An Honest Services Debate

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I. INTRODUCTION

Modern federal prosecutors found a wide variety of innovative uses for the mail fraud statute,[1] and by the middle of the Twentieth Century it had become a major weapon in the government's arsenal. When he was a federal prosecutor, Judge Jed Rakoff called the mail fraud statute the "true love" of white collar prosecutors because of "its simplicity, adaptability, and comfortable familiarity."[2] This affection for the mail fraud act has not been universally shared. Indeed in two cases, one in 1987 and the other in 2010, the Supreme Court has made clear its discomfort with the adaptability that has made the mail fraud statute so valuable to prosecutors. In the first decision, *McNally v. United States*, a majority of the Court gave the statute a narrowing interpretation and held that if Congress wished the statute to sweep more broadly, "it must speak more clearly than it has."[3] Congress did speak more clearly. Within a year it put federal prosecutors back in business, overriding *McNally* with the enactment of 18 U.S.C. § 1346, which extends the mail fraud statute to schemes to "deprive another of the intangible right of honest services."[4]

In 2009, the Supreme Court granted certiorari in three cases presenting questions concerning the "honest services" provision. *Weyhrauch v. United States*[5] was a Ninth Circuit case in which an Alaska state legislator had been charged with violating his duty of honest services by failing to disclose a conflict of interest.[6] The Court granted certiorari to decide whether a violation of state law is a requisite element of an honest services violation under § 1346. *Black v. United States* was a private sector fraud case from the Seventh Circuit involving newspaper magnate Conrad Black.[7] The question in *Black* was whether § 1346 requires proof that the

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1 *See* 18 U.S.C. § 1341 (2006). Although for simplicity's sake I refer only to mail fraud, this discussion also encompasses the wire fraud statute, 18 U.S.C. § 1343, which parallels its older sibling in virtually all respects.

2 Jed S. Rakoff, *The Federal Mail Fraud Statute (Part 1)*, 18 DUQ. L. REV. 771, 771 (1980).

3 McNally v. United States, 483 U.S. 350, 360 (1987).

4 *See* 18 U.S.C. § 1346 (2006).

5 130 S. Ct. 2971 (2010) (per curiam).

6 United States v. Weyhrauch, 548 F.3d 1237 (9th Cir. 2008).

7 130 S. Ct. 2963, 2966−67 (2010).

defendant's fraudulent scheme contemplated economic harm to the party to whom the duty of honest services was owed.[8] In *Skilling v. United* States, a Fifth Circuit case, former Enron CEO Jeffrey Skilling's petition raised two questions concerning § 1346: (1) whether the statute requires intent to obtain private gain from the party to whom honest services are owed; and (2) if not, whether § 1346 is void for vagueness.[9]

The Court issued only one opinion on the merits, in *Skilling*. It concluded that in enacting § 1346 Congress had (once again) not spoken clearly enough. In an opinion written by Justice Ginsburg, six members of the Court rejected the vagueness claim but construed the statute to be limited to bribes and kickbacks, which it found had comprised the "vast majority" and "lion's share" of the honest services prosecutions.[10] The Court did not resolve–or even discuss–whether a state law violation, economic harm, and/or private gain were necessary elements (though bribery and kickbacks by their nature involve gain to the defendant). Justice Scalia (writing for himself and two other justices) wrote separately to argue that § 1346 was unconstitutionally vague.[11] *Weyhrauch* and *Black* were vacated and remanded in light of the decision in *Skilling*.[12]

I have chosen to use a fictional debate to explore the issues raised by § 1346 and the Supreme Court's opinion in *Skilling*. The debate takes place when two faculty colleagues who always enjoy a good argument meet in the faculty lounge to discuss the cases from the Supreme Court's most recent term.

II. THE DEBATE

PROF. COURTRIGHT: I like the decision in *Skilling*. It's a good practical solution to the problems created by Congress's abysmally bad drafting of § 1346. Congress provided no definition of "the intangible right to honest services," and frankly nobody knew what it meant. We should be grateful that the Court cleaned up the mess Congress made without invalidating the law. It's much better to limit federal prosecutions to bribery and kickbacks, rather than some broader and more amorphous standard.

I don't think Congress had any idea of the problems its broad language created. That's probably why the *Skilling* Court added a footnote detailing some of the many issues Congress would have to resolve if it wants to pass legislation

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[8] Petition for Writ of Certiorari at i, Black v. United States, 130 S. Ct. 2963 (2010) (No. 08-876).

[9] Petition for Writ of Certiorari at i, Skilling v. United States, 130 S. Ct. 2896 (2010) (No. 08-1394).

[10] 130 S. Ct. 2896, 2930, 2931−32 n.44 (citations omitted).

[11] *See id*. at 2935 (Scalia, J., concurring).

[12] Weyhrauch v. United States, 130 S. Ct. 2971 (2010); Black v. United States, 130 S. Ct. 2966, 2970 (2010).

criminalizing other conduct.[13] Congress was clueless when it wrote § 1346, and the Court was right to worry that Congress might make the same mistakes again.

PROF. KRYTIC: As a matter of judicial interpretation, the *Skilling* opinion—and your defense of it—is problematic on so many levels it's hard to know where to begin. For starters, the Court's interpretation of § 1346 came out of the blue. As Justice Scalia correctly noted, *no* court had previously held that honest services mail fraud is limited to bribery and kickbacks,[14] though admittedly Jeffrey Skilling's brief and some academics had proposed such limitations.[15]

How do you get there as a matter of statutory interpretation? You can't just decide what you think is good policy. Statutory interpretation should start with the text but also take account of the legislative history. Interestingly, *Skilling* gives us hardly any textual analysis (a point which even Justice Scalia ignores), and only a few opinions in the lower courts took the language of the statute seriously. Judges Reena Raggi and Patrick Higginbotham were noteworthy exceptions.[16]

But most courts have started more or less where Justice Ginsburg did: with the fact that Congress enacted § 1346 to override *McNally*. As she wrote (lifting a line from the Second Circuit), when § 1346 refers to "the" right to honest services, it was referring to that right as defined in the pre-*McNally* case law.[17]

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[13] Footnote 45 of the *Skilling* opinion states:

> If Congress were to take up the enterprise of criminalizing undisclosed self-dealing by a public official or private employee . . . it would have to employ standards of sufficient definiteness and specificity to overcome due process concerns. The Government['s] propose[d] [] standard that prohibits 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 . . . leaves many questions unanswered. How direct or significant does the conflicting financial interest have to be? To what extent does the official action have to further that interest in order to amount to fraud? To whom should the disclosure be made and what information should it convey? These questions and others call for particular care in attempting to formulate an adequate criminal prohibition in this context.

Id. at 2933 n.45 (internal citations and quotations omitted).

