FOR THE PEOPLE OR DESPITE THE PEOPLE: THE THREAT OF CORPORATIONS' GROWING POWER THROUGH *CITIZENS UNITED* AND THE DEMISE OF THE HONEST SERVICES LAW

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I. INTRODUCTION

Sharpe James "learned a lesson" from a colleague who had ended his public life only when he died of a debilitating illness.[1] Instead, the former mayor of Newark told *The New York Times*, he was leaving politics at seventy-one so he could "play tennis, spend time with his

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1. Ronald Smothers, *With Usual Flourish, Sharpe James Pulls Curtain on a Career and an Era in Newark*, N.Y. TIMES, Apr. 11, 2007, at B5.

family and travel on his boat."[2] "With Usual Flourish" the paper's headline read, "Sharpe James Pulls Curtain on a Career and an Era in Newark."[3] However, his retirement from the public eye was not quite complete. Instead, on September 15, 2008, former Mayor James reported to prison camp to serve a twenty-seven month sentence[4] for corruption charges including honest services fraud.[5]

The demise of a once popular mayor had an effect on the people of Newark that mirrors the reaction of a growing number of disenfranchised citizens throughout this country: betrayal, helplessness and anger.[6] Newark native, and one time student of

2. *Id.*

3. *Id.*

4. The controversial sentence handed down by U.S. District Judge William Martini, a former Republican politician, was much lighter than the fifteen to twenty years requested by the U.S. Attorney General (now Governor Chris Christie). The judge defended the sentence with his own commentary on the honest services law:

> Martini read a litany of sentences given to New Jersey politicians who had been convicted of what he called more-egregious crimes. He noted former state Senate president John Lynch got a 39-month term for accepting tens of thousands of dollars in kickbacks, former Marlboro Township mayor Matthew Scannapieco is serving 21 months for taking nearly a quarter-million dollars in bribes, and one-time Paterson mayor Martin Barnes served 37 months for taking hundreds of thousands of dollars in payoffs, starting almost as soon as he took office.
>
> Martini, a Republican, came to the bench in 2002 after a career as a federal prosecutor, defense attorney, Passaic County freeholder and, ultimately, a congressman. *He mentioned his background several times, noting politicians often do favors for constituents and it's sometimes hard for some of them to distinguish between public service and wrongdoing*.

John Martin, *Former Newark Mayor Sharpe James Sentenced to 27 Months*, STAR-LEDGER, July 30, 2008, *available at* http://www.nj.com/news/ledger/topstories/index.ssf/2008/07/former_newark_mayor_sharpe_jam.html. Sharpe James was released to a halfway house on April 5, 2010. He was followed home by *The Star-Ledger* who reported that while waiting to depart, he "walked around the Greyhound terminal carrying three cardboard boxes" holding binders containing early chapters of his prison-written memoirs, "A Sharpe View." David Giambusso, *Ex-Newark Mayor Sharpe James is Welcomed Home by Hundreds of Supporters*, STAR-LEDGER, Apr. 6, 2010, *available at* http://www.nj.com/news/index.ssf/2010/04/ex-newark_mayor_sharpe_james.html.

5. *See* Vinessa Erminio, *Sharpe James Due at Prison Camp on Monday*, STAR-LEDGER, Sept. 12, 2008, *available at* http://blog.nj.com/ledgerarchives/2008/09/sharpe_james_due_at_prison_cam.html; *see also* Laura Craven, *Sharpe James Convicted*, STAR-LEDGER, (Apr. 18, 2008, 5:16 AM), http://blog.nj.com/ledgerarchives/2008/04/jamesriley_photo_star_ledger_f.html.

6. *See, e.g., Sharpe James Convicted*, NEWARK METRO, http://www.newarkmetro.rutgers.edu/essays/display.php?id=276 (last visited Feb. 25, 2011). This site lists series of reactions to Mayor James's conviction, including one by Damary Rivero:

> The city of Newark that once welcomed you is now condemning you to a federal prison. You may be wondering why after you did so much for the people of Newark. Well, Mr. James, the answer is simple . . . . You let the

Rutgers University,[7] a five-term undefeated Mayor and a State Senator for eight years,[8] James had long been a colorful political figure, both celebrated and suspected. His Rolls Royce, eight houses, several yachts and millions in the bank[9] led to a conflicted constituency—the same voting public who was quick to point out his endless "cheerleading"[10] for Newark, felt disappointed and cheated of their fair representation.[11] Echoing many others' sentiment, Newark resident Fernando Villar had no pity, "So long and good riddance, Sharpe James."[12]

Mayor James's fraud conviction joins the ninety-five percent of high profile cases today that have been prosecuted under the honest services law.[13] He is accompanied by hundreds of both political and corporate leaders who have betrayed their public and ended up in jail.[14] His compatriots in crime have engaged in varying levels of

> city of Newark down. The promises of change that you once made were replaced by deceptions that are much too common in this city. In conclusion, Mr. James, although I was not surprised by your politics the outcome of your trial was unexpected. I am glad there was an attempt to bring justice to a city that is desperately awaiting prosperity and reliability.

See also, Joseph C. Racioppi, *We Have a Serious Image Problem*, N.J. VOICES (Apr. 16, 2008, 1:26 PM), http://blog.nj.com/njv_joseph_racioppi/2008/04/we_have_a_serious_image_proble.html ("Sharpe James will not be the last of what we Jerseyans have become all too used to. But maybe, just maybe, this verdict will be the start of a good thing. That corrupt politicians will no longer have free reign, will no longer be rewarded, tolerated, or re-elected, and may actually go to prison.").

7. Gale Group, Inc., *Contemporary Black Biographies: Sharpe James,* http://www.answers.com/topic/sharpe-james (last visited Mar. 10, 2011).

8. Smothers, *supra* note 1.

9. Mayor James was ultimately convicted of "conspiring to rig the sale of nine city lots to his mistress, who quickly resold them for hundreds of thousands of dollars in profit." Laura Craven, *Newark Ex-Mayor Sharpe James is Convicted of Fraud*, STAR-LEDGER, Apr. 16, 2008, *available at* http://www.nj.com/news/index.ssf/2008/04/newark_ex_mayor_sharpe_james_convicted.html.

10. Smothers, *supra* note 1 (reporting that a Democratic leader said Mayor James "was a cheerleader for Newark when the city had little to cheer about"). The New Jersey Performing Arts Center was opened in 1997, during Mayor James's term as mayor, and the New Jersey Devils were moved to Newark. *See* Lovet Obakpolor, *The New Jersey Performing Arts Center*, NEWARK METRO, http://www.newarkmetro.rutgers.edu/essays/display.php?id=126 (last visited Apr. 4, 2010); *see also* BALLPARKS.COM, http://hockey.ballparks.com/NHL/NewJerseyDevils/newindex.htm (last visited Apr. 4, 2010).

11. *Sharpe James Convicted*, *supra* note 6.

12. *Id*.

13. Roger Parloff, *The Catchall Fraud Law That Catches Too Much*, CNNMONEY.COM: FORTUNE (Jan. 6, 2010, 9:08 AM), http://money.cnn.com/2010/01/04/magazines/fortune/fraud_law.fortune/ (quoting a former federal prosecutor and listing defendants such as: former Governor Rod Blagojevich, former Congressman William Jefferson and lobbyist Jack Abramoff).

14. Lucy Morgan, *Fighting Corruption with the 'Honest Services' Doctrine*, ST.

dishonesty; from Maureen A. Cronin, a North Carolina Judge who accepted an interest-free $18,000 loan in the back seat of a car from a business owner whose cases she was deciding,[15] to Richard Scrushy, a prolific donor who was known for his Hummer SUV and luxurious estate,[16] and who paid $500,000 in bribes to a former Alabama governor.[17]

Criminal dishonesty is a tangled web of deceit; the successful prosecution of Jack Abramoff resulted in the convictions of over seventeen other high powered politicians and business leaders.[18] A corrupt lobbyist who motivated his colleagues by imitating "The Godfather," and making references to crooked politicians and gambling profits,[19] Abramoff was involved in incredibly complex scandals involving multiple countries, guerilla warfare and Indian

PETERSBURG TIMES, Jan. 25, 2009, *available at* http://www.tampabay.com/news/perspective/article969867.ece; *see also*, Kendall Coffey, Op-Ed., *Feds Get Back Into Battle With Better Tools*, SUN-SENTINEL (Fort-Lauderdale, Florida), Sept. 11, 2007, at 21A, *available at* http://articles.sun-sentinel.com/2007-09-11/news/0709100141_1_corruption-mail-fraud-honest-services (counting more than 500 public official corruption cases around the country).

15. *Cronin Pleads Guilty to Fraud*, VINDY.COM (Dec. 15, 2009, 11:34 AM), http://www.vindy.com/news/2009/dec/15/cronin-pleads-guilty-fraud-newswatch/.

16. Simon Romero, *The Rise and Fall of Richard Scrushy, Entrepreneur*, N.Y. TIMES, Mar. 21, 2003, at C4, *available at* http://www.nytimes.com/2003/03/21/business/the-rise-and-fall-of-richard-scrushy-entrepreneur.html.

17. Milt Freudenheim, *Scrushy is Indicted on Charges of Bribery*, N.Y. TIMES, Oct. 27, 2005, at C18, *available at* http://query.nytimes.com/gst/fullpage.html?res=9E06E1D81130F934A15753C1A9639C8B63. Because of the decision limiting the honest services law in *Skilling v. United States*, 130 S. Ct. 2896 (2010), the judgment against Scrushy has been vacated, his case has been granted writ of certiorari and remanded to the Ninth Circuit. Scrushy v. United States, 130 S. Ct. 3541 (2010).

18. *Convictions in the Abramoff Corruption Probe,* HUFFINGTON POST (Feb. 11, 2011, 2:09 PM), http://www.huffingtonpost.com/huff-wires/20110211/us-abramoff-convictions/ (containing a list of those convicted). Among those connected to Abramoff, at least one is being retried with the Supreme Court decision in *Skilling v. United States* on his side: lobbyist Kevin Ring is counting on his gifts of meals and tickets in exchange for funding for clients on transportation projects no longer being considered illegal because "it's going to be hard to show whether a particular meal or event was in exchange for specific legislation" as the narrowing of the honest services law to bribery and kickbacks requires. Nedra Pickler, *Abramoff Associate being Retried*, WASH. POST, Oct. 17, 2010, at A17, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/10/17/AR2010101702800.html; *see also*, Spencer S. Hsu, *Supreme Court Ruling Raises Bar for Corruption, Fraud Prosecutions*, WASH. POST, July 18, 2010, at A05, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/07/17/AR2010071702339.html (noting ruling had "jeopardiz[ed] high-profile investigations . . . including several related to convicted ex-lobbyist Jack Abramoff.").

19. Susan Schmidt & James V. Grimaldi, *The Fast Rise and Steep Fall of Jack Abramoff*; *How a Well-Connected Lobbyist Became the Center of a Far-Reaching Corruption Scandal*, WASH. POST, Dec. 29, 2005, at A01, *available at* http://www.washingtonpost.com/wpdyn/content/article/2005/12/28/AR2005122801588.html.

casinos.[20] He referred to his Native American clients as "morons" and "troglodytes," and he used their millions to fund his corruption.[21] After pleading guilty to honest services fraud and other charges, he received a six-year prison term. No more mafia movies for Abramoff: "[S]ometimes, the staff plays G-rated movies," a Bureau of Prisons spokeswoman said.[22]

On October 13, 2009, the Supreme Court agreed to hear a third case[23] concerning the "intangible right of honest services."[24] The Court had already planned to hear arguments concerning the application of 18 U.S.C. § 1346 in two other cases: one of an Alaskan legislator who attempted to work for a company he was also voting for in the Alaska House of Representatives,[25] as well as a senior corporate executive's theft of $5.5 million from his company, Hollinger International.[26] In the Court's grant of certiorari for *Skilling v. United States*,[27] a third variation of the "honest services law" was examined: the conviction of a CEO who made exaggerated statements about his company's performance, but with no apparent personal gain.[28]

When the Supreme Court made its decision on the constitutionality of the honest services law, the victims of criminal dishonesty lost significant power over their representation in the private and public sector.[29] Although criticisms against the law of federalism, vagueness, and over-criminalization had merit at one time, the growing culture of corruption had made the broad law necessary.[30] In 1988, Congress wrote a law that was perhaps purposefully vague.[31] But we are now twenty years further into a

20. *Id.*

21. *Id.*

22. David Dishneau & Matt Apuzzo, *Jack Abramoff Reports to Md. Prison*, WASH. POST Nov. 15, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/11/15/AR2006111501159.html.

23. United States v. Skilling, 554 F.3d 529 (5th Cir. 2009), *cert. granted*, 130 S. Ct. 393 (2009).

24. 18 U.S.C. § 1346 (1988).

25. United States v. Weyhrauch, 548 F.3d 1237, 1239 (9th Cir. 2008), *cert. granted in part*, 129 S. Ct. 2863 (2009).

26. United States v. Black, 530 F.3d 596, 599 (7th Cir. 2008), *cert. granted*, 129 S. Ct. 2379 (2009).

27. Skilling v. United States, 130 S. Ct. 2896, 2928 (2010).

28. *Skilling*, 554 F.3d at 545 (explaining the defendant's contention that his fraud was excusable because it was not "self dealing").

29. *See* David W. Mills & Robert Weisberg, *Point of View: Honest Services*, STANFORD LAWYER, Nov. 8. 2010, *available at* http://stanfordlawyer.law.stanford.edu/2010/11/honest-services/.

30. *See infra* Part II.

31. 18 U.S.C. § 1346.

growing culture of corruption. We have witnessed our economy collapse from lack of oversight and hundreds of politicians and CEOs go to jail for fraud. The public's confidence in democracy is flagging. And now, the Supreme Court has overturned decades of precedent to allow corporations into a historically protected area of our democracy: campaign finance.[32] With this last protection evaporating, corruption is leading to disenfranchisement.

