3 Rulings May Reveal Next Frontier Of Gov't Contract Cases

By **Gregory Rosen, Lauren Sujeeth and Cindy Lopez** (June 24, 2025)

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In Kousisis v. U.S.,[1] the U.S. Supreme Court in May granted the government a rare win in the white collar space, allowing wire fraud prosecutions without a resulting economic loss.

This decision is difficult to square with recent Supreme Court jurisprudence in the same realm.[2] But the takeaway is clear: The U.S. Department of Justice will continue to broadly prosecute fraud.

This is particularly relevant given the current administration's recent focus on diversity, equity and inclusion initiatives and its stated intent to investigate such initiatives using a wide array of statutes. But even Kousisis suggests that DEI enforcement will come with its own litigation risks for the government.

Kousisis and other recent white collar Supreme Court decisions highlight the tension and discomfort that arises when prosecutors utilize traditional fraud statutes in more aggressive or less commonplace applications. It also suggests that, while the DOJ may scale back public corruption efforts or narrow Foreign Corrupt Practices Act prosecutions,[3] procurement and related fraud remains a prime target for government enforcement — with implications for all government contractors.

The Changing Landscape

This administration has increased its enforcement focus on the DEI landscape. In a May 19 memorandum, the DOJ announced that it had established a Civil Rights Fraud Initiative, intending to pursue civil and criminal action against any recipient of federal funds that knowingly violates federal civil rights law.[4]

According to the memorandum, the Civil Rights Division will spearhead a nationwide effort — including with local U.S. attorney's offices and state attorneys general — to coordinate enforcement actions.[5] The department is also encouraging whistleblowers to report knowledge of illegal discrimination.[6]

This is somewhat echoed in Justice Clarence Thomas' concurrence in Kousisis, casting general constitutional doubt on disadvantaged business enterprise, or DBE, initiatives in the government contracts sector.[7]

Coupled with Criminal Division Head Matthew Galeotti's May 12 pronouncement that certain white collar prosecutions will remain active over the next several years, including "health care fraud and program and procurement fraud,"[8] the DOJ will prioritize individual defendants who commit crimes "at the expense of shareholders, workers, and American investors and consumers."[9]

Given the robust use of the False Claims Act in recent years, alongside a now-empowered

DOJ with wire fraud tools at its disposal, these policy directives suggest continued enforcement in the contracting realm.

There are nonetheless meaningful barriers to successful prosecutions. Recent Supreme Court decisions raise serious questions about how far the DOJ can push the DEI envelope. And a look at these decisions may reveal the next stage of litigation.

Wire Fraud

In Kousisis,[10] the Supreme Court adopted a plain-text reading of the wire fraud statute — Title 18 of the U.S. Code, Section 1343 — that had nothing to do with economic loss or harm. Section 1343 requires the government to prove that the defendants used wires to execute a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."

Kousisis concerned federally funded construction contracts with the Pennsylvania Department of Transportation, which required that a certain portion of the work be performed by a DBE.[11] The defendants, who were convicted of violating the wire fraud statute, misrepresented their compliance by subcontracting with a DBE that acted "solely as a pass-through entity" and did no actual work on the projects, in violation of the U.S. Department of Transportation's DBE regulations incorporated into the construction contracts.[12]

The defendants argued that there was no economic loss because they had successfully performed the work, such that any violation of the incorporated DBE regulations resulted in no economic loss to the government.[13]

In its Kousisis decision, the court refused to read the wire fraud statute to exempt frauds that resulted in no economic loss.[14] In rejecting the defendants' narrow interpretation, the court noted that "the boundaries of the fraudulent-inducement theory are not so imprecise as to risk encroachment on States' authority or to 'create traps' for the 'unwary.'"[15]

As discussed at the outset, Kousisis represents a rare victory for the government's prolific use of the wire fraud statute, and a largely total endorsement of the plain text of the statute's application to a government contractor.[16]

Gratuities

But the deference afforded to federal prosecutors in that context can be difficult to square with recent Supreme Court jurisprudence in the same field.

For example, in Snyder v. U.S.,[17] the court in June 2024 held that a reward given to a state or local public official after a contract is awarded did not violate Title 18 of the U.S. Code, Section 666.[18] Section 666 prohibits the theft or bribery of state, local or tribal government officials concerning federally funded programs.

On appeal, the court tackled whether the law only prohibits state and local officials from accepting bribes that are promised before the official act, as opposed to during the course of the transactional history.[19]

As noted by the court, the nuanced analysis assessed text, statutory history, statutory structure, statutory punishments, federalism and fair notice, leading to the conclusion that

Section 666 was a bribery statute, not a gratuities statute.[20]

Despite the use of the word "rewarded" in the statute, the court was unwilling to transform the statute into one that criminally prohibited after-the-fact bonuses.[21] Thus, the court narrowed the scope of Subsection (a)(1)(B), disallowing prosecutions based on the benefits accrued after the key governmental action, so long as the things of value provided after the official act did not accompany a corrupt agreement at the time the act was performed.[22]

In other words, the statute's language implied a preexisting quid pro quo, not a retroactive gift of appreciation.

