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Cover Page Footnote

J.D. Candidate, May 2016, The Catholic University of America, Columbus School of Law; B.A., 2011, Skidmore College. The author would like to thank Justice Mark Dwyer of the New York State Supreme Court for his guidance and suggestions and the *Catholic University Law Review* staff and editors for their work on this Comment.

THE *QUID PRO QUO* QUARK: UNSTABLE ELEMENTARY PARTICLE OF HONEST SERVICES FRAUD

Brian H. Connor⁺

As Governor of Virginia, Bob McDonnell accepted a \$15,000 check for his daughter's wedding, \$120,000 in undisclosed loans, a custom golf bag, several \$300-plus rounds of golf, a \$6,500 Rolex inscribed with "71st Governor of Virginia," and an opportunity to drive his benefactor's Ferrari.¹ McDonnell argued that this was all perfectly legal under Virginia ethics laws.² However, the federal government contended in its indictment of McDonnell on three counts of federal honest services fraud that McDonnell granted his generous patron, businessman Jonnie R. Williams, Sr., "favorable official action."³ That "action" included arranging meetings with McDonnell himself and other government officials.⁴

After McDonnell's indictment, the former governor's legal team called the prosecution's argument "a never-before-used legal theory" and insisted that the "centuries-old crime of bribery requires" a *quid pro quo*, or "illicit payments made to secure official government benefits."⁵ At trial, however, Assistant U.S. Attorney Ryan Faulconer insisted that there is no such requirement, stating, "it's not *this* Ferrari ride for *this* official meeting."⁶ In fact, both parties were correct to some degree. Although the U.S. Supreme Court limited the 18 U.S.C. § 1346

⁺ J.D. Candidate, May 2016, The Catholic University of America, Columbus School of Law; B.A., 2011, Skidmore College. The author would like to thank Justice Mark Dwyer of the New York State Supreme Court for his guidance and suggestions and the *Catholic University Law Review* staff and editors for their work on this Comment.

1. Carol D. Leonnig & Rosalind S. Helderman, *Donor Bought Rolex Watch for Virginia Governor McDonnell, People Familiar with Gift Say*, WASH. POST (June 25, 2013), http://www.washingtonpost.com/politics/donor-bought-rolex-watch-for-virginia-gov-mcdonnell-people-familiar-with-gift-say/2013/06/25/72ddffa2-ddd2-11e2-b197-f248b21f94c4_story.html; Associated Press, *Ex-Virginia Governor, Wife Found Guilty of Corruption*, PBS NEWS HOUR (Sept. 4, 2014, 3:44 PM), <http://www.pbs.org/newshour/run-down/ex-virginia-governor-wife-found-guilty-corruption/>. See also Indictment, United States v. McDonnell, No. 3:14-cr-00012-JRS (E.D. Va. Jan. 21, 2014).

2. Leonnig & Helderman, *supra* note 1.

3. *Id.*; Associated Press, *supra* note 1; Indictment, *supra* note 1.

4. Associated Press, *supra* note 1.

5. Carol Leonnig & Rosalind Helderman, *McDonnell: 'I Repeat Again, Emphatically, That I Did Nothing Illegal'*, WASH. POST (Jan. 21, 2014), http://www.washingtonpost.com/politics/mcdonnell-i-repeat-again-emphatically-that-i-did-nothing-illegal/2014/01/21/9be5b4f4-82f4-11e3-8099-9181471f7aaf_story.html (emphasis added).

6. Trip Gabriel, *Debate Over Jury Instructions at Ex-Governor's Trial*, N.Y. TIMES (Aug. 28, 2014), http://www.nytimes.com/2014/08/29/us/debate-over-jury-instructions-at-ex-governors-trial.html?_r=0.

honest services fraud doctrine considerably in its 2010 opinion in *Skilling v. United States*,⁷ the precise transactional dynamic sufficient to constitute honest services fraud has been widely interpreted to be an open question.⁸ Post-*Skilling* defendants have read a *quid pro quo* requirement into *Skilling*'s holding, but many courts modified this requirement or rejected it outright.⁹ In McDonnell's case, the jury convicted him of honest services fraud, perhaps reflecting a common sensibility—and mirroring the congressional intent that should be strictly adhered to by the courts going forward—that exchanges can be corrupt regardless of the precision with which the illicit benefits are connected.¹⁰

The federal mail fraud statute from which honest services fraud doctrine is derived had innocuous origins. Congress enacted the statute, 18 U.S.C. § 1341, in 1872 to prevent the postal system from being used to further criminal schemes, prohibiting the use of the mails for “any scheme or artifice to defraud.”¹¹ During the twentieth century, however, congressional amendment and federal court interpretation expanded the statute's scope to also prohibit schemes to defraud others of their “intangible rights” to “honest services.”¹²

The honest services fraud theory proved to be a powerful device in prosecuting public officials because any instance in which a public official did

7. 130 S. Ct. 2896 (2010).

8. See, e.g., Bridget Rohde & Narges Kakalia, *After Supreme Court's Honest Services Fraud Ruling, Questions Remain*, N.Y. L.J., July 14, 2010, at 4 (discussing the questions that remain regarding honest services fraud in the wake of *Skilling*).

9. See, e.g., Reply Brief of Defendant-Appellant at 17–18, *United States v. Bruno*, 661 F.3d 733 (2d Cir. 2011) (No. 1:09-cr-29-1), 2011 WL 1461744, at *17–18 (arguing that the government must demonstrate an *intent* to engage in a *quid pro quo* arrangement). See also *infra* Part III.B–D.

10. See Jeffrey Bellin, *What the McDonnell Verdict Says About U.S. Politics*, WASH. POST (Sept. 5, 2014), https://www.washingtonpost.com/opinions/the-mcdonnell-verdict-shows-how-easily-prosecutors-may-criminalize-politics/2014/09/05/3128202a-3519-11e4-9e92-0899b306bbe_a_story.html (discussing the grounds on which McDonnell was convicted); Joshua A. Kobrin, *Betraying Honest Services: Theories of Trust and Betrayal Applied to the Mail Fraud Statute and § 1346*, 61 N.Y.U. ANN. SURV. AM. L. 779, 801–02 (2006) (finding that trust in government is an essential element of a functioning democratic society, and that a breach of that trust constitutes a special and particularly onerous “super breach”). See *United States v. McDonnell*, No. 15-4019, 2015 WL 4153640, at *28–33 (4th Cir. July 10, 2015) (upholding McDonnell's conviction for honest services fraud and holding that the jury was properly instructed that it must find that McDonnell received the gifts “corruptly,” that is, contemplating a “specific type of official action or favor in return,” that the temporal relationship of the exchanged benefits “constitute compelling evidence of corrupt intent,” and that an “official action can include actions taken in furtherance of longer-term goals” and “may pertain to matters outside of the bribe recipient's control,” but declining to rule on whether “the subjective beliefs of a third party” regarding the bribe recipient's authority over the sought benefit “in an honest-services wire fraud case can convert non-official acts [over which the recipient has no actual authority] into official ones”) (internal quotation marks omitted), *cert. granted*, 57 U.S. 1 (2016).

11. 18 U.S.C. § 1341 (2012); *Skilling*, 130 S. Ct. at 2926 (discussing the legislative intent underlying the statute).

12. Joseph E. Huigens, Note, *If All Politicians Are Corrupt, But All Defendants Are Presumed Innocent, Then What? A Case for Change in Honest Services Fraud Prosecutions*, 85 NOTRE DAME L. REV. 1687, 1695–98 (2010).

not “exercise his independent judgment in passing on official matters” could fall within the ambit of the mail fraud statute, including everything from failure to disclose a conflict of interest to blatant transactional bribery.¹³ The transformation of “one of the oldest federal criminal statutes in continuous use” into a powerful doctrinal tool against nearly all forms of public corruption made the law a lightning rod of criticism, which centered on the lack of a sufficient standard of what conduct constituted deprivation of intangible rights to honest services.¹⁴ In *McNally v. United States*,¹⁵ the Supreme Court vindicated these criticisms, abolishing the doctrine of honest services fraud for vagueness.¹⁶

13. *United States v. Mandel*, 591 F.2d 1347, 1362 (4th Cir. 1979), *different results reached on reh’g, en banc, by an equally divided court*, 602 F.2d 653 (4th Cir. 1979) (per curiam) (describing the mail fraud statute broadly as a principle of “fiduciary” relationship with the public).

14. Kristen Kate Orr, Note, *Fencing in the Frontier: A Look into the Limits of Mail Fraud*, 95 KY. L.J. 789, 789 (2006–2007). See also John C. Coffee & Charles K. Whitehead, *The Federalization of Fraud: Mail and Wire Fraud Statutes*, in WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES § 9.01 (Otto G. Obermaier & Robert G. Morvillo eds., 1990) (illustrating that federal prosecutors have long followed the maxim: “When in doubt, charge mail fraud”); *United States v. Margiotta*, 688 F.2d 108, 143 (2d Cir. 1982) (Winter, J., dissenting in part) (calling the § 1341 honest services fraud doctrine a “freeswinging club” of “political power”). For criticism more focused on the federalism implications of the honest services fraud doctrine, see Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 KY. L.J. 75, 130–31 (2003–2004) (discussing the use of the Hobbs Act to prosecute local officials for bribery); George E.B. Holding et al., *Federal Prosecution of State and Local Officials Using Honest Services Mail Fraud: Where’s the Line?*, 32 CAMPBELL L. REV. 191, 192–93 (2010) (discussing the use of the mail fraud statute to prosecute state and local officials); Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 166–69 (1994) (discussing U.S. Supreme Court jurisprudence on the mail fraud statute in connection with the intangible rights doctrine). For criticism of the mail fraud statute’s potential for political abuse, see Alexa Lawson-Remer, Note, *Rightful Prosecution or Wrongful Persecution? Abuse of Honest Services Fraud for Political Purpose*, 82 S. CAL. L. REV. 1289, 1292–93 (2009) (discussing the mail fraud statute’s susceptibility to politicization); Huigens, *supra* note 12, at 1698–1703 (discussing the passage, use, and jurisprudence of the mail fraud statute from its inception through the twentieth century). Preet Bharara, U.S. Attorney for the Southern District of New York, has made prolific use of the doctrine, most recently obtaining convictions of New York State Assembly Speaker Sheldon Silver and New York State Senate Majority Leader Dean Skelos. Mike Vilensky, *Prosecutor Preet Bharara Shakes Up New York Politics*, WSJ (Dec. 11, 2015, 6:26 PM), <http://www.wsj.com/articles/prosecutor-preet-bharara-shakes-up-new-york-politics-1449876382>. The sheer number of honest services fraud prosecutions by Bharara’s office has drawn speculation from the press that his crack-down on corruption is aimed at advancing his own political ambitions. See, e.g., The Editors, *Bharara’s Grand Ambition*, N.Y. OBSERVER (Apr. 21, 2015, 10:16 PM), <http://observer.com/2015/04/bhararas-grand-ambition/>. Indeed, Bharara’s boasts and rhetoric following Silver’s indictment drew harsh criticism from Judge Valerie Caproni, who wrote, in a decision denying Silver’s motion to dismiss for prejudicial pretrial publicity, that “In this case, the US Attorney, while castigating politicians in Albany for playing fast and loose with the ethical rules that govern their conduct, strayed so close to the edge of the rules governing his own conduct.” Rich Calder, *Silver’s Bid to Dismiss Corruption Charges Denied*, N.Y. POST (Apr. 10, 2015, 5:35 PM), <http://nypost.com/2015/04/10/silvers-bid-to-dismiss-corruption-charges-denied/>.

