THE COMMONWEALTH'S RIGHT TO "HONEST SERVICES": PROSECUTING PUBLIC CORRUPTION IN MASSACHUSETTS

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Massachusetts politicians have found themselves repeatedly in the crosshairs of federal prosecutors seeking to crack down on public corruption. But in light of the Supreme Court's landmark decision in Skilling v. United States*, convicting corrupt state legislators and other public servants of so-called "honest services" fraud – long the preferred method of prosecuting official betrayals of the public trust – may no longer be quite as simple as it once was. This Note examines the structure of federal anti-corruption law available to punish the kind of political corruption that has plagued Massachusetts, with an emphasis on critically evaluating the evolving body of*

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honest services law. It concludes – based on important but admittedly limited evidence – that as applied in Massachusetts and the First Circuit, the honest services fraud statute remains a practical and effective tool for combating political corruption. Because there is little reason to believe that more robust criminal enforcement measures are in fact necessary or would even appreciably improve anti-corruption efforts, this Note suggests that any future reform should focus its efforts on changing the letter of the law to better reflect its real reach and efficacy as a tool to fight public corruption. Such an approach would promote the interests of transparency and fair notice in the criminal code, improve deterrence, and demonstrate a symbolic commitment to confront public corruption head on, rather than circuitously through the vague and general language of the existing honest services statute.

INTRODUCTION

On June 15, 2011, Salvatore F. DiMasi became the third consecutive Speaker of the Massachusetts House of Representatives to be found guilty of a federal crime.[1] DiMasi's trial and conviction naturally highlighted the issue of political corruption in Massachusetts, which has become a matter of serious public concern in recent years. To the extent such a problem exists systemically, a full solution likely requires fundamental reform in the culture of state and local government. But federal criminal prosecutions have long played, and will continue to play, a significant role in addressing state-level political corruption. It is therefore well worth considering how the current body of federal anti-corruption law is positioned to take on political rot and dishonest government in the Commonwealth of Massachusetts.

Though Speaker DiMasi's actions and the corrupt scheme he was charged with perpetrating were well documented by the media,[2] the legal basis for his conviction was less publicized. The major legal issue at trial revolved around the impact of a key 2010 Supreme Court decision, *Skilling v. United States*,[3] with the parties sparring over how that case should influence the court's jury

[1] Milton J. Valencia, *DiMasi Found Guilty on 7 of 9 Counts in Kickback Scheme*, BOS. GLOBE (June 16, 2011), www.boston.com/news/local/massachusetts/articles/2011/06/16/former_mass_house_speaker_dimasi_found_guilty_on_7_of_9_counts_in_kickback_scheme. Speaker DiMasi's two immediate predecessors in office, Thomas Finneran and Charles Flaherty, both resigned amid federal criminal probes that resulted in guilty pleas. *See infra* Part II.A.

[2] *See, e.g.*, Andrea Estes & Matt Viser, *Case Against DiMasi Grows*, BOS. GLOBE (Oct. 14, 2009), http://www.boston.com/news/local/massachusetts/articles/2009/10/14/case_against_dimasi_grows/; Andrea Estes & Matt Viser, *Former House Speaker DiMasi Indicted on Corruption Charges*, BOS. GLOBE (June 2, 2009, 10:37 PM), http://www.boston.com/news/local/breaking_news/2009/06/former_speaker_1.html; Valencia, *supra* note 1.

[3] 130 S. Ct. 2896, 2935 (2010) (vacating a corporate executive's conviction for honest services mail and wire fraud). The defendant was Jeffrey Skilling, the CEO of Enron Corporation until shortly before its collapse.

instructions.[4] Casual observers of the trial naturally may have wondered why DiMasi's public corruption proceeding should hinge on the former Enron CEO's appeal of his conviction for corporate misconduct, and why both cases were prosecuted under the federal mail-fraud statute. The reason, in short, was that federal prosecutors in both cases relied on the nebulous "honest services" doctrine of fraud to pursue convictions.[5] That prosecutorial tool – ingeniously flexible or unfathomably vague, depending on one's perspective – extends criminal mail- or wire-fraud penalties to cover public officials, corporate fiduciaries, or anyone else who perpetrates "a scheme or artifice to deprive another of the intangible right of honest services."[6]

Somewhat strangely, the mail- and wire-fraud statutes have been the principal tools of federal prosecutors to combat corruption in state politics. The "intangible rights" and "honest services" conception of fraud codified therein was recognized, but limited, by the Supreme Court in *Skilling*.[7] But many of the interpretive questions traditionally raised and debated in common law fraud cases remain to be answered. Therefore, there will continue to be federal common law development of the honest services doctrine in the courts of appeals, even as individual issues may be resolved by the Supreme Court in post-*Skilling* clarifications of the law. Of particular interest for Massachusetts, the U.S. Court of Appeals for the First Circuit has developed its own conception of honest services fraud for public officials, which the district court effectively applied both doctrinally and pragmatically in DiMasi's prosecution and conviction.[8]

This Note will examine the use of the honest services doctrine and mail-fraud statute – that favorite instrument of federal law enforcement – to prosecute political corruption in Massachusetts. Part I provides an overview of the framework for federal anti-corruption law at prosecutors' disposal, with an emphasis on honest services mail and wire fraud. It also presents some problems with the current law, suggesting that it is not yet settled in some respects. Part II offers a brief snapshot and summary of the erosion of public

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[4] *See infra* Part III.C.

[5] *See Skilling*, 130 S. Ct. at 2907 (reviewing conviction for "conspiracy to commit 'honest-services' wire fraud"); Valencia, *supra* note 1 (reporting that DiMasi was convicted on seven of nine counts of honest services fraud and extortion).

[6] 18 U.S.C. § 1346 (2006).

[7] *Skilling*, 130 S. Ct. at 2907 (narrowing § 1346 to apply only to bribery and kickback schemes). It should be noted that there may be significant doctrinal and practical differences between honest services fraud in public corruption cases and in cases where a defendant like Skilling is charged with violating purely private fiduciary or contractual duties in order to deprive associates or employers of their right to his or her honest services. *See* John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 432-48 (1998) (comparing trends in caselaw involving "public fiduciaries" and "private fiduciaries"). Issues relating to the latter are beyond the scope of this Note, which is concerned solely with public corruption law.

[8] *See infra* Part III.A.

trust in elected officials in Massachusetts, and demonstrates the need for effective enforcement measures to weed out, expose, and punish public corruption. Part III examines a series of significant honest services fraud prosecutions, culminating with DiMasi's trial and pending appeal, which have shaped and will continue to shape the doctrine's effective application in Massachusetts. This analysis tends to show that, practically speaking, the law is sufficiently robust and flexible to regulate the most harmful forms of public corruption that threaten the Commonwealth. Part IV observes the impotent efforts at legislative reform, and suggests that Congress's failure to overhaul the honest services statute might be for the best, given the current law's functional effectiveness. But extant dissatisfaction with this curious law and calls for reform should nonetheless be addressed. Therefore, if Congress is inclined to revise the statute at all, a desirable approach would be to focus on clarifying and sharpening the existing statute without discarding the caselaw that gives it underlying meaning. Any amended statute should specifically draw upon the caselaw to outline in more detail prohibited conduct and, more important, should clearly frame itself as a precautionary directive against corrupt and self-dealing conduct in government affairs – rather than as an imposition of a vague, general duty that offers little guidance or deterrence to public officials. In this way Congress could send a message that would satisfy doctrinal critics and might even galvanize public support for anti-corruption efforts in Massachusetts and elsewhere, while preserving the practical effectiveness of the current honest services doctrine.

I. FEDERAL ANTI-CORRUPTION LAW

Federal prosecutors must, of course, be authorized by specific federal criminal statutes in order to prosecute state or local government officials for corrupt or illegal practices. But deriving such authority is not necessarily as straightforward as one might think, even in cases of patently dishonest and grossly inappropriate behavior clearly violative of the public trust. Prosecutors face challenges inherent in the federal system and in the code-based structure of the criminal law, as well as difficult judgments about just what qualifies as "corruption" and when it becomes "criminal." Not every bit of dishonest or unsavory conduct by public officials constitutes a federal crime, nor should it. But federal law has developed in such a way as to recognize pragmatic and flexible tools for combating governmental corruption that crosses an imprecise line into dishonest behavior that our society is not prepared to tolerate.

A. *The Statutory Framework*

There is no general, comprehensive federal law or section of the U.S. Code that defines or targets "public corruption" or "political corruption" as such.[9]

[9] Even a cursory perusal through the U.S. Code's fifty-one titles and innumerable chapters and subdivisions reveals that the codified body of federal law is extremely disjointed in many areas, both in form and in substance. This is undoubtedly the case with

Rather, federal law contains various narrower anti-corruption provisions that proscribe specific types of wrongdoing – particularly those that improperly enrich public officials. Most notably, 18 U.S.C. §§ 201-227 criminalize a range of offenses involving bribery, illegal gratuity, and conflicts of interest.[10] Section 201 defines criminal bribery of public officials, barring payments made or received with the specific intent to directly influence some official act.[11] But the federal bribery and gratuity statutes explicitly target only *federal* officials,[12] and the Supreme Court has held that they properly apply to non-federal officers (that is, state or local officials or private contractors) only when those individuals "occup[y] a position of public trust with official federal responsibilities."[13]

Other federal statutes setting out crimes of public corruption, as one intuitively perceives it, amount to more of a patchwork of laws. The Hobbs Act's[14] provisions on criminal activity affecting commerce include a general clause barring extortion, the act of wrongfully inducing money or property from another "under color of official right."[15] Another well-known statute, the RICO Act,[16] prohibits the operation of any enterprise (including a political office) through a pattern of racketeering activity, for which the many predicate illegal acts include bribery and extortion.[17] Separate laws criminalize the theft or embezzlement of public money or property,[18] and establish the inchoate crime of conspiracy to defraud, or commit any other offense against, the United States.[19] Other relevant statutory sections generally regulate and criminalize corrupt governmental practices in even more specific situations and contexts.[20]

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regard to the laws regulating the conduct of public officials and criminalizing certain misconduct.

[10] For an overview of these laws, see D. Taylor Tipton, *Public Corruption*, 48 AM. CRIM. L. REV. 1025 (2011).

[11] 18 U.S.C. § 201.

[12] *See id.* § 201(a)(1) ("[T]he term 'public official' means Member of Congress, Delegate, or Resident Commissioner, . . . or an officer or employee or person acting for or on behalf of the United States . . . ."); *see also id.* § 202(a), (e) (defining "special Government employee" as "an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia" and referring to only the federal branches of government).

[13] Dixson v. United States, 465 U.S. 482, 496-98 (1984).

[14] Hobbs Anti-Racketeering Act of 1946, Pub L. No. 79-486, 60 Stat. 420 (codified at 18 U.S.C. § 1951).

[15] 18 U.S.C. § 1951.

[16] Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, § 901(a), 84 Stat. 922, 941-47 (1970) (codified at 18 U.S.C. §§ 1961-1968).

[17] *See* 18 U.S.C. §§ 1961-1962.

