

**Skilling v. United States: U.S. Supreme Court Ruling Clarifies the Scope of the
Honest Services Statute**

On June 24, 2010, the Supreme Court vacated three circuit court decisions and held that 18 U.S.C. §1346¹, commonly referred to as the honest services statute, criminalizes only bribery and kickback schemes.² The Court's ruling clarified the scope of the honest services statute, which previously had been undefined and subject to various interpretations by the lower courts since it was passed by Congress as an attempt to supersede *McNally v. United States*.³

I. Facts and Procedural History

Jeffrey Skilling was the chief executive officer of Enron Corporation, four months before the company collapsed and went into bankruptcy. The government initiated an investigation to determine what had caused the company, whose stock price once traded at \$90 per share to become virtually worthless. The investigation found that there had been a conspiracy to prop up the stock price by overstating the company's financial condition.⁴ Skilling was charged with multiple crimes including conspiracy to commit securities and wire fraud. The indictment alleged that Skilling "sought to 'depriv[e] Enron and its shareholders of the intangible right of [his] honest services.'"⁵ Skilling was found guilty on 19 counts including the honest services fraud conspiracy charge.⁶

Skilling appealed his conviction to the Fifth Circuit, arguing that the government had used an improper theory of honest services fraud to convict him. Skilling claimed that his actions did not violate the honest services statute because he did not commit a breach of fiduciary duty against Enron. The fraud was in the corporation's interest, not his own.⁷ The Fifth Circuit held that the jury was entitled to convict Skilling of conspiracy to commit

¹ 18 U.S.C. §1346 states, "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

² *Skilling v. United States*, No. 08-1394, slip op. at *45, 560 U.S. ____ (June 24, 2010). On the same day as the *Skilling* opinion, the Court issued decisions in two other cases involving the honest services statute. In *Black v. United States*, 08-876, slip op. at *5, 560 U.S. ____ (June 24, 2010), the Court vacated the Seventh Circuit's decision that the defendants had forfeited their objection to a jury instruction on honest services, noting that the *Skilling* decision rendered the instruction incorrect. In *Weyhrauch v. United States*, 08-1196, 561 U.S. ____ (June 24, 2010), the Court, in a per curiam decision, vacated the Ninth Circuit's holding in *United States v. Weyhrauch*, 548 F.3d 1237 (9th Cir. 2008), that the honest services statute "establishes a uniform standard for 'honest services that governs every public official and that the government does not need to prove an independent violation of state law to sustain an honest services fraud conviction.'"

³ 483 U.S. 350 (1987). In the *McNally* case, the Court held that the mail fraud statute only protected property rights and not the right to honest services. *Id.* at 360.

⁴ *Skilling v. United States*, No. 08-1394, slip op. at *2, 560 U.S. ____ (June 24, 2010).

⁵ *Id.* at *3. Skilling was also charged with securities fraud, wire fraud, making false representations to Enron's auditors, and insider trading. *Id.*

⁶ The jury returned a general verdict, making it unclear whether the jury found Skilling guilty of conspiracy to commit securities fraud, wire fraud to deprive shareholders of money and property, or wire to fraud to deprive Enron and its shareholders of Skilling's honest services. *United States v. Skilling*, 554 F.3d 529, 542 (5th Cir. 2009). For the purposes of its decision, the Supreme Court seems to assume that the conviction was based on a violation of the honest services statute.

⁷ *Id.* at 545.

honest-services wire fraud if they found (1) “a material breach of fiduciary duty imposed under state law. . . (2) that results in a detriment to the employer.”⁸

II. The Supreme Court’s Decision

The Court considered two questions: (1) whether §1346 is unconstitutionally vague, and (2) if §1346 is not unconstitutionally vague, what behavior does it criminalize. The Court began its inquiry into the constitutionality of §1346 by noting that whenever possible, it must elect to construe a statute rather than declare it void for vagueness.⁹ Establishing that Congress had intended to reinstate the honest services doctrine created by the lower courts, the Court reviewed the Courts of Appeals’ pre-*McNally* decisions to ascertain the meaning of the statute’s phrase “the intangible right of honest services.”¹⁰ The Court acknowledged that there was inconsistency among the lower courts’ decisions on what constituted an honest services violation, but found that “[t]he vast majority of the honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes.”¹¹

