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US Supreme Court Narrows Scope of "Honest Services" Mail and Wire Fraud

On June 24, 2010, the US Supreme Court decided three separate cases concerning the scope of "honest services" mail and wire fraud under 18 U.S.C. § 1346. In its decisions in *United States* v. *Skilling*, No. 08-1394, *United States* v. *Black*, No. 08-876, and *United States* v. *Weyhrauch*, No. 08-1196, the Supreme Court narrowed the scope of Section 1346 to "core" cases involving "only bribery and kickback schemes." These decisions, two of which came in high-profile corporate fraud prosecutions and the third in a high-profile public integrity investigation, limit one of the government's most powerful tools for prosecuting public corruption and corporate fraud matters.

Background: 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 certain "intangible rights," including the right of citizens to the honest services of public officials.[2] However, in 1987, the Supreme Court, in *McNally* v. *United States*,[3] held that courts could not read intangible rights into these statutes without "clear and definite language" from Congress. 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 the prosecutions of hundreds of corporate executives and public officials.

Since the enactment of Section 1346, courts have struggled with the fact that the 1988 amendments failed to define "honest services." This failure led to considerable confusion and disagreement among the circuit courts of appeal.[4] This fractured state of the law was reflected in Justice Scalia's lengthy dissent from the Court's 2009 denial of *certiorari* in an honest services case, where he warned that:

> Though 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

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).

4 *Sorich* v. *United States*, 129 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting from denial of petition for writ of certiorari).

Contacts

Marcus A. Asner
+1 212.715.1789

John A. Freedman
+1 202.942.5316

Kirk Ogrosky
+1 202.942.5330

Mara V.J. Senn
+1 202.942.6448

> employees and corporate fiduciaries…it seems …quite irresponsible to let the current chaos prevail.[5]

The Supreme Court granted *certiorari* in the *Black*, *Skilling*, and *Weyhrauch* cases to address a number of technical issues that had divided lower courts concerning the application of the statute:

- 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), which the government contended were fraudulent. The trial judge used jury instructions that the jury could convict the defendants of fraud if, among other things, 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.'"[6] The Court granted *certiorari* to decide 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).
- 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, 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; the trial court concluded that Alaska law did not require Weyhrauch to disclose his solicitation of future legal work from VECO. The Supreme Court granted *certiorari* to address whether a public official, to be convicted of using the mails or wires to deprive the public of his or her honest services, must have violated a state law.
- 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, and the trial judge issued jury instructions that Skilling could be convicted if the government established the conduct resulted in a detriment to the employer.[7] Skilling argued that his conviction should be overturned because he was acting for Enron's benefit, and not his own private gain. The Supreme Court granted *certiorari* to decide 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.

At oral argument on these cases, the Justices did not inquire about the questions presented. Instead, a majority of the Justices focused on a more basic issue: whether the government's interpretation of the honest services statute was vague, overbroad, and potentially unconstitutional.

The Decisions

Writing for the Court in the *Skilling* decision, Justice Ginsburg (on behalf of six Justices) concluded that the honest services statute should be confined to "fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived." Slip Op. at 39. In reaching this decision, the Court noted "there is no doubt that Congress intended

5 *Id.* at 1311.

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

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

§ 1346 to refer to and incorporate the honest-services doctrine recognized in Court of Appeals' decisions before *McNally*," and while that case law was in "considerable disarray," the courts had "dominantly and consistently applied the fraud statute to bribery and kickback schemes." Slip Op. at 40-41. *See also* Slip Op. at 43 (noting that "the vast majority of the honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes").

Justice Ginsburg also noted that although Skilling had requested the Court to declare the statute unconstitutional, principles of judicial restraint required the Court "before striking a federal statute as [unconstitutionally] vague, to consider whether the [statute] is amenable to a limiting construction." Slip Op. at 41. In light of this principle, the Court held that the statute "reach[ed] at least bribes and kickbacks," but that reading the "statute to proscribe a wider range of offensive conduct…would raise the due process concerns underlying the vagueness doctrine." Slip Op. at 44.[8] The Court specifically rejected the government's request that Section 1346 be construed to apply to "undisclosed self-dealing by a public official or a private employee, *i.e.,* the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty." Slip Op. at 45. The Court concluded that if Congress intends for Section 1346 to cover other conduct "it must speak more clearly than it has," and "would have to employ standards of sufficient definiteness to overcome due process concerns." Slip Op. at 47 & n. 45.

The Court concluded that, because the government had not alleged that Skilling "solicited or accepted side payments from a third party," the jury instruction was improper because Skilling did "not commit honest services fraud." Slip Op. at 49-50. The Court remanded the case to the Fifth Circuit to determine whether the conviction could be sustained on the other theories the government advanced at trial (securities fraud and money-or-property wire fraud).[9] The Court did not address the specific question for which *certiorari* was granted whether a violation of Section 1346 requires a showing of private gain.

