See *infra* Part III.A for a complete description of the arguments advanced against honest services fraud over the past several decades.

146. See *infra* Part III.C for an analysis of cases with and without the presence of these facts under the old and new standards of honest services fraud.

convicted of honest services fraud when the elements of deception and financial benefit owing to a public position are both present.[147]

A. Change: Legal Challenges to Honest Services Fraud Charges

For about seventy years, the strategy used by those appealing their traditional or honest services mail fraud convictions has been the same: challenge the ambiguity of the statutory language, which initially centered on "scheme to defraud,"[148] and when Congress foreclosed that option in 1988, "honest services."[149] These challenges have produced three distinct eras in honest services fraud jurisprudence: pre-*McNally*, post-§ 1346, and post-*Skilling*.

1. Pre-*McNally*: How Can Fraud Not Involve Lost Money or Property?

Prior to 1987, public officials convicted of mail fraud would often challenge their convictions by essentially asking if it was possible for them to be guilty of a federal crime when the alleged victim suffered no tangible loss; in short, how was it possible for "fraud" to exist without the loss of money or property?[150] Courts were forced to answer whether the "scheme to defraud" required a certain *result*. Each court that answered this question arrived at the same conclusion: the scheme does not have to reach any particular end.[151]

Courts offered various justifications for the broad reach of the statute, such as Congress's legitimate right and desire to protect the mail from being used to carry out fraudulent activities,[152] and the need to maintain a certain level of generality when dealing with definitions of fraud because "'[t]he law does not define fraud; it needs no definition. It is as old as falsehood and as versable as human ingenuity.'"[153] Prior to *McNally*, every federal circuit that addressed the question answered in the

147. See *infra* Part III.B for a discussion of the fact-intensive analyses used by Justice Stevens in *McNally* and the majority in *Skilling*.

148. *See, e.g.*, United States v. Isaacs, 493 F.2d 1124, 1149 (7th Cir. 1974) (challenging theory that "scheme to defraud" could include situation where State of Illinois was not defrauded "out of something of definable value, money or property" (internal quotations marks omitted)); United States v. Buckner, 108 F.2d 921, 925 (2d Cir. 1940) (attacking indictment for "fail[ing] to specify the precise character of each fraud").

149. *See, e.g.*, *Skilling*, 130 S. Ct. at 2928 ("[T]he phrase 'the intangible right of honest services,' [Skilling] contends, does not adequately define what behavior it bars."); United States v. Sorich, 523 F.3d 702, 711 (7th Cir. 2008) (noting Sorich's allegation that "government's interpretation of [§ 1346] is open to prosecutorial overreaching"); United States v. Brumley, 116 F.3d 728, 730 (5th Cir. 1997) (referring to Brumley's allegation that indictment failed to charge conduct that was actually federal fraud).

150. *E.g.*, *Isaacs*, 493 F.2d at 1149; United States v. States, 488 F.2d 761, 763–64 (8th Cir. 1973).

151. *See, e.g.*, *Isaacs*, 493 F.2d at 1149–50 ("[M]ail fraud statute is not restricted in its application to cases in which the victim has suffered actual monetary or property loss."); *States*, 488 F.2d at 764 (explaining there was no common law or legislative history to support excluding intangible losses).

152. United States v. Keane, 522 F.2d 534, 544 (7th Cir. 1975) (citing Parr v. United States, 363 U.S. 370, 389 (1960)).

153. *States*, 488 F.2d at 764 (alteration in original) (quoting Blachly v. United States, 380 F.2d 665, 671 (5th Cir. 1967)).

affirmative—federal mail fraud can exist even though the victim suffers no tangible loss.[154]

The *McNally* Court said no, however.[155] The Court essentially felt uncomfortable with what it perceived as the government's broad interpretation of "scheme to defraud"[156] and therefore did not believe the thinly worded mail fraud statute would be an appropriate guide for future prosecutions if it was allowed to reach intangible losses.[157]

2. Post-§ 1346: What Does "Honest Services" Actually Mean?

But then Congress said yes.[158] After 1988, challenges to honest services fraud convictions were brought before courts under an entirely differently guise. Individuals could no longer challenge their convictions under the theory that intangible losses were outside the reach of federal prosecutors—Congress closed the door on that argument when it codified the theory. Instead, the question shifted to the inherent ambiguity of the phrase "deprive another . . . of honest services" in § 1346.[159] The underlying question on appeal became: What is the exact nature of the relationship between the accused and the victim that enables conduct to be categorized as criminal when the victim has suffered no tangible loss of money or property.[160]

Justice Scalia, in his dissent from the Court's denial of certiorari in *Sorich v. United States*,[161] provided a concise summary of the problems some saw in the statute's lack of guidance for prosecutors, courts, and the public during this era.[162] *Sorich* was a case from the Seventh Circuit that affirmed the honest services fraud conviction of

154. McNally v. United States, 483 U.S. 350, 362–364 (1987) (Stevens, J., dissenting). Of course, not everyone agreed with this interpretation. *See, e.g.*, Gray, *supra* note 79, at 563–64 (arguing traditional mail fraud statute should not extend to political corruption cases where public officials did not cause economic loss to citizens).

