

## **Honest Services Fraud Disarmament: Supreme Court Dismantles Government's Prosecution Arsenal by Limiting Application of Statute**

**June 28, 2010**

On June 24, the U.S. Supreme Court issued rulings in three significant cases involving honest services fraud under 18 U.S.C. § 1346, which purported to criminalize behavior that deprives another of “the intangible right of honest services.” In *Skilling v. United States*, No. 08-1394 (2010), the Court interpreted the statute to prohibit **only** bribery and kickback schemes, rather than a broader array of conduct suggested by the government, such as self-dealing and failure to disclose financial interests. According to the Court, if Congress would like to prohibit a broader range of conduct, “it must speak more clearly than it has.” The Court’s interpretation significantly limits the use of the honest services fraud statute, restricting what had been an expanding doctrine for federal prosecutors.

Justice Antonin Scalia’s concurring opinion points out, however, that the Court has not resolved whether Section 1346 is limited to public officials, or whether prosecutors can continue to charge private corporate officers, directors, and employees with honest services fraud. In Justice Scalia’s review of the case law, he found cases applying Section 1346 to both public and private individuals, including private individuals who had no role in public decision-making. Justice Scalia argued that the statute’s lack of clarity makes it unconstitutionally vague.

Thus, while the *Skilling* decision significantly limits the type of conduct that can be prosecuted under the honest services fraud statute by requiring the government to prove a specific *quid pro quo* involving a bribe or kickback to secure a conviction, Justice Scalia’s opinion highlights the risk that prosecutors will continue to employ the honest services statute to prosecute private citizens for conduct that is entirely unrelated to conduct involving public officials or the public trust.

### **Summary of the Cases: Corporate Executives and a Public Official**

In *Skilling*, former Enron chief executive officer Jeffrey Skilling was indicted for engaging in a scheme to deceive investors about Enron’s true financial performance. Skilling purportedly manipulated Enron’s publicly reported financial results and made false and misleading statements. Count 1 of the 42-count indictment charged Skilling with conspiracy to commit securities and wire fraud, alleging that Skilling sought to deprive Enron and its shareholders of the intangible right of his honest services under Section 1346. A jury found Skilling guilty of 19 counts under the indictment, including the honest services fraud conspiracy charge.

On appeal, Skilling argued that the jury had improperly convicted him of conspiracy to commit honest services fraud, which, as applied to his actions, should be invalidated as unconstitutionally vague. The Court reviewed the development of the honest services statute and concluded that it had been expanded by courts to cover conduct for which it was not specifically intended (i.e., failure to disclose conflicts of interest) and to cover conduct that the language of the statute did not specifically proscribe. Rather than invalidating the entire statute as being unconstitutionally vague, as advocated by Skilling and by Justices Scalia and Thomas in the concurring opinion authored by Justice Scalia, the Court significantly narrowed the reach of the honest services fraud statute by holding that it should be confined to criminalize only bribery and kickback schemes. Because the government did not contend that Skilling was involved in a bribery or kickback scheme, the Court determined that Skilling's conduct did not violate Section 1346. However, the Court concluded that his convictions on other charges may stand if the jury instructions resulted in harmless error and remanded the case to the district court for a determination on that issue.

The Court applied *Skilling* to *Black v. United States*, No. 08-876 (2010), in which former Hollinger International chief executive officer Conrad Black was indicted under the honest-services fraud doctrine. The jury instructions used in *Black* stated that a person commits honest services fraud if he “misuses his position for private gain for himself and/or a co-schemer and knowingly and intentionally breaches his duty of loyalty.” In light of *Skilling*, the Court found the instructions to be erroneous and remanded the case to the Seventh Circuit to determine whether the error was harmless.

The Court also remanded, without opinion, *Weyhrauch v. United States*, No. 08-1196 (2010), for further consideration in light of *Skilling*. *Weyhrauch* involves Bruce Weyhrauch, the former Alaska state legislator, who faces honest services charges for failing to disclose a conflict of interest—his personal negotiations with an oil-field operation company—while the state legislature was considering an oil bill that would benefit that company.