In this Note, I will explore how the review and limitation of the honest services law in *Skilling v. U.S.*,[33] combined with the Supreme Court's recent decision on campaign finance reform,[34] has paved the way for a corporate-controlled government that will be devastating for democracy. The rescue of the honest services law is more important than ever before. Although roundly criticized, the revival of the key elements of this statute may be our last opportunity for a government owned by the people, not despite the people.

Part II of this Note reviews the history of the honest services law and why it had become heavily depended on to fight corruption.[35] Part III summarizes the three cases that were before the Court and the issues that stem from each.[36] After looking at the similar effect that *Citizens United*[37] has had on the public voice in Part IV, the implications for our democracy will be discussed.[38] This Note will examine, finally, the impact of the loss of protection from corruption on a population scarred by the collapse of the economy and mounting betrayals of the people's trust in their leaders.[39]

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

33. 130 S. Ct. 2896 (2010). This analysis also includes the companion cases *Black v. United States*, 130 S. Ct. 2963 (2010) and *Weyhrauch v. U.S.*, 130 S. Ct. 2971 (2010), which were tried and decided simultaneously.

34. *Citizens United*, 130 S. Ct. at 876.

35. *See infra* Part II.

36. *See infra* Part III.

37. 130 S. Ct. at 876.

38. *See infra* Parts IV, V.

39. *See infra* Part VI.

II. THE HISTORY OF THE HONEST SERVICES STATUTE[40]

"Before 1987, we and other courts interpreted § 1341[41] as covering schemes to defraud another not just of money and property, but also of 'intangible rights,' including the right of citizens to have public officials perform their duties honestly."[42]

A. The Statute in its Original Form

From the statute's creation in 1872,[43] Congress has amended it over seven times, showing a historical shift from concern over exploitation of the mails to a more general attempt to control fraud.[44] In 1947, the "intangible rights doctrine" began as dicta and was adopted by all federal circuits.[45] The current version of the statute begins: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises. . ."[46] In a plain reading of the statute, because the two clauses were separated by "or," they were deemed independent and therefore it was not necessary to obtain money or property in the scheme to defraud.[47] Therefore, "[t]he fraudulent gains could be intangible."[48] Originally, many circuits interpreted both sections 1341[49] and 1343[50] to address

40. My discussion of the long early history of the mail fraud statute will be abbreviated because of adequate coverage of this topic by other sources. *See, e.g.*, John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427 (1998); Christopher Q. Cutler, *McNally Revisited: The "Misrepresentation Branch" of the Mail Fraud Statute a Decade Later*, 13 BYU J. PUB. L. 77 (1998); Daniel W. Hurson, *Mail Fraud, The Intangible Rights Doctrine, and the Infusion of State Law: A Bermuda Triangle of Sorts*, 38 HOUS. L. REV. 297 (2001); Carrie A. Tendler, *An Indictment of Bright Line Tests for Honest Services Mail Fraud*, 72 FORDHAM L. REV 2729 (2004). Instead, I will focus on the pre-*McNally* and post-*McNally* history of the statutes.

41. For means of explaining the definition and history, section 1341 and section 1343 are interchangeable.

42. United States v. Weyhrauch, 548 F.3d 1237, 1243 (9th Cir. 2008), *vacated*, 130 S. Ct. 2971 (2010).

43. *See* Tendler, *supra* note 40, at 2731-32 (explaining that the statute originated from a plea to Congress by the Postmaster General who worried about "inappropriate materials being sent through the mails.").

44. *Id.* at 2732.

45. Cutler, *supra* note 40, at 85.

46. 18 U.S.C. § 1341 (2006). Both section 1341 and section 1343 begin with identical statutory construction; the difference is the former deals with the mails and the latter with the wires (radio and television).

47. Cutler, *supra* note 40, at 85.

48. *Id.*

49. Frauds and swindles:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent

two categories: the first, fraudulent "schemes to deprive others of *tangible* property interests, and the second . . . [fraudulent] schemes to deprive others of *intangible* rights."[51] In addition, the victim need not actually be defrauded, because the "gravamen of the offense" is the scheme itself.[52] As Judge Learned Hand explained in *United States v. Rowe*:

> Civilly of course the action would fail without proof of damage, but that has no application to criminal liability. A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. It may be

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pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use 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, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing . . . .

§ 1341.

50. Fraud by wire, radio, or television:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

§ 1343.

51. United States v. Williams, 441 F.3d 716, 721 (9th Cir. 2006) (citing United States v. Bohonus, 628 F.2d 1167, 1171 (9th Cir. 1980)). There are indications that this distinction is valid once more, following the *Skilling* decision, *see e.g.*, United States v. Siddiqui, 2010 U.S. Dist. LEXIS 102242, at *4 (Sept. 28, 2010) ("This Court concludes [the statutes] are not inextricably tied. The two sections give rise to alternative theories: (1) money-or-property fraud . . . and (2) honest services fraud."); United States v. Hatfield, 2010 U.S. Dist. LEXIS 67634, at *15 (July 7, 2010) ("Money and property fraud survives the Supreme Court's recent decisions.") (citing Black v. United States, 130 S. Ct. 2963 (2010)).

52. United States v. George, 477 F.2d 508, 512 (7th Cir. 1973) (affirming conviction of defendants who participated in a kickback scheme).

> impossible to measure his loss by the gross scales available to a court, but he has suffered a wrong; he has lost his chance to bargain with the facts before him. That is the evil against which the statute is directed.[53]

In a history of broad interpretation by the courts, both public and private activity has been held to be fraudulent under the intangible rights doctrine.[54] For example, in *United States v. Williams*,[55] the defendant argued that the intangible rights did not apply to private-sector fraud.[56] The court held that, where a fiduciary duty is owed to the victim, 18 U.S.C §§ 1341 and 1343 apply to private sector fraud under the "intangible rights theory."[57] In general, fraud has been identified in two types of situations: when an employee defrauds his or her employer of honest services[58] or, more commonly, when a public servant defrauds the citizenry of its right to honest service.[59] The court in *United States v. Brumley*[60] even went so far as to find that "a governmental entity qualifies as 'another'" and is owed honest services.[61]

Two cases, *United States v. Bronston*[62] and *United States v. Margiotta,*[63] decided by the Second Circuit in the early 1980's marked the beginning of a significant expansion of the scope of the intangible rights doctrine that ultimately led to the Supreme Court's decision to hear *McNally v. United States*.[64] In the most often-noted decision,

53. 56 F.2d 747, 749 (2d Cir. 1932), *cert. denied*, 286 U.S. 554 (1932). Judge Learned Hand was referencing 18 U.S.C.A. § 338, which later became § 1341.

54. Hurson, *supra* note 40, at 304.

55. 441 F.3d at 716 (9th Cir. 2006), *cert. denied*, 549 U.S. 927 (2006).

56. *Id*. at 718.

57. *Id.* at. 722-23.

58. The actual reference states "by the employee or by another," meaning someone who has the ability to defraud an employer but is not necessarily working for him or her. For the sake of clarity, I have omitted "another." *See* United States v. Sorich, 523 F.3d 702, 707 (7th Cir. 2008).

59. *See id.* (affirming the conviction of city employees who set up a false hiring scheme).

60. 116 F.3d 728 (5th Cir. 1997) (en banc).

61. Hurson, *supra* note 40, at 305-06 (quoting United States v. Brumley, 116 F.3d 728 (5th Cir. 1997) (en banc) (Brumley III).

62. 658 F.2d 920 (2d Cir. 1981).

63. 688 F.2d 108 (2d Cir. 1982).

64. 483 U.S. 350 (1987), *superseded by statute*, 18 U.S.C. § 1346 (1988); *see also* Hurson, *supra* note 40, at 306-08 (describing the decisions of the Second Circuit as a period when "[t]he [s]takes [r]ise"); Ingber v. Enzor, 841 F.2d 450, 454 (2d Cir. 1988) ("The *Margiotta* decision was but one in a series of Second Circuit decisions expanding the scope of section 1341. The steady expansion by this and other circuits of the mail and wire fraud statutes continued for more than a decade, unaddressed by the Supreme Court."); *see, e.g.,* United States v. Newman, 664 F.2d 12 (2d Cir. 1981); United States v. Bronston, 658 F.2d 920 (2d Cir. 1981), *cert. denied*, 456 U.S. 915

Margiotta, the court found that a "formal employment relationship" should not be a "rigid prerequisite to a finding of fiduciary duty in the public sector,"[65] and therefore found the statute applied to the defendant, a long-time chairman of the Republican Committee.[66]

B. Developments After 1987

The short history[67] of using the intangible rights doctrine in the mail fraud statute to prosecute white-collar criminals and people with political influence was almost ended by the Supreme Court's decision in *McNally*.[68] In a stark reversal of the broadening application of the intangible rights doctrine,[69] Justice White wrote: "The mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government."[70]

(1982); United States v. Von Barta, 635 F.2d 999 (2d Cir. 1980), *cert. denied*, 450 U.S. 998 (1981); United States v. Bohonus, 628 F.2d 1167 (9th Cir. 1980), *cert. denied*, 447 U.S. 928 (1980); United States v. Condolon, 600 F.2d 7 (4th Cir. 1979); United States v. Bush, 522 F.2d 641 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976); United States v. States, 488 F.2d 761 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974). I have included all of the cases cited as evidence of the large amount of cases expanding the idea of the "honest services doctrine," as well as to show the numerous opportunities the Supreme Court had to review the doctrine.

65. *Margiotta*, 688 F.2d at 122. As dicta, Judge Kaufman gave an interesting commentary on a political figure's influence over the public which I will be discussing in reference to the three cases that will be studied in this Note:

> The significant role played by political parties in municipal government has been an often noted characteristic of American urban life. Some critics, contributing to the prevailing mythology that machine politics have controlled the corridors of local government, have highlighted the opportunities available to those who hold the strings of political power for defrauding the citizenry and reaping personal gain, through the sale of public office and other favors. Other commentators, however, have asserted that local party leaders have often served important functions of political representation and association. In cities fragmented into diverse social and economic groups, it has been argued, party organizations have played a salutary role in organizing large numbers of people, and fulfilling their desires with patronage, jobs, services, community benefits, and opportunities for upward social mobility. In sum, the line between legitimate political patronage and fraud on the public has been difficult to draw.

Id. at 111 (internal citations omitted).

66. *See id.* at 122 (finding that prosecution was "permissible" under the mail fraud statute).

67. *See* Jeffrey J. Dean & Doye E. Green, Jr., *McNally v. United States and Its Effect on the Federal Mail Fraud Statute: Will White Collar Criminals Get a Break?*, 39 MERCER L. REV. 697, 703 (1988) (explaining that the prosecutors' "'Colt 45' was loaded" and they began using the mail fraud statute to protect intangible rights in 1973).

68. 483 U.S. 350 (1987), *superseded by statute*, 18 U.S.C. § 1346 (1988).

69. *See supra* note 64 (containing a list of decisions in which courts broadened interpretation of the "honest services doctrine").

70. McNally v. United States, 483 U.S. 350, 356 (1987).

The Court's opinion referenced the historical reasoning behind the creation of the statute, and narrowed the statute to its "original impetus": protecting people from thieves using the mail to deprive their victims solely of their "money or property."[71]

In *McNally*, the issue considered was the legality of commissions received by the chairman of the Democratic Party through an arrangement with an insurance agency that secured workmen's compensation for the state.[72] The Court dismissed the argument that the disjunctive in the statute should imply that the two clauses be independent.[73] Instead, the Court limited its scope, finding the second phrase "simply" specified frauds that could involve money or property.[74] Finally, the Court invited clarification: "If Congress desires to go further, it must speak more clearly than it has."[75]

C. Why and How "Congress then spoke"[76]

1. Why: An "Unmet Need"[77]

A year later, in a concept credited to the now Vice President Joe Biden,[78] Congress did speak. However, instead of resolving the ambiguity of the statute's outer boundaries in order to distance the Federal Government from setting local government standards, as the Court in *McNally* requested,[79] Congress *added* the intangible right theory to the statute: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[80]

Congress clearly restored the mail fraud provision to pre-*McNally*[81] broadness and stated that § 1346 was meant to overturn

71. *Id.*

72. *Id.* at 352.

73. *Id.* at 358.

74. *See id.* at 359 (finding that the phrase "simply made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property").

75. *Id.* at 360.

76. United States v. Sorich, 523 F.3d 702, 707 (7th Cir. 2008).

77. Brief for Respondent at 13, Weyhrauch v. United States, 129 S. Ct. 2863 (2009) (No. 08-1196), 2008 U.S. S. Ct. Briefs LEXIS 1100 [hereinafter Brief for the United States].

78. *U.S. News & World Report* sarcastically called honest services fraud the "brilliant idea" of Joe Biden. Peter Roff, *The Supreme Court, Conrad Black and Joe Biden's Bad Idea*, U.S. NEWS & WORLD REPORT, Dec. 11, 2009, *available at* http://www.usnews.com/opinion/blogs/peter-roff/2009/12/11/the-supreme-court-conrad-black-and-joe-bidens-bad-idea. *See* Brief for the United States, *supra* note 77, at 37.

79. 483 U.S. at 360.

80. 18 U.S.C. § 1346 (1988).

81. 483 U.S. 350 (1987), *superseded by statute*, 18 U.S.C. § 1346 (1988).

the Supreme Court's effort to limit the statute.[82] As a modified version of the Anti-Corruption Act of 1988, Congress had "public corruption squarely in mind"[83] and, through comments by Representative Conyers and others,[84] deliberately broadened the scope of the statute by purposely excluding a reference to "intentional or contemplated loss or harm,"[85] as well as any dependence on a state law violation.[86] By insisting on this language, Congress was acting purposefully to "restore the federal-state balance before *McNally*—under which federal prosecutions safeguarded the integrity of state and local government, thereby filling an otherwise unmet need."[87]

The honest services law addressed this "unmet need" by encompassing and expanding upon numerous ineffective criminal charges. "[A]t a time when officials have become increasingly sophisticated at covering their tracks," the law is a "valuable instrument against corruption"[88] specifically because it is able to reach almost all forms of corruption where other laws fall short. For honest services, it is unnecessary, for instance, to prove the victim lost money as a result of the fraud.[89] It is therefore "easier to win a conviction than on extortion or bribery."[90] In fact, more people are imprisoned yearly for honest services fraud "than ethical violations, bribery, and extortion combined."[91]

Without the honest services law, Judge Cronin's backseat interest-free loan would have gone unpunished.[92] Because bribery must be proven with a showing of quid pro quo, prosecutions like the

82. 134 CONG. REC. H10829, H11251 (daily ed. Oct. 21, 1988) (statement of Rep. Conyers); *see also* Tendler, *supra* note 40, at 2738; Brief for the United States, *supra* note 77, at 37-38.