15. 483 U.S. 350 (1987).

16. *Id.* at 356 (noting that “the mail fraud statute . . . does *not* refer to the intangible right of the citizenry to good government”) (emphasis added).

Congress responded to *McNally* by codifying honest services fraud at 18 U.S.C. § 1346.¹⁷ Section 1346 set the pre-*McNally* honest services fraud doctrine in stone, providing that honest services fraud schemes include contrivances that “deprive another of the intangible right of honest services.”¹⁸ The statute restored the honest services fraud doctrine and became a favorite among prosecutors in public corruption cases, although it is also narrowly applicable to private actors.¹⁹

In *Skilling*, the Supreme Court revisited the honest services fraud doctrine and the perennial vagueness concerns that accompanied it, this time as enshrined in the statute.²⁰ Although the Court narrowed § 1346 to include only bribery and kickback schemes, to the exclusion of activities involving only undisclosed self-dealing and conflicts of interest, it did not explicitly rule on the requisite transactional content of the remaining prohibited schemes—that is, whether the law requires proof of a *quid pro quo*.²¹ As it stands today, § 1346 prohibits corrupt schemes along a spectrum of transactions, with some federal circuits requiring more stringent standards of proof of a corrupt transaction, up to and including an explicit *quid pro quo*, and others adopting standards that encompass a broader range of conduct not limited to precise *quid pro quo* exchanges.²²

This Comment begins by tracing the development of the intangible rights theory of federal mail and wire fraud statutes from the statutes’ enactment in the 1870s to the development of honest services fraud doctrine in the 1940s. It then examines the doctrinal developments of pre-*McNally* case law that were ended by that decision, as well as Congress’s intent in enacting § 1346 in order to revive the pre-*McNally* doctrine. Then, this Comment describes the Supreme

17. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346 (2012)).

18. *Id.*

19. John J. Falvey, Jr. & Ryan E. Ferch, *Theft of Honest Services: Reining in a Catch-All Conflicts Statute*, 23 ANDREWS LITIG. REP.: WHITE COLLAR CRIME 1 (2009) (noting that “[p]rosecutors love the honest-services statute for the same reasons many courts hate it: [i]t is short, vague and capable of seemingly endless elasticity”). For discussions of the unique problems that § 1346 presents in private sector prosecutions, see generally Michelle V. Barone, Note, *Honest Services Fraud: Construing the Contours of Section 1346 in the Corporate Realm*, 38 DEL. J. CORP. L. 571, 575–76, 585 (2013) (analyzing the uncertainty that private sector individuals have over whether some conduct is criminally liable under § 1346); Anita Cava & Brian M. Stewart, *Quid Pro Quo Corruption Is “So Yesterday”*: Restoring Honest Services Fraud After *Skilling* and *Black*, 12 U.C. DAVIS BUS. L.J. 1, 1–2 (2011) (expressing the urgency for Congress to speak post-*Skilling* in order to restore to prosecutors the tools to hold accountable bad actors in the business community); John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 430–32 (1998) (arguing that a distinction should be drawn between public and private fiduciaries when interpreting the statute); Andrew B. Matheson, *A Critique of United States v. Rybicki: Why Foreseeable Harm Should Be an Aspect of the Mens Rea of Honest Services Fraud*, 28 AM. J. TRIAL ADVOC. 355, 356 (2004) (arguing for a connection between private honest services fraud and the mens rea requirement).

20. *Skilling v. United States*, 130 S. Ct. 2896, 2928–29 (2010).

21. See *id.* at 2907, 2932.

22. See discussion *infra* Part III.B–C.

Court's limitation of § 1346 in *Skilling*, its direction that the courts "draw from" other bribery statutes in defining the contours of honest services fraud, and the subsequent splintering of the circuits regarding the requirement of proving a *quid pro quo*. Because the courts are split with respect to whether the "draws from" statutes require proof of a *quid pro quo*, this Comment argues that *Skilling*'s instruction to draw from them should not be considered an endorsement of a *quid pro quo* requirement.

This Comment argues that the differences regarding *quid pro quo* among the circuits should ultimately be resolved in favor of a "stream of benefits" theory of bribery. This theory best comports with congressional intent and the impetus of prosecuting public corruption while still remaining within the Supreme Court's narrowed construction of § 1346. Failing such a circuit-wide adoption, the courts should be accommodating to the broad re-characterization of traditional bribery schemes as kickbacks, the other theory of honest services fraud which *Skilling* left standing. Ultimately, the courts should not read an explicit *quid pro quo* requirement into § 1346 because doing so would frustrate congressional intent and fail to protect the public from the types of corrupt schemes that § 1346 was originally intended to guard against: those in which proof of a *quid pro quo* was elusive, but in which the official had engaged in a scheme to defraud the public of its right to the official's honest services, as ultimately determined by a jury.

I. PRE-MCNALLY HONEST SERVICES FRAUD DOCTRINE

The original mail and wire fraud statute, enacted in 1872, prohibited "any scheme or artifice to defraud" using the mails.²³ The statute was amended in 1909 to prohibit "any scheme or artifice to defraud, *or* for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."²⁴ Over the next century, the federal courts of appeals, noting the disjunctive phrasing of the statute as amended, began to read the statute as prohibiting schemes or artifices that deprived others of "intangible rights" separately from and in addition to those which deprived the victims of money or

23. 18 U.S.C. § 1341 (2012). *See also* Cong. Globe, 41st Cong., 3d Sess. 35 (1870) (statement of Rep. Farnsworth) (stating that the law is designed "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rascallions generally, for the purpose of deceiving and fleecing the innocent people in the country").

24. 18 U.S.C. § 1341 (emphasis added); *Skilling*, 130 S. Ct. at 2908. The mailing element has been practically abandoned, now serving only as a "jurisdictional hook." *United States v. Sawyer*, 85 F.3d 713, 722–23, 723 n.5 (1st Cir. 1996). *See also* Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 438 (1995) (noting that "[o]ver the past two decades . . . use of the mail fraud statute shifted away from its traditional application of protecting against misuse of the mails [and] . . . became a strategic tool in fighting political corruption and increasingly sophisticated economic misconduct . . . regardless of the mailing's relationship to the underlying scheme").

property.²⁵ This intangible rights theory permitted the prosecution not only of schemes to deprive others of money or property, but also—in what came to be the theory’s most contentious application—schemes to defraud the public of its intangible right to public officials’ “honest services.”²⁶ The intangible rights theory departed from traditional theories of fraud because it did not rest on the violation of economic expectations, but rather on the breach of the “political contract” in which citizens elected the official “to act for the common good.”²⁷

In *Shushan v. United States*,²⁸ the first articulation of the intangible rights theory of federal mail fraud, the Fifth Circuit ruled that a public official was guilty of such a scheme when the official accepted a bribe from contractors seeking favorable treatment from the city.²⁹ The court rejected the argument that the prosecution failed to prove intent to defraud because the city actually saved money by awarding the contract and because the contract might have been awarded notwithstanding the pecuniary benefits.³⁰ The official, the *Shushan* court ruled, had perpetrated a scheme that defrauded the *public* by depriving it of its right to his honest services, a decision that spurred the development of “honest services fraud” doctrine.³¹

Similar to intangible rights theories found by courts in other federal fraud statutes,³² a victim of honest services fraud need not suffer property or pecuniary loss, and may in fact materially benefit from the scheme.³³ The actionable harm

25. *Skilling*, 130 S. Ct. at 2926; *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1941) (stating that a scheme to corrupt a public official can constitute a scheme to defraud).

26. Falvey, Jr. & Ferch, *supra* note 19, at 2 (observing that “[i]n the 1970s and 1980s prosecutors increasingly used the honest-services theory under the mail and wire fraud statutes to prosecute public officials”). See also *Skilling*, 130 S. Ct. at 2926 (discussing the development of the honest services doctrine from *Shushan*); *Shushan*, 117 F.2d at 115 (theorizing about what would come to be known as the honest services doctrine).

27. Orr, *supra* note 14, at 797 (quoting *United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996)). See also Robert Gray, Comment, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. CHI. L. REV. 562, 563 (1980) (noting that federal courts have applied the mail fraud statute where “corrupt politicians did not deprive the citizens of anything of economic value” but rather “their rights to honest government”).

28. 117 F.2d 110 (5th Cir. 1941).

29. *Id.* at 119, 121. See also *Skilling*, 130 S. Ct. at 2926.

30. *Shushan*, 117 F.2d at 119.

31. See *Skilling*, 130 S. Ct. at 2926 (discussing the holding in *Shushan*). See also *United States v. Mandel*, 591 F.2d 1347, 1362 (4th Cir. 1979), *different results reached on reh’g, en banc, by an equally divided court*, 602 F.2d 653 (4th Cir. 1979) (per curiam) (noting that “the fraud involved in the bribery of a public official lies in the fact that the public official is not exercising his independent judgment in passing on official matters”). See also *United States v. Ganim*, 510 F.3d 134, 148 (2d Cir. 2007) (noting that a scheme or artifice to deprive another of *property* is “traditional mail fraud”).

32. See Lawson-Remer, *supra* note 14, at 1296–97 (listing other, non-mail fraud offenses for which intangible rights serve as the basis of prosecution, including voting fraud and employee fraud).

33. See, e.g., *United States v. Plyler*, 222 U.S. 15, 16–17 (1911) (holding that the government is not required to prove “actual financial or property loss” to convict a defendant who forged civil

results from the perpetrator depriving the victim of his right to the perpetrator's honest services, which, in the case of a public official, is a component of the official's general fiduciary duty to the public.³⁴ The courts affirmed, and prosecutors relied on, this theory of honest services fraud in cases in which there was no evidence of an explicit *quid pro quo*.³⁵ *Quid pro quo* is an "intent to receive a specific benefit in return for payment,"³⁶ as was required under other statutes proscribing bribery of public officials.³⁷ As a result, the honest services fraud doctrine both included, and distinguished between, cases in which bribery was present and cases in which there was no *quid pro quo* but the scheme nevertheless defrauded the public.³⁸ Some judges have criticized this theory of

service applications of fraud); *United States v. Barnow*, 239 U.S. 74, 79–80 (1915) (holding that the government need not prove actual financial loss where the defendant impersonated a federal official because the purpose of the prohibiting statute was to maintain the dignity of federal offices); *Skilling*, 130 S. Ct. at 2926.

