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'Varsity Blues' Cases Narrow Path for Honest Services Fraud

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The US Supreme Court continues to reverse public corruption convictions with surprising regularity and often unanimity—based on what it views as unconstitutionally broad application by prosecutors of the federal fraud statutes.

The First Circuit's recent decision in the consolidated "Varsity Blues" college admissions scandal cases, [United States v. Abdelaziz](#) and [United States v. Wilson](#), was in line with that trend. So were two other Supreme Court decisions that same week reversing public corruption convictions in the Second Circuit— [Percoco v. United States](#) and [Ciminelli v. United States](#) .

On May 10, the First Circuit vacated the convictions of two parents for mail and wire fraud based on the honest services and property theories of fraud. Consistent with Supreme Court precedent, the vacatur reflects general reluctance of federal appellate courts to criminalize what courts increasingly view as ordinary business dealings or politics. It also suggests a return to more traditional reading of federal fraud statutes and what constitutes property under them.

In 2019, federal prosecutors in Massachusetts charged two parents, Gamal Abdelaziz and John Wilson, for allegedly making payments to university accounts so university employees would secure their children's admission as athletic recruits.

Appellants were charged with mail and wire fraud and conspiracy to corruptly influence university employees. In 2021, a jury convicted appellants on all counts. In the ensuing appeal, they challenged the full slate of convictions, including mail and wire fraud based on honest services fraud, by allegedly using payments to deprive universities of honest services of their employees, and property fraud, by allegedly depriving universities of property in the form of "admissions slots."

First Circuit Vacatur

Challenging the government's two theories of mail and wire fraud, appellants argued that payments to

university accounts don't constitute honest services fraud because payments were directed to alleged fraud victims. They said admissions slots aren't property—or not as a matter of law as suggested by the jury instructions.

Subject to limited caveats, the First Circuit agreed with appellants in each instance, narrowing the reach of the mail and wire fraud statutes and heeding the Supreme Court's "repeated instruction to apply the honest services doctrine narrowly."

Honest Services Fraud

"While the question is close, in the end[.]" the First Circuit held that mail and wire fraud charges based on honest services fraud failed as a matter of law under the Supreme Court's holding in [United States v. Skilling](#). The First Circuit characterized the government's honest services fraud charges as a "non-traditionally recognized form of bribery" that didn't fit the historical "core" of the honest services doctrine under 18 U.S.C. § 1346.

Recounting the doctrine's history and courts' efforts to define the scope of § 1346, the First Circuit relied on *Skilling* in holding that § 1346 applied only to "fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived."

Compared to payments in the "Varsity Blues" matter, made to "an agent's purportedly betrayed principal," *Skilling* "embodies a narrower understanding of the meaning of 'bribery' for purposes of honest services fraud[.]" The First Circuit thus found that a broad and far-reaching interpretation of honest services fraud that extends to payments made to a bribery victim would be "impossible to reconcile" with *Skilling*.

Such interpretation also would disregard "*Skilling's* core 'hold[ing] that § 1346 criminalizes only the bribe-and-kickback core'" of bribery claims. "[C]onstruing § 1346 to cover conduct" that includes payment to a purportedly betrayed party "would not provide sufficient notice for 'ordinary people [to] understand what conduct is prohibited'" by the statute. Thus, the conviction on that count necessarily was vacated.

Property Fraud

Separate and apart from the honest services fraud theory, the First Circuit addressed and rejected the government's theory of property fraud as applied to the facts of the case. As charged, a prosecution for property fraud requires the government to prove "that the 'object of the fraud ... [was money or] property in the victim's hands.'"

The First Circuit rejected the government's contention that "admissions slots at any university always qualify as property for purposes of the mail and wire fraud statutes." The court concluded such an all-encompassing bright-line rule fails to account for variability in admission slots, including early admission, rolling admission, and deferred admission.

The First Circuit reasoned the government's position also didn't consider that "admissions occur at all levels of education, from nursery school through postgraduate studies, and involve millions of students and parents." Although rejecting appellants' equally absolute position that slots are never appropriately considered property, the First Circuit held the government failed to identify "adequate details about the admissions slots" in the record that could support the jury instruction that "admission[s] slots are the property of the [u]niversities."

In reversing the property-based convictions on the ground that the government "did not prove that property was involved in the commission of those offenses," the Circuit emphasized the "narrowness" of its holding: "We do not hold that admissions slots cannot ever be property. Nor do we hold that the jury instruction given by the district court could never be appropriate. The resolution of these questions will require much more detail, both legal and factual, on the nature of the purported property interest at issue."

Impact

Although the First Circuit left a path forward for prosecutors to rely on a property fraud theory, it closed the door on charging "non-traditionally recognized form[s] of bribery" as honest services fraud. The full scope of what constitutes non-traditionally recognized bribery has yet to be determined. At least in the First Circuit, however, bribe payments made to "an agent's purportedly betrayed principal" fall squarely within that category.

Federal courts' continued reluctance to criminalize what increasingly is viewed as ordinary business dealings or politics as usual will appropriately require prosecutors to more adequately weigh additional considerations when confronted with atypical public corruption schemes.

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