83. Brief for Citizens For Responsibility and Ethics In Washington (CREW) as Amicus Curiae Supporting Respondent at 17, Black v. United States, 129 S. Ct. 2379 (2009) (No. 08-876) [hereinafter Brief for CREW].

84. Brief for the United States, *supra* note 77, at 37-38 (citing comments from Senator Biden, Senator De Concini, Senator Simon, and Representative Conyers).

85. Brief for CREW, *supra* note 83, at 17.

86. Brief for the United States, *supra* note 77, at 38-39 (presenting the state/federal law question to the court).

87. Brief for the United States, *supra* note 77, at 13.

88. John Schwartz, *Justices to Decide if Honest-Services Law Gives Prosecutors Too Much Discretion*, N.Y. TIMES, Dec. 7, 2009, at A12.

89. Christine Seib, *Black Fights Conviction under 'Honest Services' Law*, THE TIMES (London), Dec. 7, 2009, at 51.

90. *Id.*

91. Frank Perry, *Veteran FBI Agent Speaks Out on U.S. Supreme Court's Pending Review of Honest Services Fraud Law*, PR NEWSWIRE LLC, Dec. 14, 2009, *available at* http://www.thestreet.com/story/10644947/veteran-fbi-agent-speaks-out-on-u-s-supreme-court%E2%80%99s-pending-review-of-honest-services-fraud-law.html (last visited Mar. 4, 2011).

92. *See Cronin Pleads Guilty to Fraud*, *supra* note 15.

one against Judge Cronin must show that the judge's opinion was a direct result of the money given to her. Therefore, prosecutors cannot rely on bribery in prosecutions of judges–the judge can always claim her decision was not influenced by the bribe.[93] Instead, the honest services law had become a "major arrow in the quiver of prosecutors," allowing the successful prosecution of corrupt public officials.[94] With a charge that was "almost impossible to beat,"[95] our representatives had been put on notice that their actions would be scrutinized for inconsistencies and falsehoods.

Congress spoke, not only answering the unmet need for controlling corruption in government, but also intending the law to "function as a foundation for a more expansive federal role in regulating corporate governance."[96] In fact, *United States v. Skilling*[97] and *United States v. Black*,[98] the two cases involving corporate corruption, are good examples of indictments that stunned the public by exposing high-level fraud, signaled the downfall of very successful corporations, and contributed to the collapse of the economy.[99] Twenty years ago, Congress foresaw the need to "instill greater investor confidence";[100] today that purpose is crucial, especially in light of corporate civil remedy failure.

The significant barriers to civil remedies in fighting corporate corruption that necessitate section 1346 are most obvious in the corporate bastion of Delaware.[101] A short list of some of the more obvious obstacles, put in place by both the legislature and court, are: only allowing shareholder standing (which excludes employees, bondholders, and creditors); forcing the plaintiff to keep its shares through litigation; and an automatic loss of standing if the plaintiff

93. Parloff, *supra* note 13 ("Proving quid pro quo became superfluous.").

94. Bill Barnhart, *Circuits Split Over Application of Computer Fraud Law,* INSIDE COUNSEL, Dec. 1, 2009, at 66, *available at* http://www.insidecounsel.com/Issues/2009/December-2009/Pages/Circuits-Split-Over-Application-of-.aspx?k=Circuits+split+over+application+of+computer+fraud+law (last visited Mar. 4, 2011).

95. Michael Hinkelman, *28-Word Federal Law, A Key Tool Against Corruption Here*, *Faces High Court Scrutiny*, THE PHILADELPHIA DAILY NEWS, Dec. 7, 2009, at 04 (noting that of thirty cases in that city, only two had been acquitted of the honest services charge).

96. Lisa L. Casey, *Twenty-Eight Words: Enforcing Corporate Fiduciary Duties Through Criminal Prosecution of Honest Services Fraud*, 35 DEL. J. CORP. L. 1, 94 (2010).

97. 554 F.3d 529 (5th Cir. 2009), *aff'd in part, vacated in part, and remanded*, 130 S. Ct. 2896 (2010).

98. 530 F.3d 596 (7th Cir. 2008), *vacated and remanded,* 130 S.Ct. 2963 (2010).

99. *See infra* Parts III.B, III.C.

100. Casey, *supra* note 96, at 94.

101. *See id.* at 17-35 (an extensive study of the civil remedy failures in Delaware, only touched upon here).

involuntarily loses its shares.[102] The lawsuit is difficult to plead and the standard is often not achieved.[103] Due to the "business judgment rule" that presumes the director is acting in the best interest of the company, most cases are dismissed without any review of their merits.[104] In addition, indemnity agreements prevent personal liability and limit responsibility to "wasting" corporate assets, a claim "nearly impossible to prove."[105]

The ongoing Citigroup saga[106] is a good example of the inability of state law to protect shareholders, and the necessity of safeguarding the honest services law. In 2009, shareholders sued Citigroup executives in an attempt to recover over $25 billion in losses.[107] In response to this apparently valid claim,[108] the Delaware court "sharply criticized this attempt to hold the Citigroup executives personally liable" and called it a "kind of judicial second guessing" of the firm's investments.[109]

Corporate-friendly laws put into place by Congress,[110] as well as thirty-five years of Supreme Court decisions making "federal civil liability unlikely,"[111] compound the reluctance of state courts to hold executives responsible. Considering the Court's similar reluctance to interfere with state regulations,[112] the inability of those state regulations to stymie corruption, and the resulting economic collapse,

102. *Id.* at 18.

103. *Id.* at 19 (Casey calls the pleading standard "onerous" with "particularized factual allegations," which are almost impossible to achieve.).

104. *Id.* at 21.

105. *Id.* at 22.

106. *See Financial Crisis Inquiry Commission Takes Aim at Citigroup (NYSE-C)*, AMERICAN BANKING & MARKET NEWS (Apr. 2, 2010), http://www.americanbankingnews.com/2010/04/02/financial-crisis-inquiry-commission-takes-aim-at-citigroup-nyse-c/.

107. Casey, *supra* note 96, at 26 (citing Consolidated Second Amended Derivative Complaint, *In re* Citigroup Inc. S'holder Deriv. Litig., 964 A.2d 106 (Del. Ch. 2009) (No. 3338-CC).

108. See *Financial Crisis Inquiry Takes Aim at Citigroup, supra* note 106 (describing how the FEIC is investigating Citigroup's potential liability for the financial crisis).

109. Casey, *supra* note 96, at 28.

110. Both the Private Securities Litigation Reform Act of 1995 (PSLRA) (Pub. L. No. 104-167, 10a Stat. 737 (1995) (limiting rights to file class action suits), and the Securities Litigation Uniform Standards Act of 1998 (SLUSA) (Pub. L. No. 105-353, 112 Stat. 3227 (1998) (preventing the filing of securities fraud complaints in state court) contribute to a body of law that "favors early dismissal of plaintiff's claims." Casey, *supra* note 96, at 30-32.

111. Casey, *supra* note 96, at 32.

112. *See id.* at 33 ("foreshadowing" the Court's analysis of section 1346); *see also* discussion *infra* Part II.C.2 (discussing reluctance of federal courts to overturn corruption cases).

Joe Biden's "brilliant"[113] idea made sense. In fact, losing the honest services law in its previous form could "hit plans to bring honest services fraud charges against bankers who sold and securitized sub-prime mortgages."[114] Before the Supreme Court's decision limiting the honest services law in June, "[m]ultiple people on Wall Street [were] terrified that this law [wouldn't] get stricken by the Supreme Court,"[115] but it's the public that has the most to lose now.

2. How: Congress' Answer to the "Unmet Need"

Stemming the flow of numerous retroactive and collateral attacks on intangible rights convictions that had suddenly appeared,[116] the honest services statute superseded *McNally*[117] and "reinstated the line of cases preceding it."[118]

Faced with defining 'honest services' through case law, courts had been ruling on the constitutionality of the "intangible rights theory" since the implementation of section 1346:

> Unfortunately, Congress did not define the concept of "honest services" in § 1346, thereby creating some confusion over the reach of the mail fraud statute . . . . Because the statute's plain language is inconclusive, we turn for guidance in construing the statute to our pre-McNally case law and any relevant post-McNally decisions, and then consider pre- and post-McNally decisions from our sister circuits.[119]

The Seventh Circuit also expressed their concern in *United States v. Hausmann*:[120] "Despite [the court's] doubts as to the applicability of these 'intangible rights theory' provisions . . . to cases

113. Roff, *supra* note 78.

114. Seib, *supra* note 89.

115. *Id.*

116. *See* Deborah Sprenger, Annotation, *Effect Upon Prior Convictions of* McNally v. United States *That Mail Fraud Statute (18 U.S.C.A. § 1341) Is Directed Solely At Deprivation of Property Rights*, 97 A.L.R. FED. 797, 3a (1990, supp. 2008) (listing approximately fifty cases in which courts held the *McNally* decision could be applied retroactively). Similarly, now after the Supreme Court ruling there are already at least twenty-eight cases that have been retried and remanded.

117. McNally v. United States, 483 U.S. 350 (1987), *superseded by statute*, 18 U.S.C. § 1346 (1988).

118. United States v. Sorich, 523 F.3d 702, 707 (7th Cir. 2008) (citing United States v. Rybicki, 359 F.3d 124, 136-37 (2d Cir. 2003).

119. United States v. Weyhrauch, 548 F.3d 1237, 1243 (9th Cir. 2008), *vacated and remanded*, 130 S. Ct. 2971 (2010). The court in *Weyhrauch* continues, "'[t]he central problem is that the concept of `honest services' is vague and undefined by the statute. So, as one moves beyond core misconduct covered by the statute (e.g., taking a bribe for a legislative vote), difficult questions arise giving coherent content to the phrase through judicial glosses.'" (quoting United States v. Urciuoli, 513 F.3d 290, 294 (1st Cir. 2008).

120. 345 F.3d 952, 956 (7th Cir. 2003).

of breach of fiduciary duty and nothing more," the court nonetheless found a breach of this duty sufficient when done in furtherance of a scheme to defraud for personal gain.[121] This court was not alone in finding that the statute was not unconstitutionally vague when applied to a scheme enabled by the defendant's misuse of his fiduciary position.[122] Although "[t]he constitutionality of § 1346 has repeatedly been challenged . . . every circuit to address this issue has upheld it, even though the rationales have differed."[123]

Although Congress acted to end the honest service debate in 1988, the controversy did not end.[124] In fact, many believed the "prophecy that the Supreme Court will curb the federal fraud statutes may yet prove accurate," even though there had been a limited response by the lower federal courts to overturn public corruption cases.[125] Instead, the courts have acted to reverse decisions that restrict private fiduciary actions.[126] This imbalance is reflected in the Supreme Court's rehearing of two private fiduciary cases[127] and only one public corruption case.[128] The public versus private distinction may have also signaled a reason why the Court chose to hear three separate cases on the same "intangible right to honest service" issue, although, ultimately, their opinion did not draw a distinction.[129]

There have been many academic solutions offered to resolve the

121. *Id.* (affirming conviction of chiropractor who received kickbacks), *cert. denied sub nom*, Rise v. United States, 541 U.S. 1072 (2004).

122. United States v. Hausmann, 345 F.3d 952, 958 (7th Cir. 2003).

123. United States v. Warner, 498 F.3d 666, 697 (7th Cir. 2007) (giving several examples of courts upholding the statute's constitutionality); *see, e.g.*, United States v. Rybicki, 354 F.3d 124, 132 (2d Cir. 2003) (en banc); United States v. Bryan, 58 F.3d 933, 941 (4th Cir. 1995); United States v. Gray, 96 F.3d 769, 776-77 (5th Cir. 1996); United States v. Brumley, 116 F.3d 728 (5th Cir. 1997) (en banc); United States v. Frost, 125 F.3d 346, 370-71 (6th Cir. 1997); United States v. Frega, 179 F.3d 793, 803 (9th Cir. 1999); United States v. Welch, 327 F.3d 1081, 1109 n.29 (10th Cir. 2003); United States v. Waymer, 55 F.3d 564, 568 (11th Cir. 1995).

124. Coffee, *supra* note 40, at 428.

125. *Id.* at 429-30.

126. *Id.* at 430.

127. *See* United States v. Skilling, 554 F.3d 529, 534 (5th Cir. 2009), *aff'd in part, vacated in part, and remanded*, 130 S. Ct. 2896 (2010); *see* United States v. Black, 530 F.3d 596, 599 (7th Cir. 2008), *vacated and remanded,* 130 S. Ct. 2963 (2010).

128. United States v. Weyhrauch, 548 F.3d 1237, 1239 (9th Cir. 2008), *vacated and remanded*, 130 S. Ct. 2971 (2010).

129. *See Skilling*, 130 S. Ct. at 2912 n.9 ("Today we vacate and remand [the other two] decisions in light of this opinion . . . ."). In Justice Scalia's concurrence, he argues that this lack of distinction makes the statute unconstitutionally vague and questions "the 'fiduciary capacity' to which the bribery and kickback restriction applies. Does it apply to public officials? Or in addition to private individuals who contract with the public? Or to everyone, including the corporate officer here?" *Id.* at 2938-39 (Scalia, J., concurrence).

confusing result of basing future holdings on pre-*McNally* rulings. In fact, "the amendment to date ha[d] received little substantive judicial interpretation because the amendment has prospective application only."[130] From tying in a "reasonable foreseeability" requirement to the breach of fiduciary duty that causes economic harm,[131] to the requirement that the "deprivation of 'honest services' must be actionable" under state law,[132] case law and academia have presented ways to limit and define the intangible right to honest services. Now, the Supreme Court has had the final say.

