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Supreme Court of the United States Limits Scope of “Honest Services” Doctrine in Three Rulings

On June 24, 2010, the Supreme Court of the United States issued its rulings in the cases of *Skilling v. United States*, *Black, et al. v. United States*, and *Weyhrauch v. United States*. These rulings affected the convictions of three high-profile defendants and limited the application of 18 USC § 1346 — the “honest services” doctrine — to cases which specifically involved the acceptance of bribes and kickbacks and did not apply the statute to cases dealing generally with undisclosed self-dealing or other conflicts of interest.

Under the statute, “the term ‘scheme or artifice to defraud’ includes a plan to deprive another of the intangible right of honest services.” To successfully prosecute a defendant under the honest services doctrine, the government must prove “that officers breached their duty as fiduciaries, that officers intended thereby to harm [the] corporation by obtaining [the] corporation’s property or money for themselves, and that such harm to [the] corporation was [a] reasonably foreseeable result of breach of fiduciary duties.” Prior to these cases, the statute had frequently been used to prosecute executives and politicians for crimes committed in the scope of their employment.

Rejecting prior applications of the honest services doctrine, in *Skilling v. United States*, the Supreme Court vacated and remanded the honest services conviction of former Enron CEO Jeffrey Skilling based upon an “elaborate conspiracy to prop up Enron’s stock prices by overstating the company’s financial well-being.” Skilling had been sentenced to 24 years in prison for violation of the statute.

Skilling argued to the United States Supreme Court that the honest services doctrine was “unconstitutionally vague.” In opposition, the United States government urged the Court to follow the lower courts and apply the honest services doctrine to “undisclosed self-dealing by a public official or private employee.” The Court did not completely strike the statute, but limited the honest services doctrine to the acceptance of bribes and kickbacks (which had not been proven in the case of Jeffrey Skilling); omitting from its statutory interpretation the “amorphous category of cases” involving self-dealing and conflict of interest.

In ruling that the entire statute was not unconstitutionally vague, Justice Ginsburg noted that “it has always been clear that bribes and kickbacks constitute honest services fraud” and “the Court perceives no significant risk that the honest services statute, as here interpreted, will be stretched out of shape. Its prohibition on bribes and kickbacks draws content not only from [precedent] case law, but also from federal statutes proscribing and defining similar crimes.” However, the

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Court declined to extend application of the statute to more general categories of misconduct which were not statutorily proscribed.

In light of the new standard established in *Skilling*, the Court followed suit with regard to *Black, et al. v. United States* and *Weyhrauch v. United States*. In *Black*, the mail fraud convictions of Conrad Black, John Boulton, and Mark Kipnis, former executives of Hollinger International Inc. were also vacated and remanded.

Similarly, in *Weyhrauch v. United States*, former Alaska state representative Bruce Weyhrauch was charged with failing to disclose his search for legal work from an oil company at the same time he was voting on a pending oil tax. His case was remanded to the Ninth Circuit for reconsideration in light of the *Skilling* decision.

More recently, the Supreme Court vacated the convictions of former HealthSouth Corp. CEO Richard Scrushy and former Alabama Gov. Don Siegelman as their conduct did not violate the Supreme Court's new, limited reading of the of 18 USC § 1346.

These decisions will make it more difficult for federal prosecutors to pursue allegedly corrupt politicians and corporate chiefs. The honest services doctrine had been used for decades as a catch-all provision when the government could not establish the elements of other corruption and malfeasance claims.

With the doctrine now restricted only to bribes and kickbacks, government lawyers will face a much more difficult path. In fact, recognizing that Congress may try to expand the law's reach, the Supreme Court warned that such revision should be done with its expressed constitutional limitations in mind.

