

# THE NATIONAL LAW JOURNAL

Select 'Print' in your browser menu to print this document.

Copyright 2009. Incisive Media US Properties, LLC. All rights reserved. National Law Journal Online  
Page printed from: <http://www.nlj.com>

[Back to Article](#)

---

## Honest Services Fraud

Laurie L. Levenson  
March 09, 2009

It is the hottest little criminal statute in federal court. Only one line long, 18 U.S.C. 1346 provides that a federal scheme to defraud includes "a scheme or artifice to deprive another of the intangible right of honest services." Congress enacted the law in response to the U.S. Supreme Court's decision in *McNally v. U.S.*, 483 U.S. 350 (1987), in which the court held that the mail fraud statute only clearly protected property rights and did "not refer to the intangible right of the citizenry to good government." Since then, federal prosecutors have seized on Section 1346 as their omnibus statute for federal charges.

In the past two decades, the honest services statute has been used for a wide range of fraud charges. For example, it has been used to charge county commissioners with "tawdry" relationships with a Las Vegas strip club owner, *U.S. v. Kincaid-Chauncey*, 2009 WL 415567, at \*1 (9th Cir. Feb. 20, 2009); Enron Chief Executive Officer Jeffrey Skilling with depriving Enron's shareholders of the honest services of the firms' employees, *U.S. v. Skilling*, 2009 WL 22879 (5th Cir. Jan. 6, 2009); a former juvenile court and state court judge with diverting taxpayer's money to a private dispute-resolution company she operated and required divorcing couples to attend, *U.S. v. Sutton*, 2009 WL 383400 (M.D. Ga. Feb. 11, 2009); executive officers of "The Most Worshipful Prince Hall Grand Lodge of Free and Accepted Masons" in an insurance fraud scheme, *U.S. v. Souder*, 2009 WL 88919, at \*1 (M.D.N.C. Jan. 12, 2009); and a campaign worker for the governor of Puerto Rico for obtaining illegal campaign contributions, *U.S. v. Vila*, 2009 WL 79189 (D.P.R. Jan. 9, 2009).

Taken literally, the statute could apply to almost any situation in which a public or private official has acted dishonestly and not provided the "services" expected of him. In fact, the statute has even been proposed as a vehicle to charge the Roman Catholic archbishop of Los Angeles, Cardinal Roger Mahoney, with not providing honest services to his parishioners because he allegedly concealed the actions of priests who molested children within his parishes. Although state prosecutors have not been able to bring a case against the cardinal for covering up child abuse, a federal grand jury reportedly continues to investigate the matter under the honest services statute.

### Far-reaching Section 1346 catches eye of high court

Section 1346 is so far-reaching that it has begun to catch the eye of the Supreme Court. This term, the Supreme Court was petitioned to review the case of *U.S. v. Sorich*, 531 F.3d 501 (7th Cir. 2008). Robert Sorich and his co-defendants were convicted of a scheme to defraud Chicago's citizens of honest services by doling out thousands of city civil service jobs based on political patronage and nepotism.

The government alleged that the defendants concealed what they were doing by falsely assuring city lawyers that their hires were legitimate, and then shredding evidence and hiding their involvement once a criminal investigation began. The defendants argued on appeal that the honest services mail fraud statute is unconstitutionally vague, and that only state law can supply the fiduciary duty that runs between public officials and the citizenry.

In denying Sorich's appeal, the 7th U.S. Circuit Court of Appeals reviewed the nature of honest services fraud cases. They come in two flavors: when an employer is defrauded of its employee's honest services by the employee or by another; and when the citizenry is defrauded of its right to the honest services of a public servant by that servant or by someone else. Given its broad scope, the 7th Circuit panel noted that courts have tried to find some limiting principles to ensure that the statute is used to prosecute other than run-of-the-mill breaches of fiduciary duties.

Some courts have required that the misuse of office be for private gain. See, e.g., *U.S. v. Bloom*, 149 F.3d 649, 655 (7th Cir. 1998). Other courts have adopted "a state law limiting principle." *Sorich*, 523 F.3d at 708. These jurisdictions will apply the honest services fraud statute only when the defendant's scheme involves a violation of state law. See, e.g., *U.S. v. Murphy*, 323 F.3d 102, 116-17 (3d Cir. 2003); *U.S. v. Brumley*, 116 F.3d 728 734-35 (5th Cir. 1997) (en banc). Still other courts have rejected both of these approaches and instead have crafted special requirements for applying the honest services fraud statute to misconduct in the private sector. *Sorich*, 523 F.3d at 708.

In appealing his conviction, Sorich argued that because no state law specifically outlawed the patronage hiring, his actions were not covered under the "honest services" statute. He also argued that he did not receive any personal gain from the scheme. However, the 7th Circuit rejected both of these arguments. It held that Sorich was guilty of the fraud even though his dishonest actions benefited third parties who were not charged as co-schemers. The persons who benefited were the people who obtained their jobs through Sorich's patronage machine.