155. *See McNally*, 483 U.S. at 360–61 (holding mail fraud statute limited to protecting property rights and therefore insufficient to uphold conviction of public official who was not proven to have caused any economic loss to state or its citizens).

156. *See id.* at 360 (choosing to read statute in way that avoids federal prosecutors and judges setting "good government" standards for state and local officials).

157. *See id.* at 360–61 (holding jury instructions inadequate because they allowed jurors to find defendants guilty without proving economic loss to state, or even that state would have received better insurance or lower premiums if defendants had not executed their scheme).

158. Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (1988) (codified as amended at 18 U.S.C. § 1346 (2006)).

159. *See* 18 U.S.C. § 1346 (2006).

160. *See* United States v. Weyhrauch, 548 F.3d 1237, 1244 (9th Cir. 2008) (citing federal appellate court interpretations of honest services fraud statute, wherein some courts require that public official violated state law, or intended to personally gain from undisclosed conflict of interest, or materially breached fiduciary duty), *vacated per curiam*, 130 S. Ct. 2971 (2010) (mem.).

161. 129 S. Ct. 1308 (2009) (Scalia, J., dissenting).

162. *Sorich*, 129 S. Ct. at 1308–11; *see also id.* at 1310 (asking how the statute prevents "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"); Brown, *supra* note 111, at 299 (concluding "existence of a state law duty" should be requirement in honest services fraud cases to alleviate constitutional concerns); Coffee, *supra* note 25, at 464 (recommending "normal fiduciary duties of a trustee" as workable definition for "honest services" in context of public officials).

Robert Sorich, the "so-called 'patronage chief'" of Chicago's mayor.[163] Justice Scalia correctly pointed out that federal circuits across the country were in disagreement over the proper definition of the "terse amendment . . . . [that] consists of only 28 words . . . [but which] has been invoked to impose criminal penalties upon a staggeringly broad swath of behavior."[164] Scalia was concerned with the ability of prosecutors and courts to separate unethical from criminal conduct without a well-defined principle; the ambiguity of the statute giving individuals inadequate notice of what constitutes criminal conduct; and the appropriateness of federal prosecutors potentially deciding standards of conduct for state and local officials.[165] Scalia reasoned that, until these concerns are addressed, it is but a "logical conclusion" that the federal government will use the honest services fraud statute to prosecute incredibly minor, insignificant employee infractions.[166] He did not, however, cite to any actual cases that had reached such low points, and instead relied on hypothetical scenarios to illustrate the point.[167]

3. Post-*Skilling*: Do the Old Questions Still Matter?

In 2010, the *Skilling* Court made two things clear: honest services fraud prosecutions would continue, but would only include cases involving bribes or kickbacks, not conflicts of interest.[168] Again, Justice Scalia's opinion—this time a concurrence—provides a window into the future of the honest services fraud discussion.[169] Scalia's dislike of the statute continued along the same lines he had laid out a year earlier in his *Sorich* dissent.[170] In addition to criticizing the majority's method of statutory interpretation,[171] Scalia explained that the number of honest services fraud cases that may or may not have involved bribes or kickbacks was irrelevant; questions still remained unanswered,[172] particularly with regard to "the

163. United States v. Sorich, 523 F.3d 702, 705–06 (7th Cir. 2008).

164. *Sorich*, 129 S. Ct. at 1309.

165. *Id.* at 1310–11.

166. *Id.* at 1309.

167. *See id.* (describing possible prosecutions for, inter alia, a mayor attempting to use his status to obtain better table at restaurant and an employee calling in sick to watch baseball game).

168. See *supra* Part II.E for a discussion of *Skilling*.

169. Skilling v. United States, 130 S. Ct. 2896, 2935 (2010) (Scalia, J., concurring).

170. *Compare id.* at 2935 (stating statute still unconstitutionally vague and repudiating Court's "power to define new federal crimes"), *with Sorich*, 129 S. Ct. at 1310 (Scalia, J., dissenting) ("It is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail.").

171. *See Skilling*, 130 S. Ct. at 2939–40 (Scalia, J., concurring) (explaining that neither Congress nor lower courts ever limited honest services fraud to merely bribes and kickbacks).

