

HONEST SERVICES FRAUD IN THE WAKE OF
SKILLING V. UNITED STATES

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I. Introduction

On June 24, 2010 the United States Supreme Court decided *Skilling v. United States*¹ and two companion cases, *Weyhrauch v. United States*² and *Black, et al. v. United States*.³ The Supreme Court's holding in *Skilling* limited the scope of the federal honest services fraud statute, 18 U.S.C. § 1346 ("Section 1346").⁴ Prior to *Skilling*, Section 1346 was broadly construed to include a wide range of corrupt practices by government officials and corporate executives. The *Skilling* decision limited the scope of Section 1346 to bribes and kickback schemes.⁵

The *Skilling* decision is significant because Section 1346 is an important tool for federal prosecutors in many high profile public corruption cases. Federal prosecutors relied on Section 1346 in some of the most infamous corruption cases of the past decade including the cases against Jack Abramoff, New Jersey state senator Wayne Bryant, Enron CEO Jeffrey Skilling, United States representatives Randy "Duke" Cunningham and Bob Ney, Alabama governor Don Siegelman, Palm Beach County commissioner Mary McCarty,⁶

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¹ *Skilling v. United States*, 130 S. Ct. 2896 (2010).

² *Black, et al. v. United States*, 561 U.S. ____ (2010) (applying the *Skilling* honest services fraud statute limitation), available at <http://www.supremecourt.gov/opinions/09pdf/08-876.pdf>.

³ *Weyhrauch v. United States*, 561 U.S. ____ (2010) (applying the *Skilling* honest services fraud statute limitation), available at <http://www.supremecourt.gov/opinions/09pdf/08-1196.pdf>.

⁴ *Skilling*, 130 S. Ct. at 2931.

⁵ *Id.*

⁶ Lucy Morgan, *Fighting Corruption with the 'Honest services' Doctrine*, ST. PETERSBURG TIMES, Jan. 25, 2009 (discussing Honest services Fraud charges against Jack Abramoff, Wayne Bryant, Kevin Geddings, Jeffrey Skilling, Randy Cunningham, Bob Ney, Don Siegelman and Mary McCarty), available at <http://www.tampabay.com/news/perspective/article/969867.ece>.

Illinois governor George Ryan,⁷ New York state senate majority leader Joseph Bruno,⁸ publishing magnate Conrad Black,⁹ and Illinois Governor Rod Blagojevich.¹⁰ Federal prosecutors relied on the honest services fraud statute in hundreds of additional recent corruption cases.¹¹ The Supreme Court's decision to narrow the scope of Section 1346 has significant ramifications on federal prosecutors' ability to respond to political and corporate corruption.¹² The *Skilling* decision has "deterred prosecutors from bringing charges they would have brought before."¹³

Senator Patrick Leahy, Chairman of the Senate Judiciary Committee, is critical of the Supreme Court's decision to narrow the scope of Section 1346.¹⁴ Senator Leahy is concerned that "whole categories of corrupt and fraudulent conduct could go unpunished" because of the *Skilling* decision.¹⁵ On September 28, 2010, the Senate Judiciary Committee held a hearing to consider new legislation to restore the honest services fraud doctrine in the wake of *Skilling*.¹⁶

⁷ Rick Pearson & John Chase, *Illinois Corruption Defendants See Opening as Court Narrows "Honest Services" Law*, CHICAGO TRIB., June 24, 2010 (discussing potential ramifications of the *Skilling* decision on George Ryan's conviction and Rod Blagojevich's ongoing prosecution), available at http://articles.chicagotribune.com/2010-06-24/news/ct-met-honest-services-chicago-20100624_1_honest-services-corruption-cases-public-corruption/2.

⁸ Nicholas Confessore & Danny Hakim, *Bruno, Former State Leader, Guilty of Corruption*, THE N.Y. TIMES, Dec. 7, 2009, available at http://www.nytimes.com/2009/12/08/nyregion/08bruno.html?_r=4.

⁹ See *Black, et al. v. United States*, 561 U.S. ____ (2010).

¹⁰ *U.S. v. Rod Blagojevich, et al.*, Superseding Indictment (Apr. 2008) (charging Rod Blagojevich with violations of the honest services fraud statute), available at <http://news.findlaw.com/hdocs/docs/blago/usblagojevich409ind.html>.

