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'Honest services' law expansion sought



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While the [U.S. Supreme Court](#) has attempted to limit the application of vague “honest services” statutes, the [Obama Administration](#) is working to restore what the *Wall Street Journal* describes as “essentially unlimited prosecutorial discretion to bring white-collar cases.”

[David Rittgers of the Cato Institute](#) explains the meaning of this law: “The ‘honest services’ statute criminalizes ‘a scheme or artifice to deprive another of the intangible right of honest services.’ This criminalized an employee lying to his employer, and as Justice Scalia pointed out, ‘would seemingly cover a salaried employee’s phoning in sick to go to a ball game.’ Prosecutors were able to get those convicted up to five years in federal prison, a \$250,000 fine, or both.”

On the impact of the laws, Rittgers writes: “As a practical matter, the law gave federal prosecutors the power to criminalize objectionable behavior, conflating the merely unethical with the intentionally criminal. Behavior that was not illegal under state law (particularly state ethics requirements for public officials) became illegal under federal law.”

In other words, the power of prosecutors was vast. While the Court rewrote the law, Rittgers contends that little has changed.

The *Journal* notes how the honest services laws amount to a large expansion of the criminal justice system, and is used as a method of back-door business regulation: “Among the multitude of federal, state and local laws, there is little human behavior, much less criminal activity, that remains outside the reach of the justice system. Federal white-collar criminal statutes have multiplied in recent years, often as a way to regulate business conduct.”

The vagueness of this law troubles [Timothy Sandefur](#), an attorney at the [Pacific Legal Foundation](#) and Cato Institute Adjunct Scholar. In his article [Get Rid of Vague Laws: They impede on individual rights and economic freedom](#), he explained the danger of vague laws: “There’s probably nothing more dangerous to individual rights than vaguely written laws. They give prosecutors and judges undue power to decide whether or not to punish conduct that people did not know was illegal at the time. Vagueness turns the law into a sword dangling over citizens’ heads — and because government officials can choose when and how to enforce their own interpretations of the law, vagueness gives them power to make their decisions from unfair or discriminatory motives.”

Sandefur notes that vagueness combined with proliferation of criminal laws gives government large power over citizens: “Combine vagueness with the ever expanding number of statutes and regulations affecting businesses and entrepreneurs on a daily basis and the result is a government bureaucracy with almost unlimited power to intimidate and blackmail citizens with the threat of prosecution — or to punish practically any conduct they choose to declare ‘illegal.’”

Sandefur explains this and more in an audio broadcast The Intangible Right of Honest Services.

The *Journal* piece also warns of the danger of vague laws: “Vague laws are invitations to legal mischief. In his recent dissent in *Sykes v. U.S.*, Justice Antonin Scalia wrote that ‘We face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws.’”

What is troubling are the efforts by the Obama Administration and some members of Congress to undo what limits the Court applied, and also their efforts to expand the power of prosecutors. An assistant U.S. attorney general told Congress that it needed to “remedy” the Court’s decision. The *Journal* also reports there are three bills in Congress that would “[expand] the reach of prosecutors to go after unpopular politicians or businesses whom they can’t pin with a real crime.”

An example is a bill introduced in the last Congress by Vermont Senator Patrick Leahy, titled “Honest Services Restoration Act.” In the current Congress, virtually identical legislation has been introduced under the title H.R. 1468: Honest Services Restoration Act. It was introduced by Representative Anthony Weiner of New York, who is no longer serving in Congress.

The *Journal* article is Return of ‘Honest Services’: Politicians try to restore prosecutorial powers that the Supreme Court killed (subscription required).

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