### **History of Honest Services Fraud**

The mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1342 prohibit “any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.” *Skilling* at 35 (emphasis omitted). When these statutes were enacted, federal courts of appeals, in interpreting the phrase “scheme or artifice to defraud,” began to include deprivations not only of money or property, but also of intangible rights.

In 1987 in *McNally v. United States*, the Court put the brakes on the development of the amorphous intangible-rights doctrine. In that case, the prosecutor maintained that a kickback scheme defrauded the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly. The Court found that such a scheme did not qualify as mail fraud, and stated that if Congress wanted broader application of the statute, it legislate accordingly.

Congress quickly responded by enacting 18 U.S.C. § 1346 to clarify that the term “scheme or artifice to defraud” covers “the intangible right of honest services.” This exceedingly broad honest services provision became a popular prosecution tool used by aggressive prosecutors to try and convict private and public officials alike for a wide array of conduct that the government deemed unacceptable.

## The Supreme Court Limits Honest Services Fraud to Bribes and Kickbacks

Justice Ruth Bader Ginsburg, writing for the *Skilling* majority, concluded that 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.” *Id.* at 39. Rather than strike down the provision in its entirety as urged by Justice Scalia, the Court chose to interpret the statute to uphold its validity. Viewing the pre-*McNally* cases, the Court concluded, “In view of this history, there is no doubt that Congress intended § 1346 to reach *at least* bribes and kickbacks.” *Id.* at 44.

The Court specifically rejected the government’s attempt to include within Section 1346’s reach the area of “undisclosed self-dealing by a public official or private employee—i.e., the taking of official action by the employee that furthers his [or her] own undisclosed financial interests of those to whom he [or she] owes a fiduciary duty.” Reiterating *McNally*, the Court wrote, “‘If Congress desires to go further,’ we reiterate, ‘it must speak more clearly than it has.’”

As limited to conduct involving bribes and kickbacks, the Court determined that Section 1346 was not unconstitutionally vague, but could not be applied to Skilling’s conduct because “[t]he Government did not, at any time, allege that Skilling solicited or accepted side payments from a third party in exchange for making these misrepresentations.” The Court did not find that Skilling’s conspiracy conviction was automatically reversed, however, and remanded for the Fifth Circuit to determine whether Skilling’s conspiracy conviction should be reversed, as the jury was instructed on three objects of conspiracy—honest-services wire fraud, money or property wire fraud, and securities fraud. The Court left it for the Fifth Circuit to determine whether the conspiracy conviction or any of Skilling’s other convictions were harmed by the erroneous application of Section 1346.

### Unanswered Questions—To Whom Does the Statute Apply?

In his concurrence, Justice Scalia argued that even as interpreted by the majority, Section 1346 remained unconstitutionally vague. Justice Scalia pointed out, for example, that the statute does not provide clarity as to whether Section 1346 applies to both public and private individuals. Justice Scalia found pre-*McNally* decisions applied the honest services provision to public officials, private individuals who participated in public decisions, and private employees who had no role in public decisions.

By finding that Congress only meant to include bribes and kickbacks in its reference to the honest-services doctrine, the Court failed to resolve application of the bribery and kickback restriction. Justice Scalia wrote: “Does it apply only to public officials? Or in addition to private individuals who contract with the public? Or to everyone including the corporate officer?”

Although the Supreme Court significantly disarmed government prosecutors of their recent use of the honest services fraud statute, Justice Scalia’s concurring opinion highlights the significant risk that prosecutors will continue to employ the honest services provision when prosecuting the conduct of private citizens that is entirely unrelated to conduct involving public officials or the public trust.

If you have any questions regarding this LawFlash, or require assistance with any other issue relating to the defense of any other government enforcement matters, please contact the authors, **Eric W. Sitarchuk** (215.963.5840; [esitarchuk@morganlewis.com](mailto:esitarchuk@morganlewis.com)) **Nathan J. Andrisani** (215.963.5362; [nandrisani@morganlewis.com](mailto:nandrisani@morganlewis.com)), **Matthew J.D. Hogan** (215.963.4681; [mjdhogan@morganlewis.com](mailto:mjdhogan@morganlewis.com)), **Alison Tanchyk Dante** (215.963.5847; [adante@morganlewis.com](mailto:adante@morganlewis.com)), and **Bethany Wong**

