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Are halcyon days of honest services prosecutions over?

By Denis M. King

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For many years prior to 1987, prosecutors used the federal mail and wire fraud statutes to prosecute defendants for fraudulently depriving their victims of "intangible" property rights, such as the right to the "honest services" of elected officials or corporate employees.

In its 1987 decision in McNally v. United States, the U.S. Supreme Court held that while the mail fraud statute applied to schemes designed to defraud victims of property rights, it did not protect "the intangible right of the citizenry to good government."

Of its decision to limit the scope of the statute, the court said: "If Congress desires to go further, it must speak more clearly than it has."

Congress did speak in response to McNally, but it hardly spoke clearly.

In 1988, Congress passed 18 U.S.C. §1346, a statute comprised of only 28 words: "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."

Thereafter, "honest services fraud" prosecutions were pursued with renewed vigor. The theory is currently being used in the pending federal prosecutions of ex-House Speaker Salvatore DiMasi and ex-Sen. Dianne Wilkerson in Massachusetts and ex-Illinois Gov. Rod Blagojevich, among many others.

Conflicting interpretations

For more than 20 years, criminal defense lawyers have argued that Section 1346 violates the Due Process Clause by failing to put the average citizen on notice as to what conduct it proscribes.

The most obvious deficiency in the statute is the absence of any definition of "honest services." The statute also lacks any language limiting the types of defendants who might be prosecuted under its provisions.

Those factors have combined to produce conflicting interpretations of the statute in the Circuit Courts of Appeal. For example, while the 5th Circuit holds that Section 1346 criminalizes conduct of state officials only if the conduct is also illegal under state law, the 7th Circuit imposes no such requirement. Similarly, the 7th Circuit construes Section 1346 to prohibit only the abuse of a position "for private gain," while the 3rd Circuit requires no proof of private gain.

Closer to home, the 1st Circuit has expressed its frustration over the lack of any "simple formula specific enough to give clear cut answers to borderline problems" presented by the statute.

In a recent dissent from the Supreme Court's decision to deny further appellate review in Sorich v. United States, Justice Antonin Scalia suggested that Section 1346 is written so broadly that it could be read to criminalize "a mayor's attempt to use the prestige of his office to obtain a restaurant table without a reservation."

‘Black,' ‘Weyhrauch' and ‘Skilling'

Apparently, the Supreme Court has finally decided weigh in on the debate. It recently granted certiorari in three case challenging honest services fraud convictions under Section 1346.

Black v. United States involves the conviction of Conrad Black and two others charged with depriving Hollinger International, a private company, of its right to the honest services of its employees by wrongfully causing a Hollinger subsidiary to pay $5.5 million for the defendants' agreement not to compete with the subsidiary.

The defendants claim that the money actually represented the payment of management fees due to a company controlled by Black. According to the defendants, they improperly characterized the payments in order to obtain a tax benefit under Canadian law.

The issue presented on appeal in Black is whether Section 1346 applies to purely private conduct in which the scheme to defraud did not contemplate economic or other property harm to the private party to whom honest services were owed.

The second case, Weyhrauch v. United States, involves the prosecution of an Alaskan state representative on the theory that he failed to disclose to the Legislature that he was in the midst of negotiations for a job with an oil field operating company while, in his official capacity, he was promoting a bill favorable to that company's interests.

The issue presented on appeal is whether, in order to convict a state official of honest services fraud for failing to disclose material information, the government must prove that the official violated some state law duty of disclosure.

The final case, Skilling v. United States, involves the prosecution of Jeffrey Skilling, the former CEO of Enron Corp., who was convicted of conspiracy to commit wire fraud. One alleged object of the conspiracy was to deprive Enron and its shareholders of the honest services of its employees. In furtherance of the conspiracy, Skilling was found to have engaged in a series of transactions designed to shift losses suffered by several Enron subsidiaries to a more profitable Enron division, thereby making the failing subsidiaries appear financially sound and encouraging additional investment in them.

The question presented in Skilling is whether Section 1346 requires the government to prove that the defendant intended to achieve "private gain" rather than simply seek to advance his employer's interests and, if not, whether the statute is unconstitutionally vague.

It is fundamental that the Due Process Clause requires a federal criminal statute to be sufficiently specific to place an ordinary citizen on notice as to the conduct proscribed. However, the Supreme Court historically has been reluctant to declare criminal statutes facially unconstitutional on any ground, much less vagueness.

Nonetheless, questions and comments of several justices during oral argument of Black and Weyhrauch on Dec. 8 suggest that they harbor serious concerns that Section 1346 may be unconstitutionally vague.

For example, when Black's attorney suggested that Section 1346 might be found constitutional if limited to cases involving bribes, kickbacks or self-dealing, Scalia observed that "there's no basis in the statute for limiting it to that."

Addressing government counsel, Justice Sonia Sotomayor later made a similar point, stating that "you have to give us the source or some source of limiting [the statute]."

When government counsel suggested that Congress intended that Section 1346 incorporate the "intangible right of honest services" that had become a "term of art" in pre-McNally cases, Justice Ruth B. Ginsburg asked: "How could it have been a term of art when ... the lower courts were massively confused?"

As is his wont, Scalia made the same point more bluntly. Referring to the pre-McNally cases, he said, "They are a mess, I don't understand them at all. It's one of the reasons McNally came out the way it did."

Justice Stephen G. Breyer also expressed concern over the breadth of Section 1346, asking government counsel to explain why it did not potentially criminalize the conduct of "100 million workers in the United States" who might have violated duties owed to their employers through seemingly limitless types of conduct.

The oral argument of Weyhrauch revealed similar concerns. Government counsel argued that a defendant becomes liable under Section 1346 for failing to disclose a conflict of interest only when he takes official action that furthers his interest.

In response to Justice Samuel A. Alito Jr.'s question about whether "some kind of disclosure code" was needed "to separate the things that have to be disclosed from the things that don't have to be disclosed," government counsel argued that Section 1346 applies only to "the kind of personal conflicting financial interest that, in the universal view of the common law, raised a problem."

Following up on that comment, Breyer asked: "And this is supposed to be something the average citizen ... just knows about?"

When government counsel again attempted to tie Section 1346 to cases decided pre-McNally, Scalia asked: "What is the citizen supposed to do? He is supposed to go back and read all those pre-McNally cases?"

Chief Justice John G. Roberts Jr. added: "I thought the principle was that [a citizen] has to be able to understand the law, and if [he] can't, then the law is invalid."

Later, Scalia pointed to "the great variety of pushing the envelope prosecutions" that have been pursued by the Department of Justice and said that "if the justice department can't figure out what is embraced by this statute, I don't know how you can expect the average citizen to figure it out."

While it is rare for the Supreme Court to declare a criminal statute facially unconstitutional for vagueness, the sharp questioning by the six members of the court noted above suggests that it may be preparing to do just that.

While all parties in Black and Weyhrauch suggested limiting principles that might be employed by the court to avoid the constitutional question, those principles are not found in the language of Section 1346.

Emphasizing that fact, in his comments to government counsel during oral argument in Black, Scalia said: "You speak as though it is up to us to write the statute. We can make it mean whatever ... would save it or whatever we think is a good idea, but that's not our job."

If Section 1346 is declared unconstitutional, the ruling will be hailed by the defense bar, and the effect on pending federal prosecutions will be profound. Congress will face intense pressure to clarify the statute and define the parameters of honest services fraud.

Whether Congress will be able to speak clearly enough to satisfy the Supreme Court remains to be seen.

Denis M. King is a director at Goulston & Storrs in Boston.