

The Degradation of the “Void for Vagueness” Doctrine: Reversing Convictions While Saving the Unfathomable “Honest Services Fraud” Statute

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The “void for vagueness” doctrine is, in theory, rather simple to comprehend: in order to justify the deprivation of its citizens’ liberty, government must give sufficiently clear notice of what its laws demand or prohibit. This fundamental aspect of due process of law, applied to federal legislation through the Constitution’s Fifth Amendment and to the states via the Fourteenth, has long been a backstop against capricious enforcement of American laws. Its significance is perhaps best appreciated when compared to a legal system with no such safeguard. Soviet-era KGB secret police, confident that their elastic criminal statutes could be stretched to target all perceived enemies of the regime, were known to boast: “Show me the man and I’ll find you the crime.”

Notwithstanding its centrality to liberty and justice, the void for vagueness doctrine has fallen of late into a kind of desuetude in the arena of federal criminal legislation and prosecution. It remains alive in theory, but not terribly supportive of liberty in practice. This situation is particularly problematic because federal criminal law,

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unlike its state counterparts is entirely a creature of statute rather than of common law.¹ Hence, traditional common-law doctrines of willfulness and criminal intent, which cabin the application of state criminal statutes, do not apply on the federal side. Nor is federal statutory interpretation assisted very much by the hundreds of years of Anglo-Saxon common-law court opinions passed down from England and from the pre-colonial American courts. For a criminal statute to apply only to those who intentionally violate the law, Congress must specify the degree to which knowledge of the law and intent to violate it will factor into a potential prosecution.² Furthermore, much state law involves areas of human conduct where ordinary citizens, because of long tradition, have a good sense of the line between lawful conduct and crime. Murder and theft, for example, are not foreign concepts to most of us. Yet few citizens can be expected to have an intuitive grasp of what is entailed in “mail or wire fraud,” or in rendering “material assistance” to terrorist groups, or the myriad other areas covered by the rapidly growing body of federal criminal statutes and regulations.³ Therefore, the vagueness doctrine, one would think, has an even more vital role to play in federal criminal law than it does in the state criminal justice system. Yet the opposite often appears to be the truth.

Several cases decided in the past term highlight the inadequate amount of thought, as well as lack of practical common sense, that seems to characterize the Supreme Court’s modern jurisprudence with regard to the due process aspects of the vagueness doctrine. The resolution of these cases is so unsatisfactory as to call for a reexamination of the role of due process vagueness analysis in all

¹ *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

² According to a recent study, of the 446 nonviolent, non-drug-related criminal laws presented in the 109th Congress, more than half lacked a requirement that a defendant act with criminal intent. See Brian W. Walsh and Tiffany Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, the Heritage Found. and the Nat’l Ass’n for Criminal Def. Lawyers, May 2010, at 13, available at <http://www.nacdl.org/withoutintent>.

³ A study by the Federalist Society reported that, by the year 2007, the U.S. Code (listing all statutes in force enacted by Congress) contained more than 4,450 criminal offenses, up from 3,000 in 1980. See John S. Baker Jr., *Measuring the Explosive Growth of Federal Crime Legislation*, Federalist Society for Law and Public Policy Studies White Paper, May 2004, updated June 16, 2008, available at <http://www.heritage.org/Research/LegalIssues/lm26.cfm>.

the high court’s jurisprudence as it affects the validity of federal criminal statutes. Unless and until the vagueness doctrine becomes a viable tool for requiring that a citizen’s obligations be clear before he can be punished for criminal transgressions, judges are going to be punishing citizens utterly innocent of evil intent, thus undermining the moral supports of the law.

An analysis of the Supreme Court’s reasoning in this term’s vagueness cases suggests that the time has come for the high court to begin to weed the garden of federal statutes that fail to inform the average citizen, or indeed even highly skilled lawyers, of what the law requires or prohibits.⁴

I. Introduction

In *Skilling v. United States*,⁵ and the related cases *Black* and *Weyhrauch*,⁶ the Supreme Court claimed to pare down 18 U.S.C. § 1346—

⁴ The authors of this article are both practicing criminal defense attorneys, one of whom was involved in and has written about a Massachusetts federal wiretapping prosecution, *United States v. Bradford Councilman*, that, in many ways, typifies the lens through which life-tenured judges view the problem of statutory vagueness. That case involved the interpretation of the somewhat esoteric federal wiretapping statute and its application—or not—to an Internet service provider who routinely made copies of emails passing through its computer system. The district judge at first denied, then changed his mind based on a Ninth Circuit precedent, and finally allowed the defendant’s motion to dismiss. *United States v. Councilman*, 245 F.Supp.2d 319 (D. Mass. 2003). A First Circuit panel affirmed the district court, *United States v. Councilman*, 373 F.3d 197 (1st Cir. 2004), but the en banc court, in a split decision, reversed the panel *United States v. Councilman*, 418 F.3d 67 (1st Cir. 2005) (en banc). What was remarkable about the en banc majority’s decision was not so much that judges disagreed with one another, but rather that after the tortured history of the *Councilman* litigation and of the contrary statutory interpretation arrived at by another circuit as well as by the district judge and a majority of the panel that agreed with the district judge, the majority of the en banc First Circuit claimed that the rule of lenity toward the defendant did not apply. The case, the court reasoned, demonstrated simply a “garden-variety, textual ambiguity” rather than the kind of “grievous ambiguity in a penal statute” that would normally trigger a court’s giving a defendant the benefit of the doubt. One dissenting judge, obviously exasperated at the notion that a citizen should be expected to understand, at his peril, the meaning of a statute that had eluded three of the eight judges (including the district judge) who opined in this very case, not to mention a split with another circuit, suggested that if the issue was indeed “garden-variety,” then “this is a garden in need of a weed killer.” *United States v. Councilman*, 418 F.3d 67, 90 (1st Cir. 2005) (en banc) (Torruella, J., dissenting). For an extended discussion, see Harvey A. Silverglate, *Three Felonies a Day: How the Feds Target the Innocent* 257–64 (2009).

⁵ *Skilling v. United States*, 561 U.S. —, 130 S. Ct. 2896 (2010).

the 28-word broadly defined and amorphous “honest services” fraud statute—to the point of clarity. For nearly a quarter century, federal prosecutors have exploited the statute’s vagueness by pursuing state and local politicians and corporate executives for essentially what U.S. Attorneys deem to be morally or ethically questionable conduct. These overzealous prosecutions wreaked havoc on the federal courts, which had devised sometimes-conflicting views of the statute to save it from invalidation, all the while handing down honest services fraud convictions and decades-long sentences.⁷

Perhaps more importantly, the federal criminalization of certain business and political practices that enjoyed approval—or at least tacit acceptance—in the state and local culture left citizens without adequate guidance as to what was and was not a federal crime. When squarely faced with the honest services statute this term, the Court, without any textual basis or legislative history to guide it, reached back to decades-old case law, predating the statute itself, to conclude that the “core” of the statute involved cases of bribery or kickbacks and, therefore, if limited to only those cases, the statute passed constitutional muster.

The majority’s mind-bending decision to effectively rewrite the honest services statute has been almost uniformly characterized by the media, legal scholars, and even seasoned white-collar criminal defense attorneys as a setback to the federal government’s attempt to “clean up” state and local government and corporate America.⁸

⁶ *Black v. United States*, 561 U.S. —, 130 S. Ct. 2963 (2010); *Weyhrauch v. United States*, 561 U.S. —, 130 S. Ct. 2971 (2010) (per curiam).

⁷ See Brief of Amicus Curiae Albert W. Alschuler in Support of Neither Party at 2–3, *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010) (No. 08-1196) (“The Courts of Appeals have offered three views of the significance of state law in federal prosecutions for honest-services mail fraud: (1) A violation of state law is necessary to establish a federal violation; (2) although a violation of state law can establish the central element of honest-services fraud (breach of fiduciary duty or misuse of office), the Government may also establish this element without proving any state law violation; and (3) state law violations are immaterial, as the term ‘honest services’ must have a uniform national meaning.”).

⁸ See, e.g., Adam Liptak, Justices Limit Use of “Honest Services” Law against Fraud, *N.Y. Times*, June 24, 2010, available at <http://www.nytimes.com/2010/06/25/us/25scotus.html> (“The Supreme Court . . . significantly narrowed the scope of a law often used by federal prosecutors in corruption cases[.]”); Lyle Denniston, “Honest Services” Law Pared Down: Three Cases, Three Rulings; Opinions Recapped, *Scotusblog.com* (June 24, 2010, 15:46 EST), <http://www.scotusblog.com/2010/06/honest-services-law-pared-down> (“Three separate rulings, threatening (though not quite

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As we will demonstrate below, the decision is hardly a blow to the federal government’s increasing encroachment on local political practices and culture, which should be the sole province of state and local governments. While the Court may have provided some modicum of clarity to a small subset of politicians and businessmen whose conduct cannot possibly be shoehorned into the definitions of bribes or kickbacks, the vagueness problem is far deeper and more pervasive than the Court’s opinion suggests. The underlying reason why these federal prosecutions are so problematic is that there are no clear, uniform national standards of ethics in local politics or corporate governance (nor should there be, many would argue). Yet the Department of Justice nonetheless attempts to dictate local political culture or corporate behavior via federal criminal prosecutions. Whether federal authorities attack local political arrangements or corporate conduct as the “deprivation of honest services,” or by deeming them “extortion,” “bribery,” or “kickbacks,” is irrelevant. In the end, these prosecutions are based on vague notions of criminality that are governed by the political motivations of whichever party or clique controls the Department of Justice or by the public outrage of the day.

