

“CONGRESS MUST SPEAK CLEARLY, AGAIN”  
HONEST SERVICES FRAUD ~ 18 U.S.C. § 1346

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## INTRODUCTION

As interpreted by the judiciary, "honest services fraud" occurs when a public official deprives citizens of their "right" to the official's honest service by accepting bribes or self-dealing. This concept has been extended to the corporate sphere when senior executives deprive shareholders of their "right" to the executive performing his or her job above suspicion. As the case law in this area has evolved, loose interpretations of an already loose statute have resulted in prosecutions for alleged crimes beyond mere bribes and self-dealing. The soft standard that has emerged, in essence, created "the intangible right of the citizenry to good government"<sup>2</sup> although there exists no firm definition of "honest services" or any identifiable source of this "intangible right."

In 1987, the United States Supreme Court invalidated the concept of "honest services fraud" in *McNally v. United States*. The next year, however, Congress passed 18 U.S.C. § 1346 which, in effect, overruled the *McNally* decision. Now, over twenty years later, the U.S. Supreme Court is again confronted with the validity of the current honest services fraud statute. The Court is weighing the merits of 18 U.S.C. § 1346 in three prominent criminal cases: Jeffrey K. Skilling, the Enron Chief Executive Officer who, along with Ken Lay, rode the company into its well-heralded collapse; Conrad M. Black, the former chief executive of a newspaper conglomerate; and Bruce Weyhrauch, an attorney and Alaskan state congressman.

While some federal district courts have expressed concern about the federal statute's vague nature, there is also a split in the courts of appeals as to how to address and interpret the current honest services fraud statute. This paper will examine the honest services fraud statute, the Supreme Court decision in *McNally*, each of the cases currently pending before the Court, and the Court's willingness to act on 18 U.S.C. § 1346 based upon its three oral arguments.

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2. *McNally v. United States*, 483 U.S. 350, 356, (1987).

I. OVERRULING § 1346'S BIG BROTHER IN *McNALLY v. UNITED STATES*

In *McNally v. United States*, 483 U.S. 350 (U.S. 1987), while the Supreme Court held that the mail fraud statute clearly protected property rights, but the criminal statute was one that did not "refer to the intangible right of the citizenry to good government."<sup>3</sup> That decision temporarily invalidated the theory that officials' or executives' corruption and misconduct constituted fraud. Based on the legislative history and precedent behind the mail fraud statute, as well as the Court's concerns about the vagueness of this criminal statute, the Supreme Court refused to "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."<sup>4</sup>

A. *The Facts Behind McNally*

In *McNally*, the Supreme Court addressed honest services fraud in the context of both a public official and a private individual.<sup>5</sup> The defendants were James E. Gray, a member of the Cabinet of the Kentucky governor, and Charles J. McNally, a business associate of Gray.<sup>6</sup> The *McNally* story began after Kentucky elected a Democratic governor in 1974. Howard P. "Sonny" Hunt was appointed that year as the Chairman of the Kentucky Democratic Party, a position which gave him the authority to choose the insurance companies from which the Commonwealth would purchase its insurance policies.<sup>7</sup> Hunt devised a scheme with the Wombwell Insurance Company of Lexington, an entity for which Hunt had acted as Kentucky's agent for securing its workmen's compensation policy since 1971,

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3 *Id.*

4 *Id.* at 360.

5 *Id.* at 352.

6 *Id.*

7 *Id.*

whereby a portion of all commissions in excess of \$50,000 a year would be paid by Wombwell in exchange for a continued agency relationship with him.<sup>8</sup>

Based on this scheme, Wombwell funneled \$851,000 to 21 insurance companies chosen by Hunt.<sup>9</sup> One of the recipient companies was Seton Investments, Inc. a company controlled by Hunt and Gray and “*nominally* owned and operated” by McNally.<sup>10</sup> In fact, Hunt and Gray had created Seton Investments after Hunt’s appointment as Chairman - but before Gray entered the Kentucky cabinet – for the express purpose of sharing the money gained from the arrangement with Wombwell. Approximately \$200,000 was paid by Wombwell to Seton Investments between 1975 and 1979 which was “used to benefit Gray and Hunt.”<sup>11</sup> Wombwell also made “payments,” at Hunt’s direction, to another insurance company which gave money to McNally.<sup>12</sup>

As a result, Gray and McNally were charged with seven counts of mail fraud and one count of conspiracy.<sup>13, 14</sup> However, only one count remained after the other six were dismissed before trial; the final count alleged that the scheme that Gray and McNally devised was to (1) defraud the citizens and government of Kentucky of their “right” to have the Commonwealth’s affairs conducted honestly, and (2) obtain, both directly and indirectly, money “and other things of value” by means of false pretenses and the concealment of material facts.<sup>15</sup>

At trial, the jury was instructed of its ability to convict Gray and McNally on either of two theories:

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8 *Id.*

9 *Id.* at 353.

10 *Id.* (emphasis added).

11 *Id.*

12 *Id.* at 353.

13 For his part in the misconduct, Hunt was charged with mail and tax fraud. *Id.* He subsequently pled guilty and was sentenced to three years imprisonment. *Id.*

14 *Id.*

15 *Id.* at 353-54.

(1) that Hunt had de facto control over the award of the workmen's compensation insurance contract to Wombwell from 1975 to 1979; that he directed payments of commissions from this contract to Seton, an entity in which he had an ownership interest, without disclosing that interest to persons in state government whose actions or deliberations could have been affected by the disclosure; and that petitioners, or either of them, aided and abetted Hunt in that scheme; or

(2) that Gray, in either of his appointed positions, had supervisory authority regarding the Commonwealth's workmen's compensation insurance at a time when Seton received commissions; that Gray had an ownership interest in Seton and did not disclose that interest to persons in state government whose actions or deliberations could have been affected by that disclosure; and that McNally aided and abetted Gray (the latter finding going only to McNally's guilt).<sup>16</sup>

Subsequently, Gray and McNally were both convicted on the mail fraud and conspiracy count which was affirmed by the Court of Appeals for the Sixth Circuit.<sup>17</sup> In doing so, the Sixth Circuit relied on other appellate decisions holding that the mail fraud statute prohibited schemes to defraud citizens of their "intangible rights to honest and impartial government."<sup>18</sup> These decisions held that public officials owe a fiduciary to the public, the misuse of which is fraud, and

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16 *Id.* at 355.

17 *Id.* (See 790 F.2d 1290 (6th Cir. 1986) for the Sixth Circuit's opinion affirming the convictions.).

