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U.S. Supreme Court Limits Federal Honest Service Fraud Law

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On June 24, the U.S. Supreme Court announced their much-awaited opinions in the trilogy of honest services fraud (HSF) cases of *Skilling v. United States*, *Black v. United States* and *Weyhrauch v. United States*. Using *Skilling* to issue their principal opinion, the Supreme Court narrowed the reach of the federal honest services fraud statute, 18 U.S.C. Section 1346, to include only "core" criminal offenses of bribery and kickbacks involving breach of a fiduciary duty. The result in *Skilling* was to save the HSF law, which seeks to punish criminal breaches of the intangible duty of honest services, from being declared unconstitutionally void-for-vagueness as was urged by three dissenting justices.

The Court's opinion comes after years of litigation in lower federal courts in which courts struggled to fashion limiting principles to confine the potentially vast reach of the HSF law, which threatened to criminalize conduct such as employees falsely calling in sick from work. The opinions come in the wake of Justice Scalia's lament after the Supreme Court's 2009 denial of *certiorari* in *Sorich v. United States* that the law of honest services fraud was "in chaos" and failed to provide constitutionally adequate notice of precisely what conduct violated federal criminal law.

The Court's majority opinion imperils some existing convictions based on more exotic theories of criminal liability under the HSF law, such as convictions for violations of common law duties arising from non-disclosure of conflicts of interest. It will raise issues in individual cases about the adequacy of jury instructions that were given at trial.

Additionally, in *Skilling* for example, the defendant was convicted of a conspiracy that had three objects, one of which was a flawed HSF theory, and certain other counts. The Supreme Court remanded *Skilling* to the Court of Appeals to determine whether the conspiracy conviction on other theories can stand under the harmless error doctrine, and whether the flawed HSF theory also undermined the sustainability of the remaining counts of conviction. Among the other questions to be answered in the wake of *Skilling* is whether the opinion will be given retroactive effect, which would allow *habeas* petitions for relief from long-since-final HSF convictions.

Perhaps principal among the issues raised by *Skilling* will be how lower courts will instruct juries on what conduct constitutes "bribery" and "kickbacks." In holding that only these "core" violations will suffice for honest service fraud, the Court referred to the federal bribery, program fraud and anti-kickback statutes. In many HSF cases, however, these federal laws do not apply for various reasons, which is why federal prosecutors sought to expand the federal HSF law in the first instance. State statutory and common law have different formulations of these offenses. *Skilling* has left the lower federal courts with the task of defining precisely what these offenses are, which may turn out to be surprisingly difficult.

For legal scholars, *Skilling* reveals what can happen when Congress and the government, reluctant to directly address the federalism concerns presented by passing a federal criminal law that explicitly targets state and local political corruption, instead adopt a hazy statute that prohibits breaches of the intangible duty of honest services. For defense counsel, *Skilling* might be the "second best" opinion they could have hoped for, since the HSF statute was pared down but was not declared wholly unconstitutional. For federal prosecutors, *Skilling* could have been worse.