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Skilling v. United States and the New Meaning of Honest Services Mail Fraud

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Research Guides

Skilling v. United States and the New Meaning of Honest Services Mail Fraud

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Scope

This research guide is intended as a starting point for students and attorneys researching the federal crime of mail fraud, specifically, 18 U.S.C. § 1346, Honest Services Mail Fraud. The definition of honest services mail fraud changed in 2010 with the Supreme Court decision, *Skilling v. United States*. This guide includes both pre-*Skilling* and post-*Skilling* resources. One purpose of this guide is to provide historical context for the present state of the law. The pre-*Skilling* resources show how federal mail fraud evolved during the 20th century. The post-*Skilling* resources explain the current law, and also provide predictions about how the *Skilling* decision will affect white collar crime cases in the future.

About the Author

Frances Parrish is currently a third year law student and Georgia State University College of Law. Frances expects to graduate from law school in May, 2011. Frances is a member of the Georgia State Law Review. While in law school, Frances worked for the litigation firm, Berger & Childs. She was also an extern for the Georgia Supreme Court, where she worked for Justice Harris Hines. Before attending law school, Frances graduated cum laude from the University of Georgia with a Bachelor of Arts in History. For more information about this bibliography, please contact Professor Nancy Johnson via email at njohnson@gsu.edu.

Disclaimer

This research guide is intended to assist law students or attorneys who are interested in researching the crime of federal honest services mail fraud. It is important to Shepardize or KeyCite all cases and statutes listed in this guide. This guide should not be considered legal advice. If you need assistance in researching this topic, please contact a reference librarian in the Georgia State University College of Law library or consult an attorney.

Overview

This Web Guide explores the concept of Honest Services Mail Fraud.

The original mail fraud statute, 18 U.S.C. § 1341, made it a crime for someone to use the mail system to execute "any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses . . . " The text of the statute is important because it became the source of much confusion and controversy.

Soon after this original statute was enacted, prosecutors across the country began using the statute in increasingly creative ways. By the 1980s most courts in the United States interpreted the term "property" in the statute to include both tangible and intangible property. For example, courts recognized that § 1341 could be used to prosecute government officials for misconduct such as bribery. The theory was that the public official was robbing the citizenry of its intangible right to honest government.

However, in 1987, the Supreme Court brought an abrupt halt to the widespread practice of interpreting mail fraud to include intangible rights. The case was *McNally v. United States* (1987). In *McNally*, the Court held that the mail fraud statute does not cover intangible rights. The Court specifically held that § 1341does not refer to the intangible right of the citizenry to good government." The Court went on stating that if Congress intended § 1341 to go further, "it must speak more clearly than it has."

Congress responded just one year later when it passed 18 U.S.C § 1346. This section specifically extended mail fraud to include intangible property. The statute 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."

From the moment Congress enacted § 1346 until 2010, when the Court decided *Skilling v. United States*, lower courts struggled to decipher the meaning of "the intangible right to honest services." Prosecutors took advantage of the ambiguous language and used honest services fraud as a tool to criminalize a very wide range of corporate wrongdoing. Before *Skilling*, honest services fraud covered conduct ranging from fairly straightforward bribery to very abstract acts of nondisclosure and self-dealing. It was almost impossible for corporate executives to know what conduct would rise to the level of a crime. In one important case Justice Scalia noted that the statute was so loosely worded, it could be used to prosecute "a salaried employee's phoning in sick to go to a ball game."

In *Skilling v. United States*, Skilling argued that § 1346 should be declared unconstitutional for vagueness. The Court agreed that in its current state, § 1346 was unconstitutionally vague. However, rather than invalidating the statute altogether, the Court simply limited the statute's permissible reach. The Court declared a "new definition" of honest services fraud as including only (1) bribery and (2) kickback schemes. This new definition excluded such corporation actions as nondisclosure of a conflict of interest, and general self dealing.

Since *Skilling v. United States* was decided in June, 2010, scholars and commentators have predicted a number of possible consequences stemming from the Court's decision. For example, some argue that § 1346 will still present interpretation problems because prosecutors will now try to argue that certain conduct falls within the "bribery or kickback paradigm." Thus, courts will have to interpret the exact meaning of those two crimes.