(215.963.5608; [bwong@morganlewis.com](mailto:bwong@morganlewis.com)) or any of our White Collar or U.S. Supreme Court and Appellate Litigation practitioners:

**Philadelphia**

Eric W. Sitarchuk	215.963.5840	<a href="mailto:esitarchuk@morganlewis.com">esitarchuk@morganlewis.com</a>
John C. Dodds	215.963.4942	<a href="mailto:jdodds@morganlewis.com">jdodds@morganlewis.com</a>
Eric Kraeutler	215.963.4840	<a href="mailto:ekraeutler@morganlewis.com">ekraeutler@morganlewis.com</a>
Matthew J. Siembieda	215.963.4854	<a href="mailto:msiembieda@morganlewis.com">msiembieda@morganlewis.com</a>
Lisa C. Dykstra	215.963.5699	<a href="mailto:ldykstra@morganlewis.com">ldykstra@morganlewis.com</a>
Nathan J. Andrisani	215.963.5362	<a href="mailto:nandrisani@morganlewis.com">nandrisani@morganlewis.com</a>
Meredith S. Auten	215.963.5860	<a href="mailto:mauten@morganlewis.com">mauten@morganlewis.com</a>

**Washington, D.C.**

Fred F. Fielding	202.739.5560	<a href="mailto:ffielding@morganlewis.com">ffielding@morganlewis.com</a>
Mark E. Matthews	202.739.5655	<a href="mailto:mark.matthews@morganlewis.com">mark.matthews@morganlewis.com</a>
Barbara “Biz” Van Gelder	202.739.5256	<a href="mailto:bvangelder@morganlewis.com">bvangelder@morganlewis.com</a>
Mark A. Srere	202.739.5049	<a href="mailto:msrere@morganlewis.com">msrere@morganlewis.com</a>
Amy Conway-Hatcher	202.739.5953	<a href="mailto:aconway-hatcher@morganlewis.com">aconway-hatcher@morganlewis.com</a>
Ronald J. Tenpas	202.739.5435	<a href="mailto:rtenpas@morganlewis.com">rtenpas@morganlewis.com</a>
Kathleen McDermott	202.739.5458	<a href="mailto:kmcdermott@morganlewis.com">kmcdermott@morganlewis.com</a>
Scott A. Memmott	202.739.5098	<a href="mailto:smemmott@morganlewis.com">smemmott@morganlewis.com</a>

**Houston**

Ted Cruz	713.890.5137	<a href="mailto:tcruz@morganlewis.com">tcruz@morganlewis.com</a>
Allyson N. Ho	713.890.5720	<a href="mailto:aho@morganlewis.com">aho@morganlewis.com</a>

**New York**

Leslie R. Caldwell	212.309.6260	<a href="mailto:lcaldwell@morganlewis.com">lcaldwell@morganlewis.com</a>
Kelly A. Moore	212.309.6612	<a href="mailto:kelly.moore@morganlewis.com">kelly.moore@morganlewis.com</a>
Joanna C. Hendon	212.309.6377	<a href="mailto:jhendon@morganlewis.com">jhendon@morganlewis.com</a>

**San Francisco**

John H. Hemann	415.442.1355	<a href="mailto:jhemann@morganlewis.com">jhemann@morganlewis.com</a>
William H. Kimball	415.442.1277	<a href="mailto:wkimball@morganlewis.com">wkimball@morganlewis.com</a>
Thomas M. Peterson	415.442.1344	<a href="mailto:tmpeterson@morganlewis.com">tmpeterson@morganlewis.com</a>
Lisa Tenorio-Kutzkey	415.442.1309	<a href="mailto:ltenorio-kutzkey@morganlewis.com">ltenorio-kutzkey@morganlewis.com</a>

**Wilmington**

Colm F. Connolly	302.574.7290	<a href="mailto:cconnolly@morganlewis.com">cconnolly@morganlewis.com</a>
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**Frankfurt**

Jürgen Beninca	+49.69.714.007.19	<a href="mailto:jbeninca@morganlewis.com">jbeninca@morganlewis.com</a>
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**Paris**

Thierry Dalmasso	+33 1 53 30 44 39	<a href="mailto:tdalmasso@morganlewis.com">tdalmasso@morganlewis.com</a>
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