Supreme Court Curtails Reach of Honest Services Fraud and Affirms Juror Bias Metric

On June 24, 2010, the Supreme Court released its much anticipated decision in the prosecution of former Enron CEO Jeffrey Skilling, sharply curtailing the scope of the federal "honest services" fraud statute. The statute, which prohibits depriving another person, such as one's employer, of the "intangible right of honest services," had been harshly criticized as unconstitutionally vague and overly broad. Some argued that it unfairly allowed prosecutors to obtain prison sentences for corporate officers and politicians who merely engaged in commonplace, noncriminal, self-serving behavior. The Court's decision in *Skilling v. United States* rejected the constitutional challenge to the statute, but only after restricting its reach to a limited "core" of fraudulent conduct involving bribes and kickbacks. Prosecutors now may charge honest services fraud in cases where a private employee accepts bribes or kickbacks, but not where the employee merely acts while subject to an undisclosed conflict of interest.

Skilling was convicted in 2006 on 19 counts of conspiracy, securities fraud, insider trading, and lying to auditors, for his role in Enron's collapse. He raised two issues in his appeal to the Supreme Court: (1) that the honest services statute was unconstitutionally vague if interpreted to apply to his actions, and (2) that pretrial publicity and community prejudice related to Enron prevented him from obtaining a fair trial in Houston, home of Enron's headquarters.

In resolving Skilling's vagueness challenge, the Court decided that the history of honest services fraud prosecutions includes a clear, appropriate "core" of cases involving schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived. The Court noted that the statute is not a model of precision and that the rule of lenity, under which ambiguous criminal statutes are read narrowly, counseled limiting its scope to this established core. The Court's limitation precludes prosecutors from charging honest services fraud based merely on "undisclosed self dealing by a public official or private employee"—such as the government's charges that Skilling fraudulently deprived Enron's stockholders of his own honest services by managing Enron to benefit himself (through his salary and bonuses) at the stockholders' expense. Limited to circumstances of bribery and kickbacks, the Court held that the statute was not unconstitutionally vague. The decision leaves unresolved the nature of the underlying fiduciary duty that can give rise to a prosecution for "honest services" fraud where bribery or kickbacks are involved.

The Court also rejected Skilling's claim that media coverage of Enron's implosion had so saturated Houston that a fair trial there was impossible. The trial judge had denied Skilling's request to move proceedings to a different city to escape publicity. The Supreme Court agreed that a trial in Houston was fair and that impartial Houston jurors could be found in light of the city's size, the delay between the trial and the publicity, and the nature of the publicity, which lacked prejudicial information unforgettable to viewers (such as a confession by Skilling). In affirming the propriety of trial in Houston, the Court extended a series of decisions that make it extremely difficult for a criminal defendant in a large city to move his trial elsewhere on grounds of bias.

In a signal of the importance of the *Skilling* decision, the Supreme Court also vacated and remanded two other honest services fraud cases, *Black v. United States* and *Weyhrauch v. United States*, for further proceedings in the lower courts in light of *Skilling*. *Black* concerned the prosecution of Conrad Black and other senior executives at Hollinger International, Inc., owner of numerous newspapers in the United States and abroad. As with Skilling's case, the government's prosecution for honest services fraud in *Black* did not involve any third-party bribes or kickbacks, but the executives' failure to disclose the receipt of noncompetition fees from Hollinger. *Weyhrauch* involved the prosecution of a state official for failure to disclose a conflict of interest.

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