

**WHITE COLLAR CRIME:
CASES, MATERIALS, AND PROBLEMS**

2011 Supplement

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(Pub 3193)

Chapter 2

CORPORATE AND INDIVIDUAL LIABILITY

[C] CORPORATE MENS REA

[2] New Models of Corporate Criminal Liability

P. 37: *[Insert at end of page:]*

When considering these questions, note that the Massachusetts Supreme Court has rejected the collective knowledge doctrine. *See Commonwealth v. Life Care Centers of America*, [926 N.E.2d 206, 212](#) (Mass. 2010) (“We conclude, consistent with our existing case law, that a corporation acts with a given mental state in a criminal context only if at least one employee who acts (or fails to act) possesses the requisite mental state at the time of the act (or failure to act)”.)

Chapter 3

CONSPIRACY

[B] MENS REA

P. 58: [Insert at the end of note 3:]

The United States Supreme Court has recently defined the willful blindness doctrine as follows:

[T]he Courts of Appeals . . . all appear to agree on two basic requirements [for willful blindness]: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact. We think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence. Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts.

Global-Tech Appliances, Inc. v. SEB S.A., [131 S. Ct. 2060, 2070](#) (2011). Is this definition sufficiently clear? Why or why not?

[C] THE “OFFENSE CLAUSE” AND THE “DEFRAUD CLAUSE”

P. 62: [*Insert new case following note 3:*]

* * *

Do the offense and defraud clauses of § 371 create a single offense with two possible underlying theories, or two different offenses? If the latter is true, then defendants could be separately punished for the same conspiracy and it would not violate the Double Jeopardy Clause. The issue arose in the next case, involving prosecutions of former Adelphia Communications Corp. Chairman and CEO John Rigas and his son Timothy. The defendants had been convicted in one circuit under the offense clause, and the government sought to try them again in another circuit under the defraud clause. The defendants argued that the second prosecution violated double jeopardy. In a split decision, the Third Circuit sitting *en banc* agreed with the majority of circuits that have considered the issue and held that § 371 creates a single offense that can be violated in alternative ways. As you read the case, consider whether the majority or dissenting opinion is more persuasive.

UNITED STATES v. RIGAS

[605 F.3d 194](#) (3d Cir. 2010)

FUENTES, Circuit Judge, with whom McKEE, Chief Judge, and BARRY, AMBRO, SMITH, FISHER, and JORDAN, Circuit Judges, join:

Defendants John and Timothy Rigas (the “Rigases”) seek to prevent their federal trial in Pennsylvania for conspiracy to defraud the United States, in violation of [18 U.S.C. § 371](#), and for substantive tax evasion violations. The Rigases, who were convicted of conspiracy under the same statute in New York, claim that their re prosecution in Pennsylvania violates their right to be free from double jeopardy. Specifically, they contend that § 371 creates a single offense that can be violated in alternative ways, and that the Government cannot split a single conspiracy into two prosecutions. The Government, on the other hand, contends that § 371 creates separate and distinct crimes, and therefore the Rigases' prosecution in Pennsylvania presents no double jeopardy violation. We conclude that, under a plain and natural reading of § 371, the statute creates a single offense, and that the successive prosecution of the Rigases in this case may constitute a double jeopardy violation.

I. Background

This appeal stems from the 2002 collapse of Adelphia Communications Corporation (“Adelphia”). John Rigas was the founder of Adelphia. Until 2002, he served as Adelphia's Chairman and Chief Executive Officer (“CEO”). His son, Timothy Rigas, was a board member and the Chief Financial Officer (“CFO”). Until its disastrous collapse in 2002, Adelphia was the sixth largest cable television provider in the United States. Although the Rigas family did not own a majority of Adelphia's outstanding common stock, they controlled a majority of Adelphia's shareholder votes. As a result, the Rigas family elected eight of Adelphia's nine directors and controlled all of Adelphia's corporate affairs.

In the late 1990s, Adelphia began a process of rapid expansion by acquiring other cable operators. It financed these acquisitions by issuing new corporate stock and taking on corporate debt. As a result of this process, Adelphia became highly leveraged. In order to avoid diluting their control of Adelphia, and to create the appearance that Adelphia was reducing its debt burden, the Rigases purchased large amounts of Adelphia stock and assumed Adelphia's debt. According to the Government, these transactions were a sham. When the true state of Adelphia's finances and operations became clear, Adelphia collapsed.

Prior to June 2002, Adelphia's stock was registered with the Securities and Exchange Commission (“SEC”) and was publicly traded on the NASDAQ National Market System. In January 2002, Adelphia's stock traded at \$31.85. By June 2002, Adelphia's stock was worth pennies a share and was delisted by NASDAQ.

In 2002, John and Timothy Rigas were indicted in the Southern District of New York. The New York Indictment charged, among other offenses, a wide-ranging conspiracy to loot Adelphia and to hide both the Rigases' plunder and Adelphia's weak financial condition from the public and the SEC, all in violation of [18 U.S.C. § 371](#). A jury subsequently convicted the Rigases on the conspiracy count, as well as a number of substantive fraud offenses. They were acquitted of wire fraud and one of the bank fraud counts.

In 2005, the Rigases were indicted in the Middle District of Pennsylvania and charged with conspiracy to defraud the United States in violation of [18 U.S.C. § 371](#) by evading the taxes due on their ill-gotten gains. John and Timothy Rigas were also each charged with three counts of tax evasion for the tax years 1998 to 2000.

A. The New York Action

In September 2002, a grand jury sitting in the Southern District of New York returned an indictment against John Rigas, Timothy Rigas, Michael Rigas (Adelphia's Executive Vice President of Operations and another son of John Rigas), and Michael Mulcahey (an Adelphia executive but not a member of the Rigas family). A Superseding Indictment, returned in July 2003, charged the defendants with conspiracy to commit an offense against the United States in violation of [18 U.S.C. § 371....](#)

After a four-and-a-half month trial, the jury found John and Timothy Rigas guilty of: (1) conspiracy to commit securities fraud, to make false statements to the SEC, to falsify Adelphia's books and records, and to commit bank fraud; (2) securities fraud in connection with the purchase or sale of Adelphia Class A stock, debentures, and notes; and (3) bank fraud....

John Rigas received a sentence of five years imprisonment on the conspiracy count, and an aggregate sentence of twelve years on all the counts. Timothy Rigas received a sentence of five years imprisonment on the conspiracy count, and a total combined sentence of seventeen years on all counts. Financial penalties were governed by a Settlement Agreement between the Government and the Rigas family....

Count One of the New York Indictment alleged a wide-ranging conspiracy (1) to create the false appearance that Adelphia's operating performance was strong and that Adelphia was reducing its debt burden, (2) to use Adelphia assets for the personal benefit of members of the Rigas family, and (3) to make false and misleading statements. We focus on the second aspect of the conspiracy, which most closely overlaps with the charges in the Pennsylvania Indictment.

The New York Indictment and Bill of Particulars alleged that the Rigases used Adelphia funds, “[a]mong other things[,] ... to construct a golf course on land primarily owned by JOHN J. RIGAS; routinely used Adelphia's corporate aircraft for their personal affairs, without reimbursement to Adelphia; and used at least approximately \$252,157,176 in Adelphia funds to pay margin calls against loans to the Rigas family.”

According to the Bill of Particulars: Adelphia purchased real estate from Rigas family members above market value without the property being conveyed to Adelphia; Adelphia purchased real estate for Rigas family members and paid to maintain and renovate that property; Adelphia paid the Rigases' property taxes and insurance premiums; Adelphia paid golf club membership dues for the Rigases, paid expenses related to Ellen Rigas's wedding, and purchased 100 pairs of slippers for Timothy Rigas. The New York Bill of Particulars also alleged that Adelphia made "charitable contributions" on behalf of the Rigases....

B. The Pennsylvania Action

On October 6, 2005, a grand jury sitting in the Middle District of Pennsylvania returned an indictment charging John and Timothy Rigas with (1) one count of conspiracy to defraud the United States in violation of [18 U.S.C. § 371](#); and (2) six counts of tax evasion in violation of [26 U.S.C. § 7201](#).

According to the Pennsylvania Indictment, the Rigases' conspiracy to evade income tax dates back to the late 1980s, shortly after Rigas family members sold privately held cable companies to Adelphia. As a result of this transaction, Rigas family members paid over \$12.6 million in federal income taxes. "JOHN J. RIGAS and TIMOTHY J. RIGAS stated to an Adelphia employee that they would never pay this large amount of taxes again." Timothy Rigas told "Adelphia employees that the Rigas family members should not take large salaries from Adelphia, but should 'live out of the company.'"

Shortly thereafter, the Rigases began diverting funds from Adelphia accounts to Rigas family members and family-controlled entities. The allegations about these diverted funds closely parallel the allegations in the New York Indictment....

The Rigases maintain that the alleged conspiracy-to defraud the United States as charged in Pennsylvania, and to commit offenses against the United States as charged in New York-was formed by the same illegal agreement, and therefore they should have been prosecuted under both theories in the same proceeding. The District Court denied the Rigases' motion to dismiss the Pennsylvania Indictment. On appeal, a panel of this Court concluded that the Rigases established a prima facie case that there was only one conspiratorial agreement. Accordingly, the panel remanded the matter to the District Court for a hearing to determine whether the Pennsylvania prosecution should be dismissed on double jeopardy grounds. We granted the Government's petition for rehearing. For the reasons that follow, we will vacate and remand to the District Court to conduct an evidentiary hearing.

II. Discussion

The Rigases argue that the Pennsylvania conspiracy count subjects them to double jeopardy since they were already prosecuted and convicted for conspiring to commit an offense against the United States in New York. They reason that because [18 U.S.C. § 371](#) creates a single statutory offense of conspiracy that can be violated in alternative ways,

they can only be tried once for a single conspiratorial agreement in violation of that statute....

A. Double Jeopardy

The double jeopardy clause of the Fifth Amendment provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.”

Importantly, the Double Jeopardy Clause prohibits repeat trials for the same offense, not for the same conduct. Accordingly, a defendant may be subject to multiple prosecutions for the same conduct if Congress intended to impose multiple punishments for that conduct. *See Albernaz v. United States*, [450 U.S. 333](#) (1981). In other words, a defendant generally may be subject to multiple prosecutions so long as each prosecution involves a different offense.

1. The *Blockburger* Test

Before evaluating the merits of the Rigases' double jeopardy claims, we must determine the appropriate analytical test to apply. The Government contends that to determine whether § 371 reveals Congress' intent to separately punish the same course of conduct, we should apply the test the Supreme Court outlined in *Blockburger v. United States*, [284 U.S. 299, 304](#) (1932). The Rigases, on the other hand, argue in favor of utilizing the broader totality-of-the-circumstances test to discern congressional intent.

In *Blockburger* the Supreme Court states that, “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” *Id.* ([citations omitted](#)). In other words, “[u]nder the *Blockburger* test, a court looks to the statutory elements of the crime charged to determine if there is any overlap.” Thus, in *Albernaz* the Supreme Court concluded that the *Blockburger* test applies where the defendant's conduct violated multiple conspiracy statutes. [450 U.S. at 339-40](#).

The *Blockburger* test is a tool for determining whether Congress intended to separately punish violations of distinct statutory provisions, and is therefore inapplicable where a single statutory provision was violated. In other words, distinct statutory provisions are a condition precedent to applying the *Blockburger* test. Thus, the Supreme Court did not find *Blockburger* relevant in a case where a “single agreement is the prohibited conspiracy, and however diverse its objects [that agreement] violates but a single statute, § 37 of the Criminal Code,” a predecessor to the current general conspiracy statute. *Braverman v. United States*, [317 U.S. 49](#) (1942).

..... Before determining whether application of the *Blockburger* test is appropriate, we must determine whether § 371 creates a single offense.

Both the New York and Pennsylvania actions allege violations of [18 U.S.C. § 371](#),

which contains two prongs. The heart of the Rigases' challenge is that [18 U.S.C. § 371](#) creates a single offense that may be committed in two ways, i.e., either by “conspiring to commit an offense against the United States,” as charged in the Southern District of New York Indictment, or by “conspiring to defraud the United States,” as charged in the Middle District of Pennsylvania Indictment. Thus, “[i]n order to sustain a conviction under § 371, the government must show: (1) the existence of an agreement to achieve an unlawful objective; (2) the defendant's knowing and voluntary participation in the conspiracy; and (3) the commission of an overt act in furtherance of the conspiracy.” *United States v. Harmas*, [974 F.2d 1262, 1267](#) (11th Cir.1992).

The Rigases therefore argue that double jeopardy bars the Middle District of Pennsylvania's successive prosecution because it is based on a violation of the same statute they were convicted of violating in the New York prosecution, and because application of the totality-of-the-circumstances test, reveals that the conspiracies charged in both jurisdictions are the same. Accordingly, the Rigases fault the Government for not bringing both conspiracy charges in the same indictment.

The Government argues, on the other hand, that the totality-of-the-circumstances test is reserved for situations in which a defendant is charged with successive violations of the same conspiracy statute, and that here the Rigases are charged with committing two distinct offenses prohibited by § 371. In other words, the Government maintains that § 371 creates separate, distinct crimes. In turn, the Government rejects application of the totality-of-the-circumstances test, arguing that *Blockburger's* elements test demonstrates that the successive prosecutions do not violate the Rigases' Fifth Amendment right because Congress may authorize cumulative punishments for separate criminal offenses that occur in the same act. Accordingly, a single conspiratorial agreement can be prosecuted twice if it violates two separate conspiracy statutes....

We have not yet ... explicitly addressed whether these types of conspiracy are parts of a single statutory offense. Thus, we must determine whether the New York and Pennsylvania prosecutions are based on a violation of the same statutory provision. We conclude that they are.

“Whether a particular course of conduct involves one or more distinct ‘offenses’ under the statute depends on congressional choice.” *Sanabria*, [437 U.S. at 70](#). We discern congressional intent by first analyzing the statutory text, and we “interpret a statute by giving it its most natural reading.”¹

[Section 371] contains three key components. First, “two or more persons conspire.” Second, the object of the conspiracy must be “either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for

¹ We reiterate that *Blockburger* is a tool of statutory construction that is utilized to determine whether prosecution under two distinct statutory provisions violates double jeopardy, but does not control “where ... there is a clear indication of contrary legislative intent.” *Albernaz*, 450 U.S. at 340. Plain language analysis, on the other hand, is the appropriate tool of statutory construction that is utilized to determine whether Congress created distinct statutory provisions.

any purpose.” Third, “one or more of such persons [must] do any act to effect the object of the conspiracy.”....

We believe that, under a plain and natural reading of its text, § 371 creates one offense, not two distinct offenses. First, Congress' use of the word “either” before “to commit any offense” and “to defraud” demonstrates that these objects provide alternative means of committing a single type of offense rather than creating separate offenses. Indeed, Merriam-Webster defines “either” as: “the one or the other of the two.” Next, in cases “[w]hen the term ‘or’ is used, it is presumed to be used in the disjunctive sense unless the legislative intent is clearly contrary.” Importantly, “in penal statutes, the word ‘or’ is seldom used other than as a disjunctive. Finally, these alternatives come in the middle of the sentence, and are followed by the description of an additional element, i.e., the overt act requirement, signaling that objects are alternative means of violating § 371. Thus, the plain and literal meaning of the words “either ... or” suggests that Congress enacted § 371 intending to create a single, criminal offense that may be committed in two alternative ways.

By endorsing this interpretation of the phrase “either ... or,” we join several other circuits which have also concluded that Congress' use of disjunctive language creates alternative ways of violating a statute....