34. *Skilling*, 130 S. Ct. at 2932; *Mandel*, 591 F.2d at 1362.

35. *Lawson-Remer*, *supra* note 14, at 1300 ("Because actual pecuniary loss to the public was not always evident in the public corruption cases, prosecutors relied on the theory of honest services fraud . . . [and] courts upheld application of the mail fraud statute to situations in which politicians did not deprive citizens of anything of economic value . . .") (internal quotation marks omitted) (internal citations omitted). *See also, e.g.*, *United States v. Sawyer*, 85 F.3d 713, 724 (1st Cir. 1996) (holding that "undisclosed, biased decision making for personal gain, whether or not tangible loss to the public is shown, constitutes a deprivation of honest services").

36. *United States v. Jennings*, 160 F.3d 1006, 1013 (4th Cir. 1998) (describing the type of intent that satisfies the "corrupt intent" requirement of § 201 bribery). *See also* 18 U.S.C. § 201(b)(2) (2012) (prohibiting the bribery of government officials).

37. Andrew M. Stengel, *Albany's Decade of Corruption: Public Integrity Enforcement After Skilling v. United States, New York's Dormant Honest Services Fraud Statute, and Remedial Criminal Law Reform*, 76 ALB. L. REV. 1357, 1358 (2012–2013) (noting that § 1346 was used to prosecute breaches of the public trust where the conduct involved did not rise to the level of outright bribery); Steven Wisotsky, *Honest Services Fraud After Skilling v. United States*, 12 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 31, 31 (2011) (noting that the *Skilling* court acknowledged that most cases involved public officials, but private-sector honest services fraud is also an issue reviewed by the courts). For examples of bribery statutes that require a *quid pro quo*, see *Lawson-Remer*, *supra* note 14, at 1300 (2009) (finding that prosecution may be difficult under bribery and extortion theories because of the lack of evidence of a *quid pro quo*). Section 201(b) bribery requires proof of a *quid pro quo*. *See United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404–05 (1999) (stating that § 201 bribery requires proof of a *quid pro quo* and illegal gratuities under the statute requires proof of a sufficient nexus of reciprocity). The Hobbs Act, 18 U.S.C. § 1951, also requires proof of a *quid pro quo* (at least in the campaign contribution context). *McCormick v. United States*, 500 U.S. 257, 273–74 (1991) (holding that § 1951's requirement that extortion be "under color of official right" prohibits only those situations where a public official accepts a contribution in exchange for an explicit promise to perform an official act). *See also* Lauren Garcia, *Curbing Corruption or Campaign Contributions? The Ambiguous Prosecution of "Implicit" Quid Pro Quos Under the Federal Funds Bribery Statute*, 65 RUTGERS L. REV. 229, 234 (2012) (quoting Henning, *supra* note 14, at 130) (noting that the Hobbs Act was originally designed to combat organized crime but became a popular and powerful statute for combating public corruption because it was initially successfully construed as prohibiting a mere "acceptance of an unauthorized benefit . . . under color of official right").

38. *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1941) (holding that "[a] scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public

the public's intangible right to officials' honest services for reasons of vagueness,³⁹ and the theory succumbed to a vagueness challenge in *McNally*.⁴⁰

In *McNally*, a public official arranged for an appointee to receive a share of the appointee's commissions in the form of kickbacks paid to the companies in which the official had an interest.⁴¹ The official was convicted of honest services fraud under the intangible rights theory.⁴² The Supreme Court, however, dismissed the intangible rights reading of the statute in favor of one that does not leave its "outer boundaries ambiguous."⁴³ Instead of finding that the second phrase, "or for obtaining money or property," implied that the preceding "scheme[s] or artifice[s] to defraud"⁴⁴ were not limited to money or property, the Court held that the common meaning of "defraud," harming one's property rights, combined with Congress's intent in amending the statute in 1909, confined the statute to protecting property rights.⁴⁵

The *McNally* Court held that the second phrase was there merely to instruct that this deprivation of property rights was also prohibited when conducted through "pretenses, representation[s], or promises," in addition to schemes or artifices.⁴⁶ The Court held that the intangible rights theory of the honest services fraud doctrine required a reading of the statute that was unconstitutionally vague because it did not sufficiently define the conduct that would place the actor in jeopardy.⁴⁷ The Court limited honest services fraud to the protection of property rights, stating that the law "does not extend to the intangible right of the citizenry

official would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public").

39. See *McNally v. United States*, 483 U.S. 350, 356 (1987) ("The mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government."); *United States v. Margiotta*, 688 F.2d 108, 142-43 (2d Cir. 1982) (Winters, J., dissenting) (quoting *Mandel*, 591 F.2d at 1361). Judge Winters protested:

Juries are . . . left free to apply a legal standard which amounts to little more than the rhetoric of sixth grade civics classes. One searches in vain for even the vaguest contours of the legal obligations created beyond the obligation to conduct governmental affairs "honestly" or "impartially," to ensure one's "honest and faithful participation" in government and to obey "accepted standards of moral uprightness, fundamental honesty, fair play and right dealing."

Id. See also *Skilling*, 130 S. Ct. at 2936 (Scalia, J., concurring in the judgment) (inveighing that "[n]one of the 'honest services' cases . . . defined the nature and content of the fiduciary duty central to the 'fraud' offense").

40. *McNally*, 483 U.S. at 356.

41. *Id.* at 352-53.

42. *Id.* at 355 (finding that "the mail fraud statute proscribes schemes to defraud citizens of their intangible rights to honest and impartial government").

43. *Id.* at 360.

44. 18 U.S.C. § 1341 (2012) (emphasis added).

45. *McNally*, 483 U.S. at 358.

46. *Id.*

47. See *id.* at 356, 358, 360.

to good government,” and “[i]f Congress desires to go further, it must speak more clearly than it has.”⁴⁸

II. SECTION 1346 IN THE PRE-SKILLING ERA

Congress spoke, but perhaps not as clearly as the Court demanded.⁴⁹ In 1988, following *McNally*, Congress enacted § 1346, known as the “honest services fraud” statute, which included within the ambit of § 1341’s schemes or artifices to defraud those schemes which deprive “another of the intangible right of honest services.”⁵⁰ The stated purpose of the law was to restore the honest services fraud doctrine as it existed prior to *McNally*.⁵¹ The federal circuits reached varying interpretations of § 1346 following its enactment, generating several splits on fundamental elemental questions.⁵² Among these differences between the courts of appeals’ treatment of honest services fraud under § 1346

48. *Id.* at 356, 360 (noting that an expansive interpretation of the statute would involve the federal government impermissibly setting standards of good government for local and state officials whereas the new interpretation would not have such a harsh punitive effect). For more about honest services fraud and federalism, see Anthony Gaughan, *The Case for Limiting Federal Criminal Jurisdiction over State and Local Campaign Contributions*, 65 ARK. L. REV. 587, 588–90 (2012) (arguing that prosecutors should “exercise caution” in seeking out and prosecuting violations in the “murky” and “highly partisan” arena of campaign finance); Ellie Neilberger, *Federal Prosecution of Public Corruption at the State and Local Level*, 84 FLA. B.J. 82, 82–86 (2010) (giving an overview of the public honest services fraud doctrine).

49. *Sorich v. United States*, 555 U.S. 1204, 1205 (2009) (Scalia, J., dissenting from denial of cert.) (remarking that “[w]hether that terse amendment qualifies as speaking ‘more clearly’ or in any way lessens the vagueness and federalism concerns that produced this Court’s decision in *McNally* is another matter”).

50. 18 U.S.C. § 1346 (2012) (stating “[f]or 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”).

51. 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988) (statement of Sen. Biden). Sen. Biden stated:

This section overturns the decision in *McNally v. United States* in which the Supreme Court held that the mail and wire fraud statutes protect property but not intangible rights. . . . The intent is to reinstate all of the pre-*McNally* case law pertaining to the mail and wire fraud statutes without change.

Id. See also 134 Cong. Rec. 33,296–97 (daily ed. Oct. 21, 1988) (statement of Rep. Conyers) (noting that because of *McNally* many prosecutions of public officials for severe misconduct, including bribery, were dismissed because there was no pecuniary harm to any victim); Cava & Stewart, *supra* note 19, at 6 n.27 (discussing Sen. Biden’s analysis of the amendment in the Congressional Record).

52. Cava & Stewart, *supra* note 19, at 7–10 (finding that the circuit courts are split regarding fundamental elements such as the requisite mens rea, harm to the victim, the contours of the duty which was breached, and whether federal or state law controls the statute’s meaning and defines susceptible conduct); J. B. Perrine & Patricia M. Kipnis, *Navigating the Honest Services Fraud Statute After Skilling v. United States*, 72 ALA. LAW. 294, 296 (2011) (noting that § 1346 created an even more expansive honest services fraud doctrine due to the flexibility of the language).

was the requirement of proving a *quid pro quo* in prosecutions under a bribery theory, or varying degrees thereof.⁵³

Looking to federal bribery statutes for guidance, the Ninth Circuit in *United States v. Kincaid-Chauncey*⁵⁴ held that honest services fraud under a bribery theory required proving a *quid pro quo*, which is an explicit exchange of a payment with intent to influence an official's conduct.⁵⁵ In *Kincaid-Chauncey*, a county commissioner accepted payments from the agent of a strip club in Nevada in exchange for loosening regulations on adult entertainment businesses and other favorable legislative acts.⁵⁶ The court upheld the jury instructions because they contained "at least an implicit *quid pro quo*," holding that a *quid pro quo* was required to be proved in such a transaction because "[w]ithout a link between" the payments and the actions, the statute would criminalize perfectly legitimate lobbying activities.⁵⁷

In *United States v. Kemp*,⁵⁸ the Third Circuit also held that honest services fraud bribery theories require proof of a *quid pro quo*, but differed with the Ninth Circuit's requirement of finding implicit links between benefits and official actions by holding that such proof could come in the form of a "stream of benefits."⁵⁹ Under the "stream of benefits" theory, the government is not required to link each gift with a specific official act, but can instead satisfy the *quid pro quo* requirement by showing that "a course of conduct of favors and gifts" flowed to an official in exchange for "a pattern of official actions favorable to the donor."⁶⁰

53. Falvey, Jr. & Ferch, *supra* note 19, at 3 (noting that while the Ninth and Third Circuits adopted some form of a *quid pro quo* requirement in honest services fraud prosecutions pursuing a bribery theory, the First Circuit required only evidence of a payment in exchange for "long-term favorable treatment").