Consider the Enron scandal, for example. There is one school of thought holding that Enron’s executives Kenneth Lay, Jeffrey Skilling, and others, engaged in “criminal greed” of the highest order, causing substantial financial losses to savvy investors, aging retirees, and their own employees. This theory is based on an assertion that these corporate executives concealed from investors the truth about Enron’s financial picture. However, the notion that they actually concealed the facts from investors was somewhat controversial from the start, since some financial analysts very early blew the whistle on the company’s true financial state, and others saw the true picture by simply paying sufficient attention to the details “hidden in plain

nullifying) convictions or prosecutions in three different criminal corruption cases, put an exclamation point on the defeat for government prosecutors in their efforts to salvage wide discretion in employing the so-called ‘honest services fraud’ law[.]’); Elizabeth MacDonald, *Skilling Ruling Could Affect Rite Aid, Adelphia, Qwest, AOL Cases, Emac’s Stock Watch* (June 24, 2010, 14:59 EST), <http://emac.blogs.foxbusiness.com/2010/06/24/skilling-ruling-could-affect-rite-aid-adelphia-qwest-aol-cases> (quoting MaryJeanette Dee, a white-collar criminal defense attorney and a partner at Richards Kibbe & Orbe as stating, “Many pending prosecutions and appeals will be affected”).

sight'' in the company's financial reports.⁹ Whether the defendants engaged in criminal conduct, therefore, was highly questionable to some market professionals, as well as to some federal prosecutors.¹⁰ Now, nearly a decade after the Department of Justice invested untold time and resources into the investigation of the scandal and the prosecution of major and minor players, the Court's decision may nullify the convictions of Skilling and others. Coupled with the fact that the Court had already unanimously vacated the conviction of Arthur Andersen LLP, Enron's longtime auditor, for its role in the scandal,¹¹ the *Skilling* decision suggests that federal prosecutors abused their wide discretion to pursue criminal prosecutions. These prosecutions should never have been initiated in the first place.

Instead of reining in this wasteful manipulation of the criminal justice system, the Supreme Court, in addressing the honest services fraud statute, left just enough wiggle room to allow federal prosecutions to continue anew their mission of dictating, via the abusive use of *in terrorem* prosecutions, the ethical code of conduct in local politics and the corporate boardroom.

II. Background of the Three Cases

A. *Jeffrey Skilling*

Jeffrey Skilling presided over one of the most catastrophic collapses in the history of American business. In 2001, Houston-based Enron Corporation, then the seventh-largest company in America and one of the leading energy companies in the world,¹² was accused of accounting irregularities that vastly overstated the company's earnings.¹³ Skilling, a longtime executive of the company, became its CEO in February 2001 and then abruptly resigned in August

⁹ See, e.g., Malcolm Gladwell, *Open Secrets: Enron, Intelligence, and the Perils of Too Much Information*, *The New Yorker*, January 8, 2007, available at http://www.newyorker.com/reporting/2007/01/08/070108fa_fact_gladwell.

¹⁰ Alexei Barrionuevo & Kurt Eichenwald, *The Enron Case That Almost Wasn't*, *N.Y. Times*, June 4, 2006, available at <http://www.nytimes.com/2006/06/04/business/yourmoney/04enron.html>.

¹¹ *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005).

¹² *Skilling*, 130 S. Ct. at 2907.

¹³ See *Timeline: The Fall of Enron*, *Houston Chronicle*, <http://www.chron.com/news/specials/enron/timeline.html> (last visited Aug. 25, 2010).

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2001.¹⁴ Within months, Enron’s share price plummeted from a peak of \$90 to virtually zero, and it filed for Chapter 11 bankruptcy.¹⁵ Skilling, along with Enron’s founder and chairman, Kenneth Lay, came to represent corporate excess, greed, and cronyism during the boom years of the late 1990s and early 2000s.

In response to the public outrage that ensued, the federal government initiated an investigation of Enron and ultimately prosecuted dozens of former Enron executives, as well as Arthur Andersen LLP, Enron’s auditor and, at the time, one of the five largest accounting firms in the country.¹⁶ On July 7, 2004, after working its way up Enron’s corporate ladder, the government sought and received grand jury indictments for Enron’s leadership, namely, Lay and Skilling, as well as Richard Causey, the company’s former chief accounting officer.¹⁷ The indictment alleged that each participated in a “wide-ranging scheme to deceive the investing public, including Enron’s shareholders . . . about the true performance of Enron’s businesses” by manipulating its financial results and making false and misleading public statements about its financial performance. Among numerous other counts, the indictment charged each defendant with conspiracy to commit securities and wire fraud based on the theory that they had “depriv[ed] Enron and its shareholders of the intangible right to [their] honest services.”¹⁸

The government’s theory of the case against Skilling at trial was straightforward and devastating. Prosecutors argued that Skilling violated his fiduciary duties to Enron’s shareholders and duties to its employees by taking improper measures to prop up the company’s share price, describing these duties as those of “honesty, candor, and fairness.”¹⁹ In its closing argument, the government claimed:

This is a simple case, ladies and gentlemen. Because it’s so simple, I’m probably going to end before my allotted time.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Skilling, 130 S. Ct. at 2907; Silverglate, *Three Felonies*, *supra* note 4, at 131.

¹⁷ Skilling, 130 S. Ct. at 2907.

¹⁸ *Id.* at 2908 (quoting indictment).

¹⁹ Brief for Petitioner at 3 & n.2, *Skilling v. United States*, 130 S. Ct. 2896 (2010) (No. 08-1394) (quoting Fifth Circuit record).

It's black-and-white. Truth and lies. The shareholders, ladies and gentlemen, . . . buy a share of stock, and for that they're not entitled to much but they're entitled to the truth. They're entitled for the officers and employees of the company to put their interests ahead of their own. They're entitled to be told what the financial condition of the company is. They are entitled to honesty, ladies and gentlemen.²⁰

Simple enough. But there was a problem with the application of this theory: the case against Enron and its executives was not so cut-and-dried. In fact, prosecutors privately expressed concerns about the problems in the case against Skilling, suggesting, for example, that the case exhibited "fundamental weaknesses" because he took "steps seemingly inconsistent with criminal intent," there were "no 'smoking gun' documents," and the case rested on the testimony of cooperating witnesses who had "marginal credibility."²¹ Indeed, the criminality of the defendants' conduct was not apparent, in large part, because Enron's accounting practices, though "legally questionable" and "extraordinarily risky," were openly disclosed in its financial reports and other public statements and approved by the company's auditor.²²

Despite these misgivings, the government successfully characterized Skilling's conduct as criminal in nature by relying on the honest services fraud theory, and the jury convicted Skilling of 19 counts.²³ The district court judge found that Skilling had "repeatedly lied to investors, including Enron's own employees, about various aspects of Enron's business" and, as a result, sentenced him to 24 years in prison, 3 years of supervised release, and \$45 million in restitution.²⁴ For the 52-year-old Skilling, it was effectively a term of life imprisonment.

Skilling appealed to the Fifth Circuit Court of Appeals raising, among other issues, a challenge to his conviction on the honest

²⁰ Gladwell, *Open Secrets*, *supra* note 9.

²¹ Brief for Petitioner, *supra* note 19, at 2 (quoting John C. Hueston, *Behind the Scenes of the Enron Trial: Creating the Decisive Moments*, 44 *Am. Crim. L. Rev.* 197, 197–98, 201 (2007)).

²² Gladwell, *Open Secrets*, *supra* note 9; Silverglate, *Three Felonies*, *supra* note 4, at 127.

²³ Skilling, 130 S. Ct. at 2911.

²⁴ Gladwell, *Open Secrets*, *supra* note 9; Skilling, 130 S. Ct. at 2911.

services fraud conspiracy charge. The court of appeals rejected Skilling’s claim that his conduct did not constitute conspiracy to commit honest services fraud, specifically finding that Skilling met all the elements of the crime, including: “(1) a material breach of a fiduciary duty imposed under state law, including duties defined by the employer-employee relationship, (2) that results in a detriment to the employer,” specifically one caused “by an employee, contrary to his duty of honesty, to withhold material information, i.e., information that he had reason to believe would lead a reasonable employer to change its conduct.”²⁵

B. Conrad Black

In 2005, federal authorities in Chicago focused their attention on Lord Conrad Black, then the CEO and controlling shareholder of the media company Hollinger International, Inc., which owned and operated several large newspapers, including the *Chicago Sun-Times*, and a number of small community newspapers.²⁶ Black, along with three former executives of the firm, were charged with multiple counts of mail and wire fraud for devising and participating in corporate compensation schemes arising from non-competition agreements designed “to defraud International and International’s public shareholders of money, property and their intangible right of honest services, to defraud the Canadian tax authorities of tax revenue, and to obtain money and property from these victims by means of materially false and fraudulent pretenses, representations, promises and omissions, in connection with the U.S. Community Newspaper Asset Sales.”²⁷

At trial, the government argued that Black and his colleagues “stole money from Hollinger by fraudulently paying themselves bogus and unapproved non-competition payments” and “that, in making the payments to themselves and failing to disclose them, [they] deprived Hollinger of their honest services as managers of the company.”²⁸ In the government’s view, that non-competition

²⁵ United States v. Skilling, 554 F.3d 529, 547 (5th Cir. 2009).

