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

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

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

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

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

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

As the trials of state legislators Sheldon Silver and Dean Skelos illustrate, corruption among high-profile public officials continues to be a concern in the United States. Likewise, recent examples abound of powerful executives and others in roles of authority abusing positions of trust for personal gain.

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

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

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


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


9 See United States v. Collins, 774 F.3d 256, 259, 262-63 (5th Cir. 2014).
Yet 18 U.S.C. § 1346 establishes that the term “scheme or artifice to defraud” as used in Chapter 63 also “includes a scheme or artifice to deprive another of the intangible right of honest services.” This provision was enacted in the late 1980s, in response to the U.S. Supreme Court’s holding in McNally v. United States that the mail fraud statute was “limited in scope” to only “the protection of property rights.” Section 1346 abrogates McNally’s holding, codifying the understanding of some of the lower federal courts that the mail and wire fraud statutes extend to conduct that deprives a person or group of the right to have another act in accordance with some externally imposed duty or obligation, regardless of whether the victim so deprived has suffered or would suffer a pecuniary harm. Recognizing that this lower court understanding in fact evinced “considerable disarray” as to the kinds of schemes that would qualify as “honest services” fraud, however, the Supreme Court subsequently read a limiting principle into Section 1346 in Skilling v. United States in order to avoid invalidating the statute as unconstitutionally vague. After Skilling, mail and wire fraud prosecutions under an honest services theory may extend only to “offenders who, in violation of a fiduciary duty, participate[] in bribery or kickback schemes.”

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

Overview of Mail and Wire Fraud Statutes

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

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12 Id. at 360.
13 Skilling, 561 U.S. at 405.
14 Id. at 407.
15 This report focuses specifically on “honest services” fraud, a subcategory of fraudulent conduct covered by the mail and wire fraud statutes. For a more fulsome overview of the statutes and related provisions, see CRS Report R41930, Mail and Wire Fraud: A Brief Overview of Federal Criminal Law, by Charles Doyle.
16 18 U.S.C. § 1341. The statute also prohibits use of the mails in relation to “any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article.” Id.
17 18 U.S.C. § 1343. Other sections of Chapter 63 of Title 18 of the U.S. Code mirror this language in proscribing frauds involving certain institutions and industries. 18 U.S.C. Section 1344 proscribes defrauding financial institutions. Section 1347 proscribes defrauding health care benefit programs. Section 1348 proscribes frauds in connection with commodities and securities. Though the text of Sections 1341 and 1343 would appear to comprehend two separate categories of conduct—schemes
and “wire fraud,” encompass multiple forms of fraudulent conduct using jurisdictional hooks that reach practically all forms of communication. Because the two statutes (save for the medium used in connection with the offense) essentially mirror each other, interpretations and analyses of one statute will typically apply to the other.

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

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

**Scheme to Defraud**

The requisite “scheme to defraud” has been framed broadly, sometimes as broadly as “a departure from fundamental honesty, moral uprightness and candid dealings in the general life of the community.” Generally, what the scheme to defraud element contemplates is conduct reasonably calculated to deceive. Because the mail and wire fraud statutes criminalize the
“scheme” to defraud, and not the fraud itself, the government need not prove that the scheme was successful.23 However, the Supreme Court has established that the deception contemplated by a scheme to defraud must be “material,” that is, the misrepresentation or concealment at issue must have “a natural tendency to influence, or [be] capable of influencing,” the person “to [whom] it was addressed.”24

Use of Mail or Wire

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

The statutory text contemplates use of the mails or wires “for the purpose of executing” the scheme or artifice to defraud,27 which courts typically frame as use “in furtherance of” the fraudulent scheme.28 The mailing or wire communication does not have to be “inherently criminal” or “essential” to the scheme in order to qualify29—rather, it must only be “part of the execution of the scheme as conceived by the perpetrator at the time.”30 As a result, illicit conduct under the statutes can include mailings or transmissions “designed to lull the victims into a false sense of security,” postpone an investigation by authorities, or otherwise conceal the fraud.31

Intent

The government must also prove that the defendant in a mail or wire fraud prosecution had the intent to defraud, meaning “the specific intent to deceive or cheat, usually for the purpose of

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24 Neder, 527 U.S. at 16 (quoting United States v. Gaudin, 515 U.S. 506, 509 (1995)) (internal quotations omitted). This requirement does not mean, however, that a deception need be aimed at the person defrauded. See United States v. Seidling, 737 F.3d 1155, 1161 & n.2 (7th Cir. 2013) (collecting cases).
25 18 U.S.C. §§ 1341, 1343. Communication by “wire” encompasses most modern forms of remote communication, including telephone, e.g., United States v. Foley, 683 F.2d 273, 279 (8th Cir. 1982), facsimile, United States v. Arledge, 553 F.3d 881, 892 (5th Cir. 2008), and e-mail, e.g., United States v. Corrigan, 912 F.3d 422, 427 (7th Cir. 2019).
26 Pereira, 347 U.S. at 8-9 (requiring only “knowledge that the use of the mails will follow in the ordinary course of business” or that “such use can reasonably be foreseen, even though not actually intended”); United States v. Zander, 794 F.3d 1220, 1226 (10th Cir. 2015) (recognizing that the defendant does not “need to use the mails himself”).
28 United States v. Nguyen, 829 F.3d 907, 921 (8th Cir. 2016); United States v. Faulkenberry, 614 F.3d 573, 582 (6th Cir. 2010); United States v. Henningens, 387 F.3d 585, 589 (7th Cir. 2004).
29 Nguyen, 829 F.3d at 921.
getting financial gain for one’s self or causing financial loss to another.” 32 A person who merely expresses an opinion or, in good faith, makes a statement of fact that turns out to be inaccurate cannot have the specific intent to defraud. 33 However, deliberate disregard for (or conscious avoidance of) the truth is no defense, 34 nor is the belief that a victim will be unharmed. 35

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

### Money, Property, or Honest Services

The final element of mail or wire fraud focuses on the object of the fraud. It is clear that the mail and wire fraud statutes contemplate schemes aimed 37 at obtaining victims’ money or property. 38

In addition to tangible property, the statutes apply to intangible interests, such as confidential business information, that have “long been recognized as property.” 39 If an interest lacks value in the hands of the ostensible victim, however, it is not protected by the statutes as “property.” 40 For instance, the Supreme Court held in Kelly v. United States that “the regulatory rights of allocation, exclusion, and control” are not property interests of the government for purposes of the wire fraud statute, as they implicate the government’s “role as sovereign wielding traditional police powers—not its role as property holder.” 41

Beyond money or property, 18 U.S.C. § 1346 establishes that a scheme or artifice to defraud includes “a scheme or artifice to deprive another of the intangible right of honest services.” 42 It is the history and interpretation of this provision that are the focus of this report.

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

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

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

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

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

37 See Kelly v. United States, No. 18-1059, slip op. at 10 (May 7, 2020) (“[A] property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme.”).