18 *Id.* (citing *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979), *aff'd in relevant part*, 602 F.2d 653 (en banc), *cert. denied*, 445 U.S. 961 (1980)).

private individuals without formal office “may be held to be a public fiduciary if others rely on him ‘because of a special relationship in the government’ and he in fact makes governmental decisions.”<sup>19</sup>

In 1986, the Supreme Court granted certiorari in *McNally* and issued its ruling in the following year.<sup>20</sup> In its decision, it explicitly rejected the concept of “intangible rights” as part of mail fraud:

Rather than construe [§ 1341] 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, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.<sup>21</sup>

Undeterred, Congress enacted 18 U.S.C. § 1341 in 1988 whereby it stated that a scheme or artifice to defraud included a “scheme or artifice to deprive another of the intangible right of honest services.”<sup>22</sup> However, Congress did not see fit to define the concept of “honest services” in § 1346 which has resulted in confusion over the reach of the mail fraud statute.<sup>23</sup>

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19 *Id.* (quoting *McNally*, 790 F.2d at 1296) (At the Sixth Circuit, Hunt was found to be a fiduciary due to his substantial participation in governmental affairs and ability to exercise significant control over the award of insurance contracts to Wombwell and the payment of kickbacks to Seton Investments.).

20 *Id.* at 356.

21 *Id.* (quoting *McNally*, 483 U.S. at 360).

22 *Id.* (citing *Williams*, 441 F.3d at 721-22).

23 *Id.* (citing *United States v. Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008)).

### B. *The History of the Mail Fraud Statute*

Created by Congress in 1872 as part of re-codifying postal laws, the mail fraud statute contained a prohibition against using the mail to "initiate correspondence in furtherance of 'any scheme or artifice to defraud.'"<sup>24</sup> Referring to the antifraud provision, the Congressman sponsoring the legislation stated that such measures were required "to prevent the frauds which are mostly gotten up in the large cities ... by thieves, forgers, and rapsallions generally, for the purpose of deceiving and fleecing the innocent people in the country."<sup>25</sup> The nature of the statute's origin led the Supreme Court in *McNally* to state that the original impetus behind the mail fraud statute was to protect citizens from "schemes to deprive them of their money or property."<sup>26</sup>

In 1896, the Supreme Court in *Durland v. United States*, 161 U.S. 306 (U.S. 1896) broadly interpreted the phrase "any scheme or artifice to defraud" insofar as property rights but did not state that the statute possessed a more extensive reach.<sup>27</sup> The Court held that the statute "includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future."<sup>28</sup> "[I]t was enacted for protecting the public against all intentional efforts to despoil, and to prevent the post office from being used to carry them into effect."<sup>29</sup>

In 1909, Congress codified the Supreme Court's holding in *Durland* which gave further credence to the *McNally* decision that the purpose of the mail fraud statute was to protect property rights.<sup>30</sup> This codification added the phrase "or for obtaining money or property by means of false or fraudulent pretenses, represen-

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24 *McNally*, 483 U.S. at 356.

25 *Id.* (citing Cong. Globe, 41st Cong., 3d Sess., 35 (1870) (remarks of Rep. Farnsworth)).

26 *Id.*

27 *Id.* (citing *Durland v. United States*, 161 U.S. 306 (1896)).

28 *Durland v. United States*, 161 U.S. 306, 306-07 syl. (1896).

29 *Id.*

30 *McNally v. United States*, 483 U.S. 350, 357 (1987).

tations, or promises” after the original text “any scheme or artifice to defraud.”<sup>31</sup> The added phrase was based on the *Durland*’s statement that the mail fraud statute reaches “everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future.”<sup>32</sup>

Congress used the phrase “scheme or artifice to defraud” as opposed to the *Durland* language “everything designed to defraud.”<sup>33</sup> As a result, the mail fraud statute criminalized schemes or artifices “to defraud” or “for obtaining money or property by means of false or fraudulent pretenses, representation, or promises.”<sup>34</sup> In *McNally*, the Supreme Court admitted that the appearance of the disjunctive in the text of the amended statute could lead courts to construe the two phrases independently and perceive that the requirement for money or property in the latter phrase does not limit “schemes to defraud” to those intended to deprive money or property.

To that end, in *Hammerschmidt v. United States*, 265 U.S. 182, 188 (U.S. 1924), the Supreme Court stated that the words “to defraud” have a limited application:

It is true that words “to defraud” as used in some statutes have been given a wide meaning, wider than their ordinary scope. They usually signify the deprivation of something of value by trick, deceit, chicane, or overreaching. They do not extend to theft by violence. They refer rather to wronging one in his property rights by dishonest methods or schemes. One would not class robbery or burglary among frauds.<sup>35</sup>

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31 *Id.* (citing Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130).

32 *Durland*, 161 U.S. at 306-07 syl.

33 *McNally*, 483 U.S. at 358.

34 *Id.*

35 *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924).

The *McNally* Court stated that the 1909 codification of *Durland* did not indicate that Congress departed from this basic understanding.<sup>36</sup> The Court went on to find that Congress' addition of the second phrase "simply made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property."<sup>37</sup> The *McNally* Court concluded, in passing the mail fraud statute, that it was Congress' intent to prevent the use of the mail system in furtherance of such schemes.<sup>38</sup> Speaking to the two possible interpretations based on the disjunctive in the statute, the Supreme Court noted its precedent that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language."<sup>39</sup> This concept was echoed in another mail fraud case, *Fasulo v. United States*, where the Supreme Court held that "[t]here are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute."<sup>40</sup>

### C. *McNally's Parting Shot*

Based on this, the Court concluded that the jury instructions in *McNally* permitted a conviction for conduct beyond the reach of § 1341.<sup>41</sup>

Rather 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

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36 *McNally*, 483 U.S. at 358-59.

37 *Id.* at 359.

38 *Id.*

39 *Id.* at 359-60 (citing *United States v. Bass*, 404 U.S. 336, 347 (1971); *United States v. Universal C.I.T. Credit Corp.*, 344 U. S. 218, 221-22 (1952); *Rewis v. United States*, 401 U. S. 808, 812 (1971)).

40 *Fasulo v. United States*, 272 U.S. 620, 629 (1926).

41 *McNally*, 483 U.S. at 361.

government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.<sup>42</sup>

## II. CONGRESS' HONEST SERVICES FRAUD -18 U.S.C. § 1346

Congress did "speak" soon thereafter when it passed 18 U.S.C. § 1346; in 1988, Congress passed the current honest services fraud statute, 18 U.S.C. § 1341, in direct response to *McNally*.<sup>43</sup> In its present state, § 1346 defines a "scheme or artifice to defraud" under the mail fraud statute as including "a scheme or artifice to deprive another of the intangible right of honest services."<sup>44</sup> However, as Justice Scalia stated in the denial of cert in *Sorich v. United States*, "[w]hether that terse amendment qualifies as speaking 'more clearly' or in any way lessens the vagueness and federalism concerns that produced this Court's decision in *McNally* is another matter."<sup>45</sup> The Supreme Court will determine the fate of § 1346 in the three honest services fraud cases before it: *United States v. Skilling*, *United States v. Black*, and *United States v. Weyhrauch*.

## III. THE PRESENT CASES BEFORE THE U.S. SUPREME COURT

### A. *United States v. Skilling*

In *United States v. Skilling*, the defendant enjoys the most notoriety of any defendant in the three cases before the Supreme Court. Skilling, the former Enron CEO, was convicted of conspiracy, securities fraud, making false represen-

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42 *Id.* at 360.