²⁶ Black v. United States, 130 S. Ct. 2963, 2966–67 (2010).

²⁷ First Superseding Indictment at 9, United States v. Black, No. 05 CR 727 (N.D. Ill. Nov. 17, 2005).

²⁸ Brief for the United States at 10, Black v. United States, 130 S. Ct. 2963 (2010) (No. 08-876).

agreement was worth little or nothing. But to Black, the nature of the agreement presented significant advantages under Canadian tax law,²⁹ and, to the willing buyers, removing an international media mogul from potential future business competition had its obvious upside as well. Thus, what was essentially a matter of business judgment governed by local law found the federal government second-guessing the parties to the sale by superimposing its own business judgments.

Following a four-month trial, the jury found the defendants, including Black, guilty of three of the mail fraud counts and also found Black guilty of obstruction of justice for removing file boxes from his office that were under protective order, but acquitted the defendants of nine other counts.³⁰ At the sentencing hearing, District Court Judge Amy St. Eve concluded, “Mr. Black, you have violated your duty to Hollinger International and its shareholders,” and sentenced him to six and a half years in prison and a fine of \$125,000.³¹

On appeal, the Seventh Circuit, in a surprisingly short and dismissive opinion written by Judge Richard Posner, affirmed defendants’ convictions.³² Characterizing some of defendants’ challenges as “ridiculous,” the court held there was sufficient evidence of “conventional fraud” demonstrating “a theft of money or other property from Hollinger by misrepresentations and misleading omissions amounting to fraud, in violation of 18 U.S.C. § 1341.”³³ Posner also concluded that the conduct of Black and his colleagues satisfied the elements of honest services fraud under § 1341, holding that “[they] had a duty of candor in the conflict-of-interest situation in which they found themselves. Instead of coming clean they caused their corporation to make false filings with the Securities and Exchange Commission, and they did so for their private gain.”³⁴ The court of

²⁹ *Id.* at 9.

³⁰ *Id.*

³¹ Mary Vallis & Theresa Tedesco, Conrad Black Sentenced to More than Six Years in Jail, *Nat’l Post*, Dec. 13, 2007, p. 1, available at <http://www.nationalpost.com/news/canada/Conrad+Black+gets+years+prison/156762/story.html>.

³² See *United States v. Black*, 530 F.3d 596 (7th Cir. 2008).

³³ *Id.* at 599, 600.

³⁴ *Id.* at 602.

appeals also rejected Black’s challenge to his obstruction of justice conviction.³⁵

C. Bruce Weyhrauch

In 2006, federal authorities in Alaska raided the offices of a number of state legislators in connection with the government’s investigation of financial ties between VECO Corporation, an oil field services company, and several Alaska legislators. One of the politicians subjected to the raid was Bruce Weyhrauch, a licensed attorney and member of the Alaska House of Representatives representing Juneau since 2002.³⁶ Following the raid and subsequent investigation, the federal government indicted a dozen individuals, including Weyhrauch, U.S. Senator Ted Stevens, and VECO CEO Bill Allen.³⁷ The indictment against Weyhrauch alleged that he, former House Speaker Pete Kott, and VECO employees devised and participated in a scheme “to defraud and deprive the State of Alaska of the honest services of Kott and [Weyhrauch] performed free of deceit, self-dealing, bias, and concealment.”³⁸ The specific charges against Weyhrauch are predicated on his failure to disclose to his constituents that he allegedly attempted to gain future legal work from VECO upon his retirement from the legislature in return for voting on a tax measure favored by the company. However, the government ran into an obstacle in the case—there was no state law or local rule compelling disclosure under such circumstances.³⁹

Absent any state law or local ordinance to support its conflict-of-interest theory, the government attempted to introduce at trial evidence of Alaska ethics practices, the ethics training provided to Weyhrauch as a legislator, and Weyhrauch’s own position on the legislature’s ethics committee.⁴⁰ The district court granted Weyhrauch’s motion *in limine* to exclude the evidence, finding that no Alaska statute or rule required Weyhrauch to publicly disclose his

³⁵ *Id.* at 603–05.

³⁶ Brief for Petitioner at 7, *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010) (No. 08-1196).

³⁷ *Id.* at 10.

³⁸ *Id.*

³⁹ *Weyhrauch v. United States*, 548 F.3d 1237, 1240 (9th Cir. 2008).

⁴⁰ *Id.* at 1239–40.

negotiations with VECO before he took official action on the legislation at issue.⁴¹

The government filed an interlocutory appeal challenging the district court's ruling, which the Ninth Circuit Court of Appeals reversed on the grounds that a defendant may be convicted of honest services fraud without "proof that the conduct at issue also violated applicable state law."⁴² The court of appeals further held that the government could proceed in its case against Weyhrauch, as the alleged conflict of interest and/or quid pro quo arrangement "falls comfortably within the two categories long recognized as the core of honest services fraud."⁴³

III. The Supreme Court Invents a New Federal Crime

Federal law criminalizes use of the mails or wire communications to advance any "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."⁴⁴ More than two decades ago, in *McNally v. United States*, the Supreme Court rejected the theory that this language proscribed public and private corruption that deprived individuals of their so-called intangible right to the honest and impartial services of their political representatives and fiduciaries.⁴⁵ Specifically, the Court declined to "construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials" and called on Congress "to speak more clearly than it has" should it "desire[] to go further."⁴⁶ Responding swiftly, Congress enacted a 28-word statute that purported to clear up the ambiguity in the law, stating, "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."⁴⁷

⁴¹ *Id.*

⁴² *Id.* at 1239.

⁴³ *Id.* at 1247.

⁴⁴ See 18 U.S.C. §§ 1341, 1343 (2006).

⁴⁵ 483 U.S. 350, 356 (1987).

⁴⁶ *Id.* at 360.

⁴⁷ 18 U.S.C. §1346 (2006).

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There can be no doubt that, in the wake of *McNally*, Congress replaced an ambiguously interpreted law with a patently vague statute. Indeed, it offered no definition or guidance regarding the term “honest services.” Since its enactment, federal prosecutors have exercised the wide discretion afforded by the statute to root out political corruption and corporate fraud. In an attempt to limit the scope of these prosecutions, federal courts have come up with various contradictory interpretations of the statute to save it from invalidation.⁴⁸ In his blistering dissent from the Supreme Court’s denial of certiorari in an honest services case in the Court’s previous term, Justice Antonin Scalia wrote, “Without some coherent limiting principle to define what ‘the intangible right of honest services’ is, whence it derives, and how it is violated, this expansive phrase invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct.”⁴⁹

When it finally faced this issue in the *Skilling*, *Black*, and *Weyhrauch* cases this term, the Court suggested that it had, indeed, found that coherent limiting principle. Justice Ruth Bader Ginsburg, writing for a 6–3 majority, including Chief Justice John Roberts and Justices John Paul Stevens, Stephen Breyer, Samuel Alito, and Sonia Sotomayor, rejected *Skilling*’s argument that the honest services statute is impermissibly and fatally vague. Instead, the Court explained that “§ 1346 should be construed rather than invalidated.”⁵⁰ Without any textual authority or legislative history to guide its interpretation of the statute’s language, the Court instead took an inventive but dubious two-step approach to save the statute from invalidation—ostensibly in accord with the majority’s stated aim of judicial modesty, shying away from invalidation of a statute on constitutional grounds. First, the majority attempted “to ascertain the meaning of the phrase ‘intangible right of honest services.’”⁵¹ To that end, the Court stated,

⁴⁸ *Skilling*, 130 S. Ct. at 2928 n.37 (“Courts have disagreed about whether § 1346 prosecutions must be based on a violation of state law . . . ; whether a defendant must contemplate that the victim suffer economic harm . . . ; and whether the defendant must act in pursuit of private gain . . .” (internal citations omitted)).

⁴⁹ *Sorich v. United States*, 555 U.S. ___, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari).

⁵⁰ *Skilling*, 130 S. Ct. at 2928.

⁵¹ *Id.*

with little explanation, that the “intangible right of honest services” refers to “the honest-services doctrine recognized in the Court of Appeals’ decisions before *McNally*.”⁵² While the majority acknowledged “there was considerable disarray over the statute’s application” in pre-*McNally* case law, it nonetheless concluded that, in cases of bribery and kickbacks, there was no such confusion.⁵³

In light of this apparent clarity, the Court proceeded to the second step of its analysis by “par[ing] that body of precedent down to its core,” which the majority concluded consisted of “fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived.”⁵⁴ In order to avoid constitutional invalidation, the Court therefore held that “§ 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law.”⁵⁵ The Court excluded from its formulation the more amorphous outer boundaries of the statute, namely, undisclosed self-dealing by a public official or private employee—the very theories of guilt under which *Skilling* and *Black* were convicted and for which *Weyhrauch* was indicted.⁵⁶ In light of this holding, the Court remanded the *Skilling* case to the Fifth Circuit to determine whether the flawed jury instruction on the honest services fraud charge was harmless error.⁵⁷ The Court also remanded the *Black* case for harmless error review and recognized that his obstruction of justice charge may have been tainted by the flawed instruction on the honest services charge, and remanded the *Weyhrauch* case to reconsider whether the prosecution against him should go forward.⁵⁸

The concurrence, authored by Justice Scalia and joined by Justices Anthony Kennedy and Clarence Thomas, tears into the majority’s seemingly deferential, modest, and elegant holding. Justice Scalia observed that, by transforming the statute from “a prohibition of ‘honest services fraud’ into a prohibition of ‘bribery and kickbacks,’”

⁵² *Id.*

⁵³ *Id.* at 2929.

