

JOURNAL OF THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

Volume XLII; Issue I; New Millennium Edition

5/15/2011

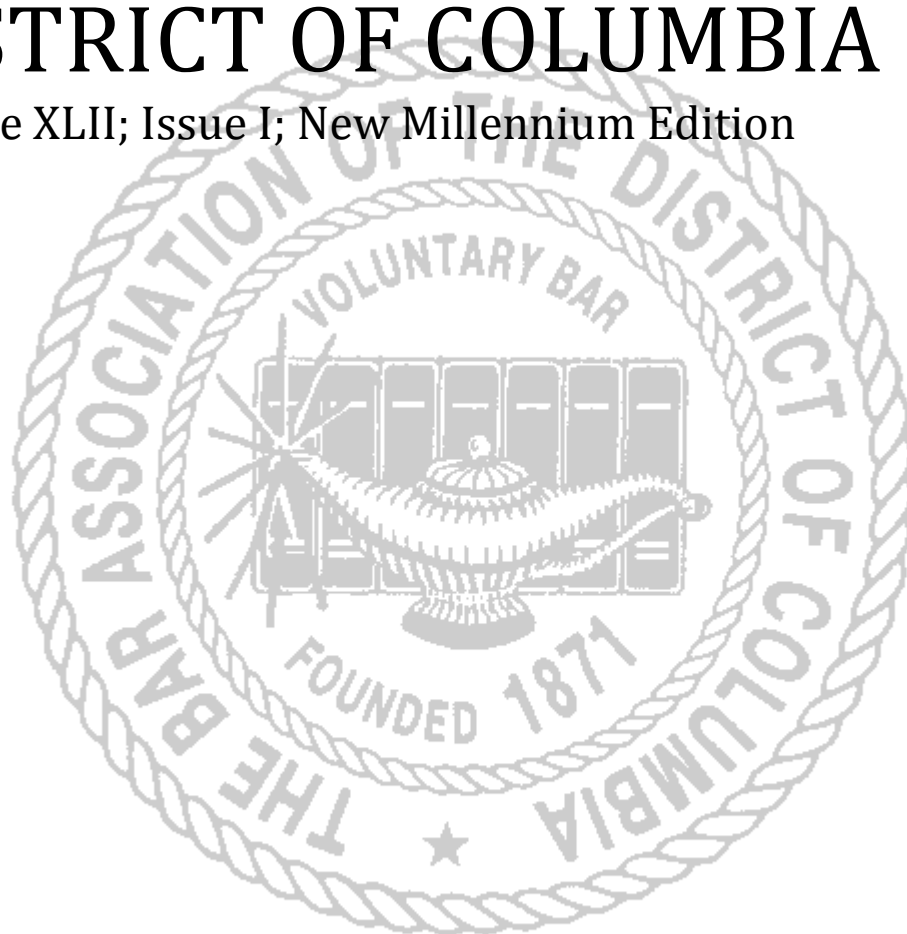


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Introductory Remarks on the First Edition of the New Millennium Journal of the District of Columbia Bar Association

By Christopher A. Zampogna

Almost forty years from the last publication of the *Journal of the Bar Association of the District of Columbia* in 1974 (hereinafter JBADC), this new Millennial Edition reflects the changes in the Bar and the District of Columbia.

In 1935, Dick Baker described the *Journal of the Bar Association of the District of Columbia* as the only rival to the major newspaper of the City of Washington¹. The *Journal* ranged in size from 50 to 250 pages in length and focused on topics of civility in the practice of law to negligence actions. Written before the advent of the internet, blogs, online journals, the *Journal* was one of the sole sources of legal discussion in the District of Columbia.

Today, both the District and the practice of law have changed dramatically. The City and its lawyers now influence national and international issues. No longer a local bar association, the Bar Association of the District of Columbia is home to the best lawyers in the nation and some of the most prominent law firms in the world. The City now has countless journals, blogs, and legal discussions.

It is within this remarkable change in the landscape of the District and its attorneys that the BADC has reincarnated the JBADC: a forum to exchange ideas about legal topics that will provide a platform to influence policy. The *Journal* strives to provide articles that provoke

¹ JBADC was created originally in April 1935, building on the legacy of the *Bulletin of the Bar Association of the District of Columbia* - "the Washington Times' only rival," Dick Baker, Esq., *Bulletin of the Bar Association of the District of Columbia*, 1, 9 (August 1934).

thought, create discussions, and stimulate solutions. Unlike the mandatory District of Columbia Bar that publishes a Journal, the BADC takes policy positions in an effort to find the answer to dilemmas facing the City of Washington and the Nation.

There is little doubt that the JBADC strives to raise the debate on issues facing our legal community and the DC community as a whole. It is an honor for me to edit and shape this debate, and I thank all those who supported my idea of re-launching or reincarnating this publication, starting with the President of the Bar Association, Annamaria Steward. Also, thanks to all who assisted in my editing duties and to those who submitted articles to shape this debate. This *Journal* stands upon the shoulders of those that edited and wrote in its 40 year history. I thank those who provided such a rich and deep past. Most notably, I want to give a special thank you to Judge Margolis, the first Editor in Chief, for his contribution. Enjoy the read!

Editor's Bio:



My journey to the Editor in Chief of the JBADC has been a long one. It started as a Law Clerk to a Judge in Indiana then as an Assistant District Attorney and finally as a practicing attorney in Buffalo, NY. Now, I write as a decade long resident of the DC metropolitan area and a practicing attorney at Zampogna, P.C. with several other associates and colleagues in downtown Washington, DC. Living here has been a great experience and editing this journal has been a passion of mine.

Honest Services after *Skilling v. U.S.*: Less Is Still More

By Richard C. Smith, Kimberly Walker, Mark Emery, and Tracy DeMarco

It has been observed that in both love and architecture, “less is more.”² For quite some time, that observation has proven true in criminal prosecutions under the federal “honest services” statute, as codified in 18 U.S.C. § 1346.³ Consisting of only twenty-eight words,⁴ the statute’s vague language has been “invoked [by federal prosecutors] to impose criminal penalties upon a staggeringly broad swath of behavior, including misconduct not only by public officials and employees, but also by private employees and corporate fiduciaries.”⁵ Long criticized by many for alleged unconstitutionally vague language, the “honest services” statute, until recently, has provided the basis for a wide range of criminal prosecutions. But in its 2009 term, the United States Supreme Court surprised many by setting three “honest services” cases for oral argument: *Black v. United States*,⁶ *Weyhrauch v. United States*,⁷ and *Skilling v. United States*.⁸

² ROBERT BROWNING, *Andrea del Sarto (Called "The Faultless Painter")*, in MEN & WOMEN 72 (BiblioBazaar 2009). The phrase is also attributed to architect Ludwig Mies van der Rohe (1886–1969), speaking about restraint in design. NEW YORK HERALD TRIBUNE (June 28, 1959).

³ 18 U.S.C. § 1346 (2010).

⁴ “For the purposes of this chapter, the term “scheme or artifice to defraud” includes a scheme or artifice to deprive another of the intangible right of honest services.” 18 U.S.C. § 1346 (2010).

⁵ See *Sorich v. United States*, 129 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting from denial of certiorari) (Feb. 23, 2009).

⁶ No. 08–876 (May 18, 2009) (granting certiorari), 130 S. Ct. 2963 (2010).

⁷ No. 08–1196 (June 29, 2009) (granting certiorari), 135 S. Ct. 2971 (2010).

⁸ No. 08–1394 (Oct. 13, 2009) (granting certiorari), 130 S. Ct. 2896 (2010).

In the third of those cases, *Skilling v. United States*, the Court limited the statute’s scope to conduct involving “bribery” and “kickbacks,” and held the statute unconstitutionally vague outside those contexts.⁹

Skilling was a shrewd decision. The Court declined the invitation to throw out the entire “honest services” statute for unconstitutional vagueness. Instead, *Skilling* subtly confirmed that § 1346 of the statute has a purpose in punishing state and local corruption as well as private conduct, without actually taking a hard line on whether that conduct is prohibited. The Court’s opinion made overtures to judicial deference to Congress as it tethered the “honest services” statute’s content to a pre-1987 body of law that Congress intended to incorporate, as well as other federal statutes defining related crimes. But *Skilling* papered over—for the time being—sharp disagreements about whether those sources can provide rules that are constitutionally sufficient to prescribe criminal conduct.¹⁰ Unresolved are the source and scope of the fiduciary duties that underlie “honest services” charges and whether duties are drawn from state law alone, or from federal common law. *Skilling* offers little guidance on why and how there are differences in its application to public officials and private individuals. And, even though the statute is now limited to bribery and kickbacks, important questions are still unanswered regarding the standards for those crimes within the “honest services” context.

On the same day it issued *Skilling*, the Court vacated and remanded *Black* and *Weyhrauch*. Days later, the Court granted, vacated, and remanded (“GVRed”) petitions pending

⁹ No. 08-1394 (Oct. 13, 2009) (granting certior), 130 S. Ct. 2896 (2010).

¹⁰ See *infra* Part II.A. Justices Scalia, Thomas, and Kennedy concurred in the *Skilling* judgment but disagreed with the majority’s conclusion that a limiting construction of § 1346 corrected the statute’s constitutional defects. See *Skilling v. United States*, 130 S. Ct. 2896, 2936–40 (Scalia, J., concurring).

in several other § 1346 cases in light of *Skilling*, leaving a great deal of lawmaking to the courts of appeals in the near future. This Article attempts to shed some light on the “honest services” statute’s murky beginnings as well as its uncertain future. Part I of this Article provides a background on the statute’s origins, discussing both the conduct the statute intended to proscribe and the problems that arose from its enactment. Part II addresses the *Skilling* decision, focusing on parts of the statute that were clarified by the Court’s decision and discussing the ambiguities that remain. Part III surveys some implications and shortcomings of *Skilling*, by tracking early developments in the cases GVRred by the Court. Part IV takes a brief look at early legislative responses to *Skilling*. Ultimately, while *Skilling* somewhat curtails the “honest services” statute’s expansive reach, it falls short of eliminating the “chaos,” that preceded it.¹¹ Although the uncertainty has temporarily returned to a low tide, it is likely to rise again in light of federal prosecutors’ creativity, and the continued potential for varying interpretations by the courts of appeals. In the absence of clear and decisive Congressional action to articulate precisely what conduct the statute criminalizes, indeed less is still more.

I. Why The “Honest Services” Statute Was (And Still Is) A Problem

For all of its controversial reach, it is noteworthy that the “honest services” statute does not even create its own offense. Nevertheless, an imputed cause of action for failure to provide “honest services” existed long before the current “honest services” statute was enacted. It evolved as a common law doctrine (“the intangible right to honest services”), from an 1872 recodification of the federal postal laws that proscribed the use of mail services to further “any

¹¹ See *Sorich v. United States*, 129 S. Ct. 1308, 1311 (2009).

scheme or artifice to defraud.”¹² Through the years and multiple statutory revisions, courts of appeals addressing the issue invariably interpreted the statute to proscribe any scheme intended to “deprive individuals, the people, or the government of intangible rights, such as the right to have public officials perform their duties honestly.”¹³ That position went unchallenged until the Supreme Court granted certiorari in *McNally v. United States*, a case involving the conviction of public officials who skimmed money from the award of state insurance contracts. On the grounds that the lower courts’ expansive interpretation rendered the outer boundaries of the statute ambiguous, the Supreme Court reversed the conviction and held that the statute applied *only* to the protection of property rights and *not* to any “intangible right of the citizenry to good government.”¹⁴

Congress reacted immediately to the *McNally* decision. Recognizing the circumscribing impact of the decision on any future “honest services” cause of action, Congress promptly considered three different bills to address the statute’s ambiguities as highlighted by *McNally*.¹⁵ After rejecting the first two proposals, Congress passed an amendment to the current federal mail and wire fraud statutes defining the phrase “scheme or artifice to defraud” as “a scheme or artifice to deprive another of the intangible right of honest services.”¹⁶

¹² Act of June 8, 1872, ch. 335 §§ 149, 301, 17 Stat. 302, 303 (1872).

¹³ *See McNally v. United States*, 483 U.S. 350, 359 (1987).

¹⁴ *Id.* at 360.

¹⁵ *Id.* at 350.

¹⁶ 18 U.S.C. § 1346 (2006). Section 1346 can be charged as mail fraud. *See* 18 U.S.C. § 1341 (2006) (“Whoever, having devised or intending to devise any scheme or artifice to defraud . . . places in any post office or authorized depository for mail matter . . . shall be fined under this title or imprisoned not more than 20 years, or both”). Section 1346 can also be charged as wire fraud. *See* 18 U.S.C. § 1343 (2006) (“Whoever, having devised or intending to devise any scheme or artifice to defraud . . . transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs,

Despite Congress' purported efforts to better define the mail and wire fraud offenses, much in the statute was left undefined and, as a result, to the discretion of the courts. For example, the statute provided no instruction as to what conduct should fall within the meaning of "honest services." Further, the "another" to whom the "honest services" are owed was also left unidentified. Thus, without expressing any intent to do so, for over 22 years, Congress has left the legislative duty of defining the elements of an "honest services" crime to the courts—a role not relished or accepted by all judges.¹⁷

The legislative history of the current "honest services" statute is brief. Enacted as part of an omnibus drug bill, the statute was not the subject of a committee report or debate.¹⁸ The brief comments provided by a few members of Congress noted that § 1346 was intended to overturn the Supreme Court's decision in *McNally*, which had limited the reach of the statute only to "honest services" involving money or property. That version did not make clear that the statute was intended to reach the conduct of state and local public officials. Indeed, the legislators' comments notably did not contain any reference to terms such as "state," "citizens of a state," "state official," "public official," or even "state employee."¹⁹

In contrast, the two other bills Congress considered—and rejected—would have made the legislature's intent to reach the conduct of state and local public officials much clearer, but

signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.”).

¹⁷ See *United States v. Brumley*, 116 F.3d 728, 736 (5th Cir. 1997) (Jolly, J. & DeMoss, J., dissenting) (“the majority assumes a role somewhere between a philosopher king and a legislator to create its own definitions of the terms of a criminal statute”).

¹⁸ See Pub. L. No. 100–690, § 7603(a), 102 Stat. 4508 (1988); *Brumley*, 116 F.3d at 739, 742.

¹⁹ 134 CONG. REC. H11, 108–01 (daily ed. Oct. 21, 1988) (statement of Rep. Conyers); see also 134 CONG. REC. S17360–02 (daily ed. Nov. 10, 1988) (statement of Sen. Biden).

would have also cast some doubt on the statute’s applicability to private actors.²⁰ The first, H.R. 3050, would have provided for the addition of a new section in Chapter 63 of Title 18 of the U.S. Code, entitled “Section 1346. Definition of Defraud for Certain Sections.”²¹ It provided, as used in 18 U.S.C. §§ 1341 and 1343, that the term “defraud” includes the defrauding of the citizens of a body politic: (1) of their right to the conscientious, loyal, faithful, disinterested and unbiased performance of official duties by a public official thereof; or (2) of their right to have the public business conducted honestly, impartially, free from bribery, corruption, bias, dishonesty, deceit, official misconduct, and fraud.²² This bill was referred to the House Committee on the Judiciary where it died. Had that bill become law, Congress would have declared in clear and unmistakable language that the “citizens of a body politic” are protected by federal law from dishonest public servants.

The second bill, S. 2793, was entitled the “Anti-Corruption Act of 1988.”²³ Section 2 of that bill would have created a new Section 225, entitled “Public Corruption.” This new section

²⁰ See generally *Brumley*, 116 F.3d at 743–44.

²¹ H.R. 3050, 100th Cong. (as filed July 29, 1987).

²² See *Brumley*, 116 F.3d at 743.

²³ Anti-Corruption Act of 1988, S. 2793, 100th Cong. (1988). This bill was introduced in the Senate on September 7, 1988, referred to the Judiciary Committee, reported favorably by that committee without a report, and passed later by the Senate on October 14, 1988. This bill was then sent to the House of Representatives, where it was referred to the House Judiciary Committee on October 19, 1988. See *Brumley*, 116 F.3d at 744. Concurrently with its passage by the Senate, S. 2793 was designated by a unanimous consent agreement of the Senate as one of a large number of amendments to “comprise the joint leadership package” which would be attached as amendments to H.R. 5210, the Drug Initiative Act of 1988, Omnibus, which was then before the Senate, having earlier been passed by the House. H.R. 5210 (with S. 2793 included) was then passed by the Senate and sent back to the House. *Id.* On October 22, 1988, the House of Representatives reconsidered H.R. 5210 with the leadership package of amendments attached in the Senate and made various amendments thereto, and then passed the revised bill. *Id.* One of the amendments made by the House of Representatives was to delete the text of S. 2793 and substitute in its place the language that now appears codified as 18 U.S.C. § 1346. H.R. 5210 as then amended was sent back to the Senate, which concurred in those amendments later on

would have made it a crime to: (a) deprive or defraud the inhabitants of a state or a political subdivision of a state of the “honest services” of an official or employee of such state or subdivision and (b) deprive or defraud the inhabitants of a state or political subdivision of a state of a fair and impartially conducted election process in any primary, runoff, special or general election. If Section 2 had been adopted by the House, then it would have made express that the word “another” in the statute meant a “state or a political subdivision of a state.” But like the prior legislation, it was rejected by the House, in an apparent rejection of the effort to comprehensively criminalize state and local “public corruption” on such terms.²⁴ Only Section 3 survived as part of the omnibus drug bill, and eventually became § 1346 as a last minute, “bobtailed” compromise which had never been the subject of hearings in either house.²⁵

The minimalist “honest services” text that ended up as § 1346 has permitted the government to define “honest services” by reference to duties from a multitude of sources, including statutory provisions and federal common law.²⁶ And the undefined term “another” has invited the government to find deprivations of “honest services” purportedly owed to a wide

October 22, 1988. *Id.* There is no report in the legislative history explaining why the House of Representatives declined to accept the full text of S. 2793 as part of the omnibus Anti-Drug Act of 1988 (H.R. 5210).

²⁴ See *Brumley*, 116 F.3d at 744.

²⁵ *Id.*

²⁶ See, e.g., *United States v. Bohonus*, 628 F.2d 1167, 1171 (9th Cir. 1980) (any scheme “contrary to public policy” was also condemned by the statute); *United States v. Mandel*, 591 F.2d 1347, 1361 (4th Cir. 1979) (any scheme that is “contrary to public policy and conflicts with accepted standards of moral uprightness, fundamental honesty, fair play and right dealing”); *Blachly v. United States*, 380 F.2d 665, 671 (5th Cir. 1967) (“[I]aw puts its imprimatur on the accepted moral standards and condemns conduct which fails to match the ‘reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.’”) (quoting *Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958)).

range of entities, such as the general public, employers, or corporate shareholders, even at state and local levels.²⁷

Though the courts of appeals have spent “two decades attempting to cabin the breadth of § 1346 through a variety of limiting principles,” no consensus has emerged, rendering a vast range of public and private conduct potentially subject to the statute.²⁸ While the more obvious sense of “honest services” might appear to be those of public servants, the statute has been used “for any kind of corporate skullduggery” as well.²⁹ Such breadth imposes a unique risk that the deprivation of the intangible right to honest services “invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engaged in any manner of unappealing or ethically questionable conduct.”³⁰ Some have suggested that the

²⁷ See, e.g., *United States v. Hasner*, 340 F.3d 1261, 1271 (11th Cir. 2003) (per curiam) (affirming conviction of a housing official who failed to disclose a conflict of interest); see also *United States v. Sorich*, 523 F.3d 702, 705 (7th Cir. 2008) (affirming convictions of Chicago employees who engage in political patronage hiring for local civil-service jobs); *United States v. Potter*, 463 F.3d 9, 18 (1st Cir. 2006) (affirming the conviction of a businessman who attempted to pay a state legislator to exercise “informal and behind-the-scenes influence on legislation”); *United States v. Rybicki*, 354 F.3d 124, 142 (2d Cir. 2003) (en banc) (affirming convictions of lawyers who made side-payments to insurance adjusters in exchange for expediting of their clients’ claims); *United States v. Frost*, 125 F.3d 346, 369 (6th Cir. 1997) (affirming convictions of students who schemed with their professors to turn in plagiarized work).

²⁸ As Justice Scalia argued, “[i]f the ‘honest services’ theory . . . is taken seriously and carried to its logical conclusion, presumably the statute also renders criminal a state legislator’s decision to vote for a bill because he expects it will curry favor with a small minority essential to his reelection; a mayor’s attempt to use the prestige of his office to obtain a restaurant table without a reservation; a public employee’s recommendation of his incompetent friend for a public contract; and any self-dealing by a corporate officer. Indeed, it would seemingly cover a salaried employee’s phoning in sick to go to a ball game.” *Sorich v. United States*, 129 S. Ct. 1308, 1309 (2009).

²⁹ Michael Rothfeld, *Enron Ruling Dims Prosecution Picture*, WALL ST. J. (June 24, 2010) (quoting Columbia University law professor John Coffee), available at <http://online.wsj.com/article/SB10001424052748704911704575326981059943428> (last visited Nov. 19, 2010).

³⁰ See *Sorich*, 129 S. Ct. at 1310.

statute came to provide “a technique used to go after the infamous as opposed to the criminal.”³¹ Thus, the Congressional failure to either define key terms, or otherwise limit the scope of § 1346 provided federal prosecutors license to extend it nearly everywhere, even to college basketball coaches who violate NCAA rules.³²

II. *What Skilling Did (And Didn't) Do*

A. The Offense Is Limited To Offenses Involving Bribery And Kickbacks.

In *Skilling*, the government based its case against former Enron executive Jeffrey Skilling on allegations that Skilling engaged in a scheme to deceive investors about Enron’s true financial performance by manipulating its publicly reported financial results and making false and misleading statements.³³ Count 1 of the indictment charged Skilling with, among other things, conspiracy to commit “honest-services” wire fraud,³⁴ by depriving Enron and its shareholders of the intangible right to his honest services.³⁵ After the Fifth Circuit affirmed his conviction on the “honest services” charges and several others, Skilling urged the Supreme Court to hold § 1346 void as unconstitutionally vague, because it fails to adequately define barred conduct, and facilitates “opportunistic and arbitrary” prosecutions.³⁶

The Court, in an opinion authored by Justice Ginsburg and joined by five other justices, rejected that position. Looking to the early development of the “honest services” doctrine before

³¹ See Rothfeld, *supra* note 29 (quoting attorney James Wareham).