172. *Id.* at 2938–39. Future challenges to post-*Skilling* convictions will also likely involve struggles over the precise definition of "bribery." While the *Skilling* Court referenced other federal statutes containing the term, *id.* at 2933–34 (majority opinion), the Court did not definitively define it. And although the definition may at first glance seem obvious, some circuits have defined bribery in honest services fraud cases more broadly than perhaps the classic conception of a quid pro quo. *See, e.g.*, United States v. Kemp, 500 F.3d 257, 282 (3d Cir. 2007) (holding "stream of benefits" given in exchange for official actions, or possibility of official actions, although not done contemporaneously, constitutes bribery (citing United States v. Jennings, 160 F.3d 1006, 1014 (4th Cir. 1998); United States v. Sawyer, 85 F.3d 713, 730 (1st Cir. 1996))).

character of the 'fiduciary capacity' to which the bribery and kickback restriction applies."[173] In other words, does it still matter *who* the defendant is?[174]

B. Constant: Focusing on Facts Leads to Similar Outcomes

Not everyone who has scanned this panorama of cases has drawn the conclusion that the statute's reach is limitless, or that the ambiguous nature of the actual words are cause for concern. For some, despite the difficulty of honing in on the one-size-fits-all definition of honest services fraud, a more productive analysis of honest services fraud has involved focusing on the *facts* underlying the legal challenges—facts that have clearly pointed to corrupt public officials, whether in 1987 or 2010.[175] This perspective has perhaps been most articulately presented by the dissenting opinion in *McNally*, and the majority opinion in *Skilling*.

In 1987, Justice Stevens wrote the dissenting opinion in *McNally*, analyzing decades of mail fraud convictions often involving public officials or employees.[176] In opposing the Court's decision, Justice Stevens framed his analysis in a way that kept the actual conduct of the public officials, and their intent to deceive the citizens and state of Kentucky, at the forefront of the discussion.[177] After opening his opinion with that contextual backdrop, Justice Stevens moved on to review and summarize decades of case law where federal courts had "uniformly and consistently" read the mail fraud statute as encompassing deprivations of intangible rights.[178] While Justice Stevens did engage in statutory construction and an exploration of the legislative history and intent of the statute,[179] he made strong references to the actual corruption found in the facts of the cases.[180] Instead of theorizing about what could happen, therefore, Justice Stevens focused on what had in fact happened—the mail fraud statute was, and had been, used

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

174. For example, in *United States v. Murphy*, the Third Circuit held that Robert Murphy, a local Republican party boss, did not owe the citizens of the New Jersey county where he operated the duty of his honest and faithful services because he was not a public official. 323 F.3d 102, 104, 117 (3d Cir. 2003). Does *Skilling* change the outcome for a future Robert Murphy? Can a bribe or kickback exist in a case that does not involve a public official, but only an individual who exercises de facto control over a public process? See *supra* notes 106–10 and accompanying text for a more complete description of the facts in *Murphy*.

175. *See, e.g.*, McNally v. United States, 483 U.S. 350, 375 (1987) (Stevens, J., dissenting) (concluding public official and private businessman certainly knew secret disbursement of hundreds of thousands of public dollars was unlawful), *superseded by statute*, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (1988) (codified as amended at 18 U.S.C. § 1346 (2006)).

176. *McNally*, 483 U.S. at 362–77.

177. *Id.* at 362 (stating question before Court was whether mail fraud statute reached "a secret agreement by state officials to place the State's . . . insurance with a particular agency . . . including sham agencies under the control of the officials themselves").

178. *See id.* at 363–64 (grouping cases into frauds where public officials: made secret decisions benefitting themselves or their own interests instead of public; committed election fraud; and private sector scenarios).

179. *Id.* at 364–75.

180. *See id.* at 375–76 (reasoning that state officials certainly must have known their conduct was "unlawful," and noting that "criminality of the scheme and the fraudulent use of the mails could not be clearer" in voting fraud cases heard by other courts).

to prosecute and convict public officials who engaged in fraudulent schemes using the U.S. Postal Service to further those schemes.[181]

The *Skilling* Court, with Justice Stevens in the majority,[182] drew similar conclusions to his dissent twenty-three years before: honest services fraud prosecutions have consistently targeted actual corruption;[183] congressional support exists for the statute's continued use;[184] and the difficulties lower courts were having in formulating the precise legal definition of the statute would be overcome by using a common sense approach towards clearly corrupt conduct.[185] The Court, sharing in the perspective of a younger Justice Stevens, formulated its interpretation of the statute by focusing on the facts emerging time and time again in honest services cases.[186] The *Skilling* definition