43 *Sorich v. United States*, 129 S.Ct. 1308, 1309 (2009) (SCALIA, J., dissenting in the denial of writ of certiorari).

44 18 U.S.C. § 1341 (1988).

45 *Sorich*, 129 S.Ct. at 1309.

tations to auditors, and insider trading.<sup>46</sup> On appeal, the Court of Appeals for the Fifth Circuit analyzed Skilling's complaints: that the government prosecuted him under an invalid legal theory (honest services fraud); the jury was provided with erroneous instructions; the Houston jury was biased; the prosecutors engaged in unconstitutional misconduct; and his sentence was improper.<sup>47</sup>

### 1. The Charges Against *Skilling*

In its first indictment, the government alleged that Skilling and Ken Lay, Skilling's predecessor as CEO, led the conspiracy whereby the duo worked to manipulate Enron's earnings in efforts to meet Wall Street's expectations.<sup>48</sup> The government also identified the Chief Accounting Officer, the Chief Financial Officer, and the Treasurer as "key players" in the illegal scheme.<sup>49</sup> In July 2004, the Grand Jury returned a second indictment, superseding the first, alleging that Skilling, Lay, and the Chief Accounting Officer committed conspiracy, securities fraud, wire fraud, and insider trading.<sup>50</sup> Specifically, Skilling was charged with one count of conspiracy to commit securities and wire fraud, fourteen counts of securities fraud, four counts of wire fraud, six counts of false representations to auditors, and ten counts of insider trading.<sup>51</sup>

Weeks before trial, the Chief Accounting Officer pled guilty to one count of securities fraud, which prompted the government to drop four of the counts against Skilling that involved the Chief Accounting Officer.<sup>52</sup> At the close of the government's case at trial, the government dismissed four additional counts against Skilling and Lay.<sup>53</sup> In his case in chief, Skilling asserted that he did not

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46 United States v. Skilling, 554 F.3d 529, 534 (5th Cir. 2009).

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.* at 542.

51 *Id.*

52 *Id.*

53 *Id.*

commit any illegal acts; on the contrary, Skilling maintained that he consistently relied on competent legal and accounting advice and that any misrepresentations in his statements were “immaterial in content and context.”<sup>54</sup>

Despite this defense, in May 2006, Skilling was convicted of one count of conspiracy, twelve counts of securities fraud, five counts of making false statements, and one count of insider trading.<sup>55, 56</sup> Subsequently, Skilling was sentenced to 292 months of imprisonment, three years of supervised release, and was ordered to pay \$45 million in restitution.<sup>57</sup>

## 2. *Skilling* at the Fifth Circuit

On appeal, the Fifth Circuit addressed Skilling’s claim that the “honest-services fraud” theory used to convict him was invalid.<sup>58</sup> The government’s theory at trial allowed for three objects of the conspiracy: to commit (1) the securities fraud, (2) wire fraud to deprive Enron and its shareholders of money and property, and (3) wire fraud to deprive Enron and its shareholders of the honest services owed by its employees.<sup>59</sup> However, because the jury returned a general verdict, it was impossible to know which of the three theories that the jury believed had taken place.<sup>60</sup> Quoting the Supreme Court’s decision in *Yates v. United States*, 354 U.S. 298, 312 (U.S. 1957), the Fifth Circuit found that where a jury returns a general verdict of guilt resting on even one insufficient legal theory, the jury’s verdict must be set aside.<sup>61</sup> This reasoning is based on the consideration that a jury cannot be trusted to choose the legally sufficient theory - and ignore the insufficient one

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54 *Id.*

55 *Id.*

56 Skilling was acquitted of nine counts of insider trading. Moreover, Lay was convicted of every count against him.

57 *Skilling*, 554 F.3d at 542.

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.*

- because jury members "are not generally equipped to determine whether a particular theory...is contrary to law."<sup>62</sup> Applied to Skilling's case, the Fifth Circuit acknowledged that his conviction must be set aside if the general verdict rests on an insufficient theory.<sup>63</sup>

Aside from the text of § 1346, the Fifth Circuit Court of Appeals found that the phrase "scheme or artifice to defraud" is found in the substantive mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, respectively, and includes the substantive crime of depriving another of one's honest services.<sup>64</sup> Because of this, the court concluded that where mail or wire fraud is the vehicle of a conspiracy, there are two possible objects of the conspiracy which can be charged: use of the mail or wire to deprive another of (1) property or money, or (2) honest services.<sup>65</sup> This stands in stark contrast to *McNally* which held that only money or property could be subject of the mail fraud statute.

As addressed by other courts of appeals, the Fifth Circuit acknowledged that § 1346 identifies no definition of "honest services."<sup>66</sup> The *Skilling* court stated that other courts had read the "or" in the phrase "to defraud or for obtaining money or property" to indicate two separate objects of the scheme or artifice.<sup>67</sup> Based on this disjunctive, courts had found that money or property could be one object of a conspiracy and, in schemes "to defraud," add an object of the deprivation of intangible rights such as honest services.<sup>68</sup>

In *McNally*, however, the Supreme Court ended prosecutions for honest services fraud as part of mail fraud.<sup>69</sup> *McNally* stated that the disjunctive did not indicate there were two objects in the statute; instead, it was intended to limit

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62 *Id.* at 542-43 (quoting *Griffin v. United States*, 502 U.S. 46, 59 (1991)).

63 *Id.* at 543.

64 *Id.* at 43.

65 *Id.* (citing 18 U.S.C. §§ 1341, 1343).

66 *Id.*

67 *Id.* at 43 (citing *McNally*, 483 U.S. at 358).

68 *Id.*

69 *Id.* at 544 (citing *McNally* at 358-60).

§ 1341 to the protection of property rights.<sup>70</sup> As a result, the Fifth Circuit looked to pre-*McNally* precedent to determine exactly what constituted honest services fraud.<sup>71</sup>

In reaching its decision, the *Skilling* court examined two previous Fifth Circuit decisions construing honest services fraud. In the *United States v. Gray*, 96 F.3d 769 (5th Cir. 1996), the court upheld the conviction of three assistant basketball coaches at Baylor University who conspired to commit mail and wire fraud by depriving the University of their honest services through a scheme to obtain credits and scholarships for players in violation of the National Collegiate Athletic Association ("NCAA") rules.<sup>72</sup> In *Gray*, the defendants argued that they had broken no laws, only rules of a private association, and lacked the intent to obtain personal benefit or harm victims.<sup>73</sup> Nevertheless, the *Gray* court rejected that argument finding that the University's knowledge of their practices was immaterial:

A breach of fiduciary duty of honesty or loyalty involving a violation of the duty to disclose could only result in criminal mail fraud where the information withheld from the employer was material in that, where the employer was in the private sector, information should be deemed material *if the employee had reason to believe the information would lead a reasonable employer to change its business conduct.*<sup>74</sup>

The court concluded that because the University was unaware of the defendants'

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70 *Id.* at 544 (citing *McNally* at 360).