[14] *Skilling*, 130 S. Ct. at 2939 (Scalia, J., dissenting).

[15] Brief for the Petitioner at 48–52, Skilling v. United States, 130 S. Ct. 2896 (2010) (No. 08-1394) (arguing that § 1346 "Should Be Limited To Acts Taken For Private Gain In The Form Of Bribes Or Kickbacks" and should not "encompass the ambiguous, outlier category of 'self dealing' cases."). Also, Professor Albert Alschuler filed an influential brief in *Weyhrauch* making the same argument. *See* Brief of Albert W. Alschuler as Amicus Curiae in Support of Neither Party at 28−32, Weyhrauch v. United States, 130 S. Ct. 2971 (2010) (No. 08-1196). *See also* Sara Sun Beale, *Comparing the Scope of the Federal Government's Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal*, 51 HASTINGS L.J. 699, 718–21 (2000) (arguing that state and local officials should not be subject to more stringent federal standards than federal officials and § 1346 should be construed in accordance with the carefully drawn limitations in 18 U.S.C. § 1346).

[16] *See* United States v. Rybicki, 354 F.3d 124, 152–53 (2d Cir. 2003) (Raggi, J., concurring in the judgment); United States v. Brumley, 116 F.3d 728, 731–32, 734–35 (5th Cir. 1997).

[17] *See Skilling*, 130 S. Ct. at 2928–29.

So far, so good. But as Justice Ginsburg acknowledged, *before McNally* there were honest services prosecutions that rested on self-dealing and the failure to disclose conflicts, not bribery or kickbacks. The Justice Department brief listed thirteen of them from a variety of circuits.[18] Those cases were an important part of the honest services doctrine that Congress reenacted in § 1346.

The Supreme Court knew what Congress intended, but it refused to interpret the statute in conformity with that intent. Why? The Court didn't like the breadth of honest services, so it rewrote the statute. Justice Scalia was right to call this "invention" rather than "interpretation."[19]

Lots of people—including many members of the Supreme Court—clearly think Congress made a dog's breakfast of § 1346. But deciding whether legislation is well written (or good policy) isn't really the job of the Supreme Court (or the lower court judges, for that matter). Maybe a statute limited to bribes and kickbacks would be better than the one Congress wrote. But the policy choice belongs to Congress, even if you don't like the results. Courts can't insert their policy preferences in the guise of "interpretation." And that's really what the majority did (just as they did in *McNally*).

Frankly, I think the Court stepped over the separation of powers line.

PROF. COURTRIGHT: Nobody's saying that courts should rewrite statutes and define crimes to suit their policy preferences. But the majority opinion in *Skilling* rests on the well-established principle of constitutional avoidance, which gives appropriate deference to Congress's legislative goals.[20]

Otherwise, the Court would have had to throw the baby out with the bath water. As the Court says, reading the statute more broadly "would raise the due process concerns [of] the vagueness doctrine," so "[t]o preserve the statute without transgressing constitutional limitations," the Court holds that "§ 1346 criminalizes *only* the bribery-and-kickback core of the pre-*McNally* case law."[21] You referred to Justice Scalia, but failed to note that, joined by Justices Thomas and Kennedy, he wrote separately to argue that the statute is pervasively vague and can't be saved by interpretation.[22] The majority had no choice but to cut back on the statute in order to save it.

This is a perfectly appropriate exercise of judicial authority.

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[18] Brief for the United States at 44 n.5, Skilling v. United States, 130 S. Ct. 2896 (2010) (No. 08-1394).

[19] *Skilling*, 130 S. Ct. at 2939 (Scalia, J., concurring).

[20] *See, e.g.*, Northwest Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2513 (2009) ("[I]t is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.").

[21] *Skilling*, 130 S. Ct. at 2931.

[22] *See id.* at 2935 (Scalia, J., concurring).

It doesn't frustrate Congress's purpose. As Justice Ginsburg noted, the bribery and kickback cases made up the lion's share of the prosecutions before *McNally*, and if Congress had been "[a]pprised that a broader reading of § 1346 could render the statute impermissibly vague, Congress . . . would have drawn the honest services line, as we do now, at bribery and kickback schemes."[23] She cites precedent, most notably *Booker*, in which the Court sought to determine what Congress would have intended in light of the Court's constitutional holding.[24]

PROF. KRYTIC: In the passage you quoted (and other parts of its opinion) the Court does seem to say that its interpretation is necessary to save the statute from invalidity, and, yes, three justices did write separately to say that the statute could not be saved.

But note that Justice Ginsburg refers to the *possibility* that a broader reading *could* make the statute unconstitutionally vague. In *Booker*, the Court expressly held that the Sentencing Reform Act violated the Sixth Amendment before the remedial majority channeled Congress to decide what remedy it would prefer.[25] In *Skilling*, the Court skipped a key step. Despite the fact that Congress reacted quickly and aggressively to the Court's opinion in *McNally*, adopting very broad language seeking to override it and reinstate the pre-*McNally* case law, the Court justified reading the statute narrowly because otherwise it *could* be unconstitutionally vague. Because the Court never unambiguously determined that § 1346 *is* impermissibly vague, *Booker*'s not on point.

There are lots of reasons not to do this kind of guessing about what Congress might have preferred, and the Court itself made those points in another case this term. In *United States v. Stevens*, Justice Roberts (writing for eight members of the Court) declined to interpret 18 U.S.C. § 48 narrowly (declining to read in a requirement of extreme "cruelty" despite the inclusion of that word in the statute) in order to save it.[26] Justice Roberts emphasized that courts may impose a limiting construction to avoid serious constitutional doubts only if the statutory language is "readily susceptible" to that interpretation. The courts may not "'rewrite'" a statute to conform it to the Constitution, because "doing so would constitute a 'serious invasion of the legislative domain,' and sharply diminish Congress's 'incentive to draft a narrowly tailored law in the first place.'"[27]

Didn't *Skilling* do just that, rewriting the statute, invading the domain of Congress and diminishing its incentive to devise narrowly tailored laws? If Congress wanted to write a statute making bribes and kickbacks crimes, it knew how to do so. But that's not what it did in § 1346.

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[23] *Id.* at 2931 n.43.

[24] *See id.* (citing United States v. Booker, 543 U.S. 220, 246 (2005)).

[25] United States v. Booker, 543 U.S. 226, 226−27 (2004).

[26] 130 S. Ct. 1577, 1591–92 (2010).

[27] *Id.* at 1592 (citations omitted).