181. *See id.* at 376–77 (noting federal courts had "thoughtfully considered and correctly answered" challenges these cases presented, and Court's holding would enable elite group to escape prosecution despite their corrupt conduct). These cases are often quite fact-specific, and the presentation of facts by those that dislike the statute can often be quite different from those that see its value. *Compare* Sorich v. United States, 129 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting) (describing Sorich's conduct as "political-patronage hiring for local civil-service jobs" despite city regulations to contrary), *with* United States v. Sorich, 523 F.3d 702, 705–06 (7th Cir. 2008) (explaining that Sorich worked in city department with no official role in hiring city employees; maintained spreadsheet with 5,700 patronage applicants over seven-year period that he purposely attempted to destroy during investigation; and created false documentation to maintain illusion of qualified applicants being hired for city jobs). The ambiguity criticism has much less force when analyzed alongside the real facts of these cases. *See, e.g.*, *Sorich*, 523 F.3d at 711 ("It is hard to take too seriously the contention that the defendants did not know that by creating a false hiring scheme that provided thousands of lucrative city jobs to political cronies, falsifying documents, and lying repeatedly . . . they were perpetrating a fraud."); United States v. Brumley, 116 F.3d 728, 730–31, 735–36 (5th Cir. 1997) (affirming Brumley's conviction based on secret receipt of tens of thousands of dollars from attorneys appearing before him on Texas Industrial Accident Board); United States v. Mandel, 591 F.2d 1347, 1355 (4th Cir.) (noting ample evidence to support "scheme to defraud" based on defendants' misrepresentations and concealment of true owners of private company having business before Maryland Racing Commission and General Assembly), *aff'd by an equally divided court*, 602 F.2d 653 (4th Cir. 1979).

182. Skilling v. United States, 130 S. Ct. 2896, 2906 (2010).

183. See *supra* notes 135 and accompanying text for a discussion of the Court's emphasis on bribery and kickback schemes seen throughout the crime's history.

184. See *supra* notes 136–37 and accompanying text for a more complete description of congressional intent and the Court's desire to honor it.

185. *See Skilling*, 130 S. Ct. at 2933–34 (explaining bribe-and-kickback definition dispelled any further notions statute was void for vagueness because, among other things, terms were already defined in other federal statutes (citing 18 U.S.C. §§ 201(b), 666(a)(2); 41 U.S.C. § 52(2))).

186. Interestingly, the *Skilling* Court referred to the scheme carried out by McNally and his cohorts as kickbacks, whereas the majority in *McNally* never used such criminal-sounding words. *Compare Skilling*, 130 S. Ct. at 2932 (describing facts in *McNally* as "classic kickback scheme"), *with McNally*, 483 U.S. at 360 ("[I]ssue [was] . . . whether a state officer violates the mail fraud statute if he chooses an insurance agent . . . for the State but specifies that the agent must share its commissions with other . . . agencies, in one of which the officer has an ownership interest."). In fact, it was the dissenting opinion in *McNally* written by Justice Stevens that used the phrase "kickbacks" several times when analyzing the case law. *Id.* at 362 n.1, 363, 377 n.10 (Stevens, J., dissenting).

shifted the primary focus away from battles over state law requirements[187] to the actual conduct of the public officials being prosecuted.[188]

C. Constancy in Change

Have these changing legal questions and perspectives actually caused shifts in the types of prosecutions and convictions seen around the country? Does it really matter that *Skilling* "pared down" the definition of the crime—are there certain types of cases that once thrived but are now lifeless post-*Skilling*? For decades criminal defendants have challenged their honest services fraud convictions using a variety of arguments,[189] and with even a single open question remaining after *Skilling* there is no doubt that challenges to future prosecutions will continue for decades to come.[190] However, despite constant challenges and changes, there are two elements which form the conceptual anchor of honest services fraud in the public sector: (1) specific intent to deceive the victim *and* (2) a tangible thing of value a public official received because of his public position. Prosecutors, juries, judges, and the general public will continue[191] to support cases against public officials when these two elements are present[192]—and pull their support when a single element is missing[193]—regardless of the words that have been[194] and will be[195] used to characterize the crime.

187. See *supra* Part II.D for discussion on the circuit split over the role of state law in honest services fraud prosecutions.

188. *See Skilling*, 130 S. Ct. at 2934 (focusing attention on conduct by stating, for example, "a criminal defendant who participated in a bribery and kickback scheme, in short, cannot tenably complain about prosecution").

189. See *supra* Part III.A for a discussion of the changing legal challenges to honest services fraud convictions.

190. Fraud, no matter what shape it comes in, has always been difficult to pin down precisely. *See* Blachly v. United States, 380 F.2d 665, 671 (5th Cir. 1967) (discussing Justice Holmes's refusal to pin down "fraud" in legal terms).

191. Commentators often seem to forget that the history of honest services fraud is really marked by support from various segments of the federal government and public, not just maverick federal prosecutors. *Compare* Skilling v. United States, 130 S. Ct. 2896, 2932 (2010) (noting that federal appeals courts had supported, albeit not uniformly, reading § 1346 broadly to include undisclosed conflict of interest), *with The Supreme Court, 2009 Term*, *supra* note 128, at 369–70 (suggesting some form of early judicial review over prosecutor's charging decision is necessary otherwise "review as it was done in *Skilling* will languish as a post hoc remedy for a problem that judges should be able to prevent before it begins").

