

White Collar Crime

U.S. Supreme Court Limits Mail and Wire Fraud Statutes

By John P. Lacey

In a decision that will have significant implications on past and future federal fraud prosecutions of public officials and business executives, the United States Supreme Court has substantially narrowed the reach of the federal mail and wire fraud statutes. *Skilling v. United States*, No. 08-1394 (Slip Op. 6/24/10). This ruling also serves as a warning shot to prosecutors who have thus far successfully sought to convert ordinary theft and conflict of interest cases into “frauds.”

Jeffrey Skilling was a longtime officer and the chief executive officer of Enron until he resigned in August 2001. Within four months, Enron was in bankruptcy and its stock price had crashed. A subsequent investigation exposed a scheme to overstate Enron’s financial health and, in doing so, to support Enron’s stock price. Ultimately, a federal grand jury charged Skilling and two other Enron executives with engaging in a massive scheme to mislead investors about Enron’s financial well-being through false and mislead-

ing statements and through manipulation of Enron’s reported financial results. Included in Count I of the indictment was the charge that Skilling conspired to commit “honest-services” wire fraud, i.e., he deprived Enron’s shareholders of their right to Skilling’s honest services, in violation of 18 U.S.C. Sections 371, 1343 and 1346. Skilling appealed his conviction, claiming that the fraud statute was vague as it pertained to “honest-services” frauds.

The *Skilling* Court agreed that the statute was vague as applied. The Court began its analysis by examining the history of the mail and wire fraud statutes. See 18 U.S.C. Sections 1341 and 1343. Taken in tandem, those statutes prohibit the use of the mails and wires to further “any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.” Sections 1341 and 1343. Federal prosecutors, as well as courts, had interpreted the words of the statutes very broadly, applying the statutes not only to prosecute clear-cut fraud cases, but also a variety of ordinary thefts and cases involving politicians who had failed to provide “honest services” to the public. Using these expansive theories,

the government had prosecuted politicians and ordinary businessmen who may have improperly stolen funds or done something as simple as engaging in a conflict of interest. Unlike ordinary fraud cases, these “honest-services” frauds involved offending officials or executives who may have profited, but the “betrayed parties suffered no deprivation of money or property.” By way of example, when a public official accepts a bribe in exchange for some official action that likely would have been taken in any event, the betrayed party “would suffer no tangible loss.” Under this theory, lower courts determined that the “fraud” rested in the denial of the public’s right to the offender’s “honest services.” Once this theory was successfully utilized, federal prosecutors attempted to expand its reach still further, charging private businessmen under the theory that, in failing to provide “honest services” to their employer, they had breached the duty of loyalty and thus “defrauded” the employer of a right to the employee’s honest services.

In 1987, the U.S. Supreme Court invalidated the use of the intangible-rights doctrine. This doctrine included only not only “honest-services” prosecutions, but also other kinds of intangible rights, such as election fraud and privacy violations. See *McNally v. United States*, 483 U.S. 350 (1987). Shortly after the *McNally* decision, Congress enacted a new statute, 18 U.S.C. Section 1346. The effect of

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that statute was to reverse *McNally* and to permit use of the “intangible-rights” doctrine once again in mail and wire fraud cases brought under 18 U.S.C. Sections 1341 and 1343. This honest-services statute provided as follows:

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.

In the *Skilling* case, the Supreme Court ultimately “construed” rather than invalidate Section 1346 in its entirety. Specifically, the *Skilling* Court found that, at its core, the statute was intended to reach only those fraudulent schemes that “[d]eprived another of honest services through *bribes or kickbacks* supplied by a third party who had not been

deceived. Accordingly, in these types of basic bribery and kickback cases, the *Skilling* Court found “no vagueness problem.”

However, for *Skilling* and many other defendants charged with mail and wire fraud in recent years, the underlying facts did not involve either a kickback or a bribe. In some cases, individuals had been charged with “honest-services” fraud based merely on an ethical breach such as a conflict of interest. Indeed, the Government argued forcefully in *Skilling* that Section 1346 encompassed “undisclosed self-dealing by a public official or private employee,” i.e., the defendant’s “nondisclosure of a conflicting financial interest.”

The *Skilling* Court rejected the Government’s arguments and rejected the notion that the “honest-services” fraud statute should reach conduct other than bribery or kickback schemes. In so construing, and narrowing, the scope of the honest-services statute, the Supreme

Court determined that the statute was not void for vagueness and did not violate notions of due process.

After *Skilling*, the fun begins. For *Skilling*, the Court remanded the case for a hearing to determine whether the erroneous “honest-services” fraud instructions to the jury constituted “harmless error” because he also was charged with more traditional fraud. For the government, it will now have to review every pending indictment to determine whether it falls within the permissible limits of *Skilling* and the restructured Section 1346. Similarly, defendants previously convicted of “honest-services” fraud will seek to overturn their convictions. The overriding message to both sides, however, is that the mail and wire fraud statutes should be used to prosecute actual frauds, not ordinary thefts and certainly not conflict of interest cases where the Government decides that a politician or executive has engaged solely in some immoral or inappropriate conduct. ■