IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
V.	)	**CR NO. 2:10cr186-MHT**
	)	
LARRY P. MEANS,	)	
	)	
Defendants.	)	

DEFENDANT LARRY P. MEANS' BRIEF IN SUPPORT OF MOTION TO DISMISS (REGARDING "HONEST SERVICES" CHARGES)

Defendant Larry P. Means submits this brief in support of his motion to dismiss all the charges, Counts 23-33, against him under the "honest services" law, 18 U.S.C. §1341, 1343, and 1346. The Indictment's allegations do not come within the scope of that law, as properly construed in light of the holdings and principles of Skilling v. United States, U.S., 130 S.Ct. 2896 (2010). Consequently, application of the "honest services" law to the allegations of the indictment would be unconstitutional, and the Court should interpret the law in a way that would avoid such constitutional issues.

I. Introduction and Summary

The Indictment alleges that Means and others took part in a scheme to deprive the government and the public of the "honest services" of State Legislators and legislative staff. Indictment, ¶ 234. The Supreme Court has now clearly limited the statute to cases involving "bribes and kickbacks." Skilling, supra.

The Government has tried to bring the Indictment within Skilling by adopting, as part of the "honest services" charges, the factual allegations of prior portions of the Indictment. *See* ¶ 233. Those incorporated factual allegations demonstrate that as to this Defendant the Government is trying to term campaign contributions as "bribes" within the meaning of Skilling. Mr. Means contends that is a wrong inference.

Campaign contributions should not and it is submitted, do not constitute "bribes" for purposes of "honest services" law — not even when it is alleged that the contributions were too closely connected to some official action.

For these and other reasons explored herein, including constitutional concerns under the First, Fifth and Tenth Amendments, the Court should hold that the "honest services" law does not encompass the allegations of the indictment, and the Court should dismiss these charges.

The offering or giving of campaign contributions, or in-kind campaign support, does not constitute a violation of "honest services" law — not even if it is alleged that there was a connection between such contributions and some official action. This conclusion follows from the Supreme Court's holding in Skilling, as well as from relevant constitutional considerations (including both the due process doctrine discussed in Skilling, and the First Amendment).

As Justice Scalia noted, in a dissent from denial of certiorari in Sorich v. U.S. , U.S. ___, 129 S.Ct. 1308 (2009), the "honest services" law has been a dangerous one in the hands

of aggressive prosecutors. "[T]his expansive phrase ["honest services"] invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct." Id. at 1 3 1 0. Justice Scalia pointed out the fundamental unfairness of convictions gained under such a vague, malleable, and unsettled legal standard. "It is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail." Id.

In Skilling, the Court's approach echoed the concerns that Justice Scalia had raised in Sorich: the concern about the possibility of prosecutorial abuse, and the concern that the criminal laws must be clear in advance (so that people can know, before they act, what the law forbids), rather than being developed after the fact through prosecutorial advocacy. Both of those concerns, as the Court recognized in Skilling, are a matter of constitutional due process.

> To satisfy due process, "a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.' Kolender v. Lawson, 46 1 U.S . *352, 357,* 103 S. Ct. 1855, *75* L. Ed. 2d903 (1983).

Skilling, 130 S .Ct. at 2927-28.

In the end, the Supreme Court in Skilling did not go so far as to hold the "honest services" law unconstitutionally vague. Instead the Court saved the law by dramatically

cutting back its scope.

In dramatically narrowing the scope of "honest services" in Skilling, the Supreme Court declared that the statute could be saved from concerns about unconstitutional vagueness by "par[ing]" the statute's coverage down to its pre-McNally "core." This, the Court said, was "bribes or kickbacks," of the sort that formed the bulk of pre-McNally reported decisions.

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

Skilling, 130 S.Ct. at 2928. The Court said that it had "surveyed" "the body of pre-McNally" case law, see Skilling, 130 S.Ct. at 2929. The Court described the results of its survey:

> While the honest-services cases preceding McNally dominantly and consistently applied the fraud statute to bribery and kickback schemes --schemes that were the basis of most honest-services prosecutions -- there was considerable disarray over the statute's application to conduct outside that core category.

