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WHITE-COLLAR CRIME

Expert Analysis

Overcriminalization And the Fallout From 'Skilling'

In *Skilling v. United States*,[1] the U.S. Supreme Court limited the application of the honest services fraud statute to bribery and kickback schemes, ruling that it did not include schemes involving undisclosed self-dealing. Although widely considered to be a defense victory, federal prosecutors have not let the decision slow them down, soliciting help from the legislative branch and doggedly pursuing prosecutions impacted by the decision. The continued press for additional laws in this area despite the Supreme Court's recent decision is at odds with concerns regarding the continued expansion of federal criminal law and the growth of federalism.

By **Elkan Abramowitz**

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Legislative Efforts

On Sept. 28, 2010, the Senate Judiciary Committee held a hearing on "Restoring Key Tools to Combat Fraud and Corruption After the Supreme Court's Skilling Decision." Not surprisingly, Assistant Attorney General Lanny A. Breuer encouraged Congress to pass legislation to enable the government to continue to rely on mail and wire fraud statutes to prosecute corrupt conduct by public officials and corporate executives.[2]

Opining that undisclosed self-dealing by public officials was "most likely to fall outside the reach of any other statute," Mr. Breuer's testimony focused primarily on the public sector. Acknowledging language in the *Skilling* decision that any attempt by Congress to criminalize undisclosed self-dealing should "employ standards of sufficient definiteness and specificity to overcome due process concerns,"[3] Mr. Breuer suggested that a new statute provide "that no public official can be prosecuted unless he or she knowingly conceals, covers up, or fails to disclose material information that he or she is already required by law or regulation to disclose." Finally, while Mr. Breuer indicated the Justice Department's interest in working with the committee to draft legislation to address private actors, he noted that the exigency was not as great because undisclosed self-dealing in the private sector typically involves a loss of money or property, allowing for the use of existing mail or wire fraud statutes.

The National Association of Criminal Defense Lawyers (NACDL) took issue with the assertion that the *Skilling* decision had left a legitimate gap in the criminal statutory framework and opined that congressional efforts to draft a statute in response was not only difficult because of the constitutional concerns raised in that opinion, but also was unnecessary. In written testimony offered on behalf of the NACDL, Timothy O'Toole warned that "Congress should be extremely cautious of any legislative 'fix' and *especially* wary of any *quick* legislative 'fix' that attempts to retain the 'flexibility' that prosecutors enjoyed when they had an unlimited honest services statute in their toolbox."[4]

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Rather, Mr. O'Toole noted that the corrupt behavior of federal officials already is regulated by an "intricate web of regulations, both administrative and criminal," including anti-bribery statutes, mail fraud, racketeering statutes, the Hobbs Act, the Travel Act, and anti-kickback laws.[5] Similarly, corruption by state and local officials is, to a large extent, already covered by anti-corruption laws at the state and local levels. Mr. O'Toole observed that allowing the federal government to override this "extensive" regulatory framework adopted by state and local governments to address the misconduct of their own officials creates federalism concerns.

To the extent federal officials need to police state and local corruption, Mr. O'Toole asserted that the government should rely on existing federal statutes. In conclusion, Mr. O'Toole opined that "[i]t is difficult to believe that existing federal, state and local criminal laws do not already reach all conduct that is properly criminal. If conduct is still beyond reach, that is likely because the conduct itself is properly beyond the reach of the criminal laws."

Despite the cautionary overtones of much of the testimony, after the hearings on Sept. 28, Senate Judiciary Chairman Pat Leahy (D-Vt) introduced legislation intended to "plug a gap in prosecuting public corruption and corporate fraud cases created by [*Skilling*]." The proposed legislation, S. 3854, titled the "Honest Services Restoration Act," would create a new provision in a proposed 18 U.S.C. §1346A that defines "a scheme or artifice to defraud" as set forth in the mail and wire fraud statutes to include a scheme or artifice by a public official or private officer and director to "engage in undisclosed self-dealing."

Under the proposed statute, an individual engages in undisclosed self-dealing when he: 1) performs an act for the purpose of benefitting a financial interest, and 2) knowingly falsifies, conceals, or covers up material information regarding that financial interest that is required to be disclosed by any federal, state, or local law. The financial benefit must inure directly to the individual, the individual's spouse, minor child or general partner, or a business or organization with which the individual is associated.

In the case of a public official, defined to include federal, state, and local elected officials, the act must be an "official act." With respect to private officers or directors, the act must cause or intend to cause harm to the officer or director's employer and must generate a financial benefit worth at least $5,000. The term "employer" is defined to include publicly traded corporations and private 501(c)(3) charities.

Interestingly, the day after Senator Leahy introduced S. 3854, legislation bearing the same title also was proposed in the House of Representatives. While the definition of "undisclosed self-dealing" is the same as in the Senate bill, the House version, H.R. 6391, lacks any provision applying to private individuals. Both bills have been referred to the Judiciary Committees of the respective congressional houses.

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Prosecutorial Efforts

Until Congress determines the nature and extent of any new honest services fraud legislation, federal prosecutors will have to manage on already existing tools. And although the government may concede that it lost the battle in *Skilling*, federal prosecutors are not acting as if they believe they have lost the war. The best example is the *Skilling* case itself. In *Skilling*, the Supreme Court declined to reverse Jeffrey Skilling's convictions, instead remanding to the U.S. Court of Appeals for the Fifth Circuit for a determination whether the district court's "constitutional error" in instructing the jury on the honest services theory was harmless as to any of the 19 counts (one conspiracy, 12 securities fraud, one insider trading and five false statement counts) on which Mr. Skilling was convicted.