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


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

41 Kelly, No. 18-1059, slip op. at 11 (citations and internal quotation marks omitted).

Development of “Honest Services” Theory of Fraud

Origins

The original mail fraud statute was enacted in 1872 and merely prohibited “any scheme or artifice to defraud.” Congress amended the statute in 1909 to add the second clause, “or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.” Mirroring this language, the wire fraud statute became law in 1952. Though the legislative history of the mail fraud provision, and the inclusion of the “obtaining money or property” clause, arguably suggest that Congress initially contemplated only frauds involving money or property, lower federal courts by the 1980s had interpreted the mail and wire fraud statutes to cover deprivations of intangible rights.

“Most” of these cases involved public officials who “made governmental decisions with the objective of benefitting themselves or promoting their own interests, instead of fulfilling their legal commitment to provide the citizens of the State or local government with their loyal service and honest government.” Regardless of whether the betrayed party (the citizenry) was or would be financially harmed, under this theory, the violation lay in the deprivation of that party’s intangible right to the official’s “honest services.” This is not to say that the doctrine extended only to public officials, however—courts came to recognize that a private employee could also be guilty of mail or wire fraud for breaching a fiduciary duty to the employer. So-called “honest

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45 See Cong. Globe, 41st Cong., 3d Sess. 35 (1870) (statement of Rep. Farnsworth) (describing a scheme to solicit the purchase of counterfeit bills and noting the need to prevent frauds “for the purpose of deceiving and fleecing the innocent people in the country”); McNally, 483 U.S. at 356 (“Insofar as the sparse legislative history reveals anything, it indicates that the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property.”).
46 See United States v. Silvano, 812 F.2d 754, 759 (1st Cir. 1987) (“At least four other courts of appeals have held that the mail fraud statute proscribes use of the United States mails in furtherance of schemes to defraud citizens of their intangible rights[,]”); United States v. McNeive, 536 F.2d 1245, 1249 (8th Cir. 1976) (acknowledging that an “increasing number of courts” had endorsed the application of Section 1341 to schemes “which operate to deprive individuals of intangible rights or interests”).
47 McNally, 483 U.S. at 362-63 (Stevens, J., dissenting). Both public officials and private individuals who participated in public decisions could be prosecuted for breaching a duty to the public. E.g., United States v. Gray, 790 F.2d 1290, 1295 (6th Cir. 1986) (“[A]n individual who has no formal employment relationship with government may nonetheless substantially participate in government operations so as to assume a fiduciary duty to the general citizenry.”).
48 See, e.g., United States v. Brown, 540 F.2d 364, 374 (8th Cir. 1976) (recognizing that “a public official may be prosecuted” based on “conduct [that] operates to defraud the citizens of his government of their right to his honest and faithful services”); Silvano, 812 F.2d at 760 (“It is immaterial whether [the official] personally profited from the scheme or whether the City suffered a financial loss from it. The loss to the City of [the official’s] good faith services alone establishes the breach.” (internal citations omitted)); but see United States v. Lemire, 720 F.2d 1327, 1337 (D.C. Cir. 1983) (holding, in private employer context, that such conduct must foreseeably pose an “independent business risk to the employer”).
49 McNeive, 536 F.2d at 1249; see also United States v. Procter & Gamble Co., 47 F. Supp. 676, 678 (D. Mass. 1942) (“When one tampers with [the employment] relationship for the purpose of causing the employee to breach his duty [of loyalty and honesty] he in effect is defrauding the employer of a lawful right.”). Courts tended to recognize that a fiduciary duty for purposes of private-sector honest services fraud did not have to “arise from state or federal law,” but could instead stem from the nature of the employment relationship itself. See United States v. Lemire, 720 F.2d 1327, 1335-36 (D.C. Cir. 1983) (describing the “judicial consensus” that a duty may “stem from an employment relationship of the sort that imposes discretion and consequent obligations of loyalty and fidelity on the employee”). Indeed, two
services” fraud often arose in the context of an official’s or employee’s receipt of a bribe or kickback in exchange for some veritable benefit. Yet the doctrine was not limited to bribery and kickback schemes; other forms of self-dealing, such as concealing material conflicts of interest, also gave rise to honest services mail and wire fraud prosecutions.

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

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

**McNally v. United States and Congressional Response**

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

courts held that the existence of a fiduciary relationship was not required at all, though those holdings appear to have been undermined by subsequent precedent. See United States v. McGeehan, 584 F.3d 560, 573 n.11 (3d Cir. 2009), vacated, 625 F.3d 159 (3d Cir. 2010). As described *infra*, some courts subsequently recognized a limitation that duties should be defined by reference to state law, in order to cabin the expansive scope of the mail and wire fraud statutes.

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

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

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

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


57 *Id.* at 355.
The Supreme Court reversed, however, examining the text and legislative history of the mail fraud statute to conclude that the provision was “limited in scope to the protection of property rights.”\(^{58}\) In the Court’s view, a broader reading would “leave [the statute’s] outer boundaries ambiguous and involve[] the Federal Government in setting standards of disclosure and good government for local and state officials.”\(^{59}\) In other words, the Court’s decision was driven by two constitutional concerns that have underlain much of the subsequent commentary on the scope of the honest services doctrine: first, a criminal statute may violate the Due Process Clauses of the Fifth and Fourteenth Amendments if it is so vague that “ordinary people can[not] understand what conduct is prohibited.”\(^{60}\) Thus, by alluding to the potentially “ambiguous” “outer boundaries” of the mail fraud statute, the Court was signaling that, if not construed more narrowly, the statute could be considered unconstitutionally vague. Second, courts are hesitant to read federal criminal statutes in a way that intrudes on areas of traditionally state-exclusive interest in light of the Constitution’s reservation to the states of powers not expressly given to the federal government.\(^{61}\) This concept of federalism inherent in the Constitution has animated the Court’s hesitancy to involve the federal government in policing the ethicality of state and local officials.\(^{62}\)

Ultimately, the Court in *McNally* declined to adopt a reading of the mail fraud statute that would risk contravening the constitutional principles described above absent a decision by Congress to “speak more clearly than it has.”\(^{63}\) Within a short time, however, Congress had accepted the Court’s invitation to speak by passing legislation, now codified at 18 U.S.C. § 1346, which clarified that “the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.”\(^{64}\) There is some indication in the legislative history that this provision was intended to “overturn the *McNally* decision”\(^{65}\) in full, “reinstat[ing] all of the pre-*McNally* case law pertaining to the mail and wire fraud statutes without change.”\(^{66}\)

Nonetheless, it is doubtful that Section 1346 restored all pre-*McNally* case law, as the “intangible rights” that courts had viewed the mail and wire fraud statutes to cover were not necessarily limited to honest services. As noted above, cases prior to *McNally* had recognized that deprivations of other intangible rights like the right to privacy and the right to honest elections could be covered.\(^{67}\) Thus, by limiting 18 U.S.C. § 1346 to the “right of honest services,”\(^{68}\)

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\(^{58}\) *Id.* at 360.

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


\(^{61}\) See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (“[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes.”).

\(^{62}\) *McNally*, 483 U.S. at 360; see also *McDonnell v. United States*, 136 S.Ct. 2355, 2373 (2016) (construing bribery statute narrowly in honest services case out of concern for state authority to “regulate the permissible scope of interactions between state officials and their constituents”).

\(^{63}\) *Id.*


\(^{65}\) See 134 CONG. REC. H11, 108-01 (daily ed. Oct. 21, 1988) (statement of Rep. Conyers) (“This amendment restores the mail fraud provision to where that provision was before the *McNally* decision.”).