Evidence Impairment

Fischer v. U.S., decided last summer, involved a unique application of Title 18 of the U.S. Code, Section 1512(c)(2), in the context of the riot at the U.S. Capitol on Jan. 6, 2021.[23]

The court began its analysis by noting that "[t]he Sarbanes-Oxley Act ... imposes criminal liability on anyone who corruptly 'alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding.'"[24]

It continued, "The next subsection extends that prohibition to anyone who 'otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so.'"[25]

The Fischer prosecutors sought to charge individuals who participated in the riot with federal obstruction because they obstructed an official proceeding — the certification of the Electoral College, as mandated by the U.S. Constitution and federal law.[26]

The government argued that the plain language established a broad actus reus under the statute, and — coupled with the context of the original statute's enactment in 2002 — was sufficient to act as a catchall criminal clause to prevent future and unique attempts at obstruction.

The court rejected this argument, largely using Subsection (c)(1) as the guiding light in understanding Subsection (c)(2), tethering the scope of the latter to the (c)(1) offense. Contrary to the government's interpretation, the broader context of Section 1512 and Congress' intent was actually "to capture other forms of evidence and other means of impair[ment] ... beyond those Congress specified in (c)(1)."[27]

The court clarified that Subsection (c)(2) only covers obstruction that involves "some action with respect to a document, record," or other tangible evidence, consistent with the structure of Subsection (c)(1).[28]

Reconciling the Three

There are wide-ranging and arguably conflicting takeaways from these decisions relevant to the government investigations and contracting space.

Both Fischer and Snyder emphasize a contextual reading of the statute. For example, in Fischer, Section 1512(c)(2) could only be read in conjunction with Section 1512(c)(1), despite Congress' broad language when it enacted the law. Similarly, in Snyder, the court did not evaluate the plain text of the statute alone, but amalgamated multiple reasons for why Congress did not intend the bribery statute to sweep so broadly.

Both cases involved significant limitations to the use of each statute, and animating those concerns were the court's continued apprehension of criminalizing what might be perceived as normal conduct. In Snyder, the court highlighted that if the government's interpretation were correct, Section 666 would "cover[] virtually all state and local officials — about 19 million nationwide."[29] Interference with local political conduct of this nature would upend "an intricate web of regulations, both administrative and criminal" currently in place by state and local governments.[30]

The larger takeaway in Snyder is that courts may now be reticent to widely apply statutes that, when read broadly, implicate the conduct of millions.[31]

Fischer is no different. In narrowing the construction of the statute to those instances of evidence impairment, rather than an omnibus catchall, the court expressed concern over criminalizing "peaceful protester[s] ... [and] any lobbying activity that 'influences' an official proceeding."[32]

As in Snyder, the court evaluated the varying degrees of punishments available for similarly situated crimes. And again, the court hesitated to endorse a plain-text reading of the statute that could swallow other federal crimes in the process.

But how does one square Fischer and Snyder with Kousisis? Indeed, the author of the Fischer dissent — Justice Amy Coney Barrett — joined the majority in Snyder. This alone is unique. In Fischer, Justice Barrett criticized how the majority set aside the obvious plain text of the statute:

> Given these premises, the case that Fischer can be tried … seems open and shut. So why does the Court hold otherwise? Because it simply cannot believe that Congress meant what it said. Section 1512(c)(2) is a very broad provision, and admittedly, events like January 6th were not its target. (Who could blame Congress for that failure of imagination?) But statutes often go further than the problem that inspired them, and under the rules of statutory interpretation, we stick to the text anyway.[33]

Justice Barrett's dissent chastised the majority for engaging in "textual backflips to find some way — any way — to narrow the reach of subsection (c)(2)."[34]

But Justice Barrett joined the majority in Snyder nonetheless, suggesting limits to a broad principle regarding plain-text interpretation, even though Section 666 used key language — "rewarding" — that militated in favor of the government's broad reading and less cramped construction.

Could it be that judicial philosophy governing statutory interpretation only goes so far? Or is the Supreme Court engaging in results-oriented case determinations, based on the way the statute is used and the specifics of each underlying fact pattern?

Regardless, it may not matter, because the court has now empowered the DOJ to continue its wire fraud approach with fewer restrictions.

The Next Wave of Prosecutions: Concerns Abound

The Supreme Court seems to be signaling that criminal statutes that have been broadly applied in the past, when the statute is clear and the conduct is obviously deceitful, will be

upheld. But statutes that seem more contextually ambiguous or threaten a unique federal-state balance will be scrutinized.