Also, the doctrine of constitutional avoidance, as the Court invokes it here, presumes that Congress did not want to risk the *possibility* that the statute (or some applications of it) would be invalid. But Congress is not always so risk averse. Sometimes it wants to extend legislation as far as possible, testing the constitutional limits. The avoidance doctrine unduly restricts such legislation. Where, as here, Congress chose broad language in response to a narrow interpretation of the statute in question, shouldn't the Court first determine whether the statute can be constitutionally applied more broadly?[28]

PROF. COURTRIGHT: You are missing the point. The Court is clearly saying that without its narrow construction § 1346 would be void for vagueness. Notice that not a single member of the Court disagreed on that point, not even Justice Stevens, who was such a strong defender of the honest services theory in *McNally*. The only disagreement was on the question of whether the statute could be saved even with such a narrowing construction.

PROF. KRYTIC: I agree that the Court said its interpretation was necessary to save the statute from invalidity, and that three justices thought even that was not enough to save it.

But can that really be right as a matter of doctrine? Is the statute really vague on its face? The Court has repeatedly said that facial challenges are rare and disfavored.[29] As it acknowledged this term in the *Stevens* case, the Court has employed two standards to govern facial invalidation. Facial challenges are successful only when (1) no set of facts exists under which the challenged provision would be valid, or (2) the "statute lacks any 'plainly legitimate sweep.'"[30]

I don't think anyone can seriously contend that § 1346 meets either of these standards. The point of the majority's opinion is that § 1346 has a "solid core" of valid applications: the bribery and kickback cases.[31] Further, this "solid core" encompassing bribery and kickback schemes would seem to indicate § 1346's "plainly legitimate sweep." That would explain why none of the circuits had invalidated § 1346 on its face, despite a great deal of academic and judicial teeth gnashing about vagueness.

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[28] *See* Bertrall L. Ross III, Against Constitutional Mainstreaming: Toward a Proper Judicial Role in Dynamic Statutory Interpretation (Sept. 17, 2009) (draft, on file with author).

[29] Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450–51 (2008) (noting that facial challenges are disfavored because they "often rest on speculation," are contrary to judicial restraint, and "threaten to short circuit the democratic process by . . . frustrat[ing] the intent of the elected representatives of the people.") (internal quotations and citations omitted).

[30] United States v. Stevens, 130 S. Ct. 1577, 1587 (2010) (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)); Washington v. Glucksberg, 521 U.S. 702, 740 n.7 (1997) (Stevens, J., concurring in judgments).

[31] Skilling v. United States, 130 S. Ct. 2896, 2930 (2010).

In my view, the Court should have considered whether § 1346 was vague using the standard as-applied analysis, focusing on the facts of the three cases before it. That's what Jeffrey Skilling's brief asked the Court to do. He argued that (1) § 1346 should apply only when a defendant breached his duty of honest services in order to obtain private gain from the party to whom he owed honest services, or, in the alternative, (2) if the statute were not so limited it would be unconstitutionally vague, i.e., vague as applied to defendants who did not seek such gains, but not vague as to all defendants (or all who did not seek bribes or kickbacks).[32]

Suppose the Court had considered in each of the three cases—*Skilling*, *Black*, and *Weyhrauch*—whether or not the defendants had fair notice that their conduct fell within the statute. It's not clear that any of those defendants would have been able to succeed in the claim the statute was invalid as applied to them.

But so what if the Court had held, for instance, that the statute was vague *as applied* to Jeffrey Skilling? Let's assume the prosecutors really pushed the envelope in his case, and Skilling didn't have notice. In other cases, the statute could still have been applied—properly—not only to defendants who took bribes and kickbacks, but also to lots of other defendants who had sufficient notice from the case law.[33] Didn't the Court need to explain why the statute was not subject to as-applied analysis (if, as it appears, it was construing the statute on its face)?

PROF. COURTRIGHT: You've put your finger on a soft spot in the Court's jurisprudence: it hasn't articulated a clear standard for when it will permit facial challenges and its decisions have been inconsistent. The *Morales* decision, which held Chicago's gang loitering ordinance void for vagueness, is a good example.[34] The Court didn't explicitly reject its earlier holding that facial challenges are proper only when no set of facts exists under which the challenged provision would be valid, but it didn't apply that standard, and it was unable to muster a majority for any approach.

Despite repeated statements that facial challenges are rare and disfavored, many of the Court's constitutional decisions are effectively facial rulings with no

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[32] Brief for Petitioner at 48−57, Skilling v. United States, 130 S. Ct. 2896 (2010) (No.08-1394).

[33] Generally the vagueness test is applied to a statute with its judicial gloss, i.e., as it has been authoritatively construed. *See, e.g.*, United States v. Lanier, 520 U.S. 259, 266 (1997) (citing *inter alia*, Kolender v. Lawson, 461 U.S. 352, 355−56 (1983) and John C. Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 207 (1985)).

[34] *See* Chicago v. Morales, 527 U.S. 41, 51 (1999).

acknowledgement of that fact.[35] That was true before John Roberts became Chief Justice, and it seems nothing's changed under his watch.[36]

Maybe the Court is making a mistake in frequently analyzing statutes in the abstract rather than as applied; but, if so, that's a general problem, not one that's particular to the mail fraud statute.

PROF. KRYTIC: So maybe we can't resolve the question whether the Court is right or wrong to do a de facto facial analysis in other cases. But I would like you to think about how that plays out here, because it radically alters the results. In other words, how can a statute be unconstitutionally vague on its face when the text plus the relevant case law provide adequate notice to many defendants of the prohibited conduct and accompanying penalties?

I think most defendants—even those whose convictions don't rest on bribery or kickbacks—did have notice under § 1346. Indeed, to rephrase a point Justice Stevens made in his powerful dissent in *McNally*, why is everybody so concerned about these kinds of defendants having notice, when they are highly sophisticated and much better informed than the average criminal defendant? Bruce Weyhrauch was a lawyer on the legislative ethics committee. Black and Skilling are exceptionally sophisticated businessmen who had the assistance of as many lawyers as money can buy. All three knew (or had notice of) the breadth of the statute, and they could cross the T's and dot the I's in their own cases.

I'm especially interested in Weyhrauch, and I think he had ample notice that what he did violated § 1346. The Ninth Circuit had repeatedly given § 1346 a broad reading that extended beyond bribes and kickbacks to the failure to disclose material information. In a pre-*McNally* case the Ninth Circuit stated:

> A public official's non-disclosure of material information has also been held to satisfy the fraud element. In *United States v. Bush*, 522 F.2d 641 (7th Cir. 1975), *cert. den.*, 424 U.S. 977 (1976), the failure of a public official to disclose his ownership interest in a corporation he recommended to the city he worked for was deemed fraudulent. Most importantly for our purposes, the court held that the duty to disclose was incident to the defendant's duty as an employee of the city. His employer had the right to negotiate for and award a contract with "all the relevant facts" before it.[37]

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[35] David L. Franklin, *Looking Through Both Ends of the Telescope: Facial Challenges and the Roberts Court*, 36 HASTINGS CONST. L.Q. 689, 690 (2008) (arguing that the Roberts Court's decisions "adopt the language of the as-applied model even as their reasoning pursues the logic of the facial model").