\(^{67}\) See supra note 52 and accompanying text.

\(^{68}\) 18 U.S.C. § 1346.
“Congress amended the law to cover [only] one of the ‘intangible rights’ that lower courts had protected under § 1341 prior to McNally.”

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

Following the enactment of 18 U.S.C. § 1346, the lower federal courts continued to apply the mail and wire fraud statutes to a range of fraudulent conduct on the part of both public officials and private parties implicating the deprivation of an intangible right of honest services. “[T]ypical[]” cases involved “either bribery . . . or [the] failure to disclose a conflict of interest, resulting in personal gain.”

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

For example, some courts recognized a limitation that to be guilty of mail or wire fraud on an honest services theory, a defendant must have participated in a scheme involving conduct that violated or would violate state law. These courts expressed concern that leaving federal judges

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70 United States v. Garrido, 713 F.3d 985, 993 (9th Cir. 2013) (“Following the enactment of § 1346, courts around the country interpreted the statute to encompass various types of schemes and to make criminal a wide variety of acts.”); see United States v. Waymer, 55 F.3d 564, 572 (11th Cir. 1995) (concluding that Atlanta Board of Education member violated Section 1346 by failing to disclose receipt of portion of school board payments to sanitation and pest control companies); United States v. deVegter, 198 F.3d 1324, 1327-28 (11th Cir. 1999) (noting that Section 1346 “extends to the defrauding of some private sector duties of loyalty”). The deVegter court distinguished between public officials, who “inherently owe a fiduciary duty to the public to make governmental decisions in the public’s best interest,” and “private sector relationships” in which such a duty does not always exist. Id. The court used this distinction to recognize a requirement of reasonably foreseeable employer harm in private-sector honest services fraud cases. Id. at 1329. As discussed infra, post-McNally interpretations of Section 1346 split on whether such a requirement should apply in private-sector cases, all honest services cases, or none of them.

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

72 See McNally, 483 U.S. at 360.

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

74 Sawyer, 85 F.3d at 725.

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

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

77 See United States v. Brumley, 116 F.3d 728, 734 (5th Cir. 1997) (en banc) (“We decide today that services must be owed under state law and that the government must prove in a federal prosecution that they were in fact not delivered.”); United States v. Murphy, 323 F.3d 102, 117 (3d Cir. 2003) (“We thus endorse (and are supported by) the decisions of other [c]ourts of [a]ppellates that have interpreted § 1346 more stringently and required a state law limiting
free to define the duties and breaches that would constitute a violation of the mail and wire fraud statutes would amount to unmoored federal imposition of “an ethical regime for state employees.”

However, several other courts rejected the state-law limitation as inconsistent with the intent of the statute.

Taking a different tack, a few courts imposed a “foreseeable harm” requirement in honest services cases. As the U.S. Court of Appeals for the Sixth Circuit\(^{80}\) enunciated the limitation, conviction for honest services fraud in these jurisdictions required proof that the defendant “foresaw or reasonably should have foreseen that [the victim] might suffer an economic harm as a result of the breach” of fiduciary duty.\(^{81}\) In *Frost*, for instance, the Sixth Circuit applied the foreseeable harm limitation to conclude that university professors committed honest services fraud by entering into a scheme with their students to submit plagiarized dissertations, as they could have “reasonably contemplated” that the breach of their duty to the university would cause it to “suffer a concrete business harm by unwittingly conferring an undeserved advanced degree” on each student.\(^{82}\)

Courts recognizing the foreseeable harm requirement appeared to apply it only in private-sector cases,\(^{83}\) where the “meaning of the ‘intangible right of honest services’ has different implications” given that “a strict duty of loyalty ordinarily is not part of” commercial and employment relationships.\(^{84}\) On occasion, however, the requirement was stated broadly enough to potentially encompass public-sector cases, as well.\(^{85}\) According to the Fourth and Sixth Circuits, the merits of

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\(^{78}\) *Bramley*, 116 F.3d at 734.

\(^{79}\) *See* United States v. Martin, 195 F.3d 961, 967 (7th Cir. 1999) (expressing skepticism that the mail fraud statute was “intended merely to back up state criminal law”); see also *United States v. Weyhrauch*, 548 F.3d 1237, 1245-46 (9th Cir. 2008) (“We also cannot find any basis in the text or legislative history of § 1346 revealing that Congress intended to condition the meaning of ‘honest services’ on state law.”), vacated and remanded, 561 U.S. 476 (2010); *United States v. Walker*, 490 F.3d 1282, 1299 (11th Cir. 2007) (“[A]n honest services mail fraud . . . conviction does not require proof of a state law violation.”); *United States v. Frost*, 125 F.3d 346, 366 (6th Cir. 1997) (“Federal law governs the existence of fiduciary duty under the mail fraud statute.”). Regardless of whether a violation of state law was required, courts could and did consider such violations as evidence of intent. *E.g.*, *United States v. Woodward*, 149 F.3d 46, 62 (1st Cir. 1998) (finding defendant’s failure to report financial interest when required by statute to do so provided “a solid basis for the jury to find that [he] had the requisite intent to deprive the public of his honest services”).

\(^{80}\) This report references a significant number of decisions by federal appellate courts of various regional circuits. For purposes of brevity, references to a particular circuit in the body of this report (e.g., the Second Circuit) refer to the U.S. Court of Appeals for that particular circuit.

\(^{81}\) *Frost*, 125 F.3d at 368. Some courts adopting this foreseeable harm requirement took the view that economic harm did not have to be intended, so long as it was reasonably foreseeable. *United States v. Sun-Diamond Growers*, 138 F.3d 961, 974 (D.C. Cir. 1998), *aff’d on other grounds*, 526 U.S. 398 (1999); *but see Frost*, 125 F.3d at 368-69 (noting that one benefit of the foreseeable harm limitation is that it “focuses on the intent of the employee”).

\(^{82}\) *Frost*, 125 F.3d at 369.

\(^{83}\) *Id.* (stressing that only “the intangible right to honest services in the private sector” was under consideration and suggesting that foreseeable economic harm standard might not be needed in cases involving public officials); *United States v. Vinyard*, 266 F.3d 320, 327 (4th Cir. 2001) (considering “the reach of the honest services doctrine in the private employment context” and applying foreseeable harm test).

\(^{84}\) *United States v. deVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999); see also *Sun-Diamond Growers*, 138 F.3d at 973 (noting that “[i]n the private sector context, § 1346 poses special risks,” as any “material act of dishonesty by an employee deprives the employer of that worker’s ‘honest services,’ yet not every such act is converted into a federal crime by the mere use of the mails or interstate phone system”).

\(^{85}\) *See* United States v. Rybicki, 287 F.3d 257, 265 (2d Cir. 2002) (adopting requirement that “the scheme at issue created a foreseeable risk of economic or pecuniary harm to the victim, which is consistent with traditional notions of fraud and fraudulent harm,” and stating requirement as one of the “elements necessary to establish the offense of honest
the foreseeable harm requirement were twofold: (1) it kept “the focus of the analysis on employee intent rather than employer response,” and (2) it “limit[ed] the scope of § 1346 to serious harms.”