[18] 18 U.S.C. § 641.

[19] 18 U.S.C. § 371.

[20] *See, e.g.*, 15 U.S.C. §§ 78dd-1 to 78ff (2006) (covering bribery of foreign officials in

Though the main federal bribery statute has a wide substantive focus, its applicability is limited even beyond the restriction that defendants must have some official *federal* responsibilities.[21] To convict for bribery under § 201, the government must prove not only specific criminal intent, but also specific linkage between the bribe and the official act the briber seeks to influence.[22] This requirement alone can easily foil the prosecution of a corrupt official, inasmuch as "the multifactor decisionmaking in which public officials engage can preclude proof of the link to an illicit benefit."[23] Federal prosecutors have thus tended to look elsewhere for legal authority on which to base their public-corruption cases, especially at the sub-federal level, and have relied in great part on a less-than-obvious source of law: mail and wire fraud. In practice, "[t]he enforcement challenges of public corruption cases have made the generous language of mail fraud the first place that federal prosecutors turn when drafting an indictment,"[24] and that position has been solidified and largely validated by time and courts' acquiescence. Indeed, "the mail and wire fraud statutes have been the 'principal vehicle' for the development of public corruption law."[25]

B. *The Honest Services Doctrine*

Title 18, Chapter 63 of the U.S. Code provides the range of criminal offenses that fall under the general category of federal crimes known as "mail fraud."[26] That this chapter contains the primary statutory instrument in federal law for prosecuting political corruption is undoubtedly better explained by

business or commercial dealings); 18 U.S.C. § 666 (criminalizing bribery in relation to government programs receiving substantial federal funding).

[21] *See* Dixson v. United States, 465 U.S. 482, 496 (1984).

[22] *See* United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 404-05, 414 (1999) (holding that in order to convict under § 201 "the Government must prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given"). Justice Scalia spoke for a unanimous Court in thus narrowly construing the statute. For an illustration of how this standard for bribery or criminal gratuity can be significantly stricter in practice than the standard for honest services mail or wire fraud, see United States v. Sawyer (*Sawyer II*), 239 F.3d 31, 38-39 (1st Cir. 2001) ("Sawyer claims that the information to which he pled guilty was based on his violation of [the Massachusetts gratuity statute], requiring the government to have demonstrated a link between his allegedly illegal gratuities and specific, identifiable acts of Massachusetts legislators. Because the prosecution did not attempt to offer such proof, he believes that *Sun-Diamond* renders his conviction unjust. We disagree.").

[23] Lisa Kern Griffin, *The Federal Common Law Crime of Corruption*, 89 N.C. L. REV. 1815, 1818 (2011); *see also Sun-Diamond*, 526 U.S. at 414 (affirming the decision of the court of appeals to remand, but "cast[ing] doubt upon the lower courts' resolution of [the defendant's] challenge to the sufficiency of the indictment").

[24] Griffin, *supra* note 23, at 1818.

[25] *Id.* at 1819 (citing Coffee, *supra* note 7, at 453).

[26] 18 U.S.C. §§ 1341-1350 (2006).

historical experience and practical exigency than by logic. The interesting story of mail fraud's development and expansion to cover deprivations of "honest services" has already been expounded elsewhere, at varying levels of historical and doctrinal detail.[27] What follows here is a brief summary sufficient for the purposes of this Note.

1. Historical Development

Congress passed the first mail-fraud statute in 1872 in order to secure the integrity of the U.S. Postal Service and to provide authority for federal criminal enforcement.[28] In 1896 the Supreme Court held in *Durland v. United States*[29] that the statute covered frauds and swindles achieved not only by past or present representations but also by "suggestions and promises as to the future."[30] Congress validated this liberal interpretation of mail fraud in its 1909 amendment to the statute, which codified the core language that remains law today, prohibiting "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[31] In 1952 Congress passed a companion wire-fraud statute criminalizing such schemes that, rather than being limited to the traditional mails, made use of "wire, radio, or television communication."[32]

Over time, the courts played a major role in expanding the scope of these laws to target emergent classes of crimes that did not satisfy the elements of traditional common law fraud and thus punishing a broader range of conduct deemed culpable.[33] The mail- and wire-fraud statutes together became a powerful discretionary tool for prosecutors, often wielded as a kind of catch-all or "'stopgap' device to permit prosecution of new forms of fraud until Congress enacts particularized legislation to combat the new fraud."[34] The federal courts of appeals in particular facilitated the growth of a broadening conception of mail fraud whereby perpetrators might be prosecuted even when their actions deprived no particular victim of any money or tangible property interests. Rather, the courts began to recognize that a "scheme or artifice to

[27] *See, e.g.*, Skilling v. United States, 130 S. Ct. 2896, 2926-27 (2010); Pamela Mathy, *Honest Services Fraud After* Skilling, 42 ST. MARY'S L.J. 645, 648-58 (2011); William M. Sloane, *Mail and Wire Fraud*, 48 AM. CRIM. L. REV. 905, 906 (2011).

[28] An Act to Revise, Consolidate and Amend the Statutes Relating to the Post-office Department, ch. 335, 17 Stat. 283 (1872); *see also* Sloane, *supra* note 27, at 906.

[29] 161 U.S. 306 (1896).

[30] *Id.* at 313.

[31] An Act to Codify, Revise and Amend the Penal Laws of the United States, ch. 321, § 215, 35 Stat. 1088, 1130-31 (1909); *see also Skilling*, 130 S. Ct. at 2926.

[32] An Act to Further Amend the Communications Act of 1934, Pub. L. No. 82-555, §§ 18-19, 66 Stat. 721, 722 (1952) (codified at 18 U.S.C. § 1343 (2006)).

[33] *See* Sloane, *supra* note 27, at 906-07.

[34] *Id.* at 906 (citing United States v. Maze, 414 U.S. 395, 405-06 (1974) (Burger, C.J., dissenting)).

defraud" might constitute mail fraud even when it causes a person or group of people to be deprived of nothing more than their *intangible rights* to some service or thing.[35]

By all accounts this trend began in 1941 with *Shushan v. United States*,[36] in which the Court of Appeals for the Fifth Circuit was called upon to interpret the language of 18 U.S.C. § 338[37] in the mail-fraud prosecution of a Louisiana public official accused of accepting bribes in exchange for urging certain city action in the bribe payers' interest.[38] Shushan and his coconspirators argued that regardless of their internal financial arrangements, there were no victims actually defrauded because the city had merely awarded a lawful business contract, the operation of which materially benefited, not harmed, the public.[39] But the court held that the corrupt dealings still constituted mail fraud, even if the terms of the contracts that resulted were substantively fair and advantageous to the public:

> A scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public. . . . *No trustee has more sacred duties than a public official and any scheme to obtain an advantage by corrupting such an one* [sic] *must in the federal law be considered a scheme to defraud*.[40]

Over the next four decades, all of the federal courts of appeals recognized in some form or another this intangible-rights theory of fraud,[41] as the Fifth Circuit's attractive reasoning in *Shushan* "stimulated the development of an 'honest-services' doctrine."[42]

But when the Supreme Court took up this widespread development in 1987 it reversed the trend. In *McNally v. United States*,[43] the Court overturned the mail-fraud convictions of a former Kentucky state official and a private coconspirator who conceived and carried out a scheme in which they awarded state insurance contracts to an agent, who in return made undisclosed payments to benefit the defendants.[44] In a seven-two decision, the Court held that the

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[35] *Skilling*, 130 S. Ct. at 2926.

[36] 117 F.2d 110 (5th Cir. 1941).

[37] This language is now located at 18 U.S.C. § 1341, which criminalizes "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1341.

[38] *Shushan*, 117 F.2d at 114-15.

[39] *Id.* at 118 (considering the defendants' argument that they only created a lawful, rather than fraudulent, scheme that "resulted not in loss but in benefit to the Levee Board").

[40] *Id.* at 115 (emphasis added).

[41] Daniel J. Hurson, *Limiting the Federal Mail Fraud Statute – A Legislative Approach*, 20 AM. CRIM. L. REV. 423, 456 (1983).

[42] Skilling v. United States, 130 S. Ct. 2896, 2926 (2010).

[43] 483 U.S. 350 (1987).

[44] *Id.* at 352-56.

mail-fraud statute protected only property rights, and guaranteed to the public no intangible right to honest government.[45] The development of the honest services doctrine was snuffed out, and the Court made its institutional point directly and plainly: if Congress wished the mail-fraud statute to have a wider reach, "it must speak more clearly."[46]

Congress wasted no time in responding, and the following year it passed a new amendment to the mail-fraud statute, 18 U.S.C. § 1346, which states in full: "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] This sparse language is made even more uncertain and unhelpful as an interpretive guide by the fact that "honest services" is not a clear term of art with any specific, known meaning to import from other legal authorities, but rather must be developed in caselaw.[48] The context and legislative history, however, strongly suggest – and courts and commentators have generally agreed – that "Congress's intent in passing § 1346 was to overturn *McNally* and to codify honest services or intangible rights theories of mail- and wire-fraud law as they existed before *McNally*."[49] But questions still remained about how these theories should be defined and applied; the pre-*McNally* caselaw did not, on the whole, provide clear, consistent answers and fact-specific interpretations varied on some of the more controversial issues.[50]

Over the next two decades the Department of Justice prosecuted many corruption cases under § 1346, and the interpretive questions that had vexed and split the courts of appeals prior to *McNally* returned and multiplied.[51] With so little concrete guidance from Congress, the courts varied in their pronouncements of the scope of honest services fraud, its basic mens rea and harm requirements, and other issues clearly implicating constitutional

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[45] *Id.* at 360-61.

[46] *Id.* at 360.

[47] 18 U.S.C. § 1346 (2006).

[48] *See* Mathy, *supra* note 27, at 668.

[49] *Id.* at 669 (citing floor statements and committee reports in the Congressional Record); *see also* Cleveland v. United States, 531 U.S. 12, 19-20 (2000) (stating that with the addition of § 1346, "Congress amended the law specifically to cover one of the 'intangible rights' that lower courts had protected under § 1341 prior to *McNally*: 'the intangible right of honest services'").

[50] *See* Mathy, *supra* note 27, at 670 ("Must the defendant always be subject to a fiduciary duty? Must the holder of the duty be the victim? Must the victim suffer an economic harm? Must the harm be reasonably foreseeable to the defendant? . . . [A] rigorous examination of the pre-*McNally* case law shows disagreement regarding the fundamental elements of honest services fraud – an assessment ultimately adopted by the Supreme Court in *Skilling*.").

