No Reason for Congress to Tinker With Federal Criminal Law

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Sometimes even the United States Congress does not know when to leave well enough alone.

Despite the growing sentiment that the federal government has overextended the reach of federal criminal law, both the House of Representatives and the Senate are considering legislation that would expand the ability of federal prosecutors to bring public corruption cases in areas now subject to prosecution only under state law. This legislation is designed to address a series of decisions by the United States Supreme Court that have limited the reach of federal criminal law in the public corruption sphere.

In 1987, in *McNally v. United States,* the U.S. Supreme Court limited the application of federal mail and wire fraud statutes to cases involving crimes against tangible property rights. The following year, Congress enacted section 1346 of Title 18 to specifically provide that the "scheme or artifice to defraud" required to show a violation of the mail and wire fraud statutes included "a scheme or artifice to deprive another of the intangible right of honest services."

But in June 2010, in *United States v. Skilling, United States v. Black,* and *United States v. Weyhrauch,* the U.S. Supreme Court narrowed the scope of "honest services fraud" prosecutions to cases involving bribes and kickbacks. Although the Court was deeply divided, the majority specifically rejected the position of the United States Department of Justice that "honest services fraud" should include cases involving "self-dealing" – that is, taking some action that gives one personal gain, without disclosing that fact – or conflicts of interest.

One piece of legislation being considered on the House side (sponsored by Rep. Jim Sensenbrenner (R-Wis.) and co-sponsored by Rep. Mike Quigley (D-Ill.)) would restore the ability of prosecutors to bring cases based on such self-dealing. It would also apply mail and wire fraud statutes to licenses and other intangible rights (a response to the Supreme Court's decision in *Cleveland v. United States)* and would override the Supreme Court's 1999 ruling in *United States v. Sun-Diamond Growers,* which interpreted federal bribery law to require a specific connection between a gift and an official action. Other provisions would expand the availability of court-ordered wiretaps and the scope of the Racketeering Influenced and Corrupt Organizations Act, lengthen potential sentences and extend the statute of limitations for certain crimes.

A similar bill, sponsored by Sen. Patrick Leahy (D-Vt.), has been reported out of the Judiciary Committee and placed on the Senate's legislative calendar.

At a hearing before the House crime subcommittee, Deputy Assistant Attorney General Mary Pat Brown testified that the Department of Justice supports the House proposal. Miller & Chevalier partner Timothy O'Toole, testifying on behalf of the National Association of Criminal Defense Lawyers, suggested that the bill's provisions raise the same concerns about vagueness and federalism that previously led the Supreme Court to limit the scope of what prosecutors may do under the mail and wire fraud statute.

Assuming that this legislation has sufficient support to pass to be signed by the President into law, it is likely to represent yet another attempt by the federal government to overextend the reach of federal criminal law. Unfortunately, that may mean that it will be some number of years before the judicial system has effectively rejected such legislation as ambiguous or otherwise unconstitutional.

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