Id. at 2929. The Court pointed to a catalog of dozens of pre-McNally cases that appeared in the Government's brief; this catalog reflected what the "solid core" of pre-McNally law consisted of.

> The "vast majority of the honest-services cases involved offenders

> who, in violation of a fiduciary duty, participated in bribery or kickback schemes. United States v. Runnels, 833 F.2d 1183, 1 187 (CA6 1987); see Brief for United States 42, and n. 4 (citing dozens of examples).

Skilling, 130 S.Ct. at 2930.

Thus, the Court concluded, "Congress' reversal of McNally and reinstatement of the honest-services doctrine, we conclude, can and should be salvaged by confining its scope to the core pre-McNally applications." Id. at 2931.

The Court expressly tied this, again, to the due process concerns of providing fair notice, and confining prosecutorial discretion, that the Court had discussed earlier in its opinion.

> Congress intended § 1346 to reach at least bribes and kickbacks. Reading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine. To preserve the statute without transgressing constitutional limitations, we now hold that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-McNally case law.

Id., 130 S.Ct. at 2931 (emphasis in original, footnotes omitted); see also id. at 2933 (again noting the dual concerns of due process: "(1) fair notice and (2) arbitrary and discriminatory prosecutions.") Likewise, the Court tied its decision to the longstanding "rule of lenity" in the interpretation of unclear criminal laws. *Id.* at 2932.

The Court understood that there were some pre-McNally cases that did not fall within that "solid core," Skilling, 130 S.Ct. at 2930. The Court did not ratify every pre-McNally case, because there was "considerable disarray" about the doctrine's pre-McNally content outside the solid core. *Id* at 2929. For instance, the Court knew that there were some "relative[ly] infrequen[t]" pre-

McNally cases based on conflicts of interest; but the Court did not allow that part ofthe doctrine to survive. Id. at 2932. The Court allowed only the true "solid core" to survive, the area in which – as reflected by the "dozens" of cases that the Government had cited in its brief to the Court, Id. at 2930 – there was broad pre-McNally consensus as developed through consistent and repeated application. This was "bribes and kickbacks" of the sort reflected in case after case before McNally.

The crucial point, in terms of the present argument, is this : that the term "bribery," as that word is used in Skilling to refer to the remaining "solid core" of "honest services" doctrine, does not encompass political contributions. It encompasses only personal self-enrichment, not campaign contributions or other political support. This is the best understanding of what "bribery" means in this particular context, because of (a) pre-McNally history, as relied upon in Skilling, (b) the due process concerns identified in Skilling, and (c) the important First Amendment implications of political contributions and political advocacy, as contrasted with the absence of First Amendment concerns in the context of true bribery.

Campaign contributions and other political advocacy expenditures are protected by the First Amendment to the Constitution, Just this year, the Supreme Court emphasized and expanded the First Amendment protections for political spending. Citizens United v. Federal Election Commission, U.S. , 130 S.Ct. 876 (2010). This is not to say that the First Amendment protection of political spending or contributions is absolute; but it is to say that there are vital First Amendment interests at stake in cases involving campaign contributions and issue-advocacy contributions, issues that make such cases very different from cases involving payments to officials personally.

It is also instructive to note that courts have often distinguished between campaign contributions and actual "bribes," even in situations where it is alleged that the campaign

contributions were linked too closely with some official actions. See, e.g., Green Party ofConn. v. Garfield, 616 F.3d 189, 199-200 (2nd Cir. 2010) ("the Connecticut General Assembly enacted the CFRA's ban on contractor contributions in response to a series of scandals in which contractors illegally offered bribes, 'kick-backs,' and campaign contributions to state officials in exchange for contracts with the state."); McComish v. Bennett, 605 F.3d 720, 724 (9th Cir. 2010) ("A sting operation caught state legislators on videotape accepting campaign contributions and bribes in exchange for agreeing to support gambling legislation.") In other words, the word "bribe" in its most natural usage does not include campaign contributions.