The Court reasoned that because the majority of cases invoking the honest-services doctrine involved bribery or kickback schemes, Congress intended the honest services statute to, at the very least, criminalize such behavior.¹² The Court was unwilling to extend the scope of the statute further finding that claims involving self-dealing or failure to disclose a conflict of interest were outside the “doctrine’s solid core,” and therefore, not proscribed by the statute.¹³ Such an extension would create constitutional concerns. “Reading the statute to proscribe a wide range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine. To preserve the statute without transgressing constitutional limitations, we now hold that §1346 criminalizes *only* the bribe-and-kickback-core of pre-*McNally* case law.”¹⁴

The Court found that under its interpretation of the scope §1346, the honest services statute was not unconstitutionally vague. Bribery and kickback schemes had always been considered to be covered by §1346 thereby, negating any issues of notice, and “[a]s to arbitrary prosecutions . . . [the honest services statute’s] prohibition on bribes and kickbacks draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing--and defining--similar crimes.”¹⁵

The Court found that under this standard, Skilling’s conviction could not stand. The government alleged that Skilling had profited from his scheme by receiving his salary and bonuses and through his sales of Enron stock.¹⁶ The government had not made any allegations that Skilling solicited or accepted side payments from a

⁸ *United States v. Skilling*, 554 F.3d 529, 547 (5th Cir. 2009).

⁹ *Skilling v. United States*, No. 08-1394, slip op. at *39.

¹⁰ *Id.* at *39.

¹¹ *Id.* at *41.

¹² *Id.* at *44.

¹³ *Id.*

¹⁴ *Id.* at *45.

¹⁵ *Id.*

¹⁶ *Id.* at *49.

third party in exchange for making the misrepresentations that constituted the fraud, which would be required to uphold a conviction under the honest services statute.¹⁷

III. Concurring Opinion

Justice Scalia, with whom Justice Thomas joined and Justice Kennedy joined in part, agreed that the Skilling’s conspiracy conviction should be reversed, but wrote in his concurrence that he would have held that §1346 is vague and violates the Due Process Clause of the Fifth Amendment.¹⁸

Justice Scalia disagreed with the majority’s decision to limit the scope of the honest services statute, opining that the majority was rewriting the statute rather than interpreting Congress’s intent.¹⁹ Although the concurrence agreed that Congress intended to revive the body of case law that had been rejected in *McNally*, Scalia argued that the case law is so inconsistent as to preclude any meaningful definition of what behavior §1346 covers. “The pre-*McNally* cases provide no clear indication of what constitutes a denial of the right of honest services. The possibilities range from any action that is contrary to public policy or otherwise immoral, to only the disloyalty of a public official or employee to his principal, to only the secret use of a perpetrator’s position of trust in order to harm whomever he is beholden to. The duty probably did not have to be rooted in state law, but maybe it did. It might have been more demanding in the case of public officials, but perhaps not. At the time §1346 was enacted there was no settled criterion for choosing among these options, for conclusively settling what was in and what was out.”²⁰

IV. Significance of the Decision

The Supreme Court’s decision will likely narrow federal prosecutor’s use of the honest services fraud statute to prosecute crimes. Previously, the amorphous nature of the statute allowed prosecutors to charge defendants under §1346 for behavior that may be viewed as improper or unethical, but against which was not made illegal by another statute. Prosecutors will now be limited to using §1346 in cases involving bribery or kickbacks rather than its previous expansive use.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Elisabeth Grippando at 212.701.3888 or egrippando@cahill.com.

¹⁷ *Id.* at *49.

¹⁸ *Id.* at 1.

¹⁹ *Id.* at 9-10.

²⁰ *Id.* at 6-7.