[51] *Id.* at 671-82 (chronicling a series of federal cases with varying interpretations of § 1346, and stating that "[m]eanwhile, courts struggled to define the limits of honest services fraud within the scope of § 1346, developing many of the same theories and conflicts that led to the Court's decision in *McNally*").

questions of federalism and due process.[52] The Supreme Court eventually granted certiorari to consider three of these questions, handing down decisions in the summer of 2010.[53] But it only rendered a significant decision on the merits in *Skilling*, the case which presented the broadest question of all: whether § 1346 was on its face unconstitutionally vague.[54]

2. *Skilling v. United States*

Jeffrey Skilling was a longtime executive at Enron and served as CEO until shortly before the company's precipitous fall in 2001 amid a scandal that included allegations of criminal misconduct.[55] For his part, Skilling was convicted of multiple counts of conspiracy, securities fraud, and insider trading, for which he began serving a hefty prison sentence – but the Supreme Court eventually reviewed substantively only one of his convictions: that for honest services fraud under § 1346.[56] The Court's ruling was innovative and somewhat unexpected, as it strained to faithfully construe the statute as constitutional. It held that in order to avoid a "vagueness shoal," § 1346 applied only to "fraudulent schemes to deprive another of honest services through bribes or kickbacks."[57]

Limiting the honest services doctrine to bribery and kickback schemes struck some on the Court as an unusual, and even inappropriate, exercise of judicial discretion.[58] But the majority relied on the pre-*McNally* caselaw, and

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[52] *Id.* at 673-75.

[53] *See* Skilling v. United States, 130 S. Ct. 2896, 2912 (2010) (stating that the Court had granted certiorari to address whether the honest services statute, if not narrowed, "should be invalidated as unconstitutionally vague"); Black v. United States, 130 S. Ct. 2963, 2968 (2010) (stating that the Court had granted certiorari in 2009 to determine, inter alia, whether a corporate fiduciary owing a duty of honest services to his employer commits honest services fraud when his actions in fact cause harm to a third party, and not to the employer to whom honest services are owed); Weyhrauch v. United States, 129 S. Ct. 2863 (2009) (mem.) (granting certiorari to determine whether the conviction of a state government official for honest services fraud under 18 U.S.C. § 1346 required the finding of an independent violation of state law, or whether § 1346 created a uniform standard to apply to all public officials).

[54] *Skilling*, 130 S. Ct. at 2907. *Black* and *Weyhrauch* were both remanded for consideration in light of the Court's decision in *Skilling*. *See* Weyhrauch v. United States, 130 S. Ct. 2971, 2971 (2010); *Black*, 130 S. Ct. at 2970 ("Our decision in *Skilling* makes it plain that the honest-services instructions in this case were indeed incorrect.").

[55] *Skilling*, 130 S. Ct. at 2907.

[56] *Id.* The Court also considered whether pretrial publicity and community prejudice influenced the jury and deprived Skilling of a fair trial. *Id.* It concluded that Skilling did not prove actual improper bias or prejudice among the jurors, and that his trial was indeed fair. *Id.*

[57] *Id.* at 2928.

[58] *See id.* at 2939 (Scalia, J., concurring in part and concurring in the judgment) ("The Court replaces a vague criminal standard that Congress adopted with a more narrow one

McNally itself, to conclude that schemes involving bribes and kickbacks had historically constituted the "core" of honest services fraud.[59] Because § 1346 was intended to supersede *McNally* and restore the authority of the prior federal common law, it seemed reasonable to infer that Congress intended the law to reach *at least* that "core."[60] But the Court acknowledged that applying the honest services doctrine of fraud to further, less-actively corrupt conduct – such as mere nondisclosure of a conflict of interest, or of self-dealing activity – might raise serious due process concerns, and therefore interpreted § 1346 to criminalize *only* schemes involving bribes or kickbacks.[61]

Notwithstanding the deep concerns expressed in the concurring opinion,[62] the Court seemed quite comfortable and secure in the result. Ideologically, it had a nonpartisan, six-Justice majority that seemed to agree on the law without the taint of any political motivation.[63] As a matter of principle, even if the Court's limiting construction of the statute was unorthodox and creative, it at least *arguably* rested upon sound legal analysis and relatively solid doctrinal ground. But what the Court appeared to value most was a reasonable and practical balance between two extreme and equally unacceptable potential results: allowing questionable criminal convictions to go forward and inviting congressional conflict by wholly invalidating a statute with a messy and convoluted history. The Court's decision was ultimately a compromise intended to save the honest services statute while reducing the risk of arbitrary or abusive prosecutions.[64] It was also expected to stave off similar challenges

(included within the vague one) that can pass constitutional muster. I know of no precedent for such 'paring down,' and it seems to me clearly beyond judicial power." (footnote omitted)). Justice Scalia considered even the bribery or kickback limiting construction – "a dish the Court has cooked up all on its own" that "requires not interpretation but invention" – to be worryingly hazy, especially as he saw no coherent pattern of interpretation in the pre- or post-*McNally* caselaw. *Id.* at 2936-41. Therefore, he, along with Justices Thomas and Kennedy, would have invalidated the whole statute as failing to sufficiently "define the conduct it prohibit[ed]." *Id.* at 2940.

[59] *Id.* at 2931 (majority opinion) ("Both before *McNally* and after § 1346's enactment, Courts of Appeals described schemes involving bribes or kickbacks as 'core . . . honest services fraud precedents' . . . ." (citation omitted) (quoting United States v. Czubinski, 106 F.3d 1069, 1077 (1st Cir. 1997))).

[60] *Id.* ("In view of this history, there is no doubt that Congress intended § 1346 to reach *at least* bribes and kickbacks.").

[61] *Id.* ("To preserve the statute without transgressing constitutional limitations, we now hold that § 1364 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law.").

[62] *See id.* at 2935-42 (Scalia, J., concurring in part and concurring in the judgment); *supra* note 58 and accompanying text.

[63] Joining the portion of Justice Ginsburg's majority opinion reviewing Skilling's honest services fraud conviction were Chief Justice Roberts and Justices Stevens, Breyer, Alito, and Sotomayor. *Skilling*, 130 S. Ct. at 2906.

[64] *Id.* at 2933 (majority opinion) ("As to arbitrary prosecutions, we perceive no

in the future because, in the words of Justice Ginsburg, "[a] criminal defendant who participated in a bribery or kickback scheme . . . cannot tenably complain about prosecution under § 1346 on vagueness grounds."[65] Those two categories of conduct, the reasoning goes, are so patently corrupt that anyone who accepts or offers bribes or kickbacks *knows* (in some constructive legal sense, at a minimum) that he or she is committing a wrong that is subject to criminal sanction and penalties. This notion certainly seems to make sense intuitively and practically – especially in the context of corruption by elected public officials.

Thus, the Court signaled its preference for a pragmatic construction of honest services mail and wire fraud. Rather than sending Congress back to the drawing board, the *Skilling* Court opted to save § 1346 by giving it a common-sense construction that was just faithful enough to the historical doctrine and caselaw to pass muster. In so doing, the Court also necessarily placed trust in the lower courts to apply its novel interpretation faithfully and fairly to the gamut of factual circumstances that might arise.

3. Impact and Analysis

Legal scholars and commentators have raised a number of issues regarding the Supreme Court's construction of § 1346. Their opinions and analyses of the issues have varied, and they have seemingly arrived at consensus on only one point: while *Skilling* provided guidance on one aspect of the scope of honest services fraud – limiting its reach to schemes involving bribes and kickbacks – it left many other questions unanswered, and set the stage for continued debate within and between Congress and the courts.[66] This debate has constitutional, prudential, and political aspects and the stakes are the positive and normative meanings of honest services law, and the impact on the criminalization of corruption going forward.[67]

Perhaps unsurprisingly, many critics have objected to the balance the Court struck in *Skilling*, claiming that § 1346 now criminalizes either too much or too

significant risk that the honest-services statute, as we interpret it today, will be stretched out of shape.").

[65] *Id.* at 2934.

[66] *See, e.g.*, Griffin, *supra* note 23, at 1838-42 (discussing various potential theories on which honest services fraud might be prosecuted post-*Skilling*); Mathy, *supra* note 27, at 691-724 (attempting to make sense of the post-*Skilling* landscape and to describe § 1346's present and future); Elizabeth R. Sheyn, *Criminalizing the Denial of Honest Services After* Skilling, 2011 WIS. L. REV. 27, 43-52 (describing efforts to prosecute financial crimes after *Skilling*).

[67] *See generally* Sara Sun Beale, *An Honest Services Debate*, 8 OHIO ST. J. CRIM. L. 251 (2010). Professor Beale illustrates, through her creation of a fictional debate between two law professors, how many important and contentious issues surrounding honest services fraud law were left unaddressed by the Court's decision in *Skilling*, and hence remain to be fleshed out by future scholarship (as well as, presumably, future public policy decisions and rulings in the courts). *Id.* at 271-72.

little. Some critics share the perspective of Justice Scalia's concurring opinion, bemoaning the honest services doctrine's unacceptable vagueness and imprecision, even in its limited state.[68] Others lament that the Court felt the need to limit § 1346 at all, thus weakening prosecutorial power and discretion to combat corruption, and call for restored authority to punish a wider range of dishonest corporate and political conduct.[69]

Both of these simple reactions, however, seem somewhat extreme, or at least based on ideological disposition. Professor Lisa Kern Griffin has argued persuasively, and with more nuance and measure, that *Skilling* did not completely reject the fundamentally common law process through which honest services fraud has long developed.[70] In that sense, judges and prosecutors seem likely to continue to play the leading roles they have long held in expounding the principles that characterize § 1346, its scope, and its prosecutorial reach.[71]

Forecasting interpretive issues in future § 1346 prosecutions, one might as well begin with the key limiting terms in *Skilling*: bribes and kickbacks. For one thing, "bribes" and "kickbacks" are not fully self-defining terms which eliminate the problem of interpretation. After *Skilling*, it still remains for the lower federal courts to conduct the fact-intensive, context-specific inquiries necessary to determine just what kinds of schemes qualify. *Black's Law*

[68] *See, e.g.*, Abbe David Lowell, Christopher D. Man & Paul M. Thompson, *"Not Every Wrong is a Crime": The Legal and Practical Problems with the Federal "Honest-Services" Statute*, 63 VAND. L. REV. EN BANC 11, 11-13 (2010), http://www.vanderbiltlawreview.org/articles/2010/03/Lowell-et-al.-Not-Every-Wrong-Is-a-Crime-63-Vand.-L.-Rev.-En-Banc-11-20101.pdf (arguing that § 1346 is unconstitutionally vague and violates principles of federalism, and urging the Supreme Court to strike down the statute entirely); Harvey A. Silverglate & Monica R. Shah, *The Degradation of the "Void for Vagueness" Doctrine: Reversing Convictions While Saving the Unfathomable "Honest Services Fraud" Statute*, 2009-2010 CATO SUP. CT. REV. 201, 204 ("[T]he Court, without any textual basis or legislative history to guide it, reached back to decades-old case law, predating the statute itself . . . . The majority's mind-bending decision . . . effectively rewrite[s] the honest services statute . . . .").

[69] *See, e.g.*, Sheyn, *supra* note 66, at 65 (describing § 1346 after *Skilling* as "eviscerated"); Silverglate & Shah, *supra* note 68, at 204 (claiming that the *Skilling* decision "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").

[70] Griffin, *supra* note 23, at 1846-47 ("The *Skilling* decision at first glance appears to bring the statute's evolution to a halt by limiting actionable deprivations of honest services to bribes and kickbacks. . . . [T]he opinion leaves space for courts to refine the definition of bribery . . . .").

