Deprivation of Honest Services as a Basis for Federal Mail and Wire Fraud Convictions

Charles Doyle
Senior Specialist in American Public Law

July 28, 2010

Congressional Research Service
7-5700
www.crs.gov
R40852

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

The United States Supreme Court in *Skilling v. United States* construed the honest services branch of the federal mail and wire fraud statutes to reach no more than cases involving bribery or kickbacks. The mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, impose criminal penalties for the use of mail or interstate wire communications to deprive another of money or property through a "scheme or artifice to defraud." In its 1987 *McNally* decision, the Court had held that while the fraud statutes reached schemes to deprive another of property rights, they did not cover "the intangible right of the citizenry to good government." Congress responded almost immediately by enacting the "honest services" statute, 18 U.S.C. § 1346, which declares that phrase "scheme or artifice to defraud" in the mail and wire statutes also encompasses depriving "another of the intangible right of honest services."

In its 2009 term, the Court was presented with three honest services cases—*Skilling*, *Black* and *Weyhrauch*. Each offered the Court a slightly different prerequisite for an honest services conviction –for *Weyhrauch*, a public official, it was an underlying state law violation; for *Black*, in the private sector, it was foreseeable harm; for *Skilling*, an Enron executive, it was private gain. The Court instead returned to the pre-*McNally* case law which it felt Congress intended the honest services statute to revive. In the pre-*McNally* world, most of the honest services cases, the core cases, involved bribery or kickbacks. This, the Court said, is what Congress meant when it spoke of honest services: the deprivation of honest services, public or private, by bribery or kickbacks.

To construe the statute otherwise, the Court felt, would ground the statute on "a vagueness shoal." In fact, three members of the Court refused to endorse the majority opinion in full because they thought the honest services statute unconstitutionally vague on due process grounds. Should Congress desire a more inclusive definition of honest services fraud, the Court urged that it "employ standards of sufficient definiteness and specificity to overcome due process concerns."

The Court sent each of the three cases back to the lower courts—*Black* and *Skilling*, for a determination of whether erroneous jury instructions on honest services fraud had so tainted their convictions as to require a new trial or whether the instructions simply constituted harmless error; *Weyhrauch*, for the reconsideration in light of the Court's *Skilling* decision.

This report was originally prepared by Anna C. Henning.

Contents

Contacts

Introduction

The Supreme Court recently held that the definition of honest services for purposes of the federal mail and wire fraud statutes encompasses only those cases that involve bribery or kickbacks, *Skilling v. United States*, 78 U.S.L.W. 4735 (U.S. June 24, 2010). In doing so, the Court took the middle ground between those who had urged that the definition be found unconstitutionally vague and those who favored sweeping and severe condemnation of public and private corruption.

The federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, have been described as federal prosecutors' "true love," because they provide a basis for criminal liability in a broad spectrum of instances.[1] For the purpose of mail and wire fraud prosecutions, federal jurisdiction is triggered when a person utilizes the federal postal service or an interstate carrier or sends a wire or radio communication. For example, the statutes may apply to schemes in which a FedEx package or an e-mail was sent. Convictions are obtained after a prosecutor achieves the more difficult step of proving that an intent to further a "scheme or artifice to defraud" accompanied the use of mail or wire. Over time, the scope of "scheme or artifice to defraud" has been a subject of contentious debate, particularly with regard to schemes to defraud victims of rights unrelated to pecuniary assets.

Congress enacted the honest services statute, 18 U.S.C. § 1346, in 1988 to incorporate within the ambit of the federal mail and wire fraud statutes schemes infringing on a victim's right to an official's or employee's "honest services" (i.e., an employee's honest work on behalf of a company or an official's honest public service). High-profile examples include a guilty plea by the lobbyist Jack Abramoff to conspiracy to commit honest services fraud and the indictment of former Illinois Governor Rod Blagojevich on honest services fraud and related charges.[2] In the private sector, a notable case involves the conviction of Jeffrey Skilling, a former Enron executive.[3]

Although it is generally agreed that Congress has the authority to regulate the federal mail system and interstate wire communications, the sparse text and potential breadth of the honest services statute have prompted concerns regarding its constitutionality. Critics of the statute have argued that its mere "28 words" form a vague and unfair basis for federal criminal jurisdiction in many cases.[4] Likewise, in an opinion dissenting from the Supreme Court's decision to deny review in a 2008 honest services case, Justice Scalia suggested that the statute's vague language invites federal prosecution of seemingly commonplace actions, such as "a mayor's attempt to use the prestige of his office to obtain a restaurant table without a reservation."[5] Prompted by these and other considerations, federal courts have employed judicial interpretation techniques to avoid an overly broad reading of the statute. However, the federal courts of appeals disagreed regarding the appropriate approach.

---

[1] *See* Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. Cin. L. Rev. 1, 1 (1998-1999) (citing Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771, 771-72 (1980)).

[2] *See* Susan Schmidt and James V. Grimaldi, *Abramoff Pleads Guilty to Three Counts: Lobbyist to Testify About Lawmakers in Corruption Probe*, Wash. Post, Jan. 4, 2006, at A1; U.S. Fed. News Service, *Former Illinois Gov. Blagojevich, His Brother, Two Former Top Aides, Two Businessmen Indicted*, Apr. 4, 2009.

[3] *See* United States v. Skilling, 554 F.3d 529 (5th Cir. 2009), *vac'd and rem'd*, 78 U.S.L.W. 4735 (U.S. June 24, 2010).

[4] *See, e.g.*, Mike Robinson, *Federal Law Under Attack*, Dubuque Telegraph-Herald, Sep. 13, 2009, at A20.

[5] Sorich v. United States, 129 S. Ct. 1308 (2009) (Scalia, J., dissenting from the denial of certiorari).

Perhaps in part to address the disagreement among the courts of appeals, the U.S. Supreme Court granted writs of certiorari in three cases, *Weyhrauch v. United States*,[6] *Black v. United States*,[7] and *Skilling v. United States*,[8] which present questions regarding the scope of the honest services statute. The cases provided the Court's first opportunity to interpret the honest services fraud statute since it was enacted. Particularly with the decision to review *Skilling*, a highly publicized case connected with the collapse of Enron, the grants of certiorari garnered significant media attention.[9] The Court's granting of the three writs within a relatively short time frame, less than a year after Justice Scalia's strongly worded dissent from the denial of certiorari in a case from the Court's 2008 term, prompted speculation that the Supreme Court might narrow the scope of the statute.[10]

Background: Mail and Wire Fraud

The Court hardly wrote upon a clean slate. In 1872, Congress enacted the mail fraud statute "to curtail an epidemic of 'large-scale swindles, get-rich-quick schemes, and financial frauds.'"[11] In 1952, it established an analogous federal crime, wire fraud, which applies to frauds committed by the use of wire, radio, or television communications in interstate commerce. Because the triggering activities for federal jurisdiction—use of mail or wire, including the Internet—are very common modes of communication, the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, provide federal criminal jurisdiction over a broad range of fraudulent schemes.[12]

Except for the instrument (the mail system versus radio or wire) used to trigger federal jurisdiction, the mail and wire fraud statutes involve identical criminal conduct and are generally interpreted in the same manner by the federal courts.[13] The mail fraud statute subjects anyone to

[6] 129 S. Ct. 2863 (2009) (No. 08-1196).

[7] 129 S. Ct. 2379 (2009) (No. 08-876).

[8] 130 S. Ct. 393 (2009) (No. 08-1394).

[9] *See, e.g.*, John R. Emshwiller, *Supreme Court to Hear Appeal of Enron's Skilling*, Wall St. J., Oct. 14, 2009.

[10] *See, e.g.*, David Stout, *Justices Will Hear Appeal of Former Enron Chief*, N.Y. Times, Oct. 14, 2009 ("It is clear that the Supreme Court intends to take a close look at the statute."); Greg Burns, *Skilling, Black and Blagojevich: Honest Services Fraud?*, Chicago Trib., Oct. 14, 2009 ("The U.S. Supreme Court has set the stage for reining in a widely used fraud statute.... ").

[11] United States v. Svete, 556 F.3d 1157, 1162 (11th Cir. 2009) (quoting Jed S. Rakoff, *The Federal Mail Fraud Statute* (Part I), 18 Duq. L. Rev. 771, 780 (1980)). The focus in the legislative history on financial frauds provides some indication that Congress initially intended to limit the statute's scope to those activities involving money or property. In 1909, it appeared to codify this limitation when it amended the statute to clarify that it covered schemes for the purpose of "obtaining money or property" through fraud. Act of Mar. 4, 1909, 35 Stat. 1130.