54. 556 F.3d 923 (9th Cir. 2009).

55. *Id.* at 943 (distinguishing between the necessary exchange of money for official acts, or *quid pro quo*, and the "mere intent to curry favor" inherent in "legitimate lobbying"). *But see id.* at 940–41 (stating in dictum that "imposing a *quid pro quo* requirement on all § 1346 cases risks being under-inclusive, because some honest services fraud, such as the failure to disclose a conflict of interest where required, may not confer a direct or easily demonstrated benefit"). *Cf.* J. Kelly Strader, *Skilling Reconsidered: The Legislative-Judicial Dynamic, Honest Services Fraud, and the Ill-Conceived "Clean Up Government Act,"* 39 *FORDHAM URB. L.J.* 309, 313, 322 (2011) (arguing that the statute is redundant because most crimes it prohibits fall within other federal criminal statutes); *see also* Randall D. Eliason, *Surgery with a Meat Axe: Using Honest Services Fraud to Prosecute Federal Corruption*, 99 *J. CRIM. L. & CRIMINOLOGY* 929, 985 (2009) (finding that federal prosecutors turned to the relatively broad and possibly unconstitutionally vague § 1346 because federal courts had significantly narrowed the federal bribery and gratuities statutes).

56. *Kincaid-Chauncey*, 556 F.3d at 927–29.

57. *Id.* at 943.

58. 500 F.3d 257 (3d Cir. 2007).

59. *Id.* at 282.

60. *See id.* (quoting *United States v. Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998)). The court noted that "payments [to the official] may be made with the intent to retain the official's services on an 'as needed' basis, so that whenever the opportunity presents itself the official will take specific action on the payor's behalf." *Id.* (quoting *Jennings*, 160 F.3d at 1014).

In *United States v. Sawyer*,⁶¹ the First Circuit concluded that a mere unlawful gratuity with the “expectation of long-term favorable treatment” satisfies the statute, and § 1346 therefore does not require proof of a specific *quid pro quo*.⁶² The defendant in *Sawyer* had provided copious payments and luxuries to Massachusetts state legislators in violation of Massachusetts’s illegal gratuity statutes.⁶³ The court held that the lobbyist’s repeated gratuity offenses aimed at garnering favorable treatment could constitute honest services fraud.⁶⁴

The federal courts of appeals have held that the statute is not unconstitutionally vague, despite frequent challenges on those grounds.⁶⁵ Indeed, with respect to the scope of the statute, the courts of appeals largely restored the non-bribery theories of honest services fraud typical of pre-*McNally* case law.⁶⁶ The Ninth Circuit, in *United States v. Weyhrauch*,⁶⁷ observed that with § 1346, Congress intended to restore the pre-*McNally* honest services fraud doctrine.⁶⁸ With respect to misconduct by public officials, such misconduct was comprised of “two core categories” of fraud: (1) bribery and kickbacks and (2) “nondisclosure of material information.”⁶⁹

61. 85 F.3d 713 (1st Cir. 1996).

62. Falvey, Jr. & Ferch, *supra* note 19, at 3 (citing *Sawyer*, 85 F.3d at 730).

63. *Sawyer*, 85 F.3d at 726.

64. *Id.* at 730.

65. See, e.g., *United States v. Weyhrauch*, 548 F.3d 1237, 1247 (9th Cir. 2008), *vacated and remanded*, 130 S. Ct. 2971 (2010). *Weyhrauch* was ultimately vacated and remanded for further proceedings in light of the *Skilling* decision. *Weyhrauch v. United States*, 130 S. Ct. 2971, 2971 (2010). See also Matthew Modell, *(Dis)honest Services Fraud: “Bad Men, Like Good Men, Are Entitled To Be Tried and Sentenced in Accordance with Law,”* 32 N.C. CENT. L. REV. 131, 149 (2010) (stating that “[m]any circuits . . . have found . . . reasons to reject challenges of § 1346 as being unconstitutionally vague”).

66. See, e.g., *United States v. Walker*, 490 F.3d 1282, 1296–97 n.16 (11th Cir. 2007) (discussing Congress’s purpose for restoring the pre-*McNally* honest services fraud doctrine in enacting § 1346); *United States v. Rybicki*, 354 F.3d 124, 144–47 (2d Cir. 2003) (holding § 1346 constitutional against a vagueness challenge, reasoning that it can be interpreted in accordance with pre-codification understanding of the crime); Perrine & Kipnis, *supra* note 52, at 296 (noting that courts’ expansive interpretation of § 1346 proved “particularly useful” in prosecuting public official corruption). *But see* Lawson-Remer, *supra* note 14, at 1306. Lawson-Remer insists:

[R]everting to the pre-*McNally* case law is not as simple as the statute’s legislative history implies. Not only does the pre-*McNally* case law fail to capture a coherent definition of honest services fraud and differ greatly from circuit to circuit, but the ever-expanding body of case law also includes successful prosecutions that many now regard as overreaching and no longer within the statute.

Id.

67. 548 F.3d 1237 (9th Cir. 2008), *vacated and remanded*, 130 S. Ct. 2971 (2010). *Weyhrauch* was ultimately vacated and remanded for further proceedings in light of the *Skilling* decision. *Weyhrauch*, 130 S. Ct. at 2971.

68. *Id.* at 1246 (finding that “Congress demonstrated a clear intent to reinstate the line of pre-*McNally* honest services cases when it enacted § 1346”).

69. *Id.* at 1247.

Likewise, in *United States v. Walker*,⁷⁰ the Eleventh Circuit upheld the conviction of a Georgia state legislator who received business favors.⁷¹ Despite a lack of evidence that the lawmaker actually influenced legislation in exchange for the favors, the court held that the jury could infer the requisite intent to defraud.⁷² Returning to the broad, pre-*McNally* scope of honest services fraud, the court held that a public official breaches his fiduciary duty to the public when he “uses his office for personal gain,” which includes bribery or benefits from an undisclosed conflict of interest, and which consequently does not require proof of a *quid pro quo*.⁷³

The still broad and varying interpretations of the honest services fraud doctrine and its codifying statute among the circuits invited the same criticisms of vagueness that plagued it before *McNally* and prompted another review of the doctrine by the Supreme Court in *Skilling*.⁷⁴ In *Skilling*, the Supreme Court once again considered a vagueness challenge to the statute, and once again attempted to rein in pre-*McNally* honest services fraud doctrine, holding that the broad scope of the doctrine did not describe the prohibited conduct with sufficient specificity.⁷⁵

III. SKILLING LIMITS § 1346 TO BRIBES AND KICKBACKS

In *Skilling*, Jeffrey Skilling, an Enron executive, was charged with honest services fraud for deceiving Enron’s shareholders while simultaneously enriching himself and other executives by overstating the company’s value.⁷⁶ The trial court found that Skilling had deprived Enron and its shareholders of their right to his honest services and sentenced him to 292 months’ imprisonment and \$45 million in restitution.⁷⁷ The Fifth Circuit affirmed on the grounds that Skilling had engaged in self-dealing at the expense of the corporation’s interests, but declined to address Skilling’s due process claims based on the vagueness of § 1346.⁷⁸ Reversing Skilling’s conviction for honest services fraud, the Supreme Court reconciled Skilling’s due process claims, and the Court’s

70. 490 F.3d 1282 (11th Cir. 2007).

71. *Id.* at 1287–88, 1301.

72. *Id.* at 1297–98.

73. *Id.*

74. Perrine & Kipnis, *supra* note 52, at 296. *See also* *Skilling v. United States*, 130 S. Ct. 2896, 2904–06 (2010) (discussing Skilling’s challenge in the context of the history of § 1346); *supra* note 52 and accompanying text.

75. *Skilling*, 130 S. Ct. at 2928.

76. *Id.* at 2907–08.

77. *Id.* at 2911, 2912 (observing that the trial court found that “[t]he jury was entitled to convict Skilling” on these elements: “(1) a material breach of a fiduciary duty [and] . . . (2) that results in a detriment to the employer,” including one occasioned by an employee’s decision to ‘withhold material information, i.e., information that he had reason to believe would lead a reasonable employer to change its conduct’”).

78. *Id.* at 2912; *United States v. Skilling*, 554 F.3d 529, 546–47 (5th Cir. 2009), *aff’d in part, vacated in part, remanded*, 130 S. Ct. 2896 (2010).

longstanding suspicion of honest services fraud, with the “presumptive validity that attaches to an Act of Congress”⁷⁹ by confining the statute to its “paramount applications”:⁸⁰ “fraudulent schemes to deprive another of honest services through *bribes* or *kickbacks*.”⁸¹

The Court rejected as too vague the tenets of pre-*McNally* doctrine that had been restored subsequent to the enactment of § 1346 in instances that did not include bribery or kickbacks.⁸² The Court noted that honest services fraud only protects “that ‘intangible right of honest services,’ which had been protected before *McNally*, not *all* intangible rights of honest services whatever they might be thought to be.”⁸³ The Court limited the honest services statute to bribery and kickbacks, instructing that it “draws content . . . from” both pre-*McNally* case law and from federal statutes proscribing and defining “similar crimes.”⁸⁴ In reversing *Skilling*’s conviction for honest services fraud, the Court emphasized the lack of an exchange in *Skilling*’s scheme, suggesting to some courts and attorneys that a *quid pro quo* was necessary under the narrower bribery and kickback theories.⁸⁵

A. The Inconsistent “Draws From” Statutes

The Court in *Skilling* noted several statutes that should inform courts’ application of § 1346 to bribery or kickback schemes: 18 U.S.C. § 201(b),

79. *Skilling*, 130 S. Ct. at 2928 (quoting *United States v. Nat’l Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963)).

80. *Id.*; Perrine & Kipnis, *supra* note 52, at 296 n.5 (noting that Justice Scalia in particular was unconvinced of even *McNally*’s ability to save the doctrine from unconstitutional vagueness); *Sorich v. United States*, 555 U.S. 1204, 1208 (2009) (Scalia, J., dissenting from denial of cert.). Scalia dissented:

In light of the conflicts among the Circuits; the longstanding confusion over the scope of the statute; and the serious due process and federalism interests affected by the expansion of criminal liability that this case exemplifies, I would grant the petition for certiorari and squarely confront both the meaning and the constitutionality of § 1346.

Id. (Scalia, J., dissenting).

