

**SUPREME COURT SIGNIFICANTLY NARROWS SCOPE OF HONEST SERVICES
FRAUD STATUTE IN CASE INVOLVING WILLKIE CLIENT**

In opinions issued on June 24, 2010, the Supreme Court restricted substantially the application of the so-called “honest services” federal criminal statute to cases involving bribery or kickback charges. Since the passage of the statute more than twenty years ago, federal prosecutors have frequently and liberally used the law in cases involving both public officials and private individuals, seeking to capture a variety of supposed unethical behaviors within the criminal statute’s grasp. The Supreme Court’s ruling likely puts to an end the growing trend of the criminalization of conduct, such as fiduciary duty breaches and conflicts of interest, that traditionally falls solely within the reach of the civil courts.

The Supreme Court rendered its chief opinion narrowing the scope of the “honest services” statute in *Skilling v. United States*, a case involving fraud and other charges against former Enron executive Jeffrey K. Skilling. Following its holding in *Skilling*, the Court also vacated the judgment against former Hollinger International Chairman and CEO Conrad M. Black and several other company executives – including Willkie client Peter Y. Atkinson, the former General Counsel of Hollinger Inc. – in *Black v. United States*. Atkinson was acquitted on virtually all counts at trial and now seeks to have his conviction vacated entirely in light of the Supreme Court’s decision.

Background of the “Honest Services” Statute

The “theft of honest services” statute, codified at 18 U.S.C. § 1346, effectively expands the federal mail and wire fraud statutes beyond the mere prohibition of frauds aimed at obtaining money or property, by prohibiting any “scheme or artifice to deprive another of the intangible right of honest services.” Section 1346 was passed by Congress in 1988 in direct response to the Supreme Court’s ruling in *McNally v. United States* one year earlier.

In *McNally*, the Court halted the development of the so-called “intangible rights” doctrine, through which all federal Courts of Appeals had held that the federal mail and wire fraud statutes prohibited, in one manner or another, not only the theft of money or property through fraud but also the deprivation of the intangible right to honest services. The “intangible rights” theory had gradually come to be applied by courts in both the public and private spheres. *McNally* in particular involved a Kentucky state officer who allegedly steered a state insurance contract to an agent who agreed to provide kickbacks to entities partially controlled by the state officer. The Supreme Court held that the government’s theory of culpability under the mail fraud statute, namely that the state officer “defraud[ed] the citizens and government of Kentucky of their right to have the Commonwealth’s affairs conducted honestly,” was untenable, reading the mail fraud statute “as limited in scope to the protection of property rights.”

Congress responded by enacting § 1346, expressly broadening the mail and wire fraud statutes to prohibit the deprivation of the “intangible right of honest services.” In so doing, it was thought, Congress intended to resurrect the body of pre-*McNally* case law defining the scope and contours of the “intangible rights” theory of criminal liability. Given the at-once succinct and broad wording of the statute, federal Courts of Appeals prescribed varying interpretations of the requisite elements for establishing “honest services” fraud as well as differing views as to the potential substantive reach of the statute. Federal prosecutors wielded the amorphous statute as a powerful tool in constructing corruption charges and criminalizing allegedly unethical but otherwise non-criminal forms of conduct. As “honest services” prosecutions increased in number, defendants denounced § 1346 as unconstitutionally vague, as it provided little guidance on its face as to what conduct was prohibited and was applied in widely disparate manners by courts across the country. The Supreme Court accepted challenges to the statute’s constitutionality on a number of bases in the *Skilling* and *Black* cases this past year.

The Supreme Court’s Limitation of the “Honest Services” Statute

In an opinion authored by Justice Ginsburg, the Supreme Court in *Skilling* held that “§ 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law.” The Court explained that “[r]eading the statute to proscribe a wider range of offensive conduct . . . would raise the due process concerns underlying the vagueness doctrine.” In so finding, the Court expressly held that, as “a reasonable limiting construction of § 1346,” the statute did not extend to general conflict-of-interest or self-dealing cases that federal prosecutors had long charged as criminal conduct under the “honest services” statute. The Court underscored that its “decision clarifies that no other misconduct [beyond bribery or kickbacks] falls within § 1346’s province.”

