Case Notes

Honest Services Fraud: Skilling, Black, and Weyhrauch

Skilling v. United States, Docket No. 08-1394 (U.S. June 24, 2010); *Black v. United States*, Docket No. 08-876 (U.S. June 24, 2010); *Weyhrauch v. United States*, Docket No. 08-1196 (U.S. June 24, 2010).

In a set of opinions handed down on June 24, 2010, the Supreme Court significantly narrowed the scope of the honest services fraud statute but stopped short of striking down the statute as unconstitutionally vague.

In *Skilling v. United States*, the Court considered the appeal of Jeffrey Skilling, former CEO of Enron. In the wake of Enron's collapse, Skilling was tried and convicted of, among other things, a conspiracy to commit mail and wire fraud by depriving Enron and its shareholders of the intangible right of his honest services. One of the issues Skilling raised on appeal was the validity of the honest services fraud statute, 18 U.S.C. § 1346.

The Court unanimously reversed Skilling's honest services fraud conviction, with five justices joining Justice Ginsburg's opinion for the Court, and two justices signing onto a concurring opinion by Justice Scalia.

The Court first reviewed the background of the honest services fraud statute. To determine the meaning of "the intangible right of honest services," as used in the statute, the Court looked to cases that preceded *McNally v. United States*, 483 U.S. 350 (1987), which had held that the mail fraud statute was limited to deprivation of property rights. It concluded:

> [T]o preserve what Congress certainly intended the statute to cover, we pare that body of precedent down to its core: In the main, the pre-*McNally* cases involved fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived.

The Court recognized that application of the statute outside that "core category" of cases would raise the due process concerns underlying the vagueness doctrine, and it therefore held that "§1346 criminalizes only the bribe-and-kickback core of the pre-McNally case law."
The Court rejected the government's attempt to broaden the scope of the honest services fraud statute to include "undisclosed self-dealing" by a public official or private employee. Having limited the honest services fraud statute to bribery and kickback cases, the Court concluded that the statute was not unconstitutionally vague, reasoning that it has always been clear that bribes and kickbacks constitute honest services fraud and that those crimes are defined well enough to limit the risk of arbitrary or discriminatory prosecutions.

Under the newly limited interpretation of the statute, the Court found that Skilling had not committed honest services fraud, as he was never accused of taking bribes or kickbacks. The Court therefore remanded his case to the Fifth Circuit to determine whether his conviction should be reversed.

Justice Scalia concurred in the judgment as to the honest services fraud issue, but he wrote separately to note his disagreement with the Court's reasoning. Justice Scalia wrote that the statute "is vague, and therefore violates the Due Process Clause of the Fifth Amendment" and criticized the Court's analysis of and reliance on the pre-*McNally* cases as requiring "not interpretation but invention."

In *Black v. United States*, Conrad Black and other executives of Hollinger International had been convicted of mail fraud on alternative theories, including that they had deprived the company and its shareholders of the intangible right to honest services. As a result of its decision in the *Skilling* case, the Supreme Court found that the honest services fraud instruction given to the jury in Black's case was incorrect. It therefore vacated and remanded the case.

A third case, *Weyhrauch v. United States*, was also vacated and remanded in a one-sentence *per curiam* opinion based on the Court's decision in *Skilling*. The issue in *Weyhrauch* had been whether the government must prove that a state official had violated a duty to disclose imposed by state law in order to convict him under the honest services fraud statute.

By limiting the honest services fraud statute to its "core," the Supreme Court ensured that prosecutors cannot simply use the law as a catch-all provision for punishing wrongful—but not necessarily criminal—behavior. Prosecutions for corporate misfeasance under § 1346 must be based on actual wrongdoing in the form of bribes and kickbacks and not on vague allegations about the intangible right to certain unspecified "honest services." Although prosecutors often have had many tools available to them besides "honest services fraud" charges, the Court's ruling will preclude prosecution for honest services fraud in many cases that historically might have seen such charges. In those cases where such charges are brought, the Court's ruling will provide more certainty for potential defendants—including corporate officers and directors—about what the law requires for such a charge to succeed.

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