71 *Id.* (citing *United States v. Brumley*, 116 F.3d 728, 733 (5th Cir. 1997)).

72 *Id.* at 544 (citing *United States v. Gray*, 96 F.3d at 772).

73 *Id.* (citing *Gray*, 96 F.3d at 744).

74 *Id.* at 544 (quoting *Gray*, 96 F.3d at 744-75) (emphasis added).

actions, the information was "deemed material" because, had the employer known, it would have changed its business conduct given the applicable NCAA rules.<sup>75</sup>

The second case that the *Skilling* court reviewed was its decision in *United States v. Brown*, another honest services fraud matter. In *Brown*, Enron was again the source of the defendant-employees, albeit different defendants from those in *Skilling*. In the *Brown* case, the defendants arranged for Nigerian energy-producing barges to be "sold" to Merrill Lynch.<sup>76</sup> Through this transaction, Enron fraudulently reported earnings from the barge sale. Despite this, the Fifth Circuit concluded that the low-level employees' conduct did not fall within the bounds of the honest services.<sup>77</sup> The *Brown* court held that such conduct is outside the parameters of honest services fraud:

Where an employer intentionally aligns the interests of the employee with a specified corporate goal, where the employee perceives his pursuit of that goal as mutually benefiting him and his employer, and where the employee's conduct is consistent with that perception of the mutual interest [].<sup>78</sup>

Nevertheless, the *Brown* court reversed the defendants' convictions because the employees were acting both in the corporate interest and at the direction of higher-level management.<sup>79</sup> The *Brown* court reasoned that because the Enron decision makers in *Brown* sanctioned the specific fraudulent conduct of its employees, the

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75 *Id.* at 544.

76 *Id.* at 544 (citing *Brown*, 459 F.3d 509, 513 (5th Cir. 2006)).

77 *Id.* at 545 (*Brown*, 459 F.3d at 523).

78 *Id.* (*Brown*, 459 F.3d at 522).

79 *Id.* at 545 (citing *Brown*, 459 F.3d at 522).

employees did not deprive Enron of their honest services.<sup>80</sup> Using the reasoning from *Gray* and *Brown*, the *Skilling* court held that lower-level employees following their boss's direction are not liable for honest-services fraud when an employer (1) creates a particular goal, (2) aligns the employees' interests with the employer's interest in achieving that goal, and (3) has higher-level management sanction improper conduct to reach that goal.<sup>81</sup>

Applying this to Skilling's case, the Fifth Circuit held that Skilling's convictions must stand because:

First, Enron created a goal of meeting certain earnings projections. Second, Enron aligned its interests with Skilling's personal interests, e.g., through his compensation structure, leading Skilling to undertake fraudulent means to achieve the goal. Third – and fatally to Skilling's argument – no one at Enron sanctioned Skilling's improper conduct.<sup>82</sup>

Therefore, because neither the board of directors nor any other decision-maker specifically directed the improper method by which Skilling sought to meet earnings projections, the Court found that there was no way in good faith to assert that anyone had sanctioned his improper conduct, as *Gray* required.<sup>83</sup>

The Fifth Circuit articulated the two elements of honest services fraud as relevant in *Skilling* as (1) a material breach of fiduciary duty imposed under state law, as in *Brumley*, *supra*, including the duties defined by the employer-employee

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80 *Id.* at 546.

81 *Id.* at 545.

82 *Id.* at 546.

83 *Id.*

relationship,<sup>84</sup> which (2) results in a detriment to the employer.<sup>85</sup> The court found that *Brown* created an exception for honest services fraud when the employer specifically directs, and is not just aware of, the fraudulent conduct.<sup>86</sup> Moreover, this causes "a specific detriment" to the employer because of the withholding of material information contrary to his duty of honesty. Therefore, the court concluded that the jury was "entitled to convict Skilling of a conspiracy to commit honest-services wire fraud on these elements."<sup>87</sup> The court held this despite the fact that it was unaware as to which of the three alleged objects of the conspiracy upon which the jury had based its verdict because the jury was entitled to convict on any or all of the three objects.<sup>88</sup>

### B. *United States v. Black*

In *United States v. Black*, 530 F.3d 596 (7th Cir. 2008), the United States Court of Appeals for the Seventh Circuit upheld the conviction of several executives which was based on the theory of honest services fraud.<sup>89</sup> Following a four-month trial, Conrad and his three co-defendants were all convicted of mail and wire fraud.<sup>90, 91</sup>

#### 1. The Charges against Black

Conrad Black was the CEO of an American company, Hollinger International, and his co-defendants were senior executives of Hollinger. Hollinger,

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84 *Id.* (citing *United States v. Caldwell*, 302 F.3d 399, 409 (5th Cir. 2002); *Brumley*, 116 F.3d at 734).

85 *Id.* at 547.

86 *Id.*

87 *Id.*

88 *Id.*

89 *United States v. Black*, 530 F.3d 596 (7th Cir. 2008).

90 *Black*, 530 F.3d at 598.

91 In addition to the other charges, Black was also convicted of obstruction of justice in violation of 18 U.S.C. § 1512(c). *Id.* at 598.

through subsidiaries, owned a number of newspapers in the United States and abroad.<sup>92</sup> Hollinger was controlled by a Canadian company, now defunct, called Ravelston which of which Black held controlling interest with 65% of its shares.<sup>93</sup> One of Hollinger's subsidiaries, APC, owned several newspapers it was in the process of selling.<sup>94</sup> The illegal scheme apparently began when APC had only one newspaper left – “a weekly community newspaper in Mammoth Lake, California (population 7,093 in 2000, the year before the fraud).”<sup>95</sup> Hollinger's general counsel prepared, and signed on behalf of APC, an agreement whereby Black, his three co-defendants, and another Hollinger executive would receive a total of \$5.5 million in exchange for promising not to compete with APC – owning only a community newspaper - for three years after they ceased working for Hollinger.<sup>96</sup> Although the money was paid by APC, neither Hollinger's audit committee, nor Hollinger's Board of Directors was informed of the transaction.<sup>97</sup> This was problematic because Hollinger's audit committee was required to approve transactions between Hollinger's executives and the company or its subsidiaries due to concerns about conflicts of interest.<sup>98</sup>

## 2. *Black* at the Seventh Circuit

The *Black* court found that it was “ridiculous” to consider that “Black and the others would start a newspaper in Mammoth Lake to compete with APC's tiny newspaper.”<sup>99</sup> Addressing that argument, the defendants argued that the \$5.5 mil-

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92 *Id.*

93 Black also owned “some stock in Hollinger, but a much higher percentage of the stock of Ravelston, in which [two of Black's co-defendants] also owned stock. So it was in his and their financial interest to funnel income received by Hollinger to Ravelston.” *Id.* at 599.

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.* at 599.

