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Justices to Weigh Honest-Services Law

By [JOHN SCHWARTZ](#)

An unusual coalition of groups has come together to criticize the federal government's increasing reliance on a statute that is commonly used but little understood: honest-services fraud.

The honest-services law, on the federal books since 1988, broadly requires that public and corporate officials act in the best interests of their constituents or employers.

It has become an important tool for federal prosecutors, who used it successfully against the lobbyist [Jack Abramoff](#) and many of his associates. It is an element of the cases against former Gov. [Rod Blagojevich](#) of Illinois; the former New York State Senate majority leader, [Joseph L. Bruno](#); and former Gov. [Donald E. Siegelman](#) of Alabama.

Prosecutors have described the law as a valuable instrument against corruption at a time when officials have become increasingly sophisticated at covering their tracks.

But critics say it is used too broadly, is applied inconsistently, and too often criminalizes behavior that fails to merit the full weight of federal prosecution. The [Supreme Court](#) will hear three cases concerning the honest-services law in this term, with [two coming up for oral argument](#) on Tuesday.

Opposition to use of the law has emerged from across the political spectrum, from the [United States Chamber of Commerce](#) and the [Washington Legal Foundation](#) on the right, to the more left-leaning [National Association of Criminal Defense Lawyers](#).

"Could an insincere sermon at Sunday religious services come within the statute?" asked the chamber, half sarcastically, [in a brief](#) to the Supreme Court.

Justice [Antonin Scalia](#) has been harshly critical of the honest-services law, writing in a recent [dissent](#) that it has been applied to "a staggeringly broad swath of behavior." He said that it "invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate C.E.O.s who engage in any manner of unappealing or ethically questionable conduct."

One of the two cases coming before the court next week involves [Conrad M. Black](#), the newspaper executive who was convicted of defrauding his media company, Hollinger International. He is arguing that the law should not be applied to him because he did not contemplate "economic harm" to Hollinger.

In the second, Bruce Weyhrauch, a former Alaska state legislator, was convicted of failing to disclose a conflict of interest. He had not violated state law, however, and argues that the federal prosecution on honest-services charges violates important principles of federalism.

The third case, to be argued later in the term, involves [Jeffrey K. Skilling](#), the former chief executive of [Enron](#). He is arguing that the honest-services law is unconstitutionally vague.

Melanie Sloan, the executive director of Citizens for Responsibility and Ethics in Washington, a nonprofit watchdog group, scoffed at the idea that the law is so vague that people do not know when they have crossed the line, especially in the three cases before the Supreme Court.

“If you go to those cases — Black, Skilling and Weyhrauch — and look at what they did, a kindergartner knows that they were wrong,” she said. “It’s not credible that those guys really had no idea that what they were doing would get them into trouble. What they thought was that they wouldn’t get caught.”

The watchdog group’s [brief](#) to the Supreme Court called the law “an indispensable weapon in the prosecutorial arsenal for fighting government corruption” since it offers “a much easier evidentiary burden” than bribery law.

Critics of the law, however, say that its vagueness is used to bolster corruption cases in which the evidence might be weak or the offense, while perhaps distasteful, is minor.

That is the argument of Larry Remer, a political consultant in San Diego who faced multiple felony charges after successfully running a bond campaign for a community college. After the campaign was over, and the campaign fund depleted, a video production company sent in a bill for \$5,800. The college president proposed paying the bill with public money, ostensibly by buying outtakes from the video company, though it is illegal to use public money for such a campaign.

Federal prosecutors indicted Mr. Remer and the college president in 2004 on a range of charges related to the improper use of taxpayer money, including honest-services charges. Mr. Remer said he was baffled by the case.

“I do understand the need to get the sleazebags,” said Mr. Remer, whose case ended in a mistrial and a plea of guilty, along with the college president, to misdemeanor charges of improperly using public money, not honest-services charges. “But let’s get them with real laws. Let’s not just say we need to get this guy, so we’ll use this law because it can be melted to meet our needs.”

The United States attorneys office in San Diego declined to comment on the case.

The honest-services statute grew out of the Supreme Court’s earlier attempts to rein in the widening use by prosecutors of mail and wire fraud laws, said John C. Coffee, a professor at Columbia Law School.

In [a landmark 1987 decision](#), the Supreme Court limited mail and wire fraud prosecutions to cases involving tangible goods like money and property, and not the “intangible right” of the people to good government.

Within a year, however, Congress restored the prosecutors’ flexible tool by passing [the current law](#).

Since then, critics argue, chaos has resulted, with significant differences across the country in the ways that the statute is interpreted.

Bennett L. Gershman, a professor at [Pace University](#) Law School, said the power of prosecutors to overreach by focusing on a person to prosecute and then finding a law to apply “is not only subject to abuse under the honest-services theory, but has been abused” in cases like those involving Mr. Siegelman, the former Alabama governor.

The charges against Mr. Siegelman, including honest-services fraud, concerned a contribution from a businessman, [Richard M. Scrushy](#), to an issue campaign advocated by the governor, who later reappointed Mr. Scrushy to a state hospital board.

The Department of Justice has conducted an investigation of the case and found no misconduct in the prosecution; Mr. Siegelman’s supporters say the investigation was poorly conducted. Mr. Siegelman has appealed to the Supreme Court, which has not decided whether to take up the case.

Ms. Sloan, of the watchdog group, said that if prosecutors abused the statute, “it doesn’t mean the whole statute is at fault.”

“It means the prosecutors made some bad decisions,” she said.

Richard L. Thornburgh, who was attorney general when the honest-services law was passed, said he expected the Supreme Court to issue “something fairly sweeping” since it had taken on so many honest-services cases.

But, he added, “I think they can do it without doing violence to proper law enforcement.”

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