[12] *See* Jack E. Robinson, *The Federal Mail and Wire Fraud Statutes: Correct Standards for Determining Jurisdiction and Venue*, 44 Willamette L. Rev. 479, 479 (2007-2008) (noting that "[t]he federal mail and wire fraud statutes, particularly since their amendment in 2002, have become the most prevalent and lethal weapon in the federal prosecutor's arsenal" and have enabled the U.S. Department of Justice to "root out new and increasingly more sophisticated frauds," but arguing that the expanded federal authority "has also led to the 'federalization' of fraudulent conduct that is more appropriately dealt with by state prosecutors under state law").

[13] *See* Pasquantino v. United States, 544 U.S. 349, 355 n.2 (2005) ("we have construed identical language in the wire and mail fraud statutes *in pari materia*") (citing Neder v. United States, 527 U.S. 1, 20 (1999), Carpenter v. United States, 484 U.S. 19, 25 and n.6 (1987)). *See also* United States v. Ward, 486 F.3d 1212, 1221 (11th Cir. 2007) ("Aside from the means by which a fraud is effectuated, the elements of mail fraud, 18 U.S.C. 1341, and wire fraud, 18 U.S.C. 1343, are identical."). However, one difference is that the wire fraud provision is based on Congress's commerce clause authority, whereas the mail fraud statute also applies in cases involving only intrastate communications. *See* United States v. Elliott, 89 F.3d 1360, 1364 (8th Cir. 1996); United States v. Photogrammertric Data Services, Inc., 259 F.3d (continued...)

criminal liability who, "having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," deposits or causes to be deposited, knowingly causes to be delivered, or takes or receives, any "matter or thing whatever" in a post office or "authorized mail depository" or with "any private or commercial interstate carrier ... for the purpose of executing [a fraudulent] scheme."[14] The wire fraud statute includes the same "having devised or intending to devise any scheme or artifice to defraud ..." and "for the purpose of executing such scheme" language but applies to transmittals of "any writings, signs, signals, pictures, or sounds" "by means of wire, radio, or television communication in interstate or foreign commerce."[15]

Generally speaking, criminal convictions require the government to prove both an *actus reus* (action) and a *mens rea* (mental state). As mentioned, the *actus reus* component of the federal mail and wire fraud statutes is satisfied with proof of a relatively innocuous action—namely, the very common act of using mail or telecommunications. For example, in *United States v. Weyhrauch*,[16] the defendant's alleged scheme involved voting a particular way on state legislation regarding taxation of oil companies in exchange for an oil company hiring the defendant to provide legal services. However, the event triggering jurisdiction for purposes of the mail fraud statute was the defendant mailing his resumé to the oil company. Furthermore, in most cases, a prosecutor need not prove that a person actually used the mail or sent a wire or radio communication. Instead, it is generally sufficient that a defendant knew or should have foreseen that mail or wire would be used.[17] In addition, it is usually not necessary to prove that a victim was actually harmed (i.e., that a person was deprived of property or other rights).[18]

Thus, the success of mail or wire fraud prosecutions typically turns on whether a defendant had the requisite mental state—namely, whether he or she intended to devise a "scheme or artifice to defraud." For both crimes, a prosecutor must prove that a defendant had specifically intended to perpetrate a fraud.[19] Thus, the statutes are sometimes described as having a "specific intent" requirement.[20] In the public corruption context, some courts of appeals have adopted relatively strict interpretations of this requirement. For example, the U.S. Court of Appeals for the First Circuit has noted that the intent requirement in the mail and wire fraud statutes requires that a

(...continued)

229, 247 (4th Cir. 2001).

[14] 18 U.S.C. §1341.

[15] 18 U.S.C. §1343.

[16] 548 F.3d 1237 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 2863 (2009).

[17] *See* Pereira v. United States, 347 U.S. 1, 8-9 (1954) ("Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used.") (citing United States v. Kenofskey, 243 U.S. 440 (1917)).

[18] In that regard, the mail and wire fraud statutes resemble "inchoate offenses," such as attempt and conspiracy, for which a prosecutor must prove only that a defendant took sufficient steps toward the commission of a crime and had the requisite intent to commit the crime, rather than any particular outcome. However, unlike the crimes of attempt and conspiracy, the federal mail and wire fraud crimes also address crimes in which the fraud was "successful" (i.e., where harm actually occurred).

[19] *See* United States v. Galex, 341 Fed. Appx. 775, 776 (3d Cir. 2009) (requiring proof beyond a reasonable doubt that a defendant knowingly and willfully participated in a scheme or artifice to defraud "'with specific intent to defraud.'") (quoting United States v. Antico, 275 F.3d 245, 261 (3d Cir. 2001); United States v. Sloan, 492 F.3d 884, 891 (7th Cir. 2007) ("To show an intent to defraud, we require a willful act by the defendant with the specific intent to deceive or cheat, usually for the purpose of getting financial gain for one's self or causing financial loss to another.").

[20] *See* United States v. Sawyer, 239 F.3d 31, 46-47 (1st Cir. 2001).

prosecutor "indicate wrongdoing by a public official, [but] also demonstrate that the wrongdoing at issue [was] intended to prevent or call into question the proper or impartial performance of that public servant's official duties."[21] Other decisions have tempered the extent of the specific intent hurdle, however. In a later case, the First Circuit allowed that the "prosecution may prove this requisite intent to defraud through circumstantial evidence."[22] In addition, the scope of activities which may constitute fraud for the purpose of fulfilling the intent requirement is relatively broad. The Supreme Court has held that "scheme or artifice to defraud" extends to "any act or omission that 'wrong[s] one in his property rights by dishonest methods or schemes and usually signif[ies] the deprivation of something of value by trick, deceit, chicane or overreaching.'"[23]

Materiality presents a final component to the analysis in mail and wire fraud cases. In general, federal courts require that a scheme to defraud must be material; that is, it must have a natural tendency to induce reliance to the victim's detriment or to the offender's benefit.[24] However, as discussed, mail and wire fraud are typically punishable regardless of the ultimate success of a fraudulent scheme.[25]

Congress substantially increased the penalties associated with the federal mail and wire fraud statutes as part of the Sarbanes-Oxley Act of 2002.[26] The maximum penalties for the statutes, including in cases proceeding under an honest services theory, now include imprisonment for up to 20 years.[27]

Honest Services Statute

The honest services statute, 18 U.S.C. § 1346, states that for the purposes of the federal crimes of mail and wire fraud, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." As discussed, because of the sparse text but broad application, questions remain regarding the scope of the statute and the range of situations to which it applies.[28] The provision's historical context, together with case law predating the provision and various constitutional considerations, inform judicial interpretation of the statute.

---

[21] United States v. Czubinski, 106 F.3d 1069, 1076 (1st Cir. 1997). *But see* United States v. Woodward, 149 F.3d 46, 61-62 (1st Cir. 1998) (distinguishing *Czubinski* where the defendant had received tangible benefits in the form of gratuities and a "connection between the gratuities and [the defendant]'s official acts could have been justifiably inferred from the fact that [he] had discretion to act or not act in ways that would further the insurance industry's interests").

[22] *Sawyer*, 239 F.3d at 46-47 (citing United States v. Ervasti, 201 F.3d 1029, 1037 (8th Cir. 2000)).

[23] McNally v. United States, 483 U.S. 350, 358 (1987) (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)).

[24] *See, e.g.*, Neder v. United States, 527 U.S. 1, 21-22 (1999) (holding that materiality is an element of mail, wire, and bank fraud because the statutory language drew from common law, and at common law, "fraud" had to be material).

[25] *See* United States v. Gale, 468 F.3d 929, 937 (6th Cir. 2006); United States v. Schuler, 458 F.3d 1148, 1153 (10th Cir. 2006); United States v. Reifler, 446 F.3d 65, 96 (2d Cir. 2006).

[26] P.L. 107-204, 116 Stat. 745, 800 (2002).

[27] 18 U.S.C. §§ 1341, 1343. Prior to the passage of the Sarbanes-Oxley Act, the maximum prison sentence that could be imposed was five years.

[28] *See, e.g.*, United States v. Urciuoli, 513 F.3d 290, 294 (1st Cir. 2008) ("as one moves beyond core misconduct covered by the statute (e.g., taking a bribe for a legislative vote), difficult questions arise in giving coherent content to the phrase through judicial glosses").

