

## The 'honest services' fraud statute threatens the rule of law

By [David Rittgers](#) 5:32 PM 04/06/2011

### ADVERTISEMENT

The recent [conviction](#) of former lobbyist Kevin Ring under the “honest services” fraud statute marks the continuing mission creep of federal criminal law. Ring’s case is a cautionary tale of the terrible legal outcomes that can come about when a thoroughly dislikable — although statutorily innocent — defendant is in the dock.

Ring, who occasionally contributes to The Daily Caller, was a lobbyist associated with the much-reviled Jack Abramoff. The prosecution submitted as evidence an email where Ring discusses the need to “smack around” Treasury officials who were antagonizing one of his clients. Ring’s running joke in the office was holding up large campaign checks and remarking, “Hello, quid, where’s the pro quo?”

Ring’s behavior was certainly unseemly, but nothing presented at trial showed a bribe or kickback that illegally influenced lawmakers.

Last term, the Supreme Court decided three cases that should have killed the “honest services” fraud statute under which Ring was convicted. Instead, the Court rewrote the statute in an attempt to limit abuse of a vague law. The Ring case shows us how little has changed.

The “honest services” statute criminalizes “a scheme or artifice to deprive another of the intangible right of honest services.” This criminalized an employee lying to his employer, and as Justice Scalia [pointed out](#), “would seemingly cover a salaried employee’s phoning in sick to go to a ball game.” Prosecutors were able to get those convicted up to five years in federal prison, a \$250,000 fine, or both.

As a practical matter, the law gave federal prosecutors the power to criminalize objectionable behavior, conflating the merely unethical with the intentionally criminal. Behavior that was not illegal under state law (particularly state ethics requirements for public officials) became illegal under federal law.

The Supreme Court took up the constitutionality of the statute last term with an appeal from Ken Skilling of Enron fame. The Court’s majority did not strike down the ambiguous statute, but instead [rewrote it to cover cases of bribery and kickbacks](#).

While this sounds like an improvement, it is not the role of the Court to rewrite laws for Congress. And the latest conviction in an “honest services” fraud case shows that this statute continues to make bad law, putting cases to juries on an undefined standard.

The Supreme Court has [held](#) that the burden in public corruption cases, where legitimate lobbying and campaign donations (protected by the First Amendment) mean that money will change hands, an explicit bribe or kickback must be proven. To do otherwise threatens to outlaw lobbying as a profession and campaign contributions as an expression of political support.

Unfortunately, District Judge Ellen S. Huvelle refused a proposed instruction to Ring’s jury for an explicit *quid pro quo* standard. Jurors [admitted](#) “that they didn’t know much about how lobbying worked before the case, but prosecutors convinced them Ring had crossed the line.” As one juror put it, “[t]here’s a right way to do things and a wrong way to do things.”

This is an “I know it when I see it” standard of criminal justice. Which is to say, no standard at all.

Ring may not engender much sympathy, but as his liberty goes, so goes ours.

The expansion of jeopardy under the “honest services” law is unnecessary. Public corruption is already illegal. But unlike the existing federal [bribery](#) and [kickback](#) statutes, the “honest services” fraud statute isn’t limited to lobbyists or those who do [receive federal funds](#). Breach of a fiduciary duty between private actors falls within the statute when motivated by a bribe or kickback.

Criminalizing a breach of fiduciary duty revives the vagueness that the Supreme Court meant to curb. Who falls within the statute? Does it apply to private actors with the same force as public officials? Which fiduciary duties are covered? Must the fiduciary duty be one prescribed by state or federal law? As Justice Scalia put it in his *Skilling* dissent, “even with the bribery and kickback limitation the statute does not answer the question ‘What is the criterion of guilt?’”

The Supreme Court missed an opportunity in the *Skilling* decision to provide clarity to the law, allowing the scope of the revised “honest services” law to be determined by prosecutors, not legislators.

Saying that a perfume, painting, or pastry has a certain *je-ne-sais-quoi* about it is a compliment. The same can’t be said for federal statutes. Vague decrees such as “honest services” fraud undermine the rule of law.

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