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As the pendulum swings: bribery backlash to Honest Services Doctrine

By: James W. Ryan September 4, 2014

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T'was not so long ago that we saw an insurance company lobbyist in Massachusetts find himself convicted of wire and mail fraud as a result of his company picking up the tab for golf and entertainment junkets to Puerto Rico by the chairman of the Massachusetts House Insurance Committee and others.

The government theory was that the lobbyist had conspired to engage in "a scheme or artifice to deprive another of the intangible right of honest services" and had thus deprived the good citizens of the commonwealth of their intangible right to the honest services of their elected officials. This is the so-called "Honest Services Doctrine." *U.S. v. Sawyer*, 85 F. 3d 713 (1st Cir. 1996).

Prosecutors used the Honest Services Doctrine to target public officials who took part in some questionable conduct or action, but without leaving behind any telltale evidence of traditional "quid pro quo" — that the public official took some official action as a result of an improper inducement!

The Honest Services Doctrine proved to be a very sharp arrow in the prosecutor's quiver whenever public officials committed some unseemly or ethically questionable act but the government could not actually prove that it was part of a bribery scheme.

Critics argued that the ambiguous statutory language of the doctrine allowed overly ambitious prosecutors to turn minor ethical violations into federal prosecutions carrying the potential of a 20-year federal prison sentence.

A few years after the *Sawyer* case, the government used the Honest Services Doctrine when executives at the parent company of Lincoln Park conspired to bribe the Rhode Island speaker of the House by giving a very large ($1 million) "performance bonus" to the speaker's law partner in the hope of influencing the speaker's actions on important legislation.

The speaker was not prosecuted but the businessmen were, and, in affirming their convictions, the 1st Circuit uttered these sobering words of warning to all those who might try to curry favor and thereby improperly influence the actions of public officials:

"We have held that favors, such as lunches, golf games, and sports tickets, may be modest enough and sufficiently disconnected from any inferable improper quid pro quo that a fact finder might conclude that only business friendship was at work, or at least nothing more than a warm welcome was being sought by the favor giver." See *U.S. v. Sawyer*, 85 F.3d 713, 728-29 (1st Cir. 1996). "The line between permissible courting and improper use of gifts to obtain behind-the-scenes influence by an official is not always an easy one to draw, but one draws close at one's peril." *U.S. v. Potter*, 463 F.3d 9, 18 (1st Cir. 2006).

The Honest Services Doctrine was on a roll, but the tide turned in 2010 when the U.S. Supreme Court overturned the fraud conviction of former Enron CEO Jeffrey Skilling. In reversing the conviction, the justices unanimously ruled that this type of broad interpretation of the honest services statute was unconstitutionally vague.

Justice Ruth Bader Ginsburg, writing for the majority, said that prosecutors' use of the Honest Services Doctrine should be limited to cases of actual bribery and/or kickbacks. The doctrine effectively had been eviscerated. *Skilling v. U.S.*, 130 S. Ct. 2896 (2010).

How far has the pendulum swung? Just last year, in a case where the president of a security company in Puerto Rico gifted $1,000 tickets and all expenses to a boxing match in Las Vegas to two local senators who had already backed legislation that would benefit the company's business, a panel of judges from the 1st U.S. Circuit Court of Appeals reversed the conviction and reiterated the core message: gratuities — while often illegal themselves — are not the same as bribes!

The 1st Circuit went on to say that the difference between a bribe and an illegal gratuity is the intention of the bribe-giver to engage in an agreement to exchange something of value in return for official action. If the agreement to exchange the thing of value does not happen until after the act has been performed, the court said, the agreement doesn't amount to a bribe. *U.S. v. Fernandez,* 722 F.3d 1 (1st. Cir. 2013).

There are many statutes that prohibit bribery both here and abroad. The statutes have not changed. What has changed is that the courts have made it clear that when prosecutors accuse a public official of taking some official action in return for a bribe, they have got to have the evidence to prove it!

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