[71] *Id.* ("The statute uses only twenty-eight words and leaves it to the courts to supply limiting principles and monitor extensions, and at the same time, it vests substantial discretion in prosecutors to test the boundaries of the law. . . . Carving out cases that merit prosecution is thus a classic common law undertaking. . . . The Court's analysis [in *Skilling*] does not reject this premise entirely.").

Dictionary defines "bribery" as "[t]he corrupt payment, receipt, or solicitation of a private favor for official action,"[72] and it defines a "kickback" as "[a] return of a portion of a monetary sum received, esp[ecially] as a result of coercion or a secret agreement."[73] But it will not always be a straightforward task for judges or jurors armed with a judge's instructions on the law to determine whether certain patterns of conduct fall into these categories. This is particularly so given the nature of political corruption cases, which frequently consist of complex, vaguely characterized schemes that are deliberately, and often ingeniously, crafted to evade detection and obscure the quid pro quo. To complicate matters further, highly circumstantial evidence is often all that is available in such cases. The point is not to provide abstract answers to narrow definitional questions that might arise in the future; it is to recognize that they will necessarily be answered by federal courts in very context-specific ways.

There is, however, sufficient basis for making at least some generalized statements about the likely future scope of honest services fraud prosecutions. For public officials, the most significant result of the *Skilling* decision may well be the removal of cases involving only undisclosed self-dealing from the realm of potential punishment.[74] Federal Magistrate Judge Pamela Mathy has also pointed out that *Skilling* could have the effect of significantly restricting the admissibility of evidence of defendants' conduct in § 1346 cases.[75] Under Federal Rule of Evidence 404(b), prosecutors might be barred from introducing much available evidence of illicit benefits received by public official-defendants if that evidence does not directly help show the existence of a scheme involving bribery or kickbacks.[76]

But one reason that *Skilling* will likely not scuttle as many § 1346 prosecutions as its critics fear is that cases based on undisclosed self-dealing can often be reconceptualized and reframed as bribery or kickback cases. Tellingly, the very two Supreme Court cases most responsible for defining the

[72] BLACK'S LAW DICTIONARY 217 (9th ed. 2009).

[73] *Id.* at 948.

[74] *See* Mathy, *supra* note 27, at 701 ("[T]he ruling also removes an arguably significant class of cases from the purview of § 1346 – cases involving undisclosed self-dealing."). For example,

> if [a] public official secretly acquires an interest in a company and uses his official position to funnel contracts to that company, it may be corrupt and violative of the public trust, but no bribery or kickback has taken place. After *Skilling*, such a case of an undisclosed conflict of interest can no longer proceed in federal court under § 1346 . . . .

Id. at 704.

[75] *Id.* at 713.

[76] *Id.* ("Instead of introducing evidence of all sorts of tangible and intangible benefits received by a defendant, the Government may be limited to proving the accused owed a duty of rendering honest services to the victim and received a bribe or kickback that caused him to violate that duty, without reference to other benefits that are not proved to be sufficiently part of the bribery or kickback scheme.").

proper scope of honest services fraud illustrate this prospect. The charges in *McNally*, detailing a complex self-enrichment scheme on the part of defendants Gray, the public official, and McNally, the private coconspirator, in fact went to the jury on a theory of nondisclosure.[77] The Supreme Court's decision mentioned the term "kickbacks" only in quoting the court of appeals' characterization of the scheme[78] – never in its own reasoning. But in *Skilling*, the Court chose to cast *McNally* as a "kickbacks" case;[79] indeed, it declared that *McNally* had "presented a paradigmatic kickback fact pattern."[80] Of course, Justice Ginsburg may have deliberately crafted her opinion for the Court to signal that schemes like the one in *McNally* would still not be tolerated by the law going forward. But the more salient point is that even a case clearly presented at trial and conceptualized pre-*Skilling* as a nondisclosure case, can reasonably and effectively be cast as a kickbacks case post-*Skilling*, so long as sufficient facts support that characterization. As a result, the practical effect of *Skilling* on public corruption prosecutions seems likely to turn in great part on how federal judges and juries choose to construe and apply "bribes" and "kickbacks." There is undoubtedly some corrupt conduct at the margins that could have been prosecuted loosely under § 1346 before *Skilling* that cannot be prosecuted today because it is too far outside the realm of reasonable interpretation of those limiting terms. Politicians' pure undisclosed self-dealing – absent any proof of payments made or received to influence official acts – certainly falls within this category. But there are many more conceivable examples of corrupt conduct, including the worst kinds that most warrant prosecution, that follow the general pattern of payments for official acts, and thus could reasonably be susceptible to characterization as bribery or kickback schemes. It remains for the lower federal courts to make these determinations and draw some boundaries consistent with *Skilling*, and there is no reason to assume that different courts in different circuits will necessarily arrive at the same conclusions.

[77] McNally v. United States, 483 U.S. 350, 354-55 (1987) (reviewing the district court's instruction to the jury that "the scheme to defraud the citizens of Kentucky . . . could be made out by" findings that conspirators improperly failed to disclose relevant conflicts of interest that might have influenced consideration of the public contracts under investigation).

[78] *Id.* at 356.

[79] Skilling v. United States, 130 S. Ct. 2896, 2927 (2010) (describing the *McNally* scheme as involving "kickbacks" on two occasions and citing to portions of *McNally* where that term does not appear).

[80] *Id.* at 2931 (citing *McNally*, 483 U.S. at 352-53, 360). Reviewing the facts of the scheme as laid out in the *McNally* opinion, one is hard pressed to regard as unreasonable Justice Ginsburg's conclusion that they amounted to a pattern of kickbacks.

II. PUBLIC CORRUPTION IN MASSACHUSETTS

A. *Politicians Behaving Badly*

Massachusetts has a long history of scandals stemming from government corruption and has witnessed a spate of them in recent years, thanks to cynical and illegal behavior by its elected officials. Political junkies and enthusiasts may be well aware that the gerrymander – that classic American creature of legislative manipulation and political nepotism – was conceived as such by Boston-area newspapermen critical of Massachusetts Governor Elbridge Gerry and his Republican Party's electoral-redistricting efforts in 1812.[81] That colorful term of (usually corrupt) political art has, of course, spread widely in usage over the years, and the activity it describes has probably never been regionally restricted. But it is perhaps fitting that almost two centuries later, another controversy over electoral district drawing brought down the public career of a modern-day power broker in Massachusetts politics.

When the Massachusetts House of Representatives, under the leadership of Speaker Thomas Finneran, moved for redistricting following the 2000 U.S. Census, several political advocacy groups challenged the plan in federal court, claiming discrimination against minority voters.[82] During the ensuing investigation, Finneran implausibly denied his involvement and was indicted for making criminally misleading statements about his participation in the redistricting process.[83] In order to induce federal prosecutors to drop the

[81] *See* Kenneth C. Martis, *The Original Gerrymander*, 27 POL. GEOGRAPHY 833, 833-34 (2008). When the state legislature produced a new electoral map to reflect demographic changes following the 1810 Census, a *Boston Gazette* cartoon pointed out that the newly redrawn Essex South District on the city's north shore was so strangely and grotesquely shaped as to resemble a salamander or other reptilian creature – or rather a threatening "new species of monster," the "Gerry-mander." *Id.* at 835. The *Boston Gazette* thus disseminated its view that the Jefferson-Gerry Republicans drew the map that way in order to benefit their own electoral fortunes (and harm those of the waning Federalist Party), and so "gerrymandering" survived as a general term describing "spatial manipulation of electoral districts for partisan gain." *Id.* at 33-34 ("The Jefferson Republicans controlled the law making process and passed congressional and state senate and house redistricting law in early 1812, purposely creating a number of odd shaped districts benefiting their party.").

[82] *See* Black Political Task Force v. Galvin, 300 F. Supp. 2d 291, 294 (D. Mass. 2004).

[83] *In re* Finneran, 919 N.E.2d 698, 698 (Mass. 2010) ("The specific charge was that [Finneran] willfully had made misleading and false statements under oath while testifying in his capacity as Speaker in a Federal voting rights lawsuit."). Finneran was never indicted, however, for any substantive wrongdoing regarding his role in the redistricting plan. In fact, it is far from clear that even the most serious of the accusations against his gerrymandering practices would have constituted any criminal conduct. It was only the misstatements he made in trying to protect his reputation that led to criminal charges. *Id.* at 702 (stating that Finneran was charged with three counts of perjury and one count of obstruction of justice, and though his "false testimony did not occur in the context of a criminal investigation or trial, it was not designed to conceal a crime committed by another individual or conceal the

perjury charges against him, Finneran pleaded guilty to one count of obstruction of justice and agreed not to run for any public office for five years.[84]

Unfortunately for the people of Massachusetts, at the turn of the twenty-first century seeing the name of the Speaker of the House on a criminal docket became neither unusual nor shocking. After all, Finneran's immediate predecessor, Charles Flaherty, left the office in shame after pleading guilty to felony tax evasion in 1996.[85] And Finneran was himself succeeded by Salvatore DiMasi. So when DiMasi's prosecution set the familiar drama in motion for a third consecutive time, outrage began to bubble over in earnest about the corrupt state of the Massachusetts legislature.[86]

Disgust over the conduct of local politics was also fueled by another corrupt saga that unfolded just a few months before DiMasi was indicted.[87] In late 2008, both State Senator Dianne Wilkerson and Boston City Councillor Chuck Turner were arrested within a month of one another after being caught on film accepting cash bribes in separate but jarringly similar incidents.[88] Both were charged with attempted extortion and making false statements, and Senator Wilkerson was charged with honest services mail and wire fraud.[89] Both had accepted cash payments from the same businessman in return for help securing a liquor license.[90] These crimes seemed to shock the public with their sheer audacity, hypocrisy, and *dirtiness*.[91] Wilkerson ultimately pleaded guilty to eight counts of attempted extortion[92] and Turner was convicted of all charges

whereabouts of a fugitive, and it did not result in financial gain").

[84] *Id.* at 702-03.

[85] Paul Langner, *Flaherty Pleads Guilty on Taxes*, BOS. GLOBE, April 4, 1996, at 35.

[86] *See, e.g.*, Editorial, *The Infection on Beacon Hill*, BOS. GLOBE, June 3, 2009, at A16 ("The State House isn't in need of mere reform. It needs cauterization.").

[87] *See* Matt Viser & Frank Phillips, *Waves of Scandal Rattle Beacon Hill*, BOS. GLOBE, Nov. 2, 2008, at A1.

[88] *See* Jonathan Saltzman & Shelley Murphy, *Turner Arrested, Charged with Accepting a Bribe*, BOS. GLOBE, Nov. 22, 2008, at A1 ("The grainy surveillance pictures looked similar, but the subject within them had changed. The FBI . . . charged Councilor Chuck Turner with accepting a bribe, marking the second high-profile arrest of a black politician in a month . . . ."); John R. Ellement et al., *Embattled State Senator Faces Corruption Charges*, BOS. GLOBE (Oct. 28, 2008), http://www.boston.com/news/local/breaking_news/2008/10/embattl ed_state.html.

