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WLF Asks Supreme Court to Rein In Foreign Corrupt Practices Act

(Esquenazi v. United States)

“Continued uncertainty regarding the scope of the Foreign Corrupt Practices Act has created a constitutionally intolerable dilemma for U.S. companies operating overseas. American executives are left to guess at whether making payments necessary to allow them to compete will also expose them to prosecution under the FCPA.”—Rich Samp, WLF Chief Counsel

WASHINGTON, DC—The Washington Legal Foundation (WLF) today urged the U.S. Supreme Court to review (and ultimately overturn) a federal appeals court’s broad interpretation of the Foreign Corrupt Practices Act (FCPA), a federal law that bans payments to a “foreign official” for the purpose of obtaining or retaining business. In its brief urging review of a decision of the U.S. Court of Appeals for the Eleventh Circuit, WLF argues that the term “foreign official” generally does not include employees of overseas commercial entities.

The Petitioners are two American telecommunications executives who received lengthy prison sentences for making payments to employees of Haiti Teleco, the telephone company in Haiti. The appeals court held that Haiti Teleco should be deemed an “instrumentality” of the Haitian government (and thus that its employees should be deemed “foreign officials”) because—at the time of the payments—the government of Haiti owned a controlling share of Haiti Teleco’s stock. Haiti has since fully privatized the company.

Noting that the FCPA does not define the term “instrumentality,” and that no previous appellate court decision has ever construed the term, WLF argued that the Supreme Court ought to grant review in order to provide guidance regarding the term’s meaning. WLF noted that numerous FCPA investigations focus on payments made to employees of commercial entities, yet American executives lack any clear guidance regarding when the FCPA bars payments to such entities. WLF’s brief further argues that the language and structure of the FCPA suggest that it does *not* apply to payments made to commercial entities that do not perform traditional governmental functions.

Following its filing, WLF issued this statement by Chief Counsel Richard Samp: “Continued uncertainty regarding the scope of the FCPA has created a constitutionally intolerable dilemma for U.S. companies operating overseas. American executives are left to guess at whether making payments necessary to allow them to compete will also expose them to prosecution under the FCPA. Moreover, federal officials have sought to expand FCPA far beyond the limits established by the language of the statute.”

WLF is a public interest law firm and policy center that regularly litigates in opposition to overly expansive use of the criminal laws against legitimate businesses and their employees.