

LAW.COM

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

Copyright 2009. ALM Media Properties, LLC. All rights reserved.

Page printed from: <http://www.law.com>

[Back to Article](#)

Three Supreme Court Cases Challenge Law Used to Secure High-Profile Fraud Convictions

Tony Mauro

12-07-2009

U.S. Supreme Court Justice Antonin Scalia, who once said that writing dissents made life worth living, wrote a scorching dissent last February.

He was mad at his colleagues for denying review in a case called *Sorich v. U.S.* that would have forced the Court to make sense of a 21-year-old federal statute that makes it a crime to "deprive another of the intangible right of honest services."

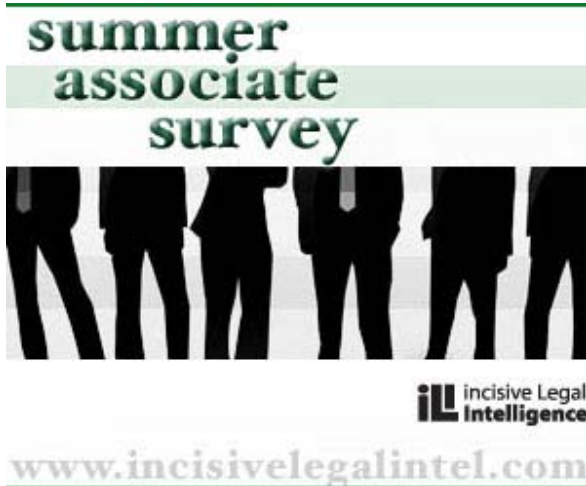
The law has been used to penalize "a staggeringly broad swath of behavior," Scalia wrote, and could, in his view, cover "a salaried employee's phoning in sick to go to a ball game." Referring to the wide disagreement in lower courts over the meaning of the law, Scalia harrumphed that "it seems to me quite irresponsible to let the current chaos prevail."

Scalia's fulminations often go unheeded by his colleagues, but this one must have struck a chord. A few months later, the Court started giving similar petitions a closer look. As a result, beginning on Tuesday, the Court will hear arguments this term in three cases challenging the "honest services" fraud statute -- an almost unprecedented multipart investigation into a single law in a single term. Justices say they don't consciously seek out issues to resolve, but it would be hard to chalk up the confluence to coincidence.

"Justice Scalia put it on the Court's agenda, and I think they want to decide the issue" once and for all, said Mark Harris, co-head of the appellate group at *Proskauer Rose*, a former assistant U.S. Attorney and Supreme Court law clerk. Why now? "In the post-Enron and post-9/11 era, prosecutors have been much more aggressive in cases that used to be business ethics or civil cases," said Harris, adding that "prosecutors will use this statute to the end of the law and beyond."

The three cases before the Court:

- *Black v. U.S.*, urging that the government should have had to prove that Canadian media mogul Conrad Black intended to cause economic harm to his employer to win a conviction on honest-services fraud.
- *Weyhrauch v. U.S.*, a test of the law's application to public officials. Former Alaska state legislator Bruce Weyhrauch asserts his honest-services conviction for failing to disclose a conflict of interest in a vote on an oil tax should be overturned, because he had no state-law duty to disclose the conflict.
- *Skilling v. U.S.*, in which former Enron chief executive Jeffrey Skilling argues that the honest-services law is unconstitutionally vague and should have required the government to prove he was seeking private gain rather than advancing his company's interests.



summer associate survey

www.incisivelegalintel.com

il incisive Legal Intelligence



2009 Focus Europe: Arbitration Scorecard

• Data Includes:
Description

il incisive legal intelligence
888.770.5647

The Black and Weyhrauch cases are set for Dec. 8. Skilling's case, not yet scheduled, will be heard next spring.

The trio of cases, as well as Scalia's pique, come at a time of increasing focus on "overcriminalization," a concern that vague federal laws like the honest-services statute are being used as catchalls to criminalize behavior that may be distasteful or unethical, but not illegal. Laws like honest-services fraud, critics say, violate the due process requirement that the public be given fair notice of what conduct is legal or illegal.

"Justice Scalia says he looks at the text of things, and he must have looked at this and said, 'what the hell does this mean?' " said Boston criminal defense lawyer Harvey Silverglate. "Scalia has put his finger on the pulse of a real problem here."