³² See *United States v. Gray*, 96 F.3d 769 (5th Cir. 1996).

³³ See *Skilling*, 130 S. Ct. at 2907.

³⁴ See 18 U.S.C. §§ 371, 1343, 1346.

³⁵ See *Skilling*, 130 S. Ct. at 2908. Skilling was also charged with over 25 substantive counts of securities fraud, wire fraud, making false representations to Enron’s auditors, and insider trading.

³⁶ See *id.* at 2928.

the enactment of § 1346, the Court found that the courts of appeals “dominantly and consistently applied the fraud statute to bribery and kickback schemes,” though there was “considerable disarray” of its application outside that core category.³⁷ As previously discussed, the *McNally* decision halted a wider development of the “honest services” doctrine and held that “[t]he mail fraud statute clearly protects property rights, . . . [it] does not refer to the intangible right of the citizenry to good government.”³⁸ The Court considered Congress’s “swift” enactment of § 1346 to be a direct response to *McNally*. With such speedy action, the Court concluded, Congress “meant to reinstate the body of pre-*McNally* honest-services law.”³⁹

Though the courts of appeals were divided on how to interpret § 1346, none had held that the statute was unconstitutionally vague. Likewise, the Court agreed that § 1346 “should be construed rather than invalidated,” and that Congress’s intent to reverse *McNally* and reinstate the prior cases meant the statute “can and should be salvaged by confining its scope to the core pre-*McNally* applications.”⁴⁰ Opting for a “limiting construction” of the statute, the Court’s majority *confined* its scope to pre-*McNally* cases that “involved fraudulent schemes to deprive another of “honest services” through bribes or kickbacks supplied by a third party who has not been deceived.”⁴¹ Thus, after *Skilling*, § 1346 “criminalizes only the bribe-and-kickback core of the pre-*McNally* case law.”⁴²

The government argued that the statute also encompassed “undisclosed self-dealing by a public official or private employee—i.e., the taking of an official action by the employee that

³⁷ See *id.* at 2929.

³⁸ See *McNally*, 483 U.S. 350, 356 (1987).

³⁹ See *Skilling*, 130 S. Ct. at 2929.

⁴⁰ *Id.* at 2931.

⁴¹ *Id.* at 2928.

⁴² *Id.* at 2931.

further his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty.”⁴³ But the Court rejected that view, finding that while some pre-*McNally* cases had upheld “honest services” convictions for non-disclosure or concealment of information, the courts of appeals “reached no consensus” on the applicable standards, and a construction of §1346 “must exclude this amorphous category of cases.”⁴⁴ Because the government did not allege that Skilling was part of a scheme involving bribery or kickbacks from a third party in exchange for misrepresentation, he could not be convicted of “honest services” fraud. Thus, the Court vacated the Fifth Circuit’s opinion, and remanded for a determination of whether the conspiracy indictment constituted harmless error, and whether a reversal on the conspiracy count, if any, would affect Skilling’s other convictions.⁴⁵

The *Skilling* majority found no reason to be concerned about any lingering ambiguity in § 1346 because it was “as plain as a pikestaff” that bribes and kickbacks constituted honest-services fraud under pre-*McNally* case law.⁴⁶ Further, the court concluded, the statute’s *mens rea* requirement “blunts any notice concern.”⁴⁷ The majority stated its expectation that the statute would “draw content,” from pre-*McNally* case law and other federal statutes that define similar crimes.⁴⁸ Here, the Court made an important distinction: the use of federal criminal statutes, such as the bribery statute, will not render “honest services” crimes superfluous. Because the federal criminal statutes generally apply to federal public officials, § 1346 serves the

⁴³ *Id.* at 2932.

⁴⁴ *Id.*

⁴⁵ *Id.* at 2933.

⁴⁶ *Id.* at 2933.

⁴⁷ *Id.*

⁴⁸ *Id.* at 2933 (citing 18 U.S.C. §201(b), 666(a)(2), 41 U.S.C. §52(2)).

additional purpose of ensuring that state and local corruption and private-sector fraud will not go unpunished.⁴⁹

B. Road Not Taken: The Statute Is Not Wholly Void For Vagueness.

While six justices found that pre-*McNally* case law yielded principles coherent enough to pass constitutional muster, three others disagreed. Though concurring in the judgment, Justice Scalia, joined by Justices Thomas and Kennedy, found the “honest services” statute to be unconstitutionally vague, and would have reversed Skilling’s conviction on the basis that § 1346 provided no “ascertainable standard of guilt.”⁵⁰ Among their grievances with the statute’s vague language, the concurring justices noted that pre-*McNally* case law had failed to determine whether fiduciary obligations derived only from state law, or from federal law as well.⁵¹ Further, they argued that even if “honest services” obligations were based on federal common law, they were “hopelessly underdefined.”⁵² The concurrence observed that courts had also inconsistently required further elements, such as actual harm to the state, or loss by a victim, beyond a violation of duties.⁵³ Moreover, the concurrence noted that while pre-*McNally* law indicated the duties for public officials were greater than those for private employees, the statute offered no clear standard for distinguishing those duties.⁵⁴ In short, the concurring justices argued, by reviving the pre-*McNally* honest-services doctrine, the Court took “a step out of the frying pan and into the fire,” leaving unacceptable ambiguity in the scope and standards of a criminal statute,

⁴⁹ *Id.* at 2934 & n.46.

⁵⁰ *Id.* at 2936 (Scalia, J., concurring).

⁵¹ *Id.*

⁵² *Id.* at 2937.

⁵³ *Id.*

⁵⁴ *Id.*

including whether the statute applies to both public and private officials, or what is the indefinite source of the fiduciary obligations underlying the statute.⁵⁵

Further, the concurrence found unconvincing the majority's view that the statute could be pared down to a "core" in bribery and kickbacks.⁵⁶ "To say that bribery and kickbacks represented 'the core' of the doctrine, or that most cases applying the doctrine involved those offenses, is not to say that they *are* the doctrine. All it proves is that the multifarious versions of the doctrine *overlap* with regard to those offenses."⁵⁷ Noting that of the "smorgasbord-offerings" of pre-*McNally*, not even one was actually limited to bribery and kickbacks, the concurrence concluded that the *Skilling* majority's limitation of the statute to those cases is "a dish the Court has cooked up all on its own."⁵⁸ The Court's "limiting construction" of the statute had not actually been adopted by any lower court; therefore, the Court had not chosen a position, but rather decided to "rewrite" the statute.⁵⁹ In short, the concurrence took issue with the Court's "prescription of criminal law," a decidedly legislative deviation from the Court's traditional judicial function.⁶⁰

III. *Honest Services Issues After Skilling*

Now that the dust is clearing, it is evident the *Skilling* decision places controls upon prosecutorial discretion. It likely eliminates prosecutions where there is no allegation that the defendant secured a benefit from a third party in exchange for fraudulent conduct. In such

⁵⁵ *Id.* at 2938.

⁵⁶ *Id.*

⁵⁷ *Id.* at 2939 (emphasis in original).

⁵⁸ *Id.* at 2939.

⁵⁹ *Id.* at 2940.

⁶⁰ *Id.*

circumstances, it will be difficult, if not impossible, to characterize the conduct as involving bribery or kickbacks. For example, in *Skilling*, the prosecution alleged that Skilling engaged in fraudulent conduct to benefit his company and, indirectly, increase his own compensation. The Court's decision appears to hold that none of the alleged conduct is covered by the statute, at least in the context of private actors. Beyond that specific set of facts, however, three of the nine justices remain unclear as to what, precisely, §1346 criminalizes. Justices Scalia, Thomas, and Kennedy made a powerful argument that the "honest services" statute was unconstitutionally ambiguous in all of its applications,⁶¹ and the majority countered this view with no more than general assurances that pre-*McNally* case law and a few federal statutes will provide adequate guidance to guide "honest services" prosecutions going forward.⁶²

Furthermore, as noted by the concurring opinion, the Court's *Skilling* decision failed to address several underlying questions. Among others, the decision left open the issue of: (1) which duties, when breached, result in the deprivation of "honest services" when combined with a benefit from a third party; and (2) whether an "honest services" offense requires predicate breach of state law, federal law, or both. Resolution of these issues will depend on both interpretation of other federal statutes and a less-than-settled body of pre-*McNally* cases.

Against the backdrop of *Skilling*'s unanswered questions and the unsettled pre-*McNally* "honest services" jurisprudence, one wonders what the Supreme Court's "honest services" guidance could have been. For example, in 2009, the Court denied certiorari in the *Sorich* case where defendants appealed their conviction for denying Illinois taxpayers of their "honest services" by fostering City Hall's patronage system even though they made no money off the

⁶¹ *Id.* at 2935–40.

⁶² *Id.* at 2930–34.

deal.⁶³ According to Justice Scalia’s dissent from denial of certiorari, the case presented two of the important limiting principles with which the circuit courts had wrestled—whether deprivation of “honest services” “requires a predicate violation of state law, and whether it requires the defendant’s acquisition of some sort of private gain.”⁶⁴ *Skilling* provided no explicit guidance on the “private gain” issue, and while the Court limited the statute’s reach, it did not do so through any effort to define the statute’s proscribed conduct, but rather on the basis of Congress’s understood intent to codify the deprivation of “honest services” offense in such situations based on pre-*McNally* case law. Further, the *Skilling* decision provides no guidance as to whether that requirement applies equally to public officials as it does to private individuals like *Skilling*.

Of course, cases filed and yet to be filed will help shape the honest services doctrine after *Skilling*. But, an initial look at its impact is available from *Weyhrauch*, *Black*, and several other cases the Court GVRed in light of *Skilling*.⁶⁵ When the Court GVRs a case, it is not a final

⁶³ See generally *Sorich v. United States*, 523 F.3d 702 (7th Cir. 2008).

⁶⁴ See *Sorich v. United States*, 130 S. Ct. 1308, 1310–11 (2009). The jury was instructed that defendants, who were employees of the City of Chicago, were obliged “[a]s part of the “honest services” they owed the City and the people of the City of Chicago to abide by a list of laws, decrees, and policies, including a 1983 civil servant consent decree entered into by the City which barred patronage hiring for some jobs.” *Id.*

⁶⁵ See *Scrushy v. United States*, 130 S. Ct. 3541 (June 29, 2010), *remanding* *United States v. Siegelman*, 561 F.3d 1215 (11th Cir. 2009) (affirming conviction of co-defendant Richard Scrushy, founder and former chief executive officer of HealthSouth Corporation); *Siegelman v. United States*, 130 S. Ct. 3542 (June 29, 2010), *remanding* *United States v. Siegelman*, 561 F.3d 1215 (11th Cir. 2009) (affirming conviction of Don Siegelman, former Governor of Alabama); *Hargrove v. United States*, 130 S. Ct. 3543 (June 29, 2010), *remanding* *United States v. Hargrove*, 579 F.3d 752 (7th Cir. 2009) (affirming conviction of co-owner of title insurance and escrow company); *Hereimi v. United States*, 130 S. Ct. 3543 (June 29, 2010), *remanding* *United States v. Hereimi*, 357 Fed. Appx. 82 (9th Cir. 2009) (affirming conviction for aiding and abetting honest-services fraud); *Richards v. United States*, 130 S. Ct. 3542 (June 29, 2010), *remanding* *United States v. Harris*, 313 Fed. Appx. 969 (9th Cir. 2009) (affirming co-defendant’s conviction for involvement in a public corruption scheme); *Harris v. United States*, 130 S. Ct.

determination on the merits,⁶⁶ but it does “indicate that, in light of ‘intervening developments,’ there was a ‘reasonable probability’ that the Court of Appeals would reject a legal premise on which it relied and which may affect the outcome of the litigation.”⁶⁷ It is not uncommon for the courts of appeals to reach the same decision on remand, and therefore not too much may be read into the mere fact of a GVR order. But because the Court only GVRs in cases where it believes there was a “reasonable probability” of a different outcome, it is worth looking at some of the cases GVRed after *Skilling* to track early developments in the *Skilling* fallout.

A. *Siegelman* and *Scrushy*: Is *Quid Pro Quo* Required For Bribery-Related Honest Services Charges?

In light of its *Skilling* decision, the Court granted, vacated, and remanded two petitions arising from the Eleventh Circuit’s decision in *United States v. Siegelman*, which affirmed the convictions of the CEO of HealthSouth Corporation, Richard Scrushy, and former Alabama Governor Don Siegelman. Both petitions presented the issue of whether the government must prove an “express” *quid pro quo* to obtain a conviction for bribery-related “honest services” offenses. The cases themselves revolved around allegations that Scrushy, Siegelman and other defendants engaged in bribery by making and executing a *quid pro quo* agreement whereby Scrushy gave then-Governor Siegelman \$500,000 in campaign contributions in exchange for an appointment to a state health-care board.⁶⁸ With regard to the bribery charges, the jury was instructed “that there must be proof that the official and the contributor ‘agree that the official

3542 (June 29, 2010), *remanding* *United States v. Harris*, 313 Fed. Appx. 969 (9th Cir. 2009) (affirming conviction for involvement in a public corruption scheme); *Redzic v. United States*, 130 S. Ct. 3543 (June 29, 2010), *remanding* *United States v. Redzic*, 569 F.3d 841 (8th Cir. 2009) (affirming conviction in connection with alleged scheme by owner of commercial driving school to obtain state licenses for students).

⁶⁶ *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964).

⁶⁷ *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001); *Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

⁶⁸ *See Siegelman*, 561 F.3d at 1215.

will take specific action in exchange for the thing of value.’’⁶⁹ The “honest services” mail fraud and conspiracy charges incorporated this bribery charge, but further required a finding that Scrushy deprived another of the right to a public official’s “honest services” by using the seat to further HealthSouth’s interests.⁷⁰ After a jury trial, Scrushy and Siegelman were convicted, among other counts, of four counts of “honest services” mail fraud and conspiracy.⁷¹

The Eleventh Circuit affirmed the “honest services” convictions of both men arising from the bribery allegations.⁷² Over the defendants’ objections that an “express” *quid pro quo* agreement must be proven, the court of appeals found that a jury could infer the actors’ state of mind from the circumstances surrounding their conversations and actions, and that there was sufficient evidence at trial to permit a jury to conclude that Scrushy and Siegelman “explicitly agreed” to a *quid pro quo* that proved the bribery, conspiracy, and mail fraud counts.⁷³ However, the Eleventh Circuit reversed Siegelman’s conviction on two other mail fraud counts, which charged him with causing “a mailing that helped to execute a scheme between himself and Scrushy to deprive the State of Alabama of its right to their “honest services” by conspiring for Scrushy to use the position on the board for self-dealing to advance HealthSouth’s interests.⁷⁴ In so doing, the Eleventh Circuit held that there was no evidence “remotely sufficient to permit a jury to infer that Siegelman agreed to a broader self-dealing scheme.”⁷⁵

⁶⁹ Petition for Writ of Certiorari at 7, *Siegelman v. United States*, No. 09–182 (Aug. 10, 2009).

⁷⁰ *See Siegelman*, 561 F.3d at 1229.

⁷¹ *Id.* at 1223.

⁷² *Id.* at 1245.

⁷³ *Id.* at 1229.

⁷⁴ *Id.*

⁷⁵ *Id.* at 1232.

Scrushy and Siegelman separately sought review by the Supreme Court to determine whether *McCormick v. U.S.*, 500 U.S. 257 (1991), required the Government to prove an “express” *quid pro quo* that may not be implied from circumstantial evidence. Each argued that this requirement equally applied to the Government’s burden of proof on the “honest services” charges.⁷⁶

While *Skilling* did not involve allegations of bribery or kickbacks, Scrushy and Siegelman were both charged and convicted of mail fraud “honest services” violations that incorporated bribery allegations. Under *Skilling*, those charges may still be within the scope of the statute. Yet, the other “honest services” charges against Siegelman that the Eleventh Circuit reversed rested on allegations of conspiracy in a broader scheme to enable Scrushy’s self-dealing, which *Skilling* appears to place beyond the scope of § 1346.⁷⁷ The remand provides an opportunity to test the substantive standards of a bribery-related “honest services” offense, and may indicate that the Court is interested in ensuring that the *quid pro quo* element obtain further definition in the context of an “honest services” charge. Scrushy and Siegelman argued in their petitions for certiorari that the Government was required to prove an “express” *quid pro quo* in order to convict under the bribery, conspiracy and “honest services” charges.⁷⁸ But the Government argued in its opposition to the petition that no court had yet interpreted whether *McCormick* applied to the “honest services” statute, that at least one circuit held it not to apply to

⁷⁶ See Petition for Writ of Certiorari at 7, *Siegelman v. United States* (No. 09–182) (Aug. 10, 2009); Petition for Writ of Certiorari at 10–17, *Scrushy v. United States*, 130 S. Ct. 3541 (2010) (No. 09–167) .

⁷⁷ See *Skilling*, 130 S. Ct. at 2928.

⁷⁸ See Petition for Writ of Certiorari at 7, *Siegelman v. United States*, No. 09–182 (Aug. 10, 2009); Petition, *Scrushy v. United States* at 10–17, 130 S. Ct. 3541 (2010) (No. 09–167).

state bribery statutes, and that the issue presented a threshold question that the court of appeals had not adequately addressed.⁷⁹

As framed by the parties, one of the issues that may be resolved on remand is whether a campaign contribution can serve as a “quid” or an official’s “quo” sufficient to sustain a bribery-related honest services charge. If it is not, the government argues that public officials would be given “complete immunity under § 1346 for selling their offices for campaign donations.”⁸⁰ Were the government to prevail on this issue, it may claw back some terrain arguably lost by pulling more conduct into the “category” of bribery-related honest services charges.⁸¹

Relatedly, there is a dispute about whether the public official is required to have been enriched by the contribution. As directed by *Skilling*, the parties have delved back into pre-*McNally* case law in order to give content to statute’s coverage. If it reaches the merits of the statutory interpretation issues, the Eleventh Circuit’s decision in this high profile case could provide a standard for post-*Skilling* analysis both in form and substance.

B. *Weyhrauch* and *Harris*: State Law Limiting Principle.

1. *Weyhrauch*

In *Weyhrauch*, the Supreme Court may have had the opportunity to address whether breach of a state law duty is required to obtain a conviction under the “honest services” statute an

⁷⁹ Brief in Opposition at 14, *Siegelman v. United States*, No. 09–182, 2009 WL 2481338 (Nov. 13, 2009).

⁸⁰ Supplemental Reply Brief at 4, 21, *United States v. Siegelman*, No. 07-13163-B (11th Cir. May 2008) (U.S. Supp. Reply Br., filed Sept. 21, 2010).

⁸¹ *Id.* at 6.

issue on which the circuits are divided.⁸² That case involved an attorney and member of the Alaska legislature, Bruce Weyhrauch, who, the indictment alleged, solicited a series of contracts with representatives of VECO Corp (“VECO”), an oil field services company, in exchange for taking action favorable to VECO with regard to pending legislation of an oil tax.⁸³ The indictment alleged that Weyhrauch committed an “honest services” offense when he “deprive[d] the State of Alaska of its intangible right to [his] ‘honest services’ . . . performed free from deceit, self-dealing, bias, and concealment’ and attempted to execute the scheme by mailing his resume to VECO.”⁸⁴ Importantly, the government did not “allege that Weyhrauch received any compensation or benefits from VECO or its executives,” but alleges facts suggesting that Weyhrauch took the actions favorable to VECO on the understanding that VECO would hire him in the future to provide legal services to the company.⁸⁵

At the district court level, *Weyhrauch* sought to exclude several pieces of evidence proposed by the government’s motion *in limine* in connection with the “honest services” charge.⁸⁶ The government argued that the challenged evidence should be admitted because proof that a legislator knowingly concealed a conflict of interest could be used to support an “honest services” conviction even if state law did not require such disclosure.⁸⁷ The district court concluded that the challenged evidence related only to a state law duty to disclose a conflict of

⁸² The Court granted certiorari limited to the question “whether, to convict a state official for depriving the public of its right to the defendant’s ‘honest services’ through the non-disclosure of material information, in violation of the mail-fraud statute (18 U.S.C. §§ 1341 & 1346), the Government must prove that the defendant violated a disclosure duty imposed by state law.” *Weyhrauch v. United States*, 129 S. Ct. 2863 (U.S. 2009), *cert. granted*, 129 S. Ct. 2863 (2009).

⁸³ *Weyhrauch v. United States*, 548 F.3d 1237, 1239 (9th Cir. 2008).

⁸⁴ *Id.* at 1239.

⁸⁵ *Id.* 1239–40.

⁸⁶ *Id.*

⁸⁷ *Id.*

interest and that the relevant state law did not require disclosure.⁸⁸ Recognizing a lack of Ninth Circuit authority on the issue, and a split among other circuits, the district court followed the “state law limiting principle” adopted by the Third and Fifth Circuits,⁸⁹ and excluded the government’s evidence on the grounds that Weyhrauch could not commit an “honest services” offense without breaching a duty imposed by state law.⁹⁰ The government filed an interlocutory appeal.⁹¹

The Ninth Circuit, in a case of first impression, reversed.⁹² Foreshadowing to some degree the analysis of the Supreme Court in *Skilling*, the Ninth Circuit acknowledged that “as one moves beyond the core misconduct covered by the statute,” such as bribes, the statute was unclear and it was necessary to return to pre-*McNally* case law.⁹³ The Ninth Circuit acknowledged that the “state law limiting principle” avoids the application of a uniform federal rule, and therefore has the favorable effect of limiting federal prosecutors’ “unwarranted influence” over state and local public ethics standards.⁹⁴ Additionally, under the state law limiting principle, state law limits the reach of the federal “honest services” statute “by tying liability to violations of specific state statutes.”⁹⁵ Nonetheless, the Ninth Circuit followed the majority of other circuits that have—if not uniformly—found that an “honest services” charge can be governed by federal standard.⁹⁶ The Ninth Circuit found that its own pre-*McNally* precedents suggested a uniform federal standard and did not require that “federal fraud statutes

⁸⁸ *Id.* at 1240.