Thus, we conclude that the most natural reading of the statute is that Congress created a single offense that may be committed in alternative ways. The Government argues, however, that such an interpretation is overly formalistic, and contends that Congress may-and indeed does-regularly combine distinct, multiple, and sometimes incongruent offenses within a single statute. Thus, the Government posits that the statute is similar to, and should be read as if, it contains a § 371(a), i.e., the “offense” clause, and a § 371(b), i.e., the “defraud” clause, evidencing Congress' clear intent to create distinct offenses. This argument, however, is unpersuasive and only undermines the Government's position.

When Congress crafts a statute to create distinct offenses, it typically utilizes multiple subsections or separates clauses with semicolons to enumerate the separate crimes. Here, unlike most statutes that create multiple offenses, § 371 is a single sentence, divided only by commas. The fact that Congress declined to structure § 371 in such a manner undermines the interpretation advanced by the Government and supports our single-offense rendering of the statute.

Furthermore, what § 371 criminalizes is the unlawful agreement and not the substantive offenses which may be the object of the conspiracy. For this reason, “[i]t is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues.” *Salinas v. United States*, [522 U.S. 52, 65](#) (1997). Therefore, however diverse the objects of a § 371 conspiracy may be, the emphasis remains on-and the statute is aimed at-criminalizing the illegal agreement.

In holding that § 371 creates a single offense, we join the majority of circuits that

have reached the same conclusion when faced with challenges to indictments based on duplicity. “Duplicity is the improper joining of distinct and separate offenses in a single count. Duplicitous counts may conceal the specific charges, prevent the jury from deciding guilt or innocence with respect to a particular offense, exploit the risk of prejudicial evidentiary rulings, or endanger fair sentencing.” An impermissibly duplicitous indictment is subject to dismissal....

The Second, Ninth, Eleventh and District of Columbia Circuits have reached the same conclusion and held that single counts alleging violations of both the “offense” and “defraud” prong of § 371 are not duplicitous. In other words, because these counts charge one crime, not two, it logically follows that § 371 creates a single offense....

2. Totality of the Circumstances

Given our determination that the plain language of [18 U.S.C. § 371](#) reveals Congress' intent to create a single criminal offense that may be violated in two alternative ways, the *Blockburger* test is not the appropriate interpretive tool to ascertain whether the successive Pennsylvania prosecution places the Rigases in double jeopardy since the same-elements test is applicable only to distinct statutory provisions. Rather, we apply the totality-of-the-circumstances test to determine whether the Government impermissibly split a single conspiracy into multiple conspiracies, thereby violating the Rigases' Fifth Amendment rights. Accordingly, we must consider whether the Rigases' conduct violated the statute multiple times or only once.

The Double Jeopardy Clause prohibits the government from “splitting one conspiracy into several prosecutions.” Additionally, a single conspiracy should not be divided into multiple prosecutions, each alleging different overt acts....

[T]he Courts of Appeals, including the Third Circuit, have developed a totality-of-the-circumstances test to distinguish conspiracy prosecutions. This test directs a district court to look at the totality of the circumstances involved in each offense. The ultimate goal of the totality-of-the-circumstances test is to determine “whether there are two agreements or only one.”

Factors that prove helpful in determining whether an indictment charges one or more conspiracies are: “(1) ‘whether there was a common goal among the conspirators’; (2) ‘whether the agreement contemplated bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators’; and (3) ‘the extent to which the participants overlap in the various dealings.’”

We also consider whether:

- (a) the [location] of the two alleged conspiracies is the same; (b) here is a significant degree of temporal overlap between the two conspiracies charged; (c) there is an overlap of personnel between the two conspiracies (including unindicted as well as indicted coconspirators); and (d) the

overt acts charged and [(e)] the role played by the defendant according to the two indictments are similar.

Liotard, [817 F.2d at 1078](#) (internal citations omitted). In other words, the defendant must show that the place, time, people, actions, and responsibilities are similar in both prosecutions. This list, however, is not exhaustive, and “different conspiracies may warrant emphasizing different factors.” Further, when examining the totality of the circumstances, a district court must “assure that the substance of the matter controls and not the grand jury’s characterization of it.” Thus, a court must “look into the full scope of activities described and implied in the indictments.”

Against this background, we turn to the Rigases’ claim that the totality of the circumstances reveals that the Government impermissibly split a single conspiracy into multiple prosecutions, violating the Rigases’ Fifth Amendment right to be free from double jeopardy. While, as we explain below, we are inclined to agree with the Rigases’ assertion, we will remand the case to the District Court to conduct a full evidentiary hearing in accordance with this opinion.

i. Common Goal Among the Conspirators

We first conclude that the Rigases had a common goal—namely, to enrich themselves through the looting of Adelpia. As we have stated, the Government alleged in the Pennsylvania Indictment that, after a particularly high tax bill, the Rigases decided “that they would never pay [a] large amount of taxes again.” To accomplish this purpose, the Rigases decided that “Rigas family members should not take large salaries from Adelpia, but should ‘live out of the company.’ ” To avoid detection, the Rigases engaged in sham transactions to conceal their use of corporate assets. Of course, to conceal their income from the Government, the Rigases also had to conceal it from the public in general, including shareholders. The New York Indictment simply targeted this aspect of the Rigases’ scheme. Further, it is not dispositive that the conspiracy charged in the New York Indictment was broader than that charged in Pennsylvania. The charges in both indictments relate to a common goal of enriching the Rigases through the plunder of Adelpia. A “master conspiracy [can involve] more than one subsidiary scheme.” The allegations related to conversion of Adelpia funds by the Rigases—a subsidiary scheme within the New York Indictment appear to be the same in both indictments.

The Government urges us to focus on the objectives of the conspiracies charged in the two indictments, arguing that the object of the New York conspiracy was to commit securities fraud, bank fraud, and wire fraud; to file false reports with the SEC; and to falsify the books and records of Adelpia, while the object of the Pennsylvania conspiracy was to defraud the IRS. This argument, however, misses the point of the totality-of-the-circumstances test. It is well established that a single conspiratorial agreement can envisage the violation of several statutes. Further, the Government’s approach would give undue weight to the “grand jury’s characterization” of the Rigases’ conduct, instead of focusing on the “substance of the matter.” Thus, in considering whether the defendants had a common goal, we look to the underlying purpose of the

alleged criminal activity.

ii. Continuous Result Requiring Continuous Cooperation

We next conclude that “the [Rigases'] agreement contemplated bringing to pass a continuous result that [would] not [have] continue[d] without the continuous cooperation of the conspirators.” The first part of this factor overlaps with the time factor set forth in *Liotard*. In evaluating the “cooperation” part of this factor, “we look to whether there was evidence that the activities of one group were necessary or advantageous to the success of another aspect of the scheme or to the overall success of the venture.” In other words, we consider whether all aspects of the scheme were interdependent.

As to time, the Pennsylvania Indictment covers a wider time span than the New York Indictment, but the key years in both conspiracies are the same. The Pennsylvania Indictment alleges that the conspiracy lasted from “November 1989, through the date of the indictment [2005],” but only describes overt acts occurring between 1998 and 2002. Pennsylvania Indictment 2. The majority of the allegations in the conspiracy count relate to the period between 1996 and 2002. The alleged tax loss is further limited to the period of 1998 to 2000.

The New York Indictment charged a conspiracy between 1999 and May 2002. The New York Indictment, however, suggests that the Rigases' conspiratorial conduct began well before 1999. The Bill of Particulars further alleges that the Rigases began using Adelpia funds for their personal benefit “[f]rom at least ... 1993.” Because the New York Indictment does not purport to reach the origin of the Rigases' conspiracy, we do not find it significant that its charges began later than those in the Pennsylvania Indictment.

As to interdependence, we reiterate that the Government claims that the Rigases appropriated money from Adelpia to avoid taking salaries on which they would have had to pay income tax. Further, the Rigases had to hide their misuse of Adelpia's corporate assets from the public in order to avoid detection of their income by the Government.

iii. Overlapping Participants

It is also clear that there is overlap between the participants of the conspiracies charged in New York and in Pennsylvania. The Rigases were the main actors in both indictments. Other members of the Rigas family are also central to both indictments.

The New York Indictment named a number of coconspirators, including Michael Rigas, Michael Mulcahey, James R. Brown, and Timothy A. Werth. Although other Rigas family members were not specifically named in the New York Indictment, many of the allegations relate to “the Rigas family,” including John Rigas's “wife, sons, daughter and son-in-law.” For example, the New York Indictment alleges that “Adelpia advanced substantial amounts of cash to other members of the Rigas Family,” and that the Rigases

caused Adelphia to file a Form 10-K “which falsely understated the total amount of compensation to ... another member of the Rigas Family by failing to include the[se] cash advances.” The Bill of Particulars also listed at least nine members of the Rigas family who used the Adelphia corporate aircraft for personal travel. Similarly, the Pennsylvania Indictment alleges that the Rigases conspired with others known and unknown. It also alleges that the Rigases caused Michael Rigas, James Rigas, and Ellen Rigas to under-report their income.

iv. Place

The locations of the crimes outlined in the two indictments also weigh in favor of concluding that the conspiracies alleged in the New York and Pennsylvania Indictments are the same.

The New York Indictment is geographically broader than the Pennsylvania Indictment, but both conspiracies occurred nationwide, and both Indictments focus on the Rigases' homes and Adelphia's corporate headquarters in Pennsylvania.

The Pennsylvania Indictment specifically names Coudersport, Pennsylvania; Buffalo, New York; Beaver Creek, Colorado; and New York, New York as places where acts related to the conspiracy took place. The New York Indictment also involves these locations. While the New York Indictment does not specifically identify Buffalo or Beaver Creek, the Bill of Particulars does include allegations related to those locations.

We do not find it significant that the New York Indictment also included misrepresentations to investors across the nation. The allegations related to conversion of Adelphia funds by the Rigases—a subsidiary scheme within the New York Indictment—appear to be the same in both indictments, and thus occurred in the same locations.

v. Overt Acts

We similarly conclude that the overt acts alleged in both indictments are sufficiently similar to support the Rigases' assertion that the charged conspiracies are the same. Both indictments seem to allege conversion of the same assets, by the same means, in the same transactions. Certainly, each indictment alleges acts not contained in the other. The New York Indictment, which alleges both fraudulent misrepresentations about Adelphia's finances and performance, and fraudulent concealment of the fact that the Rigases were misusing corporate assets for personal purposes, is far broader than the Pennsylvania Indictment. Further, the Pennsylvania Indictment includes allegations related to filing income tax returns, which are not included in the New York Indictment. The same acts, including transactions in which the Rigases secretly took Adelphia's corporate assets, are, however, key to both indictments.

vi. Role Played by the Defendants

Finally, because the Rigases were central figures in both conspiracies, this factor also

weighs in favor of a finding that there was a single conspiracy. The Rigases caused the wrongful transactions and were personally responsible for hiding those transactions. Putting all of these factors together, under the totality of the circumstances, the Rigases have made out a non-frivolous showing of double jeopardy. The New York Indictment alleges that the Rigases took Adelpia's corporate assets for their personal use and hid those transactions from investors and regulators. The Pennsylvania Indictment alleges that one reason the Rigases took those same assets was to avoid publicly receiving large salaries so that they could evade paying taxes.

In sum, because both indictments concern the same underlying transactions, they relate to the same time and place, and involve the same core group of participants. Both indictments have a common goal, and individual overt acts in both indictments were interdependent. Indeed, the record reveals no factor that would have prevented the Government from bringing the counts charged in the Pennsylvania Indictment in the New York prosecution. Accordingly, the Rigases have established a strong inference that there was a single agreement. On remand, the Government will bear the burden of proving by a preponderance of the evidence that the Rigases entered into two separate agreements....

III. Conclusion

For the reasons stated above, we will remand to the District Court to conduct an evidentiary hearing into the totality of the circumstances surrounding the conspiracies alleged in the New York and Pennsylvania Indictments to determine whether the conspiracy charged in Pennsylvania was part of the conspiratorial agreement charged in New York....

RENDELL, Circuit Judge, with whom SCIRICA, CHAGARES and HARDIMAN, Circuit Judges, join-dissenting.

The majority concludes that [18 U.S.C. § 371](#), read plainly and naturally, creates one offense, because the use of the words “either” and “or” demonstrates that “these objects provide alternative means of committing a single type of offense rather than creating separate offenses.” I suggest that the plain, natural reading is that § 371 creates separate offenses.

First, the statutory phrases typically used to set forth “alternative ways” of committing one crime are quite unlike § 371. Characteristically, they are a string of “alternative routes to a conviction” purposely included lest some conduct that is intended to be criminalized is omitted. In [such] instances, the alternative language sets forth similar conduct integrally related so as to encompass all possible modes of commission of the same crime. The two phrases of § 371 at issue here do not fit this pattern; they do not encompass similar, related conduct but set forth distinct offenses as defined by the Supreme Court....

Second, the fact that the use of the disjunctive generally sets forth alternatives does not really dictate that the two provisions of § 371 do not set forth separate crimes. The

two provisions at issue effectively say if you conspire to do A, or, if you conspire to do B, you will be punished. The real issue is whether Congress intended to punish only once under § 371 for an agreement to do A and B, or did it intend that even if you were tried, convicted, and punished for conspiring to do A, you could also be tried, convicted, and punished later for conspiring to do B? I suggest that Congress intended the latter, but, in any event, the “either ... or” language does not dictate the former....

The overriding issue is not whether a specific indictment count speaks with the requisite lucidity, enabling precise determination of the jury's findings, but rather whether Congress intended to impose multiple punishments for violation of distinct statutory provisions. And, here, considering the obvious difference between the two types of conspiracies alleged and their implications for purposes of sentence, surely it did. These fundamentally distinct inquiries preclude rote application of duplicity precedents to the double jeopardy context.

While the majority employs various modes of analysis to support reading the statute as it does—drawing on cases involving duplicity and canons of construction—I come back to the essential question as to congressional intent and believe it unimaginable that Congress did not intend to punish separately the two distinct types of conspiracies set forth in § 371—as have two of the three courts of appeals to have considered this issue. Why would Congress separate out the defraud clause if it was not intended to mean something different?

Congressional intent to impose separate punishments is “reinforced” where the two conspiracy provisions address separate evils. Clearly, these provisions do. The “defraud” clause focuses narrowly on conspiracies targeting the federal government. The “offense” clause aims to protect the public generally. Accordingly, its applicability does not hinge on the identity of the target, which need not be the federal government. Nor does the “offense” clause require proof of interference with government operations. Rather, it broadly embraces conspiracies aimed at violating any federal law. Clearly, prohibiting agreements to interfere with governmental agencies and prohibiting agreements to violate United States laws address “diverse societal harms.” They are directed at different evils..

...

I would accordingly affirm the District Court's order and permit the prosecution for conspiracy to commit tax evasion to proceed.

Chapter 4

MAIL AND WIRE FRAUD

[C] DEPRIVATION OF MONEY, PROPERTY, OR HONEST SERVICES

[3] Honest Services

PP. 108-24: *[Delete current section and insert new section:]*

Recall that *McNally* held that, in a mail or wire fraud prosecution, the government must prove an intended deprivation of money or property. The Court therefore reversed a conviction where the alleged loss was of “honest services.” Congress, however, responded to *McNally*, and reinstated the deprivation of “honest services” as a viable mail or wire fraud theory. Specifically, Congress adopted the following provision, enacted at [18 U.S.C. § 1346](#), as part of the Drug-Abuse Act of 1988:

Definition of “scheme or artifice to defraud”

For the purpose 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.

As is apparent from the text of § 1346, the statute does not define the term “honest services.” As one appellate court noted, “[t]he central problem is that the concept of ‘honest services’ is vague and undefined by the statute.” *United States v. Urciuoli*, [513 F.3d 290, 294](#) (1st Cir. 2008). The circuit courts adopted widely divergent approaches to this issue, in the contexts of both public sector and private sector defendants.