192. See *infra* Part III.C.1 for an analysis of cases where both elements are present but, at first glance, the facts do not appear sufficient for an honest services fraud conviction post-*Skilling*.

193. See *infra* Part III.C.2 for an analysis of cases where one of the elements was lacking and, therefore, honest services fraud prosecutions failed despite the seemingly broader definition of honest services prior to *Skilling*.

194. *See, e.g.*, United States v. Weyhrauch, 548 F.3d 1237, 1239 (9th Cir. 2008), *vacated per curiam*, 130 S. Ct. 2971 (2010) (mem.) (noting that charging language read "intangible right to . . . honest services" (internal quotation marks omitted)); United States v. Isaacs, 493 F.2d 1124, 1149 (7th Cir. 1974) (using phrase "honest and faithful services").

195. See *supra* Part II.E for summary of the *Skilling* Court's definition of honest services fraud wherein it limited the crime to "bribes and kickbacks."

1. Both Elements Present

In *Skilling*, the Court ended the federal government's ability to charge public officials with honest services fraud for a material, undisclosed conflict of interest.[196] In For over twenty years, federal circuit courts across the country had, to varying degrees, endorsed this expansive application of the statute.[197] At first glance, therefore, it would appear that a major substantive change has taken place in the law of honest services fraud. But when the two above-mentioned elements are present—deception and a financial relationship owing to a public position—a crime that is dead in theory, comes back to life again with a slight re-characterization of the facts.

The perfect case to demonstrate the validity of this proposition is *United States v. Bush*.[198] *Bush* was a public corruption case that grew out of 1970s Chicago government.[199] The facts of the case lay out the classic conflict-of-interest scenario—Earl Bush, a City of Chicago employee and close associate of the mayor, was convicted of mail fraud because he had a secret ownership interest in a company he actively advocated for when City contracts were being passed out.[200] Bush literally stood on both sides of the equation. Post-*Skilling*, these facts would seem to fall outside the new definition of honest services fraud. And yet, because Bush deceived the City of Chicago and received a thing of value because of his public position, the scenario can honestly be recast as a kickback (i.e., pre-*Skilling* and post-*Skilling* characterizations of the same facts).

First, deception. There must be a specific intent to deceive, a necessary component in proving any "scheme to defraud,"[201] whether traditional or honest services, pre- or post-*Skilling*. This was the element that the Seventh Circuit focused on when it upheld Bush's mail fraud conviction. The court noted that "Bush's breach of fiduciary duty . . . . alone could never be considered a crime under the mail fraud statute";[202] the mere fact, therefore, that a conflict of interest existed was not sufficient to sustain the conviction. When that breach was combined, however, with his "active concealment" of the relationship, his conduct reached the level of a federal crime.[203] If Bush had never actively hidden his ownership interests during conversations with other City officials,[204] or had not lied on his financial disclosure forms filed with the City,[205]

196. See *supra* notes 130–39 and accompanying text for a discussion of the *Skilling* Court's holding that narrowed the definition of honest services fraud.

197. See *supra* note 139 and accompanying text for documentation of appellate court support for the conflict-of-interest theory.

198. 522 F.2d 641 (7th Cir. 1975).

199. See *supra* notes 62–68 and accompanying text for a more complete discussion of *Bush*.

200. *Bush*, 522 F.2d at 647–48.

201. *See* Stuart, *supra* note 36, at 820 (noting necessity of an "intent to deceive" which goes beyond mere "puffing" or exaggeration).

202. *Bush*, 522 F.2d at 648.

203. *Id.*

204. *Id.* at 647.

205. *Id.* at 645.

then he would not have been guilty of mail fraud (i.e., there would have been nothing that could truly be called *deception*).[206]

Second, and most importantly for post-*Skilling* purposes, there was evidence that the financial relationship between Bush and the advertising company he partially owned was a result of his public position. Bush had a company called Terminal Art,[207] and in 1961 he formed DAAI, a joint venture between Terminal Art and Dell Displays.[208] DAAI put together a proposal and eventually won the advertising contract at O'Hare Airport because of Bush's help behind-the-scenes (unknown, of course, to City officials).[209] And that was Bush's sole contribution to the joint venture.[210] The owners of Dells Displays actually serviced the contract, but Bush shared in the profits.[211] In other words, the owners of Dells Displays did not need Bush's advertising skills, they needed his public position to win the contract; in return, Bush shared in the profits of that contract. In 1975, Bush's concealment of this conflict of interest constituted federal mail fraud. In 2010, these same facts could be described as a kickback under the *Skilling* definition of honest services fraud as Bush received "a thing of value" (i.e., profit from the contract) from Dell Displays "for the purpose of improperly obtaining . . . favorable treatment" (i.e., award of the City contract).[212] Either way, the conviction would stand.[213]