⁸⁹ *See* *United States v. Murphy*, 323 F.3d 102, 116–17 (3d Cir. 2003); *Brumley*, 116 F.3d 728.

⁹⁰ *Weyhrauch v. United States*, 548 F.3d 1237, 1240 (9th Cir. 2008).

⁹¹ *Id.*

⁹² *Id.* at 1239.

⁹³ *Id.* at 1243.

⁹⁴ *Id.* at 1244–45.

⁹⁵ *Id.* at 1245.

⁹⁶ *Id.*

derive their content solely from state law.”⁹⁷ The court also found that nothing in the legislative history reflected Congress’s intent to limit the reach of the statute to state law, and doing so was likely to cause a situation where identical conduct in two states might violate the statute in one, but not in the other.⁹⁸ In short, because pre-*McNally* cases did not require state law to create the duty that “public officials owe the public and the plain language of the statute does not refer to state law,” the Ninth Circuit held that it would not “infer that Congress intended to import any state law limitation into § 1346.”⁹⁹

The Ninth Circuit then determined that its pre-*McNally* (and post-*McNally*) cases identified “two core categories of conduct by public officials” that generally supported an “honest services” conviction: “(1) taking a bribe or otherwise being paid for a decision while purporting to be exercising independent discretion; and (2) nondisclosure of material information.”¹⁰⁰ The Ninth Circuit observed that the allegations that Weyhrauch “voted and took other official actions on legislation at the direction of VECO while engaged in undisclosed negotiations for future legal work from VECO,” fell “comfortably” within the two categories of pre-*McNally* cases.¹⁰¹ Accordingly, the government could “proceed on its theory that Weyhrauch committed “honest services” fraud by failing to disclose a conflict of interest or by taking official actions with the expectation that he would receive future legal work for doing so.”¹⁰² Thus, the Ninth Circuit ruled that § 1346 “establishes a uniform standard for ‘honest

⁹⁷ *Id.*

⁹⁸ *Id.* at 1245–46.

⁹⁹ *Id.* at 1246.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

services’ that governs *every* public official and that the government does not need to prove an independent violation of state law to sustain an “honest services” fraud conviction.”¹⁰³

The Supreme Court simply vacated the Ninth Circuit’s judgment and remanded in light of *Skilling*, without providing any detail about the issues to be considered.¹⁰⁴ Whatever the Court’s intent, the Ninth Circuit dealt with *Weyhrauch* swiftly on remand, affirming the district court’s denial of the government’s motion *in limine* in a three paragraph decision.¹⁰⁵ Though the Ninth Circuit’s holding indeed affirmed exclusion of the government’s “honest services” offense evidence, it did so not based on the state law limiting principle, but on the basis that, after *Skilling*, nondisclosure of a conflict of interest could no longer provide the basis for an “honest services” offense. Notably, the Ninth Circuit implicitly interpreted the *Skilling* holding—that § 1346 does not render *private* non-disclosures a criminal offense—to apply equally to non-disclosures of a *public official*. The remand decision left untouched the issue of whether the non-disclosure obligation underpinning a “honest services” violation must be specified by state law.

2. **Harris**

The *Harris* decision provided the Court with a second opportunity to address the validity of the state law limiting principle.¹⁰⁶ *Harris* involved allegations of a public contracting corruption scheme wherein the defendants, Paula Harris and Paul Richards, argued that the state law limiting principle of § 1346 meant that the district court erred when it denied their motion to

¹⁰³ *Id.* at 1248.

¹⁰⁴ *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010).

¹⁰⁵ *United States v. Weyhrauch*, 633 F.3d 707 (9th Cir. 2010).

¹⁰⁶ *Harris v. United States*, 130 S. Ct. 3542 (2010).

strike references to “unnecessary and exorbitant” contracts in the indictment, which were not related to any state law requirement.¹⁰⁷ Observing that the references “alleged conduct on par with nondisclosure of material information, which constitutes a violation of § 1346, even if it was not also a violation of state law,” and relying on relying on *Weyhrauch*, the Ninth Circuit found no abuse of discretion by denying the motion to strike.¹⁰⁸

Following the Supreme Court’s GVR, the Ninth Circuit remanded *Harris* to the district court for further consideration in light of *Skilling*.¹⁰⁹ Upon remand, the defendants promptly filed motions to vacate the judgments based on *Skilling*, arguing that numerous counts are based on conflicts of interest and non-disclosure of material information that are no longer actionable after *Skilling*, and that other counts (such as money laundering) need to be reconsidered because they were tainted by the “honest services” counts.¹¹⁰ The court did, indeed, vacate those judgments, leaving the question of the state law limiting principle’s validity unanswered.¹¹¹

Thus, neither *Weyhrauch* nor *Harris* seized the opportunity to shed light on the issue or at least provide some arguments worthy of Supreme Court review. If these cases are indicative of future trends, it appears likely that courts will impute *Skilling*’s exclusion of *private* nondisclosures of conflicts of interest from “honest services” offenses to similar nondisclosures of *public* officials. In doing so, final determination of the state law limiting principle will likely remain unsettled until the issue arises in a bribery or kickback case.

¹⁰⁷ *United States v. Harris*, 313 Fed. Appx. 969, 2009 WL 4977272, at *1 (9th Cir. 2009).

¹⁰⁸ *Id.*

¹⁰⁹ *United States v. Harris*, 388 Fed. Appx. 608, 2010 WL 2812907 (9th Cir. 2010).

¹¹⁰ *See* Motion to Vacate Judgment, *United States v. Harris*, No. 2:04-cr-01416-RGK (Aug. 9, 2010); Motion for Release of Custody, *Harris*, No. 2:04-cr-01416-RGK (Aug. 10, 2010).

¹¹¹ *See* Minutes of Defendants’ Motion to Vacate Judgment, *United States v. Harris*, No. 2:04-cr-01416-RGK (Sept. 28, 2010).

C. *Black*: Scope of Private Duties.

The *Black* case dealt with the unsettled issue of whether, to constitute an “honest service” offense, a defendant must have obtained some form of “private gain.” In *Black*, the defendant, Conrad Black, was the chief executive of Hollinger International (“Hollinger”), which own newspapers through its subsidiary companies.¹¹² One of Hollinger’s subsidiaries, APC, was in the process of divesting several newspapers that it owned.¹¹³ Near the end of this process, Hollinger’s general counsel prepared and executed an agreement between APC, and Hollinger’s senior executives under which the executives would receive “\$5.5 million in exchange for their promising not to compete with APC for three years after” their employment with Hollinger terminated.¹¹⁴ The defendants maintained at trial that the payment constituted “management fees” and that it was characterized as such for Canadian tax purposes; the Government alleged that the transaction was fraudulent.¹¹⁵ Although the jury was instructed on money-or-property fraud, it was also instructed, over the defendants’ objections, that it could convict “upon proof that [the defendants] had schemed to deprive Hollinger and its shareholders ‘of their intangible right to the “honest services” of the corporate officers, directors or controlling shareholders of Hollinger,’ provided the objective of the scheme was ‘private gain.’”¹¹⁶ After a four-month trial, the jury convicted all of the defendants of mail and wire fraud.¹¹⁷

The Seventh Circuit affirmed, holding that the defendants owed a fiduciary duty of loyalty and candor to Hollinger and misused their positions for personal gain in appropriating the

¹¹² United States v. Black, 530 F.3d 596, 599 (7th Cir. 2008).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 599–600.

¹¹⁷ *Id.* at 598.

\$5.5 million without authorization.¹¹⁸ The court of appeals held, “if the defendants in this case deprived their employer, Hollinger, of the “honest services” they owed it, the fact that the inducement was the anticipation of money from a third party (the anticipated then tax benefit) is no defense.”¹¹⁹

In their appeal to the Supreme Court, petitioners argued that the statute was unconstitutionally overbroad, and regardless of the scope of § 1346, their convictions had to be reversed because a conviction for “honest services” fraud could not be sustained without a jury finding that the defendant contemplated some identifiable economic harm to the victim.¹²⁰ Applying *Skilling*, the Supreme Court held that the “honest services” jury instructions given by the district court in *Black* were incorrect because “[t]he scheme to defraud alleged . . . did not involve any bribes or kickbacks.”¹²¹ But the jury was also instructed that it could convict the defendants upon proof that they had schemed to deprive Hollinger and its shareholders “of their intangible right to the “honest services” of the corporate officers, directors or controlling shareholders of Hollinger,” provided the objective of the scheme was, “private gain.”¹²² There was no denial by the *Black* defendants “that Hollinger was entitled to their honest services” and that they were senior executives who owed the company certain fiduciary obligations, including implied duties of loyalty and candor.¹²³ Moreover, the Seventh Circuit found that the

¹¹⁸ *Id.* at 600.

¹¹⁹ *Id.* at 601.

¹²⁰ Petition for Writ of Certiorari at 13–14, *Black v. United States*, 130 S. Ct. 2963 (2010) (No. 08–876).

¹²¹ *Black v. United States*, 130 S. Ct. 2963, 2968 n.7 (2010).

¹²² *United States v. Black*, 530 F.3d 596, 600 (7th Cir. 2008).

¹²³ *Id.*

defendants' unauthorized appropriation of \$5.5 million belonging to a subsidiary of Hollinger was a misuse of their positions in Hollinger for private gain, agreeing with the Second Circuit.¹²⁴

On remand, Black may have provided some guidance as to whether the “private gain” requirement will survive *Skilling*, which acknowledged a circuit split on whether private gain was required, but did not resolve the issue.¹²⁵ The Seventh Circuit noted that the trial court instruction that the Black defendants had failed to render honest services to Hollinger and had done so in an effort to obtain a private gain “was a good instruction before the Supreme Court ruled that honest-services fraud requires proof of a bribe or kickback, but no longer.”¹²⁶ There was evidence that defendants had a duty of candor to the board in the conflict-of-interest situation, in which they found themselves, and by violating that duty they caused Hollinger to make false filings with the SEC, and they did so for their private gain. “That was a solid honest-services case before the Supreme Court weighed in, but not a solid pecuniary-fraud case.”¹²⁷ While there was evidence to support pecuniary fraud, the jury might have convicted based on the honest services charge. Because the government’s honest services case, even if proven, was insufficient after *Skilling* the Seventh Circuit remanded for a new trial on fraud. If the Seventh Circuit’s analysis in *Black* proves to be the normal pattern, then the unsettled “private gain” requirement may be rendered moot, because even where private gain is undisputed, it cannot support a conviction where there is no evidence of bribery or kickbacks.

¹²⁴ See *United States v. Rybicki*, 354 F.3d 124, 141–43 (2d Cir. 2003) (deprivation of “honest services” where personal injury lawyers made payments to insurance adjusters, who failed to report payments to employer, in violation of company policy).

¹²⁵ Compare *United States v. Bloom*, 149 F.3d 649, 655 (7th Cir. 1998), with *United States v. Panarella*, 277 F.3d 678, 692 (3d Cir. 2002).

¹²⁶ *United States v. Black*, 625 F.3d 386, 391–92 (7th Cir. 2010).

¹²⁷ *Id.* at 392.

D. Hereimi: Mens Rea.

In *United States v. Hereimi*, the government’s “honest services” theory was that Imad Salid Hereimi aided and abetted a state employee, Nezar Khaled Maad, “by setting up a ‘print brokerage’ called Horizon Graphics and directing state print jobs to that company.”¹²⁸ As part of his employment with Alaska, Maad had responsibility for preparing print jobs and locating vendors for those jobs.¹²⁹ The fraud was alleged to be based upon Maad’s concealment of his relationship to Horizon Graphics.¹³⁰ Though Hereimi claimed at trial he had no knowledge of printing, evidence presented showed that he was the owner of Horizon Graphics and took actions consistent with that ownership, such as obtaining a bank account and setting up the post office box to which the state sent payment for Horizon’s work.¹³¹ While finding that “[t]here really was no basis for a doubt that Hereimi was necessary to the plot’s success,” the district court concluded that “[t]he case turned on Hereimi’s knowledge.”¹³² It was apparently undisputed that Hereimi knew that Maad was a state employee with responsibility for print jobs, and that Horizon Graphics did most of its business with the state.¹³³ Instead, the dispute centered on whether “Hereimi knew that Maad’s actions involved a conflict of interest.”¹³⁴ While Hereimi denied such knowledge, the district court held that a jury could have rejected his denial in light of information known to Hereimi.¹³⁵

¹²⁸ See Order, *United States v. Hereimi*, No. 3:08-cr-00007 JKS at 1 (D. Alaska, Sept. 10, 2008) (denying motion for acquittal).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 2.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

Based on its conclusion that the jury could infer such knowledge from the elaborate efforts Hereimi and Maad made to conceal Maad’s relationship with Horizon Graphics from the state, the district court denied Hereimi’s motion for acquittal and he was convicted of 20 counts of “honest services” mail fraud.¹³⁶ In charging the jury, however, the district court instructed that, in order to convict petitioner of honest-services fraud, the jury must find “beyond a reasonable doubt that [petitioner] acted with the knowledge that “honest services” fraud was being committed by Maad.”¹³⁷ Additionally, the jury submission included a deliberate indifference instruction that Hereimi challenged on appeal to the Ninth Circuit, which affirmed in a brief memorandum opinion that did not even discuss the “honest services” statute.¹³⁸ At the government’s urging, the Court held the petition, but vacated and remanded to the Ninth Circuit.¹³⁹

In an unpublished memorandum decision, the Ninth Circuit found that the case was tried and argued to the jury based solely on the theory of honest services fraud that was rejected in *Skilling*.¹⁴⁰ Thus, it would appear that a theory based strictly on a defendant’s knowing concealment of a relationship—without any actual deprivation of property—is outside the scope of the statute based on *Skilling*. The court of appeals reversed the conviction and remanded for further proceedings, and the government gave notice that it would not pursue further proceedings against Hereimi.

¹³⁶ *Id.*

¹³⁷ See Petition for Writ of Certiorari at 52, *Hereimi v. United States*, 130 S. Ct. 3543 (2010) (No. 09–1035).

¹³⁸ See *Hereimi v. United States*, 357 Fed. Appx. 82 (9th Cir. 2009).

¹³⁹ See *Hereimi v. United States*, 130 S. Ct. 3543 (2010).

¹⁴⁰ See *United States v. Hereimi*, 357 Fed. Appx. 82 (9th Cir. 2010) (citing *Skilling* and *McNally* for the proposition that conviction reversed where “there was no charge and the jury was not required to find that the [State] itself was defrauded of any money or property.”).

E. Redzic: Precision in the Indictment and Bribery Standards.

Mustafa Redzic was the owner of a truck driving school that trained students to operate commercial vehicles.¹⁴¹ His students were required to be tested by a state run facility or a private facility that was licensed by the state of Missouri.¹⁴² Redzic was alleged to have participated in a scheme with his co-defendant, Troy Parr, a licensed third-party tester who was employed by the state, whereby students were “short tested,” skipping some or all of the requirements for a commercial driver license.¹⁴³ Redzic was charged with and convicted of a number of offenses, including mail fraud in violation of 18 U.S.C. § 1341, wire fraud in violation of 18 U.S.C. § 1343, and bribery in violation of 18 U.S.C. § 666(a)(2).¹⁴⁴

On appeal, Redzic argued that “the indictment was insufficient to charge him with depriving the state of Parr’s honest services.”¹⁴⁵ The Eighth Circuit dismissed that argument, finding that even though the indictment did not use the term “honest services,” there was no invitation for the grand jury to “wander beyond the allegations contained in the indictment.”¹⁴⁶ Instead, the Eighth Circuit found that grand jury would have considered the short-testing and submission of false paperwork course of conduct in returning the indictment, which therefore rendered the indictment sufficient.¹⁴⁷ The Supreme Court vacated the decision and remanded.

Redzic raises one of the issues at the heart of the concerns expressed in the *Skilling* concurrence, namely that “a statute that is unconstitutionally vague cannot be saved by a more

¹⁴¹ See *United States v. Redzic*, 569 F.3d 841, 843 (8th Cir. 2009).

¹⁴² *Id.*

¹⁴³ *Id.* at 843–44.

¹⁴⁴ *Id.* at 843.

¹⁴⁵ *Id.* at 847.

¹⁴⁶ *Id.* at 848.

¹⁴⁷ *Id.*

precise indictment.”¹⁴⁸ Even though the *Redzic* indictment did not use the term “honest services” the Eighth Circuit was willing to surmise what the grand jury considered in delivering the indictment, and was willing to find that “honest services” was properly charged based on particular facts that the court believed was evidence of a course of conduct adequate to plead an “honest services” violation.¹⁴⁹

On remand, the court of appeals again addressed the issue of the sufficiency of the indictment, and stuck to its guns, finding that the allegations “were more than sufficient to make out a case that Redzic and Parr intentionally devised a fraudulent scheme whereby the State of Missouri was deprived of its right to Parr’s honest services in a manner involving precisely the offense preserved in *Skilling*.”¹⁵⁰ The Eighth Circuit also held that even though the indictment cited §§ 1341 and 1343, and did not cite § 1346, the indictment was sufficient because “that section does not create a separate substantive offense; it merely defines a term contained in §§ 1341 and 1343.”¹⁵¹ According to the court, it was enough that the indictment “cited to the appropriate substantive statutes which incorporate the fraudulent deprivation of honest services.”¹⁵²

The general applicability of the Eighth Circuit’s holding on remand may technically be limited by the narrow standard of review due to the fact that jeopardy had already attached, which required that an indictment be upheld “unless it is so defective that by no reasonable

¹⁴⁸ *Skilling v. United States*, 130 S. Ct. 2896, 2935 (Scalia, J., concurring).

¹⁴⁹ *See Redzic*, 569 F.3d at 848 (“[T]he course of conduct charged in the indictment corresponded with the government’s proof at trial and the jury instructions. There was no danger that the jury might consider other, uncharged incidents in convicting him.”).

¹⁵⁰ *United States v. Redzic*, 627 F.3d 683, 688 (8th Cir. 2010)

¹⁵¹ *Id.*

¹⁵² *Id.* at 689.

construction can it be said to charge the offense for which the defendants were convicted.”¹⁵³ Nonetheless, the Eighth Circuit’s holding would appear to countenance continued flexibility in charging honest services fraud, including the fact that a reference to § 1346 or “honest services” is unnecessary. And, the Eighth Circuit affirmed that a scheme such as Redzic’s survives *Skilling*.

F. Hargrove: Vagueness.

Jack Hargrove and Laurence Capriotti co-owned Intercounty Title Company of Illinois (“Intercounty”), a title insurance and escrow agency based in Chicago.¹⁵⁴ Due to a price war among title insurers, Intercounty was losing millions of dollars each year.¹⁵⁵ Intercounty attempted to cover its losses by investing in junk bonds, but was unsuccessful.¹⁵⁶ The government’s case against Hargrove and Capriotti was based on allegations that they and other Intercounty executives “engineered numerous fraudulent schemes under which the title company’s deficits were covered by thefts from its escrow account,” which “robbed Intercounty of more than \$60 million.”¹⁵⁷

Before trial, Hargrove moved to dismiss the “honest services” charge on the ground that the statute was unconstitutionally vague.¹⁵⁸ The district court denied the motion and the Seventh Circuit summarily affirmed, finding that its precedent firmly held that the statute was not void

¹⁵³ *United States v. Pennington*, 168 F.3d 1060, 1064-65 (8th Cir. 1999).

¹⁵⁴ *See United States v. Hargrove*, 579 F.3d 752, 753 (7th Cir. 2009).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

for vagueness.¹⁵⁹ Of the cases GVRed, Hargrove’s petition to the Supreme Court made the broadest constitutional attack on the statute. In his petition, Hargrove recounted the divergent opinions of the various courts of appeals regarding the requisite elements and reach of a “honest services” violation, both pre- and post-*McNally*.¹⁶⁰

Hargrove’s “honest services” conviction would appear to be a fairly strong candidate for reversal based on *Skilling*, because the allegations arise from theft from a corporate escrow account, not bribery or kickbacks.¹⁶¹ That charge, at least, appears to be untenable after *Skilling*. Additionally, Hargrove’s contentions at trial included the argument that because the alleged conduct involved only private business activities; it did not fall within the statute’s reach. The trial court summarily found that Hargrove’s conduct alleged “fits very comfortably within the judicial gloss of what are not ‘honest services’” and that “victims of the nature alleged here are within the rational definition of ‘another.’”¹⁶² In his subsequently filed statement of issues, Hargrove contended his trial had been contaminated by the honest services charge, but there has not yet been any resolution of the issue.

IV. Proposed Legislation

It did not take long for members of Congress to react to *Skilling*. On September 28, 2010, the Senate Judiciary Committee held hearings on the effect of the *Skilling* decision, which

¹⁵⁹ *Id.* at 754 (“At oral argument, Hargrove informed this Court that he has raised the claim solely for the purposes of preserving the issue in the event that the Supreme Court chooses to consider it at some future date. Fair enough.”).

¹⁶⁰ Petition for Writ of Certiorari, *Hargrove v. United States*, No. 09–929, 2010 WL 1436447 (Feb. 1, 2010).

¹⁶¹ *Id.* at 753.

¹⁶² See *United States v. Capriotti*, No. 03 CR 779, 2003 WL 23213568, at *4 (N.D. Ill. 2003) (citing *Brumley*, 116 F.3d at 740–41).

Senator Patrick Leahy described as “another in series of cases in which the Supreme Court appears to have undermined Congressional efforts to protect hardworking Americans from powerful interests.”¹⁶³

During the hearing, Professor Michael Seigel testified that while “few experts would take issue” with *Skilling*’s holding that the concept of honest services was constitutionally vague, the Court’s solution was “far from ideal.”¹⁶⁴ The statute “suffers from the very same ills as before.”¹⁶⁵ As an example, he noted that a DMV employee could be charged with an honest services violation for taking a \$20 bribe to let an applicant cut in line.¹⁶⁶ Because *Skilling* did not clarify an authoritative definition of “bribery,” however, it remains unclear whether all bribery-related honest services charges require a *quid pro quo*. If they do, it may not be possible to use the statute to convict what would appear to be a clear deprivation of “honest services,” such as a state legislator who is secretly on the payroll of a corporation that has an interest in a wide variety of matters that are the constant subject of legislation, but to whom a clear *quid pro quo* is not provable.¹⁶⁷ Professor Seigel urged Congress to limit honest services fraud to “carefully circumscribed and well defined conduct that is of true federal significance.”¹⁶⁸

Yet, Professor Samuel Buell differed in emphasis, arguing that there is nothing “novel, or unworkable, or imprudent” about allowing courts to apply Congress’ “general prohibitions on

¹⁶³ *Restoring Key Tools to Combat Fraud and Corruption After the Supreme Court’s Skilling Decision: Hearing Before the Senate Committee on the Judiciary*, 111th Cong. (statement of Sen. Patrick Leahy, Member, Senate Comm. on the Judiciary) (Sept. 28, 2010), available at www.judiciary.senate.gov/hearings/hearing.cfm?id=4816.

