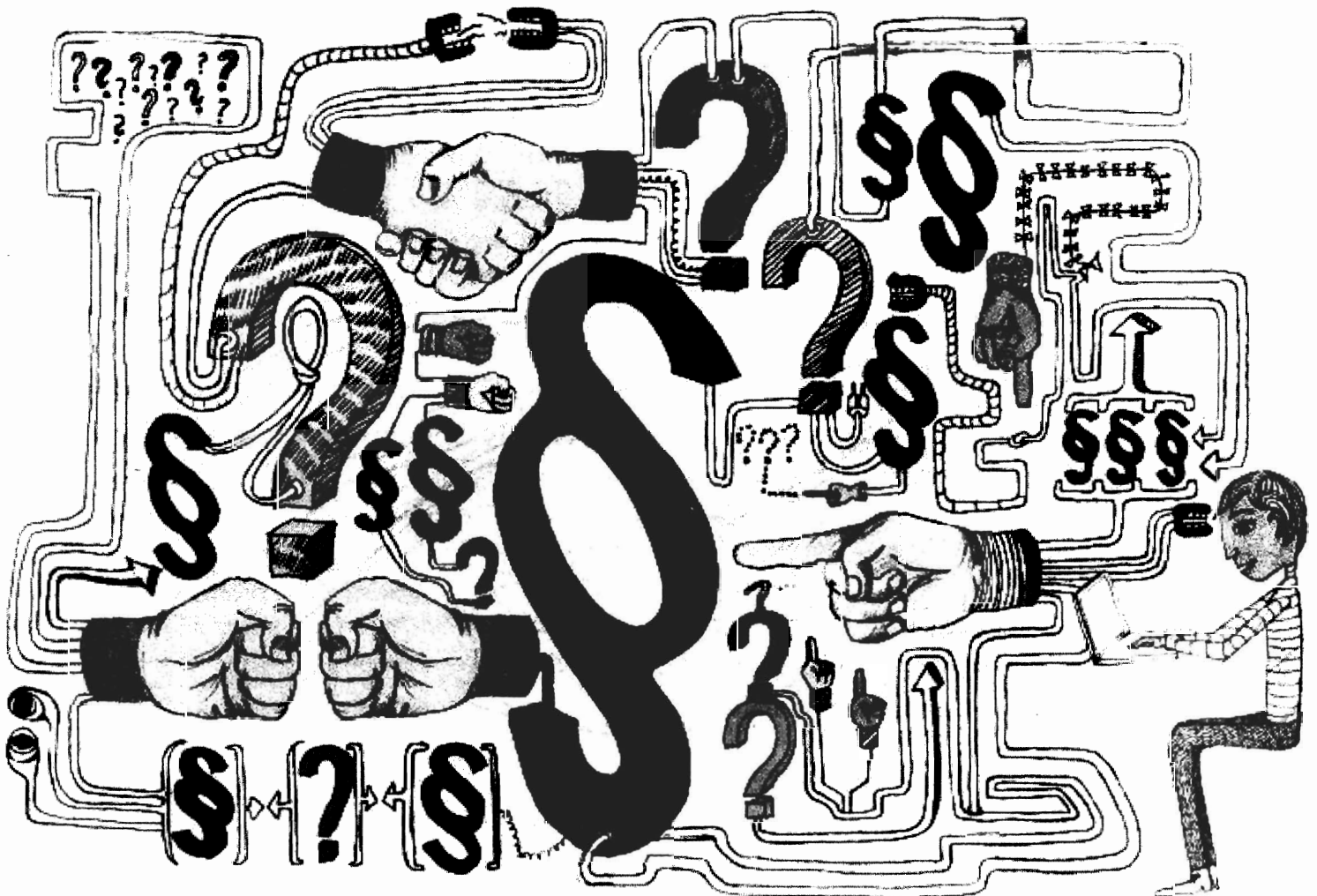


By Marc Martin

The Dilemma of the Honest Services **Statute**

Honest Services and Common Sense



After more than 20 years of lawyers, litigants and judges floundering in a sea of uncertainty, the United States Supreme Court heard oral arguments in two “honest services” cases on December 7, 2009, *Black v. United States*, and *Weyhrauch v. United States*. The oral arguments, transcripts of which are available on the Supreme Court’s web site (http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html), underscore the unacceptable vagueness inherent in the “honest services” statute, 18 U.S.C. § 1346.

