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SUPREME COURT TO CONSIDER SCOPE OF "HONEST SERVICES" MAIL AND WIRE FRAUD

This term, the United States Supreme Court is reviewing three separate cases concerning the scope of "honest services" mail and wire fraud under 18 U.S.C. § 1346. The first two of these cases, *United States* v. *Black*, No. 08-876 and *United States* v. *Weyhrauch*, No. 08-1196, were heard on December 8, 2009. Both *Black* and the third case to be argued this term, *United States* v. *Skilling*, No. 08-1394, address the application of Section 1346 in the private sector context. In *Black*, the Court is considering whether the government must prove that an employee charged with using the mails or wires to deprive his or her employer of the employee's honest services, intended to obtain a private gain *at the expense of his or her employer*, as opposed to a third party (such as a foreign government). In *Skilling*, the Court will decide the more fundamental question of whether Section 1346 requires a showing that the employee intended to obtain any private gain at all, or whether it is enough that the employer suffered some type of detriment. *Weyhrauch*, by contrast, deals with honest services in the public sector context. Specifically, the Court will address whether a public official, to be convicted of using the mails or wires to deprive the public of his or honest services, must have violated a state law.

During oral argument on both the *Black* and *Weyhrauch* cases, a clear majority of Supreme Court Justices asked questions suggesting a view that the honest services statute was vague and overbroad and may be unconstitutional. Following the *Black* and *Weyhrauch* arguments, the Supreme Court accelerated the hearing date for the Skilling case, which is now scheduled to be heard on March 1, 2010.

THE STATE OF HONEST SERVICES JURISPRUDENCE

Prior to the enactment of Section 1346, courts interpreted the mail and wire fraud statues[1] to include schemes to defraud others of "intangible rights," such as the right of citizens to the honest services of public officials.[2] However, in 1987, the Supreme Court, in *McNally* v. *United States*, held that courts could not read intangible rights into these statutes without "clear and definite language" from Congress.[3]

One year later, Congress enacted Section 1346, and explicitly expanded the mail and wire fraud statutes to include a "scheme or artifice to deprive another of the intangible right of honest services." The statute has subsequently formed the basis for a slew of prosecutions of corporate executives and public officials. The 1988

1 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 1343 (wire fraud).

2 *See,* e.g., *United States* v. *Skilling*, 554 F.3d 529, 543 (5th Cir. 2009).

3 483 U.S. 350 (1987).

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amendments did not define "honest services," however, and since the enactment of Section 1346, courts have struggled to limit its reach, leading to considerable confusion and disagreement among the circuits.[4] This state of the law is reflected in Justice Scalia's recent lengthy dissent from the Court's denial of *certiorari* in an honest services case, where he warned that "it seems…quite irresponsible to let the current chaos prevail."[5] The Court has now granted *certiorari* to cases concerning the honest services statute.

THE CONRAD BLACK CASE

The *Black* case concerns the conviction of Conrad Black, the former CEO of Hollinger International, for mail and wire fraud in connection with his role in ensuring that Hollinger paid certain "non-compete fees" to senior executives of the company (including Black). During the trial, the government argued that the non-compete fees were fraudulent and that the executives stole money from the company, while the defense argued that the fees were legitimate management fees that were legally converted to non-compete fees to avoid Canadian tax obligations.[6] The trial judge instructed the jury that it could convict the defendants of fraud if they found 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 that the objective of the scheme was 'private gain.'"[7] The Section 1346 instruction "did not require that the jury find that the defendants had taken any money or property from Hollinger; all it had to find to support a conviction for honest services fraud was that the defendants had deliberately failed to render honest services to Hollinger and had done so to obtain a private gain."[8]

The defendants argued on appeal to the Seventh Circuit that Section 1346 requires a finding that defendants sought a private gain "at the expense of the persons (or other entities) to whom the defendants owed their honest services…. "[9] The Seventh Circuit held that, because the defendants misused their positions in Hollinger for private gain, they fell within the scope of Section 1346, regardless whether the private gain was at the expense of Hollinger or a third party (i.e., the Canadian government).[10] In doing so, the Seventh Circuit joined two other courts of appeal (the Fifth and the Tenth) in holding "that no showing of harm is necessary."[11] Other courts of appeal (most notably the Fourth, Sixth, Eighth, Eleventh, and District of Columbia Circuits) all require some showing of economic or pecuniary harm to the party to whom the honest services were owed.

Although the specific question posed by the *Black* case is whether a prosecution charging private gain honest services fraud requires some showing of economic or property harm to the corporate shareholders or employer, during the *Black* argument, much of the argument focused on whether the honest services statute is unconstitutionally void for vagueness. Several Justices asked questions suggesting the statute could be broadly interpreted, with Justice Breyer noting that the government's interpretation of the statute was sweeping enough that 140 million American employees could be prosecuted for lying to their employer. Although both Justices Sotomayor and Kennedy questioned whether the statute could be limited to kickbacks and bribes, Justice Scalia noted "there is nothing in the text of the statute that would enable you to limit it to kickbacks and…bribes."

THE WEYHRAUCH CASE

The *Weyhrauch* case concerns the prosecution of Bruce Weyhrauch, a lawyer and member of the Alaska House of Representatives, who was charged with honest services mail fraud for failing to disclose an alleged conflict of interest to the Alaska legislature. According to the government,

4 *Sorich* v. *United States*, 129 S.Ct. 1308, 1309 (2009) (Scalia, J. dissenting from denial of petition for *writ of certiorari*) ("[t]hough it consists of only 28 words, the statute has been invoked 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 *Id.* at 1311.

