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June 25, 2010

On June 24, 2010, the U.S. Supreme Court largely eviscerated a formerly powerful and malleable enforcement tool used by white-collar prosecutors. Specifically, the Court held that "honest services fraud," a type of mail and wire fraud, criminalizes *only* conduct involving bribery or kickbacks. In so doing, the Court cast doubt on convictions in two of the most significant white-collar prosecutions in recent memory: those of former Enron CEO Jeffrey Skilling and former Hollinger International Chairman Conrad Black. *Skilling v. United States*, 561 U.S. \_\_\_\_ (2010); *Black v. United States*, 561 U.S. \_\_\_\_ (2010).

The honest-services fraud statute defines "scheme or artifice to defraud" to include a scheme "to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. Prosecutors had interpreted this statute liberally to cover a broad range of conduct by corporate officers and directors. In the *Skilling* case, for example, prosecutors alleged that, prior to Enron's collapse, Skilling hid the company's precarious financial position from shareholders by manipulating financial records and making misleading public statements. Prosecutors charged Skilling with, among other things, conspiracy to commit honest-services wire-fraud by depriving Enron and its shareholders of his honest services as CEO. Similarly, prosecutors charged Black and his co-defendants with depriving Hollinger of their honest services by paying themselves bogus fees and failing to disclose those fees. Neither case alleged bribery or kickbacks.

Skilling argued on appeal that the definition of "honest services" was unconstitutionally vague, and that the statute should therefore be invalidated. *Skilling*, 561 U.S. \_\_\_\_, slip op. at 41. The Court acknowledged the force of Skilling's vagueness argument, but opted to save the statute by limiting its scope. *Id.* Thus, the Court interpreted the statute to criminalize only conduct involving "bribery or kickbacks." *Id.* at 45. The Court based this limitation on its finding that Congress, in enacting the honest services statute, codified a core strand of pre-1987 case law that dealt primarily with schemes involving bribery and kickbacks. *Id.* at 41. The Court found that applying the statute to "a wider range of offensive conduct" might render it unconstitutionally vague. *Id.* at 44-45. Because the Government did not accuse Skilling of bribery or kickbacks in return for his misrepresentations, the Court held that Skilling did not commit honest-services fraud. *Id.* at 50. As such, Skilling's conviction was "flawed." *Id.*

Noting that honest-services fraud was only one of three theories of guilt argued by the Government at trial, the Court deemed it an open question whether its holding required reversal of Skilling's conviction. *Id.* at 50-51. The Court therefore remanded the case to the 5th Circuit Court of Appeals for determination of whether the error was harmless. *Id.*

In a less significant portion of its opinion, the Court rejected Skilling's claim that the negative publicity surrounding Enron in the months preceding jury selection rendered his trial unfair. *Id.* at 34.

In sum, the *Skilling* opinion greatly circumscribes the Government's use of the honest services statute as a vehicle to prosecute corporate officers and directors.

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