THE LAWYERS FOR ALL SIDES, WHILE UNDOUBTEDLY preeminent advocates, appeared to argue against themselves, and sometimes offered inconsistent or unclear positions. To the legally uneducated, and even the legally educated, the statements at the oral arguments in *Black* and *Weyhrauch* at times sounded somewhat like gibberish. That is no fault of the intellect of the Justices or the lawyers. Vague words do not suddenly become lucid by talking about them.

“Honest Services” Fraud Charges

For over 20 years, I have represented individuals charged with “honest services” fraud both at both the trial and appellate levels. In these cases, the “honest services” statute was invariably assailed on constitutional grounds. Until the expressions of the Justices at oral argument in *Black* and *Weyhrauch*, those legal arguments fell on deaf ears.

I was one of the lawyers in the district court and on appeal in *Black*. When I reviewed the indictment my reaction was one of dismay. Conrad M. Black, a former head of a company that owned newspapers throughout the world, including the *Chicago Sun Times*, and three other men were charged with multiple counts of “honest services” mail and wire fraud. The basis for the alleged “honest services” violations were *unspecified* corporate laws of the State of Delaware. While there was precedent for using State law as a basis for an “honest services” prosecution, the precedent for transforming Delaware’s civil corporate law into federal criminal offenses was virtually non-existent. It is highly doubtful that Delaware legislators, in enacting their business laws, intended to create criminal provisions, carrying the draconian punishment of up to 20 years in a federal penitentiary for each count.

Vagueness of “honest services” law

That was not the only problem with the “honest services” charges in *Black*, and the “honest services” law in general: The statute is hopelessly vague. The original mail fraud statute, 18 U.S.C. § 1341, says nothing about “honest services” or the like. In the early 1970s, creative federal prosecutors in the Northern District of Illinois, theorized that the “intangible right to honest services” could be a “property” right protected by the mail fraud statute. That theory was first accepted in a case in which a company employee accepted secret kickbacks—the employer was deprived of its right to “honest services” of the employee, so went the theory. *United States v. George*, 477 F.2d 508 (7th Cir. 1973). This theory spread to public corruption

cases, and was used to prosecute politicians throughout the country.

The problem with the theory was that the “intangible right to honest services” was not an accepted definition of the word “property,” as used in the mail fraud statute. On top of that, the aggressive theory allowed federal prosecutors to intrude upon state affairs absent a clear direction from Congress. For these reasons, the Supreme Court in *McNally v. United States*, 483 U.S. 350 (1987), repudiated the “honest services” species of mail fraud. The Court directed that Congress needed to act more clearly if it intended to prohibit the types of conduct at issue in “honest services” cases.

Congress reacts to *McNally* decision

Congress quickly reacted to *McNally*. Absent much debate or consideration, an eleventh-hour amendment snuck the 28-word statute into the federal criminal code. Surprisingly, Congress did not specifically address categories of wrongs (*e.g.*, bribery or kickbacks), nor did it amend the mail fraud statute’s definition of the word “property” to include the deprivations of “honest services.” Rather, Congress supplemented the definition of “scheme to defraud” with the following language: “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.” 18 U.S.C. § 1346.

Section 1346, like the laws permitting investment houses to lever up, demonstrates that hastily-enacted laws do not make good laws, for what emerged were some of the most pronounced circuit splits over a federal statute in modern times. The honest services statute meant one thing in New York, something else in Chicago, a different thing in Texas, still another thing in California, and so on.