[36] Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 FORDHAM URB. L.J. 773, 800 (2009) (contending that the Roberts Court has picked up where the Rehnquist Court left off, "asserting wide remedial discretion" and a "strategic use of the facial/as-applied distinction").

[37] United States v. Bohonus, 628 F.2d 1167, 1171 (9th Cir. 1980) (citation omitted).

Remember, Weyhrauch was a lawyer. He had served several years in the Alaska House (in fact, he served on their ethics committee). He was preparing to leave office when the state House took up legislation regarding the tax treatment of oil fields. Shortly before the vote, Weyhrauch wrote to one of the main companies affected by the law, VECO, seeking legal work. He neither recused himself from the legislative consideration of the oil field tax nor made any disclosure. His blatant conflict of interest was a clear violation of Alaska law, which provides that a "legislator may not . . . take or withhold official action or exert official influence that could substantially benefit or harm the financial interest of another person with whom the legislator is negotiating for employment."[38] Before trial, the government indicated its intent to introduce evidence that Weyhrauch's failure to disclose violated the standards stated in state ethics publications and was contrary to both the practice in the legislature and the ethics training he had received. (Incidentally, the indictment also alleged that he agreed to take specific acts to assist VECO in return for employment. But that might be harder to prove than the evidence of his own letter soliciting legal work, which he admittedly never disclosed.)

Do you really think Weyhrauch lacked notice?

PROF. COURTRIGHT: Notice of what? Weyhrauch apparently had notice that he was committing a violation of Alaska's ethics laws when he solicited legal employment from VECO. But apparently that's not criminalized under state law. And actually that's not what the government alleged to be the violation of honest services. Rather, the government focused on Weyhrauch's failure to disclose his conflict of interest. As the district court pointed out, Alaska has no statutory duty to disclose.[39]

The prosecutors were making a federal felony mountain out of a state molehill.

There are lots of legal restrictions that aren't part of the criminal law. There are other specialized regimes to deal with them, including rules for legislative behavior. That was the Supreme Court's point in *United States v. Sun-Diamond Growers*, when it read the gratuities provisions of 18 U.S.C. § 201 narrowly, as a scalpel rather than a meat clever, leaving other bodies of law to define the finer points of ethical behavior in the federal legislative, executive, and judicial branches.[40]

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[38] ALASKA STAT. § 24.60.030(e)(3) (2008).

[39] United States v. Kott, No. 3:07-cr-00056 JWS, 2007 WL 2572355, at *2–4, (D. Alaska Sept. 4, 2007) (noting that because the Alaska provision in question, AS 24.60.30(e)(3), "does not include any requirement for the disclosure of . . . negotiations," it would be "inappropriate to imply [such] a duty," and therefore Weyhrauch was not "subject to a duty created by State law to disclose his dealings with VECO and its executives.").

[40] *See* 526 U.S. 398, 409−12 (1999).

Congressman Charles Rangel is facing charges that he violated a variety of legislative ethics rules, and the House is preparing to try him.[41] If he is found guilty, he would be subject to a variety of sanctions imposed by Congress, not federal prosecutors. Similarly, Alaska law provided for a legislative trial and a variety of sanctions for Weyhrauch's improper solicitation of legal work, up to and including expulsion. Knowing you are facing such sanctions is not the same thing as knowing you have committed a federal felony.

PROF. KRYTIC: But knowing you are committing a clear violation of your duties as a member of the Alaska State House does give you fair notice that you are violating your duty of honest services, and that falls squarely within the language (as well as the intent) of § 1346. And failing to disclose such a clear conflict of interest should also be a violation of a uniform federal standard of honest services.

PROF. COURTRIGHT: You raised the separation of powers issue. Don't you see how your interpretation infringes on the authority of both federal and state legislatures? In the case of Congressman Rangel, Congress (not the Department of Justice) should be the judge of the severity of the sanctions it imposes if it finds violations of its own rules.

The *Weyhrauch* case is even worse, because it not only puts the executive in charge of the sanctions for legislative behavior, but it's the federal government setting standards for good government on the part of state and local officials. That's a terrible idea.

Maybe it's debatable whether these individuals had notice. That's not really the point. There's an inevitably fictive quality to the notice requirement, since few criminal defendants could or would research the text of the statute and the cases interpreting it. But I don't think that matters here.

The Supreme Court has consistently said that the due process/vagueness doctrine has two functions: notice to the individual and guidance to the police, prosecutors, and courts in enforcing a law. Recent cases make it clear that the most important function of the requirement that laws not be excessively vague is to prevent arbitrary enforcement.[42]

The real problem is that § 1346 provided virtually no guidance or limitation on the government's power to select individuals for prosecution. That's an enormously serious problem for any criminal statute. It's an especially serious problem in the case of § 1346, which covers the conduct of state and local

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[41] *See* Carol D. Leonnig & Paul Kane, *Rep. Charles Rangel Broke Ethics Rules, House Panel Finds*, WASH. POST, July 23, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/07/22/AR2010072204704_pf.html.

[42] *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2718 (2010); United States v. Williams, 553 U.S. 285, 304 (2008); Chicago v. Morales, 527 U.S. 41, 56 (1999); Kolender v. Lawson, 461 U.S. 352, 357 (1983).

government officials, implicating both federalism concerns and First Amendment values.

I think the Court's conclusion that the statute was unconstitutionally vague flowed from its recognition that at the end of the day the statute placed no real constraints on federal prosecutors. That led naturally to what was–properly–a facial analysis. The Court finally pulled the plug on the new common law crimes created when prosecutors extended honest services to new situations. Although the courts didn't endorse every new application, until *Skilling* there were no clear or coherent limits. Our system is not supposed to work that way. Congress—rather than federal prosecutors—is supposed to define what's a crime.

PROF. KRYTIC: For the sake of argument, I'll grant you that the concept of honest services did not provide clear-cut guidance to prosecutors or judges in every situation. But be realistic. The mail fraud statute is hardly unique. As Justice Stevens wrote in *McNally*:

> Statutes like the Sherman Act, the civil rights legislation, and the mail fraud statute were written in broad general language on the understanding that the courts would have wide latitude in construing them to achieve the remedial purposes that Congress had identified. The wide open spaces in statutes such as these are most appropriately interpreted as implicit delegations of authority to the courts to fill in the gaps in the common-law tradition of case-by-case adjudication.[43]

The lower courts had completed much of the work in filling in these gaps.