Historical Context

Beginning in the 1930s and 1940s, federal courts applied the federal mail fraud statute to frauds stemming from a breach of fiduciary duty.[29] During the late 1970s and 1980s, using fiduciary duty as an analogy, federal courts first included public corruption within the types of activities which could give rise to a mail or wire fraud conviction.[30] A theory suggested to justify honest services convictions in the public sector context "relie[d] on the idea that a public official acts as trustee for the citizens and the State ... and thus owes the normal fiduciary duties of a trustee, e.g., honesty and loyalty to them."[31]

In 1987, the Supreme Court halted such "honest services" convictions when it held, in *McNally v. United States*,[32] that the definition of "any scheme or artifice to defraud" extends only to schemes targeting tangible property rights, not intangible ones, such as a breach of fiduciary duty.[33] The Court explained that it had chosen the narrow interpretation, "[r]ather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials."[34] It added that "[i]f Congress desires to go further, it must speak more clearly than it has."[35]

The following year, in response to the *McNally* decision,[36] Congress amended the statutory definition of "scheme or artifice to defraud" for purposes of mail and wire fraud, as discussed, to encompass any "scheme or artifice to deprive another of the *intangible* right of honest services."[37] Some courts have interpreted the new statute as having "reinstated the line of cases preceding

[29] *See, e.g.*, Alexander v. United States, 95 F.2d 873 (8th Cir. 1938) (affirming the conviction for mail fraud of defendants who had mailed fictitious medical licenses, where they were found to have "devised a scheme and artifice to defraud numerous persons, including the public generally, and particularly those persons who would in the future desire the services of legally licensed and professionally competent doctors, surgeons, and chiropractors"); United States v. Procter & Gamble Co., 47 F.Supp. 676, 678 (D.Mass. 1942) (applying the mail fraud statute to a private sector employee's breach of his fiduciary duty).

[30] *See, e.g.*, United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979); United States v. Silvano, 812 F.2d 754 (1st Cir. 1987).

[31] United States v. Kincaid-Chauncey, 556 F.3d 923, 939 (9th Cir. 2009) (quoting United States v. Silvano, 812 F.2d 754, 759 (1st Cir. 1987), United States v. Mandel, 591 F.2d 1347, 1363 (4th Cir. 1979) (internal quotation marks omitted)). However, in general, breach of a fiduciary duty is not considered a necessary element for a mail or wire fraud conviction proceeding on an honest services theory. *See* United States v. Ervasti, 201 F.3d 1029, 1036 (8th Cir. 2000).

[32] 483 U.S. 350, 358 (1987).

[33] *Id.* at 358. The Court relied on the legislative history of the mail fraud statute.

[34] *Id.* at 360.

[35] *Id.*

[36] *See* 134 Cong. Rec. S 17,376 (Nov. 10, 1988) (section-by-section analysis inserted into the record by Senator Biden on behalf of the Senate Judiciary Committee) ("This section overturns the decision in *McNally v. United States* in which the Supreme Court held that the mail and wire fraud statutes protect property but not intangible rights. Under the amendment, those statutes will protect any person's intangible right to the honest services of another, including the right of the public to the honest services of public officials. The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change.").

[37] P.L. 100-690, § 7603, 102 Stat. 4181 (codified at 18 U.S.C. §1346) (emphasis added).

[*McNally*]"[38] with respect to the honest services theory, whereas other courts have concluded that Congress could not have intended to reinstate the pre-*McNally* case law.[39]

The honest services fraud amendment was interpreted by some as overruling *McNally* only with regard to the right of honest services, and not with regard to other intangible rights.[40] Before Congress enacted the honest services statute, the Supreme Court, in *United States v. Carpenter*,[41] applied the mail fraud statute to intangible property—specifically, to confidential information that would affect stock trading. However, the *Carpenter* holding appeared to extend only to interests that could be construed as property interests, rather than to other intangible rights, such as those contemplated by the honest services provision. Thus, it could be argued that three categories of mail and wire fraud now exist—traditional fraud affecting tangible pecuniary interests, fraud affecting intangible pecuniary interests, and honest services fraud—whereas other types of intangible rights are not included within the ambit of mail and wire fraud. For example, in a 2000 case, *Cleveland v. United States*,[42] the Court overturned a conviction in which the lower courts found that the State of Louisiana was fraudulently induced to issue a video poker license. The Court held that the mail and wire fraud statutes were inapplicable because the license was not "money or property" while in the state's hands, nor was a deprivation of honest services implicated.

Prosecutions

Based in part on the pre-*McNally* case law, federal courts had interpreted the honest services provision as encompassing services owed by both publicly elected officials and private employees. In both private sector and public corruption cases, prosecutions were not limited to the public official or employee who owed honest services.[43] For example, a third party may be criminally liable for concealing a conflict of interest on behalf of a public official or engaging in a conspiracy with an employee to defraud a corporation.[44]

In the private sector, defendants in a typical case might include various people involved in a fraudulent scheme (e.g., to award a company's contracts or services in exchange for kickbacks).[45] The statute has been described as applying to schemes that would "enable an officer or employee of a private entity ... purporting to act for and in the interests of his or her employer ... secretly to

[38] United States v. Sorich, 523 F.3d 702, 707 (7th Cir. 2008) (citing United States v. Rybicki, 354 F.3d 124, 136-37 (2d Cir. 2003) (en banc)).

[39] *See, e.g.*, United States v. Brumley, 116 F.3d 728, 733 (5th Cir. 1997) ("Congress could not have intended to bless each and every pre-*McNally* lower court 'honest services' opinion.").

[40] *See* Cleveland v. United States, 531 U.S. 12 (2000) ("Congress amended the law specifically to cover one of the 'intangible rights' that lower courts had protected under § 1341 prior to *McNally*: 'the intangible right of honest services.'").

[41] 484 U.S. 19 (1988).

[42] 531 U.S. 12 (2000).

[43] *See* United States v. Sorich, 523 F.3d 702, 707 (7th Cir. 2008) (describing the private sector type of honest services fraud as that in which "an employer is defrauded of its employee's honest services by the employee *or by another*") (emphasis added).

[44] Alternatively, a third party is sometimes charged as an accessory in an honest services case. For example, in *United States v. Panarella*, 277 F.3d 678 (3d Cir. 2002), the Third Circuit upheld the conviction of an owner of a tax collection business on charges of having been an accessory after the fact to an official's commission of honest services fraud.

[45] *See, e.g.*, United States v. George, 477 F.2d 508 (7th Cir. 1973).

act in his or her or the defendant's own interests instead."[46] Over time, it has been applied to corporate officers, purchasing agents, stock brokers, "and others with clear fiduciary duties to their employees or unions."[47]

In the public corruption context, honest services cases arose when a defendant is alleged to have deprived the public of its right to an elected official's honest services.[48] Lower courts noted that the two most common situations in which the honest services statute is implicated include bribery of a public official and undisclosed conflicts of interest.[49] Convictions for both types of schemes, as well as patronage schemes, were upheld in various cases prior to *McNally*.[50] Bribery of a public official has been described as the "most obvious" form of honest services fraud,[51] but courts occasionally characterized the receipt of benefits as a result of an undisclosed conflict of interest as a more subtle version of having accepted a bribe.[52]

Constitutional Considerations

The sparse yet broad text of the honest services statute prompts some special constitutional considerations. Related to the specific issues discussed below are overarching separation-of-powers questions. For example, which branch—Congress or the judiciary—is best suited to delineate the scope of federal criminal jurisdiction in honest services cases?

Federalism

Congress's authority to enact the mail and wire fraud statutes is derived from its Article I powers to establish a postal system and regulate interstate commerce.[53] Principles of federalism may

[46] United States v. Rybicki, 354 F.3d 124, 126-27 (2d Cir. 2003) (en banc), *cert. denied*, 543 U.S. 809 (2004).

[47] *See* McNally v. United States, 483 U.S. 350, 364 (1987).

[48] *See, e.g.*, United States v. Silvano, 812 F.2d 754, 759 (1st Cir. 1987) (describing courts' pre-*McNally* interpretation of the mail and wire fraud statutes as including an honest services component "premised upon an underlying theory that a public official acts as trustee for the citizens and the State ... and thus owes the normal fiduciary duties of a trustee, e.g., honesty and loyalty to them" (internal quotations omitted)).

[49] *See, e.g.*, United States v. Gordon, 183 Fed.Appx. 202, 208 (3d Cir. 2006) ("Honest services fraud typically is found in two situations: '(1) bribery, where a legislator was paid for a particular decision or action; or (2) failure to disclose a conflict of interest resulting in personal gain,' which, '[i]n the public sector ... is oftentimes prescribed by state and local ethics laws.'") (quoting United States v. Antico, 275 F.3d 245, 262-63 (3d Cir. 2001))).