⁵⁴ *Id.* at 2928.

⁵⁵ *Id.* at 2896–97 (emphasis in original).

⁵⁶ *Id.* at 2931.

⁵⁷ *Id.* at 2934. It should be noted that the Court rejected *Skilling*’s other argument that his jury pool was tainted and, therefore, constitutionally unfair, because he was tried in a charged atmosphere in Houston, where Enron was based. *Id.* at 2912–25.

⁵⁸ *Black*, 130 S. Ct. at 2970; *Weyhrauch*, 130 S. Ct. 2971.

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the Court “wield[s] a power we long ago abjured: the power to define new federal crimes.”⁵⁹ Specifically, Justice Scalia recognized that the majority’s attempt to narrow the statute was based on several fallacies. First, contrary to the Court’s suggestion, Justice Scalia observed that prior to (and following) *McNally*, the lower courts were hopelessly confused and recognized that honest services fraud could range from

any action that is contrary to public policy or otherwise immoral, to only the disloyalty of a public official or employee to his principal, to only the secret use of a perpetrator’s position of trust in order to harm whomever he is beholden to. The duty probably did not have to be rooted in state law, but maybe it did. It might have been more demanding in the case of public officials, but perhaps not.⁶⁰

According to Justice Scalia and the other concurring justices, the majority’s assumption that Congress adopted a clear body of precedent when it enacted the “intangible right” theory of honest services “is a step out of the frying pan into the fire.”⁶¹

The concurrence also took issue with the Court’s assumption that Congress intended the statute to encompass only bribes and kickbacks. Simply because the Court can now distill a paradigmatic or pure application of the honest services doctrine, with the benefit of hindsight, does not mean that Congress, when it enacted the statute in 1988, intended it to be so limited. “That,” according to Justice Scalia and his concurring colleagues, “is a dish the Court has cooked up all on its own.”⁶² Moreover, as Justice Scalia explained in his concurrence, limiting the statute to bribery and kickbacks does not eliminate the vagueness of the statute because

it does not solve the most fundamental indeterminacy: the character of the “fiduciary capacity” to which the bribery and kickback restriction applies. Does it apply only to public officials? Or in addition to private individuals who contract

⁵⁹ *Skilling*, 130 S. Ct. at 2935 (Scalia, J., concurring in part) (citing *United States v. Hudson & Goodwin* 11 U.S. (7 Cranch) 32 (1812)).

⁶⁰ *Id.* at 2938.

⁶¹ *Id.*

⁶² *Id.* at 2939.

with the public? Or to everyone, including the corporate officer here? The pre-*McNally* case law does not provide an answer. Thus, even with the bribery and kickback limitation the statute does not answer the question “What is the criterion of guilt?”⁶³

The Court summarily rejected the inherent indeterminacy of the meaning of “fiduciary duty” as “rare in bribe and kickback cases” and “beyond dispute.”⁶⁴ However, it failed to provide answers to the questions raised by the concurrence, leaving it for the lower courts to grapple with. In fact, although it cited as examples federal statutes and case law defining bribes and kickbacks, the Court failed to even define with specificity whether state or federal law applies to determine the elements of those crimes. In a footnote, the Court recognized that Congress “would have to employ standards of sufficient definiteness and specificity to overcome due process concerns” in order to criminalize undisclosed self-dealing by a public official or private employee.⁶⁵ Yet it did not employ the same standard of specificity and definiteness with respect to the pared-down statute that remains.

According to the concurrence, in order to reach its conclusion to save a patently vague statute, the Court engaged in an exercise of judicial “invention” by rewriting the statute.⁶⁶ This, in the opinion of Justice Scalia and the other concurring justices, was not an act of “judicial humility,” as claimed by the majority, but instead was an act of judicial legislating. The concurrence would have invalidated the convictions of Skilling and Black as unconstitutionally vague as applied to them.

However, even the concurrence overlooked a more serious problem in the majority opinion. By rewriting the statute in a manner thought by the majority to narrow the statute’s judicially prescribed ambit—according to congressional intent, so the majority posited—the majority actually included within the federal statute’s prohibition a wide variety of acts that would be *lawful* under *state* and *local* statutes and ordinances, not because such statutes and ordinances

⁶³ *Id.* at 2938–39.

⁶⁴ *Id.* at 2931 n.42.

⁶⁵ *Id.* at 2933 n.45.

⁶⁶ *Id.* at 2939 (Scalia, J., concurring in part).

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inadvertently omitted them from their ambit, and not because state and local prosecutors corruptly or incompetently looked the other way, but because the practices at issue might have been consistent with state and local political culture and practice. In short, the major defect of the vague federal honest services statute might well have been that it criminalized activities that were intentionally lawful under state and municipal law. But surely the legality of certain practices under state and local laws should be considered by the federal courts when they are called on to decide whether a *vague* federal prohibition should be deemed to outlaw accepted state and local practices. Of course, the newly minted definition of “honest services” also encompasses practices that have long been *criminalized* by state and local law, and while in such instances there is *no conflict* between federal and state laws, one does have to ask why the redundant federal statute is even necessary.

IV. Discussion

A. The Court Redefines the Vagueness Doctrine

A statute is unconstitutionally vague when it fails “to provide a person of ordinary intelligence fair notice of what is prohibited, or if it is so standardless that it authorizes or encourages seriously discriminatory enforcement.”⁶⁷ In an earlier era, the Supreme Court readily recognized the risk of vague statutes:

It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.⁶⁸

⁶⁷ *United States v. Williams*, 553 U.S. 285, 304 (2008); see also U.S. Const. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law[.]”); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (“[A] penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (“[L]aws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.”).

⁶⁸ *United States v. Reese*, 92 U.S. 214, 221 (1875).

The vagueness doctrine is particularly applicable to criminal laws, which are to be strictly construed.⁶⁹ This principle, as Chief Justice John Marshall recognized long ago, “is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.”⁷⁰

The honest services statute, and the Court’s strained effort to save it from constitutional invalidation, reflect an unmooring of federal criminal laws from these fundamental principles. Even more disconcertingly, however, these principles have been distorted in a misguided attempt to protect the widespread use of federal criminal prosecutions in various areas, from national security to public corruption and white-collar fraud.

The plain language of the 28-word honest services statute provided no clue as to its meaning, and there was no substantive legislative history to guide the Court. The Court’s inquiry should have ended there. With respect to vagueness and the rule of lenity, the Court has recognized that “[w]hen interpreting a criminal statute, we do not play the part of mind reader”⁷¹ and that “[o]nce the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end.”⁷² Instead of relying on this principle, rooted in the vagueness doctrine and the rule of lenity, the *Skilling* majority relied on the canon of constitutional avoidance “to construe, rather than condemn Congress’ enactments,” reaching back to decades-old case law to divine congressional intent in enacting the honest services statute.⁷³ As Justice Scalia’s concurrence made clear, the majority’s ultimate interpretation—that the honest services statute is limited to its bribery and kickback “core”—is inconsistent with the legislature’s intent, which was to restore pre-*McNally* case law supporting the intangible rights theory of fraud. As even the majority admitted, the lower courts prior to *McNally* imposed the theory on a range of conduct beyond simply bribes and kickbacks. There is no support, either in case law,

⁶⁹ *United States v. Enmons*, 410 U.S. 396, 411 (1973).

⁷⁰ *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

⁷¹ *United States v. Santos*, 553 U.S. 507, —, 128 S. Ct. 2020, 2026 (2008).

⁷² *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194–95 (1978) (Burger, C.J.).

⁷³ *Skilling*, 130 S. Ct. at 2930–31.

legislative history, or the text of the statute itself, for the majority’s suggestion that Congress intended to limit the statute to bribes and kickbacks.

Moreover, to reach this conclusion, the majority engaged in a form of common law-making by examining the underlying fact patterns of pre-*McNally* cases and attempting to identify a common standard most consistent with the results reached by these courts. For better or worse, the Court long ago relinquished its ability to create a federal common law. Only three decades after the Revolutionary War, a Pennsylvania federal court dismissed a bribery case because Congress had not enacted a bribery statute. The court ruled that federalism and the limited jurisdiction of federal courts precluded the existence of federal common-law crimes. The Supreme Court agreed, and, in *United States v. Hudson & Goodwin*, went on to announce that federal crimes were entirely creatures of congressional statute rather than judge-made common law.⁷⁴ “[W]hen assessing the reach of a federal criminal statute,” the Court later held, “we must pay close heed to language, legislative history, and purpose in order to strictly determine the scope of the conduct the enactment forbids.”⁷⁵ Thus, when the *Skilling* Court attempted to engage in common-law interpretation by analyzing pre-*McNally* case law rather than accepting the vague text of the statute, it failed to heed this longstanding principle set forth in *Hudson & Goodwin*. Furthermore, the *Hudson & Goodwin* decision clearly established that Congress, in writing statutes and the federal courts in interpreting them, do not have the full benefit of the common law’s wisdom and experience.⁷⁶ The *Skilling* majority compounds the highly destructive effects of this decision not only by failing to pay close heed to the text and legislative history of the statute but also by relying on case law that predated the statute and was itself unhinged from the common law. Indeed, the federal courts’ various contradictory decisions on the honest services statute reflect their detachment from the common law’s emphasis on the requirements of clarity and “fair notice.”

