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## [United States Supreme Court Limits Scope Of Federal Criminal "Honest Services" Fraud Statute](#)

In *Skilling v. United States*, 2010 WL 2518587 (U.S. Jun. 24, 2010), the [United States Supreme Court](#) significantly limited the scope of a criminal statute used frequently by federal prosecutors to criminalize a wide range of behavior by business executives and public officials. The Court held that [18 U.S.C. § 1346](#), which makes it a federal crime to deprive another of the “intangible right of honest services,” may only be used by prosecutors in cases where the defendant has participated in conduct involving bribery or kickbacks. The justices agreed unanimously that the statute does not apply to cases where the defendant’s conduct merely entails a conflict of interest, self-dealing, breaches of fiduciary duty or unwise business decisions, and that does not include bribery or kickbacks. The *Skilling* case ends the long running debate between those who perceived this “statute of last resort” as a necessary tool for prosecutors to use in fighting malfeasance by corporate and public officials, and those who contended ambitious and/or unwise prosecutors were abusing the statute to target persons whose behavior may be unpopular, unethical or subject to second-guessing, but was not clearly criminal.

The *Skilling* case arose out former Enron Corporation Chief Executive Officer Jeffrey K. Skilling’s appeal of his 2006 conviction for one count of conspiracy, twelve counts of securities fraud, five counts of making false statements to accountants, and one count of insider trading. The indictment against Skilling alleged that he had engaged in a wide-ranging conspiracy to mislead the investing public regarding Enron’s financial performance, and that in so doing had sought to enrich himself through salary, bonuses and grants of stock. Importantly, Skilling was not accused of engaging in any embezzlement, bribery or kickbacks.

The government’s “honest services” theory of criminality was expressly present in the first count against Skilling: conspiracy to commit securities and wire fraud. This count specifically alleged that Skilling had sought to deprive Enron and its shareholders of the “intangible right of honest services.” The mail and wire fraud statutes criminalize the use of those means of communication in connection with a “scheme or artifice to defraud,” and the wire fraud statute at issue in the *Skilling* case – 18 U.S.C. § 1346 – defines a “scheme or artifice to defraud” to include “depriv[ing] another of the intangible right of honest services.”

At trial, the government argued to the jury that Skilling had violated his “duty of good faith and honest services, a duty to be truthful, and a duty to do [his] job . . . and do it appropriately.” Moreover, the government succeeded in convincing the trial court to instruct the jury that Skilling could be found guilty of

committing “honest services” wire fraud by breaching his fiduciary duties to Enron and its shareholders. Skilling further contended that other jury instructions “linked” the remaining counts in the indictment to the broad “honest services” conspiracy charge.

After a four month trial, the jury convicted Skilling on most of the counts in the indictment (Skilling was acquitted on nine counts of insider trading) and Skilling was sentenced to 24 years in federal prison. There was no special verdict form indicating whether the jury convicted Skilling of conspiracy based on a securities fraud theory, or the “honest services” theory, or both. The United States Court of Appeals for the Fifth Circuit affirmed Skilling’s conviction, and thereafter the Supreme Court granted *certiorari* to determine the proper scope of the “honest services” statute. Skilling’s arguments on appeal were that the “honest services” statute was unconstitutionally vague, or in the alternative, that the statute should be limited to cases involving bribery or kickbacks.

Although three justices (Scalia, Thomas and Kennedy, JJ.) agreed with Skilling’s first argument and would have struck down the statute entirely, the remaining six-justice majority agreed with Skilling’s second argument. In a majority opinion authored by Justice Ginsburg, the Court limited the “honest services” statute to cases involving bribery or kickbacks. The Court explained that the “honest services” wire fraud statute was passed by Congress in 1988 as a response to a 1987 decision by the Court ([\*McNally v. United States\*](#), 483 U. S. 350 (1987)) that had limited the development of a body of law addressing the “intangible right of honest services.” The Court reasoned that the pre-*McNally* case law had overwhelmingly involved prosecutions of defendants engaged in conduct involving bribery or kickbacks, and that Congress’s intent in passing the “honest services” statute was to reinstate this earlier body of case law. However, since the passage of the statute in 1988, courts had extended the application of the statute to a wide variety of situations where bribery or kickbacks were not present, and the result was “considerable disarray” in the case law.

In order to salvage the statute and avoid a situation where it was being applied in a manner lacking consistency or fair notice to defendants, the Court in *Skilling* held that the statute should be limited to conduct involving bribery or kickbacks (as noted above, the three-justice dissent believed the statute was hopelessly vague on its face, and that it was not the Court’s job to effectively rewrite a vague statute). In so holding, the majority specifically rejected the government’s invitation to extend the statute to cases involving “undisclosed self-dealing by a public official or private employee – *i.e.*, 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.” The Court found this latter category of cases to be “amorphous” and rife with ambiguity, and thus left to Congress the decision whether to attempt to define this fringe category of criminal behavior. However, the Court noted that Congress would need to approach this task with “particular care” given the many open questions present in the government’s formulation (*e.g.*, how direct or significant does the conflicting interest have to be, to whom should the disclosure be

made, and what should it say?).

As for the application of the statute to Skilling's case, the Court specifically held that because Skilling was not accused of engaging in any bribery or kickbacks, he could not be found guilty of "honest services" wire fraud. However, the Court stopped short of reversing Skilling's convictions. Instead, the Court remanded the case to the Fifth Circuit to first determine whether the improper jury instruction as to the conspiracy count was "harmless error" (*i.e.*, would the jury have still found Skilling guilty of conspiracy even without the erroneous instruction), and if the error was not harmless, to then determine the effect of overturning the conspiracy conviction on the remaining counts.

Moving forward, the effects of the Court's decision in *Skilling* could be significant. First, persons previously convicted of "honest services" wire fraud who did not engage in bribery or kickbacks will likely seek to have their convictions reviewed. Second, prosecutors will no longer be able to use the "honest services" statute as a broad catch-all when dealing with persons whose conduct does not otherwise satisfy the definition of other criminal statutes (*e.g.*, securities fraud, or money/property wire fraud). Indeed, it was prosecutors' use of the "honest services" statute as a statute of last resort that had generated so much controversy.

For further information, please contact [John Stigi](#) at (310) 228-3717 or [Matthew Holder](#) at (858) 720-7411.