III. THE THREE CASES THROUGH WHICH THE SUPREME COURT SOUGHT TO DEFINE THE "INTANGIBLE RIGHT TO HONEST SERVICES"

In response to Justice Scalia's scathing dissent in *Sorich*,[133] in its 2009 term, the Supreme Court accepted three cases that dealt the honest services law.

A. Weyhrauch v. United States:[134] The Federalism Issue

In August of 2007, reporters watched through "slits in the blinds" as twenty search warrants were served on members of the Alaskan Legislature.[135] An investigation into the relationship of several elected officials with the oil company Veco Corporation resulted in numerous corruption charges.[136]

Much of the relationship between Veco and the lawmakers was public knowledge.[137] The self-anointed "Corrupt Bastards Club"

130. John E. Gagliardi, *Back to the Future: Federal Mail and Wire Fraud Under 18 U.S.C. § 1346*, 68 WASH. L. REV. 901, 901 (1993).

131. *Id.* at 902.

132. Coffee, *supra* note 40, at 431. The applicability of state law in deciding an honest services breach is the issue now in front of the Supreme Court in *Weyhrauch*.

133. Sorich v. United States, 129 S. Ct. 1308, 1308 (2009).

134. United States v. Weyhrauch, 548 F.3d 1237 (9th Cir. 2008), *vacated and remanded*, 130 S. Ct. 2971 (2010).

135. Richard Mauer, *Federal Agents Raid Legislative Offices*, ANCHORAGE DAILY NEWS, Aug. 5, 2007, *available at* http://www.adn.com/news/politics/fbi/weyhrauch/story/243117.html (last visited Apr. 4, 2010).

136. *Bruce Weyhrauch,* ANCHORAGE DAILY NEWS, http://www.adn.com/news/politics/fbi/weyhrauch (last visited Mar. 4, 2011) (lists the Key Politicians as: Senator Ted Stevens, Former Representative Vic Kohring, Former Representative Pete Kott, Former Representative Tom Anderson, Representative Don Young, Former Senator Ben Stevens, Senator John Cowdery, and Former Representative Bruce Weyhrauch).

137. *See, e.g.*, Lisa Demer & Don Hunter, *FBI's Searches Target Veco Ties*, ANCHORAGE DAILY NEWS, Sept. 2, 2006, at A1.

> For well over a decade, Veco has produced a steady and strong river of campaign contributions to candidates and political committees both in Alaska and nationally. In 2004, the company's executives, employees and family members donated more than $217,000 to 26 federal candidates or

included eleven lawmakers[138] who had been named in an Alaska newspaper column as receiving contributions from Veco.[139] The group even made hats adorned with the acronym "CBC" as an inside joke.[140] However, after a tax law vote involving new oil production, as well as the negotiation of a "draft natural pipeline contract" between then Governor Frank Murkowski and the three largest oil companies in the state, an FBI-led bribery investigation was revealed.[141] Republican Bruce Weyhrauch, who had served the people of Alaska since 2003, representing a state house district in Juneau[142] and chairing the House Ways and Means Committee,[143] was one of the legislators who had been served with a search warrant.[144] Despite his own legislative aide's declaration at the time of the search: "My own take is that [Weyhrauch is] as puzzled as everyone,"[145] Weyhrauch was one of the Representatives[146] accused of selling his votes and influence to the oil company.[147]

> groups, ranging from $45,250 for U.S. Sen. Lisa Murkowski to $400 to the Republican National Committee. In state elections that year, Veco's top three contributors alone gave more than $122,000 to the Alaska Republican Party and state House and Senate candidates. Veco executives also are known for prowling the Capitol halls and even passing notes to lawmakers on the floor to influence votes.

Id.

138. The list of the amount of donations received from VECO and the eleven legislators who received them (and the Governor of Alaska) was published in March 2006. Although the original list did not include Weyhrauch, all of the others charged with corruption with him were on the list. This included Kohring, Kott, and Anderson. The author of the article also made clear that the list only included donations made from the top seven VECO executives. Lori Backes, *Does Oil Money Buy Influence in the Legislature? It's worth asking*, FAIRBANKS DAILY NEWS-MINER, Mar. 19, 2006. Her article provoked a defensive letter-to-the-editor from Kohring on March 20, 2006, defending his stance on taxes, claiming, "I'm proud of my political philosophy. It's built upon freedom and justice, not envy and avarice. To be critical of my anti-tax position is an odd compliment. But I'll take it, once it's understood that I hold this position philosophically for the benefit of all Alaskans." Vic Kohring, Letter to the Editor, FAIRBANKS DAILY NEWS-MINER, Mar. 23, 2006.

139. Demer & Hunter, *supra* note 137, at 2.

140. *Id.*

141. Matt Volz, *FBI Searches Offices of Six Alaska Lawmakers, Including Son of U.S. Senator Ted Stevens*, USA TODAY, Sept. 1, 2006, at 1.

142. United States v. Kott, 2007 U.S. Dist. LEXIS 56541, at *1 (D. Alaska).

143. Demer & Hunter, *supra* note 137, at 3.

144. *Id*.

145. *Id.*

146. On trial with Weyhrauch were Pete Kott, Vic Kohring, and Thomas T. Anderson. United States v. Anderson, 2007 U.S. Dist. LEXIS 49375 (D. Alaska June 28, 2007); United States v. Kott, 2007 U.S. Dist. LEXIS 56541 (D. Alaska Aug. 1, 2007).

147. Lisa Demer, *Former Legislator wants trial relocated to Juneau,* ANCHORAGE DAILY NEWS, Aug. 5, 2007, *available at* http://www.adn.com/news/politics/fbi/

Originally Weyhrauch and fellow legislator, Pete Kott, were to be tried together.[148] Both faced multiple charges including corruption, bribery, and conspiracy;[149] Kott was even recorded on surveillance tapes "being cozy"[150] with Veco President Bill Allen and Vice President Rick Smith.[151] Some of Weyhrauch's fellow legislators' cases are already resolved; both Pete Kott and Vic Kohring, another legislator, were convicted and served time in federal prison on corruption charges.[152]

Weyhrauch's case persists, however. Although both Kott and Weyhrauch were charged together with honest services mail and wire fraud, Weyhrauch's lawyer filed a motion to block evidence that he "failed to disclose a conflict of interest arising from his dealings with VECO and its executives."[153] The court in *United States v. Kott*[154] discussed the parties' disagreement on whether honest services fraud could be "proved by showing something other than an illegal financial transaction" and instead showing a concealment of a conflict of interest.[155] Specifically, the court quoted the prosecutor's argument insisting that the people of the State of Alaska had the

weyhrauch/story/243119.html (last visited Mar. 4, 2011).

148. Lisa Demer, *Panel Weighs Evidence in Corruption Case*, ANCHORAGE DAILY NEWS, Aug. 5, 2008, *available at* http://www.adn.com/news/politics/fbi/weyhrauch/story/484116.html (last visited Mar. 4, 2011).

149. Weyhrauch's other charges included: conspiracy to commit extortion under color of official right, bribery, and honest services mail and wire fraud, 18 U.S.C. 371 Title 18, chapter 19; "one count of attempted interference with commerce by extortion induced under color of official right," 18 U.S.C. 1951(a) chapter 95, and "one count of bribery concerning programs receiving federal funds," 18 U.S.C. 666(a)(1)(B). *Kott*, 2007 U.S. Dist. LEXIS 56541 at 2.

150. Demer, *supra* note 147.

151. AKRaven, *FBI Surveillance Tape – Kott Trial Alaska*, YOUTUBE (Sept. 18, 2007), http://www.youtube.com/watch?v=D1LbzUVNYlo (containing a video of the surveillance tapes revealing "coziness"); Scott Levin, *Kott Trial: FBI Surveillance Tapes,* ANCHORAGE DAILY NEWS (May 7, 2006), http://community.adn.com/mini_apps/vmix/player.php?ID=1511436&GID=118.

152. Kott was sentenced to six years but released after one year when it was discovered that the prosecutor had failed to hand over some of the evidence. On January 13, 2010 a federal judge ruled that there was not "sufficient basis" to dismiss the case or order a new trial. However, he will remain free until the Ninth Circuit hears the matter. Lisa Demer, *Federal Judge Rules Kott Received Fair Corruption Trial*, ANCHORAGE DAILY NEWS, Jan. 14, 2010, http://www.adn.com/news/politics/fbi/kott/story/1092368.html. Kohring, sentenced to three and a half years, but freed with Kott, has yet to file for dismissal or retrial because of an intervening lawsuit he has brought against his own lawyer regarding a car accident. Lisa Demer, *Kohring Sues his Lawyer*, ANCHORAGE DAILY NEWS, Oct. 23, 2009, http://www.adn.com/news/politics/fbi/kohring/story/985254.html (last visited Mar. 24, 2010).

153. United States v. Kott, 2007 US Dist. LEXIS 66125, at 2 (D. Alaska Sept. 4, 2007).

154. *Id.*

155. *Id.* at 10.

right to be "'free from deceit, self-dealing, bias, and *concealment*.'"[156]

However, the court reasoned that, unless there was proof of "an existing duty to disclose" his conflict of interest to the people he represented, Weyhrauch had not violated any law.[157] Because the government did not cite a state statute showing his actions were illegal, Weyhrauch could not be held legally responsible for his actions.[158] Although he was also charged with bribery and conspiracy, felonies that do not involve the honest services law, the Supreme Court only considered the honest services aspect of his case.[159]

The procedural history leading to the Supreme Court review is full of conflicting theories of the honest services law. For example, in examining whether federal common law held the legislator responsible in *Kott,*[160] the District Court of Alaska dismissed a Seventh Circuit decision, *U.S. v. Martin*, written by Chief Judge Posner,[161] that held a fiduciary duty established by state law is not

156. *Id.* at 11.

157. *Id.* at 11-12.

158. *Id.* (determining the government may proceed only if there is a source in federal law stating a duty to disclose, but stating that "[n]o federal statute is cited").

159. Mike Robinson, *Law Used to Indict Blagojevich challenged: Honest Services: Former Rep. Bruce Weyhrauch among those taking vague fraud statute to task*, ANCHORAGE DAILY NEWS, Sept. 12, 2009, http://www.adn.com/news/politics/fbi/weyhrauch/story/933209.html (last visited Mar. 4, 2011). Weyhrauch was ultimately only charged with honest services fraud because the promises he received from VECO involved getting future legal work, not actual payment at the time of the vote (like the others received), and therefore disqualified the bribery charge. Mark Regan, *Bruce Weyhrauch Gets Good News as the Honest Services Fraud Statute Gets Cut Back*, ALASKA POLITICAL CORRUPTION BLOG, June 24, 2010, http://alaskacorruption.blogspot.com/2010/06/bruce-weyhrauch-gets-good-news-as.html (last visited Mar. 4, 2011). *See also* discussion *infra* Part IV.

160. *Kott*, 2007 U.S. Dist. LEXIS 66125.

161. United States v. Martin, 195 F. 3d 961, 966 (7th Cir. 1999). Interestingly, in his opinion, Posner addressed the possible connection between the honest services law and campaign finance, which will be discussed later in this Note.

> It is easy to see how the next step in "intangible rights" thinking would be to argue that an elected official who receives a donation to his campaign fund and afterward fails to prevent the donor from obtaining favorable treatment in dealing with the government is defrauding the government of its right to his loyalty. We are speaking not of a case in which there is either an explicit quid pro quo or even some positive act by the official to assist the donor, but merely of a case in which it can be proved (though this will often be impossible to do with the certitude required in a criminal case) that the official, had he not received the donation, would have taken positive steps to try to prevent the donor from receiving favorable treatment. For example, a legislator well known for his anti-smoking views, having received a generous donation from a cigarette company, might have muted his opposition to the industry's position. But the courts have made clear that criminal inducement of a legislator to take particular action cannot be inferred from the legislator's acceptance of campaign contributions from interests urging the

necessary to convict under the honest services law.[162] Although Posner's opinion in *Martin*[163] was described by the District Court as offering "no rebuttal"[164] to the contrary ruling in *United States v. Brumley*[165] that it ultimately sided with, the facts in *Martin*[166] are quite similar to Weyhrauch's case: an employee for the Department of Public Aid (Lowder) entertained and then accepted a job offer with a corporation (Martin) with whom Lowder's department had signed costly contracts.[167] In his opinion, Chief Judge Posner refers to

> *[t]he fear* that motivated the *Brumley*[168] decision is that if federal courts are free to devise fiduciary duties the breach of which violates the mail fraud statute, the result will be the creation in effect of a class of federal common law crimes, something federal courts have steadily refused to do.[169]

Contrary to the Alaska court, Judge Posner seems to find the *Brumley*[170] argument inadequate—stating that citing the case and quoting its conclusion (as the litigant in this case did) was not reason enough to overturn precedent, and indicating that the vagueness of the statute may continue to be resolved in courts, since "a uniform albeit judge-made federal concept of fiduciary duty might do the trick as well or better."[171]

Contrarily, the *Kott* court found "the reasoning of the *Brumley*[172] court very persuasive."[173] The passages quoted included statements

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> action, or from his acceptance of lobbyists' hospitality. The first set of cases involved specific federal criminal prohibitions, such as the prohibition against bribery in federally funded programs that Lowder also violated, but the second set involved the mail fraud statute and we cannot imagine that they would be decided differently if the government decided to prosecute them under the "intangible rights" doctrine.

Id. at 966 (internal citations omitted).

162. *Kott*, 2007 U.S. Dist. LEXIS 66125, at 12.

163. *Martin*, 195 F. 3d at 961.

164. *Kott*, 2007 U.S. Dist. LEXIS 66125 at 14.

165. *Id.* at 5.