Yet as with the state-law limitation, multiple other courts refused to apply the foreseeable harm limitation, rejecting it as “something of an ipse dixit designed simply to limit the scope of section 1346.”

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

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

services fraud pursuant to 18 U.S.C. § 1346” without regard for public/private distinction). The Second Circuit subsequently backed away from the foreseeable harm test, suggesting that it might be limited to cases involving self-dealing. United States v. Rybicki, 354 F.3d 124, 142 (2d Cir. 2003) (en banc), though other circuits do not appear to have adopted this approach. E.g., Frost, 125 F.3d at 368 (broadly stating that “the intangible right to honest services in the private sector [is] ultimately dependent upon the property rights of the victim”).

86 Vinyard, 266 F.3d at 328-29; Frost, 125 F.3d at 368-69.
87 Rybicki, 354 F.3d at 146; see also United States v. Black, 530 F.3d 596, 600 (7th Cir. 2008) (rejecting proposition that gain must “be at the expense of the persons (or other entities) to whom the defendants owed their honest services” as “a no-harm-no-foul argument”), vacated and remanded, 561 U.S. 465 (2010); United States v. Welch, 327 F.3d 1081, 1104-05 (10th Cir. 2003) (“The notion of harm in a mail or wire fraud prosecution is important only in the sense that proof of contemplated or actual harm to the victim or others is one means of establishing the necessary intent to defraud.”).
88 Vinyard, 266 F.3d at 327.
89 United States v. Cochran, 109 F.3d 660, 667 n.3 (10th Cir. 1997); see also Rybicki, 354 F.3d at 146 (overruling, en banc, panel reliance on foreseeable harm and expressing preference for “the ‘materiality’ test because it has the virtue of arising out of fundamental principles of the law of fraud”); United States v. Gray, 96 F.3d 769, 775 (5th Cir. 1996).
90 Rybicki, 354 F.3d at 146.
91 Vinyard, 266 F.3d at 328.
92 Id.; see also Frost, 125 F.3d at 368-69.
93 United States v. Sorich, 523 F.3d 702, 707-08 (7th Cir. 2008); United States v. Thompson, 484 F.3d 877, 881 (7th Cir. 2007); United States v. Bloom, 149 F.3d 649, 656-57 (7th Cir. 1998).
94 Sorich, 523 F.3d at 707-08. The court in Sorich clarified that the anticipated gain need not have been to the defendant or other participant in the scheme to defraud; thus, a scheme to dole out city civil service jobs based on political patronage and nepotism still, in the court’s view, came within the statute’s prohibition. Id. at 709.
95 United States v. Panarella, 277 F.3d 678, 692 (3d Cir. 2002).
96 United States v. Welch, 327 F.3d 1081, 1107 (10th Cir. 2003).
Finally, at least two courts appeared to reject any reliance on judicially crafted special tests or limiting principles in honest services cases, concluding instead that existing elements—such as the requirement that the defendant possessed a specific intent to defraud—were sufficient to cabin Section 1346’s breadth. These courts did, however, acknowledge that the existence of one or more of the elements required in other circuits, such as private gain, could “bolster a showing of deceptive intent,” among other things.

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

Ultimately, the Supreme Court did not expressly endorse any of the limiting principles propagated by the courts of appeals and presented for review in Weyhrauch, Black, and Skilling. However, the

97 See United States v. Inzunza, 580 F.3d 894, 905 (9th Cir. 2009) (agreeing that “careful attention to the intent element dispels concerns about the statute’s overbreadth”); Welch, 327 F.3d at 1107 (“[A] this stage we need not define the exact contours of honest services fraud or the proof necessary to sustain it.”).
98 Inzunza, 580 F.3d at 905; Welch, 327 F.3d at 1105 (noting that courts had “long permitted fact finders” to rely on circumstantial evidence, “including evidence of actual or contemplated harm, to infer [fraudulent] intent”).
99 See Sorich v. United States, 555 U.S. 1204, 129 S.Ct. 1308, 1309-10 (2009) (Scalia, J., dissenting from denial of petition for writ of certiorari) (citing “the longstanding confusion over the scope of the statute” and “the serious due process and federalism interests affected by the expansion of criminal liability” as reasons for the Court to “squarely confront both the meaning and the constitutionality of § 1346”).
100 Id. at 1310.
101 548 F.3d 1237, 1239 (9th Cir. 2008).
103 530 F.3d 596, 599 (7th Cir. 2008).
104 Id. at 600-01.
105 554 F.3d 529, 534-37 (5th Cir. 2009).
Court did use *Skilling* as a vehicle to drastically limit the scope of honest services fraud in another way.

**United States v. Skilling**

As noted above, Jeffrey Skilling, the one-time CEO of Enron, was convicted of (among other things) wire fraud on the theory that he deprived the company and its shareholders of his honest services by manipulating financial results and making false and misleading statements about the company’s performance in order to “prop up Enron’s short-run stock prices.”\(^{107}\) On appeal, the Fifth Circuit upheld Skilling’s honest services fraud conviction, rejecting Skilling’s argument that his conduct could not fall within the meaning of Section 1346 because it “was in the corporate interest and therefore was not self-dealing.”\(^{108}\) Skilling then argued to the Supreme Court that the statute should be struck down as unconstitutionally vague.\(^{109}\)

The Supreme Court agreed with Skilling that Section 1346, as written, could raise “due process concerns underlying the vagueness doctrine”\(^{110}\) given the breadth of its language.\(^{111}\) However, the Court declined to strike down the statute as irredeemably vague, opting instead to construe it narrowly in a way that avoided the problem.\(^{112}\) The Court began by “survey[ing]” the “body of pre- *McNally* honest-services’ case law, a corpus that, in the Court’s view, Section 1346 was clearly intended “to refer to and incorporate.”\(^{113}\) The Court’s survey yielded two conclusions: (1) that “honest-services decisions preceding *McNally* were not models of clarity or consistency”; and (2) that despite the inconsistency, the honest services doctrine encompassed a “solid core” of cases “involving offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes.”\(^{114}\) Therefore, to steer clear of a “vagueness shoal,” the Supreme Court read Section 1346 as being limited *only* to this “core” of bribery and kickback cases.\(^{115}\) Regarding the precise definitions of bribery and kickbacks, the Court cited to existing federal bribery statutes and the definition of “kickback” contained in Title 41 of the U.S. Code, opining that Section 1346 would “draw[] content not only from the pre-*McNally* case law, but also from [these] federal statutes proscribing—and defining—similar crimes.”\(^{116}\) The Court also clarified that its holding would not render Section 1346 “superfluous” in light of its now-substantial overlap with these “similar crimes”—as an example, the Court noted that 18 U.S.C. § 201, the “principal federal bribery statute,” applies only to federal public officials, meaning that Section 1346 would

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\(^{108}\) *Skilling*, 554 F.3d at 545.

\(^{109}\) *Skilling*, 561 U.S. at 402. Skilling alternatively argued for adoption of the Seventh Circuit’s “private gain” limitation and maintained that his conduct did not meet this limitation because the only gain he received (in the form of compensation) would not qualify under Seventh Circuit case law. See *Petition for a Writ of Certiorari* at 20, 23-24, *Skilling* v. United States, 561 U.S. 358 (2010) (No. 08-1394) (noting Seventh Circuit requirement that “any private benefit [be] distinct from the benefits awarded by the employer for pursuing the employer’s goals”).