After the *Skilling* decision was handed down, some honest services advocates immediately began urging Congress to enact new legislation that will "fill the gap" left by *Skilling v. United States*.

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Primary Sources

Statutes

18 U.S.C. § 1341: Frauds and Swindles

· This statute can be found in Title 18 of the United States Code, Chapter 63: Mail Fraud and Other Offenses.

· The first clause of the statute, "Whoever, having devised or intending to devise any scheme or artifice to defraud . . .," was a source of confusion for many years.

· Based on that clause, it was unclear whether a person could be defrauded of intangible rights under the statute.

· Before 1987, many courts across the country interpreted § 1341 so as to include various intangible rights.

· However, in 1987, in *McNally v. United States*, the Supreme Court specifically held that § 1341 did not cover intangible rights.

18 U.S.C. § 1346: Definition of "scheme or artifice to defraud."

· "For 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."

· This code section specifically overruled *McNally v. United States*.

· Congress clearly established that the Mail Fraud statute protects intangible rights.

· 18 U.S.C. § 1346 was meant to clarify existing uncertainty surrounding the Mail Fraud statute; unfortunately however, the statute lead to even more confusion.

· Between 1988, when § 1346 was enacted, and 2010, when *Skilling v. United States* was decided, courts struggled to define "the intangible right of honest services."

- 18 U.S.C. 1341
  http://www.law.cornell.edu/uscode/18/usc_sec_18_00001341----000-.html
- 18 U.S.C. 1346
  http://www.law.cornell.edu/uscode/18/usc_sec_18_00001346----000-.html

Supreme Court Cases

Early Cases Interpreting the Original Mail Fraud Statute

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

This case presents an early example of the Supreme Court interpreting the original mail fraud statute to include not only tangible rights, but also intangible rights. The Court held:

"To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful government functions by deceit, craft, or trickery, or at least by means that are dishonest. It is not necessary that the government shall be subjected to property or pecuniary loss . . ., but only that its legitimate official action and purpose shall be defeated by misrepresentation . . . ."

The Catalyst for the Honest Services Mail Fraud Statute

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

· In *McNally*, the Supreme Court interpreted the original Mail Fraud statute from 1872.

· The Court recognized that prosecutors had expanded the statute to include not only property rights, but also various “intangible” rights.

· The Court decided to sharply limit the meaning of the statute, explicitly stating that the law “does not refer to the intangible right of the citizenry to good government.”

· The Court went on, stating that if Congress intended to go further, “it must speak more clearly than it has.”

· Within one year, Congress accepted to Court’s invitation to go further by enacting the Honest Services statute which explicitly recognizes an intangible right to honest services.

Supreme Court Cases Post-***McNally*** and Pre-***Skilling***

Sorich v. United States, 129 S.Ct. 1308 (2009)

· The Supreme Court denied certiorari in this case; however, Justice Scalia wrote a dissenting opinion addressing the problems with the Honest Services Statute in its current state.

· Justice Scalia illustrated the overly broad nature of the statute. He argued that the statute was so loosely worded that it could be used to prosecute “a salaried employee’s phoning in sick to go to a ball game.”

· Justice Scalia urged the Court to finally interpret the Honest Services statute stating: “It seems to me quite irresponsible to let the current chaos prevail.”

Establishing the New Definition of Honest Services Mail Fraud

Skilling v. United States, 130 S.Ct. 2896 (2010)

· Before this decision, prosecutors interpreted the ambiguous language of the Honest Services statute very broadly. Using the expansive interpretation, a wide range of corporate conduct was criminalized as Honest Services Mail Fraud.

· In *Skilling*, the Majority pared the statute down to its “solid core.”

· Now, the law may only be used to prosecute (1) bribery and (2) kickback schemes.

· The Court chose to limit the statute to bribery and kickbacks, rather than invalidate the statute altogether for unconstitutional vagueness.

United States v. National Dairy Products Corp., 372 U.S. 29 (1963)

· The *Skilling* Court relied on this case as precedent for its decision not to invalidate the statute due to vagueness.