98 *Id.*

99 *Id.*

lion were management fees already owed to Ravelston but had been characterized as compensation in the hopes of avoiding Canadian taxes.<sup>100</sup> Further complicating matters, there was no evidence documenting that the \$5.5 million payments were approved by the corporation or credited to the management fee accounts on its books.<sup>101</sup> Although the checks were drawn on APC's accounts, the evidence established that the defendants had no right to management fees from APC and the checks were "*backdated* to the year in which APC had sold most of its newspapers."<sup>102</sup> The government asserted that the backdating was accomplished to a time period when APC owned more newspapers so that the fees for the covenant not to compete would seem less "preposterous."<sup>103</sup> Moreover, the management fees were to be paid to Ravelston but were paid to the defendants personally and were from the proceeds of a newspaper's sale.<sup>104</sup> While a Hollinger executive testified that the audit committee had approved the management fees, members of the actual audit committee testified otherwise.<sup>105</sup> Black and his co-defendants did not disclose the \$5.5 million in the 10-K reports required to be filed annually with the Securities and Exchange Commission ("SEC").<sup>106</sup> These executives also caused Hollinger to represent to its shareholders that the payments were made "to satisfy a closing condition."<sup>107</sup>

At trial, the jury was instructed "that it could convict the defendants upon proof that they had schemed to deprive Hollinger and its shareholders 'of their intangible right to the honest services of the corporate officers, directors or controlling shareholders of Hollinger,' provided the objective of the scheme was 'private

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100 *Id.*

101 *Id.*

102 *Id.* at 599 (emphasis added).

103 *Id.*

104 *Id.*

105 *Id.*

106 *Id.*

107 *Id.* at 599.

gain."<sup>108</sup> Simplifying matters greatly, the defendants acknowledged that: (1) Holinger was entitled to their honest services, and (2) they had sought private gain.<sup>109</sup> However, the defendants argued that their private gain was purely at the expense of the Canadian government as this scheme was only intended to avoid Canadian taxes.<sup>110</sup> Addressing this "no harm, no foul" argument, the court noted that "such arguments usually fare badly in criminal cases."<sup>111</sup>

Suppose your employer owes you \$100 but balks at paying, so you help yourself to the money at the cash register. That is theft, even though if the employer really owes you the money you have not harmed him. You are punishable because you are not entitled to take the law into your own hands. Harmlessness is rarely a defense to a criminal charge; if you embezzle money from your employer and replace it (with interest!) before the embezzlement is detected, you are still guilty of embezzlement.<sup>112</sup>

As applied to *Black*, the court found that if the defendants deprived Holinger, their employer, of the honest services owed to it then "the fact that the inducement was the anticipation of money from a third party (the anticipated tax benefit) is no defense."<sup>113</sup> The Seventh Circuit in *Black* was troubled by the defendants' argument and stated that avoiding Canadian taxes would not help their case.

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108 *Id.*

109 *Id.* at 600.

110 *Id.*

111 *Id.*

112 *Id.* at 600-01 (internal citations omitted).

113 *Id.* at 601.

Suppose a third party gives a bribe to a buyer for a department store, and the buyer pockets the bribe but does not carry out the side of the bargain, which was that he would purchase supplies from the principal of the person who bribed him. The buyer has deprived his employer (the department store) of his honest services, and has done so for private gain, but he has conferred no benefit on a third party.<sup>114</sup>

The *Black* court likened this scenario to judges who accept bribes but then invariably argue that their acceptance of the bribe did not influence their decisions.<sup>115</sup> The fact remains that the bribe was accepted and private gain received thereby depriving the employer of the right to honest services.<sup>116</sup> Had Black and his co-defendants disclosed to the audit committee and Board of Directors that their characterization of management fees would result in a higher after-tax income, the committee or board might have decided that this increase in the value of the fees to the defendant warranted a reduction in the size of the fees.<sup>117</sup> The *Black* court acknowledged that not every corporate employee must advise his employer of his tax status, but these defendants had a duty of candor in the conflict of interest situation which they created.<sup>118</sup> The defendants only complicated matters by filing false reports with the SEC, for private gain, which were "bound to get the corpora-

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114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.* at 602. (The court further illustrated its point by an example: "[i]f \$10 in tax-free income is worth \$15 to the recipient in taxed income, the employer who learns about the tax break may require the employee to accept in tax-free income less than \$15 in tax income.").

118 *Id.*

tion in trouble with the third party and the SEC."<sup>119</sup>

The court concluded its discussion of honest services fraud by stating that even if its analysis of honest services is incorrect, the defendants still could not prevail.<sup>120</sup> The court stated that there is no doubt that the defendants received money from APC and that Hollinger was deprived of their honest services.<sup>121</sup> The defendants' intent to avoid Canadian taxes was not an issue at trial, a fact which the defendants had acknowledged in their appellate reply brief.<sup>122</sup> At trial, the government did not assert as its theory that defendants had misused their position for personal gain in the form of Canadian tax benefits, the trial court did not instruct the jury that it had to convict the defendants if their private gain was at the expense of the Canadian government.<sup>123</sup>

On the contrary, the government's honest services theory was that "the defendants had abused their positions with Hollinger to line their pockets with phony management fees disguised as compensation for covenants not to compete."<sup>124</sup> Therefore, the instructions given to the jury did not include discussion pertaining to the avoidance of Canadian taxes.<sup>125</sup> As such, the *Black* court determined that a jury instruction which omits a qualification to make it unambiguously correct is different from submitting a case to a jury on an erroneous theory of criminal liability."<sup>126</sup> As stated above, the trial court's jury instructions merely required a conviction in the event that the jury found that the defendants had sought to deprive Hollinger and its shareholders of their intangible right to honest services and that the object of the scheme was for private gain.<sup>127</sup> Interestingly enough, at

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119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.* at 603.

125 *Id.*

126 *Id.* at 602.

127 *Id.*

trial, the prosecution had requested a special verdict form which would require the jury to make separate findings on money or property fraud and honest services fraud, but the defendants objected, requesting a general verdict.<sup>128</sup> On appeal, however, they asserted that they would have wanted more specific jury instructions despite their objection at trial and request for a general verdict.<sup>129</sup> The *Black* court acknowledged this tactic and stated that Black and his co-defendants "wanted to reserve the right to make the kind of challenge they are mounting in this court."<sup>130</sup> The Seventh Circuit concluded that the defendants were arguing that the judge should have, after receiving the verdict, "told the jury to determine whether it had found both a money or property fraud and an honest services fraud."<sup>131</sup> The *Black* court went on to detail the problem of such a concept:

The defendants' proposal could if adopted create a nightmare in which the jury renders a general verdict; the jurors are polled and think that they're about to be released from their term of indentured servitude – here for months – and be free to get on with their lives; and then they are told they must take an exam so that the judges and lawyers can know exactly how they evaluated the various theories presented to them in the instructions. Must they resume deliberations? And if they disagree, what then – an *Allen* charge?<sup>132</sup>

Based on this, and the above reasoning, the Seventh Circuit of the Court of Ap-

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128 *Id.*

129 *Id.*

130 *Id.* at 603.