\(^{110}\) *Skilling*, 561 U.S. at 408.

\(^{111}\) The “void-for vagueness doctrine embraces” the requirements that a criminal statute must define the offense (1) with sufficient clarity that ordinary people can understand what conduct is proscribed, and (2) in a way that does not allow for arbitrary enforcement. *Id.* at 402-03.

\(^{112}\) As the Court in *Skilling* explained, “[i]t has long been [the Court’s] practice, . . . before striking a federal statute as impossibly vague, to consider whether the prescription is amenable to a limiting construction.” *Id.* at 405.

\(^{113}\) *Id.* at 404-05.

\(^{114}\) *Id.* at 405, 407.

\(^{115}\) *Id.* at 368, 409.

\(^{116}\) *Id.* at 412 (citing 18 U.S.C. §§ 201(b), 666(a)(2); 41 U.S.C. § 52(2)).
continue to reach “state and local corruption and . . . private-sector fraud” that “might otherwise go unpunished.”

Significantly, the Court in *Skilling* rejected the argument, advanced by the government, that Section 1346 should be construed to extend as well to “undisclosed self-dealing by a public official or private employee—i.e., the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty.” Although courts prior to *Skilling* had recognized bribery and undisclosed conflicts of interest as the two “typical[]” scenarios giving rise to honest services fraud prosecutions, the Supreme Court viewed an undisclosed self-dealing or conflict-of-interest category of honest services fraud as “amorphous” given that lower courts had “reached no consensus on which schemes qualified.” The Court thus refused to adopt the government’s “less constrained construction,” that is, one that would include undisclosed self-dealing, “absent Congress’ clear instruction otherwise.” In a footnote, the Court went on to provide guidance to Congress should it decide “to take up the enterprise of criminalizing” such conduct, noting that legislation “would have to employ standards of sufficient definiteness and specificity to overcome due process concerns.” In the Court’s view, the formulation proposed by the government—a prohibition on the “taking of official action by the employee,” with the specific intent to deceive, that furthers his own [material] undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty”—would “leave[] many questions unanswered,” including (1) how significant the conflicting interest would have to be, (2) the extent to which official action would have to further the interest, and (3) what (and to whom) information should be conveyed in order for disclosure to be adequate.

Justice Scalia wrote separately in *Skilling* to make clear that he viewed Section 1346 as unconstitutionally vague and did not find the Court’s limiting construction sufficient to address his concerns. Specifically, Justice Scalia pointed out that (1) not a single court’s version of the pre-*McNally* honest services doctrine limited it *only* to bribery and kickbacks, rendering the Court’s supposition that it was respecting the intent of Congress dubious; and (2) even limited to bribery and kickbacks in breach of a fiduciary duty, Section 1346 (and the majority opinion) left the nature, content, and source of the requisite duty hopelessly unclear and subject to conflicting conceptualizations by the lower courts. On this latter point, the majority addressed Justice Scalia’s critique by maintaining in a footnote that “debates” over “the source and scope of

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

118 Id. at 409 (quoting Brief for United States at 2930-2931).

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

120 *Skilling*, 561 U.S. at 410.

121 Id. at 411.

122 Id. at 411 n.44.

123 Id.

124 See id. at 417-22 (Scalia, J., concurring in part and concurring in judgment) (arguing that Court’s construction did not “solve the most fundamental indeterminacy: the character of the ‘fiduciary capacity’ to which the bribery and kickback restriction applies”).
fiduciary duties” were “rare in bribe and kickback cases,” with the existence of a fiduciary relationship usually being “beyond dispute.” The Court also provided several “examples” of such relationships: (1) the relationship between a public official and the public at large, (2) the relationship between an employee and his employer, and (3) the relationship between a union official and union members.125

In light of the Supreme Court’s decision in *Skilling*, the two other honest services cases in which the Court granted certiorari—*Weyhrauch* and *Black*—proved to be anticlimactic. *Weyhrauch*, which had presented the Court with an opportunity to pass on the “state-law” limitation, was simply vacated and remanded for further consideration in light of *Skilling*;126 and the Court in *Black*—a case involving the “foreseeable harm” limitation—cursorily ruled that the jury instructions in the case were incorrect because they did not reflect *Skilling*’s construction of Section 1346, that is, that honest services fraud encompasses only participation in a bribery or kickback scheme in violation of a fiduciary duty.127

**Honest Services Fraud After *Skilling***

The Supreme Court’s decision in *Skilling* makes clear that honest services mail or wire fraud must involve “offenders who, in violation of a fiduciary duty, participate[] in bribery or kickback schemes.”128 In light of that holding, lower courts in recent years have had to reconsider the (1) vitality of the “limiting principles” they adopted prior to *Skilling*, (2) source and scope of fiduciary duties, and (3) definition and application of the terms “bribery” and “kickbacks.”

**Status of Lower-Court Limiting Principles***

Given that the Supreme Court in *Skilling* neither explicitly endorsed nor rejected any of the Section 1346 “limiting principles” developed by the lower courts, the decision’s impact on the disputes among the courts of appeals was not immediately clear.129 Indeed, one of Justice Scalia’s complaints was the Court’s failure to address the “fundamental indeterminacy” of the requisite fiduciary obligation, including its source and application to private-sector and public-official defendants.

That said, the opinion in *Skilling* offered some clues as to the continuing vitality of the limiting principles discussed above. First, by limiting honest services fraud to schemes involving bribery or kickbacks, *Skilling* appeared to indirectly validate the Seventh Circuit’s “private gain” limitation, as any bribe or kickback would necessarily seem to constitute such a gain.130 The

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125 Id. at 407 n.41 (internal citations omitted).


128 *Skilling*, 561 U.S. at 407.

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

130 See Ryan v. United States, 759 F. Supp. 2d 975, 979 (N.D. Ill. 2010) (recognizing that “steering contracts, leases,
Seventh Circuit, which was the only circuit to have squarely adopted the private gain limitation prior to *Skilling*, recognized as much in a 2014 opinion, noting that its “general approach” of “focus[ing] on the defendant’s benefit from the fraud . . . was vindicated” in *Skilling* (though “[n]ow, only bribery or kickbacks, rather than any private gain whatsoever, can be used to show honest-services fraud”).¹³¹ Thus, after *Skilling*, actual or contemplated private gain appears to be a necessary but not sufficient condition for imposition of criminal liability on an honest services fraud theory.¹³²

Second, dictum from *Skilling* may be read as calling into question the “foreseeable harm” limitation adopted by some circuits. In describing the development of the honest services theory of fraud, the Court in *Skilling* explained that the theory targets corruption where “the betrayed party [has] suffered no deprivation of money or property,” noting that “[e]ven if the scheme occasion[s] a money or property gain for the betrayed party, . . . actionable harm [lies] in the denial of that party’s right to the offender’s ‘honest services.’”¹³³ The opinion used as an example a mayor who accepts a bribe from a third party in exchange for awarding that party a city contract, where “the contract terms [are] the same as any that could have been negotiated at arm’s length.”¹³⁴ Based on this dictum, at least one district court after *Skilling* has, in a case involving a public official, rejected the argument that honest services fraud requires “an actual or intended economic loss to the victim.”¹³⁵ Of course, as described above, the circuits that recognized a foreseeable harm limitation prior to *Skilling* mostly applied it only in private-sector cases, leading a different post-*Skilling* district court to “follow the clear precedent from the Fourth Circuit . . . and apply the reasonably foreseeable harm test in the context of . . . [an] alleged private-sector honest-services offense.”¹³⁶ By contrast, the Seventh Circuit has held that the government need not show “actual or intended tangible harm” in either public- or private-sector cases,¹³⁷ while the Ninth Circuit in a post-*Skilling* decision has rejected a foreseeable-economic-loss requirement for public officials but left for “another day” the question of whether “economic damages need be shown” in private-sector cases.¹³⁸

¹³¹ United States v. Nayak, 769 F.3d 978, 981 (7th Cir. 2014) (citation and internal quotation marks omitted).