Given this very large and well-recognized distinction between personal enrichment and campaign contributions, it is unsurprising to find that cases involving campaign contributions are not encompassed within Skilling's "solid core" of pre-McNally "honest services" doctrine. There was no pre-McNally settled understanding that an official or a citizen contributor could be charged with mail- or wire fraud based on an alleged connection between true campaign contributions and an official action.

Even the Government, in its brief to the Supreme Court in Skilling, framed its suggested understanding of "honest services" bribery doctrine in terms of *personal enrichment* of officials without any hint that campaign contributions were at the core of what the doctrine covered. The Government argued in Skilling, "Schemes to deprive others of 'the intangible right of honest services' require that a public official, agent, or other person who owes a comparable duty of loyalty breaches that duty by secretly acting in his own financial interests while purporting to act in the interests of his principal" *See* Government Brief in Skilling, p. 39

(emphasis supplied). [1] At the same page of the Government's brief, the Government described the impermissible motivation as a "personal financial interest." *Id.* (emphasis supplied). And on the next page: "his [i.e., the defendant's] own interests," id., p. 40. And page 42: "whether the office-holder has placed his self-interest above that of the public."

And at page 51 of the Government's brief, and perhaps most strikingly given the way the Supreme Court ultimately disposed of the case, the Government conceded: vast majority (if not all) pre-McNally honest-services cases did involve self-enrichment schemes." (emphasis supplied). The Government thus admitted that the pre-McNally case law was almost entirely, and maybe even literally entirely, about "self-enrichment schemes." *Id.* This would make up the "core" as the Supreme Court described it in Skilling. That is what "bribery" means within the core of Skilling. Even according to the Government's own description, there was no settled pre-McNally understanding that an official or campaign contributor could be jailed on account of a connection between a campaign contribution and an official act. Most, if indeed not literally all, of the pre-McNally "bribery" cases were about personal "self-enrichment" of officials; they were not about campaign contributions.

This is further borne out by the long footnote in the Government's Skilling brief, which the Supreme Court then expressly invoked in its discussion of the pre-McNally "bribery" case law. In the words of the Supreme Court, the Government "cit[ed] dozens of examples" of pre-McNally "bribery or kickback" honest services cases. Skilling, 130 S.Ct. at 2930, citing Government Brief p, 42 and n.4. This, according to the Court, was a reflection of the doctrine's "solid core," which is

[1] <http://www.justice.gov/osg/briefs/2009/3mer/2mer/2008- 1 394.mer.aa.pdf>.

what the Court allowed to survive. Skilling, 1 30 S.Ct. at 2930.

Looking to the cited portion of the Government's brief, we find those dozens of examples, elucidating what the pre-McNally "solid core" was. These are the cases that the Government itself chose to identify as representing "bribes or kickbacks" cases prior to McNally, see Government Brief p.42; and the Supreme Court relied on this listing. And here is the striking and dispositive thing: none of them was a case charging a campaign contribution as a bribe or kickback, They were, in the phrase quoted above from the Government's brief, self-enrichment cases envelope-full-of-cash cases, and the like. Twenty-nine cases, selected by the best minds in the Justice Department as representing bribery and kickback "honest services" cases pre-McNally and none of them held that a true campaign contribution amounts to an "honest services" bribe.[2]

If there were any pre-McNally "honest services" case premised on a campaign contribution as a supposed bribe, it would have been outside the "core" of honest services

[2]Some of them mention campaign contributions, but not in ways inconsistent with our statements in the text above. *See, e.g.,* U.S. v. Pecora, 693 F.2d 421 (5th Cir. 1982) (a brief mention of a conversation about possible contributions regarding a millage campaign, though with no finding or holding of any relationship between that and the $9,000 cash bribe to the Sheriff and District Attorney); *U.S. v. Craig,* 573 F,2d *455* (7th Cir. 1977) (tens of thousands of dollars in cash-stuffed envelopes, given to officials in exchange for legislation); id. at 494 (reflecting the Government's theory was that this was *not* campaign contributions, and the Government's argument to the jury that a defendant's assertion that he received money as a campaign contribution was a fabrication); *U.S. v. Barrett, 505* F.2d 1091, 1094-97 (7th Cir. 1974) (reflecting that the case was about payments given to the official personally in valises and envelopes full of cash; there seems to have been a request above and beyond that for a political contribution, followed by the funny retort (met with a smile by the official) that the valises and envelopes full of cash were political contributions); *U.S. v. Isaacs,* 493 F.2d 1124, 1132, 1134 (7th Cir. 1974) (occasionally mentioning campaign contributions, though noting that none of them was charged as having been improper).

bribery as the Government identified it, and as the Supreme Court accepted it, in Skilling. After all, the Supreme Court recognized in Skilling that there were some pre-McNally cases that were outside the "core." Not every pre-McNally case survives Skilling; only the "core" survives.