United States v. Sorich[214] is another case that highlights the post-*Skilling* merits of pre-*Skilling* prosecutions where both factual elements were present. Robert Sorich was the Assistant to the Director of Intergovernmental Affairs.[215] Instead of acting as liaison between Chicago and federal and state government (his formal job description),[216] he secretly handed out thousands of jobs in City government to individuals that worked on the mayor's political campaigns.[217]

206. See *supra* notes 37–38 and accompanying text for an explanation of the relationship between a "scheme to defraud" (i.e., the statutory language) and the notion of deception.

207. *Bush*, 522 F.2d at 643 n.2.

208. *Id.* at 643.

209. *Id.* at 643–44.

210. *Id.* at 643 & n.4.

211. *Id.* at 643.

212. *See* Skilling v. United States, 130 S. Ct. 2896, 2933–34 (2010) (noting kickback has been defined as "'any . . . thing of value . . . provided . . . to [enumerated persons] for the purpose of improperly obtaining . . . favorable treatment in connection with [enumerated circumstances]'" (alternations in original) (quoting 41 U.S.C. § 52(2))).

213. It is hard to actually imagine an instance where a public official hides a conflict of interest, and those facts could not be appropriately recast as a bribe or kickback under the new definition of honest services fraud. *See, e.g.*, United States v. Panarella, 277 F.3d 678, 681 (3d Cir. 2002) (paying state senator "consulting" fee, which state senator did not disclose, in exchange for senator's help in obtaining state contracts for tax collection business); United States v. Isaacs, 493 F.2d 1124, 1133–35 (7th Cir. 1974) (providing stock in racetrack companies to public officials in exchange for their help in securing favorable race dates that were government regulated).

214. 523 F.3d 702 (7th Cir. 2008).

215. *Sorich*, 523 F.3d at 705.

216. *Id.*

217. *Id.*

Sorich presents an even more difficult post-*Skilling* analysis because it involves deceptive public employees, but no direct financial relationship with any third parties,[218] thus making it difficult to characterize it as a bribe or kickback. But both elements were present—deception and receipt of a thing of value because of his public position—which makes *Sorich* still within reach of the traditional mail fraud statute even if it is technically outside the scope of post-*Skilling* honest services fraud.

Admitting that a future *Sorich* prosecution would not work under the Court's more limited definition of the crime and yet still arguing it would find support among juries and courts may seem like cheating. Three things must be remembered, however. First, this Comment recognizes that the legal landscape will change post-*Skilling*, in that future prosecutions will not always be presented as they were prior. However, what this Comment seeks to demonstrate is that the factual stories told in courthouses across the country will continue to remain the same—i.e., constancy in change. Second, § 1346 is a definitional Part in the chapter on mail and other federal frauds; honest services fraud is thus a branch on the traditional mail fraud tree.[219] Third, and most importantly, the petitioners in *Skilling* were challenging the crime as void for vagueness.[220] The petitioners' concern was that the statute made it too difficult for individuals to look at a set of facts and determine whether or not those facts constituted a federal crime.[221] The Court's solution to this dilemma was to limit the definition of the crime, apparently moving certain fact patterns off the radar of federal prosecutors.[222] And yet, as will be shown below, the conduct of the public employees in *Sorich* still adds up to federal mail fraud charges, albeit traditional instead of honest services, because the fact pattern contains both elements.

First, deception. In order to effect this massive illegal hiring scheme, Sorich and others lied repeatedly about their conduct.[223] They continually assured City lawyers, for example, that positions were being filled based on applicant qualifications, not political patronage.[224]

Second, Sorich received his salary (i.e., a thing of value), year after year because he was the Assistant to the Director of Intergovernmental Affairs. In the eyes of Chicago citizens and non-schemers within City government, he was being paid with public money to legitimately act as their liaison with other levels of government. All

218. *See id.* at 708 (noting defendants enriched thousands of campaign workers by giving them jobs but did not receive anything of value directly from those individuals).

219. *See* 18 U.S.C. § 1341 (stating "scheme or artifice to defraud" combined with other elements constitutes federal felony); *id.* § 1346 (including deprivation of "honest services" within definition of "scheme or artifice to defraud").

220. Skilling v. United States, 130 S. Ct. 2896, 2925 (2010) ("The honest-services statute, § 1346, Skilling maintains, is unconstitutionally vague.").

221. *See id.* at 2928 ("[Skilling] contends [§ 1346] does not adequately define what behavior it bars.").