Silverglate, a longtime civil liberties advocate, has written a new book on the problem, *Three Felonies a Day*, which suggests, with slight exaggeration, that average citizens in the course of an ordinary day probably do things that violate as many as three federal laws, broadly construed.

But, as Scalia's strong words indicate, it's not just liberals like Silverglate who are sounding the alarm. Silverglate was featured at an event at the conservative [Heritage Foundation](#). There, he was welcomed by former Attorney General Edwin Meese III, who has also spoken out about overcriminalization. "I was amazed. I wrote some vicious things about him when he was attorney general, with good reason," Silverglate said.

Richard Thornburgh, another former Republican attorney general, now of counsel to [K&L Gates](#), also called the problem of overcriminalization a "slumbering giant" and testified before Congress about it last July. Thornburgh recently spoke at a Dec. 2 event focusing on the honest-services cases co-sponsored by an odd couple: the conservative [Washington Legal Foundation](#) and the [National Association of Criminal Defense Lawyers](#).

Thornburgh blamed Congress for "not setting boundaries" when it passed the honest-services law in 1988. "Congress created this problem in the first place." In passing the law, Congress was reacting to *McNally v. U.S.*, a 1987 Supreme Court decision that reined in the federal mail and wire fraud statutes by ruling that depriving citizens of the "intangible right" of good government did not constitute fraud. Thornburgh said the decision triggered "widespread panic" among prosecutors who had relied on the mail fraud law as their reliable weapon when more specific laws failed or were too difficult.

But Congress' response just codified the words the Court used, without elaboration, giving prosecutors a new, easy-to-use tool against public and private corruption. Former Illinois Gov. Rod Blagojevich was indicted under the law, as was former Louisiana Rep. William Jefferson and a host of other public officials, corporation executives, and lobbyists like Jack Abramoff.

"It is the most powerful tool a prosecutor can have," said Richard Craig Smith, chairman of [Fulbright & Jaworski's](#) global white-collar crime and government-investigations practice. "There is no factual basis that can't fit" the honest-services law. Smith, a former top official in the fraud section of the Department of Justice's Criminal Division, acknowledged he is "kind of torn" about the law, which he utilized as a government prosecutor. It is a useful tool in public corruption cases, he said, when "you have an inability or lack of political will" at the state or local level to go after corruption. But it has become a too-easy substitute for bribery laws, he suggested, adding, "Who wants to prove quid pro quo?"

If the law is upheld, Smith said there should be "adult supervision" before it is invoked, in the form of high-level clearance in the Justice Department, to be sure it is not being abused.

In his brief for Conrad Black, Miguel Estrada of [Gibson, Dunn & Crutcher](#) catalogs some of the uses of the law -- including a probe, apparently still pending, of Cardinal Roger Mahony, head of the Los Angeles Roman Catholic Diocese, to determine whether his handling of sexual abuse charges against priests constitutes honest-services fraud. "The government has stretched this malleable phrase, unknown in the common law, far beyond the public corruption context that gave rise to its enactment," Estrada wrote.

Not so, said Solicitor General Elena Kagan in the government's brief defending the law. "Congress did not criminalize all manner of dishonesty," the brief states. "And disloyal agents or fiduciaries who intend to deceive on a material matter have ample notice of their criminal conduct."

[Citizens for Responsibility and Ethics in Washington](#) is also defending the law as "an indispensable prosecutorial tool for fighting public corruption." In its brief before the Court, the group argues that the law has "clear parameters" that put officials on notice that bribery, kickbacks or self-dealing schemes are illegal.

The outcome of the Supreme Court cases is important not only for the appellants but also for defendants like former Republican lobbyist Kevin Ring. His Abramoff-related trial on honest-services fraud and other counts ended in a mistrial in October because of a hung jury. The judge in the case put off a retrial until next June in hopes the Court will rule on the law.

"From the jurors we talked to, the jury was divided on what would constitute a crime," said Ring's lawyer, Andrew Wise of [Miller & Chevalier](#) in Washington, D.C. A lot of the debate, Wise said, was over whether "traditional lobbying behavior" fit the statute. "What Kevin's case ended up showing is how much is undefined in this statute."