[50] *See, e.g.*, United States v. Isaacs, 493 F.2d 1124 (5th Cir. 1975) (upholding a conviction for the accepting of bribes); United States v. Keane, 522 F.2d 534 (7th Cir. 1975) (upholding a Chicago Alderman's honest services fraud conviction for, among other things, failing to disclose his personal interest in property); United States v. Bush, 522 F.2d 641 (7th Cir. 1975) (upholding the conviction of a Chicago mayor's Press Secretary, who failed to disclose his ownership interest in a business that had an exclusive contract with the city); United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982) (upholding the conviction of a political party official in connection with his alleged distribution of insurance commission positions to his political allies).

[51] United States v. Carbo, 572 F.3d 112, 115 (3d Cir. 2009).

[52] United States v. Panarella, 277 F.3d 678, 697 (3d Cir. 2002) ("The only difference between a public official who accepts a bribe and a public official who receives payments while [taking steps to benefit from an undisclosed conflict of interest] is the existence of a quid pro quo whereby the public official and the payor agree that the discretionary action taken by the public official is in exchange for payment. Recognizing the practical difficulties in proving the existence of such a quid pro quo, disclosure laws permit the public to judge for itself whether an official has acted on a conflict of interest.").

[53] *See* U.S. Const. art. I, § 8 ("The Congress shall have Power ... To regulate Commerce with foreign Nations, and (continued...)

impose outer limits on the reach of federal authority, particularly as applied to state political activities. Federalism, derived from the constitutional structure which creates a federal government of limited powers, and from the Tenth Amendment to the Constitution,[54] recognizes that the states and the federal government exist as dual sovereigns. Although the extent to which the Tenth Amendment or general principles of federalism impose an affirmative limit on the federal government is somewhat unsettled, the Supreme Court has historically invoked these principles to justify a narrow reading of federal criminal statutes.[55] Likewise, in the mail and wire fraud context, in particular, the Court has indicated that it requires a clear statement from Congress before it will interpret the statutes as intruding on areas traditionally governed by the states.[56]

As mentioned, such concerns are perhaps most strongly implicated by the honest services statute in the context of federal prosecutions against state and local officials. They may have informed the Supreme Court's decision in *Weyhrauch*, in which the Court granted certiorari to resolve the question "[w]hether, to convict a state official for depriving the public of its right to the defendant's honest services through the disclosure of material information, in violation of the mail-fraud statute ... the government must prove that the defendant violated a disclosure duty imposed by state law."[57] In other cases, lower federal courts had argued that an approach to the honest services fraud statute that is not subject to the state law limiting principle, rejected by the lower court in *Weyhrauch* and discussed *infra*, might be inconsistent with principles of federalism.[58] The Supreme Court, however, elected to return *Weyhrauch* to the Ninth Circuit for reconsideration in light of the Court's decision in *Skilling*.

Void-for-Vagueness

In *Skilling* and *Weyhrauch*, appellants argued that the honest services statute is unconstitutionally vague.[59] Criminal statutes are held to violate the due process clauses of the Fifth and Fourteenth Amendments[60] when they are sufficiently vague that people "of common intelligence must necessarily guess at [their] meaning."[61] This "void-for-vagueness" doctrine is rooted in due

(...continued)

among the several States ... [and] To establish Post Offices and post Roads").

[54] U.S. Const. amdt. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people").

[55] *See, e.g.*, Linder v. United States, 268 U.S. 5, 17 (1925) ("[W]e accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced.").

[56] *See* Cleveland v. United States, 531 U.S. 12, 25 (2000) ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes").

[57] 129 S. Ct. 2863 (2009).

[58] *See, e.g.*, United States v. Gordon, 183 Fed. Appx. 202, 210 (3d Cir. 2006) (describing a broad interpretation of the statute as "inconsistent with principles of federalism that are preserved when federal honest services fraud is tied to a violation of a fiduciary relationship arising under state or local law") (citing United States v. Murphy, 323 F.3d 102, 117 (3d Cir. 2003)).

[59] *See* Petition for a Writ of Certiorari, Skilling v. United States, No. 08-1394 (filed May 11, 2009); Petition for a Writ of Certiorari, Weyhrauch v. United States, No. 08-1196 (filed Mar. 25, 2009).

[60] U.S. Const. amdt. V; U.S. Const. amdt. XIV, § 1.

[61] Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

process concerns regarding notice to citizens and the arbitrary enforcement of laws.[62] Courts may declare statutes void if the conduct giving rise to criminal liability, the persons to which it applies, or the punishment which may be imposed are unclear.

However, assessments of vagueness are determined in light of judicial precedents that have construed a statute's scope or meaning. Thus, a key question with regard to the honest services statute is whether existing judicial precedents—including case law before and after the Supreme Court's decision in *McNally*—provide a sufficient degree of clarity to satisfy due process requirements. Some commentators argue that the case law is inconsistent and does not provide any firm boundaries for the scope of the statute.[63] As a theoretical matter, vagueness questions arise in part because judicial opinions in honest services cases have relied upon concepts such as fiduciary duty, which are borrowed from the context of civil liability. Such concepts arguably do not provide sufficient clarity to satisfy the constitutional requirements for penal statutes, which are subject to a heightened level of scrutiny before the government may place a defendant's life, liberty, or property at stake.

Prior to the Supreme Court decision in *Skilling*, the federal courts of appeals which had addressed the issue have rejected void-for-vagueness challenges.[64] The most notable case was *United States v. Rybicki*,[65] a 2003 decision in which the U.S. Court of Appeals for the Second Circuit, sitting *en banc*, upheld the honest services statute against such a challenge. The court noted that case law predating the enactment of the honest services statute clarifies the scope of the crime. In contrast, several dissenting judges argued that the judicial doctrines that the court characterized as having formed the backdrop for the honest services fraud provision are "as standardless as the statute itself."[66] However, that characterization would appear to apply to standards governing the application of the mail and wire fraud statutes, generally, rather than only honest services cases.

[62] The Supreme Court has noted that the threat of arbitrary or discriminatory enforcement of the laws is the more pressing of the two concerns. *See* Kolender v. Lawson, 461 U.S. 352, 357-58 (1983) ("Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'" (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)).

[63] *See, e.g.*, Andrew B. Matheson, *A Critique of* United States v. Rybicki*: Why Foreseeable Harm Should Be an Aspect of the* Mens Rea *of Honest Services Fraud*, 28 Am. J. Trial Advoc. 355, 356 (2004-2005).

[64] *See, e.g.*, United States v. Inzunza, 580 F.3d 894, 903-906 (9th Cir. 2009); United States v. Hargrove, 579 F.3d 752, 754 (7th Cir. 2009); United States v. Hasner, 340 F.3d 1261, 1268-269 (11th Cir. 2003); United States v. Welch, 327 F.3d 1081, 1109 n.29 (10th Cir. 2003); United States v. Rybicki, 354 F.3d 124, 141-44 (2d Cir. 2003)(en banc); United States v. Frost, 125 F.3d 346, 370-71 (6th Cir. 1997); United States v. Gray, 96 F.3d 769, 776-77 (5th Cir. 1996). Justice Scalia had suggested that void-for-vagueness issues are implicated by the honest services fraud provision, *see* Sorich v. United States, 129 S. Ct. 1308 (2009) (Scalia, J., dissenting from the denial of certiorari), but the Court had not yet ruled on the issue.

[65] 354 F.3d 124 (2d Cir. 2003) (en banc).

[66] *Rybicki*, 354 F.3d at 161 (Jacobs, J., dissenting).

Judicial Limitations on the Scope of the Honest Services Statute

The courts of appeals had generally recognized a "need to find limiting principles to cabin the broad scope of § 1346."[67] When explaining the need for such standards, courts have referenced the constitutional concerns discussed *supra*.[68] Some courts had also asserted that the text of the honest services statute would otherwise seemingly justify absurd convictions. For example, at least one court has suggested that in private sector cases, "the plain language of the 'honest services' doctrine codified in § 1346 suggests that 'dishonesty by an employee, standing alone, is a crime.'"[69] Thus, although "[u]nder such an application of the statute, [a defendant's] conduct [might be] clearly within the scope of § 1346 ... courts generally [had] been reluctant to apply § 1346 in a way that would expose employees to mail fraud prosecution for 'every breach of contract or every misstatement made in the course of dealing.'"[70] Dissenting to denial of certiorari in an honest services case, Justice Scalia appeared to agree that a limiting principle was necessary. He stated: "Without some coherent limiting principle to define what 'the intangible right of honest services' is, whence it derives, and how it is violated, this expansive phrase invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct."[71]

Despite a general agreement that some limiting principle was necessary, however, the federal courts had adopted differing approaches. Some established special requirements before a defendant could be convicted for mail and wire fraud based on an honest services theory. As discussed, the three most prominent requirements include the "private gain," a "state law violation," and a "foreseeable harm" requirement.

