Experts weigh in on health of 'honest services' law
By Patricia Manson
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David N. Yellen contends that a federal law used to prosecute elected officials and corporate bigwigs accused of victimizing the people they were supposed to serve is on life support.

The so-called "honest services" provision of the mail fraud statute suffered a devastating blow last summer when the U.S. Supreme Court limited the law's reach, according to Yellen.

And Yellen, the dean of Loyola University Chicago School of Law, could not be happier with that state of affairs.

Prosecutors will no longer be able to use the prohibition on depriving another of "the intangible right of honest services" to seek the conviction of people who had no reason to believe their conduct was illegal, Yellen said.

Instead, Yellen said, prosecutors will be limited to pursuing "honest services" charges against only those defendants accused in bribery or kickback schemes.

And Yellen contended that such defendants usually can be charged directly with giving or receiving bribes or kickbacks rather than with violating the "honest services" provision.

"The statute's not dead, but it's largely redundant now," Yellen said.

Eric H. Sussman, however, delivered a more optimistic prognosis.

Sussman, a former federal prosecutor now with Kaye, Scholer LLP, did say that the government turned to the "honest services" provision too often in the past.

"I think there were clearly some cases where the statute was stretched beyond what it should have been," Sussman said. "As a result, people were convicted of things that arguably shouldn't have been illegal."

And Sussman predicted that prosecutors will be choosier in the future when it comes to using the honest services law.

But Sussman was not ready to put the "honest services" provision on the critical list.

Sussman said he did not believe the limits placed on the use of the provision would hamper the prosecution of such defendants as government officials who abuse their position of trust.

"I think the Supreme Court's decision does not have that big an impact," Sussman said.

And Sussman noted that Congress reportedly is considering amending the "honest services" provision to cover more offenses.
"It will be interesting to see what kind of legislation finally gets passed," Sussman said.

In June, the Supreme Court held that the "honest services" provision was unconstitutionally vague and broad.

And the high court concluded that the jurors who found former Enron Chief Executive Officer Jeffrey Skilling guilty of crimes that included conspiracy and securities fraud should not have been instructed on the "honest services" law.

But while holding that the law applied only in cases involving bribery or kickbacks, the court did not overturn Skilling's conviction.

Instead, the Supreme Court sent the case back to the New Orleans-based 5th U.S. Circuit Court of Appeals to determine if Skilling was entitled to a new trial.

The 5th Circuit has not yet issued a ruling in the case.

Although Skilling's ultimate fate is unknown, the Supreme Court's ruling offered hope to other defendants charged or convicted in white-collar crime cases.

Last month, the Chicago-based 7th U.S. Circuit Court of Appeals overturned former newspaper baron Conrad Black's conviction on two counts of fraud. U.S. v. Conrad Black, et al., Nos. 07-4080, 08-1030, 08-1072 and 08-1106.

Prosecutors had conceded that Black's conviction on those counts rested in part on the theory that he had deprived Hollinger International Inc. of his faithful services as a corporate officer.

Black, who was released on bond after serving two years of a 6?-year term, has not yet been re-sentenced.

Other defendants bringing challenges in the federal courts in Chicago based on Skilling include former insurance mogul Michael "Mickey" Segal, who was convicted of siphoning millions of dollars from a brokerage firm. U.S. v. Michael Segal, No. 02 CR 112.

Also planning to contest his conviction is Antoin "Tony" Rezko, a former fundraiser for impeached Illinois governor Rod R. Blagojevich. Rezko was found guilty of squeezing kickbacks from people who wanted to do business with the state. U.S. v. Antoin Rezko, No. 05 CR 691.

Blagojevich himself unsuccessfully sought to delay his trial on federal corruption charges while Skilling's case was pending before the Supreme Court.

In August, a jury found Blagojevich guilty of one count of lying to federal agents, but deadlocked on 23 other counts that included charges of racketeering. U.S. v. Rod Blagojevich, et al., No. 08 CR 888.

Blagojevich is to be retried next year.

Lawyers for another former Illinois governor, George H. Ryan, are to be in court next week to ask that their client's conviction and 6?-year sentence be thrown out.
In 2006, a federal jury found Ryan guilty of 18 counts — including obstruction, racketeering conspiracy and mail fraud — stemming from actions he allegedly took as Illinois secretary of state and later as governor.

A divided 7th Circuit upheld Ryan's conviction in U.S. v. Lawrence E. Warner, et al., Nos. 06-3517 and 06-3528.

But in a civil action filed in U.S. District Court for the Northern District of Illinois, Ryan's lawyers argue that his racketeering and mail fraud convictions are invalid under Skilling.

The lawyers contend that prosecutors "acknowledged repeatedly" during closing arguments in Ryan's trial that they had not proven the existence of bribes or kickbacks.

But prosecutors in their own filing argue that the challenged convictions could have been obtained "only if the jury concluded that Ryan took bribes and kickbacks, the very conduct Skilling held is prohibited under the 'honest services' statute."


Chicago attorney Albert W. Alschuler said he hoped Skilling would result in fewer criminal prosecutions being pursued under an "honest services" theory.

"The mail fraud statute was pretty much out of control," Alschuler said. "It was a sprawling, expansive statute."

Alschuler, who represents both Segal and Ryan, noted that he was speaking about the "honest services" provision generally and not about his clients' cases.

Yellen expressed the same view as Alschuler.

The "honest service" provision was the result of a rush by Congress to counter the Supreme Court's ruling in McNally v. U.S., 483 U.S. 350 (1987), that the mail fraud and wire fraud statutes applied only to schemes to deprive others of tangible property, according to Yellen.

"I'm glad it's gone," Yellen said of the expansive interpretation of the "honest services" provision. "Serious white-collar offenses are still going to be charged and still punished severely, but the law is going to be a little less murky."