* * *

In the next case, the United States Supreme Court attempted to resolve the issues surrounding the honest services statute in the context of a high profile white collar prosecution. As you read the case, consider whether the Court succeeded in its attempt to provide clarity to the statute. Also consider whether the criticisms that Justice Scalia articulated in his concurrence are valid.

SKILLING v. UNITED STATES

[130 S. Ct. 2896](#) (2010)

Justice GINSBURG delivered the opinion of the Court.

In 2001, Enron Corporation, then the seventh highest-revenue-grossing company in America, crashed into bankruptcy. We consider in this opinion two questions arising from the prosecution of Jeffrey Skilling, a longtime Enron executive, for crimes

committed before the corporation's collapse. First, did pretrial publicity and community prejudice prevent Skilling from obtaining a fair trial? Second, did the jury improperly convict Skilling of conspiracy to commit “honest-services” wire fraud, [18 U.S.C. §§ 371, 1343, 1346](#)?

Answering no to both questions, the Fifth Circuit affirmed Skilling's convictions. We conclude, in common with the Court of Appeals, that Skilling's fair-trial argument fails; Skilling, we hold, did not establish that a presumption of juror prejudice arose or that actual bias infected the jury that tried him. But we disagree with the Fifth Circuit's honest-services ruling. In proscribing fraudulent deprivations of “the intangible right of honest services,” § 1346, Congress intended at least to reach schemes to defraud involving bribes and kickbacks. Construing the honest-services statute to extend beyond that core meaning, we conclude, would encounter a vagueness shoal. We therefore hold that § 1346 covers only bribery and kickback schemes. Because Skilling's alleged misconduct entailed no bribe or kickback, it does not fall within § 1346's proscription. We therefore affirm in part and vacate in part.

I

Founded in 1985, Enron Corporation grew from its headquarters in Houston, Texas, into one of the world's leading energy companies. Skilling launched his career there in 1990 when Kenneth Lay, the company's founder, hired him to head an Enron subsidiary. Skilling steadily rose through the corporation's ranks, serving as president and chief operating officer, and then, beginning in February 2001, as chief executive officer. Six months later, on August 14, 2001, Skilling resigned from Enron.

Less than four months after Skilling's departure, Enron spiraled into bankruptcy. The company's stock, which had traded at \$90 per share in August 2000, plummeted to pennies per share in late 2001. Attempting to comprehend what caused the corporation's collapse, the U.S. Department of Justice formed an Enron Task Force, comprising prosecutors and FBI agents from around the Nation. The Government's investigation uncovered an elaborate conspiracy to prop up Enron's short-run stock prices by overstating the company's financial well-being. In the years following Enron's bankruptcy, the Government prosecuted dozens of Enron employees who participated in the scheme. In time, the Government worked its way up the corporation's chain of command: On July 7, 2004, a grand jury indicted Skilling, Lay, and Richard Causey, Enron's former chief accounting officer.

These three defendants, the indictment alleged,

“engaged in a wide-ranging scheme to deceive the investing public, including Enron's shareholders, ... about the true performance of Enron's businesses by: (a) manipulating Enron's publicly reported financial results; and (b) making public statements and representations about Enron's financial performance and results that were false and misleading.”

Skilling and his co-conspirators, the indictment continued, “enriched themselves as a result of the scheme through salary, bonuses, grants of stock and stock options, other profits, and prestige.”

Count 1 of the indictment charged Skilling with conspiracy to commit securities and wire fraud; in particular, it alleged that Skilling had sought to “depriv[e] Enron and its shareholders of the intangible right of [his] honest services.” The indictment further charged Skilling with more than 25 substantive counts of securities fraud, wire fraud, making false representations to Enron's auditors, and insider trading.

* * *

Following a 4-month trial and nearly five days of deliberation, the jury found Skilling guilty of 19 counts, including the honest-services-fraud conspiracy charge, and not guilty of 9 insider-trading counts. The District Court sentenced Skilling to 292 months' imprisonment, 3 years' supervised release, and \$45 million in restitution.

On appeal, Skilling raised a host of challenges to his convictions. The Court of Appeals rejected Skilling's claim that his conduct did not indicate any conspiracy to commit honest-services fraud. “[T]he jury was entitled to convict Skilling,” the court stated, “on these elements”: “(1) a material breach of a fiduciary duty ... (2) that results in a detriment to the employer,” including one occasioned by an employee's decision to “withhold material information, i.e., information that he had reason to believe would lead a reasonable employer to change its conduct.” The Fifth Circuit did not address Skilling's argument that the honest-services statute, if not interpreted to exclude his actions, should be invalidated as unconstitutionally vague.

Arguing that the Fifth Circuit erred in its consideration of these claims, Skilling sought relief from this Court. We granted certiorari, 558 U.S. ---- (2009), and now affirm in part, vacate in part, and remand for further proceedings. We consider first Skilling's allegation of juror prejudice, and next, his honest-services argument.

II

[The Court rejected Skilling argument that his convictions should be reversed because of jury prejudice due to pre-trial publicity.]

III

We next consider whether Skilling's conspiracy conviction was premised on an improper theory of honest-services wire fraud. The honest-services statute, § 1346, Skilling maintains, is unconstitutionally vague. Alternatively, he contends that his conduct does not fall within the statute's compass.

To place Skilling's constitutional challenge in context, we first review the origin and subsequent application of the honest-services doctrine.

Enacted in 1872, the original mail-fraud provision, the predecessor of the modern-day mail- and wire-fraud laws, proscribed, without further elaboration, use of the mails to advance “any scheme or artifice to defraud.” See *McNally v. United States*, [483 U.S. 350, 356](#) (1987). In 1909, Congress amended the statute to prohibit, as it does today, “any scheme or artifice to defraud, *or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.*” § 1341 (emphasis added). Emphasizing Congress' disjunctive phrasing, the Courts of Appeals, one after the other, interpreted the term “scheme or artifice to defraud” to include deprivations not only of money or property, but also of intangible rights. . . .

Over time, “[a]n increasing number of courts” recognized that “a recreant employee”—public or private—“c[ould] be prosecuted under [the mail-fraud statute] if he breache[d] his allegiance to his employer by accepting bribes or kickbacks in the course of his employment,” *United States v. McNeive*, [536 F.2d 1245, 1249](#) (C.A.8 1976); by 1982, all Courts of Appeals had embraced the honest-services theory of fraud.

In 1987, this Court, in *McNally v. United States*, stopped the development of the intangible-rights doctrine in its tracks. *McNally* involved a state officer who, in selecting Kentucky's insurance agent, arranged to procure a share of the agent's commissions via kickbacks paid to companies the official partially controlled. [483 U.S., at 360](#). The prosecutor did not charge that, “in the absence of the alleged scheme[,] the Commonwealth would have paid a lower premium or secured better insurance.” *Ibid.* Instead, the prosecutor maintained that the kickback scheme “defraud[ed] the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly.” *Id.* at [353](#).

We held that the scheme did not qualify as mail fraud. “Rather than constru[ing] the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials,” we read the statute “as limited in scope to the protection of property rights.” *Id.* at [360](#). “If Congress desires to go further,” we stated, “it must speak more clearly.” *Id.*

Congress responded swiftly. The following year, it enacted a new statute “specifically to cover one of the ‘intangible rights’ that lower courts had protected ... prior to *McNally*: ‘the intangible right of honest services.’” *Cleveland v. United States*, [531 U.S. 12, 19-20](#) (2000). In full, the honest-services statute stated:

“For the purposes of th[e] chapter [of the United States Code that prohibits, *inter alia*, mail fraud, § 1341, and wire fraud, § 1343], the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.” § 1346.

Congress, Skilling charges, reacted quickly but not clearly: He asserts that § 1346 is unconstitutionally vague. To satisfy due process, “a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, [461 U.S. 352, 357](#) (1983). The void-for-vagueness doctrine embraces these requirements.

According to Skilling, § 1346 meets neither of the two due process essentials. First, the phrase “the intangible right of honest services,” he contends, does not adequately define what behavior it bars. Second, he alleges, § 1346’s “standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections,” thereby “facilitat[ing] opportunistic and arbitrary prosecutions.”

In urging invalidation of § 1346, Skilling swims against our case law’s current, which requires us, if we can, to construe, not condemn, Congress’ enactments. Alert to § 1346’s potential breadth, the Courts of Appeals have divided on how best to interpret the statute.² Uniformly, however, they have declined to throw out the statute as irremediably vague.³

We agree that § 1346 should be construed rather than invalidated. First, we look to the doctrine developed in pre-*McNally* cases in an endeavor to ascertain the meaning of the phrase “the intangible right of honest services.” Second, to preserve what Congress certainly intended the statute to cover, we pare that body of precedent down to its core: In the main, the pre-*McNally* cases involved fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived. Confined to these paramount applications, § 1346 presents no vagueness problem.

There is no doubt that Congress intended § 1346 to refer to and incorporate the honest-services doctrine recognized in Court of Appeals’ decisions before *McNally* derailed the intangible-rights theory of fraud. Congress enacted § 1346 on the heels of *McNally* and drafted the statute using that decision’s terminology. As the Second Circuit observed in its leading analysis of § 1346:

² Courts have disagreed about whether § 1346 prosecutions must be based on a violation of state law, compare, e.g., *United States v. Brumley*, 116 F.3d 728, 734-735 (C.A.5 1997) (en banc), with, e.g., *United States v. Weyhrauch*, 548 F.3d 1237, 1245-1246 (C.A.9 2008), vacated and remanded, *post*, p. ____; whether a defendant must contemplate that the victim suffer economic harm, compare, e.g., *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961, 973 (C.A.D.C.1998), with, e.g., *United States v. Black*, 530 F.3d 596, 600-602 (C.A.7 2008), vacated and remanded, *post*, p. ____; and whether the defendant must act in pursuit of private gain, compare, e.g., *United States v. Bloom*, 149 F.3d 649, 655 (C.A.7 1998), with, e.g., *United States v. Panarella*, 277 F.3d 678, 692 (C.A.3 2002).

³ See, e.g., *United States v. Rybicki*, 354 F.3d 124, 132 (C.A.2 2003) (en banc); *United States v. Hausmann*, 345 F.3d 952, 958 (C.A.7 2003); *United States v. Welch*, 327 F.3d 1081, 1109, n. 29 (C.A.10 2003); *United States v. Frega*, 179 F.3d 793, 803 (C.A.9 1999); *Brumley*, 116 F.3d, at 732-733; *United States v. Frost*, 125 F.3d 346, 370-372 (C.A.6 1997); *United States v. Waymer*, 55 F.3d 564, 568-569 (C.A.11 1995); *United States v. Bryan*, 58 F.3d 933, 941 (C.A.4 1995).

“The definite article ‘the’ suggests that ‘intangible right of honest services’ had a specific meaning to Congress when it enacted the statute—Congress was recriminalizing mail- and wire-fraud schemes to deprive others of *that* ‘intangible right of honest services,’ which had been protected before *McNally*, not *all* intangible rights of honest services whatever they might be thought to be.”

United States v. Rybicki, [354 F.3d 124, 137-138](#) (2003) (*en banc*).

Satisfied that Congress, by enacting § 1346, “meant to reinstate the body of pre-*McNally* honest-services law,” we have surveyed that case law. In parsing the Courts of Appeals decisions, we acknowledge that Skilling’s vagueness challenge has force, for honest-services decisions preceding *McNally* were not models of clarity or consistency. While the honest-services cases preceding *McNally* dominantly and consistently applied the fraud statute to bribery and kickback schemes—schemes that were the basis of most honest-services prosecutions—there was considerable disarray over the statute’s application to conduct outside that core category. In light of this disarray, Skilling urges us, as he urged the Fifth Circuit, to invalidate the statute *in toto*.

It has long been our practice, however, before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction. We have accordingly instructed “the federal courts ... to avoid constitutional difficulties by [adopting a limiting interpretation] if such a construction is fairly possible.” *Boos*, [485 U.S. at 331](#).

Arguing against any limiting construction, Skilling contends that it is impossible to identify a salvageable honest-services core; “the pre-*McNally* caselaw,” he asserts, “is a hodgepodge of oft-conflicting holdings” that are “hopelessly unclear.” * * *

Although some applications of the pre-*McNally* honest-services doctrine occasioned disagreement among the Courts of Appeals, these cases do not cloud the doctrine’s solid core: The “vast majority” of the honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes. Indeed, the *McNally* case itself, which spurred Congress to enact § 1346, presented a paradigmatic kickback fact pattern. Congress’ reversal of *McNally* and reinstatement of the honest-services doctrine, we conclude, can and should be salvaged by confining its scope to the core pre-*McNally* applications.

[T]he honest-services doctrine had its genesis in prosecutions involving bribery allegations. Both before *McNally* and after § 1346’s enactment, Courts of Appeals described schemes involving bribes or kickbacks as “core ... honest services fraud precedents.” *United States v. Czubinski*, [106 F.3d 1069, 1077](#) (1st Cir.1997).

In view of this history, there is no doubt that Congress intended § 1346 to reach *at least* bribes and kickbacks. Reading the statute to proscribe a wider range of offensive

conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine.⁴ To preserve the statute without transgressing constitutional limitations, we now hold that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law.

The Government urges us to go further by locating within § 1346's compass another category of proscribed conduct: “undisclosed self-dealing by a public official or private employee -- *i.e.*, the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty.” “[T]he theory of liability in *McNally* itself was nondisclosure of a conflicting financial interest,” the Government observes, and “Congress clearly intended to revive th[at] nondisclosure theory.” Moreover, “[a]lthough not as numerous as the bribery and kickback cases,” the Government asserts, “the pre-*McNally* cases involving undisclosed self-dealing were abundant.”

Neither of these contentions withstands close inspection. *McNally*, as we have already observed, involved a classic kickback scheme: A public official, in exchange for routing Kentucky's insurance business through a middleman company, arranged for that company to share its commissions with entities in which the official held an interest. This was no mere failure to disclose a conflict of interest; rather, the official conspired with a third party so that both would profit from wealth generated by public contracts. Reading § 1346 to proscribe bribes and kickbacks -- and nothing more -- satisfies Congress' undoubted aim to reverse *McNally* on its facts.

Nor are we persuaded that the pre-*McNally* conflict-of-interest cases constitute core applications of the honest-services doctrine. Although the Courts of Appeals upheld honest-services convictions for “some schemes of non-disclosure and concealment of material information,” *Mandel*, [591 F.2d at 1361](#), they reached no consensus on which schemes qualified. In light of the relative infrequency of conflict-of-interest prosecutions in comparison to bribery and kickback charges, and the intercircuit inconsistencies they produced, we conclude that a reasonable limiting construction of § 1346 must exclude this amorphous category of cases.

Further dispelling doubt on this point is the familiar principle that “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.” *Cleveland*, [531 U.S. at 25](#). “This interpretive guide is especially appropriate in construing [§ 1346] because ... mail [and wire] fraud [are] predicate offense[s] under [the Racketeer Influenced and Corrupt Organizations Act], [18 U.S.C. § 1961\(1\)](#), and the money laundering statute, § 1956(c)(7)(A).” *Cleveland*, [531 U.S. at 25](#). Holding that honest-services fraud does not encompass conduct more wide-ranging than the paradigmatic cases of bribes and kickbacks, we resist the Government's less constrained construction absent Congress' clear instruction otherwise.

⁴ Apprised that a broader reading of § 1346 could render the statute impermissibly vague, Congress, we believe, would have drawn the honest-services line, as we do now, at bribery and kickback schemes.