[89] *See* Second Superseding Indictment, United States v. Wilkerson, No. 08-10345, 2009 WL 6557566 (D. Mass. April 7, 2009).

[90] Saltzman & Murphy, *supra* note 88.

[91] The most enduring image from the damning video and photographic evidence against Senator Wilkerson, for example, showed her stuffing one-hundred dollar bills into her bra in the middle of a downtown Boston restaurant – one of eight bribes she was accused of accepting in exchange for official action designed to benefit private business owners. *See* Ellement et al., *supra* note 88.

[92] Travis Andersen & Jonathan Saltzman, *Wilkerson Guilty of Attempted Extortion;*

at his trial.[93] There was never much doubt (notwithstanding Turner's adamant claims of his own innocence and victimization) that both politicians had broken the law.

Clearly, federal prosecutors seeking to crack down on public corruption have had plenty of targets among Massachusetts elected officials in recent years. But with many high-profile defendants like Wilkerson, Finneran, and Flaherty pleading out, relatively few cases have been seriously contested at a trial. So it might seem a fair question whether attorneys in the Department of Justice were fully prepared to pursue a complex corruption case without the smoking guns they had in the Wilkerson and Turner cases. Particularly after *Skilling*, did they have the tools they needed and the necessary mettle to obtain difficult convictions, especially when opposed and contested vigorously by shrewd and talented defense attorneys? The DiMasi prosecution offered just such a test.

B. *The United States' Case Against Salvatore F. DiMasi*

Unlike the two previous house speakers, who both ultimately pleaded guilty, DiMasi persistently denied any criminal wrongdoing at all times after being indicted by the federal authorities.[94] A plea bargain with prosecutors was off the table, which set the stage for a dramatic trial where detailed information about DiMasi's inside dealings on Beacon Hill would come into the public light. Though a federal district judge would administer the proceedings and apply the law, a jury would determine the facts, and ultimately DiMasi's fate.

As compared with the two previous speakers, the nature of DiMasi's criminal misconduct was fundamentally different in an important sense. Finneran and Flaherty could plausibly argue that their admitted wrongdoing, while serious, was not *directly* connected to the execution of their public duties. Perhaps their official service to the Commonwealth was performed honorably and without blemish, though they committed crimes on the side. DiMasi, on the other hand, was charged with taking money from friends and private associates to perform official acts favoring them – that is, with misusing his power as Speaker and benefiting directly from that abuse.[95] The allegations constituted active and direct corruption in the exercise of one of the most powerful positions in the Commonwealth, and thus represented a far

Prosecutors Recommend up to Four Years, BOS. GLOBE (June 3, 2010, 4:12 PM), http://www.boston.com/news/local/breaking_news/2010/06/wilkerson_plead.html.

[93] Jonathan Saltzman et al., *Boston Councilor Chuck Turner Convicted on All Counts in Corruption Case*, BOS. GLOBE (Oct. 29, 2010, 5:35 PM), http://www.boston.com/news/local/breaking_news/2010/10/post_109.html. Turner's convictions and three-year prison sentence were later affirmed on appeal. *See* United States v. Turner, 684 F.3d 244, 265 (1st Cir. 2012).

[94] Milton J. Valencia, *DiMasi Still Says He Is Not Guilty*, BOS. GLOBE, Nov. 30, 2011, at B1.

[95] United States v. DiMasi, 810 F. Supp. 2d 347, 349-50 (D. Mass. 2011).

greater threat to the integrity of honest government, and to the public trust in our democratic system, than acts such as lying to investigators, in the case of Finneran, or cheating on personal taxes, in the case of Flaherty. DiMasi's actions, though far subtler, were in fact more similar in basic nature to Wilkerson's and Turner's explicit selling of official action in their capacities as public servants. But the corrupt scheme DiMasi was alleged to have carried out as Speaker was not only more sophisticated; it was also orchestrated on a far grander scale.[96]

The gravamen of the charges against DiMasi was that he conspired with three other men – Joseph Lally, Richard "Dickie" McDonough, and Richard Vitale – to exploit his public office for personal financial gain.[97] The evidence tended to show that DiMasi used his power and influence as Speaker to steer several million dollars in legitimate state contracts for education and performance management software to a Canadian software company called Cognos Corporation.[98] In return, Lally, a Cognos employee, would cause his company to make indirect personal payments to DiMasi through McDonough, Vitale, and DiMasi's partner in his private law practice, Stephen Topazio.[99] McDonough, an influential lobbyist on Beacon Hill, was eventually convicted alongside DiMasi for his role in the scheme.[100] Vitale, DiMasi's close friend and financial advisor, was ultimately acquitted of all charges.[101] Topazio, apparently an unwitting participant who was told to pass along "referral fees" from Cognos to DiMasi for nonexistent legal work, testified for the government at trial.[102] Lally pleaded guilty in exchange for a lighter sentence recommendation, and agreed to serve as the government's star witness.[103] Though the jury saw an exhaustive amount of evidence from various sources,[104] Lally's testimony against his accomplices was the keystone that held it all together, helping to show that the voluminous assortment of

[96] *Id.* (describing the impressive amounts of money and power wielded to effect a scheme at the highest levels of state government).

[97] *Id.* at 349.

[98] *Id.* at 356-60.

[99] *Id.* at 356-57.

[100] *Id.* at 350.

[101] *Id.*

[102] *Id.* at 349-50, 356-57.

[103] *Id.* at 350; *see also* United States v. Lally, CR-09-10166, 2011 WL 5926937, at *1 (D. Mass. Nov. 29, 2011).

[104] The evidence included mountains of email, phone, and other records detailing meetings and communications among the coconspirators, as well as third-party testimony. *DiMasi*, 810 F. Supp. 2d at 363. The prosecution even called Governor Deval Patrick to the stand to testify that Speaker DiMasi had expended considerable efforts lobbying his office to ensure that the contracts appropriated by the legislature went to Cognos, and not another company. Glenn Johnson, *Patrick Testifies in DiMasi Trial*, BOS. GLOBE (May 27, 2011, 5:08 PM), http://www.boston.com/news/politics/politicalintelligence/2011/05/dimasi_trial_ge.html.

suspicious acts and communications prosecutors compiled in evidence in fact stemmed from a common scheme among the four men.[105]

After a six-week jury trial, DiMasi was convicted of extortion and he and McDonough were each convicted of conspiracy, two counts of honest services mail fraud, and three counts of honest services wire fraud.[106] Even in the face of his conviction and condemnation by the community, DiMasi still maintained his innocence; his attorney promised to appeal the conviction, expressing confidence that the District Court had applied the post-*Skilling* honest services law incorrectly, allowing the jury to infer guilt from facts legally insufficient to establish a federal crime.[107]

III. HONEST SERVICES LAW AT WORK IN MASSACHUSETTS

As Supreme Court precedent, *Skilling* necessarily changed the way federal courts must construe and apply honest services mail and wire fraud. But some pre-*Skilling* caselaw remains relevant and helpful in illuminating some of the interpretive issues that still trouble this area of the law. Further, because *Skilling* only answered one relatively limited question about honest services fraud – restricting its enforcement to bribery and kickback schemes – legal interpretations on slightly different questions and nuanced factual applications developed at the circuit level will continue to have a significant effect on how the honest services doctrine may be used to prosecute political corruption in Massachusetts.

A. *Notable Pre-*Skilling *Cases*

The Court of Appeals for the First Circuit decided nineteen reported cases involving the honest services statute between 1988, when Congress enacted § 1346, and 2010, when the Supreme Court decided *Skilling*.[108] From the

[105] *DiMasi*, 810 F. Supp. 2d at 356-60, 363-65.

[106] *Id.* at 350. They were both acquitted on one additional count each of honest services mail and wire fraud, and Vitale was found not guilty on all charges. *Id.*

[107] Milton Valencia, *In Appeal, DiMasi Case to Test High Court Ruling: Clout-for-Cash Trade Unproven, Defense Says*, BOS. GLOBE, June 18, 2011, at A1.

[108] *See* United States v. Urciuoli (*Urciuoli I*), 513 F.3d 290 (1st Cir. 2008); United States v. Potter, 463 F.3d 9 (1st Cir. 2006); United States v. Sedoma, 332 F.3d 20 (1st Cir. 2003); United States v. Serafino, 281 F.3d 327 (1st Cir. 2002); *Sawyer II*, 239 F.3d 31 (1st Cir. 2001); United States v. Martin, 228 F.3d 1 (1st Cir. 2000); United States v. Kenrick, 221 F.3d 19 (1st Cir. 2000); United States v. Paquette, 201 F.3d 40 (1st Cir. 2000); United States v. Woodward, 149 F.3d 46 (1st Cir. 1998); United States v. Christopher, 142 F.3d 46 (1st Cir. 1998); United States v. Jordan, 112 F.3d 14 (1st Cir. 1997); United States v. Czubinski, 106 F.3d 1069 (1st Cir. 1997); United States v. Fraza, 106 F.3d 1050 (1st Cir. 1997); United States v. Sawyer (*Sawyer I*), 85 F.3d 713 (1st Cir. 1996); United States v. Conway, 81 F.3d 15 (1st Cir. 1996); United States v. Boots, 80 F.3d 580 (1st Cir. 1996); United States v. Grandmaison, 77 F.3d 555 (1st Cir. 1996); United States v. Bucuvalas, 970 F.2d 937 (1st Cir. 1992); McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc., 904 F.2d 786 (1st Cir. 1990).

standpoint of judicial development of the honest services doctrine in Massachusetts, the most noteworthy and dramatic of these cases involved a Boston insurance lobbyist named F. William Sawyer. In 1994, Sawyer was indicted on allegations of schemes to improperly influence and co-opt the services of several state legislators, and after a jury trial he was convicted of several counts of honest services mail and wire fraud.[109] On appeal, the First Circuit clarified that a non-public official like Sawyer, though owing no duty of honest services to the public directly, could indeed still be guilty of mail or wire fraud if the government could prove that he engaged in a scheme that aimed to deprive the public of the honest services of an official who *did* owe that duty.[110]

But the court admitted to having great difficulty deciding what specific standard of behavior was required of public officials in these cases, and what kinds of unsavory or apparently corrupt conduct were sufficient to constitute criminal fraud.[111] It noted that cases finding a deprivation of an official's honest services most typically involved either bribery or failure to disclose a conflict of interest which resulted in personal gain.[112] But identifying past violations is not the same as defining prospective standards, on which the caselaw was far less clear. The court lamented the law's vagueness, citing a Second Circuit judge's opinion that "[o]ne searches in vain for even the vaguest contours of the legal obligations created beyond the obligation to conduct governmental affairs 'honestly'" and that "the quest for legal standards is not furthered by reference to 'the right to good government' and the duty 'to act in a disinterested manner.'"[113] The court was clearly troubled by the possibility that juries might convict defendants for actions that simply seemed dishonest or immoral, rather than for actions meeting the articulated definition of a federal crime – and it in fact vacated and remanded Sawyer's conviction due to unclear and potentially flawed jury instructions.[114]

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[109] *Sawyer I*, 85 F.3d at 720-22.