81. *Skilling*, 130 S. Ct. at 2928 (emphasis added). After the *Skilling* decision, Senator Patrick Leahy (D-VT) introduced the ultimately unsuccessful Honest Services Restoration Act, which would have restored the prohibition on undisclosed self-dealing. Honest Service Restoration Act, S. 3854, 111th Cong. § 2 (2010). See also Ashley Southall, *Justice Department Seeks a Broader Fraud Law To Cover Self-Dealing*, N.Y. TIMES (Sept. 28, 2010) at B3, http://www.nytimes.com/2010/09/29/business/29fraud.html?_r=0.

82. *Skilling*, 130 S. Ct. at 2928–31.

83. *Id.* at 2929 (quoting *United States v. Rybicki*, 354 F.3d 124, 137–38 (2003) (en banc)).

84. *Id.* at 2933.

85. *Id.* at 2934. See, e.g., *United States v. Bruno*, 661 F.3d 733, 743 (2d Cir. 2011) (suggesting that *Skilling* now mandated *quid pro quo*); *United States v. Siegelman*, 640 F.3d 1159, 1174 n.21 (11th Cir. 2011) (“After *Skilling*, it may well be that the honest services fraud statute . . . requires a *quid pro quo* in a campaign donation case.”); Stengel, *supra* note 37, at 1400 (remarking that “[a]fter *Skilling* the federal statute [§ 1346] requires a benefit and a *quid pro quo*”); Brief of Defendant-Appellant at 46–47, *United States v. Bruno*, 661 F.3d 733 (2d Cir. 2011) (No. 10-1885), 2010 WL 5474601, at *46–47 (arguing that *Skilling* states a *quid pro quo* requirement).

defining bribery of federal officials;⁸⁶ 18 U.S.C. § 666(a)(2), defining bribery concerning federal programs;⁸⁷ and 41 U.S.C. § 52(2) (now codified at 41 U.S.C. § 8701(2)), defining kickbacks in federal contracts.⁸⁸ But these statutes are of little help in answering the question of whether honest services fraud under a bribery theory requires proof of a *quid pro quo* because they are in fact at odds with each other regarding a *quid pro quo* requirement.⁸⁹

In *United States v. Sun-Diamond Growers of California*,⁹⁰ a trade association that represented fruit growers delivered more than \$5,000 in illegal gratuities to U.S. Secretary of Agriculture Michael Espy.⁹¹ The district court held that the government was not required to prove a specific connection between the gratuities and any action by the federal official under § 201(c).⁹² Instead, it was sufficient that the government demonstrate that the defendant conferred the gratuities on the official “because of his [official] position.”⁹³ The D.C. Circuit reversed the district court, and the Supreme Court affirmed, holding that an illegal gratuity must be given *because of a past or future official act*.⁹⁴ The Court further noted that only a bribe requires a specific *quid pro quo*—a specific intent to confer a benefit *in exchange* for an official act.⁹⁵

Although the Court has found § 201(b) bribery to require an explicit *quid pro quo*, no such consensus has emerged among the federal circuits regarding § 666.⁹⁶ In *United States v. Jennings*,⁹⁷ for example, the Fourth Circuit held that the district court erred in omitting from the jury instruction the requirement of finding an explicit *quid pro quo* in a § 666 bribery prosecution of a contractor

86. *Skilling*, 130 S. Ct. at 2933; 18 U.S.C. § 201(b) (2012).

87. *Skilling*, 130 S. Ct. at 2933; 18 U.S.C. § 666(a)(2).

88. *Skilling*, 130 S. Ct. at 2933–34; 41 U.S.C. § 8701(2) (2012) (formerly codified at 41 U.S.C. § 52(2) (2006)).

89. George D. Brown, *Stealth Statute-Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666*, 73 NOTRE DAME L. REV. 247, 307–08 (1998) (noting that § 666 has assumed a vast scope partly because of broad interpretations among some circuits which have held that it also prohibits gratuities offenses which lack a requirement of *quid pro quo* in addition to bribery).

90. 526 U.S. 398 (1999).

91. *Id.* at 400–01.

92. *Id.* at 402–03.

93. *Id.* (quoting *United States v. Sun-Diamond Growers of Cal.*, 941 F. Supp. 1262, 1265 (D.D.C. 1996), *rev'd*, 138 F.3d 961 (D.C. Cir. 1998), *aff'd*, 526 U.S. 398 (1999)).

94. *Id.* at 404–05, 414.

95. *Id.* See also *United States v. Alfisi*, 308 F.3d 144, 146, 148–49 (2d Cir. 2002) (affirming the § 201(b) and § 201(c) convictions of a produce wholesaler who made payments to a government inspector in exchange for lower produce grades by declining to extend the § 201(b) bribery requirement of a *quid pro quo* to § 201(c) illegal gratuities).

96. *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 406 (noting that the expression “official act” in § 201(a) requires, in addition to a *quid pro quo* in bribery cases, “that some particular official act be identified and proved” as the *quo*); Garcia, *supra* note 37, at 254–55 (noting that only two of the federal circuit courts of appeals require a *quid pro quo* in § 666 prosecutions).

97. 160 F.3d 1006 (4th Cir. 1998).

who delivered a series of payments to a housing authority official.⁹⁸ The court reasoned that the government must identify the illicit benefits conferred by the contractor, and the official acts taken by the housing authority official in exchange for such benefits, in order to show that there was an intent to engage in a relatively specific *quid pro quo*.⁹⁹ Otherwise, the court noted, § 666 would improperly extend to any benefit conferred with a “generalized desire to influence or reward . . . no matter how indefinite or uncertain the payor’s hope of future benefit.”¹⁰⁰

The Fourth Circuit’s requirement that the *quid* and *quo* be explicit, or identified specifically as *pro* one another, contrasts with the Second Circuit’s approach to § 666.¹⁰¹ In *United States v. Ganim*,¹⁰² the Second Circuit held that a conviction under § 666 requires proof of a *quid pro quo*, but rejected the defendant mayor’s contention that the government was required to link each benefit he had received from prospective city contractors with a specific official act he had taken in the award process.¹⁰³ Instead, the court held that a mere promise to perform official acts in exchange for the accepted benefits was sufficient to satisfy the *quid pro quo* requirement, reasoning that a narrower reading of the *quid pro quo* requirement would “legalize some of the most pervasive and entrenched corruption, and cannot be what Congress intended.”¹⁰⁴

The Sixth, Seventh, and Eleventh Circuits have held that § 666 does not require proof of a *quid pro quo*.¹⁰⁵ In *United States v. McNair*,¹⁰⁶ for example, the Eleventh Circuit rejected the defendant’s contention that the district court had erred in failing to instruct the jury that it must find a *quo* for the \$350,000 a

98. *Id.* at 1020–21.

99. *Id.*

100. *Id.*

101. Compare *United States v. Jennings*, 160 F.3d 1006, 1013, 1020 n.5 (4th Cir. 1998) (discussing the necessity of a *quid pro quo*), with *United States v. Ganim*, 510 F.3d 134, 136–37 (2d Cir. 2007) (holding that there need not be a “direct link” between benefits received and acts performed).

102. 510 F.3d 134 (2d Cir. 2007).

103. *Id.* at 136–37.

104. *Id.* at 147 (upholding convictions under §§ 666, 1341, 1346, and 1951 by declining to extend *Sun-Diamond Growers*’s requirement that the past or future official act for which the reward was given be identified as bribery under the aforementioned statutes in order to be an illegal gratuity).

105. See, e.g., *United States v. McNair*, 605 F.3d 1152, 1188 (11th Cir. 2010); *United States v. Abbey*, 560 F.3d 513, 515, 520 (6th Cir. 2009) (upholding the § 666 conviction of a former city administrator who received a free subdivision lot from a land developer in exchange for future unspecified official acts and holding that proof of a *quid pro quo* is not necessary by noting the statutory language’s absence of such a requirement); *United States v. Gee*, 432 F.3d 713, 714 (7th Cir. 2005) (holding that proof of a legislator’s specific official act taken in exchange for more than \$200,000 from a state contractor was not necessary and that a jury’s finding that the contractor had bought the legislator’s influence was sufficient under § 666).

106. 605 F.3d 1152 (11th Cir. 2010).

county commissioner received from city contract seekers.¹⁰⁷ The court first looked to the statutory language and, finding no requirement of a specific *quid pro quo* therein, reasoned that such a requirement would permit any corrupt deal as long as the briber pays off the official for a future, unidentified official act.¹⁰⁸ The court noted that the word “corruptly” in the statute sufficiently defines the impermissible conduct as intent to influence or be influenced and declined to adopt the Fourth Circuit’s holding in *Jennings* that the words “corrupt intent” in the statute contain the requirement of intent to “engage in any specific *quid pro quo*.”¹⁰⁹

The final “draws from” statute, 41 U.S.C. § 52(2), was presumably offered to be informative on the scope of the kickback theory of honest services fraud that *Skilling* left open.¹¹⁰ Although it addresses federal contracts, § 52(2)’s definition of kickbacks is expansive, covering even the “purchase of good will,” with no requirement that the payments be linked to certain actions.¹¹¹

The federal courts of appeals, although following *Skilling*’s instructions, diverged in their requirement of a *quid pro quo* in § 1346 prosecutions because of these and other pre-*Skilling* splits that were not resolved by that decision.¹¹²

107. *Id.* at 1168, 1187–88.

108. *Id.* at 1187–88, 1190–91 (declining to extend *Sun-Diamond Growers*’s § 201 illegal gratuities standard to § 666 bribery because the latter includes rewards for “any business, transaction, or series of transactions,” rather than for “official act[s],” and upholding § 1346 convictions on either bribe or undisclosed conflict of interest theories) (internal citations omitted). The court stated:

[T]he Second Circuit’s analysis [in *Ganim*] lies somewhere beyond a no-*quid pro quo* requirement, as adopted by the Sixth, Seventh, and now the Eleventh Circuits, and the Fourth Circuit’s requirement. While the Second Circuit requires a *quid pro quo*, that requirement is satisfied by a *quid* (thing of value) in exchange for a promise to perform an unidentified, official act at some point in the future. In other words, in the Second Circuit the *quo* need not be specific or even identifiable at the time of the *quid*, and to that extent the Second Circuit arguably supports our conclusion. And to some extent, confusion reigns in this area because courts often use the term *quid pro quo* to describe an exchange other than a particular item of value for a particular action.

Id. at 1190.

109. *Id.* at 1188–89 (internal quotation marks omitted).

110. *Skilling v. United States*, 130 S. Ct. 2896, 2933–34 (2010).

111. 64 AM. JUR. 2D *Public Works and Contracts* § 108 (2015). The treatise states:

[T]he gist of a crime . . . is the receipt of a prohibited payment with knowledge that such payment is made for the purpose of inducing the award of a subcontract [T]he question whether the recipient actually induced the award of a subcontract . . . has been held irrelevant since the statute prohibits the purchase of good will in the awarding of “negotiated” government contracts.

