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STATUTES AND ORDINANCES

An attorney with WilmerHale examines what legal commentators have called the over-criminalization of the U.S. Code. The former federal prosecutor discusses the best tactic for defense lawyers to tackle the problem, including by focusing less on critiques of Congress, and more on lobbying federal prosecutors on charging decisions.

Prosecutorial Discretion in the Age of Over-Criminalization

By Timothy Perry

Depending on whom you ask, the U.S. Code contains between 3,000 and 4,500 federal crimes. The sheer volume has prompted legal commentators to decry the steady expansion of federal criminal statutes over the last several decades as an ''over-criminalization'' of American society that threatens individual liberty and takes an unduly draconian approach to corporate misconduct. Typically, these commentaries blame Congress for the phenomenon. By focusing on Congress, however, legal observers spend too little time on the role of the executive branch and ignore the more immediate, practical question: How should prosecutors exercise their enormous discretion in an era when theories of criminal liability are so abundant?

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Every defense lawyer has his or her favorite example of a criminal statute that, on its face, seems picayune or unnecessary. Title 18's prohibition against unauthorized use of Smokey the Bear's image is a frequent object of derision (Section 711), as is the misdemeanor sanction for misappropriation of the Swiss coat of arms (Section 708). A quick scan of the industry-standard desk book yields examples of equally head-scratching felonies. You could serve 10 years in prison for ''connecting parts of different notes'' (Section 484), which is simply another form of counterfeiting, or three years for knocking down your neighbor's mailbox (Section 1705).

Conduct Not Previously Thought of as Strictly Criminal. The expansion of the U.S. Code is not just a source of statutory curiosities. More problematic are the statutes that are framed so broadly that they encompass conduct not previously thought of as strictly criminal. Among these, the primary example is the ''destruction, alteration or falsification of records'' offense (Section 1519). Enacted as part of the Sarbanes-Oxley reforms, that statute imposes felony liability on anyone who ''knowingly alters, destroys, mutilates, conceals . . . any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency . . . .''

In drafting Section 1519, Congress eliminated many of the requirements found in traditional obstruction and falsification statutes. For instance, Section 1519's statutory terms do not require proof that an act of falsification be material, i.e., significant. And its intent standard poses a low bar for prosecutors, who need only show

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that a defendant knowingly altered a record with the ''intent to impede, obstruct or influence'' some matter within the jurisdiction of a federal agency. As a result, the statute would appear to criminalize non-material false entries on (for instance) a tax return, just so long as they are meant to ''influence'' the IRS's work—even though traditionally, federal tax fraud has generally required proof of both materiality and a heightened willfulness standard.

Remarkably, some courts have held that to be guilty of impeding an investigation under Section 1519, a defendant need not actually have knowledge of that investigation—or even that such an investigation exists. These precedents would seem to dilute the ''nexus'' requirement, present in traditional obstruction statutes, which forces prosecutors to prove a connection between a defendant's obstructive conduct and a specific matter. Despite all this, a violation of Section 1519 is a serious felony, carrying a 20-year statutory cap. Focusing as it does on record-keeping, Section 1519 poses especial risk to regulated entities, including public companies and their employees.

Poster Child for Over-Criminalization. Although unfamiliar to non-criminal practitioners, Section 1519 is by no means obscure. As a federal prosecutor, I brought Section 1519 charges against a CEO who deleted emails, and lied during Securities and Exchange Commission testimony, in a matter related to stock manipulation, a context surely contemplated by Congress. But I also used the statute to indict perpetrators of a campaign finance fraud conspiracy after they falsely recorded the source of contributions in municipal and Federal Election Commission records—even though campaign finance crimes typically require proof of willfulness. In short, Section 1519 is a statute designed to apply where others fall short: it is a kind of catch-all for conduct that a prosecutor wants to charge—a poster child for over-criminalization.

Despite critiques of an overly expansive federal code, Congress has little incentive to repeal statutes like Section 1519, and is unlikely to do so any time soon. Indeed, if there is anything that the heralds of over-criminalization ignore, it is that when Congress has expanded the federal criminal code, it was often in response to popular demand. Section 1519, for instance, was drafted in the wake of the Enron scandal, in response to a perception that white collar criminals too often skirt prosecution as a result of legal ''technicalities.''

What, then, is a critic of over-criminalization to do? To be sure, they should continue to press their critiques of Congress. But they should also turn their attention to the discretion exercised by federal prosecutors, who have the immediate, day-to-day responsibility for selecting the particular statutes to charge. Legal observers should closely monitor these charging decisions and more vocally critique those decisions they view as prosecutorial overreach—and then incorporate those critiques into the ongoing dialogue about over-criminalization. Moreover, they should argue that prosecutors must recognize, and take into account, the historical context in which they operate. And in an era of an expansive federal code, where theories of criminal liability are so abundant, prosecutors should frame charges ever more reservedly, with a close eye on uncodified notions of justice, prudence and common sense.

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