[110] *Id.* at 725 ("Here, the government did not prosecute Sawyer on the theory that he, as a lobbyist, directly owed a duty of honest services to the Commonwealth or its citizens. Rather, the government sought to prove that Sawyer engaged in conduct intended to cause state legislators to violate their duty to the public.").

[111] *Id.* (exploring the limits and scope of honest services fraud and explaining that the mail-fraud statute "does not encompass every instance of official misconduct that results in the official's personal gain").

[112] *Id.* at 724. Regarding conflicts of interest, the court stated that "[a] public official has an affirmative duty to disclose material information to the public employer." *Id.* (citing United States v. Silvano, 812 F.2d 754, 759 (1st Cir. 1987)).

[113] United States v. Margiotta, 688 F.2d 108, 142-43 (2d Cir. 1982) (Winter, J., concurring in part and dissenting in part) (quoting United States v. Mandel, 591 F.2d 1347, 1361 (4th Cir. 1979)).

[114] *Sawyer I*, 85 F.3d at 731-34 (expressing concern that, without clear jury instructions, a jury may convict simply for any expenditure over the amount allowed under state statute).

The key facts at Sawyer's trial were that he gave legislators thousands of dollars by paying for things like dinners, concert tickets, and golf trips – and thus received not only privileged inside access to legislators, but also generally favorable treatment on insurance-related bills affecting his employer, the John Hancock Mutual Life Insurance Company.[115] Prosecutors never clearly alleged or showed, however, that any specific payment was explicitly for the purpose of causing a particular official act.[116] When his prosecution resumed on remand, Sawyer quickly entered a plea agreement with prosecutors and pleaded guilty to one count of honest services mail fraud.[117]

The government's case against Sawyer emphasized and relied in large part on his apparent violation of state law – specifically the Massachusetts official gift or gratuity statute,[118] which significantly mirrors the federal gratuities and bribery statute, 18 U.S.C. § 201.[119] But after the Supreme Court decided *United States v. Sun-Diamond Growers of California*,[120] which raised the standard required for a conviction under § 201,[121] Sawyer petitioned to have his honest services fraud conviction expunged from his record.[122] Because the Supreme Judicial Court of Massachusetts had since elected to follow *Sun-Diamond* in interpreting the state gratuity statute to require direct linkage between an illegal payment and an official act,[123] Sawyer argued that the state

[115] *Id.* at 720-22.

[116] *Id.* at 722 ("[Sawyer] further indicated that he made these expenditures to 'build and maintain relationships,' gain 'access to legislators,' and get legislators to 'return his calls . . . .'").

[117] *Sawyer II*, 239 F.3d 31, 35-36 (1st Cir. 2001).

[118] MASS. GEN. LAWS ch. 268A, § 3 (2010) (creating criminal punishments for "[w]hoever knowingly . . . gives, offers or promises anything of substantial value to any present or former state, county or municipal employee or to any member of the judiciary . . . (i) for or because of any official act performed or to be performed . . . or (ii) to influence, or attempt to influence, an official action").

[119] *Sawyer II*, 239 F.3d at 38 (describing the Massachusetts statute as the "analogous gratuities statute" to 18 U.S.C. § 201).

[120] 526 U.S. 398 (1999); *see also supra* note 22 and accompanying text.

[121] *Id.* at 414 ("We hold that, in order to establish a violation of 18 U.S.C. § 201(c)(1)(A), the Government must prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given.").

[122] *Sawyer II*, 239 F.3d at 36 ("In July 1999, nearly two years after Sawyer completed his probation, and paid the monies assessed against him, he petitioned the district court for a writ of error coram nobis on the basis of the Supreme Court's *Sun-Diamond* decision.").

[123] *See* Scaccia v. State Ethics Comm'n, 727 N.E.2d 824, 829 (Mass. 2000) ("Therefore, in order for the commission to establish a violation of G.L. c. 268A § 3 (*a*) and (*b*), there must be some proof of linkage to a particular official act, not merely the fact that the official was in a position to take some undefined or generalized action, such as holding a hearing on proposed legislation that, if passed, could benefit the giver of the gratuity.").

law violation undergirding his federal criminal conviction was no longer a valid basis.[124]

The First Circuit, however, disagreed.[125] Sawyer's guilty plea to honest services fraud, the court held, remained untainted and unaffected for two reasons. First, an honest services conviction need not rest upon a violation of state law; while such a violation might be good evidence that a state legislator knowingly betrayed or defrauded his constituents, it is not a necessary ground, as the federal mail-fraud statute establishes its own independent standard of criminality.[126] Second, as laid out in *Sun-Diamond*, honest services fraud convictions under § 1346 need not for any reason conform to the same strict proof requirements that are necessary for § 201 bribery convictions.[127] Honest services fraud does not necessitate a direct linkage between a particular payment and a particular official act; rather, the payment offered or received need only be intended to deceive the public and to deprive it of honest services by influencing the actions or judgments of the public official.[128]

After *Sawyer I* but before *Sawyer II*, the First Circuit also separately reviewed the honest services fraud conviction of Massachusetts State Representative Francis Woodward, one of the legislators who accepted payments from Sawyer.[129] The scheme alleged corruption of Woodward's honest services, which, as an elected official, he owed to the public.[130] While the court affirmed Woodward's conviction fairly easily, it helpfully clarified the elements required for an honest services fraud conviction, particularly regarding proof of criminal intent.

In *Woodward*, as in *Sawyer I*, the government had to prove that the defendant knowingly and willingly took part in a scheme or artifice to defraud, with the specific intent to deprive the public of its right to honest services.[131] Because it might be exceedingly difficult, if not impossible, in many cases for prosecutors to get inside a defendant's head and directly show actual intent, the court made clear its willingness to accept more oblique patterns of proof. Importantly, a jury may infer the requisite intent from the circumstances surrounding the defendant's actions, based partly or wholly on indirect evidence.[132] The court also drew on ample caselaw and established evidentiary

[124] *Sawyer II*, 239 F.3d at 38-39.

[125] *Id.* at 39.

[126] *Id.* at 41-42; *see also* United States v. Silvano, 812 F.2d 754, 759 (1st Cir. 1987) (clarifying that the duty of honest services a public official owes to the citizenry is derived at least in part from his or her role as a public trustee, and thus from the common law fiduciary duties of honesty and loyalty).

[127] *Id.* at 41 n.8.

[128] *Id.* at 40-41.

[129] United States v. Woodward, 149 F.3d 46, 73 (1st Cir. 1998).

[130] *Id.*

[131] *Id.* at 57, 63.

[132] *Id.* at 57.

principles to confirm that the existence of such a scheme could be proven by the accumulation of many individual pieces of evidence, insufficient on their own to prove a point, but taken together worth more than the "constituent parts."[133] While various types of evidence may well be important, the court suggested, and Woodward himself recognized, that the *best* evidence of a legislator's intent to perform official acts to favor a third-party coconspirator is evidence of the legislator's actions on bills that were important to that third party.[134]

Citing *Sawyer I*, the court in *Woodward* also explained clearly that "[i]t is not necessary for the government to link a particular gratuity with a specific act in order to obtain a conviction."[135] This is a crucial point that certainly appears to remain viable in the aftermath of *Skilling*.[136] While the intent to defraud must be specific, it need not be proven with respect to a particular bribe or gratuity and a corresponding corrupt decision or action; it may adequately refer to a more generally agreed-upon exchange of payment for favorable treatment or conduct in the future that would constitute the public's deprivation of its representative's honest services.[137]

B. *The Post-*Skilling *Landscape: Change and Continuity*

The First Circuit's leading post-*Skilling* case, *United States v. Urciuoli* (*Urciuoli II*),[138] was in fact the first decision by any federal court of appeals to consider the honest services statute after the Supreme Court's decision in *Skilling*. While the court in *Urciuoli II* assumed the task of applying the Supreme Court's novel interpretation of § 1346, its opinion also suggested that many principles from the Circuit's prior honest services precedents, especially cases like *Sawyer I*, *Woodward*, and *Sawyer II*, would continue to influence the analysis and application of the law to sketchy facts evidencing suspicious arrangements.

The government's prosecution of Robert Urciuoli stemmed from a public corruption probe in neighboring Rhode Island.[139] Though Urciuoli, the Chief Executive Officer of Roger Williams Medical Center (RWMC), was himself a private businessman, like Sawyer he was convicted of honest services fraud

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[133] *Id.*

[134] *Id.*

[135] *Id.* at 60. This point was confirmed yet again in *Sawyer II*. *Sawyer II*, 239 F.3d 31, 40-41.

[136] *See infra* Part III.C.

[137] Interestingly, a Federal District Judge recently reconsidered Woodward's conviction in light of *Skilling*, and still found that "[a] reasonable jury could have concluded that the facts in this case met such a definition of bribery." United States v. Woodward, 2012 WL 4856055, at *8 (D. Mass. Oct. 10, 2012) (denying Woodward's petition for a writ of *coram nobis* to vacate and expunge his conviction for honest services mail and wire fraud).

[138] 613 F.3d 11 (1st Cir. 2010).

[139] *Id.* at 13.

after participating in a scheme to improperly influence a state legislator.[140] Urciuoli placed Rhode Island State Senator John Celona on the payroll of a RWMC-owned nursing home in exchange, the government argued, for Celona's favorable action on bills of interest to RWMC pending in the Rhode Island Senate.[141] After initially receiving a new trial due to faulty jury instructions,[142] Urciuoli was again convicted of several counts of honest services fraud, and he filed a second appeal, primarily claiming the conviction was based on evidence of conduct insufficient to establish the crime of honest services fraud.[143]

In light of *Skilling*, decided less than a month before *Urciuoli II*, the question before the First Circuit was essentially whether the government had alleged and proven facts sufficient to characterize Urciuoli's influence-peddling scheme as one of bribery or kickbacks. *Skilling*, after all, held that a power-buying scheme must include bribery or kickback payments in order to sustain a conviction under § 1346, otherwise the elements of honest services fraud have not been met.[144] In other words, a corrupt scheme may satisfy the legal definition of honest services fraud only if a jury can reasonably conclude that payments are intended to function as bribes or kickbacks to induce official acts.

After reviewing Urciuoli's second trial and conviction, the court concluded that the trial judge had properly instructed the jury to just that effect:

> [T]he Government must prove beyond a reasonable doubt that Defendant Urciuoli intended the payment to cause John Celona to alter his official acts, to change an official position that he would otherwise have taken or to take official actions that he would not have taken but for the payment and[] [t]he Government has charged honest services mail fraud based on a claim that John Celona was paid to perform certain official acts.[145]

The court considered this instruction to be accurate and clear enough to ensure that the jury did not rely upon other, potentially problematic bases for its guilty verdict.[146] The jury had simply determined that Urciuoli's employment scheme was intended to function as nothing less than a bribe to induce Celona to execute official actions to benefit RWMC.

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[140] *Id.* at 12-14.

[141] *Id.* at 13.

[142] *Urciuoli I*, 513 F.3d 290, 297 (1st Cir. 2008).

[143] *Urciuoli II*, 613 F.3d at 13-14.