State civil laws violations and “honest services”

Equally disconcerting was that courts generally permitted federal prosecutors to predicate “honest services” prosecutions on violations of state civil law. Thus, a defendant could be convicted because he/she transgressed some obscure state regulation or precatory pronouncement that is not even on the books in neighboring states. No one seemed willing to recognize the time-honored principle that Congress must provide clear direction if state law is to define a federal offense. Certainly, no court *applied* this principle to the “honest services” statute.

In *Black*, we filed a motion to dismiss the mail fraud charges on constitutional grounds, not expecting the motion to be granted by the district court obligated to follow precedent. In doing so, we practiced something the esteemed constitutional lawyer, Sam



Adam (one of former Illinois Governor Rod Blagovich's lawyers) taught me many years ago: Not only do you try a case for the jury, but you also try it, through motions, objections and jury instructions, for the court reporter. That is, despite reactions of short shrift, always preserve issues that one day might be addressed by the Supreme Court.

We followed the same practice in submitting a jury instruction in *Black* requiring the government to prove intent of economic harm—a concept embraced by certain courts of appeal, but not the Seventh Circuit where the case was being tried. This refused instruction wound up being one of the grounds for *certiorari* in *Black*.

Sorich's unjust expansion of "honest services"

An unjust expansion of "honest services" statute occurred in *United States v. Sorich*, 523 F.3d 702 (7th Cir. 2008). In that case, a violation of a civil consent decree served as the predicate for mail fraud charges. In addition, the defendants received no personal gain for their actions. Despite warnings in *United States v. Thompson*, 484 F.3d 877 (1987), the Seventh Circuit panel had no problem with either of these things. Because something like an employee handbook could be the basis for "honest services" prosecution, the defendant had no cause to complain about the consent decree predicate. The defendant received no personal gain? No problem. It suffices

if the gain accrues to a third party.

Sorich seemed like a perfect vehicle to address the "honest services" statute. Unfortunately, only Justice Scalia thought so, issuing a stinging dissent from the denial of *certiorari*.

Supreme Court and *Black*

Justice Scalia's dissent woke his brethren, for the next case to come along was *Black*. The issues were presented in *Black* were limited. Although *Black* certainly discussed constitutional issues in his *certiorari* petition, the issues was framed as whether proof of intent to cause economic harm was required in an "honest services" prosecution.

Around the same time, *Weybrauch* found its way to the Supreme Court. This case, too, did not raise the broad constitutional issue in the question presented. Rather, the issue for Supreme Court consideration was framed as whether proof of a state law violation is necessary in an "honest services" case.

***Weybrauch* and state laws**

All lawyers must represent their clients in the cases as presented. Thus, the views expressed herein are solely my personal views. More to the point, *Weybrauch* presented an instance where the prosecution theory did not depend on *any* state law, so his lawyers questioned whether such proof was necessary. *Weybrauch* was not postured in such a way as to question whether § 1346 even permits federal prosecutors to base an "honest services" prosecution on state law in the first place.

Enter Professor Albert Alschuler, a renowned criminal law expert at Northwestern University Law School. He fired a stealth missile in the form of an amicus brief in support of neither party in *Weybrauch*. In his brief, Professor Alschuler pointed out, among other things, that using state law as a component of an "honest services" prosecution was inconsistent with federalism, and the decisions in *Jerome v. United States*, 318 U.S. 101 (1943), and *Cleveland v. United States*, 531 U.S. 12 (2000).

Oral Arguments in *Black* and *Weybrauch*

The oral arguments in *Black* and *Weybrauch* presented a dilemma for counsel. Normally, the path to victory is to avoid constitutional questions by proposing a

narrowing definition, and lawyers for the petitioners in both cases had laid groundwork for that approach. At the *Black* oral argument, however, the Justices seemingly did not want to be constrained by the questions presented and wanted to get to the constitutional issues. And this is why I say that the attorneys sometimes appeared to argue against themselves. For example, the proposed limitations are court-made and do not derive from the text of the mail fraud statute. The *Weybrauch* petitioner necessarily argued that there must be proof of a State law violation in an "honest services" case, while there is a sound argument that there is no authority for basing an "honest services" prosecution on state law, ala Professor Alschuler, whose amicus brief was often discussed at oral argument.