Other courts of appeals had declined to adopt tests which apply only in honest services cases. They relied instead on specific intent and materiality requirements, required elements for mail and wire fraud convictions generally. The U.S. Court of Appeals for the Tenth Circuit has perhaps articulated this view most forcefully. In *United States v. Welch*,[72] it criticized the special tests as requiring courts "to judicially legislate by adding an element to honest services fraud which the text and the structure of the fraud statutes do not justify."[73] Defendants in the case were members of the Salt Lake City Olympic Bid Committee who allegedly bribed members of the International Olympic Committee in an effort to secure Salt Lake City's chances to host the 2002 Winter

---

[67] *See* United States v. Inzunza, 2009 WL 2750488, *9 (9th Cir. 2009). *See also* Andrew B. Matheson, *A Critique of* United States v. Rybicki*: Why Foreseeable Harm Should Be an Aspect of the* Mens Rea *of Honest Services Fraud*, 28 Am. J. Trial Advoc. 355, 372 (2004-2005) (noting that a "broad consensus" exists that "there must be a limiting element for honest services fraud, lest every ethical lapse be treated as a crime").

[68] *See, e.g.*, United States v. McGeehan, 584 F.3d 560, 568 (3d Cir. 2009) (describing void-for-vagueness concerns as one justification for employing a limiting principle—that is, "the exercise of interpreting a malleable term in a criminal statute which applies to a wide variety of activity may generate nebulous standards that are not discernable to people of ordinary intelligence").

[69] United States v. Vinyard, 266 F.3d 320, 326-27 (4th Cir. 2001) (quoting United States v. Frost, 125 F.3d 346, 368 (6th Cir. 1997)).

[70] *Id.* (quoting United States v. Cochran, 109 F.3d 660, 667 (10th Cir. 1997)).

[71] Sorich v. United States, 129 S. Ct. 1308 (2009) (Scalia, J., dissenting from the denial of certiorari).

[72] 327 F.3d 1081 (10th Cir. 2003).

[73] *Id.* at 1107.

Olympic Games. In rejecting various proposed limiting principles, the Tenth Circuit stated that the honest services statute "'must be read against a backdrop of the mail and wire fraud statutes, thereby requiring fraudulent intent and a showing of materiality'" and concluded that these existing requirements provided sufficient checks against the statute's potential overbreadth.[74] In September 2009, the U.S. Court of Appeals for the Ninth Circuit took a similar approach in *United States v. Inzunza*,[75] a case involving former members of the San Diego City Council. It joined what it characterized as the "majority rule," holding that the intent and materiality requirements implicit in the mail and wire fraud statutes rendered special tests unnecessary. Although courts sometimes characterize materiality and specific intent requirements as alternatives to the limiting principles established for honest services, they tend to emphasize that such tests are "inherent" in the mail and wire fraud framework rather than having been judicially created specifically for honest services cases, as are the following tests.[76]

Private Gain

The "private gain" or "personal gain"[77] test, which had been most fully adopted by the U.S. Court of Appeals for the Seventh Circuit, would have limited the scope of the honest services provision by requiring a showing that a defendant aimed to secure a private gain for himself or another. In *United States v. Bloom*,[78] a Chicago alderman, who also worked as a private attorney, had advised a client to plant a proxy buyer at a real estate auction as part of a scheme to obtain tax advantages. The court dismissed the honest services count because the prosecutor had not alleged that these actions had been intended for the alderman's personal gain. The Seventh Circuit held that the "[m]isuse of office (more broadly, misuse of position) for private gain is the line that separates run of the mill violations of state-law fiduciary duty ... from federal crime."[79]

A later Seventh Circuit case, *United States v. Sorich*,[80] involved a "corrupt and far-reaching scheme, based out of the [Chicago mayor's office], that doled out thousands of city civil service jobs based on political patronage and nepotism."[81] The court upheld a jury instruction which required proof that the defendants intended "to deprive a governmental entity of the honest services of its employees for personal gain to a member of the scheme or another."[82]

---

[74] *Id.* at 1107 (quoting United States v. Cochran, 109 F.3d 660, 667 (10th Cir. 1997)).

[75] 2009 WL 2750488 (9th Cir. 2009).

[76] *See, e.g.*, United States v. Rybicki, 354 F.3d 124, 146 (2003) (en banc) (adopting a "materiality test" in lieu of the foreseeable harm test, "because it has the virtue of arising out of fundamental principles of the law of fraud: A material misrepresentation is an element of the crime").

[77] Although other courts of appeals' opinions and earlier Seventh Circuit opinions have in some cases referred to the test as requiring a showing of "personal gain," the Seventh Circuit stated in its most recent honest services case that "private gain" is the more appropriate term for the test. *See* United States v. Sorich, 523 F.3d 702, 709 (7th Cir. 2008) (noting that although the "semantic difference between 'private' and 'personal' gain may be insignificant ... to the extent that 'personal' connotes gain only by the defendant, it is misleading").

[78] 149 F.3d 649 (7th Cir. 1998).

[79] *Id.* at 655.

[80] 523 F.3d 702 (7th Cir. 2008).

[81] *Id.* at 705.

[82] *Id.* at 708-09. The court determined that the phrases "private gain" and "personal gain" were not meaningfully different.

Bloom left unresolved whether conviction may be obtained where a defendant has sought gain on behalf of a third party. In *Sorich*, the court clarified that "private gain ... simply mean[s] illegitimate gain, which usually will go to the defendant, but need not."[83] It then affirmed the convictions resulting from the patronage scheme, signaling that at least in some circumstances, private gain may include gain sought on behalf of third parties. The test's application to third parties has not been further explored.

Other parameters of the Seventh Circuit's conception of "private gain" are not clearly defined. The Seventh Circuit appears to have limited the definition to benefits that are received in secret or outside of regular procedures. In a 2007 case, *United States v. Thompson*,[84] the defendant, a section chief in a state procurement office, was alleged to have influenced the selection process for a state travel agent contract for political reasons. However, the gain that the defendant was alleged to have obtained was characterized as favor with her supervisor and a pay raise through the ordinary compensation process. The court held that strengthened job security and the pay raise could not be construed as a private gain for the purpose of a mail fraud conviction. In reaching this conclusion, the court contrasted these alleged gains with examples of private gain given in *Bloom*, all of which involved "payoffs outside the proper channels."[85] However, one could imagine factual scenarios in which a gain might be difficult to categorize as being clearly inside or outside the boundaries of typical compensation procedures. For example, it is unclear how the standard would apply in conflict-of-interest cases in which a payment related to an undisclosed interest might be received through "proper channels" within the meaning of that phrase as articulated in *Bloom* and *Thompson*—e.g., in the form of ordinary compensation for services rendered to satisfy a legal contract obligation.

Although a few other federal courts of appeals appeared to have alluded to the private gain analysis, others had explicitly rejected it.[86] Reasons for the rejection include a view that it simply "substitut[es] one ambiguous standard for another" and a concern that the private gain test has the potential to make § 1346 under-inclusive, for example by failing to apply in conflict-of-interest cases.[87] As mentioned, in some cases, courts of appeals had rejected the private gain test in favor of reliance on the specific intent requirement inherent in the mail and wire fraud framework. For example, the U.S. Court of Appeals for the Ninth Circuit, in *Inzunza*, stated that "careful attention to the intent element dispels concerns about the statute's overbreadth."[88] In other cases, courts of appeals have rejected the test in favor of other limiting principles. Most notably, the Court of Appeals for the Fifth Circuit in *Skilling* declined to apply the test.[89]

[83] *Id.* at 709.

[84] 484 F.3d 877, 882 (7th Cir. 2007).

[85] *Id.* at 883.

[86] *See, e.g.*, United States v. Gordon, 183 Fed.Appx. 202, 210 (3d Cir. 2006) (noting that the Third Circuit has "specifically refused to limit the offense to situations in which a public official uses his or her office for personal gain").

[87] United States v. Panarella, 277 F.3d 678, 691-92, 699 (3d Cir. 2002).

[88] 2009 WL 2750488, *10 (9th Cir. 2009) ("Evidence of private gain may bolster a showing of deceptive intent, but such a showing could also rest heavily on evidence of harm and deceit."). However, it held that evidence of intent to obtain a private gain, although not a necessary prerequisite for conviction, provides some evidence of the requisite mental state.

[89] United States v. Skilling, 554 F.3d 529 (5th Cir. 2009), *cert. granted*, 130 S. Ct. 393 (2009).