PROF. COURTRIGHT: First, don't forget that Justice Stevens was writing in dissent. And in this case the lower court decisions were all over the map. They left gaps big enough to drive a truck through. One opinion from the Second Circuit's en banc decision in *Rybicki* identified circuit splits on the following key issues:

- the mens rea required to commit mail fraud;
- whether the defendant must have caused actual tangible harm;
- the duty that must be breached;
- the source of that duty; and
- which body of laws governs the statute's meaning.[44]

That's why Justice Scalia wrote separately in *Skilling* to argue that the statute is "hopelessly undefined" and provides "no ascertainable standard of guilt."[45]

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[43] McNally v. United States, 483 U.S. 350, 372–73 (1987) (Stevens, J., dissenting).

[44] *See* United States v. Rybicki, 354 F.3d 124, 162–63 (2d Cir. 2003) (Jacobs, J., dissenting).

In any event, the mail fraud act is nothing like the Sherman Act. After all, we are talking about a statute that is employed to prosecute state and local government officials, with all of the issues that it raises: federalism, the danger of politically motivated use of prosecutorial discretion, and the potential to chill political activity.

At best, the occasional interventions of federal prosecutions are likely to be arbitrary (and reminiscent of Justice Stewart's comment that the imposition of the death penalty was like being struck by lightning[46]). At worst, there's a real danger that improper motivations will influence the prosecution of state and local officials. These are high-profile, "big game" cases that can make a lawyer's career. So why not push the envelope a little? And then there's the temptation to prosecute (persecute?) your political enemies and protect your friends. Has that ever happened? To take one recent example, a bipartisan group of forty-four former state attorneys general asked the House and Senate to investigate the prosecution of Alabama's former Democratic governor, Don Siegelman, who alleges that his prosecution for mail fraud and other offenses was politically motivated and orchestrated by Karl Rove and others.[47] Some people think Otto Kerner was prosecuted by the Nixon administration because he had delivered the 1960 election to John Kennedy.[48]

And then there's the prosecution of Wisconsin state employee Georgia Thompson, which may be the worst horror show of them all. That poor soul was sent up the river on a § 1346 charge for what was at most a minor breach of the state's contracting procedures.[49] Before the Seventh Circuit reversed her conviction (ordering her to be released the day of oral argument, without waiting for a formal opinion) she became a major focus of a hotly contested election.

PROF. KRYTIC: You raise troubling questions, but even more troubling is the fact that Justice Ginsburg's opinion failed to even mention them despite the fact that these same concerns were articulated in both *McNally* and in Ginsburg's earlier opinion in *Cleveland v. United States*.[50]

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[45] Skilling v. United States, 130 S. Ct. 2896, 2936−37 (Scalia, J., concurring in the judgment) (citation omitted).

[46] Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

[47] *See* Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 385–87 (2009).

[48] *See* NORMAN ABRAMS ET AL., FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 159−60 (5th ed. 2010).

[49] *See* United States v. Thompson, 484 F.3d 877, 882 (7th Cir. 2007). For a discussion of the *Thompson* case, see Beale, *supra* note 47, at 388–90.

[50] *See* Cleveland v. United States, 531 U.S. 12, 24–25 (2000) (rejecting a broader reading of the mail fraud statute in order to avoid a "sweeping expansion of federal criminal jurisdiction" that would significantly alter the "federal-state balance in the prosecution of crimes") (internal quotations omitted); McNally v. United States, 483 U.S. 350, 360 (1986) ("[r]ather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting

Instead, the Court chose Jeffrey Skilling's case as the sole vehicle for its interpretation of § 1346. It never suggested (even in its helpful footnote listing the issues Congress would have to consider if it wanted to override the decision[51]) that there were special federalism and political concerns in public sector cases. The Court could have done so--some circuits did, explaining how the concept of honest services needed to be tailored in public and private sector cases.

Why didn't the Court rely on or even discuss these federalism-based arguments? Perhaps it's because the justices knew they had been rejected by Congress when it enacted § 1346. I think you're applying an unreasonable and unrealistic standard. Lots of federal criminal statutes are broadly written and difficult to interpret (thus raising issues of both notice and guidance to prosecutors). The RICO statute[52] is a great example. It's long and complicated, with definitions of all of the key terms, such as pattern, enterprise, and so forth. All of this language, however, just raised a host of interpretative questions. The Supreme Court has now decided seven cases interpreting different aspects of the RICO statute pertinent in criminal prosecutions.[53] The circuit splits here rival (or exceed) those found under the mail and wire fraud statute, but only one member of the Court, Justice Scalia, has ever even suggested that the statute is unconstitutionally vague. After characterizing the majority's explanation of the statutory term "pattern" to be extraordinarily vague and about as helpful to the lower courts as "'life is a fountain,'"[54] Justice Scalia concluded with this provocative statement, forecasting a future vagueness challenge to the law: "That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented."[55] The Court has never taken this issue up. Apparently something Justice Scalia finds no more helpful than "life is a fountain" is enough notice to defendants and guidance for prosecutors in RICO criminal cases, where the penalty is twenty years plus forfeiture. Do you think "honest services" is worse?

Whether it's the application of the doctrine of constitutional avoidance, the choice of on-its-face or as-applied analysis, or ultimate judgments about

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standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights.").

[51] *See* Skilling v. United States, 130 S. Ct. 2896, 2933 n.45 (2010).

[52] Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961−68 (2006).

[53] *See* Boyle v. United States, 129 S. Ct. 2237 (2009) (association-in-fact enterprise); Cedric Kushner Promotions Ltd. v. King, 533 U.S. 158 (2001) (person and enterprise); Salinas v. United States, 522 U.S. 52 (1997) (conspiracy); Nat'l Org. for Women v. Scheidler, 510 U.S. 249 (1994) (enterprise); Reves v. Ernst & Young, 507 U.S. 170 (1993) (conduct); H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229 (1989) (pattern); United States v. Turkette, 452 U.S. 576 (1981) (enterprise). Other cases interpreted aspects of the statute relevant only to civil litigation. *See* Beck v. Prupis, 529 U.S. 494 (2000); Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258 (1992); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985).

[54] *See Nw. Bell Tel.*, 229 U.S. at 251−52 (Scalia, J., concurring in the judgment).

[55] *Id.* at 256 (Scalia, J., concurring in the judgment).

vagueness, there's a double standard operating, and *Skilling* falls on the wrong side each time from the government's point of view. It seems to me that the Court's manifest uneasiness or even visceral dislike of § 1346 led it to exaggerate the constitutional problems.

PROF. COURTRIGHT: I presume you are not seriously endorsing Justice Scalia's mocking "life is a fountain" as a constitutionally adequate standard.

Maybe the Court does treat § 1346 differently than RICO. If so, there are at least two good reasons why it might want to do so. First, prior violations of other criminal statutes are a necessary element of RICO, which criminalizes a pattern of racketeering crimes when other requirements are met. This means that defendants have notice they are violating the predicate offenses, and prosecutors can't charge anyone unless they can prove these predicate violations.