At trial, evidence of two conspiracies was submitted to the jury for consideration—a conspiracy to deprive Enron and its shareholders of the intangible rights of honest services and a conspiracy to commit securities fraud. Mr. Skilling argues that it is impossible to know which theory the jury relied upon in finding him guilty of conspiracy, requiring a reversal of that conviction. Further, Mr. Skilling argues that the other counts must be reversed because the jury was permitted to rely on the conspiracy conviction and evidence of honest services fraud in convicting on those counts as well.[6]

In response, the government asserts that the evidence on securities fraud was overwhelming and that "the inclusion of the flawed honest services fraud instruction was harmless beyond a reasonable doubt because no rational jury could have failed to find that Skilling conspired to commit securities fraud." Further, the government argues that even if the conspiracy conviction is reversed, the deprivation of honest services was never offered as a basis for conviction on any of the other counts, so those counts must remain.[7] The Fifth Circuit heard oral argument on these issues on Nov. 2, 2010, and a decision is pending.

Even in cases that seem lost, the federal prosecutors remain steadfast in their prosecutorial vigor. In December 2009, former State Senator Joseph Bruno, who served in the New York Senate for 30 years and was its majority leader for 13 years, was convicted of two counts of honest services fraud. While Mr. Bruno's appeal of that conviction was pending, the Supreme Court invalidated the honest services statute, leaving virtually no question that Mr. Bruno's conviction should be reversed.

The government has indicated that it intends to seek a retrial on "proper jury instructions," believing the evidence against Mr. Bruno supports a conviction under the honest services fraud statute based on bribery or kickbacks.[8] Mr. Bruno's counsel has indicated that he will seek a full reversal, arguing that the indictment should be dismissed on the merits. The issue is scheduled to be briefed to the U.S. Court of Appeals for the Second Circuit in February 2011.

Media reports note that a victory by Mr. Bruno will bring "an abrupt end to a case that took federal authorities years to construct,"[9] which may explain the government's reluctance to concede. Commentators note that the more alarming issue is that the federal government seeks to prosecute a state official for activities that did not amount to a violation of state law or regulation. While the Bruno case has led to calls for reform of state ethics laws, observers believe these are questions more properly addressed by the citizens of New York and their elected representatives rather than the federal government. "One would think that the federal government, after its use of the indecipherable honest services statute was rebuked by the Supreme Court, might consider leaving such prosecutions to state authorities…."[10]

Overcriminalization Efforts

The idea that the federal government is overstepping its bounds is a recurring theme voiced by students of the criminal justice system. The same day the Senate Judiciary Committee held the hearing on the impact of the *Skilling* decision, the House Judiciary Committee held a hearing titled "Reining in Overcriminalization: Assessing the Problems, Proposing Solutions." As evidenced by these topics, there is a tension within the federal government between boosting prosecutorial reach while simultaneously considering the propriety of the exponential increase of federal crimes over the past 30 years.

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As previously noted in this column,[11] concerns regarding the "overcriminalization" of federal law have flourished over the past few years. However, real efforts to address these concerns may be thwarted by continued demands for government response to corporate corruption and finding those potentially blameworthy for a sagging economy. Assessing the Obama administration's approach to criminal justice reform, the NACDL believes "public outrage against corporate malfeasance has stymied nascent bipartisan efforts to combat overcriminalization."[12] Instead, lawmakers continue to expand the federal government's criminal reach. For instance, the financial services reform bill signed by President Obama in July 2010 created more than 24 new crimes, many of which lacked any criminal intent requirement.[13]

Conclusion

Clearly, the Supreme Court's decision in *Skilling* is not the last chapter on honest services fraud. It remains to be seen whether Congress will consider the cautionary voices in drafting new legislation or decide to rely on the existing criminal framework.

1. 130 S. Ct. 2896 (2010).
2. Statement of Lanny A. Breuer before the U.S. Senate Committee on the Judiciary, "Honest Services Fraud" (Sept. 28, 2010).
3. 130 S. Ct. at 2933 n. 44.
4. Written Statement of Timothy P. O'Toole on behalf of the NACDL before the Senate Committee on the Judiciary Re: "Restoring Key Tools to Combat Fraud and Corruption After the Supreme Court's *Skilling* Decision" (Sept. 28, 2010) (emphasis in original).
5. Id. at pp. 5-6. See also Robert G. Morvillo and Robert J. Anello, "Alternatives to Honest Services Fraud," NYLJ (Oct. 5, 2010) (detailing elements of other federal statutes).
6. Jeffrey K. Skilling's Opening Brief on Remand from the U.S. Supreme Court, *United States v. Skilling*, 06-20885 (5th Cir. July 28, 2010).
7. United States' Response to Appellant's Opening Brief on Remand from the U.S. Supreme Court, *United States v. Skilling*, 06-20885 (5th Cir. Aug. 20, 2010).
8. Letter from Richard S. Hartunian, U.S. Attorney, to William J. Dreyer, *United States v. Bruno*, 10-1885 (2d Cir. Oct. 26, 2010).
9. Nicholas Confessore, "U.S. Seeks to Retry Ex-State Senate Leader Bruno," The New York Times (Nov. 16, 2010).
10. Harvey Silverglate, "When 'Honest Services' Prosecution Turns Into Persecution," Forbes.com blog (Dec. 1, 2010) (available at http://blogs.forbes.com/harveysilverglate/2010/12/01/bruno/).
11. Elkan Abramowitz and Barry A. Bohrer, "Too Big to Fail: Is Federal Criminal System in Need of Overhaul?" NYLJ (Sept. 10, 2010).
12. Kyle O'Dowd, Shana-Tara Regon, and Michael Price, "Notes From the Defense Bar: Fighting for Reform on Three Fronts During the Obama Administration," Federal Sentencing Reporter, Vol. 23, No. 2 at p. 121 (Dec. 2010).
13. Id. at 103 (discussing the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010)).

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