

ADVISORY | White Collar

June 24, 2010

HONEST SERVICES FRAUD

Today in a trilogy of cases, the Supreme Court clarified that the federal honest services fraud statute, 18 U.S.C. §1346, covers only bribery and kickback schemes.

The honest services fraud statute, frequently used by prosecutors against alleged corruption, punishes mail and wire fraud that is “a scheme or artifice to deprive another of the *intangible right of honest services*.” 18 U.S.C. §1346. Congress enacted this statute in response to the Supreme Court’s ruling in *McNally v. United States*, 483 U.S. 350 (1987), that the federal mail fraud statute was “limited in scope to the protection of property rights” and did not extend to “a scheme or artifice to deprive another of the intangible right of honest services.”

Skilling v. United States narrowed the reach of the statute, acknowledging that prior case law was in “considerable disarray” about what it means to deprive someone of honest services. The Court reasoned there is “no doubt” Congress intended the “intangible right of honest services” to incorporate schemes involving bribes or kickbacks, the core of pre-*McNally* honest services fraud.

In *Skilling* and the two related cases decided today – *Black v. United States* and *Weyhrauch v. United States* – the government advanced a view of honest services fraud that goes well beyond bribes and kickbacks, including undisclosed self-dealing by a public official or private employees. The Court expressly rejected this view. While lower courts have upheld honest services fraud convictions on this theory, *Skilling* states there is “no consensus on which schemes qualifie[d]” and “a reasonable limiting construction of § 1346 must exclude this amorphous category of cases.”

In all three decisions issued today, the Supreme Court vacated the lower-court judgments and remanded the cases for further proceedings in the courts of appeals.

The implications of the Court’s holding that honest services fraud encompasses only bribery and kickbacks are significant. The decisions indicate the Court is willing to closely scrutinize the government’s charging decisions and theories.

With respect to federal officials and federal lobbyists, *Skilling* essentially renders the honest services fraud statute co-extensive with existing bribery and kickback statutes, meaning that the Government will need to prove that gifts, political contributions, or other things of value were provided to federal officials as a *quid pro quo* for specific official acts. This is a far more stringent standard than the Government has applied in bringing recent honest services fraud prosecutions in public corruption cases.

Legislative action and judicial challenges may be on the horizon. As in *McNally*, *Skilling* invites Congress to “speak more clearly” if it “desires to go further[.]” It bears watching whether Congress will broaden §1346 to include undisclosed self-dealing. The Court in *Skilling* warns that an attempt to do so “would have to employ standards of sufficient definiteness and specificity to overcome due process concerns.”

The government should also expect an avalanche of legal challenges on both direct and collateral review. Any defendant whose conviction possibly rests on an honest services theory, be it for mail fraud, wire fraud, conspiracy, or other crimes, has fertile ground for obtaining relief.

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