Id.

112. *See supra* Part III.B–D.

B. Eleventh Circuit: Failure To Instruct on Quid Pro Quo is Harmless if the Scheme is Corrupt

In *Stayton v. United States*,¹¹³ the U.S. District Court for the Middle District of Alabama set aside a conviction under § 1346 in light of *Skilling*'s new requirements.¹¹⁴ The court held that the jury instruction was overbroad, and therefore it was impossible to determine whether the jury had convicted the defendants on newly required bribery or kickback grounds, or impermissible undisclosed conflict of interest or self-dealing grounds.¹¹⁵ In reaching this holding, the court pointed to the defendants' acquittals on standalone bribery charges as dispositive of the verdict's basis on an impermissible non-bribery or non-kickback theory, suggesting that the elements of honest services fraud on a bribery theory are largely indistinguishable from § 666, which the Eleventh Circuit has found not to require proof of a *quid pro quo*.¹¹⁶

Similarly, in *United States v. Siegelman*,¹¹⁷ the Eleventh Circuit reversed two counts of honest services fraud against Alabama Governor Don Siegelman predicated on theories of self-dealing.¹¹⁸ At the same time, the court upheld the conviction of Alabama Governor Don Siegelman under § 1346 on a bribery theory despite the trial court's failure to instruct the jury that it must find a *quid pro quo*.¹¹⁹ The Eleventh Circuit reasoned that because the jury also convicted Siegelman of bribery under § 666 from a jury instruction charging a *quid pro quo* (provided in response to the defendant's request, although not required by the Eleventh Circuit), any failure to instruct the jury as to the necessity of proving a *quid pro quo* to convict under § 1346 was harmless error.¹²⁰ Furthermore, the court added that while it did not read a general *quid pro quo* requirement into honest services fraud after *Skilling*, it conceded that in cases involving campaign contributions, a *quid pro quo* might be required in order to protect the donor's First Amendment rights.¹²¹

Mirroring the decision of the district court in *Stayton*, the Eleventh Circuit in *Siegelman* equated the proof requirements of § 666 with that of a bribery theory

113. 766 F. Supp. 2d 1260 (M. D. Ala. 2011).

114. *Id.* at 1269.

115. *Id.*

116. *Id.* at 1269 n.9; Perrine & Kipnis, *supra* note 52, at 298 (quoting *Stayton*, 766 F. Supp. 2d at *25 n.10) (noting that "the Court also mentioned that its ruling did not mean that either man was 'actually innocent' of honest services fraud, and that the government could elect to retry one or both men for honest services fraud"). See *supra* notes 105–09 and accompanying text.

117. 640 F.3d 1159 (11th Cir. 2011).

118. *Id.* at 1172–74, 76.

119. *Id.*

120. *Id.* at 1172–74.

121. *Id.* at 1174, n.21 (noting in dicta that "[a]fter *Skilling*, it may well be that the honest services fraud statute, like the extortion statute in *McCormick*, requires a *quid pro quo* in a campaign donation case"). For a more detailed exploration of the requirement of proving *quid pro quo* in the campaign contribution context, see generally Garcia, *supra* note 37.

of honest services fraud.¹²² However, it ultimately declined to decide whether the prosecution must prove a *quid pro quo* in a § 1346 action.¹²³ In *United States v. Spellissy*,¹²⁴ the court acknowledged both that it had declined to explicitly rule on whether honest services fraud requires proof of a *quid pro quo* in *Siegelman*, and that the lack of a *quid pro quo* instruction may not be harmless without a corresponding bribery charge.¹²⁵ The court nevertheless denied the petitioner's writ of error *coram nobis* on harmless error grounds because the prosecution was "premised on a bribery or kickback scheme," further suggesting a rejection of any express *quid pro quo* requirement in honest services bribery cases.¹²⁶

C. Second Circuit: Quid Pro Quo is an Essential Element, Mere "Magic Words," and Entirely Disposable if the Bribe Looks Like a Kickback

In *United States v. Bruno*,¹²⁷ former New York State Senate Majority Leader Joseph Bruno had been charged and convicted by a district court of honest services fraud for accepting consulting fees from a nanotechnology firm in exchange for assisting the firm in obtaining government funding.¹²⁸ The Supreme Court decided *Skilling* while Bruno awaited appeal.¹²⁹ Subsequently, the Second Circuit vacated the conviction and dismissed the indictment of honest services fraud against Bruno because the government had declined to pursue a bribery theory and instead elected to charge Bruno under a theory of failure to disclose a conflict of interest.¹³⁰ *Skilling* foreclosed conviction under this theory.¹³¹

The court then evaluated the sufficiency of the evidence to determine whether Bruno was entitled to a judgment of acquittal in the event that the evidence was insufficient to support an honest services fraud conviction under a bribery or kickback theory in a new trial.¹³² In making this assessment, the court described evidence of a *quid pro quo* as "an essential element of a bribery theory of honest services fraud."¹³³ The court ruled that a rational jury, provided with identical evidence at retrial, could find evidence of a *quid pro quo*, noting that such an exchange could be inferred from "evidence of benefits received and subsequent favorable treatment, as well as from behavior indicating consciousness of

122. See *Siegelman*, 640 F.3d at 1173–74.

123. *Id.*

124. 438 F. App'x 780 (11th Cir. 2011).

125. *Id.* at 782.

126. See *id.* at 784 (emphasis added).

127. 661 F.3d 733 (2d Cir. 2011).

128. *Id.* at 736.

129. *Id.*

130. *Id.* at 740.

131. *Id.*

132. *Id.* at 742.

133. *Id.* at 743.

guilt.”¹³⁴ The court also seemed to embrace the Third Circuit’s “stream of benefits” theory, wherein the precise *quids* and *quos* need not be matched nor agreed upon in advance, and the requirement can be satisfied by showing that the agreement contemplated reciprocal action as “opportunities arise,”¹³⁵ which largely comports with the Second Circuit’s holding in *Ganim*—that the *quid pro quo* requirement in § 666 can be satisfied by an exchange of a promise to bestow benefits.¹³⁶

In a contrasting set of facts in *United States v. Botti*,¹³⁷ the Second Circuit upheld the conviction of a real estate developer who had been convicted of honest services fraud for conferring illegal benefits on the city’s mayor in exchange for favorable treatment from the city’s zoning board.¹³⁸ Botti argued that in light of *Skilling*, the “general theory” of honest services fraud, as represented in the jury instruction, rendered the instruction defective because it did not specifically charge a bribery theory.¹³⁹ Although the jury failed to reach a verdict on § 666 bribery, which in the Second Circuit required finding only that the bribery had conferred corrupt benefits on an official with an intent to influence that official in the performance of his official duties, the district court held that this outcome did not demonstrate that the evidence was insufficient to find Botti guilty of honest services fraud under a bribery theory.¹⁴⁰ The Second Circuit held that, although it was plain error for the lower court to fail to limit the honest services fraud jury instruction to bribery or kickback schemes, such an error did not substantially affect the defendant’s rights because the bribery theory was the only theory supported by the evidence or argued at trial.¹⁴¹ In so holding, the Second Circuit noted that “[i]t was unnecessary for the District Court ‘to use the magic words . . . ‘quid pro quo’ to effectively charge a jury on bribery,’” suggesting an unwillingness to read *Skilling* as an endorsement of *quid pro quo* as a definitional element of honest services fraud.¹⁴²

The Second Circuit has not only downplayed the extent to which a *quid pro quo* is an essential element of honest services fraud, but has seemed to accept the kickback theory, as articulated in § 52(2), as an alternative in § 1346 prosecutions where no exchange is apparent or where the precise dynamic of the

134. *Id.* at 744 (quoting *United States v. Friedman*, 854 F.2d 535, 554 (2d Cir. 1988)).

135. *Id.* (citing *United States v. Ganim*, 510 F.3d 134, 142 (2d Cir. 2007)). *See also* Part III.D (discussing the “stream of benefits” theory).

136. *See supra* note 104 and accompanying text.

137. 711 F.3d 299 (2d Cir. 2013).

138. *Id.* at 303.

139. *Id.* at 307.

140. *Id.* at 305, 307 (noting that in *Yeager v. United States*, 557 U.S. 110 (2009), the Supreme Court had instructed courts not to attribute any meaning to the failure to return a verdict).

141. *Id.* at 311.

142. *Id.* at 314 (quoting *United States v. Bahel*, 662 F.3d 610, 635 (2d Cir. 2011)) (holding that “it was unnecessary for the District Court ‘to use the magic words ‘corrupt intent’ or ‘quid pro quo’ to effectively charge a jury on bribery’”).

exchange is elusive.¹⁴³ In *United States v. Nicolo*,¹⁴⁴ a local official pled guilty to a count of honest services fraud for accepting frequent payments from a real estate consultant, but at his plea hearing he specifically denied that these payments had induced him to alter his official actions.¹⁴⁵ On appeal of his plea agreement after *Skilling*, the official argued that he had not “knowingly” entered into the plea agreement because he had not engaged in a *quid pro quo* sufficient to violate § 1346 under the bribery theory indicated by his sentence.¹⁴⁶ The court affirmed the official’s conviction on the grounds that his conduct was sufficient to convict him of honest services fraud under a kickback theory, citing *Skilling*’s directions to look to § 52(2).¹⁴⁷ The Second Circuit, therefore, has demonstrated a willingness to employ the kickback theory liberally, including, apparently, in cases where the precise exchange constituting the *quid pro quo* falls through.¹⁴⁸

D. Third Circuit: “Stream of Benefits” and No Requirement of Official Action

The Third Circuit has held that honest services fraud under a bribery theory does require proof of a *quid pro quo*.¹⁴⁹ In *United States v. Bryant*,¹⁵⁰ a New Jersey state senator was charged under a bribery theory of § 1346 for taking a “low-show” job at a university in exchange for official actions to increase the university’s funding.¹⁵¹ The court upheld the senator’s conviction, applying the requirements of § 201(b) as articulated by the Supreme Court in *Sun-Diamond*

143. See Gary Stein & Eli J. Mark, *Gratuities and Honest Services Fraud*, BUS. CRIMES BULLETIN, Sept. 2014, at 1 (noting that some courts, including the Second Circuit, have begun to adopt a broad “kickback” theory). See also *infra* notes 144–48 and accompanying text.

144. 421 F. App’x 57 (2d Cir. 2011).

145. *Id.* at 60, 63.

146. *Id.* at 64 (holding that to “knowingly” enter a plea agreement only means to be aware of the consequences of the agreement).