Second, the Department of Justice adopted very stringent internal guidelines for RICO cases shortly after the enactment of the statute.[56] These detailed internal standards require advance approval from the Criminal Division before charges can be filed, thereby reducing the likelihood of arbitrary enforcement.

And it's not a new insight that vagueness analysis is (and should be) highly context specific. The Court was well aware that honest services prosecutions often target the behavior of state and local government officials, often conduct that does not violate any other law. In *Weyhrauch*, for example, the court of appeals held that the defendant's conduct need not violate state law because the mail and wire fraud statutes themselves provide for a uniform national standard for honest services. That gives me the willies, and it's a lot different from organized crime cases prosecuted under RICO or Sherman Act cases involving "unreasonable" restraints on trade.

PROF. KRYTIC: To borrow your own metaphor, it seems to me that amidst all this vagueness and due process bath water, you are forgetting exactly what baby we are trying to hang on to. Congress enacted § 1346 to provide a basis for federal prosecutions.

Under *Skilling*, the wire and mail fraud statutes reach only bribery and kickbacks. But after *McNally* and before the enactment of § 1346, federal prosecutors had the authority to prosecute state and local officials for bribery under the Hobbs Act,[57] and they could prosecute bribery, kickbacks, and illegal gratuities in cases involving federal officials and employees under other federal laws.[58] Congress obviously agreed with the Department of Justice that this was not enough, and it enacted § 1346 with its broad wording in order to cast a wider prosecutorial net. Congress did not think it was a terrible idea to give federal

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[56] U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-111.300 (1997), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/110mcrm.htm.

[57] *See* 18 U.S.C. § 1951 (2006).

[58] *See, e.g.*, 18 U.S.C. § 201 (2006).

prosecutors the ability to bring cases against corrupt state and local officials (or federal officials, like Congressman "Dollar Bill" Jefferson, who was recently convicted of mail fraud along with other corruption offenses).

And frankly, both the facts of the cases that made it to the Supreme Court and a glance at other cases in the news show just how right Congress was.

In many state and local governments, corruption is rampant and endemic. Illinois is a familiar example. The outrageous conduct of Governor Rod Blagojevich follows on the heels of his predecessors Governors George Ryan, Dan Walker, and Otto Kerner, all of whom were convicted of federal corruption under the mail fraud statute, as were scores of other state and local officials.

Chicago is not the only sewer. The corruption probe that gave rise to the Weyhrauch prosecution has already led to the conviction of at least six other state lawmakers–including the former speaker–as well as various private individuals.[59] After an op-ed criticizing the clout VECO had in the state legislature and listing the legislators who had taken the most VECO money, legislators began joking openly about being members of the "Corrupt Bastards Club" ("CBC").[60] The speaker's girlfriend testified under oath that she embroidered CBC on a hundred items for them.[61] Cute.

PROF. COURTRIGHT: Occasional federal prosecutions just catch a few rats. They can't clean up a state or local sewer. At the end of the day, the local authorities have to take responsibility for thorough housecleaning and structural changes. Actually, the occasional federal prosecution may do more harm than good. If people believe that these haphazard federal prosecutions solve the problem of governmental corruption, that may reduce pressure for the necessary changes and let state and local authorities off the hook.

PROF. KRYTIC: I'm not sure if I want to stick with the sewer imagery, but I'll give it a try. It does make a difference to catch some of the biggest rats, such as governors and legislative leaders. And it's very hard, if not impossible, for lower level state and local officials to do so. Section 1346, as Congress wrote it, wouldn't solve all corruption problems, but it would serve as an important tool for federal prosecutions.

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[59] *See generally* David Hulen & Richard Mauer, *The Alaska Political Corruption Investigation*, ANCHORAGE DAILY NEWS (Sept. 24, 2009, 12:30 PM), http://community.adn.com/adn/node/112569 (describing jury convictions, guilty pleas, and ongoing investigations). Additionally, U.S. Senator Ted Stevens of Alaska was convicted of seven felony counts related to allegations that he failed to report thousands of dollars in gifts and services on Senate disclosure forms. *See* Neil A Lewis, *Senator is Guilty Over His Failures to Disclose Gifts: Stevens Calls Verdict 'Unjust'*, N.Y. TIMES, Oct. 28, 2008, at A1, *available at* 2008 WLNR 20527529. Stevens' conviction was later set aside because of prosecutorial error.

[60] *See* Hulen & Mauer, *supra* note 59.

[61] *See id. See also* Sean Cockerham & Lisa Demer, *Kott was Different When He Drank, Witness Says*, ANCHORAGE DAILY NEWS, Sept. 22, 2007, at A10, *available at* 2007 WLNR 18849457.

Of course federal prosecutions of state and local corruption raise federalism concerns. But there are countervailing interests as well. In addition to the inability of state and local actors to respond effectively when corruption is entrenched and pervasive, other federal interests may be implicated. In the *Weyhrauch* case, the corruption affected critical legislation on oil field production. Rod Blagojevich was prosecuted for trying to sell the nomination for the U.S. Senate seat vacated by Barack Obama. Surely there are federal interests in those cases, and many others.

It all boils down to this. Think about how much the Court has narrowed the scope of the honest services provision: only bribery and kickbacks are prohibited, nothing else. We don't know exactly how the courts will define bribes and kickbacks for this purpose, but it seems pretty clear that they require a prohibited financial transaction between the defendant and a third party.

That seems totally inconsistent with what Congress was trying to do. Recall that before the enactment of § 1346 the mail and wire fraud statutes both covered fraudulent schemes to obtain money or property. The point of enacting § 1346 was to extend the statute to cases *not* involving schemes to obtain money or property but involving a breach of the duty of honest services. So how does requiring a corrupt financial transaction make sense?

PROF. COURTRIGHT: Well, in our postmodern world, what does "honest services" even mean? A colleague suggested that perhaps the Court is concerned that there is no moral consensus at a societal level to underpin a broader definition of "honest services."[62] Maybe the corrupt financial transaction inherent in bribes and kickbacks is necessary to anchor the concept of "fraud" and square it with modern notions of wrongdoing.

But, postmodernism aside, ask yourself one of the positive political theory questions: how did the decision affect the Court's institutional interests?

The *Skilling* decision was the product of compromise and the best practical way to both resolve the legal issue and preserve the Court's institutional legitimacy. After all, the Justices knew the pundits, press, and politicians were all waiting for the honest services cases. I'm sure they remembered the storm kicked up earlier in the term by the decision in *Citizens United*, which held that corporations have a First Amendment right to unlimited, independent spending in election campaigns.[63] That decision generated a lot of negative press, and President Obama criticized it in his State of the Union address. Maybe the Court didn't want to see the headlines "Supreme Court Holds Political Corruption Statute Unconstitutional." That might also explain why the Court chose *Skilling* as its vehicle and didn't emphasize the special considerations raised by public sector cases.