¹¹ Michael Rothfeld, *Fraud Cases Get Rehashed After Court Ruling*, WALL ST. J., Sept. 25, 2010, available at <http://online.wsj.com/article/SB10001424052748703793804575511914001223110.html?KEYWORDS=honest+services>.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Restoring Key Tools to Combat Fraud and Corruption After the Supreme Court's Skilling Decision Before the Senate Judiciary Committee*, 111th Cong. (2010) (statement of Sen. Patrick Leahy, Chairman of the Senate

The Senate Judiciary Committee is poised to introduce new legislation to close the gaps left by *Skilling v. United States*.¹⁷

II. Definition of Honest Services Fraud

Honest services fraud is defined as a “scheme or artifice to deprive another of the intangible right of honest services.”¹⁸ The honest services fraud statute, Section 1346, is an addendum to the federal mail¹⁹ and wire fraud statute.²⁰ The federal mail and wire fraud statute generally refers to fraudulent behavior devised to deprive another of tangible money or property.²¹ Section 1346 extends federal mail and wire fraud to an intangible, ill-defined right to honest services.²²

The mail and wire fraud provisions targeting fraudulent deprivation of money or property are well defined and relatively uncontroversial. The honest services doctrine, on the other hand, has been subject to over a century of divergent common law and statutory development.²³ The Supreme Court limited application of Section 1346 in *Skilling v. United States* because the statutory definition of “deprivation of intangible right to honest services” was unconstitutionally vague as applied in that case.²⁴

The honest services doctrine has defied clear statutory definition for over a century, so the Supreme Court construed the honest services doctrine through reference to the common law development of honest services cases.²⁵ As the Senate Judiciary Committee contemplates new legislation to reinvigorate honest services fraud enforcement in light of *Skilling*, one of their primary challenges is to create a specific, usable definition of honest services

Judiciary Committee), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=4816&wit_id=2629.

¹⁷ *Id.*

¹⁸ 18 U.S.C.A. § 1346 (2011).

¹⁹ 18 U.S.C.A. § 1341 (2011) (establishing the federal prohibition against mail fraud).

²⁰ 18 U.S.C.A. § 1343 (2011) (extending the federal prohibition against fraud to wire, radio and television).

²¹ *Id.*

²² 18 U.S.C.A. § 1346.

²³ *Skilling v. United States*, 130 S. Ct. 2896, 2926-28 (2010) (tracing the common law and statutory development of the Honest services doctrine).

²⁴ *Id.* at 2931.

²⁵ *Id.* at 2926.

fraud.²⁶ Until the Senate Judiciary Committee creates a clear definition for honest services fraud, the courts will continue to rely on common law history to define the fraudulent behavior proscribed by Section 1346.²⁷

III. Development of Honest Services Fraud Doctrine

The original mail fraud provision enacted in 1872 “proscribed, without further elaboration, use of the mails to advance ‘any scheme or artifice to defraud.’”²⁸ In 1896, the Supreme Court first construed the meaning of the phrase “any scheme or artifice to defraud” to apply broadly in regard to property rights, but didn’t extend the mail fraud law to any intangible honest services right.²⁹ In 1909, the mail fraud statute was updated to prohibit “any scheme or artifice to defraud, *or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.*”³⁰ But appellate courts interpreted the 1909 mail fraud statute to go beyond the original limitation to property rights and began to consider fraudulent deprivation of intangible rights within the ambit of mail fraud.³¹

Between 1909 and 1987, appellate courts developed a broad common law “honest services doctrine.”³² In *Shushan v. United States*,³³ *United States v. Starr*,³⁴ and *United States v. Dixon*,³⁵ among other cases, courts construed fraudulent schemes to deprive others of intangible rights to honest services as violations of the mail fraud statute.³⁶ These cases usually concerned bribery of public officials, which resulted in no discernable financial or property loss to their

²⁶ *Restoring Key Tools to Combat Fraud*, *supra* note 16.

²⁷ *Skilling*, 130 S. Ct. at 2931.

²⁸ *Id.* at 2926 (citing *McNally v. United States*, 483 U.S. 350, 356 (1987)).