147. *Id.*

148. *Id.* See also Brian Nichilo, *Honest Services Fraud: Constancy in Change*, 83 TEMP. L. REV. 1065, 1089 (2011) (noting that bribery is generally easily susceptible to recharacterization as a kickback); *United States v. McDonough*, 727 F.3d 143, 153 (1st Cir. 2013), *cert. denied* 134 S. Ct. 1041 (2014) (quoting *Skilling v. United States*, 130 S. Ct. 2896, 2932 (2010)) (upholding § 1346 convictions on the grounds that a lobbyist’s delivery of money to the speaker of a state legislature in exchange for political favors was a “classic kickback scheme”); *United States v. Renzi*, No. CR 08-212 TUC DCB (BPV), 2012 WL 983580, *6–7 (D. Ariz. Mar. 22, 2012) (rejecting the magistrate judge’s recommendation that the congressman’s conviction under § 1346 be reversed in light of *Skilling* on grounds that his scheme to promote favorable land exchange legislation in exchange for payments stemming from the land sale constituted not merely a foreclosed self-dealing but a “paradigmatic bribery and kickback case”). The Second Circuit also appears to be amenable to expanding the scope of what constitutes a kickback. See *United States v. DeMizio*, 741 F.3d 373, 380 (2d Cir. 2014) (holding that a stockbroker’s requirement that firms doing business with his employer employ his family members in return for increased business constituted kickbacks sufficient to sustain a conviction under § 1346 despite his not receiving any direct benefits).

149. *United States v. Bryant*, 655 F.3d 232, 240–41 (3d Cir. 2011).

150. 655 F.3d 232 (3d Cir. 2011).

151. *Id.* at 236–37.

Growers of California.¹⁵² The court held that conviction under a bribery theory of honest services fraud does not require an *explicit quid pro quo*, but can instead be proved by an *implied quid pro quo*, which can take the form of a “stream of benefits.”¹⁵³ The government need not prove that a particular *quid* was exchanged for a particular *quo*; instead, the government need prove only that benefits flowed to a public official in exchange for a “pattern of official actions favorable to the donor.”¹⁵⁴

The court also noted that *Skilling* did not alter the existing rule that the government need not prove that the recipient performed the official action for which the bribe was taken, but only that the bribe was accepted with requisite intent to be influenced.¹⁵⁵ Therefore, according to the Third Circuit, in order to convict a defendant of honest services fraud under a bribery theory, the government need show only that an official accepted benefits with the intent to be influenced. This effectively disposed of the requirement that the government prove even an *implied quid pro quo*.¹⁵⁶

IV. SEARCHING FOR THE “CRITERION OF GUILT”

Although *Skilling* precluded honest services fraud theories involving merely undisclosed conflicts of interest and self-dealing, the Court left unresolved the extent to which the remaining bribery and kickback theories require proof of a *quid pro quo*.¹⁵⁷ The federal courts of appeals differed in their *quid pro quo* requirements in pre-*Skilling* § 1346 cases premised on bribery, or “core” pre-*McNally* honest services fraud doctrine.¹⁵⁸ *Skilling* purportedly limited § 1346

152. *Id.* at 240–41, 243. See *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404–05 (1999) (distinguishing bribery, which requires specific intent to influence or be influenced, from a gratuity, which requires that a benefit be given or accepted “for or because of” an official act). See also *United States v. Kemp*, 500 F.3d 257, 281 (3d Cir. 2007) (quoting *Sun-Diamond Growers*, 526 U.S. at 404–05) (“[*Sun-Diamond Growers*’s distinction between a gratuity and a bribe] is equally applicable to bribery in the honest services fraud context, and we thus conclude that bribery requires ‘a specific intent to give or receive something of value *in exchange* for an official act.’”).

153. *Bryant*, 655 F.3d at 241.

154. *Id.* (quoting *United States v. Bryant*, No. 3:07-cr-267, 2009 WL 1559796, at *4 (D.N.J. May 28, 2009)). See also *Kemp*, 500 F.3d at 281–82 (affirming the lower court’s application of the “stream of benefits” theory of bribery in the conviction of a city treasurer who accepted payments in exchange for directing contracts to companies favored by the payor). *Kemp* noted that “while the form and number of gifts may vary, the gifts still constitute a bribe as long as the essential intent—a specific intent to give or receive something of value *in exchange* for an official act—exists.” *Id.*

155. *Bryant*, 655 F.3d at 245.

156. See *id.* (noting that *Skilling* only prohibited theories that went “beyond” the core of bribery or kickbacks and did not limit traditional theories of bribery, one of which is the “stream-of-benefits theory”).

157. *Skilling v. United States*, 130 S. Ct. 2896, 2939 (2010) (Scalia, J., concurring in the judgment).

158. See *supra* notes 65–69 and accompanying text.

to this “core” doctrine.¹⁵⁹ Moreover, the courts of appeals differ in their requirements of a *quid pro quo* for the “draws from” statutes.¹⁶⁰ Thus, the extent to which a *quid pro quo* is necessary, and the precise conduct sufficient to sustain a conviction under § 1346, remains elusive.

A. *No Consensus on Quid Pro Quo Among the Circuits Before or After Skilling*

The federal courts of appeals’ approaches to honest services fraud post-*Skilling* differ appreciably in the degree to which they require a *quid pro quo*. The Eleventh Circuit in *Siegelman*, for instance, declined to state whether conviction under § 1346 required proof of a *quid pro quo*.¹⁶¹ Furthermore, the court held that because the defendant was convicted of § 666 bribery, any failure to instruct the jury as to § 1346’s purported post-*Skilling* *quid pro quo* requirement was harmless error because the instructions on the reception of benefits and the intent to influence would presumably have been duplicative.¹⁶²

This differs markedly from the Second Circuit’s approach, which has characterized proof of a *quid pro quo* as an “essential element” in honest services fraud based on bribery.¹⁶³ The Second Circuit declined to extend to the defendant in *Botti* the inferential benefit that a § 666 bribery instruction was effectively coterminous with an instruction on bribery-based honest services fraud, holding that the jury’s failure to find the defendant guilty of bribery was not detrimental to finding sufficient evidence for a conviction for honest services fraud.¹⁶⁴

The Third Circuit’s approach also differs from that of the Second and Eleventh Circuits. While the Third Circuit applied *Sun-Diamond Growers’s* *quid pro quo* requirements for § 201 to the § 1346 prosecution in *Bryant*, its “stream of benefits” theory, combined with the rule that no official action need have been taken, effectively reduces the *quid pro quo* requirement to a mere *quid*, or merely “magic words” devoid of substance.¹⁶⁵ If a *quid pro quo* can be implicit, and the official action need not be taken, then any conferral of a benefit with intent to influence, or any *quid*, would seem to constitute a *quid pro quo* in the Third

159. Lisa Kern Griffin, *The Federal Common Law Crime of Corruption*, 89 N.C. L. REV. 1815, 1840 (2011) (noting that “[b]ribes and kickbacks’ are not self-defining, and it is not clear that the Supreme Court intended them as terms of art. Some bribery statutes require that payments influence particular official actions, but not all pre-*McNally* bribery cases involved *quid pro quos*”) (footnote omitted).

160. *See supra* Part III.A.

161. *United States v. Siegelman*, 640 F.3d 1159, 1173–74 (11th Cir. 2011).

162. *Id.*

163. *United States v. Bruno*, 661 F.3d 733, 743 (2d Cir. 2011) (citing *United States v. Ganim*, 510 F.3d 134, 148–49 (2d Cir. 2007)).

164. *United States v. Botti*, 711 F.3d 299, 305, 307, 314–15 (2d Cir. 2013).

165. *United States v. Bryant*, 655 F.3d 232, 241 (3d Cir. 2011); *Botti*, 711 F.3d at 314 (quoting *United States v. Bahel*, 662 F.3d 610, 635 (2d Cir. 2011)).

Circuit, and resemble a kickback more than a bribe. Because the courts cannot read *Skilling* in consensus as not requiring a *quid pro quo* for honest services fraud, they should adopt a bribery doctrine that limits this proposed limiting factor by following the Third Circuit's approach.

B. Skilling's Commands Are Further Obfuscated by the Transposability of the Kickback Option

Courts can also preserve the scope of pre-*McNally* honest services fraud by drawing from 41 U.S.C. § 52(2) kickbacks. Section 52(2) defines a kickback as “any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind that is provided . . . to improperly obtain or reward favorable treatment.”¹⁶⁶ The breadth of this definition contrasts starkly with the definition of bribery in § 201(b), which the Supreme Court has stated is defined by its essential intent element.¹⁶⁷ As the Second Circuit has apparently noted, because § 52(2) defines kickback so broadly and carries no intent element, the statute would presumably undermine the utility of pursuing any conviction on a bribery theory when a kickback theory could be more easily employed to avoid the requirement of proving a *quid pro quo*.¹⁶⁸

Adopting wholesale the standards of the other statutes, namely § 201(b) and § 666 bribery, the former of which strictly requires a *quid pro quo*, would render § 1346 redundant.¹⁶⁹ It would also frustrate the congressional intent of restoring honest services fraud to its pre-*McNally* scope and application, which was primarily prosecuting official indiscretion that did not manifest a *quid pro quo* character.¹⁷⁰ Absent a circuit-wide or Supreme Court adoption of the Third Circuit's “stream of benefits” theory, or a total repudiation of *quid pro quo* in honest services fraud doctrine, the divergent requirements of proving a *quid pro quo* among the federal courts of appeals, and that ever-elusive “criterion of guilt,” will frustrate both congressional intent and the Supreme Court's presumed reinstatement of “core” pre-*McNally* doctrine.¹⁷¹ In order to bring certainty that the *Skilling* decision failed to provide and avoid the vagueness that Congress and pre-*McNally* doctrine is accused of fostering, courts should adopt

166. 41 U.S.C. § 8701 (2012) (formerly codified at 41 U.S.C. § 52(2) (2006)).

167. Compare *id.* (not discussing an intent requirement), with 18 U.S.C. § 201(b) (2012) (requiring intentionality); *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404–05 (1999) (distinguishing that while bribery requires “intent ‘to influence,’” a gratuity requires that something be “given or accepted ‘for or because of’ an official act”).

168. See *supra* Part III.C.

169. See Thomas Rybarczyk, Comment, *Preserving a More Perfect Union: Melding Two Circuits' Approaches To Save a Valuable Weapon in the Fight Against Political Corruption*, 2010 WIS. L. REV. 1119, 1141.

170. *Skilling v. United States*, 130 S. Ct. 2896, 2939 (2010) (Scalia, J., concurring in the judgment) (arguing that “[i]t is entirely clear (as the Court and I agree) that Congress meant to reinstate the body of pre-*McNally* honest-services law; and entirely clear that [it] prohibited much more . . . than bribery and kickbacks”).

