

White Collar Defense Alert: Supreme Court Significantly Limits Fraud Prosecutions

6/28/2010

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On June 24, 2010, in *Skilling v. United States*, 561 U.S. ____ (2010), the Supreme Court vacated former Enron CEO Jeffrey Skilling's conviction, holding that the honest services fraud statute, which makes it a crime to use the mail or wires in a scheme or artifice "to deprive another of the intangible right of honest services" passes constitutional scrutiny only when limited to *bribery* and *kickback* schemes. Skilling's conspiracy conviction relied on the honest services fraud statute, but did not involve either bribery or kickbacks.

The honest services fraud statute has long been a favorite weapon of white-collar crime prosecutors. Mail and wire fraud are federal felonies carrying maximum prison terms of 20 years. Expansion of the "intangible right of honest services" by prosecutors has resulted in federal felony prosecution of conduct involving all types of individual dishonesty, from student plagiarism to corporate self-dealing. Defendants have included public officials, private individuals, and corporate executives whose conduct violated *no other* law, state or federal. After many lower court challenges to the statute's language as vague and its application as overbroad, the Supreme Court has finally reined in over-zealous honest services prosecutions.

Along with *Skilling*, the Court decided two other cases challenging the honest services fraud statute, and all three involved private sector misconduct or state public corruption. In the wake of the Enron collapse, a jury convicted Skilling of conspiracy based on an honest services theory, as well as wire fraud, making false statements to auditors and insider trading. A jury found that former media tycoon Conrad Black deprived his company, Hollinger International, of his faithful services as a corporate officer by accepting noncompetition payments from parties acquiring several of Hollinger's smaller newspapers. Finally, prosecutors charged that former Alaska legislator Bruce Weyhrauch failed to disclose that he was in job negotiations with an oil field services company at the same time the state legislature was considering an oil bill. All three cases have been vacated and remanded.

Implications

The Supreme Court has significantly limited federal mail and wire fraud prosecutions and curtailed the power of the government to selectively prosecute individuals who engage in unethical behavior. A corporate executive who breaches a fiduciary duty to his or her company, but breaks no laws, may now be held accountable to his or her shareholders, but not the federal criminal justice system. Although the Court's ruling may not ultimately result in complete exoneration for Skilling or Black, it will affect the scope of numerous ongoing prosecutions, including those of former Massachusetts House Speaker Sal DiMasi and former Illinois Governor Rod Blagojevich. Although Congress may ultimately act to define other conduct that

falls within the “intangible right of honest services,” the Court has warned that it will require specificity and clarity. Until Congress acts, individuals who engage in conduct that may be unethical, but is not otherwise criminal, finally face a much lower risk of federal prosecution. In *Skilling*, the Court does not encourage unethical behavior, but makes clear that federal criminal liability may be imposed only when such behavior is a clear violation of a specific standard of conduct.

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