· This case describes the concept of “Void for Vagueness,” explaining that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed.

· This case also stands for the principle that, when analyzing congressional legislation, the Supreme Court should seek an interpretation which supports the constitutionality of the legislation.

- Hammerschmidt v. United States, 265 U.S. 182 (1924)
  http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=265&invol=182
- McNally v. United States, 483 U.S. 350 (1987)
  http://supreme.justia.com/us/483/350/case.html
- Sorich v. United States, 129 S.Ct. 1308 (2009)
  http://www.supremecourt.gov/opinions/08pdf/08-410.pdf
- Skilling v. United States, 130 S.Ct. 2896 (2010)
  http://www.law.cornell.edu/supct/html/08-1394.ZS.html
- United States v. National Dairy Products Corp., 372 U.S. 29 (1963)
  http://supreme.justia.com/us/372/29/case.html

Lower Court Cases

Federal Circuit Courts Struggle to Interpret Honest Services Mail Fraud:

Second Circuit:

United States v. Gotti, 459 F.3d 296 (2nd Cir. 2006)

· This case held that it was the scheme itself, not the success of the scheme, that was the essential element in Honest Services Mail Fraud Cases.

· The case divided Honest Services Fraud into two categories: (1) Bribery and Kickbacks, and (2) Self-dealing.

Unites States v. Weiss, 752 F.2d 777 (2nd Cir. 1985)

· One form of Honest Services Mail Fraud occurs when a fiduciary fails to disclose material information which he is under a duty to disclose, where nondisclosure could result in harm.

· In Honest Services Cases, it is not necessary that the fraudulent actors actually benefited from their fraud.

· The government must show that harm or injury was contemplated by the fraud; however, it need not show that the victims suffered direct, tangible economic loss

Fifth Circuit:

United States v. Brown, 459 F.3d 509 (5th Cir. 2006)

· This case defined Honest Services as services owed to one's employer under state law, including fiduciary duties defined by the employee-employer relationship.

· This case is in accord with the Second Circuit cases in that it recognizes “self-dealing” as a form of Honest Services Mail Fraud.

· However, according to this case, Honest Services Fraud specifically requires that there must be some detriment to the employer. Whereas the Second Circuit did not require direct loss.

United States v. Gray, 96 F.3d 769 (5th Cir. 1996)

· This case held that neither intent to harm the victim, nor intent to gain personal benefit is necessary for an Honest Services Fraud Conviction.

Eighth Circuit:

Foshay v. United States, 68 F.2d 205 (8th Cir. 1993)

· This case held that actual loss was not required for Honest Services Mail Fraud.

· Rather, *any* false, deceptive, deluding pretense put forth through the mails was sufficient to violate Honest Services Fraud, even if the defendants believed the fraud would benefit the victims.

Ninth Circuit:

United States v. Williams, 441 F.3d 716 (9th Cir. 2006)

· This case held that an employee-employer relationship is not a prerequisite to a finding of Honest Services Fraud

Tenth Circuit:

United States v. Welch, 327 F.3d (10th Cir. 2003)

· This case held that neither intent to harm the victim nor intent to obtain personal gain were elements of Honest Services Mail Fraud, and neither were necessary for a conviction.

- United States v. Gotti, 459 F.3d 296 (2nd Cir. 2006)
  http://www.lexisone.com/lx1/caselaw/freecaselaw?action=FCLRetrieveCaseDetail&caseID=1&format=FULL&resultHandle=4df5c1d271698ea0ac1ac163728a4a41&pageLimit=10&xmlgTotalCount=1&citation=459%20F.3d%20296%20%282nd%20Cir.%202006%29
- Unites States v. Weiss, 752 F.2d 777 (2nd Cir. 1985)
  http://web2.westlaw.com/find/default.wl?rs=WLW11.04&rp=%2ffind%2fdefault.wl&vr=2.0&fn=_top&mt=Westlaw&cite=752+F.2d+777+(2nd+Cir.+1985)&sv=Split
- United States v. Brown, 459 F.3d 509 (5th Cir. 2006)
  http://www.lexisone.com/lx1/caselaw/freecaselaw?action=FCLRetrieveCaseDetail&caseID=1&format=FULL&resultHandle=4eeea0449cef6739c65eeadf6167a820&pageLimit=10&xmlgTotalCount=1&citation=459%20F.3d%20509%20%285th%20Cir.%202006%29