⁷⁴ 11 U.S. (7 Cranch) 32, 34 (1812).

⁷⁵ *Dowling v. United States*, 473 U.S. 207, 213 (1985) (citing *Liparota v. United States*, 471 U.S. 419, 424 (1985)).

⁷⁶ See Harvey Silverglate, *Federal Criminal Law: Punishing Benign Intentions*, in *In the Name of Justice: Leading Experts Reexamine the Classic Article “The Aims of the Criminal Law”* 67–68 (Timothy Lynch ed., 2009).

Professor Henry Hart recognized in his seminal essay, “The Aims of the Criminal Law,” that such a detachment is a risk when society has transformed its criminal laws from merely prohibiting *malum in se* acts—that is, acts in which the blameworthiness is self-evident because the behavior in question is “intrinsically antisocial”—to also outlawing *malum prohibitum* acts—behaviors, such as the kind at issue in the honest services case, that are not intuitively evil but are barred by the legislature to “secure some ultimate social advantage.”⁷⁷ In order for an offender to be considered “blameworthy” of the latter acts, Hart reasoned, he must be given fair notice that the conduct in question is prohibited and he must have willfully ignored this warning.⁷⁸ “[K]nowing or reckless disregard of the legal obligation affords an independent basis of blameworthiness justifying the actor’s condemnation as a criminal, even when his conduct was not intrinsically antisocial.”⁷⁹ As the law shifts from the *malum in se* to the *malum prohibitum* framework, as the federal criminal scheme clearly has, Hart recognized that “it necessarily shifts its ground from a demand that every responsible member of the community understand and respect the community’s moral values to a demand that everyone know and understand what is written in the statute books.”⁸⁰ If those statute books become too confusing and impractical, wrote Hart, they also become useless and unjust.⁸¹ In this way, Hart pinpointed a necessary level of moral authority imbued in the criminal law. After all, to punish individuals for committing acts they had no reasonable way of knowing constituted crimes would be the moral equivalent of punishing an infant or a person with severely diminished mental capacity—something that the Western legal tradition has long avoided in order to preserve the moral underpinnings of the criminal law.⁸²

As the *Skilling* decision demonstrates, the principles in Hart’s monumentally important essay have been evaded by a steady erosion of this fundamental moral requirement in the law—punishing

⁷⁷ *Id.* at 65–66.

⁷⁸ *Id.*

⁷⁹ *Id.* at 66.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

only conduct committed in knowing violation of the criminal law—in the enforcement and interpretation of federal criminal statutes. Federal prosecutors find it easier to pursue criminal prosecutions at their whim when they are enforcing statutes with no apparent definitions of what constitutes the prohibited conduct—a luxury not available to prosecutors enforcing most state laws. Such statutes become a kind of roving commission, enabling federal prosecutors, within their respective districts, to single out political figures, businesspeople, political activists, and others whose practices are found unpopular, irksome, or otherwise offensive. As set forth below, that the Supreme Court chose to “pare down” rather than strike down a vague statute more than two decades after its enactment is not a solution to the fair notice problem in public and private corruption cases, nor does it give any comfort to the defendants who were long ago convicted of the vague portion of the crime and have served their sentences.

B. Vague Laws Permit the Continued Federalization of State Criminal Law

Academic discussions and judicial decisions concerning vagueness problems inherent in federal honest services and other public corruption prosecutions of state and local officials barely scratch the surface of the fundamental concern. In particular, solutions such as that adopted by the Supreme Court majority in *Skilling*—to limit the scope and meaning of the honest services statute to bribery and kickback schemes—are hardly solutions at all, since the vagueness problem afflicts federal definitions of bribery and kickback schemes themselves. This problem is particularly egregious when federal prosecutors go after state and local politicians, whether under honest services or extortion or other such statutes, for engaging in practices that are *not* criminalized under state and municipal law. Thus the majority’s apparent resolution does not, as a practical matter, represent a move toward clarification of federal corruption laws.

Lawyers whose clients face indictments in this arena—and, of course, their public official clients—have a bird’s-eye view of the abuse of the honest services and related formulations that inject both life and reality into problems of statutory vagueness and due process. The very undertaking by federal officials to control local political culture rather than restrict their oversight to practices that clearly

interfere with interstate commerce or other core federal constitutionally designated interests virtually invites abuse. Add to this the litany of laws prosecutors can employ, and vagueness becomes a central problem. Put another way, as long as federal prosecutors and courts attempt to superimpose federal standards on local political culture, there is going to be a problem—perhaps best described as vagueness, but also demonstrating simply a clash of cultures—that traps even the well-intentioned state or local politician.

The situation is a quite practical one, hardly academic and theoretical, for the trial lawyer and his or her public official client. To understand how the statute unfairly traps even the innocent and well-meaning state or local public official, it is necessary to examine in some detail how these public officials, and the honest services and related corruption statutes, function “on the ground.”⁸³

Throughout the 1980s, state and federal investigators launched several probes into allegations of corruption among local political bodies in Hialeah, Florida, a heavily Cuban-American city just outside Miami. The *Miami Herald* published a series of articles in 1985 claiming that members of the Hialeah Zoning Board and City Council were “selling” their votes to developers in exchange for receiving lots or shares in the projects. As bad as that sounds, it’s important to put these allegations in context. Florida laws governing local political office-holders are similar to those in most states. Local politicians are allowed, if not encouraged, to maintain private careers and businesses to support themselves and their families. Salaries paid to such political figures typically are modest, necessitating that anyone other than those with inherited or previously earned wealth maintain an income-generating occupation while in public office.

In the 1980s, members of the Hialeah Zoning Board were unsalaried volunteers, while city councilors were paid a mere \$2,600 per year, and the mayor’s salary hovered around \$50,000. Since such officials are paid so little in their elected positions, it might well be seen as a perk of office that one is allowed to parlay one’s importance and prestige into increased business success. At the very least, state and local laws and political culture tolerate local officials’ engaging

⁸³ The following discussion relies heavily on the longer rendition of the Raul Martinez case in Chapter 1 of Harvey Silverglate’s book, *Three Felonies a Day: How the Feds Target the Innocent*. See *supra* note 4.

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in private business dealings that almost certainly benefit from their holding municipal office, as long as they do not engage in official acts, such as voting on municipal bodies on matters that directly affect their own financial interests. In an area where real estate development was exploding and where local city councils and zoning boards maintained dockets crowded with petitions for enactment of or relief from laws, some degree of fusion between civic and professional work among local officials was almost certainly inevitable and, indeed, even intended.

What is crucial to bear in mind here is that states and municipalities do prescribe limits to these relationships, often in fairly straightforward terms. Typically, state and municipal conflict-of-interest laws prohibit public officials from playing both ends of a project or business venture. There are also statutes prohibiting bribery and extortion. It is not as if these states and municipalities are lawless no-man’s-lands screaming for the feds to march into town to redefine what is acceptable political culture.

Indeed, the state of Florida did not neglect Hialeah, nor its highly popular mayor, Raul Martinez. Elected to the Hialeah City Council in 1977 and to the mayor’s office four years later, the highly popular Cuban-American, like many successful professionals in that fast-growing part of the state, dabbled in real estate development in addition to his career in public office. But to some in the local news media, Martinez’s careers were too close, and their coverage led to state authorities’ launching an investigation into whether he had parlayed his public office into improper personal gain. Finding neither bribery nor extortion to pin on the mayor, however, state investigators closed their inquiry in 1989.

Still, the federal investigation continued, and, after the death of long-time Democratic Congressman Claude Pepper, federal prosecutors ramped it up. The U.S. Attorney at the time was Dexter Lehtinen, whose wife expressed interest in replacing Pepper when he had fallen ill.⁸⁴ But it was widely thought that the up-and-coming Martinez was being groomed for Pepper’s seat. Sure enough, when the corruption investigation made its way into the press, Martinez

⁸⁴ Alfonso Chardy, Sources: Lehtinen Rushed Probe after Pepper Fell Ill, *The Miami Herald*, Feb. 17, 1991.

dropped out of the congressional race. Ileana Ros-Lehtinen, the U.S. Attorney's wife, sought and won Pepper's seat after his death.

This political setback quickly became the least of Martinez's problems. On April 3, 1990, he was charged in a complex, 64-page indictment alleging, at its center, a "racketeering conspiracy" and the crime of extortion under the federal Hobbs Act. This indictment did not rely on supposedly vague formulations such as honest services fraud. Instead, it focused on the kinds of federal offenses held by the Supreme Court majority in *Skilling* to resolve any vagueness concerns. But in reality, the prosecution of Martinez evidenced the same infirmities as did the *Skilling* and other honest services cases.