166. *Martin*, 195 F. 3d at 961.

167. *Id.* at 963-65.

168. 116 F.3d 728 (5th Cir. 1997) (en banc) (the fear of creating a class of criminal common law crimes motivated the *Brumley* decision to require violation of a state law).

169. *Martin,* 195 F. 3d at 966; *see also* James T. Van Strander, *A Potent Federal Prosecutorial Tool: Weyhrauch v. United States*, 5 DUKE J. CONST. LAW & PUB. POL'Y SIDEBAR 80, 88 (2009) ("The Supreme Court has thus far refused to recognize any federal criminal common law. In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, [511 U.S. 164, 181 (1994)], the court stated flatly, 'there is no federal common law of crimes.'").

170. *Brumley*, 116 F.3d at 728.

171. *Martin*, 195 F. 3d at 967.

172. *Brumley*, 116 F.3d at 728.

173. United States v. Kott, 2007 U.S. Dist. LEXIS 66125, at *12-13. Specifically, the

that reveal a fear of big government defining a state's moral stance, or "an ethical regime for state employees" that would "sorely tax separation of powers and erode our federalist structure."[174] Dismissing the concept of "citizens' right to honest services," as merely an idea with a "rhetorical ring," the court quoted *Brumley*'s[175] warning that giving citizens' rights independent of state law would have the "potential for large federal inroads into state matters."[176] As for the cases presented by the prosecution, the District Court of Alaska found no explanation for the conclusion that the crime exists independent of state law.[177] In fact, citing *United States v. Martin* and seven other decisions,[178] the court concluded that all of the opinions from the First, Seventh, and Eleventh Circuits, lack sufficient rationale:

> [S]uffice it to say that when one reads the cases cited by the United States and then goes some distance back through the chain of cases cited looking for reasons why federal law may be used to supply an

court quoted these passages:

> We begin with the plain language of the statute. There are two words "honest" and "services." We will not lightly infer that Congress intended to leave to courts and prosecutors, in the first instance, the power to define the range and quality of services a state employer may choose to demand of its employees. We find nothing to suggest that Congress was attempting in § 1346 to garner to the federal government the right to impose on states a federal vision of appropriate services -- to establish, in other words, an ethical regime for state employees. Such a taking of power would sorely tax separation of powers and erode our federalist structure. Under the most natural reading of the statute, a federal prosecutor must prove that conduct of a state official breached a duty respecting the provision of services owed to the official's employer under state law. Stated directly, the official must act or fail to act contrary to the requirements of his job under state law . . . . We pause to put aside frequent invocations of citizens' right to honest services. The reference to such "rights" of citizens has little relevant meaning beyond a shorthand statement of duty rooted in state law and owed to the state employer. Despite its rhetorical ring, the rights of citizens to honest government have no purchase independent of rights and duties locatable in state law. To hold otherwise would offer § 1346 as an enforcer of federal preferences of "good government" with attendant potential for large federal inroads into state matters and genuine difficulties of vagueness.

Id. (quoting *Brumley*, 116 F.3d at 734-5 (internal citations omitted)).

174. *Kott*, 2007 U.S. Dist. LEXIS 66125, at *13.

175. *Brumley*, 116 F.3d 728.

176. *Kott*, 2007 U.S. Dist. LEXIS 66125, at *13-14 (citations omitted).

177. *Id.* at *14-18.

178. United States v. Martin, 195 F.3d 961 (7th Cir. 1999); United States v. Keane, 522 F.2d 534, 544-45 (7th Cir. 1975); United States v. Bush, 522 F.2d 641, 646 n.6 (7th Cir. 1975); United States v. Woodward, 149 F.3d 46 (1st Cir. 1998); United States v. Silvano, 812 F.2d 754 (1st Cir. 1987); United States v. Sawyer, 85 F.3d 713 (1st Cir. 1996); United States v. Walker, 490 F.3d 1282 (11th Cir. 2007); United States v. deVegter, 198 F.3d 1324 (11th Cir. 1999).

> inherent duty to disclose which supports an honest services fraud charge, one does not find any rationale sufficient to counter the reasoning in *Brumley*.[179]

The three cases discussed here, *Brumley*, *Martin* and now *Kott*,[180] exemplify the larger, theoretical issue of the honest services law. These cases exhibit the historical debate between those who fear big government usurping the state's voice versus those who believe in the ability of the Court to resolve vagueness in the law. However, neither school of thought has an answer on how to define the honest services law in order to hold elected officials responsible for criminal behavior that is yet unspecified by law. Relying on *Brumley*,[181] and choosing an ideology as much as a precedent, the *Kott* court threw out the prosecutors's request to enter into evidence the resume Weyhrauch mailed to Allen during his time as a legislator, seeking work with Veco.[182]

One year later in *United States v. Weyhrauch*,[183] the Ninth Circuit reversed the district court's decision.[184] The court detailed the evidence the prosecutors sought to introduce: legislative ethics publications, evidence that Alaskan Legislators "customarily acknowledge the existence of conflicts of interests on the floor of the Legislature" and Weyhrauch's own lack of disclosure, the ethics training he had received, and evidence of his service on the "Legislature's Select Committee on Ethics."[185] The Ninth Circuit reviewed the district court's ruling suppressing this evidence for abuse of discretion.[186]

Acknowledging the District Court's reliance on the Fifth Circuit *Brumley* decision,[187] the Ninth Circuit Court re-framed the circuit split. The *Weyhrauch* court described the Fifth and Third Circuit decisions as being in the minority and reflecting "the so-called 'state limiting principle'"—requiring a state law to be violated in order to convict a public official of honest services fraud.[188] Instead, the

179. *Kott*, 2007 U.S. Dist. LEXIS 56541, at *18.

180. *Brumley*, 116 F.3d 728; *Martin*, 195 F. 3d 961; *Kott*, 2007 U.S. Dist. LEXIS 66125.

181. *Brumley*, 116 F.3d 728.

182. *Kott*, 2007 U.S. Dist. LEXIS 66125, at *12-15.

183. United States v. Weyhrauch, 548 F.3d 1237, 1239 (9th Cir. 2008), *cert. granted in part*, 129 S. Ct. 2863 (2009), *vacated* 130 S. Ct. 2971 (2010), *remanded to* 623 F.3d 707 (9th Cir. 2010).

184. *Weyhrauch*, 548 F.3d at 1248 (the government had decided to appeal the decision only for Weyhrauch's case).

185. *Id.* at 1239-40.

186. *Id.* at 1240.

187. *Id.*

188. *Id.* at 1243-44. *But see* Marc Martin, *The Dilemma of the Honest Services Statute: Honest Services and Common Sense*, 24 CBA REC. 34, 36 (Jan. 2010) (citing

Weyhrauch court sided with the "majority of circuits" that are "governed by a uniform federal standard inherent in [section] 1346."[189] By following a complicated process of applying precedent, the Ninth Circuit described the "contours" of the standard in each circuit.[190]

The *Weyhrauch* court noted "one concern" that this interpretation of § 1346 would give "federal prosecutors *unwarranted influence* over state and local public ethics standards,"[191] and listed what it deemed valid considerations supporting a limited reach of the law.[192] However, regardless of the dangers presented, the court joined the First, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits in finding other ways than a state law requirement to limit the honest services law.[193]

Although this decision has been criticized as "in effect creat[ing] a federal common-law crime of honest-service mail fraud that [is] independent of any state ethics laws,"[194] a creation that the Supreme Court has never recognized,[195] the court cited a long history of precedent, the legislative history of section 1346[196] and finally, the United States Constitution.[197] Stating that "Congress has a legitimate constitutional basis for preventing public officials from using the mails to perpetrate fraud," the court detailed how state actions could have implications in the ability of the federal

Professor Alschuler's Brief to the Supreme Court for Weyhrauch: "He fired a stealth missile . . . . In his brief . . . Aschuler pointed out . . . that using state law as a component of 'honest service' prosecution was inconsistent with federalism, and the decisions in *Jerome v. United States* and *Cleveland v. United States*" (citations omitted)).

189. *Weyhrauch*, 548 F.3d at 1244.

190. *Id.*

191. *Id.*

192. *Id*. (giving three reasons: need for fair notice to public officials of criminal conduct, to establish firm boundaries so not every dishonest act becomes a federal crime, and the potential for selective enforcement). This was also Scalia's worry in his dissent in *Sorich* (and now in *Skilling*), where he wrote that it would be used by "headline-grabbing prosecutors" for political reasons. Sorich v. United States, 129 S. Ct. 1308 (2009) (Scalia, J., dissenting).

193. *Weyhrauch*, 548 F.3d at 1244-45.

194. *See* Van Strander*, supra* note 169, at 88.

195. *Id.*; *see also* United States v. Martin, 195 F.3d 961, 966 (7th Cir. 1999).

196. The legislative history is an important part of the government's argument in front of the Supreme Court. In the government's brief, it details this history, revealing that the references to state law requirements present in the original draft of section 1346 were dropped from its final form. Also, a statement made by Representative Conyers confirmed that the abandonment of the state-law violation requirement was purposeful. Strander, *supra* note 169, at 90-91 (citing Brief for Respondent at 22-23, Weyhrauch, 129 S. Ct. 2863 (2009) (No. 08-1196)).

197. *Weyhrauch*, 548 F.3d at 1246 (quoting U.S. Const. art. VI, cl. 2: "[T]he Laws of the United States . . . shall be the supreme Law of the land.").

government to protect its interests.[198]

By outlining the contours of honest service fraud, the court enumerated two categories of conduct by public officials that undermined the transparency necessary for the public to discern the motivations of their elected representatives.[199] The first, "taking a bribe . . . while purporting to be exercising independent discretion," and the second, "nondisclosure of material information."[200] Perhaps also an indication of why the Supreme Court heard three separate honest service cases,[201] the court in *Weyhrauch* was careful to distinguish its decision holding public officials responsible for honest service independent of state law from the prosecution of fraud in the "private context."[202]

B. Black v. United States:[203] The Harm Issue

In Weyhrauch's petition for certiorari, he argued that his case was made "[m]ore [c]ertworthy [b]y [t]he Court's [g]rant [o]f [r]eview [i]n *Black v. United States*."[204] Pointing out both the Ninth Circuit's decision in *Weyhrauch*[205] and the Seventh Circuit's decision in *Black*,[206] the petition urged the Court to clarify the two circuits' seeming "premise that § 1346 is a mandate for open-ended federal common law making" in both the private and public forums.[207]

In the spring of 2005, Lord Conrad Black of Harcross,[208] upon learning that his business records were being subpoenaed, went to his office, unsuccessfully trying to avoid surveillance cameras, and with the aid of his chauffer and secretary, carried thirteen boxes of records down a back stairway and then home.[209] Although he was

198. *Id.* at 1246.

199. *Id.* at 1247.

200. *Id.*

201. *Id.* at 1243; United States v. Skilling, 554 F.3d 529 (5th Cir. 2009), *aff'd in part, vacated in part, and remanded*, 130 S. Ct. 2896 (2010). United States v. Black, 530 F.3d 596, 599 (7th Cir. 2008), *vacated and remanded,* 130 S.Ct. 2963 (2010); *see also* discussion *infra* note 230 (explaining the Supreme Court decision not to rule on this distinction, instead narrowing the crime itself and focusing on the aforementioned categories of conduct).

202. *Weyhrauch*, 548 F.3d at 1245 n.5 (emphasis omitted).

203. Black v. United States, 130 S. Ct. 2963 (2010).

204. Reply Brief for Petitioner at 7, United States v. Weyhrauch, 130 S. Ct. 2971 (2010) (No. 08-1196) 2009 WL 1604420 at *7.

205. *Weyhrauch*, 548 F.3d. at 1237.

206. *Black*, 530 F.3d 596.

207. Reply Brief for Petitioner*, supra* note 204, at *9.

208. Seib, *supra* note 89.

209. *Black*, 530 F.3d at 603-04; *see also* Bill Otis, *The Honest Services Argument and the Culture of Deceit*, CRIMES AND CONSEQUENCES BLOG (Jan. 17, 2010, 2:00 PM), http://www.crimeandconsequences.com/crimblog/2010/01/the-honest-services-

eventually forced to give them back,[210] U.S. prosecutors had already obtained copies of the documents.[211] Black was the CEO of the American company, Hollinger International, which owned numerous newspapers in different countries through several subsidiaries.[212]

Conrad Black was indicted for funneling income in the form of large management fees paid by Hollinger to a Canadian company, Ravelston, which he controlled.[213] Included in the charges against Black was a $5.5 million payment to Ravelston for granting a covenant not to compete with a weekly community newspaper in Mammoth Lake, California, a town with a population of 7,093.[214] Chief Judge Posner called the idea that they would start a competing newspaper in the small town "ridiculous,"[215] and the defendants seemed to agree; they argued that they were only trying to evade Canadian taxes on management fees.

However, no record was ever found that the corporation, the audit committee, or the board of directors had approved the payment of $5.5 million.[216] In a series of questionable actions including backdating of checks, payments to the defendants personally from the sale of a newspaper, failure to disclose payments to the SEC and a misrepresentation of payments to the shareholders,[217] the court commented that "[t]here was still more evidence of the fraud, but there is no need to go into it."[218]

Aside from the conventional fraud, Black and his partners were charged with the honest service law § 1341 for "misuse of their positions in Hollinger for private gain."[219] The focus of the appeal in the Seventh Circuit was the jury instructions that allowed conviction upon proof that the objective of the scheme to defraud the shareholders was for "private gain."[220] The defendants argued that for the honest service law to be violated, "the private gain must be at

argument-a.html; *Conrad Black Caught Red-Handed*, NOW PUBLIC (May 26, 2005, 11:08 AM), http://www.nowpublic.com/Conrad_black_caught_red_handed (containing a picture of the incident).

210. Canadian Press, *Conrad Black returns boxes to Hollinger Inc*, CTV NEWS (May 26, 2005, 11:36 PM), http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1117121587072_112530787/?hub=CTVNewsAt11.