State Law Limiting Principle

A few federal courts of appeals adopted the "state law limiting principle," which dictated that a conviction for mail or wire fraud on an honest services theory required a showing that a defendant's activity violated state law. Courts that adopted the principle emphasized the principles of federalism and the importance of state law as a dividing line between criminal behavior and common political maneuvering.[90]

The Fifth Circuit first adopted the principle in *United States v. Brumley*,[91] in which it noted the importance of federalism concerns for its holding.[92] The defendant in *Brumley* had served on the Texas Industrial Accident Board, which administered workers compensation claims in the state.[93] He allegedly borrowed money from several lawyers who represented claimants whose claims were to be resolved by the Board. The court held that "services must be owed under state law" and that "the government must prove in a federal prosecution that they were in fact not delivered."[94] It concluded that the defendant's behavior violated a state statute which prohibited "a public servant with judicial authority" from accepting "any benefit" from a person with an interest in a matter before the public servant.[95] The Fifth Circuit has reaffirmed the principle in later cases, most recently in *United States v. Skilling*,[96] discussed *infra*.

Although it has declined to formally adopt it,[97] the U.S. Court of Appeals for the Third Circuit also followed the state law limiting principle. In *United States v. Panarella*,[98] a state senator had allegedly failed to disclose compensation he had obtained from the owner of a tax collection business. The Third Circuit concluded that "[s]tate law offers a better limiting principle for purposes of determining when an official's failure to disclose a conflict of interest amounts to honest services fraud" than is offered by the private gain test or other alternatives.[99] Applying the principle, it upheld the conviction of an accessory to the senator's crime, holding that the senator had taken a discretionary action which he knew would directly benefit a financial interest that he had concealed in violation of a state criminal law. In a subsequent case, the court clarified that the

[90] *See, e.g.*, United States v. Carbo, 572 F.3d 112, 118 (3d Cir. 2009) ("[T]he violation of state law is critical to distinguishing between acceptable political deal-making and criminal deprivation of the public's right to the honest services of public officials—in other words, between normal politics and fraud.").

[91] 116 F.3d 728 (5th Cir. 1997).

[92] *See Id.* at 735 ("The federalism arguments that inform the definition of 'honest services' under federal criminal law are powerful, and we acknowledge them in our holdings today.").

[93] *Id.* at 730-31.

[94] *Id.* at 734.

[95] *Id.* at 735-36.

[96] 554 F.3d 529, 544 (5th Cir. 2009) (referring to the state law limiting principle established in *Brumley* as "the rule for this circuit").

[97] *See* United States v. McGeehan, 584 F.3d 560, 568 (3d Cir. 2009) (noting it has endorsed the state law limiting principle but has reserved the question whether a violation of a state or federal fiduciary duty is *necessary* to sustain an honest services fraud conviction); United States v. Carbo, 572 F.3d 112, 117 n. 4 (3d Cir. 2009) (stating that the court has so far viewed the violation of state law as sufficient to support an honest services conviction but has not yet resolved the question of whether such a violation is necessary).

[98] 277 F.3d 678 (3d Cir. 2002).

[99] *Id.* at 692-93.

violation of state law "does not require a violation of *criminal* law, but rather a violation of a state-created fiduciary duty."[100]

In a 2009 case, *United States v Carbo*,[101] the Third Circuit considered what mental state is required in connection with the violation of a state law. As in *Panarella*, the case involved a failure to disclose a conflict of interest. However, in *Carbo*, the defendant was a third party, rather than a public official or his accessory. Specifically, he was a business owner in Norristown, Pennsylvania, who was charged with honest services fraud as a result of a scheme with the borough administrator in which favors were allegedly provided in return for government contracts. The administrator allegedly failed to disclose his interest in the business in violation of state law.[102] An issue on appeal was whether a knowledge requirement—that is, a showing that a defendant knew that a public official's failure to disclose would violate state law—should be applied in cases involving a third party defendant.[103] The court adopted such a requirement, but it construed it so as not to present an "insurmountable obstacle to prosecutors."[104] Specifically, the court stated that "it is not necessary to demonstrate that the defendant knew the fine details of an official's reporting requirements."[105] It further clarified that "if the evidence is sufficient for a reasonable jury to conclude that the defendant participated in a scheme to assist a public official in hiding a conflict of interest, and that the defendant knew that the law forbade the official from engaging in that form of undisclosed conflict of interest, a conviction for honest services mail fraud should be upheld."[106]

In *United States v. Murphy*,[107] a 2003 case, the Third Circuit characterized a sister circuit's rejection of the state law limiting principle as an outlier approach and criticized it as having "extend[ed] the mail fraud statute beyond any reasonable bounds."[108] However, thereafter, a majority of federal courts which considered the issue declined to adopt the principle.[109] A notable example is the opinion by the U.S. Court of Appeals for the Ninth Circuit in *Weyhrauch*.[110]

In the federal circuits in which the state law limiting principle was rejected, some applied a "federal common law standard of good government" to determine whether a defendant's actions are covered by the statute.[111] Even in such cases, however, the violation of state law was often

---

[100] United States v. Gordon, 183 Fed.Appx. 202, 211 (2006) (emphasis in original).

[101] 572 F.3d 112 (3d Cir. 2009).

[102] The administrator had purchased a truck, which he rented to local contractors, whom he had the authority to choose for contracts with the borough. The administrator failed to disclose his income from the truck rental business on an annual disclosure form required by the Pennsylvania Public Official and Employee Ethics Act, 65 Pa. Cons. Stat. § 1104(a), and he failed to disclose his interest in businesses proposing to contract with the borough and to recuse himself from decisions regarding such contracts, as was required by the borough's charter.

[103] The court acknowledged that the issue had not arisen in *Panarella* because that case focused on the wrongdoing of a public official, who was presumably aware of state disclosure requirements.

[104] *Carbo*, 572 F.3d at 118.

[105] *Id.*

[106] *Id.*

[107] 323 F.3d 102 (3d Cir. 2003).

[108] *Id.* at 104, 111 (characterizing the Second Circuit's rejection of the state law limiting principle in United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982)).

[109] *See, e.g.*, United States v. Walker, 490 F.3d 1282, 1299 (11th Cir. 2007) ("an honest services mail fraud or mail fraud conviction does not require proof of a state law violation").

[110] 548 F.3d 1237 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 2863 (2009).

[111] See Michael K. Avery, *Whose Rights? Why States Should Set the Parameters for Federal Honest Services Mail and* (continued...)

viewed as relevant evidence to establish that a defendant had the requisite intent to deprive a government or employer of its right to an official or employee's honest services. This principle was been demonstrated most clearly in the context of conflict-of-interest cases. For example, in *United States v. Woodward*,[112] the U.S. Court of Appeals for the First Circuit held that specific intent was demonstrated by the defendant's failure to disclose a conflict of interest which he was required by law to disclose.

It was unclear whether courts of appeals that rejected the state law limiting principle in public corruption cases might be willing to apply the principle in private sector honest services cases.[113] Some federal courts "crafted special requirements in the limited context of honest services fraud in the private sector."[114]

Foreseeable Harm

Several federal circuit courts had adopted a "foreseeable harm" test to limit the scope of the honest services provision.[115] The U.S. Court of Appeals for the Sixth Circuit adopted the test in *United States v. Frost*,[116] a case involving a professors and graduate students at the University of Tennessee who allegedly defrauded the University and government agencies in order to secure government research contracts. It held that in order for a conviction on an honest services theory to stand, "the prosecution must prove that the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of [a] breach" of fiduciary duty.[117] In *United States v. Vinyard*,[118] the U.S. Court of Appeals for the Fourth Circuit applied the Sixth Circuit's approach to a case involving two brothers who allegedly misrepresented their joint venture's relationship with one brother's employer for the purpose of defrauding the employer.

Some courts had characterized the foreseeable harm test as an alternative to a "materiality" test, which appears to be the same as or similar to the test for materiality applied in mail and wire fraud cases generally.[119] Both the Fourth and Sixth Circuits have asserted that the foreseeable harm test is superior to the materiality test for two reasons: (1) its focus on a defendant's mental state ensures that only criminal behavior is included; and (2) it excludes what the Fourth Circuit termed "trivial frauds"—that is, infractions that are minor but nonetheless instigate a material change in business practices—from the scope of the honest services fraud statute.[120]

(...continued)

Wire Fraud Prosecutions, 49 B.C.L. Rev. 1431 (2008).

[112] 149 F.3d 46 (1st Cir. 1998).

[113] *See, e.g.*, *Id.* at 1245 n. 5 ("Although we reject the state law limiting principle in the context of honest services prosecutions of public officials, we express no opinion on the role of state law in honest services fraud prosecutions in the *private* context.") (emphasis in original).

