Citizens United Redux?

Sarbanes-Oxley, Jeffrey Skilling and the End of Term Rulings of the Roberts Court

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Introduction

The Supreme Court's 5-4 decision in *Citizens United v. Federal Election Commission,* allowing unlimited corporate spending on elections, has focused a national spotlight on the business rulings of the Roberts Court. President Obama has criticized *Citizens United* repeatedly, calling it "a huge victory [for] the special interests and their lobbyists - and a powerful blow to our efforts to rein in corporate influence." Senate Judiciary Committee Chairman Patrick Leahy has been even more vocal and persistent, holding hearing after hearing on the rulings of the Roberts Court that unfairly disadvantage hard-working Americans and hailing Elena Kagan's potential confirmation to the Court as a welcome counterweight to the Court's "activist conservative majority."

By the end of June, *Citizens United* could be just the tip of the iceberg. Just as Congress is passing a comprehensive response to the worst financial crisis since the Great Depression, the Court in *Free Enterprise Fund v. PCAOB* may strike down a major portion of the Sarbanes-Oxley Act, Congress' response to the country's last financial crisis in 2001 and 2002, caused by the Enron and WorldCom accounting scandals. In three related cases -- one involving the criminal conviction of former Enron CEO Jeffrey Skilling -- the Court might also hold unconstitutional all or part of Congress' "honest services fraud" statute, which has been one of the main criminal laws used in successful recent prosecutions of notorious white collar criminals such as Randy "Duke" Cunningham, William Jefferson, and Jack Abramoff. And finally, in *Rent-A-Center v. Jackson,* the Court may add to a long line of rulings that force aggrieved consumers and employees out of court and into arbitration proceedings that are structurally biased to favor corporations.

We don't know at this point how these cases will be decided or what the votes in them will be. But we do know that these remaining business cases will provide a big part of the story of the Court's final month and an important frame for the Kagan hearings, slated to begin on the very same day the Court issues its final rulings.

Post Enron: Regulating Public Companies

As Wall Street accountability legislation moves through Congress, the Court is considering whether to strike down a key part of the Sarbanes-Oxley Act, passed by overwhelming majorities in

Congress and signed into law by President Bush in 2002 in the wake of the Enron and related financial auditing scandals. *Free Enterprise Fund v. PCAOB* (argued Dec. 7, 2009) involves a constitutional challenge to the Public Company Accounting Oversight Board ("the Board"), which ensures oversight of audits of public corporations that are subject to federal securities laws by establishing auditing and ethical standards, conducting investigations, and imposing sanctions when appropriate. If the Court were to invalidate the Board, it would be a major setback to congressional efforts to overcome the legacy of Enron and ensure that our nation's corporations play by the rules and remain accountable to their shareholders and the American people. At a time when Americans are clamoring for tough new reforms in the financial sector, and when faith in the federal government is near an all-time low, such a ruling by the Roberts Court could have a significant negative effect on the public's view of the Court.

The PCAOB Board (known colloquially as the "peek-a-boo" board) is appointed by the SEC and subject to the SEC's comprehensive control, and Board members may be removed by the SEC for dereliction of duty. The Free Enterprise Fund has attacked the constitutionality of the Board based on the fact that the President has neither the power to appoint Board members, nor the power to remove them. According to the Fund, the Board's structure violates Article II of the Constitution, which vests all executive power in the President. However, in the 1938 case of *Humphrey's Executor v. United States*, the Supreme Court upheld the constitutionality of restrictions on presidential power to remove members of independent agencies, and has repeatedly reaffirmed that decision since, most notably in a 7-1 ruling written by Chief Justice Rehnquist in *Morrison v. Olson* (1988).

The Free Enterprise Fund is a 501(c)(4) organization established by Club for Growth founder Stephen Moore. The litigation is part of a long-running effort by conservative legal activists to attack *Humphries Executor* and *Morrison* (they prefer Justice Scalia's dissent over Chief Justice Rehnquist's majority opinion) and to challenge the existence of independent federal agencies as an infringement on the powers of the "unitary executive." If the Court sides with the Fund, and undercuts or perhaps even overturns these prior rulings, it will be a powerful new example of the activism of the Roberts Court and a wake-up call for Americans who want more corporate accountability, not less.

Solicitor General Elena Kagan argued this case on behalf of the United States.

"Honest Services" Cases and Corporate and Public Corruption

With the Goldman Sachs fraud case pending and the Bernie Madoff scandal still fresh in the public consciousness, few Americans will want to see the Court overturn charges against corporate criminals such as former Enron CEO Jeffrey Skilling, but Skilling is one of three criminal defendants in three different cases before the Court this Term raising challenges to a federal criminal law known as the "honest services" statute. The cases are: 1) *Black v. United States* (argued 12/8/09), which involves newspaper tycoon Conrad Black, who is accused of enriching himself and his company through bogus deals; 2) *Weyhrauch v. United States* (argued 12/8/09), which involves Alaska State Representative Bruce Weyhrauch, who is accused of ethical violations and conflicts of interest in an

oil services deal; and 3) *Skilling v. United States* (argued 3/1/10). Skilling was prosecuted and convicted after lying about the financial health of Enron and then selling half a million Enron shares to make a profit of $15 million just a few months before Enron fell into bankruptcy.