The Court's resolution of the case also had other benefits because it limited the number of defendants previously convicted under § 1346 who would be

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[62] I thank Joseph Kennedy for this insight.

[63] *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

eligible for post-conviction relief. So the decision limited both the work of the lower courts and the number of newspaper stories about bad guys being released because of the Supreme Court.

PROF. KRYTIC: Well, if you want to look at *Skilling* that way, it's a real winner for the Court, which got all of the benefits you noted and also got as close as possible to its preferred policy result. But the Court could have at least been candid about what it was doing. It doesn't discuss those issues, and it stuck the honest services discussion at the end of a much longer discussion of jury prejudice. Why hide the ball?

And how can you square *Skilling* with Justice Roberts' opinion earlier in the term in *Stevens*? He wrote for eight members of the Court, and declined to read another statute narrowly because it would invade the policy-making province of Congress and not create the proper institutional incentives.

Even if it was the right result from your perspective, can you reconcile *Skilling* with the rule of law values of transparency and consistency?[64]

PROF. COURTRIGHT: I'm tired of negativity and pot shots at the Court. You take issue with its interpretive mechanics, alleging that the majority uses a double standard in the application of various doctrines. But suppose you were the new academic on the Supreme Court. How would you have written the opinion in *Skilling*?

PROF. KRYTIC: Why assume a single decision? I think I would have written not only in *Skilling*, but also in *Weyhrauch* and *Black*. That would allow me to consider the vagueness challenges in the context of specific legal arguments and factual situations. And it would give me a chance to resolve the key issues raised in the lower courts.

First, I'd want the Court to answer the question on which it granted certiorari in *Weyhrauch*: is a violation of state law necessary? Does it matter whether Weyhrauch's failure to disclose violated Alaska law? Looking to state law provides an obvious way to give content to the term honest services. They are the services that are required under state law. If you are concerned about vagueness, that's a big help. And it links to the language of the statute, because it's a definition of the "services" in question (and perhaps also what "honest" means in a particular context). But it means that the standard will vary from state to state, and some of the worst problems may be in states with the weakest regulations.

Second, what about harm? The Supreme Court granted certiorari in *Black* to decide the question whether § 1346 applies to the conduct of a private individual

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[64] For an excellent discussion of the tension between judicial statesmanship (approaching individual cases in a manner that facilitates the capacity of the legal system to legitimate itself) and other rule-of-law values of consistency and transparency, see Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959 (2008).

whose alleged "scheme to defraud" did not contemplate economic or other property *harm* to the private party to whom honest services were owed. Should it matter if the defendant contemplated harm to the party to whom he owed a duty (and, if so, what kind of harm counts)? Some courts thought this was an essential attribute of "fraud," while others thought that depriving the victim of honest services was, per se, a form of fraud under § 1346. As I said a moment ago, I think that's a strong argument. But it does substantially expand the scope of criminal liability, and the issue plays out differently in public and private sector cases.

Incidentally, this issue highlights an interesting facet of the Court's decision in *Skilling*, which is that it does not necessarily bring the most serious or important cases within § 1346. Bribes and kickbacks may or may not be particularly harmful. It depends on a variety of factors, including the size of the bribe or kickback and the effect of the payments. On the other hand, some self-dealing and/or other undisclosed conflicts of interest could have a much greater impact than a small bribe or kickback. So a focus on harm may justify extending § 1346 beyond bribes and kickbacks.

That leads to my third point. This is a "fraud" statute, and fraud has traditionally included failure to disclose material information under certain circumstances. But when? There's a strong argument that the application of this doctrine necessarily requires an interpretation that focuses on both the context in general and the relationship between the parties. Different fiduciaries have traditionally had different duties. But what factors should count? Sadly, the Court did not even begin to explore these issues.[65]

Fourth, fraud cases also traditionally focus on the requirement of fraudulent intent. If one focuses on the intent to deceive, cases like *Skilling* and *Black* really come into focus. For example, there's no question that Jeffrey Skilling was engaged in elaborate attempts to mislead investors about Enron's financial well-being. Similarly, Conrad Black clearly sought to disguise the true nature of payments totaling $5.5 million ostensibly in return for his agreement not to compete with newspapers owned by a corporation he controlled.[66] Exactly what is the relevant definition of fraudulent intent? Does it mean intent to deceive on some material matter? Or, as Jeffrey Skilling argued, does it mean intent to obtain private gain by deceptive and dishonest means?

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[65] *See* Samuel W. Buell, *The Court's Fraud Dud*, 4 DUKE J. CONST'L LAW & PUB. POL. (forthcoming 2010) (on file with author), *available at* http://ssrn.com/abstract=1656350.

[66] *See* United States v. Black, 530 F.3d 596, 599 (7th Cir. 2008). The corporation owned only one very small community newspaper, and Black subsequently admitted that the payments were management fees labeled as non-compete fees to avoid Canadian taxes. *Id.* A report commissioned by the board of one of the companies found that the management and non-compete fees to Black and his cronies had been "grossly excessive." REPORT OF INVESTIGATION BY THE SPECIAL COMMITTEE OF THE BOARD OF DIRECTORS OF HOLLINGER INTERNATIONAL INC. 15 (Aug. 30, 2004), available at http://www.sec.gov/Archives/edgar/data/868512/000095012304010413/y01437exv99w2.htm. They personally collected 95.2% of the corporation's adjusted net income.

And, finally, I'd like to think about whether there should be some distinctions between public and private sector cases, either in terms of the nature of the fiduciary duties, the requirement of a state law violation, or the potential for monetary gain or harm. I think the statute might work better if it were bifurcated, but Congress didn't write it that way. So is there any room for judicial distinctions?

PROF. COURTRIGHT: Don't you see that all these unanswered questions validate the holding of the majority in *Skilling?* If you don't cut mail fraud back radically, it's hopelessly vague. The only alternative would be agreeing with Justice Scalia that § 1346 is so pervasively vague it can't be saved by interpretation.

PROF. KRYTIC: All these questions prove is that the mail and wire fraud statutes, augmented by § 1346, do require interpretation. Many issues will arise as they are applied to a limitless range of factual scenarios. That's always been the nature of both fraudulent activity and the crime of fraud. But the courts should interpret the statute, not rewrite it.

I'd turn the question around: do you really want to say that the concept of fraud is unconstitutionally vague?

PROF COURTRIGHT: Don't be ridiculous. The sky is not falling. The consequences of the *Skilling* decision will largely be positive. Public and private actors now have greater notice of what conduct could make them subject to the honest services provision and, correspondingly, federal prosecutors and lower courts have more guidance.

The ball is now back in the court (so to speak) of the Justice Department and Congress. If we need to criminalize conflicts of interest or other forms of deceptive or dishonest conduct, *Skilling* provides Congress with the proper incentive to enact precise legislation.