222. *See id.* at 2932–33 (reasoning that by excluding a certain "amorphous category of cases" criminal charges in this arena would no longer be subject to lack of "fair notice" allegations or claims of "arbitrary and discriminatory prosecution").

223. See *supra* note 181 for a more complete description of the deceptive conduct that Sorich and his co-conspirators engaged in.

224. *Sorich*, 523 F.3d at 705; *see also id*. at 712 (explaining history of "Shakman decrees" which banned political patronage jobs in Chicago government).

the while, however, he spent his working days as a kind of black-market human resources coordinator.[225] Sorich deceived the City of Chicago and its citizens into paying him a salary that he never would have received had either party known his true conduct.[226] Robert Sorich would stand convicted of federal mail fraud whether he carried out this scheme before *Skilling* or after *Skilling*.

2. One Element Lacking

On its face, the definition of honest services fraud was broader pre-*Skilling*.[227] But even with such a broad definition there have, of course, been cases throughout the years where courts overturned honest services fraud convictions in the public sector.[228] While the reasoning varied, a review of the facts in some of these instances will reveal that the element of deception was missing (i.e., a failure to prove a specific intent to defraud).[229]

First, in *United States v. Thompson*,[230] the Seventh Circuit reversed the honest services fraud conviction of a Wisconsin state employee and ordered her immediate release from the eighteen-month prison sentence she was serving.[231] Georgia Thompson was in management at the Wisconsin Bureau of Procurement during the state's bidding process for a new travel agent.[232] Thompson was indicted for taking numerous steps to ensure Adelman Travel secured the winning bid and then several months later receiving a $1,000 pay raise at the Bureau of Procurement.[233] The prosecution's theory was that Thompson deprived Wisconsin of her honest services when she sought to award Adelman Travel the contract for "'political reasons.'"[234] Specifically, her politically-appointed boss may have favored Adelman because of past campaign contributions to the Wisconsin governor, rather than in strict accordance with the Wisconsin administrative regulations controlling the bidding process.[235] In short, Thompson received a thing of value (i.e., a raise) because of how she used her public position to Adelman Travel's benefit. Honest services fraud? No—there was no evidence of deception.

225. *See id.* (noting Sorich kept track of hiring scheme from at least 1990 through 1997).

226. *See id.* at 706 ("[Illegal hiring scheme] went on despite the existence of multiple laws and personnel regulations forbidding the use of political considerations in hiring for civil service jobs, and mandating the awarding of those jobs on merit."). In fact, Sorich actually was convicted under a traditional mail fraud theory (although slightly different than the above), in addition to his honest services fraud conviction. The Seventh Circuit held that Sorich defrauded the City of Chicago out of "property," namely, the thousands of jobs he illegally gave to others. *Id.* at 713. And the fact that this property went to others—not Sorich himself—did not make Sorich any less culpable in the eyes of the court. *See id.* at 710 ("Robin Hood may be a noble criminal, but he is still a criminal.").

227. See *supra* Part III.A for a discussion of the different eras in honest services fraud jurisprudence.

228. *E.g.*, United States v. Murphy, 323 F.3d 102, 104 (3d Cir. 2003); United States v. McNeive, 536 F.2d 1245, 1251 (8th Cir. 1976).

229. See *supra* Part II.A for a description of the elements of mail fraud.

230. 484 F.3d 877 (7th Cir. 2007).

231. *Thompson*, 484 F.3d at 878.

232. *Id.*

233. *Id.* at 878–79.

234. *Id.*

235. *Id.* at 879–80.

Chief Judge Easterbrook, writing for the *Thompson* court, said "[w]hat 'fraud' did Thompson commit, and who was the victim?"[236] Again and again, Thompson expressed to fellow co-workers her desire to see Adelman Travel win the contract; Adelman was the lowest cost bidder, albeit with poor service ratings; and there was no direct evidence that the pay raise was connected to the Adelman negotiations.[237] This case failed despite the allegedly expansive nature of honest services fraud pre-*Skilling* because the facts did not prove a basic element—a "scheme to defraud"—required by the federal mail fraud statute since it was enacted.[238]

An earlier "honest services" mail fraud case, *United States v. McNeive*,[239] provides an even more powerful example of a factual scenario that appears criminal yet ultimately failed because there was no deception. James McNeive was the Chief Plumbing Inspector in St. Louis from the early 1960s through the mid 1970s.[240] During this time, he often received unsolicited five-dollar checks in the mail from local plumbing companies submitting their permit applications.[241] There was a written City ordinance prohibiting the receipt of "'any payment or gift of money'" by City employees; over the course of four years McNeive received $490 through this process.[242] In other words, McNeive was receiving cash from local businessmen solely because of his public position with the City of St. Louis. Honest services fraud? No—the evidence failed to prove an intent to defraud.