171. *Id.* at 2931. See also *id.* at 2939 (Scalia, J., concurring in the judgment).

an honest services fraud approach that successfully reconciles these competing criticisms while effectuating the initial congressional intent of battling public corruption regardless of its precise transactional manifestation.

V. RESTORING AN OLD DOCTRINE BY DISPENSING WITH A NEW LIMITATION

The circuits' divergent treatment of the essentiality of proving a *quid pro quo* in honest services fraud demonstrates that, despite *Skilling*'s purported clarifying interpretation, a range of different approaches to § 1346 honest services fraud persist among the federal courts of appeals. This circuit split perpetuates the problems long identified with honest services fraud doctrine, particularly the vagueness for lack of defining conduct.¹⁷² Meanwhile the initial impetus and congressional intent underlying the enactment of § 1346 persists, as courts and legislators have conveyed that a range of behavior can deprive citizens of their right to officials' honest services.¹⁷³

A. Courts Should Adopt the Third Circuit's "Stream of Benefits" Approach in Order to Avoid Vagueness and Effectuate Congressional Intent

Does *Skilling* truly "accomplish[] Congress's goal" in enacting § 1346 as the Court claimed in that decision?¹⁷⁴ As seen in *Bruno*, *Bryant*, and *Siegelman*, post-*Skilling* inclusivity and vagueness concerns can turn on a given court's adoption, rejection, or modification of the *quid pro quo* requirement.¹⁷⁵ Because the pre-*Skilling* case law on § 1346 and the federal courts of appeals' treatment of the "draws from statutes" diverge in their requirement of a *quid pro quo*, *Skilling* should not be read as identifying a *quid pro quo* as the "criterion of guilt" in honest services fraud prosecutions.¹⁷⁶

172. *Id.* at 2938 (urging that "the first step in the Court's analysis—holding that 'the intangible right of honest services' refers to 'the honest-services doctrine recognized in Court of Appeals' decisions before *McNally*—is a step out of the frying pan into the fire").

173. *See supra* notes 51 and 55. *See also Skilling*, 130 S. Ct. at 2928 (finding that "[t]here is no doubt that Congress intended § 1346 to refer to and incorporate the honest-services doctrine recognized in Court of Appeals' decisions before *McNally* derailed the intangible-rights theory of fraud").

174. *Skilling v. United States*, 130 S. Ct. 2907, 2933 (2010) (quoting Brief of Albert W. Alschuler as Amicus Curiae in Support of Neither Party at 28–29, *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010) (No. 08-1196), 2009 WL 2052480, at *28–29) (internal quotation marks omitted).

175. *See supra* notes 117–23, 127–36, 150–56. *See also, e.g.*, Brief of Defendant-Appellant at 4–5, *United States v. Bruno*, 661 F.3d 733 (2d Cir. 2011), (No. 10-1885), 2011 WL 1461744, at *4–5. The defendant-appellant argued:

[T]he government . . . claims that a valid indictment need not include any mention of *quid pro quo* because the concept is somehow "embedded" in the legal term of art But "embedded" concepts cannot provide valid notice unless the words of a statute "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished."

Id.

176. *Skilling*, 130 S. Ct. at 2939 (Scalia, J., concurring in the judgment).

Instead, courts should adopt a standard for honest services fraud which respects the limitations and guidance of *Skilling* by adhering to pre-*McNally* honest services fraud doctrine, but which also does not defeat the congressional intent of restoring that doctrine by applying a *quid pro quo* requirement that was not essential to the doctrine pre-*McNally*.¹⁷⁷ By employing a “stream of benefits” theory and requiring only that the official accept the bribes with intent to be influenced, the Third Circuit’s approach remains within *Skilling*’s anti-vagueness parameters while effectuating congressional intent and advancing the interests of society in prohibiting corruption.

B. The “Stream of Benefits” Theory Comports with Public Notions of Corruption and Empowers the Public To Determine When It Has Been Deprived of its Right to Officials’ Honest Services

Modern social science and public opinion depart from the Supreme Court’s notions of what behavior constitutes improper influence and official action in a democratic society, viewing corruption as a more nuanced and systemic phenomenon capable of taking various forms.¹⁷⁸ This is quite different from the Supreme Court’s focus on *quid pro quo* as the primary criterion of corruption.¹⁷⁹ Honest services fraud, historically and into the present in certain jurisdictions, serves the essential function of punishing what social scientists have identified and the public perceives as a potentially more insidious and almost certainly more widespread form of corruption: that of non-transactional influence, or non-*quid pro quo* corruption.¹⁸⁰

177. See *supra* notes 35–37, 51 and accompanying text.

178. See *infra* note 180 and accompanying text.

179. Compare *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 357, 359 (2010) (stating that “we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption” and “[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt”); *Fed. Election Comm’n v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) (stating that “[t]he hallmark of corruption is the financial *quid pro quo*: dollars for political favors”), with Francis Fukuyama, *America in Decay: The Sources of Political Dysfunction*, FOREIGN AFFAIRS (Aug. 18, 2014), <https://www.foreignaffairs.com/articles/united-states/2014-08-18/america-decay>. Fukuyama writes:

What is not covered by the law is what biologists call reciprocal altruism or what an anthropologist might label a gift exchange In a gift exchange, the receiver incurs not a legal obligation . . . but rather a moral obligation to return the favor in some way later on. It is this sort of transaction that the U.S. lobbying industry is built around.

Id.

180. See, e.g., Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 119 (2004) (finding that many Americans perceive the government and the political process as corrupt, but for a variety of reasons and in nuanced ways depending on socioeconomic status and political beliefs); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPECTIVES ON POLITICS 564, 564 (2014) (finding that “economic elites and organized groups representing business interests have substantial independent impacts

Because the honest services fraud statute seeks to punish officials for behavior that defrauds the public of its right to the officials' honest services, it ought to comport with the public's beliefs of what constitutes corruption.¹⁸¹ Of the approaches to honest services fraud taken by the courts of appeals in the aftermath of *Skilling*, the Third Circuit's "stream of benefits" theory best meets this imperative by treating the influence that was bought, rather than the precise benefits exchanged, as the "criterion of guilt."

C. Prosecutors Can and Should Bypass Quid Pro Quo Requirements by Showing a Paradigmatic Narrative of Corruption

Reading *Skilling* to require a *quid pro quo* is also ultimately futile. Whether or not courts adopt the "stream of benefits" theory, prosecutors will flout whatever *quid pro quo* requirement *Skilling* may have imposed by charging corruption under novel honest services fraud theories. The *Skilling* decision may have been a "good day for the bad guys," but workarounds exist even in jurisdictions that have adopted a *quid pro quo* post-*Skilling*, whether by borrowing from § 201, § 666, or pre-*Skilling* bribery and kickback cases.¹⁸² In the Second Circuit, for example, the court's reference to *quid pro quo* as "magic words," gives prosecutors leeway to construct an honest services fraud theory that need only fit within a traditional bribery narrative.¹⁸³ Likewise, the Second Circuit's apparent openness to recharacterization of bribery as a kickback scheme signals that the best route for prosecutors might be simply to avoid the

on U.S. government policy, while average citizens and mass-based interest groups have little or no independent influence").

181. See ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO *CITIZENS UNITED* 195 (2014) (demonstrating that "[f]or most of the twentieth century . . . juries were given broad authority to determine whether something was corrupt or merely friendly"); Poll: *Virginians Think McDonnell's Behavior Typical, but Deserving of Prison, Also Weigh in on Medicaid and Budget Shortfall*, ROANOKE COLL. (Sept. 9, 2014), http://www.roanoke.edu/about/news/rc_poll_virginians_think_mcdonnell_behavior_typical (finding that most Virginians thought former Governor McDonnell should face time in prison for his public corruption charges); Rybarczyk, *supra* note 169, at 1124 (advocating a "public-trust preserving, private-gain standard" for post-*Skilling* honest services fraud doctrine that would apply where "a public official corruptly misused his or her position to create an economic gain for himself or for an individual that the official personally knows").

182. John W. Shoen, *High Court Upends Widely Used Anti-Fraud Law*, MSNBC (June 25, 2010), http://www.msnbc.msn.com/id/37905334/ns/business-us_business; Nichilo, *supra* note 148, at 1088 (arguing that *Skilling*'s limiting of § 1346 to prohibit only bribery and kickbacks still embodies the types of conduct that society seeks to punish and prohibit in its public officials). Cf. Timothy P. O'Toole, *The Honest-Services Surplus: Why There's No Need (or Place) for a Federal Law Prohibiting "Criminal-esque" Conduct in the Nature of Bribes and Kickbacks*, 63 VAND. L. REV. EN BANC 49, 62 (2010) (arguing that there is "an intricate web of overlapping federal provisions" and comparable state provisions targeting official corruption and that § 1346 is ultimately superfluous and its invalidation would not present any setbacks to the prosecution of federal or state corruption).

183. *United States v. Botti*, 711 F.3d 299, 314 (2d Cir. 2013).

bribery and *quid pro quo* questions altogether and liken each corrupt scheme to a § 52(2) kickback in any given jurisdiction.¹⁸⁴

As for the lack of specificity regarding the type of conduct exposing one to § 1346 prosecution, “a criminal defendant who participated in a bribery or kickback scheme, in short, cannot tenably complain about prosecution under § 1346 on vagueness grounds.”¹⁸⁵ In other words, if the charged scheme fits within the paradigm of a prohibited exchange, as defined by an expansive doctrine going back to the 1940s and reaffirmed by Congress as late as 1988, then it is a scheme to defraud the public of its intangible right to the official’s honest services.¹⁸⁶

VI. CONCLUSION

In order to further clarify the duty owed to the general public by public officials in § 1346 honest services fraud prosecutions, the Supreme Court or the federal courts of appeals should adopt the Third Circuit’s unique “stream of benefits” approach to honest services fraud bribery. This approach identifies the public official’s receipt of a benefit and intent to be influenced, rather than the existence of a precise corrupt exchange, as the criterion of guilt. Because pre-*McNally* honest services fraud doctrine did not identify *quid pro quo* as the criterion of guilt, the “stream of benefits” approach’s emphasis on intent rather than precise exchange best retains the utility of the pre-*McNally* honest services fraud doctrine in prosecuting corruption and best effectuates the congressional intent in enacting § 1346, while still remaining within the parameters of non-vagueness mandated by the Supreme Court in *Skilling*.

184. Griffin, *supra* note 159, at 1840–41 (arguing that even if the “stream of benefits” theory or an implicit *quid pro quo* requirement are not acceptable, “the definition of ‘kickbacks’ appears broad enough” to encompass most corrupt schemes).

185. *Skilling v. United States*, 130 S. Ct. 2896, 2934 (2010).

186. See *supra* Parts I–II.