¹⁶⁴ *Restoring Key Tools*, *supra* note 163, at 2 (statement of Michael Seigel).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 2.

¹⁶⁸ *Id.* at 3.

fraud” to new and developing forms of deception.¹⁶⁹ Accordingly, he found a “somewhat unrealistic quality” in *Skilling* decision and worried that the Court’s “somewhat arbitrary” decision risks “leaving important forms of abusive deception outside the scope of federal criminal law.”¹⁷⁰ Arguing that the Supreme Court’s concerns regarding vagueness were manifestations of a greater concern over the statute’s overbreadth, Professor Buell suggested that the problem could be solved in legislation without curbing the statute’s ability to reach the deceptive deprivation of important information. Such a statute would need to (1) clarify the requisite mental state, (2) specify the kinds of relationships that involve instances of intangible harm, and (3) set thresholds for culpable conduct.¹⁷¹ While acknowledging the need for statutory action, he emphasized that the role of the courts in developing the doctrines should not be abandoned.¹⁷²

Assistant Attorney General Lanny A. Breuer testified at the hearing, and provided some indication that the DOJ’s priorities may include elements of both positions in the new legislation. *See Restoring Key Tools*, (statement of Lanny A. Breuer). He provided an example that echoed Professor Seigel’s comments, noting:

[I]f a mayor were to solicit tens of thousands of dollars in bribes in return for giving out city contracts to unqualified bidders, that mayor could be charged with bribery. But if the same Mayor decides that he wants to make even more money through the abuse of his official position, he might secretly create his own company, and use the authority and power of his office to funnel city contracts to that company. Although this second kind of scheme is corrupt, and undermines public confidence in the integrity of their government, it is not bribery.¹⁷³

¹⁶⁹ *Restoring Key Tools*, *supra* note 163, at 2 (statement of Samuel A. Buell).

¹⁷⁰ *Id.* at 2.

¹⁷¹ *Id.* at 5.

¹⁷² *Id.*

¹⁷³ *Id.* at 6.

To address the latter scenario, Assistant Attorney General Breuer acknowledged the need for new legislation. Specifically, he argued that the new legislation should include four elements: (1) clear and specific language to ensure compliance with Supreme Court’s *Skilling* directive that future legislation provide citizens with notice of prohibited conduct; (2) the ability to craft a criminal charge that fully encompasses the scope of a criminal scheme, achieved through reliance on mail and wire fraud statutes, which provide an established jurisdictional basis for prosecution, enabling; (3) a defined scope of the financial interests that trigger improper self-dealing, achieved through reflection of the federal conflict of interest statute, 18 U.S.C. § 208, applicable to the Executive Branch; and (4) the exemption of public officials unless he/she “knowingly conceals, covers up, or fails to disclose material information” that he/she is legally required to disclose. That the government must prove both knowing concealment and specific intent to defraud under this proposed scheme obviates any risk of conviction for mere mistake or chance conflict of interest.¹⁷⁴

Legislation that roughly conforms to the guidelines laid out by Assistant Attorney General Breuer was proposed in both houses of Congress under the name “Honest Services Restoration Act.”¹⁷⁵ The more detailed and extensive legislation introduced in the Senate would amend the mail and wire fraud statutes by adding a new Section 1346A. The proposed Section 1346A(a)(1)–(2) would address, respectively, “undisclosed self-dealing” by public officials and “undisclosed private self-dealing” by “officers and directors.”¹⁷⁶ Self-dealing in both respects is defined as the defendant using his or her official position to, in whole or in part, benefit the

¹⁷⁴ *Id.* at 7.

¹⁷⁵ See S. 3854, 111th Cong. (2010) (Sen. Leahy) (introduced Sept. 28, 2010); H.R. 6391, 111th Cong. (2010) (Rep. Weiner) (introduced Sept. 29, 2010).

¹⁷⁶ See S. 3854 (proposed § 1346A(a)(1) and (2)).

financial interest of certain associated parties, such as spouses, children or organizations, generally tracking the language of the federal conflict-of-interest statute, 18 U.S.C. § 208. The legislation also requires that the defendant knowingly falsify, conceal, cover up, or omit “material information that is required to be disclosed regarding that financial interest by any Federal, State, or local statute, rule, regulation, or charter applicable to the [defendant].”¹⁷⁷ Similar provisions exist for private officers, with the added requirement that the self-dealing must also cause or be intended to cause actual harm to the officer’s or director’s employer.¹⁷⁸ The House version of the bill would also add a much simpler Section 1346A, but contains only a provision regarding public officials.¹⁷⁹

Several items are noteworthy. Both bills would appear to retain the same vexing problem of pegging the honest services statute to a large variety of legal bases by basing liability on falsification or a failure to disclose information required by “by any Federal, State, or local statute, rule, regulation, or charter.” That improvisation is unlikely to reduce the variety of disclosure of fiduciary duties that can create liability under the statute, or therefore is unlikely to reduce the confusion and inconsistently in the courts. Both bills define “public official,” but the Senate bill fails to define “officers and directors.” Thus, it has still not solved a basic problem of how far the statute reaches into private conduct, although it would at least provide a clear statutory basis to create criminal liability for private actors and define the relevant harm. The legislation also fails to clarify what criminal intent is required. A defendant must “knowingly” falsify, conceal, cover up, or omit material information that is required to be disclosed regarding the relevant financial interest. Assistant Attorney General Breuer’s statement had recommended

¹⁷⁷ *Id.* (proposed § 1346A(b)(1)(VI)(ii)).

¹⁷⁸ *Id.* (proposed § 1346A(b)(2)(i)).

¹⁷⁹ *See* H.R. 6391, 111th Cong. (2010).

“specific intent,” not “knowingly,” and the latter term can acquire different meanings in different jurisdictions and contexts.

The proposed legislation—though in its infancy—does not seem to tackle the primary issues left unaddressed by *Skilling*. One general impression from the DOJ’s focus (exemplified by Assistant Attorney General Breuer’s private company example) and the early legislative proposals is that the primary item on the law enforcement “wish list” is statutory authority to be able to pursue crimes of concealment, cover-ups, and other kinds of non-disclosure. The proposed statute does not appear to provide a basis to criminalize disclosed wrongdoing.

V. Conclusion: The “Honest Services” Tide Will Likely Rise Again

There is little doubt that “honest services” law reached a high tide prior to the Court’s decision to address it during the 2009 term. That the circuit courts had adopted such an expansive interpretation of the vague statute dictated the need to concretely determine what the statute criminalized. In limiting the scope of § 1346 to bribery and kickbacks, the *Skilling* majority held that the statute should draw content, at least in part, from federal statutes that define bribery and other similar crimes. The Court provided as example of appropriate statutes on which to rely.¹⁸⁰ But, the Court did not render this list exclusive of other statutes. In an important footnote, the Court emphasized that the overlap with other federal statutes, such as bribery, did not render § 1346 superfluous because, to the extent those statutes apply only to federal actors, § 1346 applies to state and local corruption and other private-sector fraud that

¹⁸⁰ See 41 U.S.C. § 52(2) (2010); 18 U.S.C. § 201(b) (giving or receiving a gratuity); 18 U.S.C. §666(a)(2) (bribery involving federal funds).

“might otherwise go unpunished.”¹⁸¹ This statement alone takes a significant step in providing § 1346 with a *raison d’être*. The Court’s remark indicates a full confirmation that § 1346 is intended to not only reach the conduct of the state and local officials, and “corrupting” schemes involving them, but also that the statute equally applies to private sector fraud. The latter inference could be particularly important as the current administration will continue to seek ways to prosecute financial sector corporate fraud, and early legislative efforts show an interest in reliance on violations of both private sector fraud and state- and locally-imposed duties as sources of “honest services” duties.

Controversially, the Court’s strong—albeit unsettled—statement of the statute’s ongoing usefulness offers more content than Congress has yet saw fit to provide.¹⁸² As some commentators have argued, “[i]n not only ‘blue penciling’ Section 1346 to reach bribery and kickbacks, but also countenancing courts’ prospective elaboration of what these offenses constitute, it seems undeniable that, in the words of Justice Scalia, this is not ‘interpretation’ but ‘invention’ of criminal law.”¹⁸³ Of course, confirmation of the “honest services” statute’s purpose is not the same thing as an elaboration of its standards. The Court’s failure to specifically define covered content may have been an effort to avoid the perception that it was essentially writing a statute.¹⁸⁴

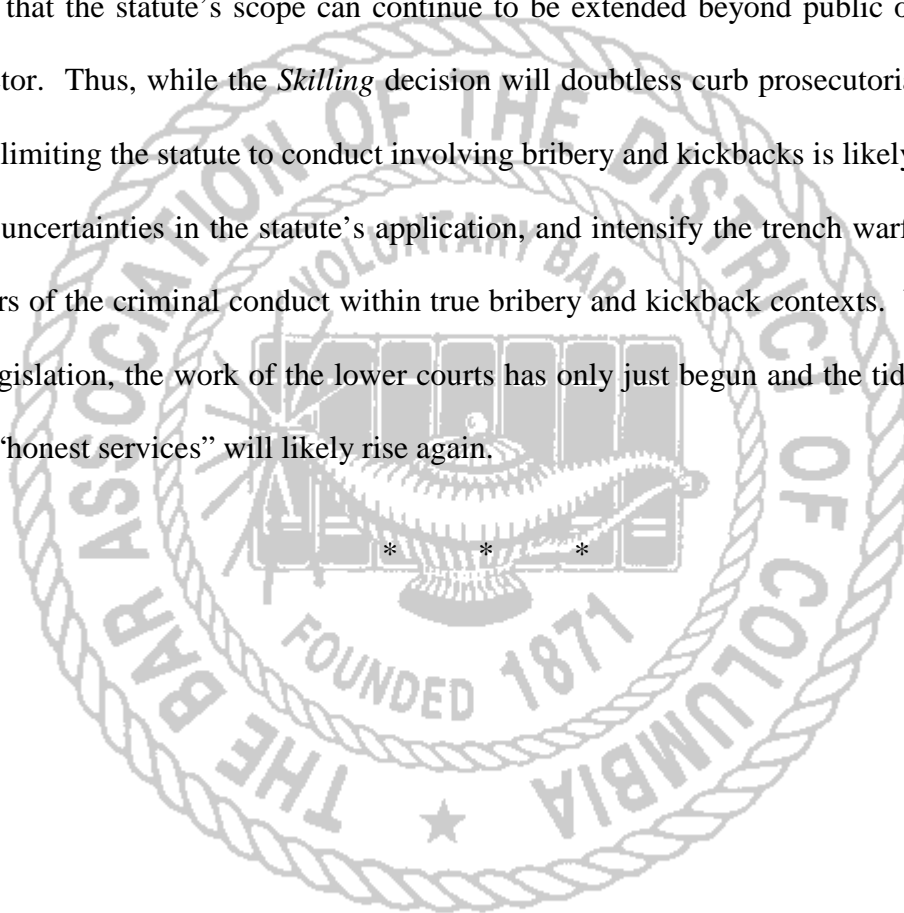
¹⁸¹ *Skilling*, 130 S. Ct. at 2934 n.46.

¹⁸² *See id.* at n.2.

¹⁸³ Frank C. Razzano & Jeremy D. Frey, *U.S. Supreme Court’s Recent Decisions on ‘Honest Services’ Fraud Raise Questions About Fiduciary Duty, Quid Pro Quo, Mens Rea and Other Issues*, 5 BNA WHITE COLLAR CRIME REP. 508, 512 (July 16, 2010).

¹⁸⁴ *See Skilling*, 130 S. Ct. at 2935 (Scalia, J., concurring) (“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”).

The immediate practical result is that Congress is not prompted to start fresh with new legislation that will avoid the vagueness defects identified by the *Skilling* concurrence. Instead, Congress has likely been encouraged to craft a new statute that will draw more broadly from the multiple legislative and judicial sources (federal, state and local statutes and rules) to define conduct, to delay fundamental questions about *mens rea* requirements, to keep open the possibility that the statute’s scope can continue to be extended beyond public officials into the private sector. Thus, while the *Skilling* decision will doubtless curb prosecutorial discretion, its manner of limiting the statute to conduct involving bribery and kickbacks is likely to magnify the remaining uncertainties in the statute’s application, and intensify the trench warfare to delineate the contours of the criminal conduct within true bribery and kickback contexts. With or without the new legislation, the work of the lower courts has only just begun and the tide of uncertainty regarding “honest services” will likely rise again.



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Copyright Infringement in Cyberspace – Decoding Strict Liability

By Guity Deyhimy

Envision an environment where plaintiff's file seriatim in the Federal District Court for the District of Columbia, alleging copyright infringement for unauthorized download and/or unauthorized distribution of motion pictures on private computers.¹ Initially, plaintiff files against Doe defendants, whose Internet access has been identified as having been used for the unauthorized downloads, on a given day and at a given time, by what is referred to as a "dynamic internet protocol" (dynamic IP) address. Plaintiff then subpoenas the Internet Service Providers (ISPs), which had issued the dynamic IP addresses, demanding disclosure of the actual identification and physical address of each individual account holder whose dynamic IP address was thus identified. The ISP then notifies these individuals that it is required to disclose their actual identification and physical address to plaintiff's counsel unless a timely filed motion to quash is granted.

These individuals, the Doe defendants, reside throughout the United States; residents rarely in or near the District of Columbia. A great number of these Doe defendants would testify under oath that in fact they did not download and have no knowledge of the allegedly

¹ See, e.g., G2 Productions v. Does 1-83, 1:10-cv-00041-CKK (D.D.C. filed Jan. 8, 2010); Worldwide Film Entertainment v. Does 1 – 749, 1:10-cv-00038-HHK (D.D.C. filed Jan. 8, 2010); DonkeyBall Movie v. Does 1-171, 1:10-cv-01520-EGS (D.D.C. filed Sept. 8, 2010); Cornered v. Does 1-2,177, 1:10-cv-01476-CKK (D.D.C. filed Aug. 30, 2010); Voltage Pictures v. Does 1-5,000, 1:10-cv-00873-RMU (D.D.C. filed May 24, 2010); Maverick Entertainment Group v. Does 1 – 1,000, 1:10-cv-00569-RJL (D.D.C. filed Apr. 8, 2010); West Bay One v. Does 1 – 1,653, 1:10-cv-00481-RMC (D.D.C. filed Mar. 23, 2010); Call of the Wild Movie v. Does 1-358, 1:10-cv-00455-RMU (D.D.C. filed Mar. 19, 2010); Achte/Neunte Boll Kino Beteiligungs GmbH & Co. KG v. Does 1 – 4,577, 1:10-cv-00453-RMC (D.D.C. filed Mar. 1, 2010).

unlawful download using their respective dynamic IP addresses. The specter of substantial legal expenses in defense of a proceeding away from home, however, often militates towards an agreement to pay between \$1,000 and \$3,500, to purchase freedom from prosecution of the case against them.²

Assuming plaintiff files against 4,000 Doe defendants,³ and half of the defendants settle close to inception for an average of \$2,000, the case will have yielded plaintiff about \$4,000,000 without the need to litigate it! Plaintiffs' counsels have reportedly no intention of litigating the cases but instead intend to "farm out the litigation to other law firms."⁴

This paper raises the question of whether such lawsuits constitute a proper use of the legal process, given the apparent lack of any evidence attributing to each Doe defendant the alleged infringing conduct element of plaintiffs' claims, based on the use of their respective dynamic IP addresses.⁵

In this context, consider the relationship between a dynamic IP address and individual computers. Dynamic IP addresses are assigned by Internet Service Providers to their customers (account holders) on each occasion that a customer's network connects to the ISP. The term is referred to as "dynamic" because the address is reassigned to a customer every time a new connection is made to the ISP.⁶ If the account holder had a "static" IP address, the access to the Internet would serve to identify that account holder. However, a dynamic IP address does

² Greg Sandoval, *Accused pirates to indie filmmakers: Sue us*, (Oct. 21, 2010), http://msn-comet.com.com/2001-1_1-0.html?tag=hdr:brandnav (follow "News" hyperlink; then follow "Latest News" and find article number 179).

³ See, e.g., *Achte/Neunte Boll Kino Beteteiligungs GmbH & Co. KG v. Does*, *supra* note 1.

⁴ Sandoval, *supra* note 2.

⁵ The important issues relating to in personam and subject matter jurisdiction otherwise raised by these cases are beyond the scope of this paper.

⁶ Jan L. Harrington, *Ethernet Networking for the Small Office and Professional Home Office*, 123 (2007); Douglas Jacobson, *Introduction to Network Security*, 33 (2009).

not actually identify the computer hardware used at the given time on the given day, but only the connection of that hardware to the Internet. Whenever a connection is established⁷, particularly by way of wireless networks⁸ or war drivers,⁹ data thieves or anyone else who has the appropriate wireless device can quite easily capture a person's connection and use it,¹⁰ among other things, for unlawful download of motion pictures, sometimes even through walls¹¹ or in adjacent parking lots.¹² Indeed, the Federal Trade Commission has issued a safety memorandum which describes measures one can take to reduce such security risks.¹³

It has been said that “[a]pplication of copyright law in cyberspace is elusive and perplexing. The World Wide Web has progressed far faster than the law and, as a result, courts are struggling to catch up.”¹⁴ The types of cases discussed in this paper¹⁵ (*see, e.g.*, the cases cited in footnote 1) are premised on the use of individual account holders' dynamic IP addresses

⁷ *Id at pp.* 104, 114.

⁸ Harrington describes the process as follows: “Wireless network adapters communicate with wireless *access points* (Aps) . . . To distinguish themselves, Aps have names known as Service Set Identifiers (SSIDs). When a remote device wants to connect to an AP, it supplies the SSID of the access point it wants to use By default, Aps broadcast their SSIDs for any wireless adapter in range to pick up. Aps broadcasting their SSIDs are therefore wide open to any device in range, a major security problem . . . unless one has taken higher-level security measures, which is beyond the technical know-how of the regular consumer.” Harrington, *supra* note 6, at 147.

⁹ FOLDOC – Free Online Dictionary of Computing (foldoc.org) defines war driving as “(from wardialer in the ‘carrier scanner’ sense of that word) : To drive around with a laptop with a wireless card and an antenna, looking for accessible wireless networks.”

¹⁰ Jacobson, *supra* note 6, at 115.

¹¹ Harrington, *supra* note 6, at 147.

¹² Jacobson, *supra* note 6, at 107; *see also* Lance Whitney, *More people grabbing Wi-Fi from their neighbors* (Feb.4, 2011, 9:45 AM PST), <http://msn-cnet.com.com/2011-1.html?tag=hdr;brandnav> (follow “News” hyperlink; then follow “Latest News” and find the article number 15.

¹³ <http://www.onguardonline.gov/topics/wirelesssecurity.aspx>.

¹⁴ *CoStar Group Inc. v. LoopNet Inc.*, 164 F. Supp. 2d 688, 694 (D. Md. 2001), *aff'd* 373 F.3d 544 (4th Cir. 2004).

¹⁵ *See, e.g.*, *G2 Productions v. Does*, *supra* note 1.

to access the Internet, on a given day at a given time, to engage in the infringing conduct. Yet, such dynamic IP addresses may well have been, and in at least some cases most certainly were, captured by third parties who may have in fact engaged in the alleged infringing download and/or distribution. Thus, identification of the dynamic IP addresses does not inevitably lead to the conclusion that the account holders engaged in copyright infringing conduct. In fact, at least a good number of the targeted individuals sued as Does did not engage in the infringing conduct.¹⁶

Section 501 of the Copyright Act¹⁷ entitles the legal or beneficial owner of a copyright to institute an action for infringement against anyone who violates his or her exclusive right.¹⁸ Motion pictures are by definition specifically classified as such a right, as defined in Section 106 of the Copyright Act.¹⁹ If the court finds the defendant to be individually liable for the infringement, instead of actual damages and profits, the copyright owner may elect to recover statutory damages, in an amount to be determined by the court, between \$750 and \$30,000.²⁰ The Copyright Act is a strict liability statute, for a plaintiff makes a case of infringement where she shows she had (a) ownership of a valid, registered, copyright in the motion picture alleged to have been downloaded and that (b) by copying or reproduction defendant infringed upon that

¹⁶ See, e.g., Sandoval, *supra* note 2.

¹⁷ 17 U.S.C. § 501(a) (1976 as amended).

¹⁸ 17 U.S.C. § 106 (1976 as amended): Exclusive rights in copyrighted works. “Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords”

¹⁹ 17 U.S.C. § 101 (1976 as amended) (“[M]otion pictures . . . defined as audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.”).

²⁰ 17 U.S.C. § 504(c)(1) (1976 as amended). Under this section, this amount may be increased to up to \$150,000 if the infringement was willful. It may be decreased down to \$200 if the infringer proves that “such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright.”

copyright.²¹ Plaintiff must, however, be alleged and proven that defendant engaged “in some volitional conduct sufficient to show” that she actively engaged in the infringing conduct.²²

The cases cited in footnote 1 lack a link between defendant Does and the “conduct” element of an action for copyright infringement, i.e., that the “acts” of the named defendant – and not someone else – constitute the infringement of the copyright. Because dynamic IP addresses are re-assigned systematically by ISPs, the identification of the dynamic IP address does not equate to identification of an account holder. As the connection of ISP customers or account holders can readily be captured and used by third parties, the identification of a dynamic IP address at a given time and on a given day simply cannot be deemed to have factual sufficiency for either a *prima facie* or proven allegation that the unlawful conduct was in fact engaged in, known to or intended by the account holder. The attribution of the dynamic IP address at a given time on a given day does not and cannot serve even as an inference that the account holder, to whose Internet access that address was attributed at the time, engaged in the unlawful infringing conduct. Given the current state of technology and the facility with which any knowledgeable passerby may use an Internet access, the question is raised whether the premise for these cases is flawed.