[144] Skilling v. United States, 130 S. Ct. 2896, 2931 (2010).

[145] *Urciuoli II*, 613 F.3d at 15 (quoting the jury instructions from the second trial).

[146] *Id.* Most important, the trial judge emphasized to the jury that non-disclosure of a conflict of interest – without a payment constituting a bribe – was insufficient to establish honest services fraud; the government had earlier advanced this alternative theory but dropped it when paring down its case on appeal after *Skilling* was decided. *Id.*

Ultimately, the court saw little merit in Urciuoli's appeal, especially with regard to the Supreme Court's recent narrowing of § 1346.[147] Its opinion expressed an unambiguous view of the illegality of schemes like Urciuoli's, concluding that his actions constituted "the core bribery offense preserved by *Skilling*."[148] Perhaps responding to perceived (or anticipated) criticism, the court also defended its judicial treatment of the political branches, and its role in adjudicating politically charged corruption cases: "Through an evolution endorsed by Congress, the mail- and wire-fraud statutes have assumed a role in policing corruption in state government, and federal prosecutors have been willing to test the limits. This court has sought to check perceived excesses . . . ."[149] Urciuoli may have disagreed, but the Supreme Court declined to review his case, apparently considering the First Circuit's interpretation of § 1346 and *Skilling* sufficiently accurate and noncontroversial to stand as final.[150]

Thus, it seems that the First Circuit has resolved, with the Supreme Court's tacit approval, to take seriously Congress's expressed intent with respect to § 1346, and interpret "bribes" and "kickbacks" under *Skilling* somewhat liberally. It has recognized, accepted, and perhaps implicitly endorsed the aggressive stance of federal prosecutors against state-government corruption on these grounds. But it has also put those same prosecutors on notice that they may not rely on lax standards to let jurors infer guilt, and that the First Circuit's rules for sufficiency of evidence in honest services fraud cases will be vigorously enforced, as in any criminal prosecution.

C. United States v. DiMasi*: A Worthy Test Case*

Former Speaker DiMasi's trial was highly publicized, with extensive media coverage of the evidence presented, witness testimony, and closing arguments by both sides – and of course, of the jury's guilty verdict.[151] But flying mainly below the general public's radar, the district court made a number of legal rulings and preliminary determinations that seriously affected the outcome of the case. In particular, District Judge Mark L. Wolf was obliged to interpret and apply the relevant Supreme Court and First Circuit precedents, as well as instruct the jury on the necessary elements of honest services fraud and what

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[147] *Id.* at 17 ("*Skilling* is harmful to Urciuoli's position in certain respects and his attempt to use it in his favor, although imaginative, is hopeless.").

[148] *Id.* at 18.

[149] *Urciuoli II*, 613 F.3d at 17. Supporting the claim about its record, the court cited multiple instances when it checked prosecutorial excesses. *Id.* at 17, 17 n.5 (citing *Urciuoli I*, 513 F.3d 290, 294-96 (1st Cir. 2008); *Sawyer II*, 239 F.3d 31, 50 (1st Cir. 2001) (Boudin, J., concurring); United States v. Czubinski, 106 F.3d 1069, 1076-77, 1079 (1st Cir. 1997); *Sawyer I*, 85 F.3d 713, 722-34 (1st Cir. 1996)).

[150] Urciuoli v. United States, 131 S. Ct. 612 (2010) (mem.).

[151] *See, e.g.*, Valencia, *supra* note 1 (describing the intense, thorough trial and the multiple charges under which DiMasi and his codefendants were convicted).

facts were sufficient in the instant case to prove that DiMasi committed the crime.[152]

In disposing of post-trial motions for acquittal and for a new trial, the court noted that the scheme and coordination of payments for official acts, as outlined at trial, were factually comparable to those in *Urciuoli II*.[153] And, as in *Urciuoli II*, the evidence against DiMasi did not necessarily show directly or beyond all doubt an explicitly illegal quid pro quo deal to deceive and harm taxpayers. Much of the evidence was circumstantial, its significance subject to interpretation; but taken all together one could perceive the mosaic-like picture of a secretive, corrupt arrangement.[154] If this formed part of the basis for the jury's guilty verdict, the court observed, there was nothing improper about it whatsoever:

> "[E]vidence of a corrupt agreement in bribery cases is usually circumstantial, because bribes are seldom accompanied by written contracts, receipts, or public declarations of intentions. This is especially true in cases involving governmental officials or political leaders, whose affairs tend more than most to be subjected to public scrutiny. As a result, a jury can in such cases infer guilt from evidence of benefits received and subsequent favorable treatment, as well as from behavior indicating consciousness of guilt."[155]

Thus the court reasoned that direct, unambiguous evidence of a quid pro quo is not required to prove a bribe or a kickback, and the absence of such an obvious smoking gun did not doom the government's case against DiMasi.

Dismissing DiMasi and McDonough's argument that prosecutors had failed to show sufficient linkage between alleged payments directed to the Speaker and official acts executed by his office, the court responded flatly that "contrary to what defendants sometimes argue, honest services fraud does not require proof that specific payments were intended to be in exchange for particular official acts."[156] The court drew support for this statement directly

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[152] *See infra* notes 159-60 and accompanying text.

[153] United States v. DiMasi, 810 F. Supp. 2d 347, 355 (D. Mass. 2011) ("In *Urciuoli II*, the First Circuit interpreted *Skilling* in a manner that is consistent with [other precedents], on facts comparable to the payments to DiMasi personally in this case.").

[154] *Id.* at 356-60.

[155] *Id.* at 353 (alteration in original) (citations omitted) (quoting United States v. Friedman, 854 F.2d 535, 554 (2d Cir. 1988)).

[156] *Id.* at 354. In Judge Wolf's footnote to this statement, he pointed out that even DiMasi seemed to acknowledge, albeit inconsistently, that such an argument could not prevail under *Skilling*; his reply brief all but conceded the point. *Id.* at 354 n.4 ("DiMasi has not been consistent in making this argument. For example, he concedes in his reply brief that, '[i]t's true that you don't have to tie specific payments to specific acts – that a stream of payment for specific acts surfices [sic].'" (quoting Defendant Salvatore F. DiMasi's Memoradum [sic] in Reply to Government's Opposition to DiMasi's Motion for Post-Verdict Acquittal on All Counts and, in the Alternative, Motion for New Trial at 6, *DiMasi*, 810 F. Supp. 2d

from *Skilling* itself, and the Supreme Court's underlying logic.[157] The Circuit's leading case provided additional support:

> *Urciuoli II* also makes clear that honest services fraud does not require proof that payments were made in exchange for official acts concerning matters identified when the payments were made and that an unlawful agreement to commit honest services fraud need not be express, but can be proven by inference, based on circumstantial evidence.[158]

By this seemingly uncontroversial reading of *Skilling* and *Urciuoli II*, Judge Wolf clarified that proving a linkage between specific payments and particular official acts in a § 1346 prosecution is as unnecessary today as it was pre-*Skilling*. Moreover, the court was careful to ensure that its jury instructions on honest services fraud closely mirrored the essential language in *Skilling*, *Urciuoli II*, and several other key appellate decisions *Skilling* had relied upon.[159] Most important, the instructions clarified that the crime requires payments be made *for* official acts, and that gratuities paid or received *without* the intent to influence official action – however suspicious or corrupt they might appear – do *not* constitute honest services fraud.[160]

Finally, the court dismissed the argument that DiMasi's scheme was too indefinite to meet the bribes-and-kickbacks limitation imposed by *Skilling*.[161] Just as the First Circuit had in the case of Mr. Urciuoli, Judge Wolf utterly rejected this argument, concluding instead that DiMasi's scheme in fact constituted the "essence of honest services fraud" after *Skilling*.[162] The court further elaborated that "[i]n *Skilling*, the Supreme Court noted that *McNally* . . . involved payments through a middleman for the benefit of a public official and characterized it as a 'paradigmatic' and 'classic' case of an honest services

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347 (No. CR-09-10166))).

[157] *Id.* at 354-55 (emphasizing the *Skilling* Court's reliance on reasoning from Second, Third, and Fifth Circuit cases consistently requiring no such linkage between specific payments and specific acts). According to this theory, a "stream of payments" intended to secure official influence is sufficient, and requires no showing of correlation between specific payments and specific official acts. *Id.* at 354; *see also* Skilling v. United States, 130 S. Ct. 2896, 2932-34 (2010); United States v. Ganim, 510 F.3d 134, 145, 148 (2d Cir. 2007).

[158] *DiMasi*, 810 F. Supp. 2d at 355.

[159] *Id.* ("The court's instructions to the jury in this case concerning honest services fraud closely tracked the language in *Skilling*, *Urciuoli II*, *Ganim*, *Kemp*, *Whitfield*, and *Kincaid-Chauncey*."); *see also* United States v. Whitfield, 590 F.3d 325, 352-53 (5th Cir. 2009); United States v. Kincaid-Chauncey, 556 F.3d 923, 943-47 (9th Cir. 2009); *Ganim*, 510 F.3d at 147-49; United States v. Kemp, 500 F.3d 257, 281-86 (3d Cir. 2007).

[160] *DiMasi*, 810 F. Supp. 2d at 355-56; *see also* Jury Instructions at 41, *DiMasi*, 810 F. Supp. 2d 347 (No. CR-09-10166).

[161] *DiMasi*, 810 F. Supp. 2d at 360-61.

[162] *Id.* at 361.

fraud scheme. The instant case fits that paradigm."[163] When DiMasi and McDonough later moved for bail pending their appeals, Judge Wolf again rejected their claims under the same analysis.[164] Despite "brilliantly presented" arguments by the defense attorneys, he did not perceive a close question of law that was likely to produce a change of any sort on appeal to the First Circuit.[165]

On August 21, 2012, DiMasi officially appealed his conviction, filing a more than 100-page brief in the U.S. Court of Appeals for the First Circuit.[166] With regard to the validity of his honest services fraud conviction, DiMasi's legal arguments on appeal largely mirror ones that have already been considered and rejected. His brief argues that the government was required to prove "an explicit agreement with the payer to exchange the payment for an official act,"[167] and that "proving a 'stream of payments' does not obviate the government's obligation to prove a quid pro quo agreement."[168] It repeatedly decries the lack of direct evidence of the scheme, characterizes the circumstantial evidence offered at trial as insufficient, and claims, with varying degrees of specificity, that the government must prove a definite agreement and a shared understanding among coconspirators that payments to DiMasi would secure agreed-upon official action.[169] While these arguments might seem compelling in isolation, they essentially raise issues that have already been decided by binding First Circuit authority.

The court will not hear arguments and issue a ruling until sometime in early 2013. But viewing the case in light of the relevant precedents, it is difficult to escape Judge Wolf's conclusion that there is little meritorious legal basis for DiMasi's appeal of his honest services fraud conviction. In particular, *Urciuoli II*'s application of *Skilling* to comparable facts, while preserving significant prior First Circuit precedent, seems too much for DiMasi to overcome. The court will necessarily review the trial record and consider the sufficiency of the evidence against the standards of those previous cases, but it should not, and most likely will not, find a reason to disturb the district court's ruling or the jury's ultimate guilty verdict.