In light of its limitation of § 1346, the Court vacated and remanded for further consideration the convictions in *Skilling* and in *Black*, as the “honest services” theories advanced by the government in those cases did not proceed upon allegations of bribes or kickbacks. In *Black*, the government had charged that Black, Atkinson and two other executives at Hollinger International engaged in self-dealing through the taking of certain non-competition agreement fees for themselves without disclosing their receipt of the fees to the company’s shareholders. Among other things, the trial court instructed the jury that a person commits honest services fraud if he “misuse[s] his position for private gain for himself and/or a co-schemer” and “knowingly and intentionally breache[s] his duty of loyalty.” Since the government’s honest services charges in *Black* centered upon alleged breaches of fiduciary duty under Delaware law (because Hollinger International was incorporated under the laws of Delaware), a significant portion of the jury instructions derived not from federal statutory and interpretative common law but rather from an extensive body of Delaware state common law on self-dealing, duty of loyalty and other issues having no direct relevance to the congressional pronouncement in § 1346. The Supreme Court’s decision in *Skilling* precludes the criminalization of breaches of state fiduciary duty law, as was the case in *Black*.

Justice Scalia, joined by Justice Thomas and Justice Kennedy, wrote in a concurring opinion in *Skilling* that they would have invalidated § 1346 altogether on the ground that it is unconstitutionally vague, violating the Due Process Clause of the Fifth Amendment. In their view, the Court's limitation of the "honest services" statute to conduct encompassing solely bribery or kickbacks, as a matter of statutory interpretation, was flawed as the "pre-*McNally* cases provide no clear indication of what constitutes a denial of the right of honest services." Justice Scalia continued that arriving at the conclusion that § 1346 criminalizes only bribery or kickbacks "requires not interpretation but invention." The Court was overstepping its authority, Justice Scalia argued, in wielding "the power to define new federal crimes."

Implications of the Supreme Court's Rulings

The Court's decision in *Skilling* should have broad implications, both on convictions previously secured on the basis of the "honest services" statute and on a going-forward basis. First, it is likely the Supreme Court's narrowing of the scope of § 1346 will trigger a slew of legal challenges to convictions based in part on the pre-*Skilling* expansive interpretation of the statute, whether on direct appeal, through habeas petitions or otherwise. Among those likely to raise challenges to convictions are Joseph Bruno, a former prominent New York state politician recently convicted of two counts of "honest services" fraud, and Richard Scrushy, the former CEO of HealthSouth, convicted of charges arising out of a bribery conspiracy with former Alabama Governor Don Siegelman. While defendants challenging § 1346 convictions in many cases were likely also convicted of other charges, they may seek to have all counts of conviction vacated on the basis that the improper "honest services" charges tainted the entire trial.

Second, the significantly constricted scope of § 1346 takes a widely used tool away from the government in the prosecution of public and private corruption cases. The statute has been a favorite of federal prosecutors because of its malleability, allowing the government in many cases to charge, as criminal, conduct that appears unethical but otherwise does not fall within a prescribed area of criminal liability. Not only did § 1346 allow prosecutors to broaden the scope of potential criminal conduct, but it also provided them a basis to present evidence bearing on unethical conduct where such evidence may have been lacking in relevance on its own and thus inadmissible. These prosecutorial advantages have been sharply scaled back, if not eliminated, with the Supreme Court's decision in *Skilling*.

Finally, notwithstanding the Supreme Court's intention in *Skilling* to define clearly the conduct proscribed by § 1346, the constitutionality of the statute may not be free of appellate scrutiny going forward. As Justice Scalia emphasized in his concurring opinion in *Skilling*, ambiguity persists as to the "most fundamental indeterminacy" of the statute, namely "the character of the 'fiduciary capacity' to which the bribery and kickback restriction applies." In particular, Justice Scalia questioned whether § 1346 as redefined applies only to public officials, or to private individuals who contract with the public, or to everyone. These questions and others will command close attention as the lower courts take up cases involving the significantly pared down "honest services" statute.

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