211. Peter Worthington, *A Chance for Conrad; 'Honest Services' Gives Fraudster Hope in the U.S. Supreme Court Appeal*, THE TORONTO SUN, Dec. 9, 2009, at 18.

212. *Black*, 530 F.3d at 599.

213. *Id.*

214. *Id.*

215. *Id*.

216. *Id.*

217. *Id.*

218. *Id*. at 600.

219. *Id.*

220. *Id.*

the expense of the persons . . . to whom the defendants owed their honest services."[221] Although the defendants claimed they were only defrauding the Canadian government, Judge Posner wrote "[t]hey are making a no harm-no foul argument, and such arguments usually fare badly in criminal cases."[222]

In an opinion that used examples of bribed judges and crooked department store buyers, the court explained that no matter who receives or is defrauded of the money, their gain or loss is irrelevant when determining to whom is owed the honest services.[223] In fact, the court states, "[e]ven if our analysis of honest service fraud is wrong, the defendants cannot prevail. There is . . . very little doubt that they deprived Hollinger of their honest services . . . ."[224] Referencing the "number and skill" of the defendant's lawyers who, the court reasoned, submitted purposely misleading jury instructions,[225] the opinion insinuated that the defendants thought their wealth could put them above the law.[226]

Although the Supreme Court agreed to hear Black's case in reference to the honest services question, the oral arguments that occurred on December 8, 2009 made it clear that the Court was not focused on the specific issue of economic harm to the employer.[227] Instead, the Justices focused on the definition of honest services and the variety of things that honest services could mean.[228] In deriding Deputy Solicitor General Michael Dreeben's definition of "a term of art recognized by the courts" as simply "no divided loyalties,"[229] the Justices seemed to dismiss the idea of a law defined by case law[230] and focused on the constitutionality of the statute.[231] As a result, in the Court's decision, the statute was narrowed considerably so that

221. *Id.*

222. *Id.*

223. *Id.* at 601-02.

224. *Id.* at 602.

225. *Id.* at 605.

226. *See id.* at 605. In an opinion that at one point debunked the myth of an ostrich putting its head in the sand ("a canard on a very distinguished bird"), *id.* at 604, the tone of the decision was one that could be described as almost mocking toward the wealthy defendants and their numerous lawyers. The court even noted that their brief numbered 161 pages, with other points that did not have "sufficient merit to require discussion." *Id.* at 606.

227. *See* Nina Totenberg, *High Court Skeptical of Anti-Fraud Law*, NPR (Dec. 8, 2009), http://www.npr.org/templates/story/story.php?storyId=121216160.

228. *Id.* (Justice Breyer used the example of pretending you liked your boss's hat so you can read a racing form).

229. *Id.*

230. *Id.* (Justice Scalia remarked, "You speak as though it's up to us to write the statute.").

231. *Id.*

the constitutionality would no longer be an issue - the proscribed crime was limited to bribery and kickbacks.[232]

C. Skilling v United States: The Constitutionality Issue

1. Vagueness

Arguing that he was only "advanc[ing] the employer's interests" and not seeking "private gain," Jeffrey Skilling's request for certiorari before the Supreme Court was the only one of the three petitions that addressed the constitutionality of the statute.[233] Although by the time the Justices heard oral arguments in defense of the former Enron CEO's fraud,[234] they seemed more interested in the venue issue he was addressing.[235] This lack of discussion may be because the Justices had already debated the constitutionality of the statute in both of the previous defendants' arguments.

Skilling's constitutional argument addressed one of the main criticisms of the honest services law: vagueness. Although "the Supreme Court historically has been reluctant to declare criminal statutes facially unconstitutional on any ground, much less vagueness,"[236] the Justices indicated during the oral arguments of the three cases that they were considering this ruling, due to lower court confusion over the meaning of the statute.[237] Justice Scalia, the

232. Skilling v. United States, 130 S. Ct. 2896, 2907 (2010); *see* discussion of decision *infra* Part IV.

233. Petition for a Writ of Certiorari at 1, United States v. Skilling, 554 F.3d 529 (5th Cir. 2009) (No. 08-1394), 2009 U.S. S. Ct. Briefs LEXIS 1064 at **1 ("Whether the federal 'honest services' fraud statute, 18 U.S.C. § 1346, requires the government to prove that the defendant's conduct was intended to achieve 'private gain' rather than to advance the employer's interests, and, if not, whether § 1346 is unconstitutionally vague."); *cf.* Petition for a Writ of Certiorari at 2, United States v. Black, 530 F.3d 596 (7th Cir. 2008) (No. 08-876), 2008 U.S. S. Ct. Briefs LEXIS 1387 at **2 (limiting itself to the question of harm); Petition for a Writ of Certiorari at 1, United States v. Weyhrauch, 548 F.3d 1237 (9th Cir. 2008) (No. 08-1196) 2009 U.S. S. Ct. Briefs LEXIS 763 at **1 (limiting itself to the question of federal law controlling state officials).

234. Because the story of Enron and its executives was well publicized and has been extensively analyzed, I am going to focus on the arguments against (and defenses of) the honest services law that stem from Skilling's case in front of the Supreme Court.

235. The second issue in *Skilling* was the problem of finding an unbiased jury in a town where almost everyone had been affected by his crimes. Petition for a Writ of Certiorari at 1, United States v. Skilling, 554 F.3d 529 (5th Cir. 2009) (No. 08-1394), 2009 U.S. S. Ct. Briefs LEXIS 1064 at **1.

236. Denis M. King, *Are Halycon Days of Honest Services Prosecutions Over?*, MASS. LAW. WKLY., Dec. 21, 2009; *see also* Skilling v. United States, 130 S. Ct. 2896, 2929 (2010) (which used this reluctance to justify the Court's opinion: "we acknowledge that Skilling's vagueness challenge has force . . . . It has long been our practice, however, before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction.").

237. *See, e.g.,* King, *supra* note 236. The author points to several comments made by

most vocal opponent of the honest services law, asked the government in *Weyhrauch* if they were arguing "that a law that is, on its face, inherently vague can, somehow, be rendered valid to the citizens by a decision of this Court?"[238] He then continued to worry about a confused public: "And if the justice department can't figure out what . . . is embraced by this statute, I don't know how you can expect the average citizen to figure it out."[239] Although Justice Scalia's concern over violating Due Process and not giving the ordinary citizen fair notice of criminal behavior is legitimate, the defendants he addresses are hardly beleaguered ordinary citizens. Two phenomenally wealthy corporate executives[240] and an elected public official do not necessarily represent a confused public.

Ultimately, fears of a flummoxed population contradict the reality of our society. Instead, there is clarity and anger after the economic collapse and betrayals by numerous elected officials.[241] As

the Justices about how to limit the statute, including Scalia's comment: "there's no basis in the statute for limiting it to [bribes, kickbacks or self-dealing]" and Sotomayor's comment: "you have to give us the source or some source of limiting [the statute]" and Roberts's comment: "if [a citizen can't understand the law], then the law is invalid." *Id.*

238. Transcript of Oral Argument at *41, Weyhrauch v. United States, 130 S.Ct. 2971 (2010) (No. 08-1196), 2009 U.S. Trans. LEXIS 74 at *41. This, in fact, is what the Supreme Court has attempted to do. Whether the citizens are convinced, however, remains to be seen and is the question presented in this Note.

239. *Id.* at *44.

240. In fact, it has been argued that the only reason the Supreme Court heard these cases were because of the well-funded defendants and their high paid lawyers. *See, e.g.*, Mary Flood, *Skilling Review Fuels Debate over Enron Prosecutors*, HOUSTON CHRON., Oct. 14, 2009 at Business 1, *available at* http://www.chron.com/disp/story.mpl/special/enron/6668427.html.

241. In researching public opinion of the honest services law, there was an enormous amount of anger toward public and private deceit. Here are some comments on anger: Sam Levine, Opinion, THE RECORD (Bergen County, N.J.), Dec. 25, 2009, at A20 ("Let's be real about this: Dozens of New Jersey politicians are in the clink for stealing our tax money; that's why this honest services law is there."); Editorial, *Honest Services Law Helps Fight Corruption*, CHICAGO-SUN TIMES, Dec. 11, 2009, at B2 ("Just ask the hundreds of people who waited in line year after year for city jobs that they never had a chance to get because they didn't do political work."); Loren Steffy, *High Court to Weigh Ex-Enron CEO's Appeal* (NPR Radio Broadcast Nov. 9, 2009) ("I think there will be a lot of people who will be angry if the Supreme Court reverses this decision."); Daniel Schorr, *Americans Vent Anger at 'Fat Cat' Bankers* (NPR Radio Broadcast Jan. 14, 2010) ("But anger . . . extends beyond compensation avarice. Now the mortgage bubble is seen as the root of a recession that poised America and the world on an economic precipice."); Mark Pazniokas, *Poll: Put Rowland Behind Bars*, HARTFORD COURANT (Conn.), Jan. 19, 2005, at B1 ("The fact that people want a longer sentence and a greater monetary fine is evidence of the public sense of outrage."); *Honest Services*, NEWS & RECORD (Greensboro, N.C.), Mar. 2, 2010, at A9 ("Without the federal statute, corrupt North Carolina politicians would have less to fear, and the public would have a weaker claim to their honest services."); John Kass, *Prosecutors Keeping an Eye on their Swiss Army Knife*, CHI.

Melanie Sloan, Executive Director of Citizens for Responsibility and Ethics in Washington (CREW), responds: "[L]ook at what [Weyhrauch, Black and Skilling] did, a kindergartner knows that they were wrong . . . . It's not credible that those guys really had no idea that what they were doing would get them into trouble. What they thought was that they wouldn't get caught."[242] And as one blogger pointed out, "Black himself had no trouble knowing,"[243] as the prompt removal of boxes from his office indicated.[244] The government's brief highlights the statute's elements: duty of loyalty, intent to deceive, and materiality, which "sufficiently define and narrow the crime to avoid vagueness . . . concerns . . . . A defendant . . . who intends to deceive the citizenry, has ample notice."[245] (As one government lawyer advised the citizens of Palm Beach County, an area riddled with corruption scandals, "if you have to think about whether you should be doing it, maybe you shouldn't be doing it."[246]) CREW's amicus brief argues that the statute has an "accumulated settled meaning" under common law.[247] This watchdog group also emphasizes intolerance for public officers who are dishonest: "Official loyalty *is* an end in and of itself. Correspondingly, betrayal of this loyalty is actionable under section 1346."[248]

2. Over-criminalization[249]

As a result of "blurring the civil-criminal distinction," the dangers of "the 'collapsing' line between civil and criminal penalties,"[250] are evident in the widespread federal prosecution of corporate executives. Criminal sanctions are "best reserved for conduct that society never tolerates and outright prohibits."[251] To this point, Justice Scalia worried that the honest services law would

TRIB., Nov. 1, 2009, at 2 ("To those of us born under the sign of The Chicago Way, that such rights are intangible is a strange concept indeed.").

242. Schwartz, *supra* note 88.

243. Otis, *supra* note 209.

244. See *id*. for the story of Black's boxes.

245. Brief for the United States, *supra* note 77, at 12-13.

246. Morgan, *supra* note 14.

247. Brief for CREW, supra note 83, at 18.

248. *Id.* at 9.

249. Another criticism of the honest services law is the potential for politicization of the law, leading to selective enforcement. Although I did find a few examples in my research that would warrant further investigation, e.g., some cases in Birmingham, Alabama, none of the cases before the Supreme Court involved this issue, so I have limited its discussion to this footnote.

250. Casey, *supra* note 96, at 87 (quoting John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1875 (1992)).

251. *Id.* at 88.

criminalize "a mayor's attempt to use the prestige of his office to obtain a restaurant table without a reservation."[252] The U.S. Chamber of Commerce's brief for *Black* asked: "Could an insincere sermon at Sunday religious services come within the statute?"[253] And one business news publication warned that the law "should send shivers down the spine of every freedom loving person in the land."[254]

However, with the weakened power of state law to regulate civil liability in corporate corruption,[255] as well as society's diminishing tolerance for dishonest public officials, "lack of moral certainty" in prosecuting a fiduciary breach of duty may no longer be a good reason to resist "harsh criminal sanctions."[256] And, examining the past twenty years of corporate growth against its sudden demise, nor would fear of stymieing "optimal risk taking"[257] in big business be a prescient concern.

In *Skilling*, the Fifth Circuit found that, although the "poster child for corporate corruption cases"[258] argued that he did not breach his fiduciary duty "because his fraud was in the corporate interest and therefore was not self-dealing," this did not excuse his illegal actions.[259] The argument that the honest service law criminalizes behavior that doesn't deserve "full weight" of federal prosecution[260] does not stand up against the crimes of the former Enron CEO.[261] As

252. United States v. Sorich, 129 S. Ct. 1308, 1309 (7th Cir. 2008) (Scalia, J., dissenting).

253. Brief for U.S. Chamber of Commerce as Amicus Curiae Supporting Petitioner at 5, Black v. United States, 129 S. Ct. 2379 (2009) (No. 08-876), 2009 WL 2441059 at *5.

254. Roff, *supra* note 78.

255. See *supra* notes 101-09 and accompanying text and discussion of Delaware Courts.

256. Casey, *supra* note 96, at 88. Casey argues that abuse of loyalty is "easier to justify and enforce," and criminal proceedings are less predictable and justifiable, when used to define fiduciary doctrine. *Id.* at 89. She writes that "criminal liability for failing to achieve these aspirational objectives" will endanger the dynamic in self-set standards that encourage fiduciaries to "follow good process" and "establish[ed] influential social norms." *Id.* at 89-90. However, in reality, the multiple failures in following such standards are omnipresent and continue to be exposed.

257. *Id.* at 88.

258. *Supreme Court Hears Former Enron CEO's Appeal*, CNNMONEY.COM (Mar. 1, 2010), http://money.cnn.com/2010/03/01/news/economy/Jeffrey_Skilling_Enron_appeal/index.htm.