¹³² As discussed infra, a mere gratuity does not come within the definition of bribery or a kickback for purposes of honest services fraud.

¹³³ Several district court decisions after *Skilling* have addressed private gain in the context of campaign contributions, with public-official-defendants contending that such contributions cannot support an honest services conviction because they do not personally enrich the official. United States v. Terry, No. 1:10-CR-390, 2011 WL 5008415, at *4 (N.D. Ohio Oct. 19, 2011); United States v. McGregor, No. 2:10-CR-186, 2011 WL 1576950, at *3 (M.D. Ala. Apr. 4, 2011); Ryan, 759 F. Supp. 2d at 993 n.9. Courts have uniformly rejected the argument, concluding that even if “honest-services bribery must involve a personal benefit to the ‘offender,’” such “benefit would not have to be in the form of a direct payment of cash to the individual in question.” McGregor, 2011 WL 1576950, at *4; see also Terry, 2011 WL 5008415, at *5 (concluding that jury could “certainly have concluded that the defendant personally benefitted” from contributions that were “instrumental” in retaining defendant’s seat as judge).


¹³⁵ Id.


¹³⁸ United States v. Nayak, 769 F.3d 978, 982 (7th Cir. 2014) (concluding that a “proposed distinction between private and public corruption has no textual basis in § 1346”).

¹³⁹ United States v. Milovanovic, 678 F.3d 713, 726-27 (9th Cir. 2012). In a subsequent case, the Ninth Circuit...
Finally, with respect to the “state law” limitation adopted by the Third and Fifth Circuits—that is, the requirement that a defendant must have violated some affirmative duty recognized under state law—one might read the Skilling Court’s brief discussion of “the source and scope of fiduciary duties” as calling the limitation into question. In dismissing Justice Scalia’s concerns regarding the indeterminacy of such duties, the majority in Skilling averred that the existence of a fiduciary relationship was “usually beyond dispute” in bribe and kickback cases, citing several examples of public and private duties arising from “specific relationship[s] between two parties.” This apparent endorsement of a broad conception of fiduciary relationships in the context of honest services fraud would seem to be inconsistent with a requirement that any breach of duty be grounded in positive state law. Nevertheless, and perhaps bearing out Justice Scalia’s concerns, the source and scope of fiduciary duties have, as discussed below, continued to be a source of considerable confusion among lower courts following Skilling.

### Fiduciary Duty

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

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

With respect to the first question, a logical starting point is the Skilling footnote that provides three “examples” of fiduciary relationships that lower courts had previously found to be “beyond dispute”: “public official-public, employee-employer, and union official-union members.” Courts have recognized that this footnote does not “represent an exhaustive list of the fiduciary relationships that can support an honest-services fraud prosecution,” meaning that other relationships sharing similar characteristics, “such as attorney-client, doctor-patient, or stockbroker-customer,” may also be included. And one appellate court has determined that the

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140 Skilling, 561 U.S. at 407 n.41.

141 Id. (quoting Chiarella v. United States, 445 U.S. 222, 233 (1980)).

142 See infra § Fiduciary Duty.

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


145 Id.

146 Skilling, 554 F.3d at 407 n.41.

term “fiduciary” may encompass even “informal” relationships of trust where “one party acts for the benefit of another and induces the trusting party to relax the care and vigilance which it would ordinarily exercise.”

Not all courts agree with this broader conception of a fiduciary relationship, however.

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

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

Regarding the third question—the nature and scope of the requisite fiduciary duty—the outcome will likely depend on what source of authority is relied upon and how it is framed. As noted above, some courts have treated the existence of an employment relationship, for example, in the context of a bribe or kickback scheme as a conclusive indication that a fiduciary duty has been breached in a way that constitutes honest services fraud, while other courts have focused more specifically on the "type of fiduciary duty" at issue and whether it "falls within the core" of the term as applied in honest services cases.

**Definitions of Bribery and Kickbacks**

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

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158 See United States v. Terry, 707 F.3d 607, 611-12 (6th Cir. 2013) (declining to "wade into the debate over whether a state-law violation is a precondition of honest services fraud").
159 E.g., United States v. Halloran, 821 F.3d 321, 338 (2d Cir. 2016) (analyzing duty and breach under federal and New York law to determine whether outcome would differ).
160 United States v. Seabrook, No. 16-CR-467, 2017 WL 3995630, at *2 (S.D.N.Y. Sept. 11, 2017) (concluding that because the defendant was a union official, he owed a duty and "no further inquiry in[to] the scope and nature of that relationship is necessary").
161 *Smith*, 985 F. Supp. 2d 547, 592-95.
162 *Skilling*, 561 U.S. at 412.
163 18 U.S.C. § 201(b) makes it a crime for any person to “corruptly give[], offer[] or promise[] anything of value to any [federal] public official . . . with intent” to “influence any official act,” to influence the public official to commit a fraud on the United States, or to “induce” the public official “to do or omit to do any act in violation of the lawful duty of such official or person.” 18 U.S.C. § 201(b)(1). The statute also criminalizes parallel conduct on the part of the public-official bribe recipient. Id. § 201(b)(2).
164 18 U.S.C. § 666 criminalizes the solicitation or acceptance (as well as the offer or provision) of “anything of value” with intent to influence or be influenced “in connection with any business, transaction, or series of transactions of” an “organization or of a State, local or Indian tribal government” “involving anything of value of $5,000 or more,” provided that the organization or government at issue receives in excess of $10,000 in federal funds in any one-year period. 18 U.S.C. §§ 666(a)(1)-(2), (b).
165 The statute defines “kickback” as “any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind that is provided to a prime contractor, prime contractor employee, subcontractor, or subcontractor employee to improperly obtain or reward favorable treatment in connection with a prime contract or a subcontract relating to a prime contract.” 41 U.S.C. § 8701(2).
166 United States v. Nagin, 810 F.3d 348, 351 (5th Cir. 2016).
courts have also relied on state-law definitions of bribery or simply on prior honest services case law.

In general, bribery requires a quid pro quo, meaning a specific intent to “give or receive something of value in exchange for an official act.” This requirement distinguishes a bribe from a “gratuity,” which “may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.” Thus, although the text of the federal bribery statutes appears to criminalize it, payment or receipt of a mere gratuity does not constitute honest services fraud.