The argument might be made that, even if someone else in fact used a dynamic IP address of an account holder to engage in the infringing conduct, the individual whose dynamic IP address was used should still bear liability for the download, given the strict liability nature of the statute. Yet reliance on this secondary liability theory also appears flawed, as it would be

²¹ *Wildlife Express Corporation v. Carol Write Sales*, 18 F.3d 502, 507 (7th Cir. 1994) (*citing* *Feist Publications, Inc. v. Rural Telephone Service*, 499 U.S. 340, 361 (1991)); *UMG Recordings v. Augusto*, (No. 08-55998, filed Jan. 4, 2011) (9th Cir. 2011).

²² See *Arista Records v. Usenet.Com*, 633 F. Supp. 2d 124, 148 (S.D.N.Y. 2009); *Perfect 10 v. Cybernet Ventures*, 213 F. Supp. 2d 1146, 1169 (C.D. Cal. 2002).

difficult to establish the requisite volitional conduct on the part of Doe defendants, in the absence of knowledge or intent. For, in such cases, a plaintiff must actually show that “the defendant knew or had reason to know that infringing activity was taking place”²³, instead of simply relying on the technology’s potential for the infringing conduct.

“[T]he Copyright Act does not expressly render anyone liable for infringement committed by another (in contrast to the Patent Act).”²⁴ An account holder cannot be held liable simply by the fact that her Internet access was identified in connection with the alleged infringing download. This being so, where a Doe defendant had neither intent nor knowledge of the passage of the infringing material, through her Internet access, no liability can attach to her merely as the account holder of such Internet access²⁵. This holds true regardless of whether the unlawful conduct is alleged to have been copying or reproduction. With regard to file sharing, such lack of intent or knowledge is even more persuasive if the alleged conduct is said to be unauthorized distribution.²⁶ One cannot distribute what one does not possess.

An argument that the account holder should otherwise be held liable, as the holder of the Internet account used for the alleged infringement, based on the rationale that he or she was in control, would also appear vacuous, because the account holder did not have control over whether a third party would or would not, did or did not capture the account holder’s Internet access at the time of the alleged copyright infringement. A court “may not impute constructive

²³ A&M Records v. Napster, 239 F.3d 1004, 1021 (9th Cir. 2001); Perfect 10 v. Cybernet Ventures, 213 F.Supp.2d 1146, 1169 (C.D. Cal. 2002).

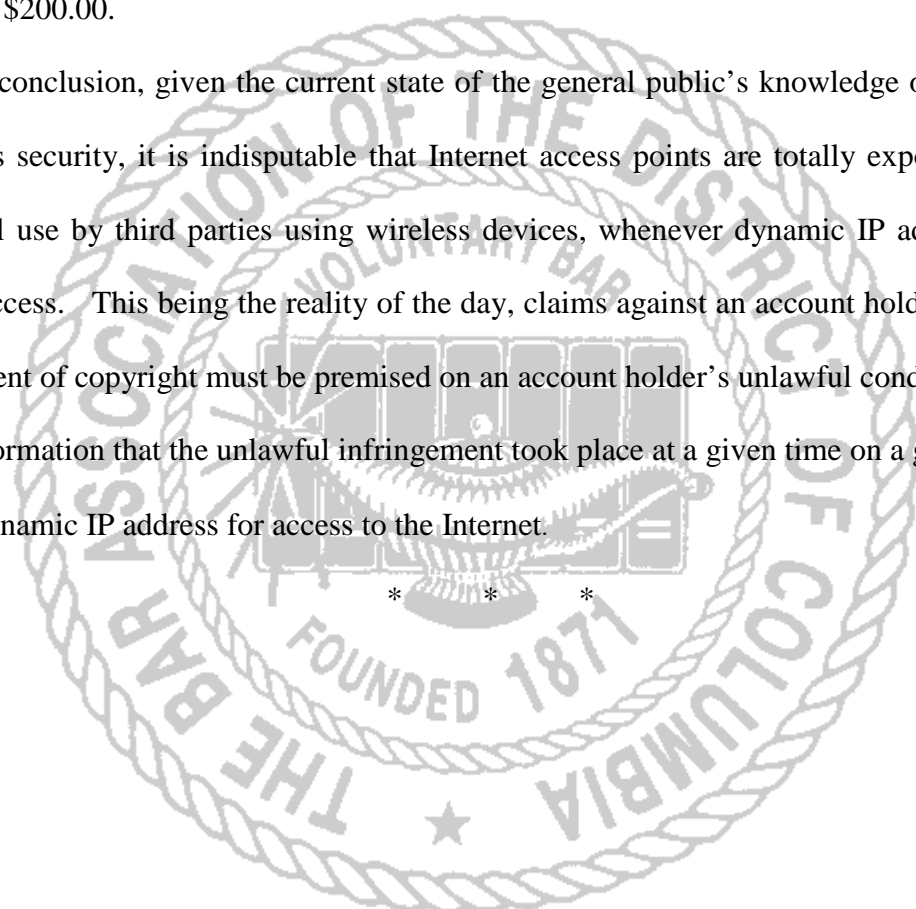
²⁴ Sony Corporation of America v. Universal City Studios, 464 U.S. 417, 434–35 (1983).

²⁵ The inference of knowledge/intent drawn from access in Columbia Pictures Industries v. Zakarian, 1991 U.S. Dist. LEXIS 6978, at *10 (N.D. Ill. May 22, 1991), cited in Columbia Pictures v. Landa, 974 F.Supp. 1, 17 (D.D.C. 1997) turned on the fact that 144 videocassettes seized from defendant’s business were illegal duplicates of the copyright motion pictures.

²⁶ Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1168 (C.D. Cal. 2002).

knowledge to a defendant merely because a technology may be used to infringe a plaintiff's copyrights if the system is capable of commercially significant non-infringing uses."²⁷ Defendant must be proven to have "materially contributed to another's infringement."²⁸ To the extent that the availability of a Doe defendant's Internet access might be deemed to be such contribution, under 17 U.S.C. § 504(c)(1), plaintiff would most likely be entitled to recover no more than \$200.00.

In conclusion, given the current state of the general public's knowledge of and attention to systems security, it is indisputable that Internet access points are totally exposed to capture and illegal use by third parties using wireless devices, whenever dynamic IP addresses enable Internet access. This being the reality of the day, claims against an account holder for unlawful infringement of copyright must be premised on an account holder's unlawful conduct, not merely on the information that the unlawful infringement took place at a given time on a given day using a given dynamic IP address for access to the Internet.



* * * * *

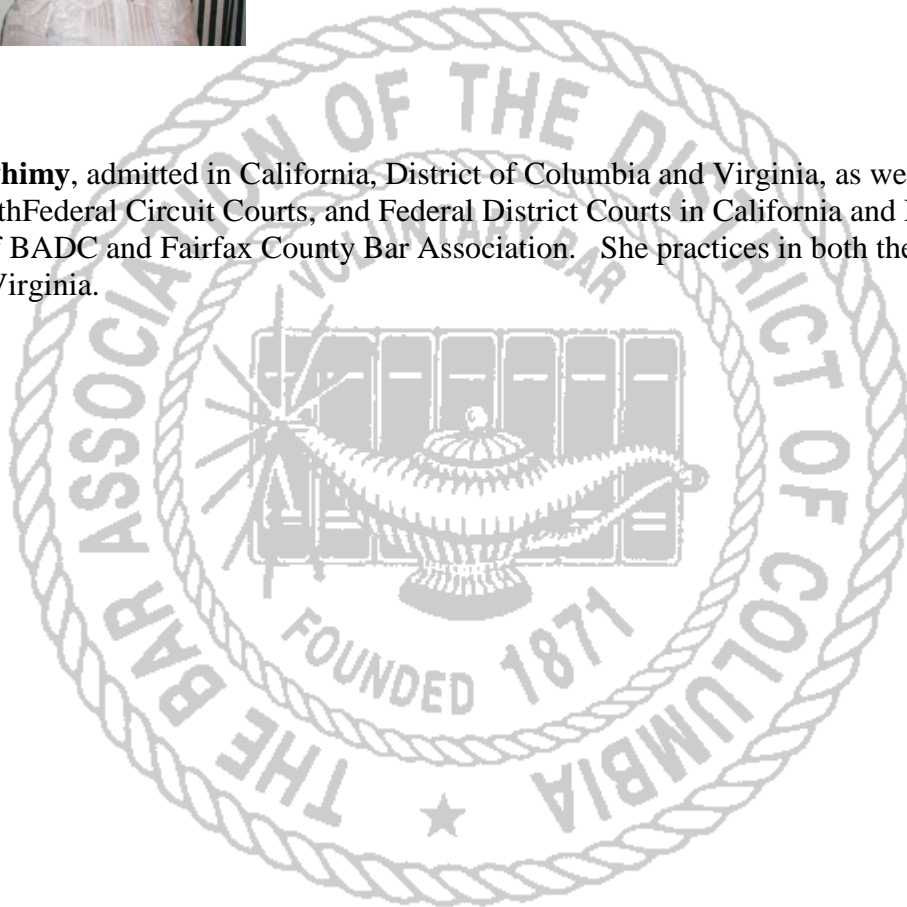
²⁷ A&M Records v. Napster, 239 F.3d 1004, 1020–21 (9th Cir. 2001).

²⁸ Ellison v. Robertson, 357 F.3d 1072, 1076 (9th Cir. 2004).

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Ending the Disappearing Act of Affordable Housing in the District of Columbia

by

Professor Kemit A. Mawakana¹

I. Introduction

Housing is among the most basic of human needs.² Accordingly, many lawyers have spent their entire careers advocating for and securing affordable housing³ for that segment of American society generally referred to as low-income or the working poor.⁴ Theoretically, with each unit of affordable housing preserved, homelessness or some other housing-related tragedy is averted or at least delayed. The benefits of these efforts can be seen in the expressions of joy and

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² Educational Psychology Interactive, <http://chiron.valdosta.edu/whuitt/col/regsys/maslow.html> ("Abraham Maslow (1954) . . . posited a hierarchy of human needs . . . 1) Physiological: hunger, thirst, bodily comforts, etc.; 2) Safety/security: out of danger [.]; see also, Janet A. Simons, Donald B. Irwin and Beverly A. Drinnien, *Psychology - The Search for Understanding*, (West Publishing Company 1987); *United Nations Committee on Economic, Social and Cultural Rights*, General Comment No. 4, paras. 1, 6 and 7. ("The right to adequate housing . . . derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights. . . . The right to adequate housing applies to everyone. . . . [I]ndividuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status. . . . [T]his right must . . . not be subject to any form of discrimination. . . . [T]he right to housing should not be interpreted in a narrow or restrictive sense. . . . Rather it should be seen as the right to live . . . in security, peace and dignity. . . ."), available at <http://www.pdhre.org/rights/housing.html> (last accessed Feb. 5, 2010).

³ "The generally accepted definition of affordability is for a household to spend no more than 30 percent of its annual income on housing. Families who pay more than 30 percent of their income are considered cost burdened and may have difficulty affording necessities such as food, clothing, transportation and medical care." See Elizabeth Figueroa, Esq., et al., Coalition for Nonprofit Housing & Economic Development, *A Study of Limited-equity Cooperatives in the District of Columbia* 7 (Spring 2004), available at http://www.cnhed.org/shared/layouts/newsletter.jsp?_event=view&_id=120130_U127242__170033 (last accessed July 8, 2010); see also Aaron O'Toole and Benita Jones, *Tenant Purchase Laws as a Tool for Affordable Housing Preservation: The D.C. Experience*. 18 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 367, 378 (2009) ("[H]ousing is affordable if a household spends no more than 30 percent of its gross income on housing costs. In the homeownership context, a somewhat higher percentage, 35 percent or even 40 percent, may be justified.").

⁴ For purposes of this paper, no distinction is made between those considered low-income and the working poor. For a discussion of the differences between low-income and the working poor, see HERBERT J. GANS, *THE WAR AGAINST THE POOR: THE UNDERCLASS AND ANTI-POVERTY POLICY* (1995).

relief on their clients' faces, and tangibly experienced by their clients achieving the "American Dream" of homeownership.

Yet, affordable housing lawyers in the District of Columbia ("DC") face a conundrum. Isolated victories are not adding up to the maintenance of, or increase of, affordable housing inventory.⁵ In fact, as discussed below, DC's affordable housing inventory continues to disappear.⁶ As recently as 2009, the percentage of homeless families and homeless children increased by 19.8 percent and 24.1 percent, respectively.⁷ These percentages represent 703 families, including 1,426 children.⁸ The National Coalition for the Homeless attributes a shortage of affordable housing as a major cause of the rise in homelessness.⁹ A recent report by the DC Fiscal Policy Institute examining the city's rental housing market found that "there were 23,700 fewer apartments that cost \$750 or less a month in 2007 than in 2000, a decrease of more than 33 percent." During that period, the number of units that cost in excess of \$1,500 more than doubled, from 12,200 to 27,400.¹⁰ The magnitude of the problem is evident to the casual

⁵ This article focuses on affordable homeownership inventory; the data, arguments and conclusions herein may not be applicable to rental housing inventory. Some commentators argue that it is outdated and erroneous to assume that homeownership is superior to rental housing. For a discussion of the benefits of homeownership as opposed to renting see Lynne Dearborn, *Homeownership: The Problematics of Ideals and Realities: Contextualizing Homeownership*, 16 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 40 (2006–2007) ("Research supports these purported benefit[s] of homeownership. Evidence suggests that owner-occupied housing is in better physical condition than housing occupied by renters . . . [and] that the move from renting to ownership often has produced a more stable and well-adjusted household.").

⁶ The DC Fiscal Policy Institute tracks affordable rental inventory in DC and has concluded that affordable rental housing has significantly decreased over the period from 1980 to 2000; and a continued decrease in affordable rental housing from 2000 thru 2008. See *infra* note 10.

⁷ The Homeless Serv. Planning & Coordinating Comm., *The 2009 Count of Homeless Persons in Shelters and on the Streets in Metropolitan Washington* (Metro. Washington Council of Gov't 2009), available at <http://www.mwcog.org/uploads/pub-documents/zVZeVw20090513103355.pdf> (the data used by the Homeless Service Planning and Coordinating Committee spans between 2005 and 2009, which is during the current national recession that caused many people to foreclose on their homes) (last visited Apr. 1, 2011).

⁸ *Id.*

⁹ *Why Are People Homeless?* Published by the National Coalition for the Homeless, July 2009.

¹⁰ Ovetta Wiggins, *Fewer D.C. Affordable Housing Options Left as City Rents Rise*, WASH. POST, Feb. 6, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/05/AR2010020504067.html> (last visited Apr. 5, 2011).

observer and painfully conspicuous to those who have unfortunately experienced homelessness, shattered families, other hardships and catastrophes as a result of the lack of affordable housing.¹¹

This paper examines this affordable housing disappearing act through the lens of a landmark law designed, and amended, to preserve affordable housing -- the Rental Housing Conversion and Sale Act of 1980, more commonly referred to as the Tenant Opportunity to Purchase Act ("TOPA").¹² Part II of this article provides background information about DC and TOPA. Part III examines the empirical data with respect to the inventory of affordable housing. Part IV examines reforms and improvements needed to help TOPA function better and meet its intended goals of preserving and generating affordable housing, while minimizing displacement of low-income residents.

¹¹ Recently, the devastating effects of the loss of affordable housing in DC has impacted those diagnosed with HIV/AIDS. In November 2009, the U.S. Department of Housing and Urban Development, threatened to cut off \$12.2 million in AIDS housing funds to DC. In 2008, DC was forced to return more than \$600,000 in AIDS housing money. Debbie Cenziper, *HUD Threatens to Cut off D.C. AIDS Funding Next Year*, WASH. POST, Nov. 12, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/11/11/AR2009111117109_2.html?sid=ST2009111208316 (last visited Apr. 5, 2011).

¹² D.C. Code Ann. §3401.01 *et seq.*, as amended (2005). The statutory purposes are: "(1) To discourage the displacement of tenants through conversion or sale of rental property, and to strengthen the bargaining position of tenants toward that end without unduly interfering with the rights of property owners to the due process of law; (2) To preserve rental housing which can be afforded by lower income tenants in the District; (3) To prevent lower income elderly and disabled tenants from being involuntarily displaced when their rental housing is converted; (4) To provide incentives to owners, who convert their rental housing, to enable low income non-elderly and non-disabled tenants to continue living in their current units at costs they can afford; (5) To provide relocation housing assistance for lower income tenants who are displaced by conversions; (6) To encourage the formation of tenant organizations; (6a) To balance and, to the maximum extent possible, meet the sometimes conflicting goals of creating homeownership for lower income tenants, preserving affordable rental housing, and minimizing displacement; and (7) To authorize necessary actions consistent with the findings and purposes of this chapter." D.C. CODE ANN. § 42-3401.02 (2001); *see also* D.C. Code Ann. § 42-3404.02 (2001). TOPA was among the first statutes of its kind, creating a statutory right that provided low-income tenants with an opportunity to purchase their dwellings should the owner attempt to sell the dwelling to a third-party. *See* Richard C. Eisen, *A Practitioner's Roadmap to Tenant Ownership*, D.C. Land Title News (1999). Currently, only a handful of jurisdictions have followed suit by passing legislation similar to TOPA. The Act is remedial in character, aimed at "strengthening the legal rights of tenants or tenant organizations to the maximum extent permissible under law." D.C. CODE ANN. § 42-3405.1 (2001). While the courts have made clear the "overarching purpose [of the statute] is to protect tenant rights."

II. The District of Columbia and the Tenant Opportunity to Purchase Act

1. Brief History of DC

In 1801, Congress created the District of Columbia¹³, which originally was a 10-mile by 10-mile square situated on the Potomac River and several tributaries.¹⁴ Virginia reclaimed a portion of the original ceded land – thus, giving DC its boundaries today.¹⁵ Congress also imposed a height restriction on all construction in DC, the Height of Buildings Act of 1910, to ensure that “among the most attractive features of our Nation's Capital is its skyline.”¹⁶

2. A Brief History of TOPA

TOPA, enacted in 1980, classically embodied the possibilities of how law can be used to protect the interests of less powerful segments of society through the creation of statutorily-mandated rights. TOPA explicitly recognized that less powerful segments of society were in need of protection or assistance.¹⁷

¹³ The District of Columbia Organic Act of 1801 incorporated the District of Columbia and placed it under the exclusive control of Congress. An Act of Feb. 27, 1801, ch. 15, 2 Stat. 103 (concerning the District of Columbia); *see also* U.S. Const., Article 1, section 8; *see also* ANTHONY T. BROWDER, EGYPT ON THE POTOMAC, 21–26, IKG (2004).

¹⁴ Benjamin Banneker played a key role in the construction and design of DC. He was profoundly influenced and educated by his Malian Grandfather. Mali, of course, was a premier center of knowledge, education, civilization and commerce in the years immediately preceding the devastation launched by Europeans commonly referred to as the Atlantic Slave trade. Mali as the home of some of the world's first institutions of higher learning, provided the education to his Grandfather which was then passed down to Benjamin, including astronomical, mathematical, mechanical, logic, linguistic and surveying knowledge. *See* DR. HASSIMI MAIGA, NOTES ON CLASSICAL SONGHOY EDUCATION AND SOCIALIZATION: THE WORLD OF WOMEN AND CHILDREARING PRACTICES, Muhehm Books (2002); DR. HASSIMI MAIGA, BALANCING WRITTEN HISTORY WITH ORAL TRADITION THE LEGACY OF THE SONGHOY PEOPLE, Routledge (2009); *see also* ROBINSON, BATTLE AND ROBINSON, THE JOURNEY OF THE SONGHAI PEOPLE, Pan African Federation Organization 2ed. (1987); Browder, *supra* note 14 at 21–26.

¹⁵ Browder, *supra* note 14 at 15.

¹⁶ Rep. Fortney "Pete" Stark (D-Calif.); *Testing the Upper Limits of D.C. Building Height Act*. WASH. POST, Apr. 23, 1994, *available at* <http://www.washingtonpost.com/wp-srv/local/facts/lewis042494.htm> . (last visited April 1, 2011).

¹⁷ D.C. CODE ANN. § 42-3401.01 (2001) “Lower income tenants, particularly elderly and disabled tenants, are the most adversely affected by conversions since the after conversion costs are usually beyond their ability to pay, which results in forced displacement, serious overcrowding, disproportionately high housing costs The threat of conversion has caused widespread fear and uncertainty among many tenants, particularly lower income, elderly, and disabled tenants. . . . [The] District of Columbia housing assistance plan shows that 43,521 renter households and 14,215 homeowner households are in need of housing assistance in the District[.]”

A key feature of TOPA, designed to prevent displacement, is the statutorily-mandated right of first refusal that tenant(s) or tenant organizations are granted when an owner of a rental dwelling attempts to sell a property.¹⁸ Indeed, TOPA is quite ground breaking, taking into account many competing interests including the proverbial tension between market functioning and the public interest.

All of TOPA's provisions and features¹⁹ are intended to support its purposes and realize its goals, including the preservation of affordable housing and creation of affordable homeownership in DC.²⁰ In 2006, the Harrison Institute for Public Policy at Georgetown Law School recommended several changes to improve TOPA.²¹ It is unclear as to which, if any, of the improvements have been implemented. Nevertheless, TOPA has functioned and continues to function in DC, as evidenced by periodic news stories in the *Washington Post* detailing various properties where tenants have been able to purchase and convert the building they formerly lived in as renters into affordable homeownership.²²

¹⁸ D.C. CODE ANN. § 42-3404.02 (2001) The statute does not draw a distinction between owners that are natural persons or corporate entities; *see also* D.C. Code Ann. § 42-3404.08 (2001).