259. United States v. Skilling, 554 F.3d 529, 545-46 (5th Cir. 2009). The court's only exception to holding an employee responsible for fraud stemmed from its decision in *United States v. Brown*, where the employee was directed to commit a specific fraud by his employer. *Id.* at 545 (citing United States v. Brown, 459 F.3d 509, 522 (5th Cir. 2006)).

260. Schwartz, *supra* note 88, at A12.

261. In fact, some have suggested that the only reason the Supreme Court accepted the third case on honest services this term was because of the well paid defense team:

Deputy Solicitor Michael Dreeben said in oral arguments, Skilling's "crimes were lying to Enron, [and] lying to its shareholders about the health of the company,"[262] resulting in millions of investors' savings being lost. As most of the country struggles with the aftereffects of a failed economy, allowing the weak civil system in Delaware to handle Skilling's crimes would ignore the fact that society now deems these white collar crimes intolerable.[263] A sentiment so prevalent that Skilling's second venue issue before the Supreme Court claimed that the "wave of public passion" in Houston made it impossible for him to get a fair hearing.[264]

IV. THE SUPREME COURT DECISION ON HONEST SERVICES FRAUD

Former Mayor Sharpe James' conviction for honest services fraud was reversed on September 16, 2010.[265] Citing the Supreme Court's ruling that "'[t]o preserve the statute without transgressing constitutional limitations,' [section] 1346 criminalizes only 'fraudulent schemes to deprive another of honest services through

"where the defendant is well-funded, putting them on par with the government." Flood, *supra* note 240.

262. Transcript of Oral Argument at 14, Skilling v. United States, 130 S. Ct. 2896 (2010) (No. 08-1394), 2010 U.S. Trans. LEXIS 17 at *14.

263. *See* Casey, *supra* note 96, at 88 (on intolerance of public signifying when criminal penalty is appropriate); *see also,* Wade Goodwyn, *High Court to Weigh Ex-Enron CEO's Appeal,* NPR (Nov. 9, 2009), http://www.npr.org/templates/story/story.php?storyId=120234236 ("When prosecutors present evidence of repeated deceptions by a companys [sic] top officers, juries seem happy to convict of honest services fraud . . . . [T]here are many in Texas [who want to see Skilling spend life in prison]."); Parloff, *supra* note 13 (calling the idea of Skilling going free "maddening"); John Emshwiller, *The Last of the Golden Swindlers*, WALL ST. J., Mar. 6, 2010, at W1 ("[There is a growing] intoleran[ce] of financial fraudsters, partly due to public anger over waves of financial scandals, from the Wall Street insider-trading schemes of the 1980's to Enron Corp.'s collapse in 2001."); *Will the Supreme Court Hobble Prosecutors?*, UNITED PRESS INT'L (Dec. 6, 2009), *available at* http://www.istockanalyst.com/article/viewiStockNews/articleid/3690478 (pointing out a column headline in Houston Chronicle before Skilling trial: "Your Tar and Feathers Ready? Mine Are," as well as a rap song: "Drop the S off Skilling"); Bob Herbert, *Safety Nets For the Rich*, N.Y. TIMES, Oct. 20, 2009, at A31 ("Why should the general public have to constantly worry that a misstep by the high-wire artists at Goldman Sachs (to take the most obvious example) would put the entire economy in peril? These financial acrobats get the extraordinary benefits of their outlandish risk-taking—multimillion-dollar paychecks, homes the size of castles—but the public has to be there to absorb the worst of the pain when they take a terrible fall. Enough! Goldman Sachs is thriving while the combined rates of unemployment and underemployment are creeping toward a mind-boggling 20 percent. Two-thirds of all the income gains from the years 2002 to 2007—two-thirds!—went to the top [one] percent of Americans.").

264. Adam Liptak, *Justices Hear Appeal of Ex-Chief of Enron*, N.Y. TIMES, Mar. 2, 2010 at B1.

265. United States v. Riley, 621 F.3d 312, 317 (3d Cir. 2010) (Sharpe James and Tamika Riley appealed together).

bribes and kickbacks,'" the Circuit Court reversed.[266] Because the District Court had mistakenly instructed the jury that honest services fraud could "be based on a violation of a duty of honest, faithful and disinterested service,"[267] his case was remanded for resentencing. *Skilling* decriminalized Sharpe James' actions and dismissed the public's intangible rights of honest services from their mayor.[268]

On June 24, 2010, the Supreme Court decided *Skilling* and included the two other cases in its ruling.[269] In an opinion written by Justice Ginsburg and joined by all of the other Justices,[270] the Court "acknowledge[d] that Skilling's vagueness challenge has force" but deferred to the Court's precedent of "consider[ing] whether the prescription is amendable to a limiting construction."[271] Ultimately disregarding Scalia's vagueness objections,[272] the Court held "that [section] 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law."[273] However, reasoning that the "'vast majority' of the honest services cases"[274] involved bribery or kickback

266. *Id.* at 321 (honest services fraud, Count 5 of their conviction, was reversed, Counts 1-4 were affirmed, and the case was remanded for resentencing).

267. *Id.* at 323. Specifically, the instructions were:

> [T]he right to honest services is the right that comes from a relationship of trust that one forms with another individual or with an institution. This is known in the law as a fiduciary relationship. [A] fiduciary is prohibited from acting to enrich himself on behalf of the principal. Since the fiduciary acts and speaks for the principal, the fiduciary also owes the principal that he serves a duty of frankness and candor in matters that are of material importance to the principal . . . . A public official is a fiduciary for the public and the government he serves . . . [and] owes a duty of honest, faithful and disinterested service to the public and that official's public employer.

Id. at 323 n.15.

268. Counts 1-4 were charged under different fraud laws: section 1341 and section 666, which the Circuit Court distinguished from the fraud of section 1346 by looking at "the object of the deprivation and not the underlying fraudulent act." *Id.* at 327. As in many of the other cases that have been revisited since *Skilling*, the "money or property" issue, or "risk of exposure to such a loss," has been separated carefully from the honest services issue. *Id.*

269. Skilling v. United States, 130 S. Ct. 2896 (2010); *see also* Black v. United States, 130 S.Ct. 2963, 2970 (2010) (remanding to determine the effect of the new definition of honest services on jury instructions); United States v. Weyhrauch, 130 S. Ct. 2971, 2971 (2010) ("[R]emanded . . . for . . . consideration in light of *Skilling* . . . .").

270. *Skilling,* 130 S. Ct. at 2906. Three Justices dissented on the jury question. *Id.* at 2935.

271. *Id.* at 2929.

272. *Id*. at 2933. Responding to Scalia's charge that the narrowing was "not interpretation but invention," the Court wrote "[o]nly by taking a wrecking ball to a statute that can be salvaged through a reasonable narrowing interpretation would we act out of step with precedent." *Id*. at 2931 n. 43.

273. *Id.* at 2931.

274. *Id.* at 2930.

schemes, the Court deigned to include undisclosed self-dealings or conflicts of interest in the meaning of the statute.[275]

Unfortunately for those who suffered from Skilling's crimes,[276] although "he orchestrated a grand scheme that brought down one of the largest corporations in America, drained billions from retirement accounts and put thousands out of work," he was not accused of bribery or kickbacks.[277] Disregarding the multiple other counts included in his conviction, his attorney declared the ruling "fatal to the government's case."[278] As a journalist for Skilling's hometown of Houston wrote:

> Enron, even here in Houston, seems so long ago, an age before Bernie Madoff and Allen Stanford, before Lehman Brothers and Goldman Sachs, but the outcome of Skilling's case still matters. The more pensions become 401(k) plans, the more corporate honesty has a direct bearing on the retirement of millions, the more devastating the impact of market-related fraud. Skilling didn't deny Enron "honest services," as the Supremes have now defined it, but he also didn't provide honest services as most of us would define it.[279]

In fact, the decision in *Skilling* to decriminalize what the Enron executive, Black, and Weyhrauch have done may be interpreted as a growing disconnect between the Supreme Court, the government, and the citizens of this country. The impact of the limiting of the honest services law is just beginning, and no one knows how extensive it will be.[280] Estimates vary from declaring it a "major loss

275. *Id.* at 2932 ("In light of the relative infrequency of conflict of interest prosecutions . . . and the intercircuit inconsistencies they produced, we . . . exclude this amorphous category of cases.").

276. Loren Steffy called it "a frustrating non-resolution to a case for which this city, Enron's former employees and other victims have long sought closure." Loren Steffy, *Crossbar Motel Likely to Keep Him*, HOUSTON CHRON., June 25, 2010, at Business 1, *available at* http://www.chron.com/disp/story.mpl/business/steffy/7079371.html.

277. *Id.*

278. Mary Flood, *Enron Case Appeal Partial Victory for Skilling*, HOUSTON CHRON., June 25, 2010, at A1.

279. Steffy, *supra* note 276.

280. As of October 30, 2010, seven rulings have been vacated by the Supreme Court and remanded for reconsideration, including the high profile cases of Don Seigelman and Richard Scrushy. Of the twenty-eight cases involving an honest services fraud that have been retried, four have been redefined as bribery, four as kickbacks, nine have been convicted under another theory of fraud (mostly money or property fraud under § 1341 and § 1343), and eleven have been vacated under the new definition. On October 29, 2010, a federal appeals court reversed two of Conrad Black's fraud convictions, his resentencing will follow. Michael Tarm, *Appeals Court Reverses 2 Fraud Convictions Against Conrad Black,* USA TODAY, Oct. 29, 2010, *available at* http://www.usatoday.com/money/companies/management/2010-10-29-conrad-black-appeal_N.htm.

to the US Justice Department and federal prosecutors nationwide"[281] and "predict[ing] a flood of similar litigation by defense lawyers,"[282] to the less certain: "[W]hile there is potential for [Skilling] to have an impact, we haven't seen it yet, and there are questions about how big that potential is."[283] But the real harm may already have taken place: "The [C]ourt's decision made headlines all over the world, in large part because of the names of those sitting in prison as a result of the law."[284] The majority of cases may have been limited to bribery and kickback schemes, as the Supreme Court stated,[285] but the high profile cases that go free may be the most damaging to public confidence.

The Court historically has had an important role in establishing social justice in times of discontent and upheaval.[286] Now, the Justices seem removed from the reality of an increasingly disenfranchised electorate. The limitation of the honest services law is compounded by the Court's recent decision in *Citizens United*,[287] an opinion that also dangerously condones corruption and leaves the future of a democracy "by the people" in peril.

V. *CITIZENS UNITED* DENIES EXISTENCE OF CORRUPTION

In Justice Stevens' dissent from the Court's decision to allow independent expenditures by corporations in elections, he decried a "rejection of the common sense of the American people" in the refusal to recognize the "societal interest in avoiding corruption."[288] A cosponsor of the campaign reform bill, Senator John McCain was

281. Warren Richey, *Supreme Court Ruling Boosts Enron Executive Jeffrey Skilling*, THE CHRISTIAN SCI. MONITOR, June 24, 2010, *available at* http://www.csmonitor.com/USA/Justice/2010/0624/Supreme-Court-ruling-boosts-Enron-executive-Jeffrey-Skilling.

282. Spencer S. Hsu, *Supreme Court Ruling Raises Bar for Corruption, Fraud Prosecutions*, WASH. POST, July 18, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/07/17/AR2010071702339.html (citing "legal experts" prediction).

283. Melissa Klein Aguilar, *Fate of Honest-Services Fraud Uncertain Post-Skilling*, COMPLIANCE WEEK (Boston), Oct. 12, 2010 (quoting Barry Hartman, a partner in the law firm K&L Gates).

284. Don Babwin & Sophia Tareen, *Conrad Black Granted Bail: Ex-Media Mogul Getting Out of Jail*, HUFFINGTON POST (July 19, 2010, 9:36 PM), http://www.huffingtonpost.com/2010/07/19/conrad-black-granted-bail_n_651840.html (naming Black, Skilling, Abramoff and Randy "Duke" Cunningham).

285. *See* Skilling v. United States, 130 S. Ct. 2896, 2930 (2010).

286. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (banning segregation in public schools); Miranda v. Arizona, 384 U.S. 436 (1966) (holding that a defendant must be informed of his rights before and during questioning); Griswold v. Connecticut, 381 U.S. 479 (1965) (ruling that the Constitution protects the right to privacy).

287. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

288. *Id.* at 979 (Stevens, J., dissenting).

"troubled by the 'extreme naïveté'" of some of the Justices in their attitude toward corruption.[289]

Indeed, in *Citizens United*, the Supreme Court minimized and, in fact, discounted potential corruption, reasoning that only a "single footnote in *Bellotti*" had mentioned the possibility that corruption could be caused by corporate independent expenditures.[290] Thus, the Court concluded, "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[291] This assessment, however, was made "without the benefit of a factual record" as a result of the case being fast-tracked to the Supreme Court, and therefore the lack of corruption was assumed simply on the "basis of gut instinct."[292]

Justice Kennedy distinguished corruption from "favoritism and influence," which were "not . . . avoidable in representative politics."[293] Using Kennedy's reassurance that "[d]emocracy is premised on responsiveness,"[294] the Court attempted to interpret the electorate's psyche:

> The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. . . . The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestion that the electorate will refuse "'to take part in democratic governance'" because of additional political speech made by a corporation . . . ."[295]

The Court concluded with this final observation: "Ingratiation and access, in any event, are not corruption."[296]

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289. Editorial, *The Court's Blow to Democracy*, N.Y. TIMES, Jan. 22, 2010, at A30, *available at* http://www.nytimes.com/2010/01/22/opinion/22fri1.html.

290. *Citizens United*, 130 S.Ct. at 909. The Court also mentioned dismissively that the footnote cited a "law review student comment" as part of its argument: "*Bellotti*'s dictum is thus supported only by a law review student comment, which misinterpreted *Buckley*." *Id.*

291. *Id*. at 884.