- United States v. Gray, 96 F.3d 769 (5th Cir. 1996)
  http://web2.westlaw.com/find/default.wl?rs=WLW11.04&rp=%2ffind%2fdefault.wl&vr=2.0&fn=_top&mt=Westlaw&cite=96+F.3d+769+(5th+Cir.+1996)&sv=Split
- Foshay v. United States, 68 F.2d 205 (8th Cir. 1993)
  http://web2.westlaw.com/find/default.wl?rs=WLW11.04&rp=%2ffind%2fdefault.wl&vr=2.0&fn=_top&mt=Westlaw&cite=68+F.2d+205+(8th+Cir.+1993)&sv=Split
- United States v. Williams, 441 F.3d 716 (9th Cir. 2006)
  http://www.lexisone.com/lx1/caselaw/freecaselaw?action=FCLRetrieveCaseDetail&caseID=1&format=FULL&resultHandle=dec2aed379c9a7ee1da96f243300451d&pageLimit=10&xmlgTotalCount=1&citation=441%20F.3d%20716%20%289th%20Cir.%202006%29
- United States v. Welch, 327 F.3d 1081 (10th Cir. 2003)
  http://www.lexisone.com/lx1/caselaw/freecaselaw?action=FCLRetrieveCaseDetail&caseID=1&format=FULL&resultHandle=4ea92fcaa876e7eddbba3f61cd5883fb&pageLimit=10&xmlgTotalCount=1&citation=327%20F.3d%201081%20%2810th%20Cir.%202003%29

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Secondary Sources

Law Reviews

David R. McAtee, Jason E. Wright, *Jeff Skilling's Constitutional Challenge To "Theft of Honest Services,"* 73 Tex. B.J. 640 (2010).

This article presents a wonderful post-*Skilling* analysis of 18 U.S.C. § 1346, and how it will be used going forward. The article begins with a concise discussion of what the "theft of honest services" meant before the *Skilling* decision. He notes the vast confusion and the need for Supreme Court review. Next, the author gives a solid summary of the Court's decision in *Skilling v. United States*. He lays out the basics of the majority opinion, including the "new definition" of honest services as bribery and kickbacks only. Finally, the author concludes with a section on the impact of *Skilling* in future white collar cases.

Jennifer I. Rowe, *The Future of Honest Services Fraud*, 74 Alb. L. Rev. 421 (2010–2011).

This article considers the implications of the *Skilling* decision for future white collar crime cases. The author begins her discussion with a capsule history of honest services mail fraud. Next, she discusses how the *Skilling* Court limited the scope of Honest Services Mail Fraud to only include bribery and kickbacks, and not more abstract acts like nondisclosure and self-dealing. The author fleshes out the tricky concept of "conflict of interest nondisclosure," an act that the Supreme Court specifically held does not constitute Honest Services Mail Fraud under 18 U.S.C. § 1346. Finally, the author concludes by recommending that the nondisclosure aspect of Honest Services Mail Fraud should be revived in some form. She argues that Congress should amend 18 U.S.C. § 1346 to include nondisclosure because "it is crucial to the maintenance of the public trust."

Contrary to this author's argument, other scholars maintain that Honest Services Mail Fraud should not criminalize nondisclosure or self-dealing because such corporate acts are far better suited for civil sanctions. (*See infra* Larry E. Ribstein, *The Perils of Criminalizing Agency Costs*, 2 J. Bus. & Tech. L. 59 (2007), *and* John C. Coffee, *Paradigms Lost: The Blurring of the Criminal and Civil Law Models-And What Can be Done About It*, 101 Yale L.J. 1875 (1992).

Lisa L. Casey, *Twenty-Eight Words: Enforcing Corporate Fiduciary Duties Through Criminal Prosecution of Honest Services Fraud*, 35 Del. J. Corp. L. 1 (2010).