[114] United States v. Sorich, 523 F.3d 702, 708 (7th Cir. 2008).

[115] *See, e.g.*, United States v. Vinyard, 266 F.3d 320 (4th Cir. 2001), *cert. denied*, 536 U.S. 922 (2002) ; United States v. Sun-Diamond Growers, 138 F.3d 961 (D.C. Cir. 1998).

[116] 125 F.3d 346 (6th Cir. 1997).

[117] *Id.* at 368.

[118] 266 F.3d 320 (4th Cir. 2001), *cert. denied*, 536 U.S. 922 (2002).

[119] *See, e.g.*, United States v. Vinyard, 266 F.3d 320, 327 (4th Cir. 2001).

[120] *See Frost*, 125 F.3d at 368-69; *Vinyard*, 266 F.3d at 328-29.

Courts' formulations of the foreseeable harm test have varied somewhat.[121] However, the most common approach appears to integrate the test within an examination of a defendant's mental state. A representative articulation requires "that the defendant was at least reckless as to the likelihood that his breach of the duty of honest services would harm the party to whom the duty is owed."[122]

Although some judicial opinions suggested that the foreseeable harm test applied only in private sector cases,[123] some suggested that the test was to be employed in all honest services cases.[124] In the private sector cases in which it was applied, the "harm" contemplated by the test was generally characterized as harm to economic or property interests.[125] However, "property" in this context was been interpreted to include confidential information such as trade secrets.[126]

Some of the courts of appeals had explicitly rejected the foreseeable harm test.[127] Most notably, the U.S. Court of Appeals for the Seventh Circuit joined this latter group in *Black*.

Cases in Which the Supreme Court Granted Certiorari

The United States Supreme Court heard argument in the honest services cases of *Weyhrauch v. United States*,[128] *Black v. United States*,[129] and *Skilling v. United States*,[130] in its 2009 term. In their petitions for review, some appellants argued that the honest services statute was unconstitutionally vague.[131] Although, as mentioned, Justice Scalia had signaled some willingness

[121] *See* Andrew B. Matheson, *A Critique of* United States v. Rybicki*: Why Foreseeable Harm Should Be an Aspect of the* Mens Rea *of Honest Services Fraud*, 28 Am. J. Trial Advoc. 355 (2004-2005) (asserting that some courts have employed a foreseeable harm test as part of a *mens rea* requirement, whereas others, by introducing an element of "reasonableness" to the foreseeable harm requirement, appear to require foreseeable harm as an element of *actus reus*).

[122] *Id.* at 357.

[123] *See, e.g.*, *Vinyard*, 266 F.3d at 327-328 (describing the foreseeable harm test as its approach "in the private employment context"); United States v. Martin, 228 F.3d 1, 17 (1st Cir. 2000) (characterizing the foreseeable harm test as a court-imposed limit on the honest services statute in cases involving alleged frauds by employees against their employers).

[124] *See, e.g.*, *Matheson*, 28 Am. J. Trial Advoc. 355.

[125] *See, e.g.*, Defendants' Petition for a Writ of Certiorari at 19, Black v. United States, No. 08-876 (Jan. 9, 2009) ("Nearly half of the federal courts of appeals that have addressed [the honest services statute] in the private sector context have concluded that the statute requires proof that the defendant intended, or at least reasonably could have foreseen, that the scheme would cause economic or property harm to the victim.").

[126] *See Martin*, 228 F.3d at 16 (requiring that "either some articulable harm must befall the [corporation or other entity] as a result of the defendant's activities, or some gainful use must be intended by the [employee]").

[127] *See, e.g.*, United States v. Brown, 459 F.3d 509 (5th Cir. 2006); United States v. Welch, 327 F.3d 1081 (10th Cir. 2003).

[128] 129 S. Ct. 2863 (2009).

[129] 129 S. Ct. 2379 (2009).

[130] No. 08-1394, 2009 U.S. LEXIS 7359 (Oct. 13, 2009).

[131] *See* Petition for a Writ of Certiorari, Skilling v. United States, No. 08-1394 (filed May 11, 2009); Petition for a Writ of Certiorari, Weyhrauch v. United States, No. 08-1196 (filed Mar. 25, 2009).

to consider that issue,[132] a majority of the Court ultimately decided to construe the statute narrowly in order to avoid due process vagueness concerns.

United States v. Skilling

The Supreme Court used *Skilling* for its principal decision; it issued a separate confirming opinion in *Black*; and ordered *Weyhrauch* returned to the lower courts for disposition consistent with its *Skilling* opinion. Six members of the Court joined in Justice Ginsburg's majority opinion which limited honest services mail and wire fraud to those cases that involve either bribery or kickbacks; the other three members of the Court would have found the honest services definition unconstitutionally vague.

In the lower court, the U.S. Court of Appeals for the Fifth Circuit upheld the conviction of former Enron executive Jeffrey Skilling.[133] As Enron's former Chief Operating Officer and former Chief Executive Officer, Skilling was convicted of engaging in a conspiracy to overstate the company's financial position in order to artificially inflate the company's short-run stock price. Before the Fifth Circuit, Skilling argued that his actions did not breach his fiduciary duty to Enron, because he had acted in the company's interest. The court of appeals rejected that argument, primarily because it appeared that Enron had not approved the deceptive measures taken by Skilling. The court clarified that where an employer did not sanction a fraudulent scheme, a defendant may be found to have violated an underlying state law fiduciary duty even if he purports to have acted in his employer's best interest.[134]

In his petition for certiorari, Skilling argued that the Supreme Court should adopt the "private gain" test to limit the scope of the statute, and that without such a construction, the statute is unconstitutionally vague.[135] As conceived by the Seventh Circuit in *Bloom* and *Thompson*, the private gain test appeared to require an illicit intended gain or a gain otherwise outside of normal channels of compensation.[136] Skilling's argument was that "there is no allegation ... that Skilling sought to advance private interests instead of Enron's," and any gain he received was through proper channels and thus would not qualify as "private gain" under the Seventh Circuit's test.[137]

The Supreme Court neither endorsed the private gain test nor found the honest services statute unconstitutionally vague. Instead, it determined, as it announced at the outset of its opinion, that, "[i]n proscribing fraudulent deprivations of 'the intangible right to honest services,' §1346, Congress intended at least to reach schemes to defraud involving bribes and kickbacks. Construing the honest-services statute to extend beyond that core meaning . . . would encounter a vagueness shoal."[138]

[132] Sorich v. United States, 129 S. Ct. 1308 (2009) (Scalia, J., dissenting from the denial of certiorari).

[133] United States v. Skilling, 554 F.3d 529 (5th Cir. 2009), *rev'd and rem'd* , 78 U.S.L.W. 4735 (U.S. June 24, 2010).

[134] *Id.* at 545-47.

[135] Petition for a Writ of Certiorari, Skilling v. United States, No. 08-1394 (filed May 11, 2009).

[136] *See* discussion of the private gain test, *supra.*

[137] *See* Petition for a Writ of Certiorari at 20-21.

[138] 78 U.S.L.W. at 4738.

Beginning in the mid-nineteenth century, the Court observed, an intangible honest services theory of fraud had gained some acceptance among the lower federal courts.[139] In 1987, however, the Court "stopped the development of the intangible-rights doctrine in its tracks" with *McNally v. United States*.[140] Concerned about the "ambiguous" nature of the doctrine and its implications for federal-state relations, the Court in *McNally* confined the mail and wire fraud statutes to the prosecution of schemes designed to deprive victims of money or other property, not merely honest services.[141]

"Congress responded swiftly" with the honest services statute which provides that, "For purposes of th[e] chapter [of the United State Code that prohibits, *inter alia*, mail fraud, §1341, and wire fraud §1343], the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[142]

The Court in *Skilling* declined to find the honest services statute unconstitutionally vague. It looked rather to pre-*McNally* cases to ascertain how to accommodate Congress's intent with the amorphous wording of the statute.[143] There it found the bribery and kickback fraud cases the most common and most consistently applied, and concluded that "[c]onfined to these paramount applications, §1346 presents no vagueness problem."[144] Beyond those cases, however, the Court found the chaos and uncertainty incompatible with due process.[145]

The government urged that the third most common among the pre-*McNally* fraud cases—the self-dealing-conflicts-of-interest (private gain) cases—be admitted to the fold. This, the Court rejected in light of splits among the pre-*McNally* lower federal courts and in the interests of lenity (i.e., when a criminal statute admits to two interpretations, the more lenient should prevail).[146] Congress might of course include this category of offenses within the definition of honest services, but the Court recommended that it do so with care:

---

[139] *Id.* at 4747.