131 *Id.*

132 *Id.*

peals affirmed the judgments against Black and his three co-defendants.<sup>133</sup>

### C. *United States v. Weyhrauch*

In *United States v. Weyhrauch*, the Court of Appeals for the Ninth Circuit addressed honest services fraud in the context of an Alaskan lawmaker. Defendant Bruce Weyhrauch was a lawyer and a member of the Alaska House of Representatives in 2006.<sup>134</sup> At that time, the Alaska legislature was considering legislation to address how oil production was taxed by the state.<sup>135</sup> In fact, Weyhrauch had a connection with two executives from VECO Corporation, an oil field services company, regarding the legislature's reconsideration of the oil tax.<sup>136</sup> Weyhrauch solicited future legal work from VECO by mail, telephone, and personal contact in exchange for his votes on the oil tax legislation and other actions favorable to VECO in Weyhrauch's capacity as a state legislator.<sup>137</sup> This specifically included Weyhrauch's maneuvering the legislation and reporting information about proposed legislative changes to the VECO executives.<sup>138</sup>

#### 1. The Charges Against Weyhrauch

While the indictment does not allege that Weyhrauch received compensation for benefits from VECO during this period, it does suggest that Weyhrauch took actions favorable to VECO with the understanding that VECO would eventually hire him to provide legal services for the company.<sup>139</sup> The indictment alleged that Weyhrauch devised "a scheme and artifice to defraud and deprive the State of Alaska of its intangible right to [his] honest services... performed free from de-

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133 *Id.*

134 *United States v. Weyhrauch*, 548 F.3d 1237, 1239 (9th Cir. 2008).

135 *Id.*

136 *Id.*

137 *Id.* at 1239.

138 *Id.*

139 *Id.*

ceit, self-dealing, bias, and concealment" and attempted to "execute the scheme by mailing his resume to VECO."<sup>140</sup>

In pretrial motions, the government proposed to introduce the following:

(1) legislative ethics publications concerning excerpts of various Alaska state statutes addressing conflicts of interest and disclosure requirements;

(2) evidence that members of the Alaska State Legislature customarily acknowledge the existence of conflicts of interest on the floor of the Legislature, and that Weyhrauch never disclosed he was negotiating for employment with VECO;

(3) a description of the ethics training Weyhrauch received; and

(4) evidence that Weyhrauch served on the Legislature's Select Committee on Ethics.<sup>141</sup>

The district court in *Weyhrauch* ruled that this evidence related only to duties to disclose a conflict of interest that might be imposed by state law.<sup>142</sup> Because state law did not require Weyhrauch to disclose these conflicts of interest, the district court granted Weyhrauch's motion to exclude the proffered evidence.<sup>143</sup> This decision was based in part on the absence of Ninth Circuit precedent and the

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140 *Id.* (citing Count VII of the Indictment).

141 *Id.* at 1239-40.

142 *Id.*

143 *Id.*

district court's adoption of the Fifth Circuit's decision in *United States v. Brumley*, *supra*, which drove the court to conclude that "any duty to disclose sufficient to support the mail and wire fraud charges here must be a duty imposed by state law."<sup>144</sup>

## 2. *Weyhrauch* at the Ninth Circuit

On appeal, before ultimately overruling the district court's decision, the Ninth Circuit reviewed the respective holdings of other courts of appeals as well as the pre-*McNally* precedent. The *Weyhrauch* court recognized that before the 1987 *McNally* decision, courts had interpreted § 1341 as covering schemes to deprive another, not just of money and property, but also of "intangible rights" including the right of citizens to have public officials perform their duties honestly.<sup>145</sup> However, in *McNally v. United States*, 483 U.S. 350, 360 (U.S. 1987), the Supreme Court rejected the concept of "intangible rights" pursued under mail fraud. Acknowledging that the statute's plain language was inconclusive, the *Weyhrauch* appellate court turned to pre-*McNally* case law and any relevant post-*McNally* decisions for guidance in construing the 1988 statute.<sup>146</sup>

The *Weyhrauch* court noted the divergence of methods amongst the courts of appeals in construing § 1346. For example, the *Weyhrauch* court noted that the Fifth Circuit adopted the "state law limiting principle" which mandated that the government prove that a public official violated an independent state law to support an honest services mail fraud conviction.<sup>147</sup> Similarly, the Third Circuit adopted a similar rule whereby the government is required to prove that a public official violated a fiduciary duty specifically established by federal *or* state law.<sup>148</sup>

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144 *Id.*

145 *Id.* at 1243 (citing *United States v. Williams*, 441 F.3d 716, 721-22 (9th Cir. 2006); *United States v. Sorich*, 523 F.3d 702, 707 (7th Cir. 2008)).

146 *Id.*

147 *Id.* at 1243-44 (citing *Brumley*, 116 F.3d at 734-35).

148 *Id.* at 1244 (citing *United States v. Murphy*, 323 F.3d 102, 116-17 (3d Cir. 2003)).

On the other hand, the Ninth Circuit in *Weyhrauch* recognized that the majority of circuits have held that the definition of "honest services" was governed by a uniform federal standard inherent in § 1346, but did not uniformly define the contours of such a standard.<sup>149</sup> For example, the Seventh Circuit required governments to prove that a public official breached a fiduciary duty with the intent to reap private gain to be convicted of honest services mail fraud.<sup>150</sup> On the other hand, the First Circuit read honest services as requiring that the officials' misconduct must involve more than a mere conflict of interest to support a conviction.<sup>151</sup> The Eighth and Tenth Circuits have read § 1346 to require that a public official's breach of duty must be material and accompanied by fraudulent intent.<sup>152</sup> From their review of the honest services decisions in the various circuits, the *Weyhrauch* court found that these courts have limited, "to differing degrees, the reach of § 1346 into state and local public affairs."<sup>153</sup>

The court in *Weyhrauch* acknowledged that a literal reading of § 1346 might provide government prosecutors with unwarranted influence over state and local public ethics standards.<sup>154</sup> The court felt that such a concern was warranted given the Supreme Court's language in *Cleveland v. United States*, 531 U.S. 12, 25 (U.S. 2000), where it stated, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes."<sup>155</sup> Equally important, the *Weyhrauch* court found that (1) Congress needs to give public officials fair notice of the conduct that would sub-

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149 *Id.* (citing *Sorich*, 523 F.3d at 712; *Urciuoli*, 513 F.3d at 298-99; *United States v. Walker*, 490 F.3d 1282, 1299 (11th Cir. 2007); and *United States v. Bryan*, 58 F.3d 933, 942 (4th Cir. 1994)).

150 *Id.* (citing *Sorich*, 523 F.3d at 708).

151 *Id.* (citing *Urciuoli*, 513 F.3d at 598-99).

152 *Id.* (citing *United States v. Cochran*, 103 F.3d 660, 667 (10th Cir. 1997); *United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996)).

153 *Id.* at 1244.

154 *Id.* (citing *Brumley*, 116 F.3d at 734).