It could also be that Kousisis involved core white collar conduct — fraud to win federally funded public contracts and the use of a wire. There were no federalism concerns or interpretative ambiguities to resolve.

Snyder and Fischer seem to represent cases on the outside, where the dangers for prosecutorial overreach or political misuse triggered inquiry. In an even broader sense, fraud cases, like Kousisis, continue to give the Supreme Court less pause than public corruption or obstruction cases.

How might this apply in a future white collar investigation? For starters, individuals and companies should be cognizant of the DOJ's likely aggressive use of the wire fraud statute. While prosecutors may have once feared a jury would be loath to convict without evidence of loss, they can now benefit from a clear legal instruction informing a future jury to disregard such arguments around the lack of economic harm. That alone may pay dividends to prosecutors.

In the contracting world, expect continued inquiry into claims that contractors or subcontractors defrauded the government. The administration has signaled its particular desire to use the FCA to target DEI efforts, and Kousisis allows them to do so more easily.

But, as Justice Thomas alluded to in his concurrence, whether a contractor has materially defrauded the government based on a failure to comply with antidiscrimination laws is the next likely area of dispute.[35] After all, as he noted, the "materiality inquiry does not rest solely on a contract's labels. Even if the fact of contrary contract language, materiality 'cannot be found where noncompliance is minor or insubstantial.'"[36]

Given this landscape, it behooves all organizations that accept federal funding — prime contractors and subcontractors, grant-funded institutions, government corporations, nonprofit organizations, healthcare providers, etc. — to be prepared for whatever comes next. Given the broad rhetoric employed by the DOJ, organizations should carefully assess their agreements to see what sort of civil rights certifications were issued or required.

Contractors should likewise weigh their DEI exposure — remembering that FCA liability does not hinge upon specific intent — and consider proactive steps to mitigate any risk. This may include revamping their recordkeeping practices, reviewing the manner in which they handle complaints, and providing reminders about whistleblower protections.

With an endorsed and open-ended theory underpinning wire fraud, and the looming debate over materiality in the DEI context, good housekeeping and patience is warranted.

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[1] 605 U.S. ___, 145 S. Ct. 1382 (2025).

[2] See, e.g., Snyder v. United States, 603 U.S. 1 (2024); Fischer v. United States, 603 U.S. 480 (2024).

[3] See U.S. Department of Justice, Guidelines for Investigations and Enforcement of the Foreign Corrupt Practices Act (FCPA) Memorandum (June 9, 2025), available at https://www.justice.gov/dag/media/1403031/dl.

[4] U.S. Department of Justice, Civil Frauds Initiative Memorandum (May 19, 2025), available at https://www.justice.gov/dag/media/1400826/dl?inline=&utm_medium=email&utm_source=govdelivery.

[5] Id. at 2.

[6] Id.

[7] 145 S. Ct. at 1404 (Thomas, J., concurring).

[8] U.S. Department of Justice, Focus, Fairness, and Efficiency in the Fight Against White-Collar Crime Memorandum, at 2 (May 12, 2025), available at https://www.justice.gov/criminal/media/1400046/dl?inline.

[9] Id.

[10] 605 U.S. ___, 145 S. Ct. 1382 (2025).

[11] Id. at 1388-89.

[12] Id.

[13] Id. at 1391.

[14] Id. at 1392 ("In short, the wire fraud statute is agnostic about economic loss. The statute does not so much as mention loss, let alone require it.").

[15] Id. at 1398 (quoting Snyder, 603 U.S. at 15).

[16] See id. ("The language of the wire fraud statute is undeniably broad. But Congress enacted the wire fraud statute, and it is up to Congress – if it so chooses – to change it.") (internal citations and punctuation omitted).

[17] 603 U.S. 1 (2024).

[18] Id. at 19.

[19] Id. at 5.

[20] Id. at 15.

[21] Id. at 18.

[22] Id. at 18-19.

[23] 603 U.S. 480 (2024).

[24] 18 U.S.C. § 1512(c)(1).

[25] Id. § 1512(c)(2).

[26] 603 U.S. at 484.

[27] Id. at 492.

[28] Id. at 490.

[29] 603 U.S. at 14.

[30] Id. at 15.

[31] In the federal sphere, however, the payment of both bribes and gratuities is prohibited. See 18 U.S.C. § 201(c), which forbids providing a thing of value to a federal public official "for or because of any official act." This language encompasses gifts designed to reward or "thank" federal officials, whether they are members of Congress, contracting officers, or low-level government employees.

[32] 603 U.S. at 496.

[33] Id. at 506 (Barrett, J., dissenting).

[34] Id.

[35] 605 U.S. at 28 (Thomas, J., concurring).

[36] Id. at 29. (Internal citations omitted).