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THE HONEST SERVICES STATUTE: WHEN FEDERAL RIGHTEOUSNESS GOES OFF THE RAILS

by

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In recent years, federal prosecutors have been aggressively using the so-called “honest services” statute to accuse local politicians and corporate CEOs of criminal wrongdoing. The U.S. Attorney in Chicago, Patrick Fitzgerald, has garnered much attention, for example, as a result of his effort to crack down on corruption in the Windy City. Scores of federal cases are being brought against local officials around the country. Since no one believes that corruption is desirable, the federal attorneys have been able to deflect scrutiny of their methods by focusing attention on the shady actions of their targets. But that may be about to change.

When the Supreme Court reconvenes in the fall, white collar criminal lawyers and prosecutors will closely watch *Black v. United States* (08-876). Conrad Black was a newspaper magnate who was accused of abusing his position by lining his own pocket with phony management fees. A jury convicted Black, but on appeal his attorneys argued that the honest services law on which prosecutors relied is unconstitutionally vague. The Supreme Court will consider that complaint when it hears oral arguments in the case in the fall.

The Supreme Court has granted review in a second honest services fraud case, *Weyhrauch v. United States* (08-1196). The Court’s ruling will resolve a split in the federal circuit courts over whether the honest services law mandates the creation of a federal “common law” which defines the disclosure obligations of state and local government officials. The U.S. Court of Appeals for the Ninth Circuit, following the Seventh and Eleventh Circuits, held in *Weyhrauch* that disclosure obligations whose breach can be a predicate for honest services violations can be determined by federal common law. The Third and Fifth Circuits, in contrast, have held that courts must look to state or local law, not federal common law, to determine if a breach of a disclosure duty has occurred.

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The Honest Services Law

In modern times, federal prosecutors have used the “mail fraud” statute as a way to expand federal criminal jurisdiction into local governmental affairs. Any corrupt use of the mails—false documents, fraudulent invoices, dishonest correspondence—could potentially bring persons and organizations within the federal sphere. In the 1980s, government attorneys went so far as to push a legal interpretation that the federal law gave them a mandate to enforce the citizenry’s right to “good government.” Under this expansive reading of the law, federal prosecutors could sweep into any city or town and indict local officials if they were not delivering “honest and impartial services” to their constituents. In *McNally v. United States*, 483 U.S. 350 (1987), the Supreme Court applied the proverbial “brakes” to such a sweeping reading of the law, reasoning that it would implicate “the Federal Government in setting standards of disclosure and good government for local and state officials.”

After the *McNally* ruling, Congress enacted the controversial “honest services” fraud statute. 18 U.S.C. § 1346 provides: “For the purposes of this chapter, the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.” With that new law on the books, federal prosecutors not only revived the idea that they could police local politics for honest and impartial service, but that private employers and corporate fiduciaries could also be prosecuted under the law.

Last February, Justice Antonin Scalia expressed alarm at the “staggeringly broad swath of behavior” that the feds now claim was subject to federal criminal jurisdiction:

If the ‘honest services’ theory—broadly stated, that office holders and employees owe a duty to act only in the best interests of their constituents and employers—is taken seriously and carried to its logical conclusion, presumably the statute also renders criminal a state legislator’s decision to vote for a bill because he expects it will curry favor with a small minority essential to his reelection; a mayor’s attempt to use the prestige of his office to obtain a restaurant table without a reservation; a public employee’s recommendation of his incompetent friend for a public contract; and any self-dealing by a corporate officer. Indeed, it would seemingly cover a salaried employee’s phoning in sick to go to a ball game.

Unfortunately, Justice Scalia could not persuade his colleagues to hear a challenge to the honest services fraud law in that particular case, *Sorich v. United States* (08-410, cert denied, Feb. 23, 2009). Within a few months, however, the Court seemed to reverse course by announcing its intention to hear the appeals of Conrad Black and Bruce Weyhrauch, which will bring intense scrutiny to the controversial honest services statute and the manner in which it is used.

The Controversy

The honest services statute is controversial for two reasons. First, there is considerable

uncertainty about the meaning and scope of the law. This is a problem because American criminal law has long held that people should have advance warning of what conduct is criminally prohibited. That principle is clearly enunciated in the ex post facto clause of the U.S. Constitution. Art. I, sec. 9. Note, however, that the purpose of the ex post facto clause can be subverted if the Congress can enact a criminal law that condemns conduct in very general terms, such as “dangerous and harmful” behavior. Such a law would not give people fair notice of the prohibited conduct. To guard against the risk of arbitrary enforcement, the Supreme Court has said the law must be clear:

A criminal statute cannot rest upon uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.

Connally v. General Construction Company, 269 U.S. 385, 393 (1926).

The Supreme Court’s void-for-vagueness doctrine operates together with the due process principle of fair warning to reduce the likelihood of arbitrary and discriminatory application of the law by keeping policy matters away from police officers, administrative bureaucrats, prosecutors, judges, and members of juries, who would have to resolve ambiguities on an ad hoc and subjective basis.

Federal prosecutors have evaded these principles by using the honest services statute in a manner that comes close to criminalizing any government action that is not in the “public’s best interest.” They want that “interest” to be determined by prosecutors and juries retroactively on a case-by-case basis. As Justice Scalia observes, “Without some coherent limiting principle to define what ‘the intangible right of honest services’ is, whence it derives, and how it is violated, this expansive phrase invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct.”

The second problem with the honest services statute concerns the constitutional principle of federalism. The American Constitution created a federal government with limited powers. As James Madison noted in the *Federalist* no. 45, “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” Most of the federal government’s “delegated powers” are specifically set forth in article I, section 8. The intent of the Tenth Amendment was to make it clear that the powers not delegated to the federal government “are reserved to the States respectively, or to the people.”

Conclusion

Unfortunately, Congress has gradually accumulated increased authority under the guise of its power to regulate commerce “among the several States.” In 1995, the Supreme Court finally revived the constitutional principle of federalism by striking down the Gun Free School Zones Act in *United States*

v. Lopez, 514 U.S. 549 (1995). In a concurring opinion, Justice Clarence Thomas noted that if Congress had been given authority over matters that simply “affect” interstate commerce, much, if not all, of the enumerated powers set forth in article I, section 8 would be unnecessary. Corruption is as old as the concept of government, but in early American history there was a clear division of power. Federal prosecutors handled allegations of corruption in the federal system and local officials handled local allegations. All states have laws that prohibit bribery and extortion. Last February, Justice Scalia put the matter rather bluntly, “Is it the role of the Federal Government to define the fiduciary duties that a town alderman or school board trustee owes to his constituents?” By asking the question in this way, Justice Scalia answered it. Let’s hope a majority of the Supreme Court reaches the same conclusion in the *Black* and *Weyhrauch* cases in the coming October 2009 term.

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