The indictment alleged that real estate developers cut Martinez in on deals by selling him parcels of property at below-market prices, which prosecutors considered to be an extortionate arrangement. A typical deal for which Martinez was indicted was the Marivi Gardens project, purchased and developed by one Silvio Cardoso, a Hialeah City Council member and friend of the mayor. Cardoso believed that if Martinez were a partner in the project, it would attract buyers for the completed units.⁸⁵ Martinez indicated his interest, and Cardoso signed the purchase contract for the undeveloped property in January 1983. Martinez told Cardoso that he wanted to purchase one of the lots, but Cardoso replied that he intended to give, not sell, the lot to his valued business associate and political ally.

To the feds, this mutually beneficial arrangement was the stuff of extortion. Yet Cardoso testified that he and Martinez never discussed anything that Cardoso expected Martinez to do. And, it must be recalled, Cardoso by this time was an immunized cooperating witness for the government, under pressure to help the prosecution. Nonetheless, he never said that Martinez had ever threatened him in any way. Nor did Martinez threaten to veto Cardoso's zoning applications, even though a veto was within his power. Cardoso testified that his motive was more generalized: "I felt it would be to my benefit politically, and economically in the future."

As a result, Cardoso transferred the gift lot to Martinez, who duly declared it as income on his 1984 tax return. Three years later, Martinez sold the lot for \$45,000. As Cardoso had anticipated, when

⁸⁵ Transcript of Record at 40, *United States v. Martinez*, 14 F.3d 543 (11th Cir. 1994) (Nos. 91-5619 & 92-4668) (testimony of Silvio Cardoso).

he ran for election to the city council in 1983, Martinez not only contributed to his campaign and helped get others to do so, he also escorted the candidate around Hialeah's campaign trail. Martinez even advised on the preparation of campaign literature. Cardoso was right: a business and friendship relationship with a popular and successful public official was not bad for business or political life.

Another government witness, Renan Delgado, testified similarly in connection with another real estate deal, Steve's Estates. Delgado sold property to Martinez on favorable terms, explaining that Martinez provided useful advice and assistance in his business. At trial, Delgado elaborated on the nature of his relationship with Martinez, and the rather obvious (and perfectly legal) business advantages: "If you're in business in a city, in any city, you want to be friend[s] with your people that run the city." Delgado explained that while he would have wanted to receive more of the money on the deal and give Martinez a less favorable price for the lots the mayor purchased, his decision to accept less money was "voluntary."

At this point, it helps to step back and take a look at the law federal prosecutors used to go after Martinez. The Hobbs Act was enacted in 1951 during a period of public outcry over organized crime, essentially to deter extortionate threats by both private thugs and public officials seeking payoffs. The situation of public officials is, of course, different from that of gangsters. The latter could threaten citizens with all manner and kinds of violence to extract payments or property. Corrupt public officials have a different tool to induce citizens to fork over money: the power inherent in political office by which officials can enrich or ruin private parties seeking government approval, assistance, or forbearance on a project. Public-sector extortion is in another way very different from extortion involving the neighborhood leg breaker. In our political system, citizens who run for public office often have to raise significant sums of money to finance their campaigns. Campaign contributors sometimes donate out of a sense of civic virtue. Often their motive has something to do with official or unofficial legislative or executive support, or simply "greasing the wheels" for a project.

Under federal law, bribery of state officials (typically payments initiated by the citizen) is not a distinct federal crime, although it might be punishable under circumstances in which the citizen uses the mails or other tools of interstate commerce to carry out a violation

of state law. Only extortion engaged in by the official violates the Hobbs Act.⁸⁶

Theoretically, this law is meant to prevent and punish the disruption to interstate commerce, over which the Constitution gives the federal government much control, when local officials impede economic and commercial activity by blocking projects unless paid off. A major purpose of such regulation of interstate commerce has been to remove untoward burdens on the free flow of commerce. A state cannot, for example, selectively impose a tax on products made in and exported from another state, as this would disadvantage and hence slow the flow of goods from one state to another. And so, in theory, it seems reasonable for the federal government to forbid state and local officials from superimposing a “corruption tax” on economic activity.

The trouble commenced because the Supreme Court interpreted the Hobbs Act in a way that eliminated any meaningful distinction between extortion and bribery. It regards payment to a state or local official as inherently a product of the official’s position and power. This interpretation becomes a serious problem for local officials who choose to continue their businesses and professions while holding public office, as we shall see in the Martinez case. Indeed, the prosecution of Raul Martinez by Dexter Lehtinen’s office demonstrates the ways in which the lack of clarity inherent in the Hobbs Act can be a prescription not so much for keeping interstate commerce free of debilitating corruption but rather for arbitrary federal intervention into local political systems and, not so incidentally, perhaps evening political scores and affecting electoral outcomes.

⁸⁶ The Hobbs Act reads, in relevant part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(2) The term “extortion” means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

18 U.S.C. § 1951 (2006).

At bottom, the prosecution's case at the trial was all over the place: The mayor had used, or taken advantage of, or merely benefited from his official position in order to coerce, or accept, financial tribute from those whom he had the power to hurt or to refrain from helping. A delicate dance was played out, the feds alleged, between a fawning, sycophantic, and generous citizen-businessman, and a powerful local pol who remained in private business during his term in elective office and did not wall himself off from projects requiring government approvals.

Interestingly enough, Martinez's *defense* sounded very much like the government's *prosecution* theory. Businessmen gave Martinez good deals to encourage an alliance with them and their enterprises, because they believed that their association with Martinez would be of enormous benefit to them. To the U.S. Attorney's office, this was an extortionate (threatening) use of Martinez's official power. To the defense, it was a natural result of the combination of Martinez's golden career prospects, his official position and myriad contacts, and the realities and normal expectations of local politics involving, in particular, public officials who earn only token compensation.⁸⁷

If there are to be legal limitations to this cozy and quite logical symbiotic arrangement, it would have to be imposed by clear conflict-of-interest or other laws limiting the business activities of public officials. It would also have to be accompanied, presumably, by increasing their salaries, without which there would be a clear risk that the middle class would absent itself from running for local elective office. Were public officials not allowed to earn a living while serving in public positions that pay very little, government would become the fiefdom of the wealthy (or, of course, the thoroughly corrupt). Martinez's business activities were conducted in the open, with money passing by check, not cash, and with properties passing by legal title held in the name of the mayor, not of a straw man. And still, he was indicted for extortion.

⁸⁷ The defense pointed out to the jury that in Hialeah, as in most of Florida at the time, local political officials were expected to maintain outside employment and business interests. It's worth keeping in mind, too, that in addition to traditionally low salaries for these offices, there is the matter of campaign expenses. Cardoso testified that in 1983 he spent some \$100,000 on his own campaign and won a position that paid only \$17,000 per year.

As Martinez's first trial concluded, it appeared that the scales were tipping toward the prosecution. Just before trial, Judge James Kehoe instructed the jurors about the law that would govern their deliberations. The prosecutors argued to the judge that the Hobbs Act did not require them to demonstrate a so-called specific quid pro quo, that is, something of value given by the public official to the businessman in exchange for something of value from the businessman. To convict Martinez, they had to prove only that the mayor engaged in merely "passive acceptance" of the benefits that his business dealings could bring him, "so long as the defendant knew or believed that the benefits he was receiving [were] motivated by a hope of influence." Betraying their complete ignorance of—or perhaps contempt for—the workings of local politics and the economic realities facing middle class candidates, the prosecutors added that "if a politician wants to make money in business transactions, then he can stay out of politics."⁸⁸

Judge Kehoe bought the prosecution's argument and explained to the jury that the "passive acceptance of a benefit" by a public official constituted extortion "if the official [knew] he had been offered the payment in exchange for the exercise of his official power" or—and here is the rub that likely got Martinez convicted—"that such payment [was] motivated by hope of influence." As for the question of whether Martinez was "entitled" to the property given to him, that is a somewhat slippery concept. While Cardoso did not "owe" Martinez participation in the deal, the developer did perceive a business benefit to himself by involving the popular politician.

Given the testimony and the jury instructions, it was no surprise that the jury, while acquitting on several of the projects, convicted Martinez of extortion relating to four of the deals. On July 22, 1991, Judge Kehoe sentenced Martinez to a 10-year prison term. Martinez, now a convicted felon, nonetheless won reelection while awaiting appeal; and in 1994 the Court of Appeals for the Eleventh Circuit reversed Martinez's conviction, ruling that Judge Kehoe had erred in his instructions to the jury by blurring the line between extortionate threats and other non-threatening arrangements by which a citizen

⁸⁸ Brief for the Appellant at 51 *United States v. Martinez*, 14 F.3d543 (11th Cir. 1994) (Nos. 91-5619 & 92-4668).

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might do business with a politician.⁸⁹ After a second trial resulted in a deadlocked jury and the prosecutors’ bizarre decision to pursue a third trial ended in acquittals on some counts and deadlock on others, the government finally gave up.

The use of the extortion formulation in the *Martinez* case demonstrates with clarity and some drama the real-world consequences of federal prosecutors using even a statute *not* widely viewed as vague—and now deemed by the Supreme Court to constitute the heart of the deprivation of “honest services”—to pursue state and local public officials who, while operating fully in accord with state and local laws and political culture, can suddenly find their careers derailed and their lives trashed because it did not occur to them that following state and local rules would not necessarily protect them from a federal prosecution under federal statutes that give little useful—and certainly no protective—guidance.