In sum, our construction of § 1346 “establish[es] a uniform national standard, define[s] honest services with clarity, reach[es] only seriously culpable conduct, and accomplish[es] Congress's goal of ‘overruling’ *McNally*.” “If Congress desires to go further,” we reiterate, “it must speak more clearly than it has.” *McNally*, 483 U.S. at 360.⁵

* * *

Interpreted to encompass only bribery and kickback schemes, § 1346 is not unconstitutionally vague. Recall that the void-for-vagueness doctrine addresses concerns about (1) fair notice and (2) arbitrary and discriminatory prosecutions. See *Kolender*, [461 U.S. at 357](#). A prohibition on fraudulently depriving another of one's honest services by accepting bribes or kickbacks does not present a problem on either score.

As to fair notice, “whatever the school of thought concerning the scope and meaning of § 1346, it has always been “as plain as a pikestaff that” bribes and kickbacks constitute honest-services fraud,” *Williams v. United States*, [341 U.S. 97, 101](#) (1951), and the statute's *mens rea* requirement further blunts any notice concern. Today's decision clarifies that no other misconduct falls within § 1346's province.

As to arbitrary prosecutions, we perceive no significant risk that the honest-services statute, as we interpret it today, will be stretched out of shape. Its prohibition on bribes and kickbacks draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing-and defining-similar crimes. See, e.g., [18 U.S.C. §§ 201\(b\), 666\(a\)\(2\)](#); [41 U.S.C. § 52\(2\)](#) (“The term ‘kickback’ means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to [enumerated persons] for the purpose of improperly obtaining or rewarding favorable treatment in connection with [enumerated circumstances].”).⁶ A criminal defendant who participated in a bribery or kickback scheme, in short, cannot tenably complain about prosecution under § 1346 on vagueness grounds.

⁵ If Congress were to take up the enterprise of criminalizing “undisclosed self-dealing by a public official or private employee,” it would have to employ standards of sufficient definiteness and specificity to overcome due process concerns. The Government proposes a standard that prohibits the “taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty,” so long as the employee acts with a specific intent to deceive and the undisclosed conduct could influence the victim to change its behavior. That formulation, however, leaves many questions unanswered. How direct or significant does the conflicting financial interest have to be? To what extent does the official action have to further that interest in order to amount to fraud? To whom should the disclosure be made and what information should it convey? These questions and others call for particular care in attempting to formulate an adequate criminal prohibition in this context.

⁶ Overlap with other federal statutes does not render § 1346 superfluous. The principal federal bribery statute, § 201, for example, generally applies only to federal public officials, so § 1346's application to state and local corruption and to private-sector fraud reaches misconduct that might otherwise go unpunished.

It remains to determine whether Skilling's conduct violated § 1346. Skilling's honest-services prosecution, the Government concedes, was not “prototypical.” The Government charged Skilling with conspiring to defraud Enron's shareholders by misrepresenting the company's fiscal health, thereby artificially inflating its stock price. It was the Government's theory at trial that Skilling “profited from the fraudulent scheme ... through the receipt of salary and bonuses, ... and through the sale of approximately \$200 million in Enron stock, which netted him \$89 million.”

The Government did not, at any time, allege that Skilling solicited or accepted side payments from a third party in exchange for making these misrepresentations. It is therefore clear that, as we read § 1346, Skilling did not commit honest-services fraud.

Because the indictment alleged three objects of the conspiracy – honest-services wire fraud, money-or-property wire fraud, and securities fraud -- Skilling's conviction is flawed. This determination, however, does not necessarily require reversal of the conspiracy conviction. The parties vigorously dispute whether the error was harmless. We leave this dispute for resolution on remand.

Whether potential reversal on the conspiracy count touches any of Skilling's other convictions is also an open question. All of his convictions, Skilling contends, hinged on the conspiracy count and, like dominoes, must fall if it falls. The District Court, deciding Skilling's motion for bail pending appeal, found this argument dubious, but the Fifth Circuit had no occasion to rule on it. That court may do so on remand.

For the foregoing reasons, we affirm the Fifth Circuit's ruling on Skilling's fair-trial argument, vacate its ruling on his conspiracy conviction, and remand the case for proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, with whom Justice THOMAS joins, and with whom Justice KENNEDY joins except as to Part III, concurring in part and concurring in the judgment.

I agree with the Court that petitioner Jeffrey Skilling's challenge to the impartiality of his jury and to the District Court's conduct of the *voir dire* fails. I therefore join Parts I and II of the Court's opinion. I also agree that the decision upholding Skilling's conviction for so-called “honest-services fraud” must be reversed, but for a different reason. In my view, the specification in [18 U.S.C. § 1346](#) that “scheme or artifice to defraud” in the mail-fraud and wire-fraud statutes, §§ 1341 and 1343, includes “a scheme or artifice to deprive another of the intangible right of honest services,” is vague, and therefore violates the Due Process Clause of the Fifth Amendment. The Court strikes a pose of judicial humility in proclaiming that our task is “not to destroy the Act ... but to construe it.” But in transforming the prohibition of “honest-services fraud” into a prohibition of “bribery and kick-backs” it is wielding a power we long ago abjured: the power to define new federal crimes.

I

A criminal statute must clearly define the conduct it proscribes. A statute that is unconstitutionally vague cannot be saved by a more precise indictment, nor by judicial construction that writes in specific criteria that its text does not contain. Our cases have described vague statutes as failing “to provide a person of ordinary intelligence fair notice of what is prohibited, or [as being] so standardless that [they] authoriz[e] or encourag[e] seriously discriminatory enforcement.” *United States v. Williams*, [553 U.S. 285, 304](#) (2008). Here, Skilling argues that § 1346 fails to provide fair notice and encourages arbitrary enforcement because it provides no definition of the right of honest services whose deprivation it prohibits. In my view Skilling is correct.

The Court maintains that “the intangible right of honest services “means the right not to have one's fiduciaries accept “bribes or kickbacks.” Its first step in reaching that conclusion is the assertion that the phrase refers to “the doctrine developed” in cases decided by lower federal courts prior to our decision in *McNally v. United States*, [483 U.S. 350](#) (1987). I do not contest that. I agree that Congress used the novel phrase to adopt the lower-court case law that had been disapproved by *McNally*-what the Court calls “the pre-*McNally* honest-services doctrine.” The problem is that that doctrine provides no “ascertainable standard of guilt,” *United States v. L. Cohen Grocery Co.*, [255 U.S. 81, 89](#) (1921), and certainly is not limited to “bribes or kickbacks.”

Investigation into the meaning of “the pre-*McNally* honest-services doctrine” might logically begin with *McNally* itself, which rejected it. That case repudiated the many Court of Appeals holdings that had expanded the meaning of “fraud” in the mail-fraud and wire-fraud statutes beyond deceptive schemes to obtain property. If the repudiated cases stood for a prohibition of “bribery and kickbacks,” one would have expected those words to appear in the opinion's description of the cases. In fact, they do not. *Not at all*. Nor did *McNally* even provide a consistent definition of the pre-existing theory of fraud it rejected. It referred variously to a right of citizens “to have the [State]'s affairs conducted honestly,” to “honest and impartial government,” to “good government,” and “to have public officials perform their duties honestly.” It described prior case law as holding that “a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud.”

But the pre-*McNally* Court of Appeals opinions were not limited to fraud by public officials. Some courts had held that those fiduciaries subject to the “honest services” obligation included private individuals who merely participated in public decisions, and even private employees who had no role in public decisions. Moreover, “to say that a man is a fiduciary only begins [the] analysis; it gives direction to further inquiry What obligations does he owe as a fiduciary?” *SEC v. Chenery Corp.*, [318 U.S. 80, 85-86](#) (1943). None of the “honest services” cases, neither those pertaining to public officials nor those pertaining to private employees, defined the nature and content of the fiduciary duty central to the “fraud” offense.

There was not even universal agreement concerning the *source* of the fiduciary obligation-whether it must be positive state or federal law, or merely general principles, such as the “obligations of loyalty and fidelity” that inhere in the “employment relationship,” *Lemire, supra*, at 1336. The decision *McNally* reversed had grounded the duty in general (not jurisdiction-specific) trust law. Another pre-*McNally* case referred to the general law of agency, which imposes duties quite different from those of a trustee.

This indeterminacy does not disappear if one assumes that the pre-*McNally* cases developed a federal, common-law fiduciary duty; the duty remained hopelessly undefined. Some courts described it in astoundingly broad language. ...

The indefiniteness of the fiduciary duty is not all. Many courts held that some *je-ne-sais-quoi* beyond a mere breach of fiduciary duty was needed to establish honest-services fraud. There was, unsurprisingly, some dispute about that, at least in the context of acts by persons owing duties to the public. And even among those courts that did require something additional where a public official was involved, there was disagreement as to what the addition should be.

Similar disagreements occurred with respect to private employees. Courts disputed whether the defendant must use his fiduciary position for his own gain.

In short, the first step in the Court's analysis -- holding that “the intangible right of honest services” refers to “the honest-services doctrine recognized in Court of Appeals' decisions before *McNally*” -- is a step out of the frying pan into the fire. The pre-*McNally* cases provide no clear indication of what constitutes a denial of the right of honest services. The possibilities range from any action that is contrary to public policy or otherwise immoral, to only the disloyalty of a public official or employee to his principal, to only the secret use of a perpetrator's position of trust in order to harm whomever he is beholden to. The duty probably did not have to be rooted in state law, but maybe it did. It might have been more demanding in the case of public officials, but perhaps not. At the time § 1346 was enacted there was no settled criterion for choosing among these options, for conclusively settling what was in and what was out. . . .

Arriving at that conclusion requires not interpretation but invention. The Court replaces a vague criminal standard that Congress adopted with a more narrow one (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. . . .

* * *

I would therefore reverse Skilling's conviction under § 1346 on the ground that it fails to define the conduct it prohibits. The fate of the statute in future prosecutions-obvious from my reasoning in the case-would be a matter for *stare decisis*.

* * *

It is hard to imagine a case that more clearly fits the description of what Chief Justice Waite said could not be done, in a colorful passage oft-cited in our vagueness opinions, *United States v. Reese*, [92 U.S., at 221](#):

“The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

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

“To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.”

Justice ALITO, concurring in part and concurring in the judgment. [Omitted.]

Justice SOTOMAYOR, with whom Justice STEVENS and Justice BREYER join, concurring in part and dissenting in part. [Omitted.]

NOTES AND QUESTIONS

1. *Public official “honest services” cases.* During the 1970s, prosecutors increasingly began to use the mail and wire fraud statutes in cases brought against federal, state, and local political officials for failure to provide “honest services.” As Justice Stevens noted in his *McNally* dissent, “In the public sector, judges, state governors, chairmen of state political parties, state cabinet officers, city aldermen, Congressmen and many other state and federal officials have been convicted of defrauding citizens of their right to the honest services of their governmental officials.” Are the mail and wire fraud statutes properly used as political corruption statutes? What does the *Skilling* majority say on this issue?

2. *Private sector “honest services” cases.* Prosecutors have also used the honest services statutes in the private context, as the *Skilling* case shows. Are the mail and wire fraud statutes necessary to police private sector fraud, or do other statutes suffice?

3. *Open questions after Skilling.* As Justice Scalia noted in his concurring opinion, the *Skilling* majority did not resolve a number of questions that have plagued lower courts over the proper scope of the honest services statute.

a. *Personal gain?* Some courts limited honest services fraud cases to instances where the defendant was misusing a public position for personal gain. For example, the Seventh Circuit limited honest services fraud cases against public officials to instances where the defendant was misusing a public position for personal gain. *See United States*

v. Thompson, 484 F.3d 877, 883–884 (7th Cir. 2007) (reversing conviction of state official who arranged to have a state contract awarded to a politically favored travel agency); *United States v. Bloom*, 149 F.3d 649, 656–657 (7th Cir. 1998) (reversing conviction of city official, and holding that an employee deprives his employer of his honest services only if he misuses his position (or the information he obtained in it) for personal gain). That same court held that the personal gain requirement is met where the defendant schemed to benefit a third party. See *United States v. Sorich*, 523 F.3d 702, 710–711 (7th Cir. 2008) (defendants were city employees who violated city hiring rules so that political allies would get city jobs, satisfying the private gain requirement). Other circuits rejected the private gain requirement. See, e.g., *United States v. Welch*, [327 F.3d 1081, 1106](#) (10th Cir. 2003) (defendants were committee members seeking to bid for Olympic games; bribery indictment failed to allege that defendants sought personal gain). Does the *Skilling* opinion set clear guidelines with respect to these issues? Why or why not?

b. *State law violation?* The lower courts had split as to the role of state law in defining honest services fraud. As one court stated when attempting to discern the limits of honest services fraud:

The relationship between state law and the federal honest services statute is unsettled. The Fifth Circuit has held that § 1346 extends only to conduct that independently violates state law. *United States v. Brumley*, [116 F.3d 728](#) (5th Cir.) (en banc). Other circuits have denied that state law plays any necessary role. E.g., *United States v. Margiotta*, [688 F.2d 108, 124](#) (2d Cir.1982); *United States v. Keane*, [522 F.2d 534, 545](#) (7th Cir.1975). It is plain that §§ 1341 and 1346 enact a federal crime — but beyond that, broad generalizations may be unsafe.

United States v. Urciuoli, [513 F.3d 290, 298](#) (1st Cir. 2008). Does *Skilling* elucidate the role that state law should play in defining bribes and kickbacks?

4. *Legislative history.* The legislative history behind § 1346 provides scant guidance in defining “honest services.” One opinion summarized the history as follows:

The specific text of what has become [18 U.S.C. § 1346](#) was inserted in the Omnibus Drug Bill for the first time on the very day that the Omnibus Drug Bill was finally passed by both the House and the Senate. The text of what is now § 1346 was never included in any bill as filed in either the House of Representatives or the Senate. As a result, the text of § 1346 was never referred to any committee of either the House or the Senate, was never the subject of any committee report from either the House or the Senate, and was never the subject of any floor debate reported in the Congressional Record.

Brumley, [116 F.3d at 742](#) (Jolly, J. dissenting). Does this history provide any basis for the *Skilling* majority's reading of the statute? If not, what was the source of the majority's interpretation of the statute?

5. *Vagueness*. What is the purpose of the vagueness doctrine? Did the Court in *Skilling* hold that, without the Court's gloss on the honest services statute, the statute would be unconstitutionally vague? How did Justice Scalia respond to the Court's reasoning on the vagueness issue? Who has the better of the argument? Why?

6. *Bribes and kickbacks*. Are you persuaded by the Court's reasoning when concluding that the mail and wire fraud statutes should be limited to bribes and kickbacks? Why or why not? How do we ascertain the proper definitions of those terms?

7. *The courts' role in statutory interpretation*. Just how far should a court go to fill in the blanks of an ambiguous statute? Is Justice Scalia correct to say that Court exceeded its proper role in this case by "wielding a power we long ago abjured: the power to define new federal crimes?" Why or why not?

8. *Undisclosed self-dealing*. What was the government's proposed interpretation of the statute concerning undisclosed self-dealing? Should the Court have adopted the government's approach? Why or why not?

9. *Participants in a scheme to defraud*. In its opinion, the Court in *Skilling* referred to the Second Circuit's "leading analysis" in *United States v. Rybicki*, [354 F.3d 124, 137-138](#) (2003) (*en banc*). In *Rybicki*, the government's theory was that insurance adjusters omitted to advise their employers that the adjusters were receiving kickbacks. In a case based on an omission, the government must show that the person engaging in the deception had a duty to disclose the omitted information. Because the adjusters had fiduciary duties to their employers, the adjusters had a duty to reveal the scheme. Their omission to do so was fraudulent. The individual defendants in the case, however, were two attorneys who themselves had no duties to the insurance companies; the attorneys thus had no duty to reveal the kickback scheme. On these facts, why were the attorneys guilty of defrauding the companies?