¹⁹ In scope, TOPA's breadth is exhaustive, applying in quantitative measure to a single renter in single-unit dwelling as well as to tenants living in 50-plus unit apartment complexes. TOPA grants statutorily-mandated rights to renters regardless of income. TOPA imposes restrictions on the eviction of elderly or disabled tenants.

²⁰ D.C. CODE ANN. § 42-3401.03(16) & (17) (2001); D.C. Code Ann. § 42-3404.05(a-2) (2001); D.C. Code Ann. § 42-3402.08 (2001).

²¹ Harrison Institute for Public Law, Georgetown University Law Center, *An Analysis of the Strengths and Deficiencies of Washington, D.C.'s Tenant Opportunity to Purchase Act* (Summer 2006), available at <http://www.knowledgeplex.org/showdoc.html?id=183436> (last accessed Apr. 1, 2011) (study funded by Fannie Mae Foundation and conducted by the Georgetown University Law Center's Harrison Institute for Public Law).

²² Debbi Wilgoren, *A Crash Course in Responsibility: With Capitol Manor Reborn, Co-op Owners Step Into Their New Role as Homeowners*, WASH. POST, Dec. 16, 2005 (Metro). An ongoing area of concern is tracking the functioning properties that tenants have acquired through the TOPA process.

3. Procedural Framework

The following is a general description of the TOPA framework for purchase of an apartment building with five or more units.²³ Upon the owner's decision to sell, the owner must notify a government agency and place a standard notice in English and Spanish conspicuously in the common areas of the building.²⁴ This standard notice informs tenants of the owner's intention to sell and of their right to purchase, and provides phone numbers to government offices that can provide tenants with assistance. Next, typically, the tenants organize a tenants' association, and notify the owner that the tenant's association intends to purchase the building.²⁵ TOPA then sets forth several deadlines for due diligence, negotiation, a good-faith deposit, and closing.²⁶ The entire process can take approximately one year to complete.

The purchase price, pursuant to TOPA, can be the same as any bona fide offer that the owner previously received²⁷, thus ensuring that the owner gets the same market value from the tenants' association with its statutorily-mandated right as it would from a private actor in the market.²⁸ If all goes well, the tenants' association purchases and operates the building. Typically, the tenants' association's next step is to renovate and convert from a rental regime to a cooperative or condominium regime.²⁹ Often a mission-driven lender or the DC government

²³ The process described herein is for an apartment building with five or more residential units. The process and deadlines are different for buildings with less than five residential units. D.C. Code Ann. § 42-3404.011 (2001); D.C. CODE ANN. § 42-3404.10 (2001) (2 to 4 units); D.C. CODE ANN. § 42-3404.09 (2001) (single family accommodation).

²⁴ D.C. CODE ANN. § 42-3402.03(a) (2001).

²⁵ D.C. CODE ANN. § 42-3402.03(b) (2001); D.C. CODE ANN. § 42-3404.11(2001).

²⁶ D.C. CODE ANN. § 42-3404.05 (2001).

²⁷ A buyer may approach the owner of the property with an offer to purchase the property, thus establishing a bona fide offer. In this circumstance TOPA requires the owner of the property to first give the tenants an opportunity to purchase to property.

²⁸ D.C. CODE ANN. § 42-3404.02(a) (2001).

²⁹ For a discussion of the benefits of Cooperative Housing, see Jennifer C. McStotts, *Dwelling Together: Using Cooperative Housing to Abate the Affordable Housing Shortage in Canada and the United States*, 32 GA. J. INT'L & COMP. L. 131 (2004).

provides financing for the project, that includes a requirement that the new regime impose some type of affordability restriction to ensure the long-term preservation of affordable housing inventory.³⁰

III. An Analysis of Population, Income and Housing Cost Data

The United States Census Bureau (“Bureau”) collects census data on a rotating schedule. In the modern era, the Bureau conducts an exhaustive data collection for Population and Housing Census every ten years.³¹ Every five years, the Bureau conducts an Economic Census and a Census of Governments. Collectively, sufficient data exist to examine population, income and housing trends in the U.S. and, more importantly for our purposes, in DC.³²

This analysis considers census data starting in 1980, the year TOPA was enacted, and ending in the year 2000 (“Target Period”) to provide an objective basis upon which to consider the effectiveness of TOPA in “generating or preserving” affordable housing in DC. In addition, it examines and cross-references data collected by other entities and repositories likely to possess relevant data.³³

A. Population

In 1980, the population of the District of Columbia was 638,333. By 1990, the population of the District decreased by 5 percent to 606,900. By 2000, the population of the District decreased even further by 6 percent to 572,059. Thus, during the Target Period there was an overall 11 percent decrease or loss of 56, 274 in the population of DC.

³⁰ Affordability restrictions raise issues in and of themselves; as there is a tension between preservation of affordable housing inventory and the renter-turned-homeowner’s potential desire to sell their property at the highest price possible at some point in the future.

³¹ See “About Us”, <http://www.census.gov/aboutus/> (last visited on Apr. 1, 2011).

³² The data has been limited to DC proper, as opposed to the Washington, D.C. greater metropolitan area. The data referencing monetary figures are all in nominal dollars and have not been adjusted for inflation.

³³ Center for Housing Policy, Washington, D.C. Available online at: <http://www.nhc.org/housing/chp-research/>.

B. Income During the Target Period

In 1980, the median household income (“MHI”) was \$16,211 and accordingly the corresponding affordable housing cost (“AHC”), calculated at three times MHI,³⁴ was \$48,633. By 1990, the MHI was \$30,727 and AHC was 92,181. *Id.* By 2000, the MHI was 40,127 and the AHC was \$120,381. *Id.* Thus, during the Target Period the MHI almost doubled, increasing by 49 percent, and the affordable housing cost almost tripled, by increasing at a rate of sixty-one percent.

C. Housing Cost During the Target Period

In 1980, there were 40,798 mortgaged homes in DC and 20,455 of them were classified as affordable, i.e. 50-percent of all mortgages homes were affordable. By 1990, there were 46,967 mortgaged homes in DC and 14,732 of them were affordable, thus 31 percent of all mortgaged homes were affordable. By 2000, there were 55,138 mortgaged homes in DC and 16,709 of them were affordable, thus thirty-percent of all mortgaged homes were affordable.

In summary, during the Target Period, although the total number of mortgaged homes increased from 40,798 to 55,138, the percentage of mortgaged homes that were affordable dropped from 50 percent to 30 percent. In 1980, the median household income was \$16, 211, the median home price (MHP) was \$68,800, and the difference between the MHI and the MHP was \$20,167. By the end of the Target Period, the difference between the MHI and the MHP had increased to \$36,819.³⁵

The data support several conclusions about the housing dynamics taking place in the District during the Target Period. First, the District lost residents during the Target Period.

³⁴ Some advocate calculating AHC at five times MHI, instead of three times MHI. Even assuming a five time MHI for AHC the inventory of affordable housing decreased during the Target Period. All subsequent references to affordable herein refer to the three times MHI standard.

³⁵ According to the District of Columbia’s task force on affordable housing.

Second, the residents that remained or moved into the District were of a higher income level than those residents that left the District. Third, the price of homes in the District increased dramatically during the Target Period. Finally, the number of affordable homes during the Target Period decreased dramatically.³⁶

At a future date, a supplemental analysis of DC housing data is necessary to examine the period from 2000 thru 2010. Given that during that period a housing bubble was created, rose and met its demise causing a global recession, banking, credit and Wall Street debacle, one may expect that affordable housing disappeared at an amazing rate during the bubble, and reappeared when the bubble burst. However, when the bubble burst, there was either no credit available for mortgages or underwriting guidelines had sufficiently changed to effectively deny low income residents of DC from qualifying for a mortgage. More troubling is the fact that low income people disproportionately lost their jobs during the global economic recession, and have yet to either find new employment or reclaim lost income.³⁷

IV. Reforms and Improvements To Preserve and Generate Affordable Housing

The right to purchase housing provided by TOPA is merely a pyrrhic victory if the former tenants cannot afford to buy or live in the housing. To facilitate the further success of TOPA, additional financial supports are necessary. This section discusses two possibilities to

³⁶ The number of white residents of the district increased during the Target Period, and the number of African-American residents decreased. This racial shift has significantly altered DC which previously had one of the nation's largest concentrations of African-Americans.

³⁷ According to a report released Sept. 10, 2009, by the U.S. Census Bureau, 39.8 million people lived in poverty in 2008, a one-year increase of 2.6 million people and 6.85 percent. Even more troubling was the rise in the number of people in deep poverty. Those in households earning less than half of the federal poverty threshold rose by 7.69 percent, or 1.2 million people, to more than 17.0 million people. See Natl. Low Income Housing Coalition, *As Predicted, Recession Increases Deep Poverty*, available at http://www.nlihc.org/detail/article.cfm?article_id=6401&id=48 (last visited Apr.1, 2011) ("The increase in the poverty rate, especially deep poverty, gives a new urgency to the need for a substantial increase in federal housing assistance. People in deep poverty are at high risk of homelessness; methodology developed by the National Alliance to End Homelessness shows that an increase of this magnitude translates to potentially 123,000 to 269,000 more people becoming homeless").

address financial concerns: (1) a legal structure that controls costs; and (2) a method for developing capital resources for tenant organizations.

A. Making Limited Equity Cooperatives Work for Today and Tomorrow

There are numerous competing interests at work regarding the preservation of affordable housing. These competing interests manifest themselves in policy and practice as parties respond to the affordable housing crisis. Such conflicts underscore the fact that affordable housing is not the only achievable goal for many tenants relying upon TOPA.

A compelling example of the conflicts and tensions relating to TOPA is illustrated by the Limited-Equity Cooperatives or LECs, one of the primary mechanisms through which the "first right to purchase" has been deployed within the District.³⁸ LECs are a "special type of cooperative" that offers ownership as a solution to the affordable housing problem.³⁹ Upon creation of a tenant association to acquire the property, current residents are afforded the right to prequalify and become members or shareholders of the co-op association. Under this purchasing structure, subsidized financing from the District enables low-income purchasers to buy their residence when the building acquisition is completed.⁴⁰ Inevitably, low-income residents who leave a LEC receive far less money from the sale than ordinarily occurs when one sells their residence. This hinders wealth-creation for the residents of LECs.⁴¹

³⁸ O'Toole and Jones, *supra* note 3 at 380 ("Cooperatives are perhaps the purest form of tenant purchase because tenants maintain control of the process and the property from the moment the offer is received.").

³⁹ Figueroa et al., *supra* note 3, at 5.

⁴⁰ *Id.* at 6.

⁴¹ Indeed, this raises the question of whether a low-income resident would be better-off selling their TOPA right, and never participating in a LEC, since it is possible to receive more money from the sale of their TOPA right than from the sale of their interest in an LEC.

A recent study by the Coalition for Nonprofit Housing & Economic Development argues that LECs often have "stemmed the tide of displacement" for thousands of DC residents.⁴² The Coalition found that 81 LECs were created over the twenty-five years between 1977 and 2004. Approximately 75 percent, or 57, of these LECs are still operating in 2010. Another 18 percent have been sold or converted to condos. Five percent have been foreclosed, and the remaining two percent are unknown.⁴³ Among the 57 operating LECs, the Coalition study found that 80 percent were in "stable or excellent condition with 20 percent in poor condition."⁴⁴ While the 75 percent amounts to only 2.25 LECs per year over the 25 year period, the 57 LECs in operation in 2004 provided 2,269 residential dwelling units.⁴⁵

This data supports the conclusion that LECs are an effective tool in preserving affordable housing units. In fact, the Coalition sees the LEC as a "precious resource" for assuring ongoing affordable housing and identifies a number of concerns that it feels must be addressed in order to assure the continued viability of LECs at a time when federal support for low-income housing remains uncertain.⁴⁶ Specifically, the coalition is concerned about LECs': deteriorating structures; turnover and vacancy rates; dissatisfaction with management companies; and a general need to provide better mechanisms of financial stabilization, such as refinancing for repairs and restructuring debt.⁴⁷

In response to the tension between the creation of wealth for low-income residents and the need for preservation of affordable housing units for future usage, the Coalition recommends

⁴² Figueroa et al., *supra* note 3, at 17.

⁴³ *Id.* at 9.

⁴⁴ *Id.* at 3.

⁴⁵ *Id.* at 11.

⁴⁶ *Id.* at 3.

⁴⁷ *Id.* at 25.

consideration of alternative equity accrual options⁴⁸, as a suggested improvement in the LEC structure. The Coalition further recommends using additional modifications such as Individual Development Accounts (“IDAs”)⁴⁹ or savings accounts that would help LEC participants to use their LEC participation as a stepping stone either to a single family dwelling or other equity-building opportunities.⁵⁰ If implemented, these suggestions would be a step in the right direction towards addressing a tension in policy outcomes pursuant to TOPA.⁵¹

B. Fixing the Funding

One of the major sources of funding for TOPA has been the City's Housing Production Trust Fund.⁵² By the end of 2010, the fund will be down to only \$3.6 million, delaying housing that would have been coming onto the market by at least two to three years.⁵³ More critical, associations that already purchased their units expected further funds to be available to renovate and restore their structures.⁵⁴ Indeed, one of the primary reasons that tenant groups come together to purchase is having the ability to afford long-needed repairs and renovation, which with the reduction in the Trust Fund are now virtually impossible.⁵⁵ Councilmen have pointed

⁴⁸ An alternative investment is any investment that falls outside the realm of traditional stocks, bonds and mutual funds. The most common alternative investment is single family real estate. However, there are many other alternative investment options such as: Commodities, i.e. timber, gold, oil, and gas; Real Estate, i.e. commercial, international, development; and Small Business, i.e., franchises, hotels, vacation rentals. <http://www.nuwireinvestor.com/about/whatisanalternativeinvestment.aspx> (last visited Apr. 1, 2011).

⁴⁹ Individual Development Accounts are public policy instruments designed to provide asset development for poor and low-income individuals and families. For an explanation of IDAs, see Capital Area Asset Builders, *History of IDAs in D.C.* available at <http://caab.org/programs/IDA-history.php> (last accessed Apr. 1, 2011).

⁵⁰ Figueroa et al., *supra* note 3, at 26.

⁵¹ A differentiation that also challenges to some extent the notion that LECs provide tenants with control over the purchasing process. See O'Toole and Jones, *supra* note 3.

⁵² Lydia DePilllis, *Buyer's Remorse*, Washington City Paper, May 21, 2010, at 8. See also Housing Trust Fund Project, <http://www.communitychange.org/our-projects/htf> (last visited Apr. 1, 2011).

⁵³ DePilllis, see also Housing Trust Fund Progress Report 2007, <http://www.communitychange.org/our-projects/htf/our-projects/htf/other-media/HTF%2007%20final.pdf> (last visited Apr. 1, 2011).

⁵⁴ DePilllis at 8.

⁵⁵ *Id.* at 8

out that the failure to fund the Trust highlights the changing racial and economic make-up of DC residents.⁵⁶

The acquisition of continuing financial support to promote long-term stability and continuing affordability is needed for TOPA to be effective. As one major study has stressed in its recommendations for addressing financing issues and overcoming obstacles to promote long-term stability, funding concerns arise at a variety of critical stages during the purchase process.⁵⁷ A good faith deposit is needed when the tenant association goes to contract.⁵⁸ In addition to funding for renovation and ongoing maintenance needs, a number of projects face expiring Section 8 contracts, which must be renewed or restructured altogether.⁵⁹ In fact, the Coalition for Nonprofit Housing & Economic Development study concluded that the inability to refinance loans where necessary or to finance repairs constitutes the greatest threat to preserving this existing affordable housing.⁶⁰

⁵⁶ “Some of our city leaders have become enamored with a certain type of resident. . . . Tax incentives for amenities like new grocery stores are all very well and good . . . but are really aimed at a different type of Washingtonian. . . . [I]n a lot of cases they’re bringing in new people to the neighborhood, and that means the [existing residents] get gentrified out.” *Id.*

⁵⁷ Harrison Institute for Public Law, Georgetown University Law Center, *supra* note 22, at 17.

⁵⁸ “Predevelopment funding is needed until renovation of the building is complete and acquisition funding is needed when the association closes on the purchase.” *Id.* at 17. In addition to the incremental exposure risks lenders also “expressed concerns about lack of leadership among tenant associations, the inherent potential for the group to split into factions, the generally poor loan-to-value ratio in many of the TOPA transactions, and many lenders feel the need for additional financial support mechanisms to enhance the creditworthiness of tenant association borrowers.” *Id.* at 16.

⁵⁹ Figueroa et al., *supra* note 3, at 25.

⁶⁰ *Id.* at 25

Recommended solutions to these concerns include the creation of a loan fund to make short-term bridge loans to relieve acquisition time pressures and the development of a loan guaranty fund to enhance the credit of tenant association borrowers.⁶¹

C. Improving Technical Assistance

Another recommendation to improve TOPA is to improve technical assistance to tenants in order to navigate the complexities of the purchase process.⁶² Recommended solutions here involve persuading the nonprofit sector to take the lead in implementing technical assistance programs. Some technical assistant programs include a list of community organizers who can organize residents in TOPA situations, a list of organizations that can provide training to tenant groups, and identification or development of “written, video, and electronic training materials for tenant groups that would provide information about the TOPA process.”⁶³

V. Conclusion

The future does not bode well for the remaining low-income residents of DC if the trends during the Target Period continue. It is imperative that DC residents, organizations and politicians all work together to improve TOPA and increase the affordable housing inventory. Also, stakeholder should come together to generate new creative approaches that facilitate

⁶¹ Harrison Institute for Public Law, Georgetown University Law Center, *supra* note 22, at 21. These solutions depend upon getting “affordable housing advocates, community and non-profit lenders, and commercial lenders to intervene in order to restructure financing programs.” *Id.* at 21.

⁶² *Id.* at 10-16; *see also*, Figueroa et al., *supra* note 3, at 25.

⁶³ Harrison Institute for Public Law, Georgetown University Law Center, *supra* note 22, at 15. It should be noted that neighborhoods east of the Anacostia River, which are among the District’s poorest and most in need of technical housing assistance, are the areas that receive the least amount of development support. The community development corporations (CDCs) in the area do not assist tenants directly in the purchase of their buildings. “Only one, the Marshall Heights CDC, provides services tied to the TOPA process. It helps residents form tenant associations (although this assistance is not specifically TOPA-oriented but rather for tenant organization generally) and provides some training and counseling.” *Id.* at 13.

preservation and generation of affordable housing. Finally, the narrative around affordable housing in DC needs to shift to emphasize the value that a diverse DC provides to everyone.



***Making History in a Segregated Washington:
Dovey Johnson Roundtree and her 45-year Fight for Justice***

by Katie McCabe

They remember her still, 45 years after the fact, the lawyers, the law students, the rows of reporters who watched the beautiful African American lawyer named Dovey Roundtree take on the government in one of the most sensational murder cases the Nation's Capital had ever seen, the matter of *The United States v. Ray Crump*.¹ She was, in the unfolding drama of a trial where Washington had assembled its collective legal might and the outcome seemed a foregone conclusion, the one piece that did not fit.

A minister in her hours outside the courtroom, she held jury and spectators fast with the rolling, Biblical cadence of her speech, tempered her relentless objections with the soft accents of her Carolina beginnings, and muted her toughness with such old-fashioned civility that it was not until she'd nearly eviscerated the state's key witness that anyone in the courtroom realized what had happened.

She came at him by slow degrees, almost invisibly, on the second morning of the trial all of Washington was watching in the final week of July 1965. Perhaps better than anyone in the courtroom, she knew the fate the city expected for her client, Ray Crump, the black day laborer who'd been arrested eight months earlier for the murder of Georgetown socialite Mary Pinchot Meyer as she took her daily walk on the C& O Canal. Mary Meyer had moved in Washington's most glittering social circles. She was a niece of famed conservationist Gifford Pinchot, the former wife of a highly placed CIA officer, a frequent dinner guest at the White House, a friend

¹ *The United States v. Ray Crump*, Criminal No. 930-64 (D.D.C.).

and walking companion, the newspapers said, of Jackie Kennedy. Someone had to pay for the death of such a woman. And Washington assumed Ray Crump would be the one to do so.

Dovey Roundtree clearly did not make that same assumption. When she rose to cross examine the government's chief witness, a mechanic named Henry Wiggins, she approached him with an air of thoughtful speculation. Under oath, he had repeated to US Attorney Alfred Hantman what he'd told police on the day of the murder: that the sound of gunshots and screaming had drawn him to the wall bordering Canal Road, where he'd been servicing a stalled car, that he'd looked down at the towpath to see a Negro male standing over the prone body of a woman, putting "some kind of hand object" into his pocket. At that point, Wiggins testified, he'd rushed to phone police, giving them a description of a man about five feet eight and weighing 180 or 185 pounds. When Ray Crump appeared in the arms of the police, having been snagged by their dragnet, Wiggins instantly identified him as the man he'd seen with the body. In court he'd made that same unequivocal identification, and, when shown the pants and shoes police had taken from Ray Crump in the jail cell, and the hat and jacket they'd later fished from the Potomac River, Wiggins testified that these were the precise garments worn by the man standing over the corpse.

As Dovey Roundtree began her cross examination, she seemed almost incidentally to come to the point. Had Wiggins spoken with the prosecutor after his testimony the preceding afternoon, she wanted to know, and when, and where? By phone, or in person? Wiggins seemed flustered by the questions, confused, defensive. But she was patient, never losing her companionable tone as she meandered her way by slow degrees toward the heart of the matter. What was it, she gently pressed Wiggins, that Prosecutor Hantman had said to him yesterday? He had, after all, changed his testimony when he'd taken the stand that morning; in fact he'd

made “a gross change,” she told the Court, in the distance at which he placed himself with respect to the murder scene, shifting his estimate from two blocks to six blocks. Wasn’t it true, she asked, that Mr. Hantman was not satisfied with that testimony?

Wiggins fumbled. No, he insisted finally, interrupting himself as he tried to explain. It was simply a question of his giving the right name of the spot where he’d been standing.

And then, abruptly, Dovey Roundtree shifted direction.

“This morning,” she asked him, “do you remember that you said the defendant weighed 185 pounds?”

“Oh, yes ma’am, I did.”

“Do you remember, Mr. Witness, that you also said you had only a glimpse of the person you saw on the scene?”

“I remember that.”