The "honest services" section of the federal mail and wire fraud statute, 18 U.S.C. Section 1346, penalizes "a scheme or artifice to deprive another of the intangible right of honest services." Congress adopted this portion of the statute in 1988 to reverse a Supreme Court decision, *McNally v. United States*, that had insisted on a very narrow reading of the fraud statute. Honest services charges have become an invaluable tool for prosecutors seeking to hold accountable corrupt politicians and corporate executives who have betrayed the trust of their constituents or shareholders.

Yet across the three oral arguments, some of the Justices seemed willing, eager even, to address the constitutionality of the honest services fraud statute and strike it down as impermissibly vague or "overbroad." For example, in the argument in *Black,* Justice Scalia appeared to acknowledge that he could interpret the statute in such a way as to preserve honest services prosecutions for corporate corruption, but asked why he should bother to "turn somersaults" to find a way to save a statute he apparently dislikes.

In dissent in *McNally* -- the 1987 case that prompted Congress in 1988 to clarify the "honest services" portion of the mail and wire fraud statute -- Justice Stevens argued that even the un-amended statute was not unconstitutionally vague and gave politicians and corporate executives sufficient notice of what sort of corrupt conduct could be prosecuted under the statute. In a sentence that might well come to describe today's Roberts Court as much as it did the 1980s Rehnquist Court, Justice Stevens concluded his dissent by noting his "lingering questions about why a Court that has not been particularly receptive to the rights of criminal defendants in recent years has acted so dramatically to protect the elite class of powerful individuals who will benefit from this decision."

Forced Arbitration and Corporate Denial of Access to Courts

Forced arbitration is emerging as a critical flashpoint in the debate over the pro-corporate activism of the Roberts Court. Congress passed the Federal Arbitration Act of 1925 to promote arbitration by commercial trading partners as a more efficient alternative to the federal courts. In a long series of rulings, some divided along ideological lines, some not, the Court has interpreted the Act beyond the wildest dreams (or nightmares) of the Act's Gilded Age legislators. Now, the fine print in agreements that most people sign to get jobs, credit cards, cell phones, and medical treatment forces victims of corporate misconduct into arbitration proceedings. Arbitration can be problematic when an individual victim of misconduct tries to raise a claim against a large corporation because of rules that favor corporations -- such as limitations on discovery and high initial fees -- and the inevitable fact that corporations repeatedly appear before the same private arbitrators and thus keep them and their arbitration forums profitable, risking bias.

On April 27, 2010, in *Stolt-Nielsen S.A. v. AnimalFeeds International*, the arbitration process became even more corporation-friendly when the Supreme Court ruled 5-3 (Justice Sotomayor was recused) that arbitrators do not have the power to consolidate multiple claims against the same company into a single class action arbitration unless the company has clearly consented to class action arbitration. This ruling makes arbitration, hailed for its efficiency and cost effectiveness, efficient and cost effective only for corporate defendants.

On April 26, 2010, the day before *Stolt-Nielsen* came down, the Court heard argument in the still-pending case of *Rent-A-Center v. Jackson*, a case in which the Court will decide what rights, if any, employees and consumers have to challenge the fairness of arbitration agreements in federal court. Antonio Jackson signed an agreement when he was offered a job at Rent-A-Center requiring that any and all future claims against his employer be submitted to an arbitrator, rather than a court. Jackson was given no opportunity to negotiate the terms of the forced arbitration agreement, and his failure to sign it would have meant he would not get the job. The terms of the agreement were lop-sided in favor of Rent-A-Center, particularly with respect to fees and discovery procedures. The agreement's cramped vision of "justice" became especially troubling when Mr. Jackson sought to bring a racial discrimination claim pursuant to Section 1981 of the Civil Rights Act of 1866, a statute specifically designed to ensure that victims of discrimination could get a fair day in federal court. Mr. Jackson argued that the arbitration agreement he signed was "unconscionable" in that it created unfair procedures, was forced on him by his employer, and he had not meaningfully agreed to give up his right to go to court.

Mr. Jackson's arguments received a rough hearing at the Supreme Court, particularly from the Court's conservatives. Justice Scalia several times dismissed consumers and employees who sign arbitration agreements as "stupid people." Justice Scalia also cited to the *amicus* brief filed by the Chamber of Commerce in arguing against allowing consumers and employees to challenge the fairness of arbitration agreements in court because this would make arbitration agreements "not much use for the employer." Chief Justice Roberts was similarly dismissive of the concern that a job applicant effectively had a gun to his head -- sign the arbitration agreement or don't get a job -- calling Jackson's claim one based on "economic inequality or whatever."

These comments illustrate powerfully what President Obama and Senator Leahy mean when they critique the pro-corporate activism of the Roberts Court and say they want judges who understand how the law can be twisted in a manner that unfairly disadvantages hard-working Americans.