Therefore, based on Skilling, the proper holding in this case is that a campaign contribution (financial or in-kind) is just not an "honest services" bribe after Skilling. The application of "honest services" law to campaign contribution cases, through the assertion that someone linked an official action too closely to a political contribution, is one of those aggressive post-McNally prosecutorial arguments that the Supreme Court buried in Skilling.[3] The "bribery and kickbacks" core of pre-McNally law, which the Supreme Court allowed to survive, was a core of cases about personal self-enrichment, not about campaign contributions. And as we have shown, the two types of cases are very different in their legal implications, largely by virtue of the First Amendment interests that are so important in contribution-related cases.

Furthermore, allowing "honest services" to cover this sort of case would raise all the due process concerns that the Supreme Court was trying to eliminate in *Skilling*. It would

[3]The Government may point to cases dealing with the possibility of prosecutions based on campaign contributions under *other* statutes, such as the Hobbs Act. Any such argument would miss the mark, because it would be an attempt to evade the Supreme Court's reasoning in *Skilling*. In *Skilling,* the Supreme Court saved the "honest services" statute by attributing to Congress an intent to resuscitate the *pre-McNally* solid core of "honest services" law – not an intent to use "honest services" to cover things that had previously been prosecuted instead under *other* laws.

raise the troubling possibility of arbitrary or discriminatory prosecutorial action. And allowing "honest services" prosecutions in this area would subject officials and citizens to criminal jeopardy, in an area where the line between constitutionally-protected activity and crime is still the subject of unsettled debate. Compare U S. v. Ganim, 510 F.3d 134, 142 (2nd Cir. 2007) (Sotomayor, J.) (holding that a case involving political contributions requires proof of an "explicit *quidpro quo,"* meaning "an express promise"), with US. v. Siegelman, 561 F.3d 1215, 1226, 1228 (1 ,th Cir. 2009) (holding that "explicit" in this sense does not mean "express," and that an inferable state of mind is sufficient), *vacated,* U.S. .130 S.Ct. 3542 (2010). In fact the issue whether a specific quid pro quo is required under §666 is presently the subject of a pretrial for certiori filed in the case of United States v. Rast, opinion repealed as United States v. McNair, 605 F.3d 1152 (11th Cir. 2010) (filed on October 18, 2010). This raises the fair warning concerns that are central to Skilling's discussion of due process.

The second point is that a payment is not an "honest services" bribe unless the Government alleges and proves that the payment was made with intent to influence a specific official act. If the allegation is only that the payment was made for some other, looser or more general purpose, it does not come within "honest services." This principle follows from Skilling.

As noted above, Skilling limits "honest services" to "bribes" and "kickbacks." This case, according to the Government's view as stated in the Indictment, is supposedly about alleged "bribes."

But what is the precise definition of a "bribe" after Skilling even with regard to payments that are not campaign contributions? What must be alleged and proven, in order to make out a "bribe"? The answer remains perhaps for the Supreme Court in that under its decision in US. v. Sun-Diamond Growers of California, *526* U.S. 398 (1999) re 18 U.S.C. §201 the Government must allege and prove a specific quid pro quo, while there is a conflict in the Circuits under 18 U.S.C. §666 whether a specific quid pro quo is required. But it seems one thing is clear, the Government must allege and prove at least that any alleged payment was made with a specific intent what to corruptly influence a specific exercise of official power.