²⁹ *See McNally v. United States*, 483 U.S. 350, 356 (1987) (citing *Durland v. United States*, 161 U.S. 306 (1986)).

³⁰ *Skilling*, 130 S. Ct. at 2931 (citing 18 U.S.C. § 1341).

³¹ *Id.* at 2926.

³² *Id.* at 2926-2927.

³³ *Shushan v. United States*, F.2d 110 (5th Cir. 1941).

³⁴ *United States v. Starr*, 816 F.2d 94, 101 (2d Cir. 1987).

³⁵ *United States v. Dixon*, 536 F.2d 1388, 1400 (2d Cir. 1976).

³⁶ *Skilling*, 130 S. Ct. at 2926-27 (2010) (tracing the historical development of Honest services doctrine).

constituents.³⁷ “Even if the scheme occasioned a money or property *gain* for the betrayed party, courts reasoned, actionable harm lay in the denial of that party's right to the offender's ‘honest services.’”³⁸

While most honest services fraud cases involved bribery of public servants, courts also applied the honest services doctrine to the private sector. In *United States v. Procter & Gamble Co.*,³⁹ for example, Procter & Gamble Co. bribed the employees of their competitor, Lever Brothers Co. The court held that “when one tampers with the [employer-employee] relationship for the purpose of causing the employee to breach his duty he in effect is defrauding the employer of a lawful right [to the employee’s honest services].”⁴⁰

The honest services doctrine expanded through the appellate courts and eventually encompassed all circumstances where any employee, public or private, accepted bribes or kickbacks in the course of employment.⁴¹ Broad application of the mail fraud statute eventually expanded beyond the honest services doctrine, and was used to “attack corruption that deprived victims of other kinds of intangible rights, including election fraud and privacy violations.”⁴² But in 1987, the Supreme Court changed the course of honest services jurisprudence.⁴³

The Supreme Court’s decision in *McNally v. United States* overturned decades of honest services doctrine.⁴⁴ Justice White, writing for the *McNally* court, asserted that “[t]he mail fraud statute

³⁷ *Id.* at 2926 (“[T]he honest-services theory targeted corruption that lacked similar symmetry. While the offender profited, the betrayed party suffered no deprivation of money or property; instead, a third party, who had not been deceived, provided the enrichment. For example, if a city mayor (the offender) accepted a bribe from a third party in exchange for awarding that party a city contract, yet the contract terms were the same as any that could have been negotiated at arm's length, the city (the betrayed party) would suffer no tangible loss.”)

³⁸ *Id.* at 2926.

³⁹ 47 F. Supp. 676 (D. Mass. 1942).

⁴⁰ *Id.* at 678.

⁴¹ *Skilling* 130 S. Ct. at 2927 (citing *United States v. McNeive*, 536 F.2d 1245, 1249 (8th Cir. 1976)).

⁴² *Id.* (citing *Cleveland v. United States*, 531 U.S. 12, 18, n. 2 (2000)).

⁴³ Gurbir Singh Grewal & Charles Manice, *Honest Services Fraud: A Shifting Theory of Criminal Liability, Until Now*, Howrey LLP (Aug. 26, 2010), available at http://www.martindale.com/criminal-law/article_Howrey-LLP_1130278.htm.

⁴⁴ *McNally v. United States*, 483 U.S. 350, 356 (1987).

clearly protects property rights, but does not refer to the intangible right of the citizenry to good government.”⁴⁵ The *McNally* court acknowledged the development of honest services doctrine in the appellate courts,⁴⁶ but asserted that the mail fraud statute did not include a right to honest services.⁴⁷ The *McNally* court rejected the honest services doctrine and limited the scope of the mail fraud statute to protection of property rights.⁴⁸ Justice White instructed that “if Congress desires to go further, it must speak more clearly than it has.”⁴⁹

Congress reacted quickly to the Supreme Court’s *McNally* decision. In 1988, only one year after *McNally*, Congress passed Section 1346⁵⁰ but Section 1346 was simply a 28-word addendum to the existing mail and wire fraud statute.⁵¹ Critics of the honest services fraud Statute assert that “[a]lthough Congress responded quickly [to *McNally*], it did not speak clearly.”⁵²

IV. Criticism of Honest Services Fraud Doctrine

Section 1346 does not define the phrase “intangible right to honest services.”⁵³ This statute does not proscribe any specific behaviors, nor does it provide any examples of activities that may violate the statute.⁵⁴ Section 1346 doesn’t even state whether it applies to private actors, or whether it is limited to public officials.⁵⁵ Due to uncertainty about the definition of honest services, this statute has been subject to divergent interpretation by courts since its passage in 1988.⁵⁶

⁴⁵ *Id.*

⁴⁶ *Id.* at 357.

