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**Memo:** Kentucky voices

### In Farmer case, we could push law so far as to criminalize politics

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A Herald-Leader editorial rightly dismisses both reflexive allegations of "politics!" and what is essentially pity for someone once so admired as grounds to preclude or abort the federal criminal prosecution of Richie Farmer.

As John Prine sang, "It ain't such a long drop from the diamonds in the sidewalk to the dirt in the gutter" and this is supposed to be a nation of laws, not men and women. That said, however, some of the charges against Farmer do raise important questions about the intersection of law, especially federal criminal law and political decisions made by government officials, elected or appointed.

The federal law that Farmer is charged with violating applies to a state agency head, if the agency receives at least \$10,000 in federal monies in a 12-month period, a minimal requirement which makes the law applicable to a vast multitude of state and local agencies and departments.

The law makes it a crime to do, among other things, the following: embezzle, steal, obtain by fraud "or otherwise without authority knowingly convert to the use of any other person other than the rightful owner or intentionally misapply property" of the agency worth more than \$5,000.

One of the charges against Farmer alleges that he violated this law by giving "do- nothing" jobs to his girlfriend and two other associates. This charge and this part of the law merits our further attention.

By causing the Department of Agriculture to pay these three people for "do-nothing" jobs it would not appear that Farmer embezzled, stole or himself obtained by fraud any of the department's property or money. Neither would it appear that these hirings and subsequent payments could constitute conversion of department monies in violation of the law. That's because Farmer, as agriculture commissioner, could lawfully and properly authorize these hirings and salaries.

That leaves as a basis for these charges that by appointing these three people to and causing them to be paid for "do-nothing" jobs, Farmer "intentionally misapplied" the agriculture department's money.

It would seem that the very purpose of Farmer's election as agriculture commissioner was for him to decide how the department's resources would be applied and spent. Ultimately, the main function of the job is to decide what programs the department participates in or funds or does not, how it is organized and its responsibilities allocated and other and various operational issues in true, as President Harry Truman said, "the buck stops here" fashion.

Every decision on these issues would be intentional, and the arguments would seem endless as to whether the decision was optimal, wise, counterproductive or even foolish. The hiring of a staff person seen by someone as ineffective or unqualified would appear to constitute an intentional misapplication of department funds.

Last summer, the Herald-Leader reported on a case ("Adkins' Role In Hiring Criticized," July 11, 2012), where I represented a state employee before the Personnel Board, who claimed that political influence applied on behalf of another candidate had caused him to be wrongfully denied a

promotion for which two separate interview and hiring processes had not sent him up as the best qualified candidate.

However, for reasons that did not cohere in the testimony offered at the Personnel Board hearing, the Department of Corrections disregarded those two recommendations. The Personnel Board overturned that decision and ordered the promotion process be done a third time, which has resulted finally in my client's promotion, albeit some two years, thousands of dollars of lost pay, thousands more of attorney's fees later.

One can question whether the initial selection of the other candidate - whether due to political influence or simply disregard for the merit system promotion process - could constitute intentional misapplication of Department of Corrections property and funds.

While I certainly and emphatically do not advocate any criminal prosecution related to that case, it does illustrate that a very broad federal criminal law could itself be misapplied in a way that improperly intrudes on the decisions made by elected and government officials.

Politics may be the reason for some of those decisions, but we must be mindful that criminal prosecution can never serve as a substitute for politics.

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