As noted above, in Skilling, the Supreme Court invoked 18 U.S.C. § 201 as one of the statutes that would aid in limiting prosecutorial discretion about what can be prosecuted as a "bribe," and would aid in giving notice to the public as to what is prohibited, and what is not, under "honest services" law. Skilling, 130 S.Ct. at 2933. That discussion was important to the Court's opinion, because of the due process, "fair warning" and "rule of lenity" aspects of the case that we have described above. The law must give notice, in advance, of what is covered. So, the Supreme Court invoked § 201 because it helps to give such notice, about the nature of what is a "bribe."

And the law is clear under § 201 that there is a bribe *only* if a payment is made with the specific intent to influence a specific, identifiable and known act, i.e. a specific quid pro quo. Sun-Diamond at 404. See also U.S. v. McNair, *605* F.3d 1152, 1190-91 (11th Cir. 2010) (recognizing and discussing this holding of Sun-Diamond). Again, a more generalized intention is not enough; it must be the intent to influence a specific act. That definition therefore transfers over to "honest

services," under Skilling. If it did not, then § 201 would not serve the due-process purposes under "honest services" law that the Supreme Court harnessed it to serve, in Skilling.

The Government may say that the Supreme Court in Skilling also invoked §666 in the same vein, and the Government may say that §666 does not include that sort of "specific act" requirement in a case that does not involve campaign contributions. If the Government makes that argument, all it would be doing is destroying the needed clarity about what the law prohibits. If section 666 truly does not require proof of intent to influence a specific act (which is still open to debate, though we recognize that there is adverse Eleventh Circuit precedent, *see McNair, supra)* but section 201 does, then at best there is ambiguity about which of those standards is adopted into "honest services" under Skilling. In a companion case to McNair, supra (covered in the same Opinion) United States v. Rast, a Petition for Certiori has been filed (filed Oct 18, 2010) rasing this conflict between §201 and §666. And where there is ambiguity in the criminal law, it must be resolved against the Government, and in favor of liberty. Skilling, 130 S.Ct. at 2932-33.

The arguments made above are confirmed not only by interpretation of case law such as Skilling, but also by constitutional considerations. The prosecution in this case comes at the intersection of two important limitations on federal power: the First Amendment, and the Tenth Amendment (including, more generally, principles of the division of power between state and federal governments). The prosecution is attempting to impose criminal penalties regarding participation in the political and electoral processes, and regarding advocacy about what the laws should be. And the federal prosecutors doing this not as to electoral advocacy in federal elections or advocacy regarding federal lawmaking; the context here is the support or opposition of State elected officials, and advocacy about what State laws and the State Constitution should be. It is highly

questionable whether the federal government has any authority to set criminal laws with criminal penalties in this arena, under the law (the law of the First Amendment, and the law of federalism) as the Supreme Court is currently developing it. But it is quite clear, in any event, that if the federal government is to act in this arena, the federal government has an obligation to States, to officials, and to citizen advocates to make the laws clear. The "honest services" law fails to meet that test. For that matter, so does 1 8 U.S.C. §666, which Mr. Means has addressed in another brief(in which he adopted by reference this portion ofthis brief); prosecution under §666 depends, in this case, on the hopelessly undefined or circularly-defined word "corruption," which sets no true standard.

The prosecution in this case, which attempts to portray Mr. Means as having stepped over some line between his role as a representative of his constituents and his role as a candidate, depends on a prosecutorial vision of some golden ideal of politics – the idea that politics is "supposed" to be some pure exercise whereby political figures and citizens have courtly debates about the issues of the day, and where citizen support or opposition to candidates is based on things other than candidates' positions on specific issues. That is just not the way politics works in the United States, and under the First Amendment prosecutors are not allowed to demand that politics work that way. Federal prosecutors certainly do not have the authority to demand that politics work that way at the State level.

Imagine a voter who said to his Senator not long ago, "I oppose President Obama's health care bill, because I believe that it is wrong for our country, and I believe that it will hurt my business as well as other small businesses. From my point of view it is the most important vote you will ever make, Senator. It will speak volumes about your approach to public policy. If you vote for it, I will use every ounce of my energy and resources to ensure your defeat in November. If you vote against

it, I will be in your corner." Would that citizen have committed a crime?