“This morning, nevertheless, Mr. Witness, you are prepared to tell this court and this jury that these are the pants?” she asked, indicating Ray’s dark corduroy slacks on the evidence table.

“That’s right.”

“Positively?”

“Positive.”

“You are prepared to say that this is the cap?”

“That is the cap.”

“And that these are the black shoes?”

“That is right.”

“And that this is the jacket?”

“That is right.”

She looked over at the black wingtips Ray had been wearing that day, entered into evidence.

“Do you find any difference in black shoes?” she asked Mr. Wiggins. “If you see from a distance that a man has on black shoes, could you find any difference in those shoes than in other black shoes?”

“There isn’t too much difference,” he said. “The design on the shoes at a distance you cannot tell.”

“You can’t tell the design?”

“I can tell whether the shoes are dark, whether the shoes are light or brown or black,” he said.

“But you can’t tell if one pair is a particular pair of black shoes, or a particular pair of brown shoes if you see them two blocks away, can you?”

Wiggins shifted uneasily in the witness box. “I wouldn’t say that,” he answered.

“Could you describe the shoes?” she asked. “Did you know exactly how the shoes looked, which you say you saw this day?”

“Well, I can say that these shoes appear to be sort of a dress shoe. They were dark.”

Dovey Roundtree paused, and the jury shifted in their seats.

“Do you recall telling anyone that this defendant, the person that you saw, was five feet and eight inches tall?”

“Well,” he answered, “I believe I told one of the policemen which came down in the cruiser with me.”

“Would that, then, be an accurate estimate of what you saw, the man you saw weighed 185 and was five feet eight?”

Wiggins looked over at Ray Crump, the little slip of a person who sat hunched at the defense table. He was, the entire assembly knew, only two or three inches over five feet tall, and so slightly built he looked more child than man.

“That wouldn’t be an accurate estimate, no, ma’am.”

She turned to face the jury.

“Well, now, are you telling us now you gave them information which was not accurate?”

Wiggins hesitated. “I give it to them as close as I could remember,” he said.

“And you gave them, though, what you thought you saw from across the canal?”

“I tried to do my best.”

“All right. 185 pounds; five foot eight.”

“That’s right.”

Prosecutor Al Hantman came forward to question his witness again. He asked him if he’d had a clear view of the murder scene, whether anything had obstructed his vision.

“No,” Wiggins answered.

Dovey rose again. She asked Wiggins how Raymond Crump was dressed that day, when he’d seen him on the towpath with the two police officers and said, ‘That’s the man.’

“I didn’t look at him that hard,” he answered.

The courtroom went absolutely still. Dovey looked again at the jury, at their shocked faces, and back at Wiggins.

“Did you ever, Mr. Witness, look at this man hard?”

Wiggins did not reply.

But the jury - indeed, the entire courtroom - was looking, hard, at Ray Crump. And they were looking just as hard at Dovey Roundtree, whose uncompromising presence had so suddenly redefined the battle lines in this all-important case.

Only a handful of people in Washington knew, then, just how high the stakes really were in the matter of *The United States v. Ray Crump*. It would be years before rumors of CIA involvement in Mary Meyer's murder found their way into print, and whispers of her affair with the late President Kennedy took on the weight of documented fact with the revelation of her diary by her brother-in-law Ben Bradlee. Bradlee chose, during his trial testimony and for 30 years afterward, to avoid all mention of the diary he and his wife had found in Meyer's art studio the day after her murder, nor did he divulge until decades later the fact that the head of CIA counterintelligence had been on the premises as well, searching for that same diary. Viewed through the prism of those revelations, the case would take on a quality of mystery, and the victim would become the object of conspiracy theorizing and endless speculation.

But if the underlayers of Mary Pinchot Meyer's existence remained hidden from public view in the Summer of '65, it is also true that those who followed Dovey Roundtree's legal maneuvers with such awe in the fourth floor courtroom of the U.S. District Court for the District of Columbia saw but a partial picture of the woman whose entire existence up until that point had been defined by the search for justice, the defiance of impossible odds, and the conquest of fear.

Her life, she would say in later years, began with fear - the kind of terror known to very young children who are confronted either with terrible loss or extreme physical danger. The child Dovey Mary Magdalene Johnson knew both. There was, to begin with, the death of her

father, felled in the autumn of 1919 by the second wave of the influenza epidemic brought home by the soldiers returning from World War I. She was five years old, and the emptiness inside her parents' house swallowed her up for days, until she and her mother and three sisters were taken in hand by Dovey's maternal grandmother, Rachel Bryant Graham, and whisked to the sanctuary of her home. In the tiny African Methodist Episcopal Zion parsonage where "Grandma Rachel" lived with her husband, the Rev. Clyde L. Graham, she set about healing the broken family.

Darkness of another sort shadowed Dovey's girlhood in Charlotte, North Carolina. From the time she could think, an unease about all things associated with white people insinuated itself into her consciousness. Huddled beneath the great wooden quilting frame where her grandmother and the neighbor ladies gathered to sew and to gossip, Dovey heard whispers of the Klan and the horrors it perpetrated upon men in the neighborhood, men whose names she knew. On the terrible night when there came a thundering of hooves through the hot summer darkness and her grandmother shuttered up the house and doused the kerosene lamp and pushed the rest of the family under the kitchen table, Dovey's amorphous daytime fear of white people hardened into a knot of terror.

But the child who knew great sorrow and great fear also saw fierce and overpowering courage in the person of her grandmother, a five-foot-tall whirling dervish of a woman who beat back grief, poverty, danger and the ugliness of racism with the entire force of her being. Grandma Rachel had survived an assault, as a girl of 12 or 13, by a white overseer who'd broken her feet when she'd rejected his sexual advances, and though she limped for the rest of her days, she moved determinedly through life. She'd risen up, fighting, after the death of her young husband at the hands of the Klan, and with the AME Zion preacher who became Dovey's grandfather, she created a home that Dovey was forever to remember as a bastion against Jim

Crow and a well of religious faith. A woman with only a third-grade education, Rachel Bryant Graham imbued her granddaughters with ambition and a deep sense of their own worth in a segregated society. The Jim Crow signs were a lie, she preached, and so were the invisible lines on trolley cars and buses, all of which bespoke a falsely divided world that would someday end – perhaps not in her lifetime, but surely in theirs. The longest civil rights march she ever made, Dovey would later recall, was the mile she walked to downtown Charlotte when her grandmother yanked her off a segregated trolley car rather than permit her to endure the racial epithet the driver had flung at her. “Get that pickaninny out of here,” he’d nearly spat at Grandma when six-year-old Dovey jumped on board and into the front seat. In one swift motion, Grandma Rachel had pulled the cord, taken Dovey by the hand, and marched with her in silence all the way to town and back, even as trolley after trolley passed them by and Grandma’s limp grew worse and worse. What she told the family that night would stay with Dovey forever: “My chillun’,” she said, “are as good as anybody.”

Grandma Rachel did more than preach self-reliance and self-worth; she offered her granddaughters a living example of black achievement in the person of the internationally renowned woman who became her friend: the great educator Mary McLeod Bethune. The origin of the improbable alliance between the poorly educated minister’s wife and the famed activist remained a mystery to Dovey. Perhaps, she would later conjecture, it sprang from their shared commitment to the burgeoning black women’s movement and evolved during Bethune’s barnstorming sessions across the South as she crusaded for her National Association of Colored Women’s Clubs. Whatever its genesis, her grandmother’s connection to Mary McLeod Bethune transformed Dovey’s life. Bethune’s rise from poverty to the status of presidential adviser and college president so inspired Dovey with a sense of infinite possibility that she heeded the

suggestion of her eighth-grade teacher that she apply to the elite and expensive Spelman College during the Great Depression. When she'd graduated from Spelman, it was Bethune who intervened to place her squarely in the vortex of world events.

Twenty years were to pass between the time when the child Dovey Johnson gazed in awe upon the silk-hatted Mary McLeod Bethune, sipping homemade locust beer with her grandmother on the family's broken-down sofa in Charlotte, and the moment when the great woman selected her for a place in the first class of African American women to train as officers in the new Women's Army Auxiliary Corps (later the Women's Army Corps, or WAC). One moment, Dovey was teaching eighth grade in the tiny town of Chester, South Carolina and searching for her life's mission; the next moment, she was answering Bethune's call to become a part of history.

To enter the U.S. military, as Dovey did in May 1942 was to confront segregation in a particularly brutal way. Shouted out of the Charlotte Post Office by a white enlistment officer who insisted there was no place for her in the Army, she made her way northward, at Bethune's recommendation, to Richmond, where she was grudgingly accepted and sent to train at Fort Des Moines, Iowa. There, she met Jim Crow full in the face in the person of the white sergeant at the gate.

"White women on one side!" he shouted. "Negroes on the other!"

The mess halls were segregated, as were the barracks and even the swimming pool, which underwent mandatory "purification" after the black women swam in order to make it acceptable for white use.

It was in this crucible that the 28-year-old Dovey Johnson began forging her identity as an activist. She felt keenly her obligation to stay the course as one of the 39 black women

Bethune had selected to train in the first class of officers. And yet the Army's rigid segregationist policy, imposed on uniformed women who'd chosen to serve the United States, offended her more deeply than anything she'd experienced as a child in Charlotte or a college student in Atlanta. Initially challenging the segregated mess halls as a lone protester, and then involving Bethune in the fight, she was quickly branded a "walking NAACP" and assigned to recruiting duty in the Deep South by white superiors who hoped to neutralize her influence over her black comrades on the base. Instead, they unwittingly empowered her. Traveling alone and without Army protection across the South on buses and trains in 1942 and 1943, often at risk of her life, Dovey aggressively recruited African American women with the vision of postwar equality she had absorbed from Mary McLeod Bethune. "A free tomorrow," she called it, holding out to her well-educated black audiences the ideal of a colorblind society that was achievable if they could but stay the course long enough to break down the gates of segregation.

"We fight this day for the right to *live*," she told the women of Ohio on one of her final recruiting assignments, late in 1943. "This right knows no geographical boundaries, no barriers, nor differences of sex, race, creed, or color Whatever the past, however dark the present, your obligation, my duty to the future is not lessened. The way we participate in this global war, the way we think and work for the common good today reveals just how much we want a decent world in which to live after this conflict is ended."

African American women by the hundreds rose to that challenge, enlisting in such numbers that the Army had difficulty placing them, given the reluctance of white male officers to train black recruits. But the record stood, and in making it, Captain Dovey Johnson changed the racial face of the military before it was legally desegregated in 1948 by Presidential order.

She herself was transformed in the military, evolving into a public advocate for equality during her years in the Women's Army Corps. Even as she pitched the ideal of the colorblind democracy she believed lay ahead for America, she fought Jim Crow on the ground. When the Fort Des Moines commandant proposed a segregated platoon late in 1944 after having loosened the racial restrictions on the base, she took him on in a public meeting. Removing her Captain's bars to signal willingness to resign her commission if the Army persisted in its plan, she risked court martial and dishonorable discharge. But as a result of her speech about the Four Freedoms for which American troops were fighting, and the wrong of segregation, the commandant rescinded the order for the all-black platoon. In that moment, Dovey would later say, she discovered the lawyer in herself.

It required only the eloquence of Constitutional lawyer and activist Pauli Murray to set her on the path toward law school. When she met Murray during a postwar stint with labor leader A. Philip Randolph's Federal Employment Practices Committee campaign, Dovey embraced what she called "the gospel according to Pauli," the argument that the single most effective vehicle for racial reform was the law. Her pursuit of civil rights through the law became a mandate so all-consuming that everything else gave way, including her marriage to her college sweetheart William Roundtree, whom she had wed after the war in the hope that he would join her at Howard Law School and take up the civil rights cause. But it was not to be; her cause was not his, and they quickly divorced. It was the law, she often said, that became her mistress.

Dovey Roundtree entered Howard Law on the cusp of the civil rights legal revolution. When she arrived in the fall of 1947, the place pulsed with the brilliance of the legal minds leading the charge against 'separate but equal' that would culminate in the groundbreaking 1954

Supreme Court ruling, *Brown v. Board of Education*.² Thurgood Marshall, George E.C. Hayes and James Madison Nabrit, Jr. shaped Dovey and her classmates in the mold of the great attorney who'd recruited them for the fight, the legendary Charles Hamilton Houston. "A lawyer's either a social engineer or he's a parasite on society," Houston famously taught his protégés. Dovey took that to heart as she witnessed the assault on *Plessy v. Ferguson*³ from her seat in the law school's moot courtroom, where the NAACP Legal Defense Fund attorneys rehearsed their Supreme Court appearances for the law students and faculty.

Sipuel v. Oklahoma,⁴ *Sweatt v. Painter*,⁵ *McLaurin v. Oklahoma*⁶: these were the cases that would take their place in history as the foundation for the argument the LDF lawyers would make in *Brown*. Dovey, along with her classmates, memorized the particulars and celebrated the incremental victories that chipped away at the doctrine of 'separate but equal' even as she chafed at the Supreme Court's reluctance to dismantle segregation *per se*. It was while watching Marshall, Hayes and Nabrit in the so-called "dry runs" for these cases that she set her sights on becoming a trial lawyer. Yet, none of the great cases of her law school years hardened her resolve quite so sharply as her first case before the bar of the District of Columbia, filed on behalf of her grandmother and her mother, who'd been wronged in a way she could not tolerate in their northward journey to one of the great celebrations of her life -- her law school graduation.

They'd held first class tickets on the Southern Railroad for their trip from Charlotte to Washington – tickets she herself had purchased at Union Station and mailed to them. When

² *Brown v. Bd. of Educ.*, 349 U.S. 294 (1954).

³ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁴ *Sipuel v. Oklahoma*, 322 U.S. 631 (1948).

⁵ *Sweatt v. Painter*, 339 U.S. 629 (1950).

⁶ *McLaurin v. Oklahoma*, 339 U.S. 637 (1950).

they'd boarded in Charlotte, though, the conductor had herded them out of the half-empty white car into the overcrowded Jim Crow coach, where they rode, standing, until at last her grandmother collapsed on the closed seat of the toilet a few miles outside Washington. The sight of her Grandma Rachel - then 75 years old - limping toward her on the platform at Union Station, and of her mother, flailing her arms and weeping, propelled Dovey head first into the DC courts even before she'd taken the bar exam.

Such was the urgency of the matter in her mind that she prevailed upon her classmate and future law partner Julius Winfield Robertson to file the complaint in *Rachel Bryant Graham and Lela Bryant Johnson v. The Southern Railroad* in the U.S. District Court for the District of Columbia. Encouraged by the Supreme Court's ruling that same month in the train desegregation case of *Henderson v. U.S.*,⁷ which held that railroads were obligated to provide black passengers with dining car facilities 'substantially equal' to those they provided whites, Julius Robertson sued the Southern Railroad for breach of contract, and the moment Dovey had been sworn in as a member of the bar, she entered her appearance in the case. Those two first class tickets, she and Julius Robertson argued, constituted contracts – promises, in effect, of first class passage.

She emerged from the fray shaken and enraged – not because she'd lost, but because the “win” was so humiliating. The pittance she and her partner wrung from the Southern Railroad was attributable, she believed, not to any legal argument of theirs nor to any concern for real justice on the part of the court, but simply to the magic her Grandma Rachel had worked on the railroad's lawyer when he came to Charlotte to depose her. Once Grandma had assessed him as that rarest of all species, a decent white man, she reported to Dovey that she'd served him her

⁷ *Henderson v. United States*, 339 U.S. 816 (1950).

homemade gingerbread and warm applesauce. It was what Dovey would come to call “the human thing” that had prompted him to recommend to the notoriously segregationist Southern Railroad that they offer token damages. But the award was small, so small in fact that she erased it from her memory, vowing that the next time she aimed at the face of Jim Crow in a court of law, she would not miss. From that moment in 1951, brand new to the bar and without a paying client to her name, Dovey Roundtree focused on the larger civil rights battlefield where, she believed, she might finally win justice for her people.

Washington, DC in the early 1950's was no easy place to win justice for anyone if you were a black attorney. It was, in fact, no place for men and women of color to contemplate the practice of law at all. A black lawyer in those days had to leave the courthouse to use the bathroom or eat a meal. And the rigidly segregated DC Bar Association excluded even the distinguished NAACP Legal Defense Fund advocates who appeared before the Supreme Court men like Howard Law professor George E.C. Hayes, on the *Brown v. Board of Education* legal team - and the independent civil rights lawyer Belford Lawson, who'd argued the 1950 train desegregation case of *Henderson v. U.S.* that had inspired Dovey to seek redress for her family. Black clients who sought assistance in personal injury or negligence matters from one of the city's small cadre of black lawyers were generally referred “uptown” on the premise that if they hoped to have anything like a fair shake before the city's white judges and all-white juries, they needed a white lawyer. It was a world that marginalized minority lawyers of both genders, but particularly women, who were regarded by the bench and the bar as an alien species. Mere survival was so difficult that Dovey pieced out her income with a full-time day job as an attorney-adviser in the Department of Labor, manning the desk at “Robertson and Roundtree” at

night, while Julius Robertson, desperate to move his wife and growing family out of public housing, worked nights at the Post Office and took the day shift at the law firm. When Dovey's payment for a will she'd done for an Anacostia matron named Hortense Washington arrived in the form of collard greens, eggs and red peppers, she celebrated, feasted, and advised Julius, who kept the books, that Mrs. Washington's account was "Paid in Full." One will, she told her partner, was bound to lead to another.

And then, on a sweltering September afternoon in 1952, while Dovey Roundtree and Julius Robertson were in the throes of figuring out how to survive, a client darkened their door with a case that changed civil rights history. The matter of *Sarah Keys v. Carolina Coach Company*,⁸ arising from the Jim Crow complaint of an Army private named Sarah Louise Keys, would over time reverberate across all 48 states and transform bus travel for black passengers. That such a small case would wind its way into the 1961 Freedom Riders' struggle and empower Attorney General Robert Kennedy to mandate a permanent end to interstate bus segregation was an outcome neither Dovey Roundtree nor Julius Robertson could possibly have imagined.

Nothing about the petite, shy, almost diffident 22-year-old woman who sat with hands folded in their tiny office on 11th Street, NW, betokened magnitude of any kind. Sarah barely spoke, deferring repeatedly to her father, a towering, handsome man clearly seething with rage at the Carolina Trailways driver who'd thrown his daughter off his bus, the policeman who'd arrested her for disorderly conduct, and the judge who'd convicted her of that charge. The father had sought the legal assistance of the NAACP, first in North Carolina and then at the organization's office in Washington DC, headed by Dovey's old law professor Frank D. Reeves,

⁸ Sarah Keys v. Carolina Coach Company, 64 MCC 769 (1955).

who had referred the matter to her. It was David Keys, not his daughter, who seemed to be burning for redress.

But Sarah's demeanor changed when she finally found her voice and began talking about how proud she'd been to be traveling in uniform as she set out from Fort Dix, New Jersey to her home in the little town of Washington, North Carolina, for her first furlough since joining the Women's Army Corps a few months earlier. She'd transferred without incident in Washington, DC from the northern carrier she'd boarded in New Jersey to a Carolina Trailways bus, she said, where she'd taken the fifth seat from the front, in the empty white section, and drifted off to sleep. It was when that bus had changed drivers in Roanoke Rapids, North Carolina that the trouble began. There, she was jolted awake by the voice of a new driver, demanding her ticket and then insisting, when she presented it, that she move to the back of the bus and yield her seat to a white Marine. When Sarah refused – "I told him I preferred to stay where I was," she told Dovey and Julius -- the driver emptied the bus of everyone but her, called for another vehicle, boarded the other passengers, and slammed the door in Sarah's face. When she approached a policeman for help inside the terminal, he'd arrested her for disorderly conduct and jailed her. And the mayor's court in Roanoke Rapids, North Carolina had upheld the charge.

In Sarah's account of the driver's treatment of her in the blackness of a Southern night, Dovey saw a mirror of her own experience in uniform, eight years earlier, when she'd been thrown off a Miami bus and forced, just as Sarah had been, to give her seat to a white Marine. She'd felt compelled, then, to accede to the demand of the Miami driver in order to avoid being jailed, knowing what a dim view the Army would have taken of her defiance of a Jim Crow law. In the 1940's, there were cases where black officers had been court martialed for such actions.

But this was 1952. In theory, she and Sarah Keys occupied different worlds. The Supreme Court had declared state Jim Crow laws inoperable on interstate buses in the 1946 case of *Morgan v. Virginia*⁹ on the grounds that the imposition of widely varying statutes on black interstate passengers precipitated multiple seat changes and resulted in the kind of inconsistency prohibited by the Constitution's commerce clause. The *Morgan* ruling, however, had been rendered impotent by the crafty maneuvers of the Southern bus lines, who'd put their own Jim Crow regulations in place within weeks of the decision's announcement. As private companies, they'd managed to dodge interference from federal and state courts, as well as from the Interstate Commerce Commission, the agency charged with regulating carriers crossing state lines. The ICC had always construed the non-discrimination language in the Interstate Commerce Act as permitting segregated seating, and it had chosen to ignore the *Morgan* ruling on the basis that it applied only to state Jim Crow laws and not to private carriers.

And so for six years, the loophole left by *Morgan* had been exploited at the expense of black bus passengers traveling across the segregated states. It was clear to Dovey that the time had come to close that loophole by going after a carrier and its Jim Crow regulations. In fact, she and Julius Robertson were persuaded that there'd never been a time quite so propitious, in all of history, for such a suit as the one they filed in the U.S. District Court for the District of Columbia on November 19, 1952 on behalf of Sarah Keys.¹⁰ Even as they filed their case, Thurgood Marshall and his NAACP Legal Defense Fund team were preparing to go before the Supreme Court of the United States to present oral arguments in the five cases subsumed under *Brown v. Board of Education*.

⁹ *Morgan v. Virginia*, 328 U.S. 373 (1946).

¹⁰ *Sarah Keys v. Safeway Trails Inc., & Carolina Trailways Inc.*, Civ. Action No. 5234-52 (D.D.C.).

