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U.S. Supreme Court Limits Scope of Federal "Honest Services" Fraud Statute in Prosecutions of Jeffrey Skilling and Conrad Black

Since the enactment of the "honest services" fraud statute, 18 U.S.C. § 1346, which defines the scope of the federal mail and wire fraud statutes to include the use of interstate means of communication to effect a "scheme or artifice to defraud … another of the intangible right of honest services," federal prosecutors have used the provision in numerous cases to combat public and private corruption, and alleged corporate wrongdoing – even in situations where the defendant does not directly obtain money or property from the alleged victims of the fraud. Today, the U.S. Supreme Court issued two opinions that significantly restrict the scope of this statute. Skilling v. United States, 561 U.S. __, No. 08-1394 (June 24, 2010); Black v. United States, 561 U.S. __, No. 08-876 (June 24, 2010).

I. The Decisions

The principal question that the Supreme Court considered in Skilling was whether Section 1346's prohibition against conduct that deprives another of "the intangible right of honest services" is unconstitutionally vague.[1] Writing for the Court, Justice Ginsburg declined to rule that the law should be invalidated in its entirety, but found that "Skilling's vagueness challenge has force," and limited "honest services" fraud to reach only bribery and kickback schemes.[2] Under this approach, the Court found that Mr. Skilling could not have violated Section 1346 because the prosecution did not allege that he solicited or accepted bribes or kickbacks, but rather that he conspired to defraud Enron's shareholders by other means. Because Mr. Skilling's conviction for conspiracy was predicated not only on the "honest services" fraud theory, but also on theories including securities fraud, the Court remanded the case to the courts to determine whether to invalidate Mr. Skilling's conspiracy conviction, and to determine whether the other charges on which Mr. Skilling was convicted would be affected.

1 After the collapse of Enron, Mr. Skilling was convicted of, among other charges, conspiring to deprive Enron and its shareholders of his "honest services" by participating in a scheme to inflate the value of Enron's shares by overstating Enron's financial health.

2 Id. at 41-44.

In a separate concurrence, Justice Scalia, joined by Justices Thomas and Kennedy, both agreed that Mr. Skilling's conviction for "honest services" fraud was erroneous, and further concluded that Section 1346 was unconstitutionally vague in its entirety and could not be salvaged.

The Justices reiterated their views in Black,[3] and similarly remanded the case for further proceedings in the lower courts.

II. Ramifications of the Decisions

The decisions severely cabin Section 1346's scope to apply solely to the most egregious quid pro quo-style transactions, and not to "honest services" claims based on other forms of alleged corporate malfeasance, such as self-dealing. Thus, the decisions may dramatically change the federal white-collar criminal landscape. Although prosecutors still have many tools in their toolbox, the decisions remove a powerful tool they have used in the investigation and prosecution of alleged corporate malfeasance. Indeed, prosecutors will no longer be able to prosecute under an "honest services" fraud theory conduct, including breaches of fiduciary duties, which is typically addressed in civil litigation. The Supreme Court's decisions continue a trend of recent court decisions reorienting the balance between the state and individual in the criminal law.

Please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under "Securities Enforcement and White-Collar Defense" in the "Practices" section of our website (http://www.clearygottlieb.com) of you have any questions.

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[3] Publishing magnate Conrad Black was convicted of violating federal mail fraud laws for enriching himself through improper dealings with Hollinger that he failed to disclose to Hollinger's shareholders. Under the prosecution's theory, the defendants' failure to disclose these dealings "deprived Hollinger of their honest services as managers of the company." Black, Slip Op. at 2.

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