The Fraud Enforcement and Recovery Act (FERA): Criminalizing Our Way out of the Financial Crisis?

The Senate Judiciary Committee recently approved the Fraud Enforcement and Recovery Act (S. 386). FERA includes problematic provisions that criminalize conduct already criminal under existing law and try to reverse the Supreme Court's well-reasoned decision in *U.S. v. Santos* (2008). These unnecessary and duplicative criminal provisions in no way address the actual cause of the financial crisis.

- **Why are these provisions of FERA unnecessary and duplicative?**
  - Federal law already contains over 4,450 criminal offenses. By their own admission, federal law enforcement agencies have all of the tools necessary to reach any criminal conduct related to the market crisis.
  - Subsections 2(a) through 2(e) of FERA do not reach any novel conduct that is not already covered by current law, nor can these provisions be applied retroactively to conduct that took place before the law's enactment.
- **What is the problem with legislatively reversing *United States v. Santos*?**
  - In *Santos*, the Court correctly limited the term "proceeds," as used in the principal money laundering statute, to the profits of a crime, not its gross receipts. *United States v. Santos*, 128 S. Ct. 2020 (U.S. 2008).
  - Before *Santos*, expansive interpretations of "proceeds" exacerbated inappropriate and unfair use of the money laundering statute to "tack on" additional charges and dramatically increase penalties based on conduct that is virtually indistinguishable from the underlying offense.
  - Allowing the government to charge both the underlying offense *and* money laundering for the gross receipts of the underlying offense is, as Justice Stevens wrote in *Santos*, "tantamount to double jeopardy."
  - Outside the context of drug trafficking, money laundering charges generally result in sentences greater than the sentences imposed for the underlying offense itself. This is despite the fact that, in many cases, the alleged "laundering" adds no additional harm and does not remotely resemble "laundering" as that term is commonly understood.
- **How do we know that current law is adequate to prosecute crimes related to the financial crisis?**
  - In the mortgage fraud context, the adequacy and severity of current law is illustrated by the case of Chalana McFarland. For her role in a mortgage fraud scheme, McFarland was convicted of "money laundering, bank fraud, wire fraud, and conspiracy to commit such acts as well as obstruction of justice and perjury." A first-time offender, she is now serving a 360-month sentence – *i.e.*, 30 years.
- **What should be done instead?**
  - The theory motivating FERA – that criminal activity caused the current financial crisis and that prosecution can solve it – is faulty at best and potentially destructive of honest business. If Congress feels it must "get tough on financial crime," then it should focus on useful ventures, such as: (1) promoting inter-agency cooperation and (2) providing more money and manpower where existing resources are demonstrably deficient to enforce the laws already in place. Reflexively responding with improper criminalization is both inadequate and dangerous.

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