C. The Skilling Decision Does Not Make a Dent in the Inevitable Federalization of Criminal Law

As demonstrated by federal prosecutors’ use of the Hobbs Act to prosecute Hialeah Mayor Raul Martinez, the Supreme Court’s “paring down” of the honest services statute still leaves federal prosecutors with an arsenal of legal weapons aimed at criminalizing acts of public and private corruption. These federal statutes will likely be utilized by prosecutors in much the same way they have exploited the vaguely construed intangible rights fraud theory for so many years. However, the impact of the *Skilling* case is that federal statutes now merely criminalize what is already prohibited under state law in all 50 states, namely, acts of bribery and extortion. This fact raises the question of why federal intervention is necessary in those areas, like public corruption and corporate fraud, where state and local policymakers have already spoken and no discernable federal constitutional interests appear to exist.

⁸⁹ The Eleventh Circuit also found that jurors had improperly considered outside materials, which contributed to its decision to reverse the lower court’s verdict and grant Martinez a new trial. See *United States v. Martinez*, 14 F.3d 543, 550–51 (11th Cir. 1994). Unfortunately, the court of appeals, relying on Supreme Court opinions in the cases *McCormick v. United States*, 500 U.S. 257 (1991) and *United States v. Evans*, 504 U.S. 255 (1992), was little clearer on the definition of extortion than was Judge Kehoe. See *Martinez*, 14 F.3d at 552–53.

As set forth above, the *Skilling* decision did not invalidate the statute, but instead simply bars from federal prosecution a narrow category of honest services fraud cases, specifically those involving nondisclosure of conflicts of interest or self-dealing. While the Court limited the honest services doctrine to cases of bribery or kickbacks, by the Court's own admission such cases constitute the "lion's share" of prosecutions under § 1346.⁹⁰ Thus, although some § 1346 charges will be thrown out, many will be unaffected because they, in fact, involve bribery and kickbacks. For example, an ongoing federal corruption probe in Cleveland, in which more than two dozen public officials and business leaders have been charged, will be largely unaffected by the *Skilling* decision because the defendants have been charged in various bribery and kickback schemes.⁹¹ In another case, involving corruption charges against New Orleans technology chief Greg Meffert, the prosecution simply added the phrase "bribery/kickbacks" to 24 honest services counts in the indictment to save the charges from dismissal.⁹² And, in yet another case, Univision Services Inc., a wholly owned subsidiary of Univision Communications Inc., recently pled guilty to one count of conspiracy to commit mail fraud and paid a fine of \$1 million in relation to "a nationwide scheme in which Univision Music Group executives, employees and agents made illegal cash payments to radio station programmers and managers in exchange for increased radio broadcast time for Univision Music Group recordings" absent "on-air acknowledgments or payment of broadcast fees to the radio stations, as required by law."⁹³

⁹⁰ *Skilling v. United States*, 130 S. Ct. 2896, 2931 n.44.

⁹¹ Supreme Court "Honest Services" Ruling Unlikely to Affect County Corruption Case, *Cleveland Plain Dealer*, (June 24, 2010, 02:55 EST), http://blog.cleveland.com/metro/2010/06/supreme_court_honest_services.html.

⁹² Cindy Chan, Supreme Court's "Honest Services" Ruling Could Affect Local Public Corruption Cases, *Times Picayune*, July 11, 2010, available at http://www.nola.com/crime/index.ssf/2010/07/supreme_courts_honest_services.html.

⁹³ Mail Fraud Prosecutions Continue Despite *Skilling* Decision—Univision Services, Inc. to Pay One Million, *White Collar Crime Prof Blog* (July 27, 2010, 01:16 EST), http://lawprofessors.typepad.com/whitecollarcrime_blog/2010/07/mail-fraud-prosecutions-continue-despite-skilling-decision-univision-services-inc-to-pay-one-million.html (quoting Press Release, Dept. of Justice, Subsidiary of Univision Communications Inc. Pleads Guilty to Conspiracy to Commit Mail Fraud and Agrees to Pay \$1 Million to Resolve Related Criminal and Administrative Cases (July 26, 2010), <http://www.justice.gov/opa/pr/2010/July/10-crm-855.html>)).

Moreover, in anticipation of the Court’s decision in the honest services cases, prosecutors had avoided charging under the statute in many cases, or simply rearraigned defendants on charges safe from constitutional review. For example, the Hobbs Act, as already discussed, prohibits actual or attempted extortion affecting interstate commerce.⁹⁴ To establish extortion in public corruption cases the government’s burden is no different from that in a bribery case.⁹⁵ In addition, as the *Skilling* majority pointed out, bribery of a federal official is also a crime,⁹⁶ as is theft or bribery of any program receiving federal funds⁹⁷ and accepting or providing kickbacks in relation to contracts with the federal government.⁹⁸ Moreover, prosecutors have the vague federal conspiracy statute at their disposal,⁹⁹ and can also fashion the allegations in the indictment as a racketeering enterprise, subjecting the defendants to the draconian penalties of the federal Racketeer Influenced and Corrupt Organizations Act.¹⁰⁰ On top of these charges, federal prosecutors can also rely on charges of obstruction of justice or making false statements.¹⁰¹

The case of Rod Blagojevich, the former governor of Illinois, is instructive as to the malleability of federal criminal law and the proclivity of federal prosecutors to ignore the guidance provided by state law. Blagojevich is notorious for allegedly attempting to sell the Senate seat vacated by then-President-Elect Barack Obama following his election in November 2008. In the early morning hours of December 9, 2008, federal authorities showed up on Blagojevich’s front porch and arrested him for honest services fraud, racketeering, and extortion charges arising from his conduct and alleged attempts

⁹⁴ 18 U.S.C. § 1951(a) (2006).

⁹⁵ *United States v. Evans*, 504 U.S. 255, 260 (1992) (recognizing that at common law, “[e]xtortion by the public official was the rough equivalent of what we would now describe as ‘taking a bribe.’”).

⁹⁶ 18 U.S.C. § 201 (2006).

⁹⁷ *Id.* § 666.

⁹⁸ 41 U.S.C. § 53 (2006).

⁹⁹ 18 U.S.C. § 371 (2006).

¹⁰⁰ *Id.* § 1962(c).

¹⁰¹ See, e.g., *id.* § 1510 (obstruction of criminal investigations); *id.* § 1511 (obstruction of state or local law enforcement); *id.* § 1512 (witness tampering); *id.* § 1001 (false statement statute).

to aggressively raise campaign funds from donors.¹⁰² Illinois U.S. Attorney Patrick Fitzgerald framed the case, from the start, as a Department of Justice mission to clean up state and local politics. At the December 9, 2008, press conference, held immediately following the arrest, Fitzgerald announced that the governor had engaged in a “political-corruption crime spree,” attempting to “get as much money from contractors, shaking them down, pay-to-play before the end of the year,” when a new state ethics law would take effect.¹⁰³

The nature of this accelerating “political-corruption crime spree” was attested to at trial by a key government witness, John Wyma, a lobbyist and one of Blagojevich’s closest associates who turned on him to cooperate with the federal government. Wyma testified that he became increasingly “uncomfortable” with the governor’s aggressive campaign fundraising tactics in late 2008 in light of Illinois’ looming Ethics in Government Act, which was scheduled to take effect on January 1, 2009, and would have limited campaign contributions from individuals doing business with the state.¹⁰⁴ In effect, the government’s own witness seemed to concede, or at least assume, that this aspect of Blagojevich’s conduct was in accordance with *state law as it stood at the time*. This was precisely the point that Fitzgerald breathlessly touted at the December 2008 press conference, supposedly to show Blagojevich’s criminality. At that press conference, not one reporter felt compelled to ask why this made the governor a crook, when it appeared that he and his cohorts were racing to do their fund raising under then-existing state law. Such timing is the sign of someone who actually takes pains to follow state law, is it not? Is it not common and perfectly lawful for a citizen to arrange his tax affairs, for example, to take advantage of existing law before a change in the law takes effect? Yet this political fundraising was featured in a federal prosecution as evidence of honest

¹⁰² David Mendell, Letter from Chicago: What About Me?, *The New Yorker*, July 26, 2010, at 40–45.

¹⁰³ Mendell, *id.* at 45.

¹⁰⁴ Bill McMorris, Prosecution Rests in Blagojevich Trial as Defense Gets Extra Week, *Washington Examiner*, July 14, 2010, available at <http://www.washingtonexaminer.com/opinion/columns/special-editorial-reports/Prosecution-Rests-in-Blagojevich-Trial-as-Defense-Gets-Extra-Week-98414739.html>.

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services fraud.¹⁰⁵ It is hard to imagine a more vivid example of the failure of federal anti-fraud laws in general and the honest services doctrine in particular to give some deference to political figures who try to conform their conduct to the requirements of state law. And, of course, if federal law is to eschew such deference, at least it should do so in clear terms.¹⁰⁶

D. The Ideological Underpinnings of the Court’s Vagueness Decisions

As we have attempted to demonstrate in this article—particularly in our discussion of the true depths of the vagueness problem as demonstrated by federal prosecutors’ use of the Hobbs Act in prosecuting Hialeah mayor Raul Martinez—judges do not seem to have an adequate appreciation of the actual ways in which vague statutes allow the Department of Justice to proceed in the most confounding prosecutions against public officials. The same problem is seen in use of vague statutes against private citizens, including businesspeople, political activists, and others who provide targets of choice for prosecutors wishing to score points with future employers, the news media, or the general public.