[140] *Id.* at 4747-748.

[141] *Id.* at 4748.

[142] *Id.* quoting 18 U.S.C. 1346 (parentheticals of the Court).

[143] *Id.* ("We agree that §1346 should be construed rather than invalidated [grounds of vagueness]. First, we look to the doctrine developed in the pre-*McNally* cases in an endeavor to ascertain the meaning of the phrase 'intangible right o honest services.' Second, to preserve what Congress certainly intended the statute to cover, we pare that body of precedent down to its core").

[144] *Id.*

[145] *Id.* at 4749-750(emphasis of the Court)("[H]onest services decisions preceding *McNally* were not models of clarity or consistency. . . . While the honest-services cases preceding *McNally* dominantly and consistently applied the fraud statute to bribery and kickback schemes—schemes that were the basis for most honest-services prosecutions—there was considerable disarray over the statute's application to conduct outside that core category. . . . In view of this history, there is no doubt that Congress intended §1346 tor each *at least* bribes and kickbacks. Reading the statute to proscribe a wider range of offensive conduct, we acknowledge , would raise the due process concerns underlying the vagueness doctrine").

[146] *Id.* at 4750 (internal citations omitted)("Nor are we persuaded that the pre-*McNally* conflict-of-interests cases constitute core applications of the honest-services doctrine. Although the Courts of Appeals upheld honest-services convictions for some schemes of non-disclosure and concealment of material information, they reached no consensus on which schemes qualified. In light of the relative infrequency of conflict-of-interest prosecutions in comparison to bribery and kickback charges, and the intercircuit inconsistencies they produced, we conclude that a reasonable limiting construction of §1346 must exclude this amorphous category of cases. Further dispelling doubt on this point is the familiar principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity'").

> If Congress desires to go further, we reiterate, it must speak more clearly than it has" 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.[147]

As for Skilling himself, it was clear to the Court that the conduct with which he was charged and for which he was convicted did not constitute honest services fraud as construed by the Court. It left for the lower courts the question of whether this tainted his conviction on other grounds.[148]

Skilling raised a second constitutional issue—namely, that pre-trial publicity made Skilling's trial presumptively unfair.[149] Here, the Court affirmed the holding of the lower court.[150] The Court felt the trial court committed no error when it denied Skilling's motion for a change of venue given the steps it took to ensure selection of an impartial panel.[151] Nor, the Court concluded, did actual prejudice taint the jury that convicted Skilling.[152] Justices Sotomayor, Stevens, and Breyer contended that the trial court's voir dire of prospective jurors should have been more thorough and accordingly dissented from that portion of the opinion.[153]

United States v. Black

The Court's *Skilling* construction of the honest services statute doomed the jury instructions in Black's honest services case as well. The Court wrote a second opinion, however, to address a separate issue raised there. The Seventh Circuit had held that Black forfeited his right to challenge the erroneous honest services jury instruction when he objected to separate jury verdicts on the government's alternate honest services fraud and money or property fraud theories.[154] Not so, ruled the Supreme Court. "[B]y properly objecting to the honest-services jury

[147] *Id.* & n.45 (internal quotation marks citations omitted).

[148] *Id.* at 4751 (internal quotation marks and citations omitted) ("Because the indictment alleged three objects of the conspiracy—honest-services wire fraud, money-or-property wire fraud, and securities fraud—Skilling's conviction is flawed. . . . The parties vigorously dispute whether the error was harmless. . . . Whether potential reversal on the conspiracy count touches any of Skilling's other convictions is also an open question. All of his convictions, Skilling contends, hinged on the conspiracy count and, like dominoes, must fall if it falls. The District Court, deciding Skilling's motion for bail pending appeal, found this argument dubious, but the Fifth Circuit had no occasion to rule on it").

[149] *See, e.g.*, Tony Mauro, *Court Grants Jeff Skilling Appeal*, The Blog of Legal Times (Oct. 13, 2009).

[150] *Id.* at 4747. The question occasioned a realignment of the Court, however. Justices Scalia, Thomas and Kennedy, who dissented on the honest services question, endorsed Justice Ginsburg's opinion for the Court. Justices Sotomayor, Stevens, and Breyer, who endorsed the honest services portion of the opinion for the Court, dissented on the pre-trial publicity question.

[151] *Id.* at 4743.

[152] *Id.* at 4747.

[153] *Id.* at 4755.

[154] United States v. Black, 530 F.3d 596, 603 (7th Cir. 2008), *vac'd and rem'd*, 78 U.S.L.W. 3732 (U.S. June 24, 2010).

instructions at trial, Defendants secured their right to challenge those instructions on appeal. They did not forfeit that right by declining to acquiesce in the Government-proposed special-verdict forms."[155]

Black afforded the Supreme Court an opportunity to pass on the foreseeable harm limitation on the honest services statute. The defendants were executives of a publicly held corporation, Hollinger International, Inc. They were also majority stockholders in an Canadian private corporation, Ravelston Corp. Ltd., which in turn held a controlling interest in Hollinger. Rather than receive their compensation from Hollinger directly, the executives were paid by Ravelston out of management fees that Ravelston charged Hollinger. In order to take greater advantage of Canadian tax laws, the executives arranged for, and were compensated from, non-compete agreements between themselves and a Hollinger subsidiary. There was a factual dispute regarding the extent to which Hollinger's board had knowledge of this arrangement. The defendants argued that the board had been aware of the deal and that the payments they received constituted legitimate compensation for the do-not-compete agreements. In contrast, the government alleged that the do-not-compete payments were actually management payments received without corporate approval.

The defendants urged the court to adopt the foreseeable harm test. They argued that their convictions would fail under that test because they had arranged for the do-not-compete agreements in order to take advantage of a favorable Canadian tax ruling rather than to harm their employer corporation. However, the Seventh Circuit rejected the test, which it characterized as an argument equivalent to "no harm, no foul."[156] Instead, the court applied the private gain test. Thus, it focused on whether the defendants intended to reap a private gain by fraudulent means. Affirming a jury instruction which relied on the private gain test, the court upheld the defendants' convictions. *Skilling* established that the Seventh Circuit's ruling on the honest services jury instruction was clearly wrong.[157] The Court left for the lower courts the determination of whether the error was harmless or warranted overturning the convictions of the Black defendants and ordering a new trial.[158]

United States v. Weyhrauch

Weyhrauch presented only a honest services issue and consequently the Court simply returned it to the lower court with instructions to dispose of the case in manner consistent with the Court's opinion in *Skilling*. In *United States v. Weyhrauch*,[159] the U.S. Court of Appeals for the Ninth Circuit had declined to adopt the state law limiting principle. The defendant was an Alaska state legislator who allegedly failed to disclose a conflict of interest regarding his relationship with an oil company prior to his vote on a bill addressing the taxation of oil production. At trial, federal prosecutors sought to introduce legislative ethics publications which recommend that such conflicts be disclosed, together with evidence suggesting that Alaskan legislators customarily disclose them. However, there was no evidence that the defendant had violated any state statute. The question on appeal was whether a mail fraud conviction on an honest services theory

[155] Black v. United States, 78 U.S.L.W. at 4735.

[156] United States v. Black, 530 F.3d at 600.

[157] Black v. United States, 78 U.S.L.W. at 4735 .

[158] *Id.*

[159] 548 F.3d 1237 (9th Cir. 2008), *vac'd and rem'd*, 78 U.S.L.W. 4766 (U.S. June 24, 2010).

required a showing that a defendant's actions violated state law. The court of appeals found that no evidence in the statutory text or the legislative history indicated a congressional intent to limit the honest services statute to only those cases that involve a breach of a state-law duty. It also emphasized that Congress has sufficient constitutional authority to regulate and punish the use of mail and interstate wire communications when they are used for fraudulent purposes and that the circuit had "never limited the reach of the federal fraud statutes only to conduct that violates state law."[160] In his petition for certiorari to the Supreme Court, Weyhrauch argued, in part, that as interpreted by the Ninth Circuit, the honest services statute allows a federal common law basis for conviction in conflict with principles of federalism.[161]

Conclusion

Skilling holds that an honest services fraud prosecution must involve bribery or a kickback. Congress may prefer more expansive coverage, modeled perhaps after one of the standards previously suggested by the lower courts. If so, the Court recommends that Congress speak with clarity and precision.

Author Contact Information

Charles Doyle
Senior Specialist in American Public Law
cdoyle@crs.loc.gov, 7-6968

[160] *Id.* at 1245.

[161] Petition for a Writ of Certiorari, Weyhrauch v. United States, No. 08-1196 (filed Mar. 25, 2009).