***Skilling*—Another Chance for Supreme Court**

So what is to become of all this? There is a third honest services case on the Supreme Court's docket this term that has yet to be briefed, *United States v. Skilling*. While the question presented in the *Skilling certiorari* petition addresses yet another proposed limiting principle—whether proof of private gain is required—it also raises the constitutional issue.

At oral argument in *Black*, the Assistant Solicitor General suggested not addressing the constitutional arguments and waiting for another case. That would be ill-advised. First, there is ample authority for addressing a constitutional question that is a predicate to the question presented. Second, constitutional issues were raised in the lower courts in *Black* and in the Supreme Court filings. Third, the vagueness of the "honest services" statute has mired the lower courts long enough. The matter ought to be put to rest now. As Chief Judge Roberts observed at oral argument in *Black*, it certainly would be odd to limit the mail fraud statute in two cases and hold it unconstitutional in a third case decided the same term. Why should the Court run through all the gymnastics of applying non-textual limiting principles when the statute is unconstitutionally vague, so asked Justice Scalia. It also would be miscarriage of justice to allow prosecutions under an unconstitutional statute to go forward, or to permit the convicted to languish in prison.

Fixing "honest services"

A little common sense would clear up the dilemma of the "honest services" statute. At the oral arguments, several Justices expressed that the statute is vague. Contrary to the Assistant Solicitor General's arguments, the "intangible right to honest services" is not a term of art for which definition is readily ascertainable. The phrase was unknown at common law. It is defined nowhere in the United States Code. The pre-*McNally* case law, which used similar rhetoric, is, in the words of Justice Scalia, a "mess."

The hitch in declaring the honest services statute unconstitutional is the judge-made exception that, outside the First Amendment, a law should not be declared facially vague unless it is vague in all its applications. Those in support of the law argue that conduct such as bribery and kickbacks is covered by the "honest services" statute. Against this, the Supreme Court's decision in *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999), may evince a willingness to ease the "all applications" requirement.

Furthermore, as Justices Scalia and

Breyer observed at oral argument, our system does not allow enactment of a statute that prohibits the doing of "bad things." See, e.g., *Lanzetta v. New Jersey*, 306 U.S. 451 (1939) (declaring unconstitutional statute making it a crime to be a "gangster"). This gives too much leeway to prosecutors, deprives fair notice of prohibited conduct, and results in the creation of common law crimes (*i.e.*, crimes constructed after the fact)—all being prohibited as a matter of due process.

Conclusion

The lower courts have struggled to save the "honest services" statute by engrafting various limiting principles. But the limiting principles have been far from uniform. Moreover, there is little basis in the "honest services" statute itself for the limiting principles. One could plausibly argue that intent to do economic harm to the victim is part of the definition of "fraud," or that State law provisions are within the "right" mentioned in § 1346. But such principles are not clear from the words of § 1346. To find that § 1346 engenders these meanings would transgress the Supreme Court's direction

in *McNally* for Congress to speak clearly.

Some pundits predict that § 1346 will be struck down by the Supreme Court. While I believe this to be the correct result, prediction of future court rulings is an inexact science at best. The expected aftermath of such a ruling should not be a deterrent to a decision favorable to the petitioners in *Black*, *Weybrauch* and *Skilling*. We went through the process of reassessing mail fraud convictions after *McNally*, including in Operation Greylord cases. More recently, the Supreme Court's decision in *Booker v. United States*, 543 U.S. 220 (2005), altered how sentences are fashioned in every federal criminal case, and led to the reconsideration of numerous sentences across the country. The criminal justice system survived that process, and will survive if § 1346 is declared unconstitutional. ■

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