155 *Id.*

ject them to the federal fraud statutes' serious criminal penalties,<sup>156</sup> (2) a desire to establish firm boundaries lest every dishonest act by public officials lead to federal criminal liability,<sup>157</sup> and (3) the potential for selective enforcement against public officials many of whom engage in partisan political activities.<sup>158</sup>

The Fifth Circuit ultimately declined to adopt the "state law limiting principle" created by the Fifth Circuit, even though it addressed all of these concerns.<sup>159</sup> The court concluded that there was no "basis in the text or legislative history of § 1346 revealing the Congress intended to condition the meaning of 'honest services' on state law."<sup>160</sup> "Congress has given no indication it intended that the criminality of official conduct under federal law to depend on geography."<sup>161</sup> *Id.* The *Weyhrauch* court concluded that because pre-*McNally* case law did not require state law to create an official's duty of honesty to the public and also the plain language of the statute contains no reference to state law, it would not "infer that Congress intended to import a state law limitation into § 1346."<sup>162</sup>

The *Weyhrauch* court's review of pre-*McNally* cases identified two categories of conduct by public officials sufficient to support an honest services conviction: (1) taking a bribe or otherwise being paid for a decision while purporting to be exercising independent discretion, and (2) the failure to disclose material information.<sup>163</sup> Similarly, post-*McNally* public official honest services fraud cases also fall into one of these two categories.<sup>164</sup> The common element between the two

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156 *Id.* (citing *Urciuoli*, 513 F.3d at 294; and *Williams*, 441 F.3d at 724).

157 *Id.* (citing *Sorich*, 523 F.3d at 707-08; and *Urciuoli*, 513 F.3d at 294).

158 *Id.*

159 *Id.* at 1245.

160 *Id.* (This comports with prior Ninth Circuit holdings. "We were less equivocal in *United States v. Louderman*, 576 F.2d 1383, 1387 (9th Cir. 1978), quoting that 'state law is irrelevant in determining whether a certain course of conduct is violative of the wire fraud statute... In short, we have never limited the reach of the federal fraud statutes only to conduct that violates state law.'").

161 *Id.*

162 *Id.* at 1246.

163 *Id.* at 1247 (citing *Bohonus*, 628 F.2d at 1171).

164 *Id.* (citing *Urciuoli*, 513 F.3d at 295 n.3).

categories of misconduct is the undermining of transparency in the legislative process and other governmental functions.<sup>165</sup> The court stated that it was Congress' intent to bring the two categories of official conduct within the reach of § 1346 when it reinstated the honest services fraud theory in 1998 following *McNally*.<sup>166</sup>

The *Weyhrauch* court said that the allegations against Mr. Weyhrauch "describe an undisclosed conflict of interest and could also support an inference of a quid pro quo arrangement to vote for the oil tax legislation in exchange for future remuneration in the form of legal work."<sup>167</sup> The court found that because Weyhrauch's alleged conduct fell within one of the two categories - bribery or nondisclosure - it did not need to "define the outer limits of public honest services fraud."<sup>168</sup>

Therefore, the Ninth Circuit in *Weyhrauch* permitted the prosecution to proceed on the theory that Mr. Weyhrauch committed honest services fraud by failing to disclose a conflict of interest and by taking official actions with the expectation that he would receive future legal work in exchange for doing so.<sup>169</sup> In doing so, the court overruled the district court's decision requiring that the government prove that state law imposed an affirmative duty on the defendant to disclose a conflict of interest. Interestingly enough, because the government did not appeal the lower court's ruling that the proffered evidence related only to state law, the Ninth Circuit explicitly stated that it offered "no opinion whether the proffered evidence is relevant to proving the government's case under the standard we have announced and leave that determination to the court's sound judgment."<sup>170</sup>

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165 *Id.*

166 *Id.*

167 *Id.*

168 *Id.*

169 *Id.*

170 *Id.* at 1248.

## IV. A CHANGE IS COMING - THE SUPREME COURT'S DECISION ON 18 U.S.C. § 1346

In accepting these three cases on honest services fraud, the Court has demonstrated its resolve to take some ameliorative action and address the divergent manner in which the various courts of appeals treat this subject. However, the exact "fix" or standard to be established by the Supreme Court cannot be discerned at this time. But spectators at the oral arguments<sup>171</sup> could certainly glean the leanings of individual justices based on their questions - as well as their editorial comments.<sup>172</sup>

A. *Scalia and Sorich*

Of his peers, Justice Scalia's vote is the most easily discerned, especially given the dissenting opinion he penned addressing the Supreme Court's denial of certiorari in *United States v. Sorich*, an honest services fraud case from the Seventh Circuit.<sup>173</sup> Scalia was clearly troubled with the Court's refusal to address the "current chaos" brought about by this statute.<sup>174</sup> In his dissenting opinion in *Sorich*, Scalia illustrated his concerns about the potential for the abuse of this vague statute:

If the "honest services" theory - broadly stated, that officeholders and employees owe a duty to act only in the best interests of their constituents and employers - is tak-

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171 The argument for *United States v. Skilling* was held on March 1, 2010. The oral arguments for *United States v. Black* and *United States v. Weyhrauch* were both held on December 8, 2009. Deputy Solicitor General, Michael R. Dreeben, of the Department of Justice argued for the United States in both *Black* and *Weyhrauch*. In fact, *Black* and *Weyhrauch* were scheduled "back to back" - one at 10:16 AM and the other at 11:19 AM.

172 For the sake of brevity, the remarks of only select Justices will be addressed which highlight the Court's disquiet with § 1346 and the concept of honest services fraud.

173 See *Sorich v. United States*, 523 F.3d 702 (7th Cir. 2008) for the opinion of the Court of Appeals for the Seventh Circuit.

174 *Sorich*, 129 S.Ct. at 1311 (SCALIA, J., dissenting in the denial of writ of certiorari).

en seriously and carried to its logical conclusion, presumably the statute also renders criminal a state legislator's decision to vote for a bill because he expects it will curry favor with a small minority essential to his reelection; a mayor's attempt to use the prestige of his office to obtain a restaurant table without a reservation; a public employee's recommendation of his incompetent friend for a public contract; and any self-dealing by a corporate officer. Indeed, it would seemingly cover a salaried employee's phoning in sick to go to a ball game.<sup>175</sup>

To combat these concerns, Scalia recognized the importance of a "coherent limiting principle" to define the right to honest services, where the right originated, and how the right can be violated; without some judicial action to curtail the reach of the statute, "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."<sup>176</sup>

Scalia's dissenting opinion presented two concerns also discussed by the *McNally* Court.<sup>177</sup> First, the Supreme Court is unwilling to establish a precedent whereby federal prosecutors or federal courts create ethics codes and set disclosure requirements for local and state officials.<sup>178</sup> It is certainly permissible to enact laws prohibiting corrupt behavior but Congress places itself on shaky ground when it creates "a freestanding, open-ended duty to provide 'honest services' - with the details to be worked out case-by-case."<sup>179</sup>

The second concern Scalia offers is based on the principle that "a crimi-

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175 *Id.* at 1309.

176 *Id.* at 1310.