The answer is that a defendant in a mail or wire fraud case need not be the person making the misrepresentation or engaging in the omission. Nor need the defendant have a personal duty to the victim in an omission case. All that the statutes require is proof that the defendant *participated in a scheme* to deprive the victim of money, property, or honest services. Because the defendants participated in a scheme to deprive the insurance companies of their employees' honest services, they engaged in a scheme to defraud the companies.

10. *The boundaries of fiduciary breaches*. According to the Court, when does a person owe a principal a fiduciary duty? What does Justice Scalia have say on this issue? Are the rules clear? Why or why not?

11. *The Carpenter case*. Reconsider the *Carpenter* decision. In that case, the government did not assert a deprivation of honest services theory because Congress had not yet enacted § 1346. Would this theory have succeeded under *Skilling*'s interpretation of the statute? Why or why not?

* * *

As the above notes indicate, the *Skilling* decision left many questions unanswered. The following case confronts the issue of whether a breach of a fiduciary duty is required in an honest services case. As this split decision indicates, opinions are far from uniform on this issue.

UNITED STATES v. MILOVANOVIC

[627 F.3d 405](#) (9th Cir. 2010)

KLEINFELD, Circuit Judge.

We address “honest services” mail fraud.

I. FACTS

The district court dismissed the indictment before trial, so we describe the facts as though the indictment had been proved, which of course is not the case. The question is whether the charges, if proved, would amount to the crime charged.

According to the indictment, defendants Milovanovic and Lamb corrupted issuance of commercial drivers' licenses in the State of Washington. The other four defendants, Hot, Kovacic, Bilanovic, and Djordjevic, took advantage of the corrupt scheme to defraud the State of Washington into issuing them the undeserved licenses. A person has to be a Washington resident and pass a written test and a driving test to lawfully obtain a Washington commercial drivers' license.⁷ Milovanovic and Lamb and their clients allegedly arranged to get commercial drivers' licenses by cheating on the tests and falsifying residency, in exchange for bribes.

Milovanovic worked as a certified Bosnian translator for a firm that the state government used. He contacted Bosnian speakers in other states, and told them that if they came to Spokane and paid him personally \$2,500, he could get them Washington commercial drivers' licenses. When the out-of-state Bosnians came, Milovanovic enabled them to cheat on the written test by giving them the answers as they took it. Then

⁷ [Wash. Rev. Code § 46.25.060](#)(1)(a) (2006). See also [49 U.S.C. §§ 31305](#), 31308; [49 C.F.R. § 383.23](#). Federal regulations allow a state to authorize a third party to administer the driving skill portion of the test as long as the tests “are the same as those which would otherwise be given by the State.” [49 C.F.R. § 383.75](#)(a). The third party must also enter into an agreement with the State allowing it and the federal government to conduct audits and inspections to ensure the tests are conducted in accordance with the state's requirements. [Wash. Rev. Code § 46.25.060](#)(1)(b) (2006); Wash. Admin. Code § 308-100-140 (2006)

Milovanovic bribed Lamb, who worked for a firm the state government hired to administer the driving test, \$200 to \$500 per person to falsify that test result too. The applicants would bring the falsified forms and the State license fee to the State Department of Licensing for a temporary permit, which would be turned into a permanent permit when Lamb mailed or faxed in his falsified log. The licenses were then mailed by a third contractor to the applicants at the false Washington address Milovanovic had supplied.

Lamb and the firm for which Milovanovic worked both had contracts with the state saying that they were independent contractors, not employees and not agents. The state was not deprived of its fee, and did not lose a nickel on account of the dishonest test and residency certifications. There was no paperwork saying that any fiduciary duty pertained.

The superseding indictment charges mail fraud and conspiracy to commit mail fraud by Milovanovic, Lamb, and four of their customers under [18 U.S.C. §§ 1341](#), 1346, and 2. The district court dismissed the indictment on the ground that the mail fraud statute required a fiduciary relationship, and indicated that the jury would be instructed that the crime required economic harm to the victim. The United States appeals.

II. ANALYSIS

We review de novo both a district court's dismissal of an indictment based on its interpretation of a federal statute and the sufficiency of an indictment.

The briefs focus on an unsettled question in the Ninth Circuit: whether “honest services” fraud under the mail fraud statute can be committed only by a “fiduciary.” The “honest services” portion of the mail fraud statute says that, for the purposes of the mail fraud statute, “the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.”

The parties present arguments whether Milovanovic and Lamb were fiduciaries of the State of Washington, even though the question remains open whether this matters. The government argues that Milovanovic and Lamb were fiduciaries, and Defendants argue that they were not. Some of the arguments are of no help at all, such as pointing out that Lamb and Milovanovic were independent contractors, not government employees. It is elementary that an independent contractor may be a fiduciary, as when a testator appoints the trust department of a bank as trustee, or when a client retains a lawyer to represent him. The relevant citations are inconclusive, merely lending themselves to colorable arguments on both sides of the proposition.

The inconclusiveness of the arguments and citations points to the inutility of deciding fiduciary status as a step along the way to evaluating a mail fraud indictment. Requiring “fiduciary status” merely gives a deceptive patina of limitation to a highly manipulable pigeonholing. Justice Scalia's concurrence in *Skilling* points out “the indefiniteness of the fiduciary duty,” and thus its weakness as a limiting category. “The

Courts of Appeals may have consistently found unlawful the acceptance of a bribe or kickback by one or another sort of fiduciary, but they have not consistently described (as the statute does not) any test for who is a fiduciary.” Deciding whether Milovanovic and Lamb were fiduciaries would be difficult because they were plainly used as agents to administer the state's commercial drivers' license tests, yet the contracts state that they were not agents. For purposes of this decision, we take the state contracts at their word, and assume without deciding that Milovanovic and Lamb were not agents and were not fiduciaries.

The Supreme Court has not spoken on whether a fiduciary duty is a *sine qua non* of “honest services” mail fraud. Our sister circuits have given varying and conflicting answers, so no decision we make can avoid a circuit split.

Congress promulgated the “honest services” statute in response to the Supreme Court's decision in *McNally v. United States*. *McNally* held that the scope of the mail fraud statute was limited to schemes to defraud individuals out of property or money. Congress responded by enacting [18 U.S.C. § 1346](#). Section 1346 provided that for purposes of the mail fraud statute, [18 U.S.C. § 1341](#), “‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.” Putting the two statutes together “whoever having devised or intending to devise a scheme or artifice to defraud” by “depriv[ing] another of the intangible right of honest services,” using the mails, commits mail fraud.

As always, we begin our analysis of the mail fraud and “honest service” statutes with the text. The text of the mail fraud statute appears to rule out limiting “honest services” fraud to fiduciaries. Congress provided that “whoever” perpetrates a fraudulent scheme using the mails commits the crime of mail fraud. The perpetrator category “whoever” literally means anyone, whether fiduciary or not.

A purposiveness analysis, considering the social harm the statute addresses, likewise suggests no limitation to fiduciaries. The purpose evident from the face of the statute is prevention and punishment of fraud. Several types of fraud expressly listed, such as selling counterfeit items, do not require a fiduciary relationship. Traditional mail frauds, such as soliciting money for items that are not what they are advertised to be, or collecting remittances by mail and not sending the goods ordered, require no fiduciary relationship. Fraud generally means deception, the use of misrepresentation to obtain something of value or deprive another of something of value. Plenty of traditional fraud is committed in arms-length relationships. If a merchant purports to sell a pound of coffee, but uses false weights to put only fifteen ounces in the bag, he commits fraud despite the arms-length, nonfiduciary relationship. A fiduciary relationship would give him additional duties beyond the honesty required of any seller. He would have to not only provide sixteen ounces in a pound, but also advise if the shop down the street was selling better coffee cheaper (a corporate director renting space to the corporation would have to disclose availability of better, cheaper space to the board because of his fiduciary duty). “Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something

stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.”

Nor do the kinds of honest services fraud to which the statute is limited by *Skilling*-bribes and kickbacks-imply a fiduciary limitation. One could bribe a blogger to recommend a bistro, or kick back ten percent to a merchant who recommended a particular electrician to customers, without either of them having a fiduciary relationship. One does not have to be a fiduciary to take bribes or kickbacks.

The cases suggest a legitimate and important purpose in trying to find some sort of limitation on federal mail fraud, so that prosecutors cannot convict whoever may be on the wrong end of political shotguns. Some of the policy concerns are arguable and unsupported by the text. For example, some of the cases suggest that it is no business of the federal government that some state or local governments are corrupt. Maybe so. Or maybe it is the federal government's business, because corruption may not be curable within the very governments that are corrupt. Still, once fraud is broadened to deprivation of services, almost anyone can be charged with not doing all that they ought to have done in performing their jobs, and if broadened that far, the notion of bribes may broaden commensurately so that limitations on prosecutors run amuck become illusory. Is “sneak out to the ball game with me, I already have an extra ticket you can use” a bribe by the offeror and a deprivation of honest services by the employee who accepts?

Judge Raggi's concurrence in the Second Circuit en banc decision *United States v. Rybicki*⁸ suggests a sound textual basis for giving some content to the statute so that it distinguishes between corruption and mere nonfeasance. Her limitation makes textual sense, and is not merely picked out of the air, or based on some policy not set out or implied by the statute. We analyze the statute as she does.

The key is, as it should be, reading the words of Section 1346. This post-*McNally* restoration of “honest services” fraud says “scheme or artifice to deprive another of the intangible right of honest services.” Both “whoever” and “honest” matter. This language does not limit “whoever” in Section 1341 to fiduciaries or any other subset of “whoever.” “While a particular relationship may shed light on whether one person owes another honest services, the language of § 1346 indicates that the critical factor is the type of service at issue, not the relationship of the parties.”

The words of Section 1346 taken together with Section 1341 imply five limitations. First, there must be a legally enforceable right to have another provide honest services, because without that right, there could be no deprivation of the right. Second, not any deprivation of services provides a predicate for fraud, only deprivation of services the value of which depends on their being performed honestly. The statute says “honest services,” not just “services,” and every word should be accorded meaning. Dishonest deprivation of services differ from deprivation of honesty in providing services. The statute criminalizes the latter, not the former. Suppose an employee in charge of purchasing office supplies, bribed by a free ticket, sneaks off to the ball game

⁸ 354 F.3d 124 (2d Cir.2003).

leaving his suit jacket on the chair and having his coworker tell his boss if she inquires that he is in the men's room. He has dishonestly deprived his employer of services in exchange for a bribe, but has not deprived his employer of honesty in the performance of his tasks, as he would if in return for the ticket he steered the employer's business to the provider of the ticket instead of a cheaper, better supplier.

Third, the defendant must intend to defraud, because Section 1341 says “having devised or intending to devise any scheme or artifice to defraud.” That the victim may not get all the services it should is insufficient if the specific intent to defraud is absent. Fourth, the scheme must use fraud, that is misrepresentation or concealment of a material fact. And fifth, the mails must be used to further the scheme.

The statute does not say that the fraud must be intended to deprive the victim of money or property. At common law, in the civil context, fraud requires damages, ordinarily a monetary loss, but criminal fraud has always been broader in its reach. Ordinarily, fraud against private victims will have that intent, but fraud against the government often will not. For example, in this case, a commercial drivers' license, though it has considerable economic value to the holder, has no monetary value to the government beyond the fee the government receives when it issues the license, a fee that was paid in this case. What the government seeks, by honest enforcement of the testing requirements, is not money, but safety. The government uses the commercial drivers' license exams to protect its citizens from having to drive their little compact cars alongside big rigs driven by people who have not demonstrated their ability to drive safely. It would make no sense, in terms of the purpose of the fraud statutes or the commercial drivers' license statutes and regulations, to treat as fraud only those schemes that deprived the government of its license issuance fees, yet not of the purpose of the testing, assuring that the drivers honestly passed the tests. All sorts of government services that have to be performed honestly do not involve the financial interest of government—for example, a bribe to a policeman to let a criminal go. The gravamen of the harm prohibited by the statute is dishonesty in providing services where the victim, the government in this case, was entitled to have the services performed honestly.

III. CONCLUSION

Honest services mail fraud does not require proof of a fiduciary relationship. Nor does it require damages to the money or property of the victim. It is, however, subject to the limitations set out above. The district court thus erred in dismissing the indictment.

FERNANDEZ, Circuit Judge, dissenting.

Like the majority, I must start with the mail fraud statute itself, which imposes criminal penalties upon those who use the mails in the execution of “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....](#)

The district court's dismissal of the Indictment was based upon its determination

that for honest services fraud the Indictment had to plead and the government must prove that at least one of the Defendants had a fiduciary duty to the Washington State Department of Licensing (“DOL”). As the majority points out, § 1346 does not expressly contain that restriction, and I recognize that, in general, where a statute is sufficiently clear we look no farther than its own language. Here, however, honest services is not an unambiguous phrase, and when attempting to give content to that concept, the courts have always been concerned lest the net cast by the mail fraud statute encompass far too much activity. In my view, when Congress acted, it necessarily adopted the limitations the courts had created when they used the phrase. As we have said, “[w]ithout some kind of limiting principle, honest services wire fraud could potentially make relatively innocuous conduct subject to criminal sanctions.”

As it is, courts have applied the honest services concept to the paradigm case of bribing of or other dishonest wrongdoing by high public officials. They have also applied it to employees in general because employees can be said to owe their employers loyal and honest services. In fact, employees do owe a kind of fiduciary duty to their employers. Moreover, those who stand in an apparent agency relationship with another can be said to owe a duty of loyalty to their principal, and, thus, be subject to the mail fraud statute.

The above cases fall into a pattern requiring a fiduciary duty before an honest services mail fraud case can go forward. Some cases have reached further. For example, in one [Second Circuit] case a consultant who was retained to perform a due diligence investigation regarding a four hundred million dollar letter of credit was said to owe an intangible duty of honest services sufficient to come within the reach of the statute without regard to whether he was a true fiduciary. Nevertheless, in an en banc case from the same Circuit, the court stated that even if most of the cases involved employees, it saw “no reason the principle they establish would not apply to other persons who assume a legal duty of loyalty comparable to that owed by an officer or employee to a private entity.” *Rybicki*, [354 F.3d at 142 n.17](#). That duty, of course, is a fiduciary duty, or at least something very like one....

I, too, would eschew saying more than is needed for the decision of this case. Still and all, we are called upon to alembicate what has gone before, without suggesting that no new considerations could arise in the future. When I do that, I am satisfied that in order to spell out an honest services fraud case the indictment must plead sufficient facts to give notice that a defendant has a heightened duty (for example, as an official, or employee, or agent, or trustee, or fiduciary) rather than a mere contractual duty toward the alleged victim, and has violated (or attempted to violate) that heightened duty by use of a fraudulent scheme of some sort. I hasten to add that the mere fact that a contract contains performance or other specifications does not itself give rise to a heightened duty. When all of these principles are applied to this case, I am satisfied that the Indictment at hand is insufficient.

First, as pled, it is apparent that the applicants themselves had no honest services duty to DOL, and unless either Lamb or Milovanovic did, the Indictment must fall as to

the applicants.

Second, as pled, Milovanovic had no honest services duty to DOL. No contractual duty whatsoever is even spelled out. The Indictment does allege that he is bilingual and that an applicant “was entitled to have an interpreter of his or her choosing” to translate for him during the written driver's license examination. It then goes on to describe Milovanovic's central part in the scheme and alleged wrongdoing. No more. Thus, again, unless Lamb had a duty of honest services, the Indictment must fall as to Milovanovic also.

