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Justice Department

A Message Sent by the Federal Judiciary But Perhaps Not Received by the DOJ

BY MICHAEL KELLY

Federal courts are sending an important message to federal prosecutors about the dangers of interpreting criminal statutes too broadly. The question is whether the Department of Justice is listening.

In a series of cases, the Supreme Court has rebuffed efforts by federal prosecutors to expand the reach of criminal statutes. Now, lower courts are voicing increasing skepticism about expansive interpretations of federal criminal law.

The Supreme Court began to articulate its concerns in an unlikely case: the 2010 appeal by former Enron executive Jeffrey Skilling. He had been convicted of, among other things, defrauding Enron of his honest services. Prosecutors argued that Mr. Skilling violated the ''honest services'' fraud statute when he misrepresented Enron's financial condition so that he could earn more compensation from Enron.

But the Supreme Court rejected the Justice Department's interpretation, ruling that Congress intended for the statute to cover only employees who defrauded their employers of honest services through bribery or kickbacks. The Court reasoned that the government's interpretation, which would cover anyone engaged in the ''amorphous category'' of ''undisclosed self-dealing,'' would raise due process concerns (*Skilling v. United States*, 561 U.S. 358 (2010) (87 CrL 511, 6/30/10)).

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Last year, federal prosecutors defended the chemical weapons conviction of Carol Bond, a woman who had been involved in a domestic dispute with her husband's mistress. Prosecutors argued that Ms. Bond possessed and used chemical weapons when she sprinkled a powder on the mistress's belongings and caused the mistress to suffer a mild thumb burn easily treated by water.

But the Supreme Court threw out Ms. Bond's conviction, warning about the dangers of a boundless reading of the law and illustrating the atrocities of chemical warfare that motivated Congress to pass the law. The Court observed that the prosecutors' interpretation of the chemical weapons statute ''would sweep in everything from the detergent under the kitchen sink to the stain remover in the laundry room'' (*Bond v. United States*, 2014 BL 151637 (U.S. 2014) (95 CrL 312, 6/4/14)).

This year, federal prosecutors fought in the Supreme Court to uphold an obstruction of justice charge against a fisherman, John Yates. Mr. Yates had ordered a crewmember to throw undersized fish into the sea after federal inspectors determined the fish to be unlawfully caught and ordered Mr. Yates to preserve the fish until he returned to port. The Justice Department argued that the obstruction charge should stand because the statute applied to destruction of any ''tangible objects'' – like fish.

But the Supreme Court disagreed again, emphasizing the importance of context in interpreting criminal statutes. Congress passed this obstruction statute as part of the Sarbanes-Oxley Act, where the concern was the destruction of financial records, not fish. Four justices dissented from the opinion, but they also viewed this obstruction statute as ''a bad law'' that was ''too broad and undifferentiated'' and ''an emblem of a deeper pathology in the federal criminal code'' (*Yates v. United States*, 2015 BL 48342 (U.S. 2015) (96 CrL 576, 3/4/15)).

In each case, the Court held that a broad statute should not have been applied to the specific situation

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that the government had charged. The Court emphasized the importance of providing fair notice to defendants and urged the government to adopt a realistic view of what Congress intended.

The Supreme Court's concerns have influenced lower federal courts, which are increasingly rejecting far-reaching interpretations of criminal statutes. In the last year, federal prosecutors have been on the losing side of several notable cases:

■ In *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014) (96 CrL 292, 12/17/14), the Second Circuit concluded that the Justice Department had overreached in applying the insider trading laws to two portfolio managers who had not known either that they were trading on inside information or that the tipping insider was receiving a personal benefit for violating his fiduciary duty. The court highlighted ''the doctrinal novelty'' of the government's ''recent insider trading prosecutions, which are increasingly targeted at remote tippees many levels removed from corporate insiders.''

■ In *United States v. Toviave*, 761 F.3d 623 (6th Cir. 2014) (95 CrL 557, 8/6/14), the Sixth Circuit rejected the government's attempts to apply the forced criminal labor statute to a guardian who forced his children to perform household chores. The court expressed dismay that the government's interpretation would criminalize the exercise of ''innocuous, widely accepted parental rights.''

■ In *United States v. Bonds*, 784 F.3d 582 (9th Cir. 2015) (97 CrL 112, 4/29/15), the Ninth Circuit reversed the conviction of Barry Bonds, the former San Francisco Giant, because the federal obstruction statute did not cover his evasive and rambling, but true, answer to a question before the federal grand jury. In separate opinions, a number of judges worried about the breadth of the government's interpretation.

■ In *United States v. Sidorenko*, 2015 BL 113577 (N.D. Cal. 2015), a federal district court in San Francisco dismissed an indictment against three foreign nationals for bribery and fraud based on conduct wholly outside the United States, ruling that these statutes did not apply extraterritorially. At oral argument, U.S. District Judge Charles Breyer (the brother of Supreme Court Justice Stephen Breyer) was deeply critical of the government's legal interpretation, stating ''[t]here are really no limits to your argument'' and ''I don't understand where you really draw the line.''

The Justice Department is reportedly deciding whether to appeal the *Newman* and *Bonds* decisions to the Supreme Court, and it has appealed the *Sidorenko* case to the Ninth Circuit. It may or may not ultimately prevail in these cases.

In the past, the Justice Department has won many close cases, and it still prevails in some of them. For instance, in February, the Seventh Circuit affirmed the conviction of a doctor under the Anti-Kickback Statute for ''referring'' patients to a home health care provider even when the patients independently selected the home provider and when it was undisputed the patients needed the services. The doctor had received payments for certifying the forms subsequently prepared by the provider. The Seventh Circuit found there were ''two plausible readings'' of the statute (one of which would have resulted in the acquittal of the doctor), but opted for the government's broader interpretation because it better captured Congress's intent in enacting the Anti-Kickback Statute (*United States v. Patel*, 778 F.3d 607 (7th Cir. 2015); 96 CrL 527, 2/18/15).

However, as courts grow increasingly skeptical of broad interpretations of criminal law, this is the type of case that the Justice Department may start losing on a consistent basis in the future. Amidst this growing scrutiny, the Justice Department should take a hard look at marginal cases or charges to determine whether they truly reflect Congress's intent in passing criminal laws. If the Justice Department gains a reputation for offering unreasonably broad interpretations, that could harm the Justice Department's institutional interests far more than the outcome of any particular case.

Prosecutors should not shy away from tough cases, but tough cases should not cause prosecutors to push statutes past their natural breaking points. When it comes to the interpretation of criminal statutes, unbridled creativity is not a virtue for a prosecutor. Fairness should be the decisive factor.

This clear message being delivered by federal courts should be considered carefully by the Justice Department as it pursues vigorous and fair enforcement of the law in its current and future cases.

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