It was true that Thurgood Marshall said nothing directly pertinent to bus desegregation or interstate travel in the oral argument to which Dovey Roundtree and Julius Robertson sat listening in the Supreme Court visitors' gallery on December 9, 1952, as honored guests of their former professor James M. Nabrit, Jr. Marshall's focus in *Briggs v. Elliott*¹¹, the first of the *Brown* cases, was the Fourteenth Amendment and its equal protection clause as it pertained to the facts of segregation in the Clarendon County Public Schools of South Carolina. But he was pressing the high Court to reject *Plessy v. Ferguson* at its core, and if the Court so ruled, the ramifications in every corner of America, including the arena of public transportation, would be profound.

It was that hope which compelled Dovey Roundtree and Julius Robertson to press onward after the U.S. District Court dismissed the *Keys* complaint on jurisdictional grounds in February 1953, and take the case before the Interstate Commerce Commission. There were civil rights lawyers, they knew, who would consider their quest a fool's errand, given the ICC's record in segregation matters. Known as "The Supreme Court of the Confederacy," the Commission had ruled against every black petitioner who'd ever come before it with a Jim Crow train complaint over its 66-year history, and it had never heard a bus desegregation complaint. Still, Dovey and Julius believed that even the ICC would have to attend to the Supreme Court if the Court should repudiate 'separate but equal' in *Brown*. And if it did, the implications were far-reaching, given the Commission's critical role as the enforcer of interstate travel regulations. They were the agency that posted the signs on trains and buses designating seating arrangements, that heard complaints against the carriers, that oversaw the on-the-ground operation of every aspect of travel from one state to another. And so it was that on September 1, 1953, Dovey and

¹¹ *Briggs v. Elliott*, 347 U.S. 497 (1954).

Julius filed the complaint of *Sarah Keys v. Carolina Coach Company* before the ICC. On that date, Sarah Keys became the first black petitioner ever to bring a bus segregation complaint before that body.

What they asked, in their historic complaint, was that the ICC re-evaluate its traditional interpretation of four key words in the Interstate Commerce Act, the words that forbade “undue and unreasonable prejudice” against bus and train travelers crossing state lines. Jim Crow seating, they argued, constituted such prejudice. Still awaiting a ruling in *Brown*, which they were certain would clinch the matter, they cited a 1941 Supreme Court ruling, *Mitchell v. United States*,¹² tying the Fourteenth Amendment to the Interstate Commerce Act. What the first did in the realm of state action, the Court had said, the second did for the country’s motor carriers. In 1941, of course, both were construed as allowing segregation. But the key was that the relationship between the two had been laid out.

Everyone in the country except the ICC, it seemed, grasped the ramifications of the decision in *Brown v. Board of Education* when it was handed down on May 17, 1954. Certainly Dovey and Julius recognized its epochal nature as they sat spellbound in the high Court’s gallery, for the second time in two years, listening to Chief Justice Earl Warren read out the words stating that the very act of segregation was unconstitutional, that it affected the “hearts and minds” of schoolchildren “in a way never to be undone.” As they pointed out in the amended brief they filed in the wake of the *Brown* ruling, *Plessy* no longer had legal force.

The ICC disagreed. In a September 30, 1954 decision in *Keys*, ICC Commissioner Isadore Freidson stated that *Brown*’s ruling on public education had no bearing on the conduct of private business, such as that carried out by bus carriers. Dovey and Julius immediately filed

¹² *Mitchell v. United States*, 313 U.S. 80 (1941).

exceptions to Freidson’s ruling in which they invoked both the commerce clause and the Supreme Court’s reasoning in *Brown*. “It is submitted that what the Supreme Court did say in the ‘segregation cases,’ was that enforced separation generates a feeling of inferiority, stigmatizes those persons segregated and calls attention to their inferior status,” they wrote. “In any reasonable interpretation, it is logical to assert that the Supreme Court has decided that segregation *per se* in fields affected with a public interest subjects the person segregated to an unreasonable and constitutionally forbidden discrimination.”

This time around, the full 11-man Commission reviewed the case, and as a group, they found *Brown* persuasive, and highly relevant. One year after Dovey and Julius filed their exceptions, the ICC Commission saw fit, for the first time in its history, to condemn the doctrine of ‘separate but equal’ in interstate bus transportation, and, in a companion case filed by the NAACP, to do the same for train travel. In a ruling made public eight days before Rosa Parks took her historic stand in Montgomery, Alabama, the ICC stated in *Keys v. Carolina Coach Company*:

We conclude that the assignment of seats in interstate buses, so designated as to imply the inherent inferiority of a traveler solely because of race or color, must be regarded as subjecting the traveler to unjust discrimination, and undue and unreasonable prejudice and disadvantage We find that the practice of defendant requiring that Negro interstate passengers occupy space or seats in specified portions of its buses, subjects such passengers to unjust discrimination, and undue and unreasonable prejudice and disadvantage, in violation of Section 216 (d) of the [Interstate Commerce Act] and is therefore unlawful.

It would be the only time that a court or federal administrative body explicitly repudiated the ‘separate but equal’ doctrine in the field of interstate bus travel. The ruling had no bearing on travel *within* the segregated states; that would have to wait for Rosa Parks’ defiance of the municipal laws of the city of Montgomery, Alabama, and the national protest movement her actions precipitated. But the *Keys* case, along with the railway case decided the same day,

affected every bus and train moving across state lines, and every station at which they stopped. Hailed by New York columnist Max Lerner as a “symbol of a movement that cannot be held back,” the *Keys* ruling, and its companion train case, *NAACP v. St. Louis-San Francisco Railway Company*,¹³ made headlines across the country.

And yet, for all of that, six years would pass before the country felt the force of *Sarah Keys v. Carolina Coach Company*. From the time of the ruling in 1955 to the Freedom Riders’ campaign in 1961, *Keys* remained dormant, its effect nullified by the lone dissenter in the case, J. Monroe Johnson. Johnson, a 77-year-old South Carolina Democrat, went on to become the ICC’s chairman immediately after the *Keys* ruling, and he saw to it that the bus segregation banned by his ten ICC brethren continued unabated. For the duration of his tenure, no desegregation signs were posted on Southern carriers or in stations, no discrimination complaints considered, no enforcement implemented.

It was not until the civil rights movement exploded across the South in the wake of Rosa Parks’ historic action in Montgomery, Alabama, that the country was ready to listen to what the *Keys* ruling had said about Jim Crow in interstate travel. In 1961, the world looked on in horror at the violence perpetrated upon the Freedom Riders in their campaign to implement the Supreme Court’s 1960 *Boynton v. Virginia*¹ ruling banning segregation in bus terminal restaurants – the one travel-related arena that hadn’t been addressed in *Keys*. A chorus of protest by the Rev. Martin Luther King, Jr. and a host of other religious and political leaders, including Secretary of State Dean Rusk, prompted the Justice Department to take action. On May 29, 1961, Attorney General Robert Kennedy confronted the ICC in a petition citing *Keys*, and he pressed the Commission to deliver on it. The ICC had ignored the Supreme Court in *Morgan v.*

¹³ *NAACP v. St. Louis-San Francisco Railway Co.*, 297 ICC 335 (1955).

Virginia and in *Boynton v. Virginia*¹⁴, but in the end it could not ignore its own words. Within six weeks of the Justice Department’s petition, the ICC posted signs across the South, mandating integrated seating in every vehicle crossing state lines and in the stations, waiting rooms and restaurants that serviced them. The fact of segregation in interstate travel came to an end. And, the equality Dovey had sought so long ago for her mother and grandmother became, at last, the law of the land.

In the six years that separated *Keys* from the day in September 1961 when the ICC finally acted in accordance with its 1955 order, Dovey Roundtree walked a path far removed from the protests across the South. She became a different sort of lawyer, one who labored not on the mountaintop of closely studied statutory victories, but down in the trenches where, she told people, “the stuff of life lay.” Deeply involved in her Anacostia church community, Allen Chapel AME, from her earliest days in Washington, she began in the late 1950’s to consider pursuing the ministry, which she saw as a tool for addressing the kind of human suffering that lay beyond the reach of the law and the courts.

The clients who found their way to her door were more often than not, people in extraordinary pain – mothers fighting for their children, fathers fighting for their jobs, teenagers who’d been preyed upon by the adults charged with their care, husbands and wives in bitter custody battles, victims of violent crimes, and perpetrators as well. Many came from her church community, and others were drawn to the firm because of Julius Robertson’s wide-ranging influence as the publisher of a civil rights newsletter. The two of them took every matter that came their way, refusing to capitulate to the long-established tradition among their black

¹⁴ *Boynton v. Virginia*, 364 U.S. 294 (1954).

comrades of referring clients to white lawyers. In 1956, they set a precedent by winning the maximum damage award allowed by the Federal Tort Claims Act at that time in a case involving a woman injured by an estranged spouse who'd escaped from St. Elizabeth's Hospital. The win captured city-wide attention, drawing black lawyers to the offices of Robertson and Roundtree for advice on how to try personal injury and negligence cases. Clients, too, began seeking out Dovey and Julius in such numbers that they worked nearly around the clock to keep up, pressing themselves to the edge of endurance.

The pace of the practice broke Dovey's health. A lifelong diabetic, she suffered illness so grave in 1960 that she nearly died. Forced by the experience to a point of spiritual reckoning, she determined to pursue the ministry, a vocation to which she had been drawn from earliest childhood by the example of her grandfather. Though the African Methodist Episcopal Church barred women from the ministry, Dovey elected to embark on religious studies at the Howard University School of Divinity in order to prepare herself for ordination at such time that the AME bishops broke with their long-standing all-male tradition. As she regained her health, resumed her law practice and moved forward with her evening courses, Julius Robertson pushed himself to the breaking point. On November 3, 1961, at the age of 45, he collapsed in the courtroom of a heart attack and died.

His death forced Dovey to yet another reckoning, this one involving a re-evaluation of her commitment to the law. Acutely aware during Julius Robertson's lifetime of the importance of having a male law partner, Dovey found the thought of practicing alone, as a black woman, a daunting prospect. Her historic ordination in the vanguard of AME women ministers on November 30, 1961, just three and a half weeks after Julius Robertson's death, opened up the

possibility of the ministry as a full-time career. But her passion for the law prevailed, and rather than abandon her practice, she chose to merge it with her ministry.

The challenges she faced in the wake of her partner's death were myriad – attracting clients, forging a dual role as minister and lawyer, purchasing a new office building, making a name for herself as a sole practitioner, and breaking down yet another racial barrier as the first black member of the Women's Bar Association of the District of Columbia. Despite protests and threats of resignation by a number of WBADC's board members when she was nominated by her colleague and friend Joyce Hens Green (later a U.S. District Court Judge), she became the first African American member of that organization in 1963.

Throughout it all, she built a reputation as a one-woman legal aid society. It was a term no one used in those days, but in the minds of the city's black poor, and in all of Washington's black churches, Dovey Roundtree was known as the lawyer to seek in desperate times. And so it happened that when Ray Crump, Jr. was arrested and indicted for the murder of Georgetown socialite Mary Pinchot Meyer in October 1964, his mother found her way to Dovey, pleading for help for the son she believed was innocent. No mother in Dovey's experience with murder cases – and by that time she'd had plenty – had ever argued so passionately for her child as Martha Crump, who sat with her minister in Dovey's office at 1822 11th Street, NW, insisting, as many a mother had done before her, that her son “was a good boy, Attorney Roundtree.”

In the beginning, Dovey was dubious about Ray Crump's innocence, so incriminating were the facts the newspapers reported in the days following the murder. In addition to the car mechanic who'd identified Crump as the man he'd seen standing over Mary Meyer's body, the government apparently had a second witness, a military man jogging on his lunch hour, who claimed he'd seen a black man dressed in the same fashion Crump had been that day, trailing

Mary Meyer as she walked along the towpath. Then, too, Crump had lied to police when they'd arrested him near the scene as he wandered out of the woods and headed toward them on the towpath. Soaking wet and disheveled, he told them he'd been fishing on the rocks and had slid into the Potomac River while trying to retrieve his fallen pole, yet police found only a liquor bottle, a bag of chips, and a pack of cigarettes at the site to which he led them. They'd discovered his fishing gear later that day at his home.

But the childlike, bewildered, incommunicative little man with whom Dovey met in the DC jail struck her as entirely incapable of having committed a murder executed with the stealth and precision and forethought of Mary Pinchot Meyer's. The gunman who'd shot Mary Meyer had no other goal but murder; there was no evidence of attempted robbery or rape. And, he had committed the crime with such professionalism that it had more of the marks of an execution than an ordinary killing. The victim had been shot at point blank range, once in the head, once in the upper back, and the person who'd fired those shots had either fled with the murder weapon – a .38 caliber Smith and Wesson pistol, according to ballistics tests – or hidden it so well that the police had been unable to find it, despite weeks of searching the Canal, the woods, and the Potomac River with divers and minesweepers. The idea that the little slip of a man who sat gazing at her in bewilderment could have planned, perpetrated and hidden the crime described in the coroner's report struck Dovey as preposterous. Nothing she said to Crump in that first meeting seemed to penetrate his consciousness, let alone persuade him of the gravity of his predicament.

“Lawyer,” he said to her finally, his eyes wandering round the jail cell and back to her, “what is it they say I done?”

Certain as Dovey was of Crump's innocence, she knew she faced an uphill battle. The government had woven a web of circumstantial evidence around him, based on the statements of the two witnesses who'd given similar descriptions of the clothing worn by the Negro male at the crime scene, and the one who'd been trailing Mary Meyer. On the other hand, the government had yet to produce a weapon, or any trace of evidence that Ray Crump had fired a gun that day. Nor was there any physical evidence linking Ray to the victim, or her to him. And, Dovey discovered, Ray had an alibi. He'd been with a woman, he confessed, but he'd been afraid to tell the police or anyone else about that, for fear his wife and the woman's husband would find out. Her name was Vivian, and she'd picked him up early that morning near the corner where he normally caught his ride to the day's construction job. They'd bought a bottle of whiskey, some cigarettes and chips and then gone down to the River to do "some fooling around," as he put it. After they had sex, he told Dovey, he'd fallen asleep on the rocks and slid into the Potomac River, been jerked awake by the cold water, and climbed up the bank and into the woods to find Vivian gone, whereupon he set out down the towpath in what he thought was the direction of a bus stop. There, he'd met a policeman who began questioning him about what he was doing in the area. Afraid he was in trouble, he made up the fishing story.

When Dovey and her private investigator, Purcell Moore, finally located Vivian, she corroborated every detail of Ray's story, but she balked at testifying in open court. She was afraid her husband would kill her, she said, and although she was willing to sign a piece of paper laying out her story, she insisted that was all she would do. And then she disappeared – permanently. As the July trial date moved closer, Dovey commissioned Purcell Moore to seek her out, to no avail. Vivian was gone.

Without an alibi witness, Dovey was left with Ray Crump himself as the basis for her case, and his mental deterioration accelerated so rapidly during the months of his incarceration that he was incapable of giving any kind of accounting of himself on the stand; under a barrage of questioning by the very aggressive U.S. Attorney, Alfred Hantman, Dovey knew that Ray would collapse, probably into tears, and become incoherent. And yet, as she discovered in digging through the police file that contained the height and weight description the car mechanic Henry Wiggins had given police, Ray's smallness argued most persuasively for his innocence. At five feet three inches tall and 130 pounds, he was five inches shorter and at least 50 pounds lighter than the man Wiggins had described. That, she believed, was in itself sufficient to raise reasonable doubt about Ray's guilt in the minds of a jury.

She believed so profoundly in his innocence that she pushed forward to trial past the warnings of her legal colleagues that she and Crump stood no chance against the well-funded, well-staffed U.S. Attorney's office. She pushed past the fear she felt at the anonymous late-night phone calls she began receiving after each of her daytime visits to the crime scene. Not even the death of her beloved Grandma Rachel, coming five days after she'd entered her appearance for Crump, deterred her. For eight months, from the moment she agreed to take the case for a fee of one dollar on October 28, 1964, until she entered the courtroom on July 20, 1965, she moved single-mindedly toward her goal: to win acquittal for a man she believed had been at the wrong place at the wrong time – a man who was, quite simply, too small to have been the murderer.

By the time she was ready to present her case, Dovey had exposed holes in the police dragnet, discredited each of the expert witnesses who tried to link Crump to the victim with hair and fiber tests, and shone the spotlight on the all-important height and weight discrepancy. Her own case was but twenty minutes long, and consisted of three character witnesses from Ray's

mother's church. Each testified to his good name, to his reputation as a person of peace and good order. She rested her case. She had, she would say afterwards, done all she needed to do.

When she rose to give her closing argument, she had but a single exhibit – Ray Crump. Years later, presidential lawyer Robert S. Bennett, then the law clerk to the judge in the case, would recall in his memoir the captivating moments of Dovey Roundtree's speech to the jury. She was a lawyer, he wrote, who had the ability "to appeal to the mind but also to the heart and soul" of the jury, to "get in their gut." When she spoke about her client, he recalled, "It was as though she was pleading for her own son."

The courtroom was absolutely still when Dovey rose and walked to the jury box.

"This, as the court told you at the outset, is a serious case," she began. "You hold in your hands the life of a man – a little man, if you please."

His fate depended now, she told the jury, on whether they believed that the man seen by the government eyewitnesses was the man seated at the defense table.

"I told you in my opening that one exhibit you had before you for eight days. You had it from the moment you took this case – Raymond Crump, Jr. When you go into the jury room, you will take with you his image, and you must answer, I submit, the question: Does he weigh 185 pounds? That was the lookout given to the world at large, that there was a man five feet eight on the towpath that did indeed murder this poor lady. This is not Raymond Crump, Jr."

This case that had seemed so very complicated was really very simple, she told the jurors.

"You can remember everything, these mountains of evidence presented by Mr. Alfred Hantman, remember all of that if you please – place the jacket on him, give him a light-colored jacket, give him a cap, if you please. Well, then you must make him grow, and you must fill him out in dimensions which simply do not exist."

That alone, she said, should be enough to create reasonable doubt in anyone's mind. But there was more. The government had not produced the single piece of evidence central to any murder case: a weapon. And why not? Because it was never there to be found. "The man who committed this dastardly murder left," she said, "and he took with him this gun."

"All through this case counsel has attempted to explain things away. He attempted to say to you that gunpowder which would be on the hands of a person in firing that gun, that all of this is washed away. It had to be."

"He attempted to say that all the blood was washed away. He has to say that, ladies and gentlemen of the jury, to try and fit Raymond Crump, Jr., into this package, into this dramatic presentation he is making, weaving together facts here, half facts there, and saying to you that you have no choice. There is only one person, and only one person could have done it, and that person is Raymond Crump, Jr."

"I say to you, you must have reasonable doubt from all of the evidence that has been adduced before you. You must have reasonable doubt, if for no other reason than that the dimensions of the person out on the towpath, the dimensions of the person seen by two persons, exact in every particular, simply do not fit Raymond Crump, Jr."

She looked into the faces of the jury – the 12 people who'd listened so closely to every word of the trial.

"We have brought you character witnesses who testified before you this morning. Perhaps when I called them, you said: Well, she is not giving much evidence. I gave you the most important evidence anyone can present for another person. 'He who steals from me my purse steals trash, but take away from me my' – what? – 'my good name' and you have taken all that I have."

She turned and looked over at Ray, and then she turned back to the jury.

“I leave this little man in your hands.”

When Dovey Roundtree won acquittal for Ray Crump in the murder of Mary Pinchot Meyer on July 30, 1965, she won more than a single victory, more even than freedom for her client. She became, in the wake of that case, one of the city’s most sought after criminal defense attorneys, and went on to be appointed to some of the toughest murder cases in the District of Columbia, including the notorious Hanafi Muslim case in which she won acquittal for John Griffin. She also opened doors to attorneys of color, both men and women, who followed her into the courtroom. From the time of her victory in the Crump case until her retirement from legal practice in 1996, Dovey Roundtree fought battle after battle for “the little man.” In 1995, she was honored by the Greater Washington Area Chapter Women Lawyers Division of the National Bar Association with its Charlotte E. Ray Award, and in 2000 she received the American Bar Association’s Margaret Brent Women Lawyers of Achievement Award. Her autobiography, *Justice Older than the Law*, won the Association of Black Women Historians’ Letitia Woods Brown Memorial Book Prize for the best publication of 2009 on an African American woman. Further information about the book is available on the web at .justiceolderthanthelaw.com.

AUTHOR'S BIO



Bethesda writer Katie McCabe is the co-author, with Dovey Roundtree, of *Justice Older than the Law: the Life of Dovey Johnson Roundtree*. McCabe's National Magazine Award winning *Washingtonian* article on black medical legend Vivien Thomas was the basis for the 2004 HBO film *Something the Lord Made*, winner of three Emmys and a Peabody Award. Book cover reprinted with permission below:



JUSTICE OLDER THAN THE LAW

The Life of Dovey Johnson Roundtree



KATIE MCCABE AND DOVEY JOHNSON ROUNDTREE

From the Desk of the Former Editor in Chief

The DC Bar Journal is reborn. It had been put to rest in 1973 when, for economic reasons, publication ceased. Thanks to Chris Zampogna, the Journal of the Bar Association of the District of Columbia lives again.

With the advent of the internet and email, the Journal can now be prepared for a fraction of the cost of the 1970's. Back then, the Journal was published in 6" x 9" inch print format, with a minimum of 100 pages per issue and in large type that everyone could read.

In those days, the burning issue was whether the concept of a Unified Bar should be adopted. The *Journal* presented both sides of the issue, at great length. Here we are, nearly 40 years later, with both a vibrant Unified Bar AND a very active DC Bar Association.

My tenure as Journal editor ran from 1966 to 1973. Presidents of the DC Bar Association at that time were giants in the profession—Herbert J. Miller, Sidney Sachs, Jacob Stein, Ben Fisher, John Powell, Fred Vinson, Jr., Bernard Nordlinger, Austin Canfield, and George Monk. It was a privilege to work with them, and the many, many other local attorneys and judges who gave so generously of their time and talent.

Some day, perhaps we can put the past issues of the DC Bar Journal on-line, so that today's lawyers, judges, and law students can have easy access to the quality articles written then—many of the concepts and principles of which are still applicable today. Dating back to the early 1930's, the Journal offers an important written and pictorial history of the Washington, DC legal system and its practitioners.

Chris, go with the reincarnation!

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