This pre-*Skilling* article examines the broad use of Honest Services Mail Fraud to prosecute corporate executives for breaching their fiduciary duties to the companies for which they work. The article points out how, until *Skilling*, the Supreme Court had repeatedly refused to review the statute despite the wide spread confusion created by the ambiguous language of 18 U.S.C. § 1346. The article discusses how Supreme Court review is especially important for public company executives and their advisors because they constitute the class of people who are most affected by the vague language of the statute.

John C. Coffee, *Paradigms Lost: The Blurring of the Criminal and Civil Law Models-And What Can be Done About It*, 101 Yale L.J. 1875 (1992).

In this article, the author discusses why it is unwise to criminalize certain corporate conduct. He believes that "criminal law should be reserved for the most damaging wrongs and the most culpable defendants." Rather than criminalize corporate actors for behavior such as economic nondisclosure and self-dealing, the author advocates a system of civil sanctions as opposed to criminal prosecutions. The *Skilling* decision seems to have taken this approach by limiting criminal prosecution to bribery and kickbacks, and not to acts of executive self dealing. However, the issue is still looming because many advocates are already urging Congress to enact another criminal statute that would revert back to criminalizing executive self dealing.

Larry E. Ribstein, *The Perils of Criminalizing Agency Costs*, 2 J. Bus. & Tech. L. 59 (2007).

This article is similar to John C. Coffee's article, *Paradigms Lost: The Blurring of the Criminal and Civil Law Models-And What Can be Done About It*, because both authors are greatly concerns about the fact that the federal government is using criminal law to prosecute certain business activities. Like Coffee, Professor Ribstein would limit the use of criminal law, and only prosecute severe evils. Professor Ribstein points out that corporate actors are not thieves in the conventional sense, and they have not endangered the public. Rather, corporate executives are being prosecuted for engaging in highly complex business transactions that "differed only marginally from what was generally considered . . . legal business behavior." Moreover, Professor Ribstein argues that in many cases, corporate executives do not deserve the consequence of conviction: incarceration, which is the "most serious thing our government can do [to people], short of killing them."

Finally, Professor Ribstein discusses how many prosecutors view Enron type situations as a "launching pad into lucrative big firm practice or a political career." In other words, prosecutors have a perverse incentive to use the broad scope of § 1346 to gain publicity and improve their own careers.

John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 Am. Crim. L. Rev. 117 (1981).

This article discusses the problems associated with the Honest Services Mail Fraud statute. Specifically, the author is concerned with the fact that "courts have refused to define 'scheme to defraud' in terms of any objectively verifiable set of facts or circumstances." Fortunately, in the *Skilling* decision, the Court does, in fact, define "scheme to defraud" in more limited terms, restricting it to bribery and kickbacks. However, this article is still enlightening because it demonstrates that the crimes of bribery and kickback can still present problems of ambiguity.

Alex Hortis, NOTE, *Valuing Honest Services: The Common Law Evolution of §* 1346, 74 N.Y.U.L. Rev. 1099, 111–1113 (1999).

This article gives a wonderful, in-depth analysis of the evolution of the Honest Services Mail Fraud statute. It includes important milestones in the history of the law, including the most significant case law. This article is useful for someone who wants a thorough understanding of the development and progression of the law leading up to the *Skilling* decision.

Newspaper Articles

Mengfei Chen, ***Senators Hear Reasons to Close Loophole High Court's Ruling Affected Conviction of Enron Leader***, HOUSTON CHRONICLE, Sept. 29, 2010.

This article focuses on the immediate repercussions the *Skilling* decision will have on other defendants convicted under the Honest Services statute. The article discusses how members of the Justice Department have already begun urging Congress to enact legislation that would close the "legal loopholes" left after the *Skilling* decision.

Ashley Southall, ***Justice Department Seeks A Broader Fraud Law To Cover Self-Dealing***, N.Y. TIMES, September 28, 2010.

This article discusses the possibility of Congress enacting new legislation that would specifically restore to prosecutors certain powers taken away by *Skilling.*

Peter J. Henning, ***How The Skilling Ruling Reigns In White Collar Cases***, N.Y. TIMES, June 25, 2010.