PROF. KRYTIC: I completely disagree. The *Skilling* decision encroached on the policy-making authority of the Department of Justice and Congress, though they may be unable or unwilling to respond effectively. A decision striking down the statute was likely to provoke a strong response from the Department of Justice and Congress, something akin to the passage of § 1346 after *McNally*. But passing a response to *Skilling* won't be as high a priority for the Justice Department. And I am sure the Department noticed that little shot across their bow in *Skilling*'s footnote 45, laying out all of the issues Congress would need to resolve if it wants to extend the statute.

PROF. COURTRIGHT: Even if that's true and your criticisms of the decision have merit, so what? In the end, what's the real problem, substantively, with limiting honest services to bribes and kickbacks? Given all the practical benefits

of the *Skilling* decision, aren't any flaws in the Court's approach merely harmless error?

PROF. KRYTIC: I don't think it is harmless error, but we can't be sure exactly how big the change will be until we see how the lower courts respond. For instance, the lower courts have some work to do in construing bribery and kickbacks for purposes of § 1346 since the Court pulled those terms more or less out of thin air (rather than from the extensive body of case law under § 1346). (Does that make this new definition unconstitutionally vague? Overlooking for the moment that resolving lower court confusion was one of the Court's primary objectives in granting certiorari, apparently not.)

There might be unanticipated consequences of the Court's interpretation of § 1346. For example, it might lead prosecutors to charge health care "kickbacks" (now punishable by a maximum of five years imprisonment) as mail or wire fraud, which carry a much higher maximum penalty and also allow the government to label the conduct with the powerful label of "fraud."[67]

Other impacts may be subtle things we can't easily document. A friend who worked with senior corporate executives made an interesting point about the much-criticized provisions of the Sarbanes-Oxley Act.[68] He said some executives commented that before Sarbanes-Oxley they never really felt they needed to read their corporate documents closely to see if they were accurate. Now they do.[69] We need more such incentives for careful, scrupulous behavior.

How much clarity do we want in statutes that are aimed at sophisticated, deliberate behavior designed to skirt or evade laws and regulations designed to protect the public? Broad flexible statutes change the incentives for the "smartest guys in the room" who would otherwise set out to find the loopholes that would let them deceive groups such as shareholders or the general public in order to line their own pockets.[70] Don't the *Skilling* and *Black* facts fit this pattern?

In limiting § 1346 to bribes and kickbacks, has the Supreme Court rendered what was once a powerful prosecutorial tool irrelevant?

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[67] 42 U.S.C. § 1320a-7b(b)(1) defines the crime of illegal remuneration, including "kickbacks," and makes it punishable by five years imprisonment and a fine of not more than $25,000. In contrast, under 18 U.S.C. §§ 1341 & 1343 mail and wire fraud are punishable by imprisonment for up to twenty years in cases not affecting a financial institution or benefits paid in connection with a presidentially declared major disaster. I thank Joan Krause for drawing this point to my attention.

[68] *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 (2002).

[69] I thank Lawrence Baxter for this insight.

[70] *See* Sam W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1563–64 (2008). This can, of course, be seen as an exemplification of the rules versus standards debate. *See, e.g.*, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15–63 (1987); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

III. CONCLUSION

This fictional debate explores two largely distinct kinds of issues raised by the Court's opinion in *Skilling*. Criminal law scholars expected the Court to address some of the central issues in federal criminal law: (1) the federalism issues raised by the prosecution of state and local government officials; (2) the potential for overlap and conflict between broad conceptions of mail fraud and other federal and state regulatory systems; (3) the proper boundaries of criminal law and the problem of overcriminalization; and (4) the largely unregulated prosecutorial discretion that results from broadly drafted criminal statutes. There are no easy answers to these questions, and it was not reasonable to expect that the Court could resolve them all in *Skilling*, *Black*, and *Weyhrauch*. What was surprising, however, was the Court's failure to engage or even acknowledge these issues, except to the extent they were necessarily part of its assumption that, absent a limiting interpretation, § 1346 would have been unconstitutionally vague.

Precisely because the Court did not engage these criminal justice concerns, the *Skilling* opinion prompted the debate's exploration of other issues that are less often the focus of criminal law scholarship: the doctrine of constitutional avoidance, the standards governing facial versus as-applied challenges, the proper methodology for interpreting statutes, and institutional concerns regarding the federal judiciary and its relationship to the other branches of government. These issues have generally been seen as the province of scholars specializing in constitutional law, federal courts, legislation, and public choice theory.

Skilling suggests that criminal law scholars should broaden their agenda to encompass these issues. The doctrine of constitutional avoidance is a good example. Unlike the rule of lenity,[71] the doctrine of constitutional avoidance seems to have no special relevance to criminal justice policy. *Skilling* demonstrates, however, that the avoidance doctrine has the potential to ratchet back both the scope of federal criminal jurisdiction and the reach of individual federal criminal statutes. A consistent and robust application of the avoidance doctrine could profoundly impact the federal criminal system. The same may be true for other rules governing statutory analysis, and for the availability of on-its-face versus as-applied challenges. Accordingly, these issues should be a concern of criminal justice scholars as well as scholars in the other fields mentioned above.

But as noted in my fictional debate, the Supreme Court has not employed the doctrine of constitutional avoidance or the standards for allowing a facial challenge consistently in criminal cases.[72] Examining the Supreme Court's application of

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[71] The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. For a general discussion of the rule, see Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420 (2006). For recent decisions of the Supreme Court discussing the rule, see United States v. Santos, 128 S. Ct. 2020, 2025−31 (2008) and Burgess v. United States, 553 U.S. 124, 135−36 (2008).

[72] *See supra* text accompanying notes 30 and 34 (discussing *Stevens* and *Morales*); McCormick v. United States, 500 U.S. 257 (1991); McNally v. United States, 483 U.S. 350 (1987).

these doctrines in criminal cases could illuminate both the doctrines themselves and their implications for the federal criminal justice system. Scholarship of this nature might address a variety of questions. In the criminal justice context, what factors seem to influence the application of these doctrines? Is the Court influenced, *sub silentio*, by certain criminal justice policy concerns? Have the doctrines been employed strategically to advance certain policy objectives, and, if so, what objectives? And how do the criminal cases compare to other distinct groups of cases, such as those concerning regulatory statutes or voting rights?

Maybe that should be the next debate.

Other decisions in which the Court did not apply the avoidance doctrine as a rationale for a narrowing statutory interpretation include Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) (interpreting the "material support" for terrorism statute); United States v. Williams, 553 U.S. 285 (2008) (interpreting the child pornography statute); Sabri v. United States, 541 U.S. 600 (2004) (interpreting the federal program bribery statute).