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

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167 United States v. Teel, 691 F.3d 578, 582 (5th Cir. 2012).
168 See United States v. DeMizio, 741 F.3d 373, 381-82 (2d Cir. 2014) (relying on definition of “kickback” from Black’s Law Dictionary and Second Circuit precedent).
170 Sun-Diamond Growers, 526 U.S. at 405.
171 See 18 U.S.C. § 201(c) (prohibiting the provision or receipt of anything of value “for or because of any official act”); 18 U.S.C. § 666(a)(2) (prohibiting provision of anything of value “with intent to influence or reward”). There is some dispute as to whether Section 666 reaches gratuities. Compare United States v. Bahel, 662 F.3d 610, 636 (2d Cir. 2011) (concluding that Section 666 criminalizes receipt of gratuities), with United States v. Fernandez, 722 F.3d 1, 26 (1st Cir. 2013) (concluding that Section 666 does not cover gratuities).
172 United States v. Hawkins, 777 F.3d 880, 884 (7th Cir. 2015) (“[S]ecret receipt of a gratuity . . . does not violate § 1341, for a payment that does not entail a plan to change how the employee or agent does his job is neither a bribe nor a kickback.”).
173 United States v. Terry, 707 F.3d 607, 612 (6th Cir. 2013) (collecting cases).
174 See United States v. Ring, 706 F.3d 460, 466 (D.C. Cir. 2013) (assuming without deciding that explicit quid pro quo requirement for campaign contributions extends to honest services fraud); United States v. Menendez, 291 F. Supp. 3d 606, 613 (D.N.J. 2018); cf. McCutcheon v. FEC, 572 U.S. 185, 192 (2014) (recognizing that for a regulation of campaign contributions to comport with the First Amendment, it must target “‘quid pro quo’ corruption or its appearance”). Even then, however, it need not be express. United States v. Siegelman, 640 F.3d 1159, 1171 (11th Cir. 2011) (“The official must agree to take or forego some specific action . . . [b]ut . . . an explicit agreement may be implied from the official’s words and actions.” (internal alterations and quotation marks omitted)).
175 Terry, 707 F.3d at 612.
177 United States v. Ring, 706 F.3d 460, 467 (D.C. Cir. 2013) (“[A] defendant may be guilty of honest-services bribery where he offers an official something of value with a specific intent to effect a quid pro quo even if that official emphatically refused to accept.”).
178 United States v. Morgan, 635 F. App’x 423, 431 (10th Cir. 2015).
179 Compare United States v. Nagin, 810 F.3d 348, 351 (5th Cir. 2016) (“[A]n official may be convicted of bribery . . .
In 2016, the Supreme Court narrowly construed the scope of conduct that may be considered an “official act” supporting bribery, thus potentially narrowing the scope of honest services fraud once again as well. In *McDonnell v. United States*, the former governor of Virginia was charged with honest services fraud, among other things, for accepting benefits from a nutritional supplement company in exchange for his influence in organizing university studies of the company’s product. Importantly, the parties agreed that “bribery” for purposes of honest services fraud should be defined by reference to 18 U.S.C. §§ 201(b)(1)(A) and (b)(2)(A), which require an intent to influence or a promise to be influenced in the performance of an “official act.” Of course, the parties disputed the definition of “official act” and whether it encompassed the defendant’s conduct.

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

Following *McDonnell*, there has been some speculation that the “stream of benefits” theory of bribery—that is, that specific payments need not be linked to particular official acts—is dead. However, at least one court has held to the contrary. Furthermore, because the parties in *McDonnell* agreed that bribery should be defined by reference to Sections 201(b)(1)(A) and (b)(2)(A), the Court had no occasion to consider whether an “official act” (as it defined the term) must always underlie public-sector honest services fraud based on bribery. Thus, to the extent

even if he has no intention of actually fulfilling his end of the bargain.”), with Hawkins, 777 F.3d at 884 (noting that if defendants “were lying” about taking action in exchange for payment, they “were scamming [the payor] rather than” the public).

180 136 S.Ct. 2355 (2016).
181 Id. at 2357.
184 Id.
185 Id. at 2370.
186 Id. at 2373.
188 United States v. Menendez, 291 F. Supp. 3d 606, 613 (D.N.J. 2018) (“*McDonnell* is not antagonistic to the stream of benefits theory.”); cf. United States v. Silver, 948 F.3d 538, 552-54 & n.7 (2d Cir. 2020) (concluding that “as the opportunities arise” theory of bribery remains valid post-*McDonnell* but requires “identification of a particular question or matter to be influenced”).
courts look to provisions beyond (b)(1)(A) and (b)(2)(A) to give content to the bribery requirement in honest services cases, McDonnell arguably would have no impact.\textsuperscript{189}

That said, it does seem that McDonnell could potentially cabin the scope of honest services fraud liability in at least some cases where liability is premised on the definition of bribery found in Section 201. For instance, in the high-profile prosecution of Sheldon Silver, the former speaker of the New York State Assembly, the Second Circuit vacated Silver’s conviction on honest services charges because the jury instructions broadly captured conduct “such as arranging meetings or hosting events with constituents” that would be considered lawful after McDonnell.\textsuperscript{190}

Though it appears that honest services fraud prosecutions since 2010 have largely focused on bribery, a few cases have involved kickback schemes. “A kickback scheme typically involves an employee’s steering business of his employer to a third party in exchange for a share of the third party’s profits on that business.”\textsuperscript{191} The defendant need not directly receive the profits, however—a kickback scheme may involve one who “directs the third party to share its profits with an entity designated by the [defendant] in which [he] has an interest” or with “others loyal to the defendant.”\textsuperscript{192}

In response to Skilling and McDonnell, some federal prosecutors attempted to reframe cases that might previously have been brought on an honest services theory as traditional “money or property” wire fraud. And some courts recognized a theory of intangible property that encompasses a “right to control” one’s assets,\textsuperscript{193} which could permit prosecutors to use the mail and wire fraud statutes to reach some conflict-of-interest cases that can no longer be tried on an honest services theory.\textsuperscript{194} However, the Supreme Court in Kelly v. United States may have limited at least some efforts to fit cases that do not involve bribery or kickbacks under the “money or property” umbrella. In Kelly, the Court overturned the wire-fraud convictions of public officials who facilitated the closing of multiple lanes of the George Washington Bridge in order to cause

\textsuperscript{189} See United States v. Suhl, 885 F.3d 1106, 1111 (8th Cir. 2018) (assuming that McDonnell applies to Section 666 but noting that the provision “does not include the term ‘official act’”); Elgawhary v. United States, No. 14-CR-0068, 2018 WL 398284, at *4 (D. Md. Jan. 11, 2018) (rejecting argument in private-sector case that “honest services fraud can only be defined in reference to” Section 201 and noting that Section 666 sets out a “different definition[] for bribery”); Vuona, supra note 187, at 41-42 (arguing that in light of McDonnell, federal prosecutors should look to different portions of Section 201 that prohibit illegal agreements to perform “act[s] in violation of the lawful duty of such official or person” (quoting 18 U.S.C. §§ 201(b)(1)(C) & (b)(2)(C))).