As the court noted, even altruists can be guilty of fraud. *Sorich*, 523 F.3d at 709 (citing *U.S. v. Spano*, 421 F.3d 599, 603 (7th Cir. 2005)). There is no "Robin Hood" defense to honest services fraud. "In the case of a successful scheme, the public . . . is deprived of its servants' honest services . . . no matter who receives the proceeds." *Id.* at 710. Sorich "created an illegitimate, shadow hiring scheme based on patronage and cronyism . . . .These are the hallmarks of a fraud." *Id.* at 711.

Though the Supreme Court recently denied Sorich's certiorari petition, Justice Antonin Scalia issued a written dissent from the denial. Calling into question current use of the honest services statute, he wrote that it "consists of only 28 words, [but] the statute has been invoked to impose criminal penalties upon a staggeringly broad swath of behavior, including misconduct not only by public officials and employees, but also by private employees and corporate fiduciaries." *Sorich v. U.S.*, No. 08-418, 2009 WL 425807 (Feb. 23, 2009).

Scalia included in his list of cases brought under the far-reaching statute the following: the prosecution of "a businessman who attempted to pay a state legislator to exercise 'informal and behind-the-scenes influence on legislation,' students who schemed with their professors to turn in plagiarized work, [and] lawyers who made side-payments to insurance adjusters in exchange for the expedited processing of their clients' pending claims." *Id.* (citations omitted).

Indeed, the breadth of the honest services fraud statute is staggering. It would potentially cover everyone from Governor Rod Blagojevich who allegedly attempted to sell Barack Obama's Senate seat to "a mayor's attempt to use the prestige of his office to obtain a restaurant table without a reservation." *Id.*

As noted by Scalia, attempts to cabin the breadth of Section 1346 have been inconsistent. There is no uniformity among lower courts as to how it should be applied. At most, they have been told that it "does not encompass every instance of official misconduct." *U.S. v. Sawyer*, 85 F.3d 713, 725 (1st Cir. 1996). The lower courts are clearly awaiting guidance from the Supreme Court. See *U.S. v. Urciuoli*, 513 F.3d 290, 300 (1st Cir. 2008).

Although the Supreme Court did not grant certiorari in *Sorich*, it is only a matter of time before it or Congress will be compelled to address the limitations, if any, that apply to this statute. The stream of important cases using the statute has been steady. In 2005, it was used to charge the law firm of Milberg Weiss Bershad & Schulman, now Milberg LLP, and its partners with a kickback scheme for bringing class actions. More recently, it was used to charge the management of Broadcom Corp. in a stock-options backdating scheme.

### **Some justices may hear the whispers of 'McNally'**

In deciding the scope of Section 1346, some justices may hear the ghost of *McNally* whispering in their ears. In 1987, when the court decided *McNally*, it expressed two concerns: the worry that federal prosecutors would use federal fraud statutes to create ethical duties for state and local officials; and the unfairness of a statute that does not give fair warning to defendants as to what conduct constitutes a crime.

Under the current law of honest services frauds, defendants may be on notice that they are engaged in less-than-honest practices, but it is far from certain that they are on notice as to when they may be criminally prosecuted for their actions. To bring charges, prosecutors must identify the required "honest" practices of the defendant in his institution. For some cases, that can be particularly challenging. For example, what are the "honest" practices of a Catholic cardinal? When does a failure in moral responsibility become a federal fraud?

In the political arena, jurors may have their own doubts about what constitutes the honest services of their politicians. In the recent trial of Sheriff Michael Carona in Orange County, Calif., the jury acquitted on the scheme despite testimony indicating that Carona gave jobs and other favors to his campaign supporters. Ironically, a statute that is meant to combat corruption will become less effective the more that jurors become cynical about

whether any politician can be expected to conduct public business in a fair and honest manner.

Ultimately, the Supreme Court will need to address how Section 1346 should be applied. Scalia claimed in his *Sorich* dissent that it is "quite irresponsible to let the current chaos prevail." 2009 WL 425807, at \*4. Whether seen as chaos or earnest prosecution, honest services fraud has replaced conspiracy as, what Judge Learned Hand called, the "darling of the prosecution's nursery." *Harrison v. U.S.*, 7 F.2d 259, 263 (2d Cir. 1925). Section 1346 is a powerful statute that has opened the door for federal prosecutors to pursue corruption in all aspects of American life.

**Laurie L. Levenson** is a professor of law and the David Burcham Chair in Ethical Advocacy at Loyola Law School, Los Angeles. She can be reached at [laurie.levenson@lls.edu](mailto:laurie.levenson@lls.edu).