The Indictment comes closest in its allegations about Lamb, but not close enough. It points out that Lamb is certified to give driving skills tests, but he is not a DOL employee. He does have a contract with DOL pursuant to which he gives the tests and reports the results. However, it is not alleged that he is an agent of DOL, nor is it even alleged that he is paid by DOL for his performance pursuant to the contract. Again, the scheme and his activities are spelled out. Again, I fail to see any allegations that subtend a heightened duty toward DOL applicable to Lamb.

Thus, while I am aware of the fact that an indictment need only spell out the elements of the alleged offense and give notice, this Indictment falls short of meeting even those minimum requirements. As a result, the Indictment must, as the district court indicated, fall.

I hold no brief for the facinorous behavior alleged against Milovanovic and Lamb. However, I am also unable to say that the Indictment sufficiently pleads the crime of honest services mail fraud. [18 U.S.C. §§ 1341](#), 1346. That is because it fails to allege the kind of heightened duty to DOL that would suffice to raise Milovanovic and Lamb from the status of miscreants to the status of federal defendants.

Thus, I respectfully dissent.

NOTES AND QUESTIONS

1. *Fiduciary duty.* Which of the opinions is more persuasive? Should the government be required to prove a fiduciary duty? Why? What does *Skilling* have to say on this issue?

2. *Proof required.* Under the majority approach, what must the government prove at trial to obtain an honest services conviction? Under the dissent approach?

Chapter 5

SECURITIES FRAUD

[A] INTRODUCTORY NOTES

[4] Elements of Securities Fraud

P. 142: *[Insert following the first line on the page:]*

In *Janus Capital Group Inc. v. First Derivative Traders*, [131 S. Ct. 2296](#) (2011), the United States Supreme Court by a five-to-four vote held that only the “maker” of a false or misleading statement can be liable in a private securities fraud action brought under Rule 10b-5. The Court defined “maker” as a “person or entity with ultimate authority over the statement.” Janus Capital Management (JCM) was an investment advisor to Janus Investment Fund (JIF), which had allegedly made false and misleading statements in prospectuses with JCM’s assistance. Under the Court’s holding, JIF was the “maker” of the statements, not JCM or its parent corporation, Janus Capital Group (JCG). Thus, JCM and JCG could not be held liable under Rule 10b-5 for those statements. See Richard D. Bernstein, et al., *Supreme Court Adopts Rule of Narrow Construction for Rule 10b-5*, N.Y.L.J. (June 23, 2011).

[C] PROOF OF WILLFULNESS

P. 177: *[Insert following note 4:]*

5. *Compliance with GAAP.* Often, securities fraud prosecutions involve allegations of attempts to manipulate corporate earnings in order to bolster stock prices. In *United States v. Ebbers*, [458 F.3d 110](#) (2d Cir. 2006), for example, the former CEO of WorldCom, Inc., was convicted of securities fraud and of making false filings with the SEC. On appeal, he argued that his convictions should be reversed because the prosecution failed to prove that WorldCom’s accounting practices violated Generally Accepted Accounting Principles (GAAP), the official standards set forth by the American Institute of Certified Public Accountants. The Second Circuit affirmed the conviction, holding that an intent to defraud may exist even when the defendant has complied with GAAP. Although potentially relevant to a good faith defense, such compliance does not negate an intent to defraud where the government has shown intentional misstatements of financial condition designed to artificially inflate its stock price.

In *United States v. Goyal*, [629 F.3d 912](#) (9th Cir. 2010), on the other hand, the government affirmatively relied upon the defendant’s alleged failure to follow GAAP in its securities fraud case. The court reversed the defendant’s convictions, in part because the court found that the government failed to prove that the defendant’s representations were materially false or misleading, and that the defendant *knew* that the statements were materially false or misleading. The court concluded that the government had failed to

prove that the defendant knew of the violation of GAAAP. In a notable concurring opinion, Judge Kozinski criticized the government for bringing a criminal case in these circumstances, stating that “[t]his is just one of a string of recent cases in which courts have found that federal prosecutors overreached by trying to stretch criminal law beyond its proper bounds.” [*Id.* at 922 \(Kozinski, J., concurring\)](#).

Do the securities fraud statutes invite unnecessarily aggressive criminal prosecutions? Why or why not?

[D] MATERIALITY

P. 219: [*Insert before Problems:*]

NOTE ON *MATRIXx INITIATIVES, INC. v. SIRACUSANO*

In its 2011 decision in *Matrixx Initiatives, Inc. v. Siracusano*, [131 S. Ct. 1309](#) (2011), the Supreme Court again considered the materiality issue in the securities fraud context. The plaintiffs were investors in a pharmaceutical company, and the defendants were the company and three of its executives. The plaintiffs alleged that the company failed to disclose “adverse events” reports indicating that one of the company’s products, a nasal spray, might lead to the loss of smell. The plaintiffs did not allege that the data was “statistically significant” because of the small number of the reports. The district court dismissed the case, holding that the plaintiffs had not sufficiently alleged facts demonstrating that the omitted information was material.

On appeal, the Ninth Circuit reversed, and the Supreme Court affirmed the Ninth Circuit’s decision. Citing *TSC Industries* and *Basic*, the Court rejected a bright-line materiality rule requiring that the omitted information be statistically significant. The Court concluded, “As in *Basic*, Matrixx’s categorical rule would ‘artificially exclud[e]’ information that ‘would otherwise be considered significant to the trading decision of a reasonable investor.’” [*Id.* at 1318 \(quoting Basic, 485 U.S. at 236\)](#). The Court went on to note that, at trial, the plaintiffs’ medical experts might be able to show a causal link between the product and the adverse events. Reaffirming the *TSC* test, the Court stated that not all adverse events must be reported, but only those that a reasonable investor might consider material.

Chapter 6

COMPUTER CRIMES

[B] PROVING THE ELEMENTS OF COMPUTER CRIME

[2] Mens Rea

P. 205: *[Replace Problem 6-3 with the following:]*

6-3. The following evidence was adduced at trial. Defendant Willy was employed by Collections, Inc., a debt collection agency. To obtain information on individuals for debt collection, the agency utilized a financial information services website called Accounts.com. The information available on Accounts.com included the names, addresses, social security numbers, dates of birth, telephone numbers, and other property data of many individuals. In order to access the information on Accounts.com, customers contracted with the website to obtain a username and password. In his position as a small claims supervisor, Willy had significant responsibility for the computers in the agency. As part of his employment, Willy assigned to employees usernames and passwords to access Accounts.com. Employees were not authorized to obtain information from Accounts.com for personal use. Willy deactivated the usernames and passwords of employees who no longer worked for the company.

While investigating Mary for identity theft, police officers found pages printed out from Accounts.com with identifying information for many people. The information obtained from Accounts.com was used to make false identity documents, open instant store credit at various retailers, and use the store credit to purchase goods that were later sold for cash. A subpoena to Accounts.com revealed that the information had been obtained through the user name “Alice Diaz,” which was assigned to Collections, Inc. Federal agents interviewed Willy about the identity theft. Willy admitted that he had dated Mary, and that he began providing to her individuals’ information he obtained through Accounts.com. After Mary continued to ask Willy for information, he gave her the Alice Diaz username and password so that she could access Accounts.com herself. In exchange, Mary said that she would “take care of [Willy] later.” She later gave him a silver watch. When Willy learned through a newspaper article that Mary had been arrested for identity theft, he deactivated the username and password. Mary’s efforts defrauded the victims of over \$10,000. Mary pleaded guilty to violating [18 U.S.C. §§ 1030\(a\)\(2\)\(c\)](#) and [\(a\)\(4\)](#).

Willy was tried and convicted of one count of aiding and abetting ([18 U.S.C. § 2](#)) Mary’s violation of [18 U.S.C. §§ 1030\(a\)\(2\)\(c\)](#). On that count, he was sentenced to 40 months’ imprisonment under [18 U.S.C. § 1030\(c\)\(2\)\(B\)\(iii\)](#). Willy was also convicted of one count of aiding and abetting Mary’s violation of [18 U.S.C. § 1030\(a\)\(4\)](#). On that count, he was sentenced under [18 U.S.C. § 1030\(c\)\(3\)\(A\)](#) to four years’ imprisonment.

On appeal, Willy first argues that, although he concedes liability under

§1030(a)(2)(c), he was improperly sentenced under § 1030(c)(2)(B)(iii). He argues that instead he should have been sentenced under §1030(c)(2)(A) because there was no proof that he knew the value of the information that Mary obtained. Second, Willy argues that his conviction under § 1030(a)(4) should be overturned because there was insufficient evidence that he intended to defraud. (Willy does not contest the sentence on the § 1030(a)(4) count.)

How should the court rule? Why?

[E] EVIDENCE GATHERING

[3] Fourth Amendment Issues

P. 219: *[Insert at end of section:]*

Courts have begun to respond to the issues raised by government searches of electronically stored information. One of the most important decisions was the Ninth Circuit's *en banc* ruling in *United States v. Comprehensive Drug Testing*, [579 F.3d 989](#) (9th Cir. 2009). In that case, a federal grand jury was investigating the use of steroids by major league baseball players. The government obtained a warrant to search the records of the company that conducted drug testing of the players. When executing the warrant, the government seized records far broader than those listed in the warrant. In sustaining the district court's order to return the records beyond those in the warrant, the court announced general guidelines applicable to searches of electronically stored information. Among these guidelines, (1) judicial officers issuing the warrants must require the government to waive reliance on the "plain view" doctrine, (2) segregation and redaction must be done according to strict court-mandated guidelines, (3) the government must conduct the search in a way to only reveal information for which the government has probable cause, and (4) the government must return or destroy nonresponsive information. The court did not state whether these rules were mandated by the Fourth Amendment, or whether the court was exercising its supervisory powers over district courts' issuance of search warrants.

Do these rule help alleviate some of the dangers in government searches of electronically-stored information? Why or why not?

Chapter 7

BRIBERY AND GRATUITIES

[C] FEDERAL PROGRAM BRIBERY -- § 666

[2] The Reach of the Statute

P. 244: [*Insert at end of note 4:*]

In *United States v. McNair*, [605 F.3d 1152](#) (11th Cir. 2010), the Eleventh Circuit held that the government is not required to prove a quid pro quo under §§ 666(a)(1)(B) and (a)(2). The court relied upon the plain language of §§ 666(a)(1)(B) and (a)(2), which do not mention a *quid pro quo* nor contain such language as “in exchange for” or “in return for” a specific official act. A contrary holding, the court stated, “would permit a person to pay a significant sum to [a covered agent] intending the payment to produce a future, as yet unidentified, favor without violating § 666.”

P. 244: [*Insert new note 4a following note 4:*]

4a. *Does Sun-Diamond apply to § 666? Does the Sun-Diamond Growers requirement that the benefit to the public official be in connection with a specific official act apply to cases brought under § 666 based on a bribery theory? In United States v. Ganim,*⁹ the Second Circuit held that the language in the gratuities statute, which refers to giving benefits to a public official “for or because of *any official act* performed or to be performed,” does not apply to § 666, which contains no such language.

P. 245: [*Insert new note 6a following note 6:*]

6a. *The meaning of “agent.”* Although the Court in *Sabri* expanded the reach of § 666, federal courts of appeal have begun to narrow the statute’s application by limiting the definition of “agent.” In the case of a bribed party, the government must show that the defendant was an agent of a private organization or of a state, local, or tribal government or agency that received more than \$10,000 a year in federal benefits. The statute defines “agent” as a “person authorized to act on behalf of another person or a government and, in the case of an organization or government, [the term “agent”] includes a servant or employee, and a partner, director, officer, manager, and representative.” In *United States v. Langston*, [590 F.3d 1226](#) (11th Cir. 2009), the court found that an official paid by a state commission with state money was not a state “agent” under § 666 because he was not authorized to act on behalf of the state under applicable state law. *See also United States v. Whitfield*, [590 F.3d 325](#) (5th Cir. 2009) (even assuming arguendo that the defendant judges were “agents” of the state court administrative agency, insofar as they performed functions that involved agency funds, their decisions as presiding judges in two lawsuits were not made “in connection with any

⁹ 510 F.3d 134, 134 (2d Cir. 2007).

business, transaction, or series of transactions” of the agency under § 666). Do these cases provide a serious limitation of § 666’s reach? Why or why not?

Chapter 11

OBSTRUCTION OF JUSTICE

[D] MENS REA

P. 353: [*Insert new note 4:*]

4. *Assertion of privileges.* When does advising someone to assert an evidentiary or constitutional privilege demonstrate an intent to engage in corrupt persuasion? The courts have conflicting approaches to this issue. For example, in *United States v. Doss*, [630 F.3d 1181](#) (9th Cir. 2011), a husband had urged his wife to assert the marital privilege in a criminal investigation targeting the husband. Based on this conduct, the defendant was convicted under § 1512(b). The Ninth Circuit reversed. Describing the circuit split, the court stated, “Two of our sister circuits conclude that persuasion with an ‘improper purpose’ qualifies (such as self-interest in impeding an investigation), while another concludes there must be something more inherently wrongful about the persuasion (such as bribery or encouraging someone to testify falsely).” *Id.* at 1186. The court held that the latter was the correct interpretation under *Andersen*, and reversed the conviction. In another case, *United States v. Gotti*, 459 F.3d 296, 342–43 (2d Cir. 2006), the defendant suggested to a co-conspirator that the co-conspirator invoke his Fifth Amendment privilege. The defendant was convicted of corrupt persuasion, and the Second Circuit affirmed. The court held that the defendant had a self-interested motivation in ensuring that the potential witness did not implicate the defendant. The court found that this motivation amounted to an “improper purpose” sufficient to support the conviction.

Chapter 14

RICO

[B] THE ENTERPRISE

[3] Required Proof for the “Conduct” and “Enterprise” Elements

P. 460: [*Delete last paragraph of note 2 and replace with the following:*]

In *Boyle v. United States*, [129 S. Ct. 2237](#) (2009), the Supreme Court attempted to resolve this conflict. The Court first held that:

[f]rom the terms of RICO, it is apparent that an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose. As we succinctly put it in *Turkette*, an association-in-fact enterprise is ‘a group of persons associated together for a common purpose of engaging in a course of conduct.’

Id. at 2244, quoting *Turkette*, [452 U.S. at 583](#).

The Court went on to hold that “the existence of an enterprise may . . . be inferred from the evidence showing that persons associated with the enterprise engaged in a pattern of racketeering activity We recognized in *Turkette* that the evidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise ‘may in particular cases coalesce.’” *Id.* at 2245, quoting *Turkette*, [452 U.S. at 583](#). In a dissent joined by Justice Breyer, Justice Stevens argued that “Congress intended the term ‘enterprise’ as it is used in RICO to refer only to business-like entities that have an existence apart from the predicate acts committed by their employees or associates.” *Id.* at 2247 ([Steven, J., dissenting](#)). In your view, which view is correct? Why?

[F] CIVIL RICO

[2] Standing

P. 495: [*Insert at end of note 2:*]

In 2010, the Court again analyzed civil RICO’s causation requirement. In *Hemi Group LLC v. City of New York*, [130 S. Ct. 983](#) (2010), the plaintiff, New York City, alleged that an out-of-state cigarette vendor failed to file required reports with New York State, resulting in lost city tax revenues. Chief Justice Roberts’s four-member plurality opinion applied the *Holmes* proximate cause test, holding that the City’s injury was not a sufficiently direct product of the failure to file the reports. Under this reasoning, the fraud was committed against the state rather than not the city.

Chapter 15

INTERNAL INVESTIGATIONS AND COMPLIANCE PROGRAMS

[B] INTERNAL INVESTIGATIONS

[2] Privilege and Related Issues

P. 517: *[Insert at end of Notes and Questions:]*

Internal investigations can raise complex legal and ethical issues. None of these issues is more vexing than the duties that corporate counsel owe the corporation and, potentially, its agents and employees during an internal investigation. These issues are explored in the next case.

