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## SUPREME COURT LIMITS REACH OF HONEST SERVICES FRAUD STATUTE

By Patrick J. Egan and Eric E. Reed

On June 24, 2010, the U.S. Supreme Court partially vacated the conviction of former Enron CEO and COO Jeffrey Skilling and in the process significantly curtailed the scope of the “honest services” fraud statute frequently utilized by federal prosecutors in public and private sector corruption cases.

The honest services statute, 18 U.S.C. § 1346, provides that a “scheme or artifice to defraud” in bank, wire, securities and other frauds includes “a scheme or artifice to deprive another of the intangible right of honest services.” Unlike a traditional fraud offense, whereby the perpetrator gains from the defrauded target’s loss of money or property, in an honest services case the perpetrator’s gain comes from a third party that had not been directly deceived. Thus, “honest services” fraud scenarios have included public and private officials taking bribes or kickbacks from vendors in exchange for awarding contracts, or for undisclosed self-dealing in the course of official duties.

The current honest services statute was enacted in 1988 in response to the Supreme Court’s decision in *McNally v. United States*. In that case, the Supreme Court reversed the mail fraud conviction of a state officer who received kickbacks for selecting the state’s insurance agent, allegedly depriving citizens of their right to honest government conduct. The Supreme Court found no mail fraud because the statute did not specify that such intangible rights could be the subject of mail fraud.

In *Skilling*, the Supreme Court found that the honest services statute was intended to reach only the types of offenses addressed in *McNally* and the majority of its predecessor cases, that is, bribery and kickback schemes, and limited the statute’s reach accordingly. When applied to other scenarios, such as undisclosed self-dealing, the Supreme Court ruled that 18 U.S.C. § 1346 is unconstitutionally vague in violation of due process rights.

Skilling was convicted on 19 counts, including conspiracy to commit honest services securities and wire fraud, in connection with a scheme to overstate Enron’s financial health prior to its collapse. For Skilling, who was not charged with taking a bribe or kickback, the Supreme Court’s ruling means that the honest services portion of his conviction is invalidated. However, because Skilling’s conspiracy charge included wire fraud and securities fraud independent of the theft of honest services, the Supreme Court remanded the case for determination of whether the conviction withstands the invalidation of the honest services theory.

The Supreme Court rejected Skilling’s Sixth Amendment challenge that pretrial publicity and community prejudice deprived him of a fair trial.

It is possible that Congress, like it did after *McNally*, may revisit the honest services statute to again reach cases of undisclosed self-dealing. In the meantime, the *Skilling* ruling became the basis for vacating and remanding the honest services convictions of former

newspaper magnate Conrad Black and former Alaska legislator Bruce Weyhrauch, and could affect the convictions of former Alabama Governor Don Siegelman, former HealthSouth CEO Richard Scrushy and the ongoing prosecution of former Illinois Governor Rod Blagojevich.

The opinion may be found [here](#).

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