\textsuperscript{190} United States v. Silver, 864 F.3d 102, 118 (2d Cir. 2017). Nevertheless, Silver was retried with post-McDonnell jury instructions and was convicted a second time. Benjamin Weiser, Sheldon Silver is Convicted in 2nd Corruption Trial, N.Y. TIMES (May 11, 2018), https://www.nytimes.com/2018/05/11/nyregion/sheldon-silver-retrial-guilty.html?module=inline. The Second Circuit then affirmed Silver’s conviction on some counts but vacated several others again, concluding that the jury instructions erroneously failed to require the jury to find that “Silver promised to take official action on a specific and focused question or matter as the opportunities to take such action arose.” Silver, 948 F.3d at 569.


\textsuperscript{192} Demizio, 741 F.3d at 381-82.

\textsuperscript{193} United States v. Johnson, 939 F.3d 82, 88 (2d Cir. 2019) (“We have recognized that the property interests protected by the wire fraud statute include the interest of a victim in controlling his or her own assets.” (alterations and quotation marks omitted)); United States v. Baroni, 909 F.3d 550, 567 (3d Cir. 2018) (“Included within the meaning of money or property is the victim’s right to control that money or property.” (alteration, citations, and internal quotation marks omitted)).

\textsuperscript{194} See generally Brette M. Tannenbaum, Reframing the Right: Using Theories of Intangible Property to Target Honest Services Fraud after Skilling, 112 COLUM. L. REV. 359 (2012).
gridlock as political retribution. The government in the case took the position that the defendants sought to acquire “money or property” by commandeering the physical lanes of the bridge itself and by depriving the local entity that administers the bridge tollway of the costs of compensating employees who performed work related to the lane closings. The Court rejected both theories, however, concluding that (1) the lane realignments were a “run-of-the-mine exercise of regulatory power [that] cannot count as the taking of property,” and (2) the cost of employee services was merely an “incidental byproduct” of the scheme to create gridlock and thus was not a requisite “object of the fraud.” Though the Court’s opinion did not explicitly endorse or reject a “right to control” theory of intangible property under the mail and wire fraud statutes, in underscoring that “not every corrupt act . . . is a federal crime,” it may signal a “barrier to prosecutions for fraud schemes that do not demonstrably entail money or property as their object.”

### Potential Options for Congress

On more than one occasion since 2010, Congress has considered legislation that would expand honest services fraud to include certain categories of conduct that 18 U.S.C. § 1346 no longer encompasses under the Supreme Court’s interpretations of the statute. For instance, the Senate and House considered bills in the 112th Congress that would have restored undisclosed self-dealing as a basis for honest services fraud prosecution in public-, but not private-sector, cases. The legislation would have expanded the definition of “scheme to defraud” to include a scheme by a “public official”—meaning a federal, state, or local officer, employee, or agent—to (1) perform an official act that, at least in material part, furthers his own or certain relatives’ or associates’ financial interests, and (2) conceal or knowingly fail to disclose “material information” about the interest required to be disclosed “by any Federal, State, or local statute, rule, regulation, or charter applicable to the public official.” In short, it appears that the

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195 See Kelly v. United States, No. 18-1059, slip op. at 5 (May 7, 2020).
196 Id. at 8.
197 Id. at 10.
198 Id. at 13.
201 “The term ‘undisclosed self-dealing’ means that – (A) a public official performs an official act for the purpose, in whole or in material part, of furthering or benefitting a financial interest, of which the public official has knowledge, of – (i) the public official; (ii) the spouse or minor child of a public official; (iii) a general business partner of the public official; (iv) a business or organization in which the public official is serving as an employee, officer, director, trustee, or general partner; (v) an individual, business, or organization with whom the public official is negotiating for, or has any arrangement concerning, prospective employment or financial compensation; or (vi) an individual, business, or organization from whom the public official has received any thing or things of value, otherwise than as provided by law for the proper discharge of official duty, or by rule or regulation.” H.R. 2572 § 14(a); S. 2038 § 211(a).
202 “The term ‘undisclosed self-dealing’ means that . . . (B) the public official knowingly falsifies, conceals, or covers up material information that is required to be disclosed by any Federal, State, or local statute, rule, regulation, or charter applicable to the public official, or the knowing failure of the public official to disclose material information in a manner that is required by any Federal, State, or local statute, rule, regulation, or charter applicable to the public.
legislation would have expanded the scope of honest services fraud liability in public-sector cases, beyond the bribery and kickback schemes contemplated in *Skilling*, to include one additional category of conduct: failure to disclose a material financial conflict of interest. Additionally, though the bills were considered prior to the Supreme Court’s decision in *McDonnell*, it appears that at least one version would have established a slightly broader definition of an “official act” than the one the Court subsequently announced.\(^{203}\) Ultimately, the bills introduced in the 112th Congress did not become law, nor has any other legislation purporting to reexpand the scope of honest services fraud become law as of this writing.

Nevertheless, some commentators have continued to lament what they view as the Supreme Court’s blunting of a previously sharp weapon to combat public corruption, arguing that the decisions in *Skilling* and *McDonnell* placed too little weight on “the interests of citizens in honest government” and urging Congress to find a legislative fix.\(^{204}\) Other observers, however, have suggested that the deleterious impact of the decisions is overstated, pointing out that federal prosecutors still have multiple legal avenues through which to combat corruption in the public sphere.\(^{205}\) In any event, should Congress revisit and reconsider the scope of 18 U.S.C. § 1346, understanding the vagueness and federalism concerns that have animated the Supreme Court’s repeated limiting constructions of the statute may be beneficial to preventing further judicial limitations. One place to start could be the *Skilling* Court’s identification of some questions that must be answered if Congress seeks to “take up the enterprise of criminalizing undisclosed self-dealing . . . .”\(^{206}\) These questions include (1) how “direct or significant” a conflicting financial interest must be; (2) the extent to which an “official” act or action must further the conflicting financial interest in order to constitute fraud; and (3) to whom a disclosure must be made, and what information it must contain, for a conflicted official to avoid criminal liability.\(^{207}\) Answering these questions in any proposed legislation may go a long way toward achieving the “definiteness and specificity”\(^{208}\) needed to potentially avoid the vagueness and federalism concerns that the Court has repeatedly articulated.

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\(^{203}\) See H.R. 2572 § 14(a); S. 2038 § 211(a).

\(^{204}\) Fred Wertheimer, *Symposium: McDonnell decision substantially weakens the government’s ability to prevent corruption and protect citizens*, SCOTUSBLOG (June 28, 2016), https://www.scotusblog.com/2016/06/symposium-mcdonnell-decision-substantially-weakens-the-governments-ability-to-prevent-corruption-and-protect-citizens/; see also Johnson, supra note 54, at 106, 122 (arguing that *Skilling* hampered the federal government’s “ability to effectively prosecute state and local officials” and urging Congress to pass legislation that “would not fail the void-for-vagueness test”).

\(^{205}\) See Tannenbaum, supra note 194, at 363 (asserting that after *Skilling*, “prosecutors can and should continue to target the same kind of honest services misconduct using the classic mail and wire fraud statutes . . . by reframing the fraud as a deprivation of an intangible property right”); O’Toole, supra note 53, at 59-61 (cataloguing the various other legal mechanisms for punishing public corruption).

\(^{206}\) *Skilling* v. United States, 561 U.S. 358, 411 n.44 (2010).

\(^{207}\) Id.

\(^{208}\) Id.
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