UNITED STATES v. RUEHLE

[583 F.3d 600](#) (9th Cir. 2009)

TALLMAN, Circuit Judge.

We here explore the treacherous path which corporate counsel must tread under the attorney-client privilege when conducting an internal investigation to advise a publicly traded company on its financial disclosure obligations. Defendant-Appellee William J. Ruehle is the former Chief Financial Officer (“CFO”) of Broadcom Corporation, a California-based, publicly traded semiconductor supplier that came under intense scrutiny for its suspected backdating of company stock options. Following a government investigation, Ruehle was criminally indicted for his involvement in an alleged backdating scheme that ultimately resulted in Broadcom's restatement of its earnings to account for approximately \$2.2 billion in additional stock-based compensation expenses. The district court held an evidentiary hearing and, after evaluating the extensive briefing and evidence presented, issued an order suppressing all evidence reflecting Ruehle's statements to attorneys from Irell & Manella LLP (“Irell”), Broadcom's outside counsel, regarding the stock option granting practices at Broadcom. The court found that at the initial stages of the inquiry by Irell (called the “Equity Review”) an attorney-client relationship also existed with the CFO individually, and not just with Broadcom, and that the lawyers breached their ethical duties to their client Ruehle in disclosing what he had told them in a preliminary interview.

The government filed an interlocutory appeal. We have jurisdiction pursuant to [18 U.S.C. § 3731](#), and we reverse and remand for further proceedings.

In March 2006, the *Wall Street Journal* published the first of a series of articles called “The Perfect Payday,” which suggested that a number of public companies were backdating stock options granted to their employees.¹⁰ Shortly thereafter, in mid-May 2006, an investor rights group publicly identified Broadcom as one of the corporations that appeared to have engaged in backdating. As a result of the media attention and in anticipation of an inquiry from the Securities and Exchange Commission (“SEC”), Broadcom's Board of Directors and company management decided to bring in outside counsel to commence an internal review of the company's current and past stock option granting practices. Ruehle, as Broadcom's CFO, was among those intimately involved in that decision from the outset. On May 18, 2006, Broadcom's Audit Committee engaged Irell, a private law firm with which it had longstanding ties, to conduct the Equity Review by investigating the propriety of the measurement dates utilized by Broadcom in its option granting process and identifying those grants which failed to meet the measurement date requirements of generally accepted accounting principles. Irell immediately commenced its review, which entailed collecting corporate documents and records and conducting interviews with past and current Broadcom employees.

Broadcom representatives, including Ruehle, met with Irell lawyers on May 24 and 25, 2006, to discuss the scope of the Equity Review. It was agreed that Irell would report the results of its inquiries to the Audit Committee. It was also decided that the Board would not appoint a panel of independent, outside directors to oversee the Equity Review. On May 26, 2006, a formal meeting of the Audit Committee was convened. Ruehle and other senior Broadcom executives, several members of the Board, and Irell lawyers were among those present. During the hour-long meeting, Irell partner David Siegel explained the nature of typical “backdating” investigations and discussed the status of Irell's internal review, including the necessary involvement of Broadcom's outside independent auditors, Ernst & Young LLP, who would have to review and opine on the accuracy of the company's audited financial statements and regulatory filings. Siegel also cautioned “that Irell can handle issues related to the proper accounting for

¹⁰ Stock options give individuals the right to buy shares of stock on a future date at a set price, commonly known as the “exercise” or “strike” price. Typically, as was the practice at Broadcom, stock options granted to employees could not be exercised until the end of a fixed vesting period. Once an option vested, the holder could exercise it and purchase stock from the company at the strike price. Thus, options that have a strike price below the current trading price in the stock market are commonly referred to as being “in the money,” whereas options with a strike price above the current trading price are considered “underwater.”

The strike price is typically equal to the market price on the date that the option is granted. “Backdating” refers to the practice of recording an option's grant date and strike price retrospectively. *See United States v. Reyes*, 577 F.3d 1069, 1073 (9th Cir.2009). The ability to manipulate the strike price maximizes the benefit to the option holders. Selection of an initial grant date when the share price, and thus the strike price, is at its lowest during a given period will increase the amount an option is “in the money” or, in some cases, may determine whether an option is “in the money” at all, rather than “underwater.” In either case, the employee may immediately exercise the options to buy shares at the optimally low strike price, sell the stock at the current market price, and pocket any gain. “Backdating is not itself illegal, provided that the benefit to the employees is recorded on the corporate books as a non-cash compensation expense to the corporation, in accordance with an accounting convention promulgated in 1972 referred to as Accounting Principles Board Opinion No. 25.” *Id.*

option grants but that if an issue of self-dealing or management or Board integrity arose, a special committee of independent directors would need to be appointed and special independent counsel engaged to conduct that inquiry.” The Audit Committee and other representatives of Broadcom made clear that the intent was to turn over the information obtained through the Equity Review to the auditors, to fully cooperate with government regulators, and, if necessary, to self-report any problems with Broadcom's financial statements.

As many within Broadcom had anticipated, civil lawsuits soon followed the media reports about the company's back-dating of stock options. On May 25, 2006, a shareholder derivative suit captioned *Murphy v. McGregor* was filed in California federal court. The following day, on May 26, the plaintiffs in the ongoing securities class action in California state superior court, *Jin v. Broadcom Corp.*, filed an amended complaint. Both the *Murphy* action and the *Jin* amended class action now alleged wrongdoing in relation to Broadcom's stock option granting practices; both suits named Broadcom and also personally named Ruehle, among other Broadcom officers and directors, as an individual defendant.

On May 30, 2006, Broadcom's in-house General Counsel David Dull sent an e-mail to various Broadcom employees, including Ruehle, notifying them of the *Murphy* action and of the amended complaint filed in the *Jin* securities class action. Dull invited anyone with concerns to contact either him or Irell attorneys Siegel, Kenneth Heitz, or Dan Lefler. Shortly after receiving Dull's message, Ruehle received a separate e-mail from Heitz, one of the Irell partners with whom Ruehle had already conferred as part of the Equity Review. Heitz's e-mail updated Ruehle concerning the scheduling of interviews of three current or former Broadcom employees and, finally, inquired, “if you have open time on Thursday Dan Lefler and I would like to spend an hour or so with you...”

As arranged, Heitz and Lefler met with Ruehle in his office on Thursday, June 1, 2006, to discuss Broadcom's stock option granting practices and his role as the company's CFO.¹¹ Ruehle had subsequent, brief discussions with the Irell lawyers as the Equity Review continued and the lawyers reported back to the CFO their progress in unearthing the facts. At no point did the topic of the civil securities lawsuits arise as it might relate to Ruehle personally. Nor did Ruehle ever indicate to the lawyers that he was seeking legal advice in his individual capacity. It is the substance of these June 2006 interactions that lies at the center of the present dispute.

¹¹ At the evidentiary hearing the Irell attorneys testified that they provided Ruehle a so-called *Upjohn* or corporate *Miranda* warning. Such warnings make clear that the corporate lawyers do not represent the individual employee; that anything said by the employee to the lawyers will be protected by the company's attorney-client privilege subject to waiver of the privilege in the sole discretion of the company; and that the individual may wish to consult with his own attorney if he has any concerns about his own potential legal exposure. *See Upjohn Co. v. United States*, 449 U.S. 383, 393-96 (1981). Ruehle testified that he did not recall receiving any such warnings. As discussed *infra*, the district court seems to have disbelieved the Irell lawyers who took no notes nor memorialized their conversation on this issue in writing, and it apparently credited Ruehle's testimony that no such warnings were given. We cannot say that this finding is clearly erroneous on the record before us.

In late June 2006, Irell advised Ruehle to secure independent counsel with respect to the investigations and the pending civil suits. Ruehle retained the law firm Wilson Sonsini Goodrich & Rosati to represent him individually. Nevertheless, Ruehle remained heavily involved in the company's internal review and he was privy to Irell's reports to the Audit Committee of its findings and ultimately the disclosures of the information gathered by Irell to Ernst & Young.

In August 2006, at Broadcom's direction, Irell fully disclosed the information obtained from the Equity Review to the Ernst & Young auditors. Irell had a series of meetings with Ernst & Young in which the lawyers reported what they had found, which necessarily included the substance of Ruehle's June 1, 2006, interview with Heitz and Lefler. Ruehle was present for at least some of these meetings between Irell and the Ernst & Young auditors. There is no dispute that the Irell lawyers regularly updated Ruehle and others in senior management about the progress of the Equity Review and their meetings and contacts with the auditors.

The Equity Review revealed several accounting irregularities with respect to certain stock option grants. In January 2007, on the advice of its outside counsel and auditors, Broadcom restated its earnings as reported in its financial disclosure statements to include a total of \$2.2 billion in previously undisclosed compensation expenses.

The SEC and the United States Attorney's Office commenced formal enforcement and grand jury investigations of several company executives in relation to Broadcom's stock option granting practices. In May and June 2007, with Broadcom's authorization, government investigators interviewed Irell attorneys Heitz and Lefler by telephone regarding their conversations with Ruehle in June 2006. The information they provided was summarized in FBI Form FD-302 reports of investigation, which are part of the sealed record. When he learned that the government intended to use this information against him in connection with possible criminal charges, Ruehle objected and claimed that any statements to the Irell attorneys were protected by his attorney-client privilege. Ruehle also insisted, after the fact, that whatever he said to Irell could not be disclosed without his prior written consent.

On June 4, 2008, a grand jury in the Central District of California indicted Ruehle and Henry T. Nicholas III-Broadcom's founder, and former President and Chief Executive Officer-on charges of conspiracy, securities and wire fraud, and various other violations of Title 15 of the United States Code. The indictment alleges that beginning in or around 1999 and continuing until at least in or around 2005, Nicholas and Ruehle, among others, engaged in a fraudulent scheme and conspiracy to disguise, conceal, understate, and mischaracterize compensation expenses Broadcom was required to recognize in connection with granting its stock options to various employees. Among the allegations of wrongdoing, the indictment claims that as part of the backdating scheme the defendants paid a former employee who threatened to expose the scheme, concealed the payoff from Broadcom's Board and its independent auditors, and took various steps to create plausible deniability as to Broadcom's option backdating practices.

On January 12, 2009, the government moved *ex parte* for a hearing to resolve whether the statements Ruehle made to Irell lawyers in June 2006 were privileged communications. Ruehle argued that he had an individual attorney-client relationship with Irell arising from the securities lawsuits, in which he was a named defendant. Beginning on February 23, 2009, the district court held a three-day evidentiary hearing at which Ruehle and Irell attorneys Heitz and Lefler testified. At Ruehle's request, a substantial portion of the testimony and evidence was received *in camera* outside the presence of the federal prosecutors. Both Irell attorneys insisted that Irell's individual representation of Ruehle in relation to the civil securities lawsuits did not commence until after the June 1, 2006, interview. Among other things, the attorneys testified that they began the June 2006 meeting with a so-called *Upjohn* or corporate *Miranda* warning, which included notice that the Irell attorneys were acting as representatives of Broadcom—specifically, the Audit Committee—and that the privilege therefore rested only with the company. Ruehle, however, denied any recollection of receiving such cautionary warnings at the June 1, 2006, interview. Ruehle testified that at the time he spoke with Heitz and Lefler he believed Irell represented everyone named in the civil suits, including him, and that Heitz and Lefler were acting at least in part as his personal attorneys during the interview.

At the conclusion of the hearing, the district court rendered its oral ruling which strongly condemned the Irell attorneys' behavior with respect to the firm's handling of the Equity Review. The court then found that Ruehle “had a reasonable belief that Irell and Manella were his lawyers prior to the June 1, 2006 interrogation by Irell, and that he never gave informed written consent, either to the dual representation by Irell or the disclosure of privileged information to third parties, including Ernst & Young and the government.” Based on this reasoning, the court ordered suppression. The district court subsequently issued a written order, which included an additional finding that Ruehle intended his statements to Heitz and Lefler to be confidential. The order stated that “all evidence reflecting Mr. Ruehle's statements to Irell regarding the stock option granting practices at Broadcom is suppressed.” The court also referred Irell to the California State Bar for possible discipline in light of numerous perceived violations of state rules of professional conduct.

The government interlocutorily appealed the district court's suppression order and we consider it on an expedited basis.

II

The district court's conclusion that statements are protected by an individual attorney-client privilege is “a mixed question of law and fact which this court reviews independently and without deference to the district court.” That is, whether the party has met the requirements to establish the existence of the attorney-client privilege is reviewed *de novo*. *Id.* We also review *de novo* the district court's rulings on the scope of the attorney-client privilege. *Id.* Factual findings are reviewed for clear error. A district court's credibility determinations are given “special deference.”

III

The government raises several arguments challenging the district court's order excluding Ruehle's statements to Irell attorneys. We begin with some basic premises. First, there is no dispute that Broadcom had an existing attorney-client relationship with Irell and, by electing to reveal the information gathered to Ernst & Young (and later to various agencies of the United States), deliberately waived any corporate attorney-client privilege it held with respect to all matters at issue. Second, the Equity Review and the civil securities suits, to which Ruehle was a party, both concerned the same general subject matter as of June 1, 2006-i.e., the stock option granting practices of Broadcom. Finally, the district court concluded as a fact that Ruehle reasonably believed that Irell represented him individually with respect to the ongoing civil lawsuits when the June 1, 2006, meeting took place. Because this factual finding is not clearly erroneous, we approach the parties' arguments from the perspective that Irell had attorney-client relationships with both Broadcom and Ruehle individually.

We, however, must inquire further. After all, “[a] party asserting the attorney-client privilege has the burden of establishing the relationship *and* the privileged nature of the communication.” We must determine whether Ruehle's communications to the Irell attorneys regarding Broadcom's stock option granting practices are protected by a personal attorney-client privilege belonging to Ruehle.

“The attorney-client privilege protects confidential disclosures made by a client to an attorney in order to obtain legal advice, ... as well as an attorney's advice in response to such disclosures.” “The fact that a person is a lawyer does not make all communications with that person privileged.” “Because it impedes full and free discovery of the truth, the attorney-client privilege is strictly construed.” “[T]he privilege stands in derogation of the public's ‘right to every man's evidence’ and as ‘an obstacle to the investigation of the truth,’ [and] thus, ... ‘[i]t ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.’ ” Typically, an eight-part test determines whether information is covered by the attorney-client privilege:

- (1) Where legal advice of any kind is sought
- (2) from a professional legal adviser in his capacity as such,
- (3) the communications relating to that purpose,
- (4) made in confidence
- (5) by the client,
- (6) are at his instance permanently protected
- (7) from disclosure by himself or by the legal adviser,
- (8) unless the protection be waived.

The party asserting the privilege bears the burden of proving each essential element.

A

At the outset we note a fundamental flaw in the district court's analysis. “Issues concerning application of the attorney-client privilege in the adjudication of federal law are governed by federal common law.” The district court, however, applied a “reasonable belief” standard without ever referencing the well-established eight-part test. Rather, in

reaching its holding, the court relied almost exclusively upon California state law to define both the attorney-client relationship and the attorney-client privilege. Most significantly, the court cited [California Evidence Code section 917\(a\)](#) for the proposition that all “communications made in the course of an attorney-client relationship are presumed confidential.”

This legal error is critical in this case. The district court applied a liberal view of the privilege that conflicts with the strict view applied under federal common law, which governs here. By approaching the exclusion question with a presumption that the privilege attached, the district court inverted the burden of proof, improperly placing the onus on the government to show what information was not privileged.