A dramatic recent example is seen in the justices’ various opinions in *Holder v. Humanitarian Law Project*, decided just three days before *Skilling* and the other honest services opinions were released.¹⁰⁷ In *Holder*, a group of plaintiffs sought a pre-enforcement judicial decree that particular national security laws were either unconstitutionally vague and hence in violation of the Due Process Clause of the Fifth Amendment, or otherwise in derogation of the First Amendment’s free speech and freedom of association provisions.

¹⁰⁵ A fuller explanation of this aspect of the Blagojevich prosecution is found in Harvey Silverglate, *How the ‘Independent’ Fourth Estate Has Failed in Its Critical Duty, Volokh Conspiracy* (Dec. 17, 2009, 02:56 EST), <http://volokh.com/2009/12/17/how-the-fourth-estate-has-failed>.

¹⁰⁶ Although the press at Fitzgerald’s news conference did not question as much of the government’s evidence and legal theory as the prosecutor there disclosed, it later appeared that some members of the jury, upon hearing the evidence and, in particular, portions of the wiretap and eavesdrop tapes, were not convinced that Blagojevich was a felon rather than simply a politician trying to raise campaign funds and gain political power and leverage. The jury in varying combinations deadlocked on all of the counts, with the lone exception of a guilty verdict on a single count of lying to an FBI agent during a pre-indictment interview. Monica Davey & Susan Saulny, *Blagojevich, Guilty on 1 of 24 Counts, Faces Retrial*, N.Y. Times, Aug. 18, 2010, at A1.

¹⁰⁷ 561 U.S. —, 130 S. Ct. 2705 (2010).

Particularly at issue were provisions of the statute that prohibited four types of “material support” activities provided to any group designated by the secretary of state as a “foreign terrorist organization”: “training,” “expert advice or assistance,” “service,” and “personnel.” (Between the filing of the lawsuit in 1998 and the case’s final resolution by the Supreme Court a dozen years later, the statute was amended a number of times. The history of the statute’s various formulations is set forth in the Court’s opinion.)

The plaintiffs consisted of two American citizens and six domestic organizations, including the Humanitarian Law Project, described by the high court as “a human rights organization with consultative status to the United Nations.”¹⁰⁸ The plaintiffs did not challenge all possible applications of the statute. Rather, they complained of their inability to determine how and whether the statute would or could be applied to certain of their intended activities, with regard to a number of organizations that engaged in both terrorist activities and non-terrorist political and humanitarian actions. The particular activities in which the organizational plaintiffs wished to participate but which they feared might be deemed in violation of some provisions of the statute included:

(1) “train[ing] members of the PKK [Kurdistan Workers’ Party] on how to use humanitarian and international law to peacefully resolve disputes”; (2) “engag[ing] in political advocacy on behalf of Kurds who live in Turkey”; (3) teach[ing] PKK members how to petition various representative bodies such as the United Nations for relief.” Individual plaintiffs sought a declaration and clarification as to whether the statute would criminalize (1) “train[ing] members of [the] LTTE [Liberation Tigers of Tamil Eelam] to present claims for tsunami-related aid to mediators and international bodies; (2) “offer[ing] their legal expertise in negotiating peace agreements between the LTTE and the Sri Lankan government”; and (3) “engage[ing] in political advocacy on behalf of Tamils who live in Sri Lanka.”¹⁰⁹

The district court entered an injunction against the government’s applying to the plaintiffs’ activities the prohibitions on “personnel”

¹⁰⁸ *Id.* at 2713.

¹⁰⁹ *Id.* at 2716.

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and “training support,”¹¹⁰ which was affirmed by the Ninth Circuit.¹¹¹ The Supreme Court reversed in a 6–3 decision, with Chief Justice Roberts and Justices Stevens, Scalia, Kennedy, Thomas, and Alito in the majority.

The approach of the Supreme Court majority to the vagueness question is indicative of the difficulties encountered by ordinary—or even extraordinary—citizens in dealing with a statute where the terms are in the eyes of many seen as vague and inadequately informative for the provision of useful guidance. The majority wrote:

Most of the activities in which plaintiffs seek to engage readily fall within the scope of the terms “training” and “expert advice or assistance.” Plaintiffs want to “train members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes,” and “teach PKK members how to petition various representative bodies such as the United Nations for relief.” 552 F.3d at 921, n. 1. A person of ordinary intelligence would understand that instruction on resolving disputes through international law falls within the statute’s definition of “training” because it imparts a “specific skill,” not “general knowledge.” . . . Plaintiffs’ activities also fall comfortably within the scope of “expert advice or assistance”: A reasonable person would recognize that teaching the PKK how to petition for humanitarian relief before the United Nations involves advice derived from, as the statute puts it, “specialized knowledge.”¹¹²

All six justices in the *Holder* majority voted three days later to reverse and remand Skilling’s conviction under a narrowing of the honest services statute that would encompass only allegations involving bribes and kickbacks, with three of them (Justices Scalia, Thomas, and Kennedy) expressing the view that the honest services statute should be invalidated altogether rather than rewritten by the Court. In dissent in *Holder*, Justice Breyer wrote, for himself and Justices Ginsburg and Sotomayor, that while “I do not think this statute is unconstitutionally vague,” nonetheless the statute violates

¹¹⁰ Humanitarian Law Project v. Reno, No. CV-98-1971 ABC (BQRx), 2001 U.S. Dist. LEXIS 16729, at *12 (C.D. Cal. Oct. 2, 2001).

¹¹¹ Humanitarian Law Project v. U.S. Dep’t of Justice, 352 F.3d 382 (9th Cir. 2003).

¹¹² *Holder*, 130 S. Ct. at 2720.

First Amendment rights of speech and association.¹¹³ “[T]he government has not made the strong showing,” wrote Justice Breyer, “necessary to justify under the First Amendment the criminal prosecution of those who engage in these activities.”¹¹⁴ Justice Breyer also questioned the rational relationship between the ends of protecting national security and the means by which the statute’s criminal prohibitions were formulated.

Thus, none of the justices were prepared to declare any portion of the statute to be unconstitutionally vague—not even the dissenters who recognized that, with regard to some people operating in good faith, the statute would criminalize language reasonably deemed by a citizen to be an exercise in free speech. A citizen is to understand that he or she can be criminally prosecuted for activities—in the words of the Breyer dissent—that “involve the communication and advocacy of political ideas and lawful means of achieving political ends,” including “using international law to resolve disputes peacefully or petitioning the United Nations.”¹¹⁵ Were it not for the fact that this judicial explanation of the meaning and scope of the “material support” statute was made possible because pre-enforcement review happened to be available in this procedural context, one could readily envision the prosecution of perfectly well-meaning individuals and organizations for seeking to promote adherence to the rule of law and peaceful resolution of conflicts.

How is it that justices who understood (albeit to an incomplete extent) why the honest services statute was void or at least required a severe limiting interpretation would nonetheless find no Fifth Amendment due process vagueness infirmity in a statute that appears to transmogrify political advocacy into rendering “material assistance” to terrorism? In comparing the various opinions in the two cases, one gets the sense that the high court really does not understand the fundamental flaws that characterize vague statutes. There is insufficient appreciation of the challenge facing citizens who wish to conform their activities to the requirements of the criminal law, but who get woefully insufficient guidance from either the statutory text or even the judicial gloss on that language. (In

¹¹³ *Id.* at 2731 (Breyer, J., dissenting).

¹¹⁴ *Id.* at 2732.

¹¹⁵ *Id.*

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Holder, of course, the citizens had the benefit of being allowed to seek a pre-enforcement interpretation of the scope and meaning of the statute. Normally, given the rarity of federal court interpretations of statutes in the absence of an actual “case or controversy,” the citizen has to proceed at his or her own peril.) The world becomes a terribly dangerous place for citizens active in the political arena, as well as for citizens engaged in the world of commerce, or those who choose public life and politics.

V. Conclusion

It is, surely, time for the high court to revisit the manner in which the void for vagueness doctrine has been allowed to degrade in the area of federal criminal law and enforcement. The lack of guidance afforded by federal criminal statutes should not be the basis for an intellectual game susceptible to different outcomes that depend on the political disposition of either the citizen or the government (or, for that matter, the judge). The inability of average intelligent citizens to understand modern federal criminal statutes is a growing problem that interferes not only with Fifth Amendment due process rights but even First Amendment speech and associational rights. Congress, effectively relieved of the discipline that should be imposed by the Due Process Clause, writes statutes that it pretends citizens will understand. Courts uphold, against vagueness attacks, statutes the scope and meaning of which divide scholars and judges. It seems, even to the citizen seeking to avoid cynicism, like a page out of *Alice in Wonderland*. The time has come to restore Fifth Amendment due process to one of its core meanings: if a criminal statute does not give the average citizen a clear notion of what conduct is intended to be outlawed, that statute should not serve as a basis for turning the citizen into a criminal.

