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Bill Mateja: Supreme Court should void 'honest services'

05:40 PM CST on Friday, December 18, 2009

If reading this article is getting in the way of giving your boss an honest day's work, the federal government may want a word with you.

The problem is the federal honest-services statute, a law so spectacularly vague that it's been used to convict everyone from [Enron](#) fraudster [Jeffrey Skilling](#) to Baylor University basketball coaches who merely violated [NCAA](#) rules.

What began in 1988 as a law targeting mail and wire fraud by making it a crime to deprive an employer or the government of the "intangible right of honest services" quickly has become a favorite tool of federal prosecutors targeting not just public officials but employees in the private sector.

In many cases, it's the charge prosecutors turn to when nothing else will stick, a way to secure a fraud conviction without proving financial gain or any quid pro quo deal. And, it's been used to criminalize conduct that could be construed as nothing more than self-serving acts, conflicts of interest and slight ethical transgressions, including failing to give your employer an honest day's work.

Thankfully, the [U.S. Supreme Court](#) has recognized the problem and is taking a close look. Expect seismic consequences if the statute is repealed, as many now expect based on public comments from the court.

During oral argument this month, Justice [Stephen Breyer](#) wondered aloud whether the statute in its current form implicates the vast majority of the 150 million U.S. workers today, and nearly every justice expressed doubt about the statute's constitutionality. After all, who among us can say we're providing "honest services" every minute of the workday.

Undoubtedly, were the Supreme Court to strike down the statute, defendants previously convicted under the statute would come out of the woodwork asking to have their convictions overturned. Additionally, prosecutors who depend on the statute to prosecute worthy public corruption cases would be hamstrung.

In Dallas, the statute was used just last October to obtain high-profile convictions against some of those involved in the Dallas City Hall corruption scandal, although those convictions were coupled with other charges that are safe from Supreme Court review. Striking down the statute, however, would have voided convictions obtained against three Baylor men's basketball coaches in the mid-1990s for scheming to obtain credits and scholarships for junior college transfers. The coaches' actions may have violated NCAA rules, but no law was broken except for this so-called honest services statute.

Notwithstanding these potential shockwaves, the Supremes should strike down the honest services statute because its use leads to selective prosecutions and makes federal prosecutors omnipotent in interpreting the law. When a prosecutor's mere discretion (or whim) wields that kind of power, it can hardly be said that the rule of law is alive and well.

While we're at it, our justice system should revisit the more than 4,000 federal offenses scattered throughout the federal criminal code, as well as untold numbers of federal regulatory criminal provisions. Enforcement of this ever-growing criminal code has contributed to a backlogged judiciary, overflowing prisons and the incarceration of innocent individuals who are persuaded to plead guilty not because they are guilty, but because exercising their constitutional right to a trial is all too risky.

To this end, Congress heard testimony last summer from strange bedfellows who have formed a coalition to bring "overcriminalization" to lawmakers' attention, namely, the American Bar Association, [American Civil Liberties Union](#), [Cato Institute](#), Constitution Project, Federalist Society, [Heritage Foundation](#), National Association of Criminal Defense Lawyers, and Washington Legal Foundation.

Unquestionably, neither fraud nor public corruption can be tolerated, but relying upon flawed laws and an overcriminalized justice system are not solutions we can live with.

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