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One thing is clear: the authors who are writing in this *En Banc* discussion forum about the honest-services statute all strongly believe that § 1346 is vague. Attorneys Abbe David Lowell, Christopher D. Man, and Paul M. Thompson state "[i]n our view the statute is unconstitutionally vague."[1] Attorney Tim O'Toole states that "[t]he only fair and workable solution is for the Court to strike down the statute and force Congress back to the drawing board."[2] One only needs to look at the first sentence in Professor Julie R. O'Sullivan's essay to understand her position on § 1346 and vagueness. She states, "[i]t is my firm belief that if any statute is unconstitutionally vague, it is 18 U.S.C. § 1346, at least as applied to cases in which employees of private entities are prosecuted for depriving their employers of a right to their honest services ('private cases')."[3]

But something monumental happened at the March 1, 2010, oral argument in the Jeffrey Skilling case that went unnoticed by all the authors, including myself. Chief Justice Roberts and Justices Sotomayor, Ginsburg, Breyer, Scalia, and Kennedy were peppering Deputy Solicitor General Dreeben with questions regarding honest services and § 1346. Justice Alito, known for being the "Court's biggest baseball fan,"[4] then came up to bat. He asked a single question, but the most telling question for consideration of whether § 1346 is vague.

Justice Alito asked, "[w]ere there any pre-*McNally* cases that involved a situation like this, where the benefit to the employee was in

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1. Abbe David Lowell et al., *"Not Every Wrong is a Crime": The Legal and Practical Problems with the Federal "Honest-Services" Statute*, 63 VAND. L. REV. EN BANC 11 (2010).

2. Timothy P. O'Toole, *The Honest-Services Surplus: Why There's No Need (or Place) for a Federal Law Prohibiting "Criminal-esque" Conduct in the Nature of Bribes and Kickbacks*, 63 VAND. L. REV. EN BANC 49 (2010).

3. Julie R. O'Sullivan, *Honest-Services Fraud: A (Vague) Threat to Millions of Blissfully Unaware (and Non-Culpable) American Workers*, VAND. L. REV. EN BANC 23 (2010).

4. *See* Posting of Tony Mauro to The BLT: The Blog of LegalTimes, http://legaltimes.typepad.com/blt/2008/06/alito-on-baseba.html (June 2, 2008, 16:52 EST).

the form of the employee's disclosed compensation?"[5] Deputy Solicitor General Dreeben responded, "[t]here were not to my knowledge, Justice Alito, and I would frankly acknowledge that this case is a logical extension of the basic principle that we have urged the Court to adopt in the nondisclosure cases, and the Court can evaluate whether it believes that that is legitimately within the scope of an honest services violation or not."[6]

The answer provided here is additional confirmation to the point I made in my initial essay: the government has stretched the honest-services statute to encompass conduct that it wishes to prosecute. But it more importantly demonstrates the tenuous support for the government's claim that the statute is not vague.

The government has contended throughout this case that § 1346 reinstates the pre-*McNally* definition of honest-services fraud.[7] Calling the intangible right to honest services a "term of art,"[8] the government attempts throughout its brief to demonstrate the wealth of pre-*McNally* law that provides an understanding of the statute. The government even goes so far in its brief to say that "[p]etitioner significantly overstates the extent to which the courts of appeals differed about the scope of an honest services offense before *McNally*."[9] Petitioner Jeffrey Skilling's brief, however, notes that "[t]o identify its meaning, one must consult almost two decades worth of Federal Reports, searching for cases describing or enforcing the judicially created crime of honest-services fraud, before this Court rejected them all as exceeding the judicial function in *McNally*."[10]

But Deputy Solicitor General Dreeben's answer to Justice Alito's question presents a new dimension to this issue. It is now clear that even if one had searched the Federal Reports for like cases, they would not be found. Admitting that there are no cases that correspond to the honest-services issue presented in the *Skilling*[11] case clearly demonstrates the lack of notice provided to the defendant of what constitutes criminality. To be charged with a crime with neither notice of the acts being criminal nor the opportunity to conform one's conduct

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5. Transcript of Oral Argument at *48, Skilling v. United States, No. 08-1394, 2010 U.S. Trans. LEXIS 17 (argued Mar. 1, 2010)

6. Transcript of Oral Argument, *supra* note 5, at *48.

7. Brief for the United States at *37, Skilling v. United States, No. 08-1394, 2009 WL 4818500 (argued Mar. 1, 2010).

8. *Id.* at *38.

9. *Id.* at *46.

10. Brief for Petitioner at *22, *Skilling*, No 08-1394, 2009 WL 4818500 (argued Mar. 1, 2010).

11. *Skilling v. United States*, No. 08-1394 (U.S. argued Mar. 1, 2010)

within the legal limits flies in the face of an important principle at the bedrock of our judicial system. It certifies the lack of due process provided to the accused. The answer provided by the deputy solicitor general is confirmation of what Professor O'Sullivan calls "vagueness on steroids: a statute that is vague not only 'in the sense that requires a person to conform his conduct to an imprecise but comprehensible normative standard, but [also] . . . in the sense that no standard of conduct is specified at all.' "[12]

This Term, the Court heard oral arguments in the *Black* and *Weyrauch* cases. Both of these cases are on the field awaiting Court rulings. *Skilling* now joins them, and with three cases before the Court on § 1346, the bases are loaded. Justice Alito's single question to Deputy Solicitor General Dreeben hit the home run that brought home all of these cases. If there was no pre-*McNally* law on the issues presented to this Court, then clearly this statute is vague. *Skilling* needs to go home, and the baseball fan of the Court made this point clear.

12. O'Sullivan, *supra* note 3, at 4 (citing *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971)) (emphasis added).