Surely not, because that is what democracy is. It is the passionate clash of people with particular differing interests and beliefs, trying to convince their elected representatives – sometimes through reasoned debate, sometimes not – and trying to support or defeat candidates based on those candidates' actions and stances on the important issues.

The basic point of our First Amendment is that speech about politics must remain free and unfettered. This speech includes campaign contributions. Those things are nothing more, or less, than an expression of support for the election or re-election of a person. And every State Senator or representative seeking reelection must be sensitive to the desires of his constituents and his goal of being reelected so he can continue to serve. Running a political campaign for reelection requires campaign contributions. It is naive to suggest that these money contributions do so without any desire or expectation that the candidate is going to support "their" issues. The law is evolving in the direction of much greater recognition of the First Amendment protection for political spending, as reflected by Citizens United, supra.

But federal prosecutors may tell us that the voter hypothesized above could go jail. Or they may, alternatively, tell us that somewhere there is a dividing line, and that if one steps over that line he will go to jail – even if his crime was trying to convince an elected official on an issue of public policy, or if it had to do with a promise of support for officials who were on the right side of the issue or opposition to those on the other side. Somewhere, prosecutors will say, there is a line. It is often hard, though, to get prosecutors to say where the line actually is, with any clarity.

The Court should recognize that there is no line, not a line of the sort that the criminal law can draw. Voters are free to draw their own lines to punish at the polls those officials who seem to

be "too close" to their contributors, whatever each voter thinks that means. But the law cannot draw an effective line, between the normal course of politics and the supposedly improper use of campaign contributions or the supposedly improper advocacy of legislative action. Any attempt to draw that line will end up trampling a great deal of advocacy that is protected by the First Amendment. Imagine, again, the voter/contributor in our hypothetical above. Is that person to be prosecuted next? If not, what is the line?

The line-drawing problem becomes all the more difficult when the officials in question are State officials rather than federal ones. In this context, the First Amendment problem is compounded with federalism concerns, Tenth Amendment concerns, and concerns about the substantive boundaries of affirmative Congressional authority to enact laws.[4] If one State wishes to draw the line between politics and crime in one way in terms of the State's own official operations, and another State wishes to draw it slightly differently, does the Congress really have the authority to set a mandate for all fifty States' own operations?

If the Congress has that power, it is a power that must be exercised with clarity – clarity that this is in fact what Congress is intending to do, and clarity about where the line is. See Cleveland v. United States, 531 U.S. 12, 27, 121 S.Ct. 365, 374-75 (2000) ("Absent clear statement by Congress, we will not read the mail fraud statute to place under federal superintendence a vast array of conduct traditionally policed by the States.") This, too, is a concern of constitutional dimensions under the

[4] *See, e.g., Gregory v. Ashcrofe, 501* U.S. 452, *458,* 111 S.Ct. 2395, 2400 (1991) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.")

Fifth Amendment's due process clause, as we have discussed above. It is a matter not only of fairness to defendants, but also of separation of powers in the federal government. The Congress must make the laws, and must not leave it up to prosecutors and judges to make them.

> The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

United States v. Santos, *553* U.S. 507, 514, 128 S.Ct. 2020, 2025 (2008)

Applying the "honest services" law (and §666) to Mr. Means based on the allegations of the indictment would run straight into all of these constitutional concerns. Any conviction would be unconstitutional, as it would take the "honest services" law (and §666) beyond the substantive powers of the federal government under the Constitution, and would violate constitutional rights. But at least the Court should recognize that these are serious constitutional concerns, and that the Court should read the laws with an appropriately narrow view in order to avoid these difficult issues. If Congress wants to impose a uniform federal ethical standard on state campaign finance law, or on how citizens may advocate for legislative change, let Congress do that with clarity – and if Congress does that, then the courts can determine whether the contours of that clear law are consistent with the First, Tenth, and Fifth Amendments. But until and unless Congress does that, the prosecutors and the courts should not take it upon themselves to police the ethics of state-level politics or legislative advocacy by attempting to imprison certain selected people for violating vaguely-written laws.

Dated this 4th day of February, 2011.

s/ William N. Clark
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following and all counsel of record electronically on this the 4th day of February, 2011.

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