Justice Ginsburg also wrote the Court's decision in the *Black* case, and similarly concluded that, because the honest services statute was confined to "schemes to defraud that involve bribes or kickbacks," the jury instruction as to Black was improper. The Court also concluded that Black had not waived his objection to the jury instruction by objecting to the government's request for a special verdict form that would have specified whether the jury's verdict was specifically based on the honest services violation or the government's alternate theory that Black had committed money-or-property wire fraud. The Court remanded the *Black* case to the Seventh Circuit to determine whether the conviction could be sustained on the other theories the government advanced at trial. The Court did not address the specific question for which *certiorari* was granted, namely whether a Section 1346 conviction requires the government to prove that a defendant intended to obtain a private gain at the expense of his or her employer. The Court similarly remanded the *Weyhrauch* case to the Ninth Circuit in light of the *Skilling* decision in a *per curiam* decision.

The Implications of the Court's Rulings

It remains to be seen how the Court's rulings will be implemented by the lower courts in the *Skilling*, *Black*, and *Weyhrauch* cases. It is certainly possible that Skilling and Black could have their convictions vacated and be entitled to new trials.

But beyond the specific cases, the full implication of the Court's decisions, while potentially significant, remains unclear. As a practical matter, it may well be that the decisions will affect a relatively small number of cases. Many prosecutors traditionally have shied away from bringing honest services prosecutions unless they could

8 In a separate opinion concurring in the judgment, Justice Scalia (joined by Justices Kennedy and Thomas) concluded that Section 1346 was unconstitutionally vague.

9 In a separate holding, the Court concluded that Skilling's trial was fair, and that pre-trial publicity did not establish a presumption that the jury was prejudiced against him. Justices Sotomayor, Stevens, and Breyer dissented from this portion of the Court's decision.

point to some sort of bribe or kickback—in part because cases involving bribes or kickbacks have significantly more jury appeal, and in part because prosecutors long have been aware of the uncertain status of the honest services statute. Indeed, prosecutors have frequently charged bribery and kickback cases under the mail and wire fraud statutes because of their broad reach as compared to various limitations flowing from the myriad of federal anti-bribery laws. This historical tendency tends to explain the Supreme Court's observation in *Skilling* that "the vast majority of the honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes." Slip Op. at 43.

To be sure, prosecutors will continue to find matters in which an individual has engaged in undisclosed self-dealing, but the government nevertheless is unable to establish a bribe or a kickback scheme. In many of these cases, however, the government may well be able to rely on the myriad of other tools at its disposal to bring the case to indictment. In *Skilling*, for example, the indictment alleged three objects of the conspiracy—honest-services wire fraud, money-or-property wire fraud, and securities fraud. Were a similar case brought today, the government could attempt to avoid the impact of the Supreme Court's decisions by charging a conspiracy that alleged only money-or-property wire fraud, or securities fraud, or both.

That said, the Court's decisions *Skilling*, *Black*, and *Weyhrauch* nevertheless will likely have a number of significant ramifications. First, looking backward, the Court's decisions could result in significant collateral litigation by individuals convicted under the honest services statute. The Court did not address what impact, if any, the decisions will have on convictions based on violation of Section 1346.

Second, going forward, the Court now has expressly limited a powerful tool that the government used to combat undisclosed self-dealing. While other laws, such as the securities laws, will continue to allow the government to police undisclosed self dealing in many contexts, those statutes may well fail to reach a wide range of undisclosed self dealing—particularly in the public corruption arena, but also in a wide range of corporate fraud cases. It is not yet clear what, if anything, Congress will do to address the impact of the decisions. In 1987, in response to the Court's invitation to "speak more clearly," Congress reacted promptly to the *McNally* decision. Similarly, Congress reacted quickly to provide securities enforcement authorities additional tools following the Enron and Worldcom incidents. In light of the current public pressure and anger regarding the causes of the financial crisis, we would certainly expect this will be an area of active legislative interest. While the full contour of any such legislative "fix" is unknown, it is plain that any amendment to the statute would have to pass muster under the guidance that the Supreme Court set out in footnote 45 of the *Skilling* opinion. As the Court advised there:

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

These questions suggest it may not be easy for Congress to develop a simple legislative fix.

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

Scott B. Schreiber, Co-Chair
Securities Enforcement and Litigation Practice
+1 202.942.5672
Scott.Schreiber@aporter.com

Michael D. Trager, Co-Chair
Securities Enforcement and Litigation Practice
+1 202.942.6976
Michael.Trager@aporter.com

Marcus A. Asner
+1 212.715.1789
Marcus.Asner@aporter.com

James W. Cooper
+1 202.942.6603
James.W.Cooper@ aporter.com

John A. Freedman
+1 202.942.5316
John.Freedman@aporter.com

John N. Nassikas
+1 202.942.6820
John.Nassikas@aporter.com

Kirk Ogrosky
+1 202.942.5330
Kirk.Ogrosky@aporter.com

Mara V.J. Senn
+1 202.942.6448
Mara.Senn@aporter.com

Craig A. Stewart
+1 212.715.1142
Craig.Stewart@aporter.com

Baruch Weiss
+1 202.942.6819
Baruch.Weiss@aporter.com