177 *Id.*

178 *Id.*

179 *Id.* (citing Brown, *Should Federalism Shield Corruption?* 82 CORN. L. REV. 225 (1997)).

nal statute must give fair warning of the conduct that it makes a crime.”<sup>180</sup> Scalia relayed his concern that § 1346 will serve as an invitation for federal courts to develop a common law crime of unethical conduct.<sup>181</sup> The Justice best articulated the threat of vagueness when he said, “How can the public be expected to know what the statute means when the judges and prosecutors themselves do not know, or must make it up as they go along?”<sup>182</sup> In this vein, Scalia was particularly disturbed by the language used by the Seventh Circuit – also Conrad Black’s appellate court – which interpreted § 1346 to criminalize all conduct that is not “in the public’s best interest,” requiring all conduct to benefit *someone*.<sup>183</sup>

*Sorich* aside, Scalia’s concerns about the vague nature of the statute were plainly seen and heard during the oral arguments of the three pending cases. While other justices were content to inquiry into the prudence of a limiting principle as used by the Fifth Circuit, Justice Scalia was focused on a more fundamental question – constitutionality. In the *Black* oral argument, Scalia conveyed his belief that mere limiting principles do not address the basic failure of the statute.<sup>184</sup> He showed he had little interest in hearing the government’s proposed standard which would require a type of economic harm in any honest service fraud prosecution:

I don’t have the heart to inquire into that question if I think that the whole statute is bad...But if I think the whole statute is bad, what -- you know, why should I engage in -- in this exercise?<sup>185</sup>

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180 *Id.* (quoting *Bouie v. City of Columbia*, 378 U. S. 347, 350 (1964)).

181 *Id.*

182 *Id.* (quoting *United States v. Rybicki*, 354 F.3d 124, 160 (2d Cir. 2003) (Jacobs, J., dissenting)).

183 *Id.* at 1311 (quoting *Sorich*, 523 F.3d at 711)).

184 Transcript of Oral Argument of *United States v. Black*, United States Supreme Court, December 8, 2009, p. 24.

185 *Id.*

In addition, while the full extent of Justice Scalia's concerns are contained in the *Sorich* dissenting opinion, his conclusion can be seen in a comment made during the *Weyhrauch* oral argument. He stated that if the Court has a principle that a citizen should know when "he is violating a criminal statute" then § 1346 "is just too much."<sup>186</sup>

### B. Justice Breyer

But Justice Scalia was not alone in these concerns; he was joined by Justice Breyer, who punctuated the argument with humorous hypotheticals illustrating his unease and reticence to accept § 1346 and the case law in its current state. Most of Breyer's comments and questions focused on the vague nature of the statute; in one instance during the *Weyhrauch* oral argument, the Justice jokingly remarked on this long-standing principle:

I thought there was a principle that a citizen is supposed to be able to understand the criminal law that was around even before Justice Scalia.<sup>187</sup>

Humor aside, Justice Breyer did acknowledge the relative complexity of the Supreme Court's task in providing a remedy for the split among the courts of appeals. In the *Black* oral argument, Breyer stated that most - if not all - employees owe a fiduciary duty, including that of honesty, to their employer in some manner.<sup>188</sup> As such, limiting honest services to a fiduciary duty is not in actuality any limitation. The Justice did return to humor when he illustrated his unease about

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186 Transcript of Oral Argument of *United States v. Weyhrauch*, United States Supreme Court, December 8, 2009, p. 41-42.

187 *Id.* at 42.

188 Transcript of Oral Argument of *United States v. Black*, United States Supreme Court, December 8, 2009, p. 30.

using only a employer-employee relationship as the source of a fiduciary duty to provide honest services:

...Perhaps there are 150 million workers in the United States. I think possibly 140 of them would flunk your test...

"Do you like my hat?" Says the boss.

"Oh, I love your hat," says the worker.

Why? So the boss will leave the room so that the worker can continue to read the racing form... Explain it to me, how your test does not make this statute potentially criminalizing 100 million workers in the United States, or some tens of millions?<sup>189</sup>

Justice Breyer, who is ordinarily not ideologically aligned with Scalia and more conservative Justices, holds considerable influence and his opinion in these three cases will be carefully weighed by his companions on the Court.

### C. *Chief Justice Roberts*

Chief Justice Roberts also expressed concern about the complexity of this area of the law and the ability of citizen to understand the varied precedent. At the *Skilling* oral argument, the Chief Justice commented "[T]hat's where it gets fuzzy.

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189 *Id.* at 30-31.

I mean, you need lawyers and research before you get an idea of what the pre-*McNally* state of the law was with respect to...the right of intangible services."<sup>190</sup> Later, Roberts again commented that such a statute with varying and "evolving" precedent places the prospective defendant in "an awfully difficult position."<sup>191</sup> The Chief Justice concluded that series of remarks by concluding, "That doesn't sound like fair notice of what's criminal."<sup>192</sup>

However, in the same oral argument, he appeared to express a contrary view. In questioning Skilling's appellate counsel, Chief Justice Roberts offered the following remarks:

I don't understand why it's difficult. The statute prohibits "scheme to deprive another of the intangible right of honest services." Skilling owed the Enron shareholders honest services. He acted dishonestly in a way that harmed them. But I don't understand the difficulty.<sup>193</sup>

Shortly thereafter, though, Roberts appeared to concede that the problem lies not in the statute alone, but in Congress' failure to define, or otherwise identify the source of honest services. "[T]here has to be a right to honesty. In other words, it's not just in the abstract."<sup>194</sup>

From the oral arguments, one could get the sense that the Justices were struggling to develop a straightforward standard which could be evenly applied. For example, Justice Kennedy expressed his concern about the difficulty in construing any statute that requires one standard for private individuals and a separate

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190 Transcript of Oral Argument of *United States v. Skilling*, United States Supreme Court, March 1, 2010, p. 46.

191 *Id.* at 47.

192 *Id.* at 47.

193 *Id.* at 22.

194 *Id.* at 23.

standard for public officials.<sup>195</sup> In the *Weyhrauch* oral argument, Justice Ginsburg, when addressing the use of state law as a limiting principle as used by the Fifth Circuit, seemed troubled that citizens would be subject to criminal liability in some states - but not in others - merely based on "geography."<sup>196</sup> Similarly, Justice Sotomayor also inquired into the problem of identifying a single standard which would address the various duties contained within local and state laws.<sup>197</sup>

In conclusion, based on the statements made by several of the Justices in their opinions and at the oral arguments in these cases, the Supreme Court will likely fashion a rule which will limit honest services fraud as it currently exists. While a simple and coherent rule using existing precedent and § 1346 appears elusive, the Supreme Court may choose the simplest method by following in the steps of *McNally* and ask Congress, again, to "speak more clearly."

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195 Transcript of Oral Argument of *United States v. Black*, United States Supreme Court, December 8, 2009, p. 19.

196 Transcript of Oral Argument of *United States v. Weyhrauch*, United States Supreme Court, December 8, 2009, p. 7.

197 Transcript of Oral Argument of *United States v. Skilling*, United States Supreme Court, March 1, 2010, p. 53.