292. *ACS Panel Discussion – Citizens United v. FEC: The Decision, Its Implications, and the Read Ahead*, AM. CONSTITUTION SOC'Y (Feb. 24, 2010), http://secure.acslaw.org/node/15421 [hereinafter *ACS Panel Discussion*] (audio file available at htt://d12.newmediamill.net/media/acs/events/240210.mp3). Ms. Youn explained that the case was fast tracked to the Supreme Court and presented with no factual record. *Id.* She gives examples of corruption cases that were ignored, emphasizing that had the Justices done a little "digging," they could have found many instances of corruption. *Id.*

293. *Citizens United*, 130 S. Ct. at 910 (quoting McConnell v. Fed. Election Comm'n, 540 U.S. 93, 297 (2003) (opinion of Kennedy, J.)).

294. *Id.*

295. *Id.* (quoting McConnell v. Fed. Elec. Comm'n, 540 U.S. 93, 144 (2003)).

296. *Id.*

The U.S. Chamber of Commerce is playing a central role in both *Citizens United* and the honest services law cases. Positioned to be "a major force on the issues and elections it focuses on," after the *Citizens United* ruling the United States Chamber of Commerce is now expected to "substantially exceed" the $144 million in lobbying and grass-roots organizing it spent last year.[297] The Chamber wrote an amicus brief battling section 1346 for all three defendants and has always been a vocal opponent of the law.[298] Complaining of the "[i]ntolerable [b]urdens on [p]rivate-[s]ector [d]ealings" that section 1346 imposes, the Chamber claimed the law constituted a "major threat" to the "negotiations necessary to the creation of [business] relationships."[299] This dubious argument illustrates how the "enhanced legal stature of corporations," which has "benefited from greater sympathy from the current Court,"[300] is jeopardizing honesty and transparency in government and business.

VI. CONCLUSION

Studies show that sixty-nine percent of the population believes there is a leadership crisis.[301] But *Citizens United* not only expressed doubts about the influence of money on our leaders, but also denied they could be corrupted at all.[302] However, as midterm election coverage has shown, the public believes otherwise. As one news commentator wrote:

> The dire straits of the middle class of America has made it near impossible for our politicians to keep up the pretense that our current government truly works for the "people" . . . . Couple this with recent protections handed by the Supreme Court to corporations to directly influence elections and it can make things

297. Tom Hamburger, *U.S. Chamber of Commerce Grows into a Political Force*, L.A. TIMES (Mar. 8, 2010), http://articles.latimes.com/2010/mar/08/nation/la-na-chamber9-2010mar09.

298. *See, e.g.*, Mark Sherman, *Court Skeptical of Federal Anti-Fraud Law*, ASSOCIATED PRESS FINANCIAL WIRE, Dec. 8, 2009, *available at* http://www.chron.com/disp/story.mpl/business/6759523.html; Schwartz, *supra* note 88.

299. Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 12, Skilling v. United States, 130 S. Ct. 393 (2009) (No. 08-1394) (quoting United States v. Brown, 459 F.3d 509, 535 (5th Cir. 2006)).

300. Lyle Denniston, *Analysis: The Personhood of Corporations*, SCOTUSBLOG (Jan. 21, 2010), http://www.scotusblog.com/?p=15376 (post-decision analysis of *Citizen's United*).

301. Bill George, *After the Crisis: Restoring Trust in U.S. Leaders*, BUSINESS WEEK (Nov. 24, 2009, 2:03 PM), http://www.businessweek.com/managing/content/nov2009/ca20091123_399003.htm (citing Harvard Center for Public Leadership's Index).

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

> seem hopeless for those not on Wall Street or their chosen politicians.[303]

Having lost a vital safeguard to the fundamental concept of representation "by the people," we the people cannot afford to lose the original honest services law protection. The combined loss is a horrible blow to our already weakened democracy.[304]

With the restraints of campaign finance laws finally eradicated, "the cloud has been lifted" for business executives spending money lavishly for political purposes.[305] Although the decision "will open the floodgates"[306] immediately, corporate influence on our elections is predicted to have a "slow normalization"[307] as business exercises its now constitutional right to representation in our government.[308] "We're back to the late 19th century when the lackeys of robber barons literally deposited sacks of cash on the desks of friendly legislators. The public never knew who was bribing whom . . . . We're losing our democracy to a different system. It's called a plutocracy."[309]

303. Dylan Ratigan, *They Keep Stealing — Why Keep Paying?*, HUFFINGTON POST (June 24, 2010, 12:04 PM), http://www.huffingtonpost.com/dylan-ratigan/who-pays_b_624149.html.

304. OECD report shows that "we have more inequality in the U.S. right now than at any time since the 1920s, we should be concerned that this may become a vicious cycle." Dan Froomkin, *Social Immobility: Climbing the Economic Ladder is Harder in the U.S. Than In Most European Countries*, HUFFINGTON POST (Sept. 21, 2010, 7:30 AM), http://www.huffingtonpost.com/2010/03/17/social-immobility-climbin_n_501788.html; *see also* Bruce Watson, *Do Most Americans Favor Radical Wealth Distribution?*, DAILY FINANCE (Oct. 24, 2010, 6:00 AM), http://www.dailyfinance.com/story/americans-favor-radical-wealth-redistribution/19684224/?icid=fbuzz|americans-favor-radical-wealth-redistribution/19684224/ ("Currently, 85% of America's wealth . . . is held by the country's richest 20% . . . upper middle class holds 11% . . . middle class has 4%, and the lower class . . . 0.3%.").

305. Hamburger, *supra* note 297 (referring not only to the freedom to spend money, but also the former hesitation of companies to involve themselves in politics in order to avoid condemnation by the public and complex laws forbidding these overtures).

306. President Barack Obama, State of the Union Address, Jan. 27, 2010, *available at* http://www.nytimes.com/2010/01/28/us/politics/28obama.text.html.

307. *See ACS Panel Discussion*, *supra* note 292.

308. The Chamber of Commerce president, Thomas Donohue, "announced that his group intended 'to carry out the largest, most aggressive voter education and issue advocacy effort in our nearly 100-year history.'" Eric Lipton et al., *Top Corporations Aid U.S. Chamber of Commerce Campaign*, N.Y. TIMES (Oct. 21, 2010), http://www.nytimes.com/2010/10/22/us/politics/22chamber.html. Of seventy ads that the Chamber produced, ninety-three percent of the ones running for the midterm election are in support of Republican candidates, and the group intended to spend $50-$75 million in this election cycle. *Id.* In a message to members, the political director declared "we are so close to bringing about historic change on Capitol Hill." *Id.*

309. Robert Reich, *The Perfect Storm*, COMMONDREAMS.ORG (Oct. 19, 2010), http://www.commondreams.org/view/2010/10/19-1. Mr. Reich is the former Secretary of Labor under President Bill Clinton. *Id.*

One election may have already been lost to the interests of the minority; the November 2nd 2010, elections saw "a tidal wave of campaign spending by outside groups," showing the result of "justices' lack of familiarity with the realities of campaign fundraising and disclosure laws."[310] Because *Citizens United* did not address disclosure rules by the FEC and IRS, an estimated $200 million from undisclosed sources was spent in the midterm elections.[311] A good example of the ruling's impact was the campaign finance reform bill co-author Russ Feingold's defeat in Wisconsin.[312] The three-term senator lost a race in which "92 percent of outside spending," approximately three million dollars, supported his Republican adversary.[313] "[The] shadowy anonymous corporate campaign contributors who flooded" this election cycle[314] may have been more affected psychologically than legally by the Supreme Court decision. According to the former FEC chairman, Trevor Potter, enabling corporations to be more direct in their political advertisements effected a subtle adjustment in law that allowed "a change in psychology that has made a difference in terms of the amount of money now being spent."[315] *Citizens United* was also called a "psychological green light" and a "Good Housekeeping seal of approval" for corporate donors during the election.[316] Although the "spending now casts a pall over all lawmaking" because members of Congress fear attack ads if they challenge corporations, there is time before the next election, and "all parties agree that 2010 was just a

310. Robert Barnes, *In Wis., Feingold Feels Impact of Court Ruling*, WASH. POST, Nov. 1, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/10/31/AR2010103104314.html.

311. *See id.*; *see also Follow the Unlimited Money*, SUNLIGHT FOUNDATION REPORTING GROUP, http://reporting.sunlightfoundation.com/independent-expenditures/totals (last visited March 7, 2011) (stating that the total outside spending was $454,697,852.52).

312. Jeremy Pelofsky, *Wisconsin's Feingold Loses Senate Re-election Bid, NBC projects*, REUTERS (Nov. 2, 2010), http://www.reuters.com/article/2010/11/03/usa-elections-wisconsin-senate-idUSWBT01422520101103.

313. Barnes, *supra* note 310. Russ Feingold himself stated, "Frankly, as far as I'm concerned, they completely disregarded their oaths with regard to those issues . . . .Which is a serious accusation to make about Supreme Court justices. But I regret to say I think that's what they did." *Id.*

314. Frank Rich, *Who Will Stand Up to the Superrich?*, N.Y. TIMES, Nov. 13, 2010, *available at* http://www.nytimes.com/2010/11/14/opinion/14rich.html; *see also* Tom Hamburger et al., *Koch Brothers Now at Heart of GOP Power*, L.A. TIMES, Feb. 6, 2011, *available at* http://articles.latimes.com/2011/feb/06/nation/la-na-koch-brothers-20110206 (reporting that the ultra-conservative Koch brothers' advocacy group "Americans for Prosperity" spent forty million dollars in the 2010 election).

315. Michael Luo, *Money Talks Louder Than Ever in Midterms*, N.Y. TIMES, Oct. 7, 2010, *available at* http://www.nytimes.com/2010/10/08/us/politics/08donate.html.

316. *Id.*

warm-up for 2012."[317]

In this gap in time between *Citizens United,* the honest services ruling, and the ability of corporations to fully control actions by Congress, our legislators must take advantage of this moment in history. Congress must speak again, and it must speak quickly.[318] We must retain an honest services law that "speaks in common sense terms with the clarity of an ethical admonishment from one's grandparents: citizens have a right to have fair and honest representation by the public servants they elect."[319] Missing this brief

317. John Nichols, *From the Village Green to the C-Span Screen: 'Legalize Democracy!' Campaigners Attack Corporate Control of Elections*, THE NATION (Jan. 21, 2011), http://www.thenation.com/blog/157917/village-green-c-span-screen-legalize-democracy-campaigners-attack-corporate-control-elec (quoting Public Citizen's executive director, Robert Weissman).

318. On September 28, 2010, Assistant Attorney General Breuer of the Department of Justice testified to the Senate Judiciary Committee that:

> [T]he *Skilling* decision removed a category of deceptive, fraudulent, and corrupt conduct from the scope of the honest services fraud statute and placed that conduct beyond the reach of federal criminal law. The Department believes that the Court's decision has created a gap in our ability to address the full range of fraudulent and corrupt conduct by public officials and corporate executives, and we urge Congress to pass legislation to fill the void. . . . [T]he honest services theory of mail and wire fraud was used widely because corrupt individuals could be very creative, and the schemes that they devised included a wide range of dishonest conduct that was not always susceptible to definition as a bribe or extortion.

Honest Services Fraud: Hearings Before the Sen. Comm. on the Judiciary, 111th Cong. 2-3 (2010) [hereinafter Honest Services Hearing] (statement of Lanny Breuer, Asst. Att'y Gen. of the United States). Breuer stated that "the impact of *Skilling* is real, and that there is conduct that would have been prosecuted under the honest services fraud statute before *Skilling* that can no longer be prosecuted under the federal criminal law." *Id.* at 5. The example he set forth was one of a Mayor who "secretly create[d] his own company, and use[d] the authority and power of his office to funnel City contracts to that company." *Id.* at 6. Breuer explained that, although this secret profiting is "corrupt, and undermines public confidence in the integrity of their government," it is no longer illegal. *Id.*

Chairman Patrick Leahy, D-Vt., then introduced the "Honest Services Restoration Act" in an effort to "expand the law back to its traditional reach, covering improper, undisclosed self-dealing by state and federal public officials and corporate officers and directors." Aguilar, *supra* note 283. The Bill [S.3854], introduced on September 28, 2010, has been read twice and referred to the Committee on the Judiciary as of March 7, 2011. *S.3854: Honest Services Restoration Act*, GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=s111-3854 (last visited Mar. 7, 2011).

319. Perry, *supra* note 91 ("This core value marks the wrongness – certainly the illegality – of bribes, self-dealing, cronyism, nepotism, patronage, Hobbs Act and violations of all other state and federal anti-corruption statutes . . . . Citizens demand a higher, different sort of ethics from their public servants . . . captured by the honest service law . . . ."). Compare Breuer's testimony, which outlined a new statute for Congress:

> [T]he statute should provide that no public official can be prosecuted unless he or she knowingly conceals, covers up, or fails to disclose material

opportunity will allow *Citizens United*'s widely predicted "profoundly disastrous consequences for our democracy"[320] to deepen. Left with a government funded by corporations, and with both CEOs and public officers now free to abandon their duty to provide honest services, we the citizens have lost our voice in this so-called democracy: we are unprotected, unrepresented, and angry.[321]

> information that he or she is *already required by law or regulation to disclose*. By requiring the government to prove both knowing concealment *and* a specific intent to defraud, there is no risk that a person could be convicted for a mistake or unwitting conflict of interest.

Honest Services Hearings, *supra* note 318, at 7 (emphasis added). This preexisting law requirement suggests that *Weyhrauch*'s lack of disclosure would no longer be criminal because he violated no state laws. However, this Note concludes that *Citizens United* could have a chilling effect on those disclosure laws that would be required to prosecute honest services fraud, again leaving the citizenry vulnerable.

320. *See ACS Panel Discussion*, *supra* note 292.

321. "But the sullen mood of America goes beyond shifting party loyalties. Many Americans seem close to rejecting the whole machinery of government . . . . What happens when the people turn their back on their government is a phenomenon that this democracy has yet to experience." Daniel Schorr, *Bayh Exit Highlights Public Rejection of Politics*, NPR (Feb. 18, 2010), http://www.npr.org/templates/story/story.php?storyId=123860057&s (Daniel Schorr passed away July 23, 2010 at the age of 93).