This article discusses the *Skilling* case. It lays out the specific ruling in *Skilling*. It also addresses the implications of the *Skilling* decision for future white collar cases.

Adam Liptak, ***Justices Limit Use of 'Honest Services' Law Against Fraud***, N. Y. TIMES, June 24, 2010.

This article focuses on how the *Skilling* decision "significantly narrowed the scope" of Honest Services Mail Fraud, a "law often used by federal prosecutors in corruption cases."

John R. Emshwiller, ***Will Enron Probe Spawn Further Criminal Cases?,*** WALL ST. J., June 6, 2006 at C1.

This article gives the factual details of the Enron fraud.

David J. Phillip, ***The Enron Trials: An Enron Chronology***, USA TODAY, Jan. 23, 2006

This article provides extensive background information about Enron Jeffrey Skilling's participation in the fraud.

The Rise and Fall of Enron: A Brief History, CBC NEWS, May 25, 2006, http://www.cbc.ca/money/story/2006/05/25/enron-bkgd.html.

This article gives a detailed history of Enron.

Roger Parloff, ***The Catchall Fraud Law that Catches too Much***, Jan. 6, 2010 9:08 AM, http://money.cnn.com/2010/01/04/magazines/fortune/fraud_law.fortune/.

This article gives a good explanation of Honest Services Mail Fraud before the *Skilling* case.

Books

Ellen S. Podger, Jerold H. Israel, White Collar Crime in a Nutshell, 58 West Pub. Co. (2nd Ed. 1997).

Call Number: KF9350.Z9 P63 1997 c.1

This book is a wonderful starting point for anyone who wants to understand the basics of white collar crime. This book was published before the *Skilling* decision, so it does not explain the new definition of Honest Services Mail Fraud; however, it helps the reader understand the law leading up to the *Skilling* decision. The authors begin with the first version of the mail fraud statute and thoroughly discuss how the law evolved over the 20th Century. The book includes seminal cases that helped shape the law of Honest Services Mail Fraud.

Richard A. Posner, Economic Analysis of Law 16–18 (4th Ed. 2011).

Call Number: KF385 .P65

This book analyses Honest Services Mail Fraud in the context of financial disclosures. This book was also published before the *Skilling* decision. Therefore, it assumes that Honest Services Mail Fraud may be used to prosecute executives for financial nondisclosures and self interest. Although the *Skilling* decision limited the use of Honest Services Mail Fraud to bribery and kickbacks alone, this book is still useful for understanding how Congress might frame a future law. After *Skilling*, many advocates immediately urged Congress to enact new legislation to specifically cover nondisclosure and self dealing. If Congress does enact such legislation in the future, this book will be helpful in understanding such a law.

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Miscellaneous

Blogs

Posting of Martin Magnusson to the American Constitution Society Blog, ***Supreme Court Wrap-Up:*** Skilling v. United States.

This blog post begins with a short history of the collapse of Enron and the facts leading up to the prosecution of Jeffrey Skilling. The blog post continues into a discussion of the Supreme Court decision in *Skilling v. United States*. The author concludes by stating the outcome of the case and the new definition of Honest Services Mail Fraud put forth by the Court.

Posting of Lyle Denniston to SCOTUSblog, ***"Honest Services" Law Pared Down***.

This blog post points out that almost immediately after Congress enacted 18 U.S.C. § 1346, which held that fraud could be committed by denying someone his intangible right to honest services, "lower courts have struggled to define just what kind of wrongdoing would fit within that concept." The post then dives into a thorough examination of the Court's opinion in *Skilling v. United States*, including dissenting opinions. Finally the post discusses how *Skilling* will affect future white collar cases.

Posting of Nathan Koppel to Wall Street Journal Law Blog, ***What Does Future Hold for Honest Services Fraud?***.