As the party asserting the privilege, Ruehle was obliged by federal law to establish the privileged nature of the communications and, if necessary, to segregate the privileged information from the non-privileged information. With respect to the latter obligation, Ruehle has made no effort to identify with particularity which of his communications to the Irell attorneys are within his claim of privilege, in either his public or sealed filings before us. Under federal law, the attorney-client privilege is strictly construed. Ruehle's failure to define the scope of his claim of privilege weighs in favor of disclosure; in any event, his claim cannot support the overly broad, blanket suppression order entered here.

B

With the burden properly on Ruehle, and after carefully reviewing and evaluating the record, we hold that Ruehle fails the fourth element of the traditional eight-part privilege test. Ruehle's statements to the Irell attorneys were not “made in confidence” but rather for the purpose of disclosure to the outside auditors. That he might regret those statements after later learning of the subsequent corporate disclosure to law enforcement officials is not material to the privilege determination as of June 2006.

The district court reached the contrary conclusion: “Mr. Ruehle intended his statements to be confidential, and he had no reason to suspect that his conversations with the Irell lawyers would be disclosed to third parties.” We are unable to square this factual finding, which forms the linchpin of the suppression order, with the evidence presented at the evidentiary hearing. The notion that Ruehle spoke with Irell attorneys Heitz and Lefler with the reasonable belief that his statements were confidential is unsupported by the record. Of particular significance is what was said in the meetings he attended prior to June 1, 2006, with Irell attorneys, company management, and the Audit Committee, as acknowledged in Ruehle's own testimony. He frankly admitted that he understood the fruits of Irell's searching inquiries would be disclosed to Ernst & Young in order to convince the independent auditors of the integrity of Broadcom's financial statements to the public, or to take appropriate accounting measures to rectify any misleading reports. We reject the district court's contrary finding that an expectation of confidentiality was established because, upon review of the record, we are left with the “definite and firm conviction that a mistake has been committed” and thus we determine that this factual finding was clearly erroneous.

Ruehle was no ordinary Broadcom employee. He served as the public company's CFO—the senior corporate executive charged with primary responsibility for Broadcom's financial affairs. This was a sophisticated corporate enterprise with billions of dollars in sales worldwide, aided by accountants, lawyers, and advisors entrusted with meeting a multitude of regulatory obligations. The duties undertaken by Ruehle broadly encompassed not only accurately and completely reporting the company's historical and current stock option granting practices, but also Broadcom's strict compliance with reporting and record keeping requirements imposed through the Securities Exchange Act of 1934 and the Sarbanes-Oxley Act of 2002, among many other federal and state rules and regulations. As the head of finance, Ruehle cannot now credibly claim ignorance of the general disclosure requirements imposed on a publicly traded company with respect to its outside auditors or the need to truthfully report corporate information to the SEC.

Ruehle was also intimately involved in all aspects of the Equity Review, including the planning, investigatory, and disclosure stages. Ruehle was a full participant in the initial May 2006 meetings with the Irell attorneys where the scope of representation and the details of the Equity Review were decided and agreed upon, even before convening the formal Audit Committee meeting. From the outset, it was settled and made widely known to senior management that Broadcom intended to fully cooperate with the SEC and the auditors. Ruehle, as the primary contact with Ernst & Young over the years, personally introduced the Irell attorneys to the team of outside auditors. Thereafter, he repeatedly met with the Audit Committee, senior management, the Irell attorneys, and the auditors, and remained fully apprised throughout the summer of 2006 of the status of Irell's investigation and the flow of information.

In his testimony at the evidentiary hearing, Ruehle acknowledged the broad nature of the planned third-party disclosure, noting that Irell was directed, to his knowledge, to freely share “all factual information” gleaned through the Equity Review—whether “good, bad, or ugly.” As he explained, at the time of the June 1, 2006, interview, he understood that nothing would be withheld from Ernst & Young....

As Ruehle anticipated when he met with the Irell attorneys in June 2006, the information obtained through the Equity Review, including his input, was passed on to Ernst & Young. He never raised any anxiety about the possible disclosure over what he now claims was intended to be confidential and thus privileged information. Ruehle had ample opportunity to raise any concern he might have harbored. Ruehle not only attended meetings where the Audit Committee directed Irell to disclose to Ernst & Young the fruits of the Equity Review, he was also present at meetings where disclosures to the auditors actually occurred. He did not object. Even after engaging independent counsel to apprise him of his legal rights, Ruehle never claimed that he thought his statements to Irell during the Equity Review, later shared with the auditors, were confidential—until the specter of criminal liability arose in 2008....

The salient point from a privilege perspective is that Ruehle readily admits his understanding that all factual information would be communicated to third parties, which

undermines his claim of confidentiality to support invoking the privilege. Ruehle's subjective shock and surprise about the subsequent usage of the information he knew would be disclosed to third-party auditors-e.g., information subsequently shared with securities regulators and the Justice Department now used to support a criminal investigation and his prosecution-is frankly of no consequence here.

In support of his case for invocation of the privilege, Ruehle also repeatedly points to attorney Heitz's testimony that he could not "split his mind" so as to distinguish between facts relevant to the Equity Review and those relevant to the defense of Ruehle in the pending civil securities litigation, because they both had at their core Broadcom's stock option granting practices. But his efforts to make gold from lead are met with failure. The implicit concession on Ruehle's part that the information underlying the Equity Review and the lawsuits was largely inseparable, if not one and the same-is detrimental, not helpful, to his case. His admitted awareness that anything relating to the former would not be held in confidence but rather shared with at least one third party destroys the confidentiality essential to establishing the privilege as to both.

Ruehle attempts to raise an exception to the full disclosure of all factual information, insisting that he anticipated the disclosure of only factual information "that was not otherwise privileged information." In other words, Ruehle now asserts an expectation of confidentiality only over statements that he claims were really given in confidence. He does not distinguish what those statements might be in his blanket invocation of the privilege. This circular reasoning is, analytically speaking, unpersuasive and cannot overcome the concrete evidence in the record before us. Even supposing he subjectively believed that *some* of the information he conveyed to the Irell lawyers was confidential, upon asserting the attorney-client privilege Ruehle was obliged to distinguish which particular statements should be afforded the privilege. He made no effort to do so before the district court and fares no better on appeal. His testimony at the evidentiary hearing, despite being held *in camera* at his request, due ostensibly to the sensitive subject matter to be discussed, did not delve into the details of his substantive contributions to the Equity Review and, frankly, entailed largely non-privileged matters. We are left guessing as to what particular facts Ruehle purportedly believed were disclosed in breach of confidence.

Ruehle's position is, at bottom, that some nebulous portion of his communications with Heitz and Lefler was intended to be confidential as to him personally and therefore everything said or not said to the attorneys should be protected by his individual attorney-client privilege. That is not the law nor, in our view, should it be. Having failed to better articulate his expectations regarding the scope of disclosure to Ernst & Young, he has failed to carry his burden with respect to any and all factual information arising from the Equity Review.

Moreover, Ruehle's argument runs squarely into the settled rule that *any* voluntary disclosure of information to a third party waives the attorney-client privilege, regardless of whether such disclosure later turns out to be harmful. ...

In sum, the overwhelming evidence demonstrates that Ruehle's statements to Heitz and Lefler were not “made in confidence” but rather for the purpose of outside disclosure. Accordingly, we hold that Ruehle has failed to meet his burden of establishing the existence of an individual attorney-client privilege with respect to the information provided to the Irell attorneys in the June 2006 time frame.

IV

A considerable portion of the district court's suppression order was dedicated to recounting perceived violations of the California Rules of Professional Conduct committed by Irell attorneys. This portion of the order, which relates to possible disciplinary action by the state bar, is not before us on appeal. Ruehle, however, asserts that clear breaches of professional duties warrant suppression in a criminal prosecution. We disagree and reject this novel argument, which stands apart from the attorney-client privilege determination....

V

The district court erred in forbidding the United States from calling Irell attorneys to testify to the information they learned from Ruehle in June 2006. Consistent with his admitted understanding that Broadcom would fully disclose what Irell learned as part of the Equity Review to Ernst & Young, Ruehle lacks an expectation of confidentiality to support a blanket invocation of his individual attorney-client privilege over *all* factual information he provided.

The district court's order suppressing the Irell evidence is reversed and the matter is remanded for trial.

Chapter 16

THE GRAND JURY

[C] SECRECY AND RELATED ISSUES

[1] Leaks

P. 546: [*Insert at end of note 2:*]

In *In re Grand Jury*, [566 F.3d 12](#) (1st Cir. 2009), the First Circuit took a different approach. The court declined to hold that witnesses are entitled to review their transcripts. The court went on to find, however, that “a less demanding requirement of particularized need applies when a grand jury witness demands access [in order to review] a transcript, rather than a copy of the transcript.” [Id. at 17](#). Does this approach make sense? What are the competing interests of the witness and the government in providing access versus a copy?

Chapter 17

SELF INCRIMINATION – WITNESS TESTIMONY AND DOCUMENT PRODUCTION

[C] DOCUMENTS

P. 566: [*Insert at end of note 3:*]

The Second Circuit reached a similar conclusion in *In re Grand Jury Subpoena Issued June 18, 2009*, [593 F.3d 155, 158](#) (2nd Cir. 2010). The court held that there “simply is no situation in which a corporation can avail itself of the Fifth Amendment privilege.” *Id.* at 158 ([internal quotations and citations omitted](#)). The court noted that “every other court to have considered this issue has reached the same conclusion for largely the same reasons.” *Id.* at 159.

Chapter 18

CIVIL ACTIONS, CIVIL PENALTIES, AND PARALLEL PROCEEDINGS

[B] CIVIL REMEDIES

[2] *Qui Tam* Actions

P. 587: *[Insert at end of note 4:]*

In addition, under § 3730(e)(4)(A), a court lacks subject matter jurisdiction in a qui tam action that is “based upon the public disclosure of allegations or transactions” in certain circumstances unless “the person bringing the action is an original source of the information.” Under § 3730(e)(4)(B), the term “original source” means “an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily *provided the information to the Government before filing an action* under this section which is based on the information.”

The federal circuit courts have split over the meaning of the language “provided the information to the Government before filing an action.” As outlined by the court in *United States v. Ortho Biotech Products, LP*, [579 F.3d 13](#) (1st Cir. 2009), the courts have followed three different approaches. Under the first approach, all that is required is that the relator voluntarily provide the information to the government before filing the qui tam action. Under the second approach, the relator must have been a source of the information provided to the entity that disclosed the allegations on which a suit is based. Under the third approach, an “original source” must provide the information to the government before any public disclosure, but the relator need not be the cause of the public disclosure. Which of these approaches is preferable? Why?

P. 588: *[Insert at end of note 5:]*

The FCA was amended in several important respects by the Fraud Enforcement and Recovery Act of 2009 (“FERA”), P.L. 111-21. Among those amendments was a provision designed to overturn the *Allison Engine* decision. New sections 3729(a)(1)(A), (B), (C), and (G) impose liability on one who:

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G); ... or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the government.

The definitional section of the statute, Section 3729(b), overturns *Allison Engine* by, among other things, deleting the “by the government” language upon which the *Allison Engine* decision relied. FCA liability now requires a nexus to the government, covering requests for funds to a contractor, grantee, or other recipient, if the funds are “to be spent or used on the government's behalf or to advance a government program or interest.” Also, FERA contains a materiality requirement for actions brought under the FCA, defining “material” as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.” Does the expanded liability create dangers for potential defendants? Why or why not?

[D] DEFERRED AND NON-PROSECUTION AGREEMENTS

P. 609 [*Insert at end of background section:*]

In January 2010, the SEC announced a series of initiatives to encourage individuals and companies to cooperate and assist in investigations. *See* <http://www.sec.gov/news/press/2010/2010-6.htm>. The new cooperation tools, which had not before been available in SEC enforcement proceedings, include (1) cooperation agreements, (2) deferred prosecution agreements, and (3) non-prosecution agreements. Will these policies assist the SEC in its investigations? What risks do they pose for those under investigation?

Chapter 19

SENTENCING

[C] CONSTITUTIONAL CHALLENGES

P. 629: [*Insert new note 7 at end of section:*]

7. *The Sentencing Commission's Response.* In the wake of *Booker*, the United States Sentencing Commission in 2010 promulgated a three-step sentencing approach. Under this approach, courts should (1) calculate the applicable Guidelines offense level and criminal history score; (2) consider the policy statements and commentary to determine whether a departure is warranted; and (3) consider all of the applicable factors under [18 U.S.C. § 3553\(a\)](#). See U.S.S.G. Manual §1B1.1 commentary.

[D] THE REASONABLENESS REVIEW

[2] The Justification Required for Non-Guidelines Sentences

P. 648: [*Insert new note following note 2:*]

2a. *Post-sentencing rehabilitation.* The Supreme Court continues to provide sentencing judges with increased flexibility in light of *Booker*. In *Pepper v. United States*, [131 S. Ct. 1229](#) (2011), the Court held that, when a defendant's sentence has been set aside on appeal, the trial court at resentencing may consider evidence of the defendant's post-sentencing rehabilitation. The Court also held that such evidence may in some cases support a downward variance from the Guidelines range.

P. 648: [*Insert at end of note 3:*]

While noting that the disparities among sentences for similar crimes has increased somewhat after *Booker*, commentators frequently remark on the relatively small overall impact that *Booker* has had on federal sentencing. See Mark Hansen, *You Say You Want a Revolution: In Booker Plus Five, There's Been Rumbling But Hardly Rebellling*, A.B.A. J., March 2010, at 19. As this observer noted,

There are several explanations for why the *Booker* revolution appears to have fizzled. One is that the guidelines, though advisory, continue to have a significant influence on sentencing. Another is that judges have become so habituated to following the guidelines they find it hard to break the habit. And defense lawyers have failed to take full advantage of the opportunities *Booker* presented to plead for a lower sentence.

Id. Do you agree with these explanations? Why or why not?

[F] DEPARTURES AND SUBSTANTIAL ASSISTANCE**[2] Substantial Assistance Motions**

P. 659: *[Insert new note 4:]*

4. *Another remand.* After remand from the decision above, a new district court judge again sentenced Livesay to probation. An exasperated Eleventh Circuit panel again remanded, stating that “[w]hoever said ‘third time’s a charm’ was apparently unfamiliar with the history of this case.” *United States v. Livesay*, [587 F.3d 1274](#) (11th Cir. 2009). The court concluded,

[B]ecause the sentence imposed in this case is not reasonable in light of the sentencing factors outlined in § 3553(a), we once again vacate the sentence and remand this case to the district court for resentencing. Not only do we hold that the particular sentence imposed below is unreasonable, but we also hold that *any* sentence of probation would be unreasonable given the magnitude and seriousness of Livesay’s criminal conduct. . . . [O]nly the imposition of a meaningful period of incarceration will meet the goals that Congress laid out in the sentencing statute.

Why did trial judges three times sentence Livesay to probation? Do you agree with the court of appeals that no sentence of probation is appropriate in this case? Why or why not?

Chapter 20

FORFEITURES

[B] The Scope of Forfeitable Property

[1] Statutory Scope

[b] Criminal forfeitures

P. 674: [*Insert at end of note 1:*]

The First, Second, Third, Seventh and Ninth Circuits have upheld money judgments in criminal forfeiture orders. In *United States v. Awad*, [598 F.3d 76](#) (2d Cir. 2010), for example, the Second Circuit upheld money judgments against two insolvent defendants. The court reasoned that,

[w]hen a defendant lacks the assets to satisfy the forfeiture order at the time of sentencing the money judgment is effectively an *in personam* judgment in the amount of the forfeiture order because mandatory forfeiture is concerned not with how much an individual has but with how much he received in connection with the commission of the crime and a contrary interpretation could have the undesirable effect of creating an incentive for an individual involved in a criminal enterprise to rid himself of his ill-gotten gains to avoid the forfeiture sanction.

[Id. at 78](#). Is this reasoning compelling? Why or why not?