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[163] *Id.* (citations omitted).

[164] United States v. DiMasi, 817 F. Supp. 2d. 9, 25 (D. Mass. 2011).

[165] *Id.*

[166] *See* Opening Brief and Addendum of Appellant Salvatore F. DiMasi, United States v. DiMasi, No. 11-2163 (1st Cir. Aug. 21, 2012); Milton J. Valencia, *DiMasi Appeals Corruption Conviction*, BOS. GLOBE, Aug. 22, 2012, at B5.

[167] Opening Brief and Addendum of Appellant Salvatore F. DiMasi, *supra* note 166, at 28. DiMasi attempts to equate the federal bribery standard expounded in *Sun-Diamond* with the standard for bribery as an element of post-*Skilling* honest services fraud; in doing so he cites two cases from the Third Circuit that do not themselves appear to make that connection. *See id.* at 32-33.

[168] *Id.* at 50. Here DiMasi draws on an arguably strained reading of the Second Circuit's *Ganim* decision. *See supra* note 157 and accompanying text.

[169] Opening Brief and Addendum of Appellant Salvatore F. DiMasi, *supra* note 166, at 27-55.

IV. HONEST SERVICES REFORM: A WORTHWHILE ENDEAVOR?

The Supreme Court's consciously moderate decision in *Skilling* did not prompt any immediate, concerted congressional response like its bombshell in *McNally* had. One need not wonder too much why this was the case, as the decision exuded some level of institutional deference to Congress and to the courts of appeals, in contrast to *McNally*'s defiance. Still, some members of Congress sought to amend the mail-fraud statute to supersede all or part of *Skilling*'s limiting construction, and in particular to restore wider power and discretion to the arsenals of federal prosecutors.

A. *Halfhearted Effort in Congress*

On September 28, 2010, Senator and Judiciary Committee Chairman Patrick Leahy introduced the Honest Services Restoration Act.[170] The Act proposes to insert language immediately following § 1346 stating that the term "scheme or artifice to defraud" also includes schemes by public officials and corporate officers and directors to engage in "undisclosed self-dealing," which is defined in some depth.[171] It would also state clearly that "public official" includes any officer acting under state, rather than merely federal, authority.[172] The very next day, Anthony Weiner, then a representative from New York, introduced companion legislation in the House of Representatives.[173] The House version of the proposed legislation is nearly identical to the Senate's concerning the provisions for self-dealing by public officials. The notable exception is that it makes no mention of corporate officers and directors or any private fiduciaries; it concerns only the public's right to "honest services" from its governmental representatives.[174]

Neither "Honest Services Restoration" bill, however, has come to the floor of either chamber for a vote, much less garnered the support necessary for passage. Senator Leahy's bill expired in the 111th Congress, and was not revived in the 112th. Representative Weiner's bill was reintroduced in the

[170] Honest Services Restoration Act, S. 3854, 111th Cong. (2010).

[171] *Id.* (defining "undisclosed self-dealing" to include an official act that would benefit or further the "financial interest" of the official, his family members, a "general partner of the public official," or an "individual, business, or organization" for whom the official works, receives compensation from, or from which the official has "received a thing of value or a series of things of value").

[172] *Id.* § 2 (defining "public official" as "an officer, employee, or elected or appointed representative, or person acting for or on behalf of the United States, a State, or subdivision of a State, or any department, agency, or branch thereof, in any official function, under or by authority of any such department agency or branch of Government").

[173] Honest Services Restoration Act, H.R. 6391, 111th Cong. (2010) (proposing amendments to 18 U.S.C. § 1346 mirroring those proposed in the Senate, particularly the inclusion of a section regarding "self-dealing" of public officials).

[174] *Compare id.* § 2, *with* S. 3854 § 2.

112th Congress,[175] but to little avail; it was referred to a House Judiciary subcommittee on July 11, 2011, and has seen no major official action since then.[176] Some scholarship has attempted to predict or influence what a post-*Skilling* "Honest Services Restoration" law will or should look like,[177] but at the moment congressional inaction seems to have arrested the debate on statutory amendment.

Another bill, the Clean Up Government Act of 2011,[178] was introduced by Representative Jim Sensenbrenner on July 15, 2011. Like the House version of the Honest Services Restoration Act, this bill would explicitly add undisclosed self-dealing to the scope of § 1346 for public officials only.[179] It would also make amendments to a handful of other public corruption provisions[180] that would somewhat broaden their reach, make it easier for prosecutors to bring certain borderline cases, and increase the severity and availability of some penalties.[181] Representative Sensenbrenner's bill progressed further, and a recently amended version was reported by the full House Judiciary Committee and placed on the Union Calendar on September 21, 2012.[182] But even overwhelming support in a relevant committee may not guarantee a vote on the House floor in the current political climate. Given the well-documented hyper-partisan dysfunction in the current congressional scene, as well as the recent

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[175] Honest Services Restoration Act, H.R. 1468, 112th Cong. (2011) (proposing the same self-dealing amendment as the previous House bill).

[176] *Bill Summary & Status, 112th Congress (2011-2012), H.R. 1468*, THOMAS.GOV, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR01468:@@@X (last visited Jan. 24, 2013).

[177] *See, e.g.*, Sheyn, *supra* note 66, at 52-65.

[178] Clean Up Government Act of 2011, H.R. 2572, 112th Cong. (2011) (proposing several amendments to various corruption laws, including § 1346).

[179] *Id.* § 14 (proposing the addition of a new section entitled "Undisclosed Self-Dealing by Public Officials," which would make clear that "the term 'scheme or artifice to defraud' also includes a scheme or artifice by a public official to engage in undisclosed self-dealing").

[180] Rep. Sensenbrenner's bill also includes amendments to 18 U.S.C. §§ 201, 641, 666, 1341, 1343, and 1961, among others. *Id.* §§ 2, 4-9, 11, 13, 18.

[181] *Id.* For a strong and interesting stance in opposition to this bill on behalf of the National Association of Criminal Defense Lawyers, see *Clean-Up Government Act of 2011: Hearing on H.R. 2572 Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 62 (2011) (prepared statement of Timothy P. O'Toole, Partner, Miller & Chevalier) [hereinafter O'Toole statement] (arguing that H.R. 2572 recklessly expands federal authority to punish public corruption without proper consideration of the social costs and benefits, and that congressional desire to respond to public corruption scandals "cannot justify fashioning broad amendments to these laws without a methodical attempt to address all of the concerns identified by the Supreme Court in *Cleveland*, *Skilling*, and *Sun-Diamond*, as well as a reasoned effort to see if any amendments are necessary in the first place").

[182] *Bill Summary & Status, 112th Congress (2011-2012), H.R. 2572*, THOMAS.GOV, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR02572:@@@X (last visited Jan. 24, 2012).

transition from the 112th Congress to the 113th, major legislative action seems unlikely. In short, there is no reason to expect that the Clean Up Government Act, the Honest Services Restoration Act, or anything substantially like them will pass in the House – much less find agreement in the Senate and become law – in the near future.

B. *What to Reform?*

With efforts stalled in Congress to expand § 1346 to its pre-*Skilling* scope (and perhaps further), it is worth asking: what about § 1346 needs amendment so badly? In the absence of evidence that *Skilling* effected more than an incremental change in the common law analysis and development of honest services fraud, why assume that it will have a drastic effect on the practical consequences of public corruption prosecutions, or that the cumulative results of such an effect would be negative?[183] In fact, the lack of urgency in any legislative response thus far may indicate a growing recognition that the effects of *Skilling* are likely to be more moderate, and certainly less disastrous to anti-corruption efforts than some had feared or predicted.[184] The experience thus far in Massachusetts and the First Circuit seems to bear out this view.

But because members of Congress still seem to retain some appetite for tackling the honest services issue once again, perhaps they should consider changing something obvious that has long gone unquestioned: the fact that the most prominent public-corruption-fighting provision in the U.S. Code, § 1346 itself does not so much as mention public corruption, public officials, or public duty. This might be one situation where form is truly more of a concern than substance. Section 1346, and the judicial honest services doctrine before it, has always functioned practically and flexibly as an anti-corruption tool. In that way its elasticity mirrors that of the mail-fraud statute as a whole.[185] This remains true, albeit with some adjustments, after *Skilling*. But honesty in government is linked to public trust and confidence; both might improve if corrupt breaches were more explicitly barred by the letter of the law.[186] It may not make much of a difference to judges, prosecutors, and others well-versed in federal criminal prosecution, the mail-fraud statute, and public corruption cases. But it just might be comforting to the ordinary citizen observing a case like DiMasi's to learn that the public servant facing corruption charges has violated a clear directive for government officials not to deal corruptly with power and privilege. Such an approach offers obvious benefits, including

[183] *See* O'Toole Statement, *supra* note 181, at 54-56.

[184] *See supra* Part I.B.3.

[185] *See* Sloane, *supra* note 27, at 905-09 (outlining the broad scope and flexibility of mail and wire fraud).

[186] *See* Jacob Eisler, *The Unspoken Institutional Battle over Anticorruption:* Citizens United*, Honest Services, and the Legislative-Judicial Divide*, 9 FIRST AMEND. L. REV. 363, 367 (2010) (arguing that "trust, empathy, and respect for other parties are prerequisites for successful deliberative democracy").

clarity and deterrence, as compared to the curiously vague and general language of § 1346 that currently serves as the mainstay of public corruption jurisprudence.

CONCLUSION

For those who may have feared that *Skilling* stripped federal prosecutors of their power and discretionary tools to combat sophisticated political corruption, the *DiMasi* case offers a potentially significant and compelling rejoinder. It remains not only possible, but indeed practically feasible to convict savvy politicians of honest services fraud, even when the charges outline a sophisticated, well-planned, and well-disguised scheme that is defended and cast in the best possible light by creative and capable defense counsel. That such active and premeditated plots could escape punishment would seem far more objectionable than, for example, a lack of criminal sanctions for undisclosed self-dealing among public officials.[187] But the DiMasi case suggests that, insofar as the post-*Skilling* honest services doctrine has been applied in Massachusetts to date, that is not the case. This is good news that will be solidified in the highly likely event that DiMasi's conviction is affirmed by the First Circuit.

The honest services doctrine, then, even trimmed back after *Skilling*, is alive and well as an anti-corruption measure against public officials in Massachusetts. It seems fully capable of providing sanctions for betrayals of public trust, but its deterrent value might be questioned because so few know or understand the law's role and reach. Thus, the most significant weakness in the honest services statute may lie not in its ability to punish corrupt conduct, which is robust and flexible, but in its disconnect from the public consciousness. Repairing this disconnect could be an important step that would allow prosecutors to move from merely punishing individual instances of corruption toward fixing a pervasive culture of corruption and partiality in Massachusetts government and public life.

[187] It is also worth remembering that such conduct is already directly regulated to a certain extent by other statutes, *see supra* note 10, and can also be characterized in some cases as bribe-or-kickback activity in order to be prosecuted under § 1346, *see supra* Part I.B.3.