This blog post presents selections of an interview with Robert Plotkin, the head of McGuire Woods's SEC enforcement group. Plotkin defended Toronto Dominion Bank against civil fraud charges in connection with the Enron prosecution. In the interview, Plotkin gave his opinion about the effect of *Skilling* on future honest services cases. He stated that the Court's opinion would significantly cut back the use of honest services fraud. He went on to say that honest services fraud was "one of the most common charges brought by the Justice Department in cases involving public officials or financial-type fraud." He continued,

"It's been so popular because it's so malleable. When it looks like someone has done something unethical, prosecutors can use honest services fraud to justify introducing evidence of whatever the alleged unethical behavior was, such as failing to disclose a conflict of interest."

Such malleability is exactly why Skilling argued the statute was unconstitutionally vague, and why the Supreme Court chose to limit the definition of the statute.

Posting of Jacob Sullum to Reason Blog, ***Now We Know What Honest Services Fraud Is (Sort Of)***.

This blog post discusses the new definition of honest services fraud after the *Skilling* decision. However, the author points out that the law is still confusing, and could still be considered "dangerously broad."

- American Constitution Society Blog
  http://www.acslaw.org/acsblog/supreme-court-wrap-up-skilling-v-united-states
- SCOTUSblog
  http://www.scotusblog.com/2010/06/honest-services-law-pared-down/
- Wall Street Journal Law Blog
  http://blogs.wsj.com/law/2010/06/24/what-does-future-hold-for-honest-services-fraud/
- Reason Blog
  http://reason.com/blog/2010/06/25/now-we-know-what-honest-servic

Interest Groups

Proponents of Honest Services Mail Fraud

Citizens for Responsibility and Ethics in Washington

Citizens for Responsibility and Ethics in Washington (CREW) is an interest group that uses "high-impact legal actions to target government officials who sacrifice the common good to special interests."

CREW advocates the broad pre–*Skilling* definition of Honest Services Mail Fraud.

In response to the *Skilling* decision, CREW executive director, Melanie Sloan, said: "Today's decision deprives prosecutors of an important tool in their efforts to fight public corruption."

After the *Skilling* opinion was handed down, CREW immediately began advocating a "legislative fix." One current federal law prohibits employees in the executive branch from taking any official action that affects their personal financial interest. Sloan argues that that law could easily be extended to cover members of Congress and state and local officials. Although this would not cover private corporate executive, CREW believes this would still be an important step.

Critics of Honest Services Mail Fraud

United States Chamber of Commerce

The United States Chamber of Commerce is the world's largest business federation, "representing the interests of more than 3 million business." The mission statement is "To advance human progress through an economic, political, and social system based on individual freedom, incentive, initiative, opportunity, and

responsibility."

The Chamber of Commerce posted a list entitled "Policy Accomplishments for 2010." Included on that list, under the heading, "Supreme Court Victories," was the *Skilling* decision. The Chamber of Commerce believed that the broad use of Honest Services Mail Fraud created two major problems.

(1) Over-criminalization

(2) Abuse of prosecutorial discretion

The Chamber of Commerce applauded the Supreme Court for eliminating Honest Services Fraud as a tool for overzealous prosecutors.

Washington Legal Foundation

Mission Statement: National in Scope, the Washington Legal Foundation (WLF) works with our allies in government and our legal system to maintain balance in the courts and help our government strengthen America's free enterprise system. WLF champions free, limited and accountable government, individual rights, business civil liberties, and legal ethics.

The Washington Legal Foundation has opposed the overly broad use of honest services fraud.

National Association of Criminal Defense Lawyers

Statement: The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct.

President of the NACDL, Cynthia Hujar Orr, was both pleased and disappointed with the outcome of *Skilling v. United States*. She was happy that the Supreme Court unambiguously rejected the argument that honest services fraud could be properly used as broadly as it had been used in the recent years. However, she was nonetheless disappointed that the Court did not invalidate the statute altogether. Orr stated that she expected to see future litigation "surrounding efforts by prosecutors to wedge their cases into the bribe or kickback paradigm."

- Citizens for Responsibility and Ethics in Washington
  http://www.citizensforethics.org/
- United States Chamber of Commerce
  http://www.uschamber.com/
- Washington Legal Foundation
  http://www.wlf.org/
- National Association of Criminal Defense Lawyers
  http://www.nacdl.org/public.nsf/freeform/publicwelcome?opendocument

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