6 *See United States* v. *Black*, 530 F.3d 596, 599-600 (7th Cir. 2008).

7 *Id.* at 600.

8 *Id.*

9 *Id.*

10 *Id.* at 601-02.

11 *Black* v. *United States*, 2009 WL 75563, at *19 (Jan. 9, 2009).

Weyhrauch solicited future legal work from VECO Corp, an oil field services company, in exchange for voting in the Alaska Legislature for legislation that VECO supported, and failed to disclose the arrangement in violation of Alaska conflict of interest laws.[12] Before trial, Weyhrauch filed a motion seeking to prevent the government from introducing evidence relating to the honest services charge—namely, various ethics publications and evidence that "members of the Alaska State Legislature customarily acknowledge the existence of conflicts of interests on the floor of the Legislature…."[13] The district court, in granting Weyhrauch's motion, held that "any duty to disclose sufficient to support the mail and wire fraud charges here must be a duty imposed by state law," and Alaska state law did not require Weyhrauch to disclose his solicitation of future legal work from VECO.[14]

After the government filed an interlocutory appeal, the Ninth Circuit declined to adopt the "so-called 'state law limiting principle,'" noting that neither its pre-*McNally* decisions, nor the text or legislative history of Section 1346, support such a limitation.[15] The court reasoned that Weyhrauch's failure to disclose his solicitations of future employment "falls comfortably within the two categories long recognized as the core of honest services fraud (bribery and failure to disclose material information)," and reversed the district court's order.[16]

The Supreme Court granted *certiorari* to address "[w]hether, 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 and 1346), the government must prove that the defendant violated a disclosure duty imposed by state law."[17] As with the *Black* argument, many of the Justices expressed skepticism about the sweep and vagueness of the honest services statute, with Justice Scalia calling the statute "mush" and stating "a citizen is supposed to know and he is violating a criminal statute…this is just too much" and Chief Justice Roberts emphasizing that the public "has be to be able to understand the law, and if it can't, then the law is invalid." Other Justices noted that the core of the statute could be left intact, with Justice Sotomayor noting that "taking the bribe" is illegal "whether he discloses it or not," and Justice Breyer similarly inquiring whether the statute could be sustained if it were limited to "no bribes, no kickbacks and no conflicts of interest where that is defined in [a] narrow way."

THE JEFFREY SKILLING CASE

The third honest services case, *United States* v. *Skilling*, will be argued later this term. The *Skilling* case arises out of the conviction of Jeffrey Skilling, the former CEO of Enron, for conspiracy, and a number of other crimes, relating to his alleged role in improperly inflating the company's financial condition. The government alleged that one of the objects the conspiracy was a wire fraud scheme to deprive Enron and its shareholders of Skilling's honest services.[18] Skilling conceded on appeal that he owed a fiduciary duty to Enron, but nevertheless argued that he did not deprive Enron of his honest services because he was acting for Enron's benefit, and not his own benefit, and he did not engage in the allegedly improper conduct in secret.[19]

The Fifth Circuit rejected Skilling's arguments and held that although Skilling may have intended for Enron to benefit from his fraudulent conduct, Enron had not "specifically directed the improper means that he undertook to achieve his goals," and Enron ultimately suffered a detriment.[20] Consequently, the court held that the jury was entitled to convict Skilling of conspiracy to commit honest-services wire fraud.[21]

In his petition for *certiorari*, Skilling asked the Supreme Court to consider whether Section 1346 "requires the government to

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

13 *Id.*

14 *Id.* at 1240.

15 *Id.* at 1245-46.

16 *Id.* at 1247.

17 *Weyhrauch* v. *United States*, 129 S. Ct. 2863 (2009).

18 *United States* v. *Skilling*, 554 F.3d 529, 542 (5th Cir. 2009).

19 *Id.* at 545.

20 *Id.* at 546.

21 *Id.* at 547.

prove that the defendant's conduct was intended to achieve 'private gain' rather than to advance the employer's interests, and, if not, whether § 1346 is unconstitutionally vague."[22]

THE IMPLICATIONS OF THE COURT'S RULINGS

During argument, a majority of Justices questioned whether the honest services statute was unconstitutionally vague. At the end of the *Weyhrauch* argument, Justice Breyer suggested that the government's briefing in the *Skilling* brief should address the vagueness question, and inquired whether the government would need supplemental briefing to address the issue in the *Black* and *Weyhrauch* cases.

While the Justices appeared skeptical that the law is constitutional, it is rare for the Court to overturn a law on the grounds that it is unconstitutionally vague. If the Court does find that the law is unconstitutionally vague, the decision will limit one of the government's most powerful prosecutorial tools—particularly in the public corruption context. This could result in significant collateral litigation by individuals convicted under the honest services statute. On the other hand, if the Court finds that the law is not unconstitutionally vague as applied to the facts of the specific cases, it is bound to provide some guidance to the lower courts on how to limit the statute's reach. Given the extent to which prosecutors have used Section 1346 to prosecute both corporate officers and public officials, the Court's decisions will likely have far-reaching effects, regardless of their outcomes.

We hope that you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

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22 *Skilling* v. *United States*, Brief of Petitioner at *1, 2009 WL 1339243 (2009).