The Eight Circuit explicitly found no "scheme to defraud" within the statutory and common law definition of the phrase.[243] McNeive exercised no authority to deny or grant approval of these applications; he never demanded or took any unfavorable actions towards plumbing companies if the five dollars was not received; and when contacted by the FBI about an *unrelated* City matter, McNeive voluntarily disclosed the practice.[244] Again, while McNeive may have been slightly careless in accepting any money at all for his public service, the lack of any "active concealment" indicated there was insufficient evidence to find specific intent to deceive the City of St. Louis or its citizens about his conduct.[245] Accordingly, there was no federal mail fraud violation.

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236. *Id.* at 882.

237. *Id.* at 878–79.

238. *United States v. Urciuoli* provides another relatively recent example of an overturned conviction which can be seen as a set of facts that simply did not add up to deceptive conduct sufficient for a federal mail fraud conviction. 513 F.3d 290, 295 (1st Cir. 2008). John Celona was a Rhode Island state senator who lawfully held an outside consulting job; he publicly disclosed the income which was paid to him by a subsidiary of a local hospital. *Id.* at 292. Celona was then charged with honest services fraud after he appropriately urged local mayors to follow a state law that gave patients the right to direct ambulances to the hospital of their choice without explicitly telling the mayors he was being paid by a hospital subsidiary. *Id.* Honest services fraud? No—a state senator who was legally allowed to hold outside employment, partially disclosed it, and then urged local mayors to simply comply with state regulations; the deception was just too attenuated for the court to uphold the conviction.

239. 536 F.2d 1245 (8th Cir. 1976).

240. *McNeive*, 536 F.2d at 1246.

241. *Id.*

242. *Id.*

243. *Id.* at 1251–52.

244. *Id.* at 1246–47.

245. *Id.* at 1252.

IV. CONCLUSION

The story of honest services fraud is one of constancy and change. As a legal concept, its history has been one of expansion and contraction.[246] In 1872, the United States Congress enacted the federal mail fraud statute, making it a crime to use the U.S. mail in furtherance of a "scheme to defraud."[247] Slowly, that "scheme" came to include instances that did not necessarily require the fraud victims to lose any money or property.[248] By 1987, despite the continual challenges of some, it was accepted by juries and courts throughout the nation. But then the Supreme Court intervened, divining that the federal mail fraud statute was limited to schemes that actually take money or property from victims.[249] Within a year, however, the intangible rights theory was reborn as 18 U.S.C. § 1346, the honest services fraud statute.[250] The brief and ambiguous language used by the statute though led many courts and commentators to debate the appropriate boundaries of this federal crime for over two decades.[251] The Supreme Court then entered the fray again, this time upholding the doctrine, but limiting its reach to more specific types of conduct—bribes and kickbacks.[252]

The facts underlying these legal changes, however, tell a much more consistent story.[253] Did the fraud cause a financial loss to the citizens? Was the deceptive conduct a violation of a state law? Did the public official receive money in exchange for official action? Questions like these have undoubtedly guided the way in which honest services fraud cases have been packaged over the years, but underlying the changing legal framework has been, and will continue to be, public officials deceiving their local governments or citizens about a thing of value they received because of their public positions. When these facts are present, federal prosecutors will find support among juries, with convictions upheld on appeal; when one fact is lacking, the cases will fail.[254]

Instead of continually asking whether honest services fraud *should* exist in its current form, this Comment has tried to demonstrate that a different perspective might also prove valuable, one that begins by simply accepting that it *does* and *will* continue

246. See *supra* Part III.A for an analysis of the changing legal challenges that honest services fraud has undergone.

247. See *supra* Part II.A for an overview of traditional mail fraud.

248. See *supra* Part II.B for a history of the unofficial birth and growth of the honest services fraud doctrine.

249. See *supra* Part II.C.1 for a discussion of *McNally v. United States*, 483 U.S. 350 (1987), *superseded by statute*, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (1988) (codified as amended at 18 U.S.C. § 1346 (2006)).

250. See *supra* Part II.C.2 for a brief overview of the legislative reaction to *McNally*.

251. See *supra* Part II.D for a description of the federal circuit split that arose in the wake of § 1346 over the precise definition of honest services fraud.

252. See *supra* Part II.E for an overview of *Skilling v. United States*, 130 S. Ct. 2896 (2010).

253. See *supra* Part III.B for an analysis of the fact-intensive analyses used by the dissent in *McNally* and the majority in *Skilling*.

254. See *supra* Part III.C for an analysis of fact patterns containing both elements or lacking one.

to exist, and then seeking to uncover the deeper values[255] that have enabled this federal crime to march onward with such a broad range of support.

255. See *supra* note 27 for an example of American ideals potentially underlying the prosecution of public officials.