⁴⁷ *Id.*

⁴⁸ *Id.* at 360.

⁴⁹ *Id.*

⁵⁰ 18 U.S.C.A. § 1346 (1988).

⁵¹ *Id.*

⁵² Grewal, *supra* note 43.

⁵³ *See* 18 U.S.C.A. § 1346 (2011).

⁵⁴ *See id.*

⁵⁵ *See id.*

⁵⁶ Grewal, *supra* note 43 (“Circuit Courts have employed diverging standards to uphold these convictions. For example, while some required only the breach of fiduciary duty in private sector cases, others required the breach to be material.”).

Critics of Section 1346 contend that it is unconstitutionally vague, and does not give potential violators “reasonable opportunity to know what is prohibited.”⁵⁷ Prior to the *Skilling* decision, the honest services fraud statute was panned for its inscrutable definition and inconsistent judicial application.⁵⁸ Prosecutors were criticized for selectively adopting convenient definitions of honest services fraud and “repeatedly proffer[ing] whatever meaning is necessary to prosecute whatever defendant happen[ed] to be in the Government’s sights.”⁵⁹ In 2009, Justice Antonin Scalia argued that the honest services fraud Statute was fatally flawed and ready for review by the United States Supreme Court.⁶⁰

V. *Honest Services Fraud in Skilling v. United States*

In *Skilling v. United States*, the Supreme Court had the opportunity to review the constitutionality of the honest services fraud statute.⁶¹ The Supreme Court criticized Section 1346 for vagueness and lack of consistency,⁶² but instead of striking Section 1346 entirely, the Supreme Court decided to limit its scope.⁶³ Section 1346 was passed to extend the old honest services fraud doctrine in response to the *McNally* decision, so the Supreme Court used the pre-*McNally* cases as a guide to limit the meaning of “intangible right of honest services.”⁶⁴ Though the pre-*McNally* honest services fraud cases are diverse, the Supreme Court identified a “core” to the

⁵⁷ Brief for Petitioner at 38, *Skilling v. United States*, 130 S. Ct. 2896, No. 08-1394 (2010) (citing *Grayned v. Rockford*, 408 U.S. 104, 108 (1972)).

⁵⁸ Grewal, *supra* note 43.

⁵⁹ Brief for Petitioner at 42-43, *Skilling v. United States*, 130 S. Ct. 2896, No. 08-1394 (2010); *see* Grewal, *supra* note 43 (“[F]ederal prosecutors have used [the honest services fraud statute] to investigate and prosecute a laundry list of criminal conduct.”).

⁶⁰ *United States v. Sorich*, 523 F.3d 702 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 1308 (2009) (“In light of the conflicts among the Circuits; the long-standing confusion over the scope of the statute; and the serious due process and federalism interests affected by the expansion of criminal liability that this case exemplifies, I would grant the petition for certiorari and squarely confront both the meaning and the constitutionality of Section 1346. Indeed, it seems to me quite irresponsible to let the current chaos prevail.”).

⁶¹ *Skilling v. United States*, 130 S. Ct. 2896 (2010).

⁶² *Id.* at 2929.

⁶³ *Id.*

⁶⁴ *Id.* at 2928.

honest services doctrine.⁶⁵ The Supreme Court held that the core of honest services fraud doctrine was limited to bribes and kickback schemes.⁶⁶ After *Skilling*, Section 1346 remains a viable statute, but it is limited to cases involving bribery or kickback schemes.

