

Supreme Court limits reach of 'honest services'

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Washington - A favorite tool in prosecutors' arsenal in cases involving public corruption or corporate financial wrongdoing lost some of its punch after the U.S. Supreme Court ruled that the so-called "honest services" fraud statute applies only to bribery and kickback schemes.

The court's ruling in [Skilling v. U.S.](#) takes away a cause of action prosecutors have used for years in order to bring charges against public officials charged with corruption - and more recently, corporate executives accused of bilking stakeholders - for acts that didn't really fit within the parameters of other criminal statutes.

This charge "has been much used for the past 20 years," including in the private sector, said Sri Srinivasan, a partner in the Washington office of O'Melveny & Myers who argued the case before the court on Skilling's behalf.

As a result of the ruling, pending cases involving honest-services fraud will have to be revisited. But it's not entirely clear what will happen with decisions that are already final.

"That is very complicated," Srinivasan said

Timothy O' Toole, partner in the Washington office of Miller & Chevalier, said that defendants with final judgments have a decent argument for habeas relief in light of the ruling.

"Habeas law is pretty clear that this sort of decision should be retroactive," he said.

Bribes and kickbacks

The case involves Enron CEO Jeffrey Skilling, who was convicted of conspiracy to commit "honest services" fraud, one of more than a dozen charges for which he was found guilty. The honest-services fraud law criminalizes employee conduct intended to achieve "private gain" rather than to advance the employer's interest. Skilling appealed his conviction - claiming that the honest-services statute was unconstitutionally vague - and argued that a flawed honest-services charge effectively tainted the jury's findings regarding all the charges against him.

While the 5th Circuit agreed that Skilling's acts were not intended to harm Enron or to obtain personal benefit at Enron's expense, it affirmed his conviction, holding that the charge required only a finding of a material breach of a state-law fiduciary duty and resulting harm to the employer.

The Supreme Court took up Skilling's constitutional challenge and reversed the 5th Circuit.

The court, in an effort to avoid declaring the law void for vagueness, decided to limit its application. Noting that the statute was adopted to codify a federal common law cause of action in cases "involv[ing] fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived," it concluded that limiting the law to bribes and kickbacks would avoid overbroad application.

"In view of this history, there is no doubt that Congress intended [the law] to reach at least bribes and kickbacks," Ginsburg wrote. "Reading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine. To preserve the statute without transgressing constitutional limitations, we now hold that [it] criminalizes only" bribe and kickback cases.

While the court was unanimous that Skilling's conviction for honest-services fraud must be reversed, three justices - Justices Antonin Scalia, Clarence Thomas and Anthony Kennedy - believed that the statute itself was unconstitutionally vague.

"[I]n transforming the prohibition of 'honest-services fraud' into a prohibition of 'bribery and kickbacks' it is wielding a power we long ago abjured: the power to define new federal crimes," Scalia wrote in his concurrence. The court also reversed and remanded two other honest-services fraud cases in light of its decision in Skilling: [Black v. U.S.](#), which involved former media mogul Conrad Black, and [Weyhrauch v. U.S.](#), which involved Alaska state legislator Bruce Weyhrauch.

No more 'throwing everything at the wall'

The ruling will have an effect on a significant number of cases in which prosecutors have used the law to go after alleged corporate and public wrongdoing.

"Honest-services [fraud] was one of the most frequently charged crimes in cases involving public officials or financial type fraud," said Cory L. Andrews, senior litigator at the public interest organization the [Washington Legal Foundation](#).

Before this ruling, prosecutors would use the law in cases where the conduct didn't specifically fit into the parameters of other violations, said Andrews, who noted that the change may be a bit of a culture shock for them.

"There is an institutional dynamic [that] trickles down to federal prosecutors who want to maximize as many charges in indictments that they can," he said. "They want to throw everything at the wall and see what sticks." As a result of the ruling, prosecutors will have to work harder, Andrews said.

"I think it's going to force federal prosecutors in the Justice Department and the U.S. attorneys' offices to sharpen their skill sets to do the heavy lifting [at] the charging stage," he said. "They will have to be a lot more precise and a lot more careful in charging people."

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