Supreme Court Hands DOJ a Big Loss, Limiting Use of "Honest Services" Statute

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Today the Supreme Court decided the key white-collar crime case of *Skilling v. United States,* rejecting the Justice Department's efforts to use the well-known "honest services" statute against former Enron CEO Jeffrey Skilling. The court didn't reverse Skilling's conviction but sent the case back to the U.S. Court of Appeals for the 5th Circuit to determine whether the conviction could stand without the "honest services" element.

Skilling had argued that the "honest services" law, much relied upon by federal prosecutors since its 1988 passage in the wake of the Court's *McNally v. United States* ruling the previous year, was impermissibly vague. He contended that Congress didn't specifically define what it meant when it prohibited "a scheme or artifice to deprive another of the intangible right of honest services," so the statute didn't give adequate notice of what it prohibited.

However, instead of striking down the law, the Court, in an opinion by Justice Ruth Bader Ginsburg that commanded a 6-3 majority on this issue, chose to limit the reach of the statute to bribery and kickback schemes, which it said were the "core of the pre-McNally case law." Justice Antonin Scalia, joined by Justices Clarence Thomas and Anthony Kennedy, dissented and said he would have struck down the law entirely.

Since the government conceded that Skilling wasn't involved in any bribery, the Court rejected the conviction to the extent that it rested upon the "honest services" theory. (The indictment had also charged traditional "money-or-property" wire fraud, as well as securities fraud. Those were not directly at issue before the Court.)

Skilling, it must be remembered, was charged with "conspiring to defraud Enron's shareholders by misrepresenting the company's fiscal health, thereby artificially

inflating its stock price" and then profiting in salary, bonus, and stock sales from that scheme. No bribery or kickbacks were alleged.

Clearly, federal prosecutors now have one less arrow in their quiver – at least when bribery and kickbacks are not involved. Their use of the "honest services" statute whenever they see something amiss in corporate or political life will presumably end. They will have to find a more specific statute – mail fraud, wire fraud, securities fraud, or the like – and to be prepared to prove the elements of whatever crime they charge, rather than relying on "honest services."

One of the cases in which theft of "honest services" has been alleged is the ongoing corruption trial of former Illinois Gov. Rod Blagojevich. The federal judge overseeing that case, just hours after the *Skilling* ruling came down, refused to delay the trial. He told defense attorneys that the new decision "may not offer a lot of hope for you."

Some of the 24 counts against Blagojevich are based on the "honest services" law, but anticipating the *Skilling* decision, prosecutors there also brought charges that were not based on "honest services."

When it comes to bribes or kickbacks, prosecutors will find solace in the *Skilling* decision. Justice Ginsburg specifically noted in a footnote that the "honest services" statute will still have utility. Even though there is, of course, a general federal bribery statute, it mostly applies only to federal public officials, she wrote. Thus the "honest services" law can be used to fill in the gaps and to prosecute "state and local corruption and private-sector fraud," reaching "misconduct that might otherwise go unpunished."

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