VI. *Current Developments in Honest Services Fraud*

Department of Justice officials are concerned that the *Skilling* decision undermines their efforts to combat public corruption and fraud.⁶⁷ Legislators including Senator Patrick Leahy, chair of the Senate Judiciary Committee, also criticize the gaps created by the *Skilling* decision,⁶⁸ because other federal statutes already proscribe bribery and kickbacks, “so the honest services fraud statute was always more important in other contexts.”⁶⁹ In particular, federal prosecutors are concerned that the *Skilling* decision has deprived them of a key tool for prosecuting undisclosed self-dealing schemes by public officials.⁷⁰

Undisclosed self-dealing schemes typically involve government officials who conceal their private financial interests and then use their public office to advance those secret interests.⁷¹ Undisclosed self-dealing schemes fall short of bribery, but federal prosecutors argue that self-dealing “undermines public confidence in the integrity of their government.”⁷² The Department of Justice also wants to address undisclosed self-dealing in the private sector, but public corruption is a more urgent problem because undisclosed self-

⁶⁵ *Id.* at 2930.

⁶⁶ *Id.* at 2905, 2928.

⁶⁷ *Restoring Key Tools to Combat Fraud and Corruption After the Supreme Court’s Skilling Decision Before the Senate Judiciary Committee* 111th Cong. (2010) (Statement of Lanny A. Breuer, Assistant Attorney General, Criminal Division, United States Department of Justice), available at <http://judiciary.senate.gov/pdf/9-28-10%20Breuer%20Testimony.pdf> (“I can assure you that the impact of *Skilling* is real, and that there is conduct that would have been prosecuted under the honest services fraud statute before *Skilling* that can no longer be prosecuted under the federal criminal law.”).

⁶⁸ *Restoring Key Tools to Combat Fraud*, *supra* note 16.

⁶⁹ *Id.*

⁷⁰ Breuer, *supra* note 67.

⁷¹ *Id.*

⁷² *Id.*

dealing by government officials is “most likely to fall outside the reach of any other statute.”⁷³

On September 28, 2010, the Senate Judiciary Committee held a hearing entitled “Restoring Key Tools to Combat Fraud and Corruption after the Supreme Court’s *Skilling* Decision.”⁷⁴ On the same day, Senator Leahy introduced the Honest Services Restoration Act.⁷⁵ The Honest Services Restoration Act criminalizes undisclosed self-dealing by public officials as well as private officers and directors.⁷⁶ On September 29, 2010, Representative Anthony Weiner introduced a companion bill in the House of Representatives.⁷⁷ The House bill also criminalizes undisclosed self-dealing by public officials, but it omits any mention of private sector self-dealing.⁷⁸

Neither bill was passed by the One Hundred Eleventh Congress. Similar bills have yet to be introduced in the current legislature but Senator Leahy is committed to restoring the honest services fraud doctrine and may soon introduce new anti-corruption legislation that will close some of the gaps left in the wake of *Skilling v. United States*.⁷⁹

⁷³ *Id.*

⁷⁴ See *Restoring Key Tools to Combat Fraud, supra* note 16 and *Corruption After the Supreme Court’s Skilling Decision Before the Senate Judiciary Committee*, 111th Cong. (2010), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=4816&wit_id=2629.

⁷⁵ Melissa Aguilar, *Post-Skilling, Movement Afoot on Honest Services Fraud*, COMPLIANCE WK., Oct. 4, 2010 (discussing introduction of the Honest Services Restoration Act), available at <http://www.complianceweek.com/post-skilling-movement-afoot-on-honest-services-fraud/article/187439/>.

⁷⁶ Honest Services Restoration Act, S. 3854 111th Cong. (2010).

⁷⁷ Honest Services Restoration Act, H.R. 6391 111th Cong. (2010).

⁷⁸ *Id.*

⁷⁹ Statement of Senator Patrick Leahy, Chairman, Senate Judiciary Committee, On Introduction of The “Public Corruption Prosecution Improvements act of 2011” (Feb. 17, 2011) (“I introduced legislation in the last Congress, the Honest Services Restoration Act, to close this crucial gap and restore the government’s ability to prosecute key categories of corruption cases. I have heard from Democrats and Republicans in the Senate and the House who are eager to fix this problem. I hope to continue working with Senator Cornyn and others to find a bipartisan solution to fixing honest services fraud and perhaps to incorporate a fix into this comprehensive anti-corruption bill at some point in the future.”), available at http://leahy.senate.gov/press/press_releases/release/?id=69342C70-A1CE-4424-B0CB-5830A87257F0.