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C.J. Williams

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WHAT IS THE GIST OF THE MAIL FRAUD STATUTE?

C.J. WILLIAMS*

Under jurisprudence interpreting the mail fraud statute, it is an accepted truism that each separate mailing made in connection with a “scheme or artifice to defraud” constitutes a separate offense.¹ This truism arose from the mail fraud statute’s unique past.² In enacting the original mail fraud statute in 1872, Congress aimed to punish those who misused a government agency, namely the United States Post Office, in the process of executing a fraudulent scheme.³ Congressional authority to enact legislation on matters affecting the United States mail was the basis for federal jurisdiction to make mail fraud a federal criminal offense.⁴ It was the intentional abuse of the United States mail to carry out a fraud, therefore, and not the underlying fraud, that was the essence or gist of the mail fraud statute.⁵ Because it was

* Adjunct Professor of Law, University of Iowa College of Law; Assistant United States Attorney, United States Attorney’s Office, Northern District of Iowa. This Article was written by the author acting in his private capacity and not as an employee of the United States government. All statements made herein reflect only the author’s own views and opinions and not those of the United States of America or the United States Department of Justice.

1. *See, e.g.*, *United States v. Gardner*, 65 F.3d 82, 85 (8th Cir. 1995) (“[It is] not the general plan or scheme that is punished but rather each individual use of the mails in furtherance of that scheme.”); *United States v. Kennedy*, 64 F.3d 1465, 1476 (10th Cir. 1995) (finding that each separate mailing constitutes a separate mail fraud offense); *United States v. McClelland*, 868 F.2d 704, 706 (5th Cir. 1989) (same); *United States v. Vaughn*, 797 F.2d 1485, 1493 (9th Cir. 1986) (same); *United States v. Stull*, 743 F.2d 439, 444 (6th Cir. 1984) (same, and citing other cases for same proposition); *United States v. Ledesma*, 632 F.2d 670, 679 (7th Cir. 1980) (same).

2. *See infra* text accompanying notes 35-43.

3. *See infra* text accompanying notes 35-37.

4. Specifically, the power of Congress to enact the original mail fraud statute derived from the postal power, found in Article I, Section 8, Clause 7 of the United States Constitution, which provides Congress authority “[t]o establish Post Offices and post Roads.” U.S. CONST. art. I, § 8, cl. 7.

5. *See, e.g.*, *Mitchell v. United States*, 142 F.2d 480, 481 (10th Cir. 1944) (“But the gist and crux of the offense is the use of the mails in the execution of the scheme”); *United States v. Horman*, 118 F. 780, 780 (S.D. Ohio 1901) (“[T]he policy of this statute is to prevent the misuse of the mails of the United States, -- the prostitution of the mails of the United States in furtherance of dishonest schemes.”), *aff’d*, 116 F. 350 (6th Cir. 1902); *United States v. Loring*, 91 F. 881, 885 (N.D. Ill. 1884) (“The gist of this offense does not consist in the fraudulent scheme alone, but in using the post-office establishment of the United States for the purpose of executing a fraud.”); *United States v. Jones*, 10 F. 469, 470

the misuse of the United States mail, and not the creation of a fraud scheme, that was the essence of the original mail fraud statute, it logically followed that each separate use of the United States mails for the purpose of carrying out a scheme to defraud others constituted a separate violation of the mail fraud statute.

Nearly a century and a half has elapsed since the enactment of the original mail fraud statute in 1872.⁶ During this time, Congress has repeatedly recast the statute's language, significantly altering the focus and essence of the mail fraud statute.⁷ Indeed, use of the United States mail is no longer even necessary to violate the mail fraud statute because Congress amended the statute in 1994 to make it equally offensive to use a private or commercial interstate carrier to execute a fraudulent scheme.⁸ Congress relied on their Commerce Clause powers to expand the mail fraud statute beyond the United States mails and capture private carriers.⁹ Thus, this change eliminated the mail fraud statute's reliance and focus on the misuse of the United States mails. Because of this transformation, the current mail fraud statute bears only a vague resemblance to its ancestor.¹⁰

Courts have further broadened the scope and shifted the direction of the statute by interpreting the statute to encompass essentially any fraudulent scheme in which some mailing occurs.¹¹ Thus, the use of the United States mail or a commercial mail carrier gives rise to federal criminal jurisdiction even when the mailing is tangentially related to the offense.¹² Furthermore, the statute gives rise to federal jurisdiction even when the defendant had no intention of using the mails to execute the fraudulent scheme.¹³ For all intents and purposes, the mail fraud statute today is a general federal fraud statute. As a result, today the statute is applied to cases that never could have been brought under the original mail fraud statute.¹⁴ The evolution of

(C.C.S.D.N.Y. 1882) ("But the gist of the offence [sic] consists in the abuse of the mail. The *corpus delicti* was the mailing of the letter in execution of the unlawful scheme.").

6. Act of Mar. 3, 1865, § 16, 13 Stat. 504, 507.

7. See *infra* text accompanying notes 46-49, 54-59, 67-68, 79-82.

8. See *infra* text accompanying notes 88-92.

9. U.S. CONST. art. I, § 8, cl. 3 ("To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes").

10. This is revealed most clearly by a direct comparison of the original mail fraud statute against the current statute, available in Appendix A.

11. See *infra* text accompanying notes 50-53, 60-75, 83-92.

12. See *infra* text accompanying notes 88-90, 92.

13. See *infra* text accompanying note 91.

14. See Brian C. Behrens, Comment, *18 U.S.C. § 1341 and § 1346: Deciphering the Confusing Letters of the Mail Fraud Statute*, 13 ST. LOUIS U. PUB. L. REV. 489, 489 (1993)

the statute from a minor, narrowly tailored act to its current broad wording and expansive judicial interpretation has indeed made it the “true love” of federal prosecutors.¹⁵

As a result of these changes, abuse of the United States mails no longer forms the core of the crime. Rather, the “scheme or artifice to defraud” element has appropriately evolved to become the central focus and true “gist” of the mail fraud statute.¹⁶ The use of the United States mail, or some other common carrier engaged in interstate commerce, has become relegated to a jurisdictional element of the crime.¹⁷

Nevertheless, courts have continued to parrot language from decisions issued more than a century ago by courts interpreting the original mail fraud statute that relied upon the postal power as a basis for federal jurisdiction.¹⁸ Only the Tenth Circuit Court of Appeals has recognized that the true gist of today’s mail fraud statute is the scheme to defraud and not the use of the mails.¹⁹ Consequently, we are left with the illogical result that each mailing is treated as a separate offense, even though the number of mailings seldom bears a logical relationship to the nature or scope of the underlying fraudulent scheme and is often a matter of pure happenstance.²⁰

(“[T]he mail fraud statute has developed so dramatically over its history that the statute’s original drafters would be somewhat astonished to see the situations in which it is applied today.”).

15. Federal prosecutors are not known for waxing poetic, but the mail fraud statute compels compassion.

To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart -- and our true love. We may flirt with RICO, show off with 10b-5, and call the conspiracy law ‘darling,’ but we always come home to the virtues of 18 U.S.C. § 1341, with its simplicity, adaptability, and comfortable familiarity.

Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 771 (1980).

16. See *infra* notes 46-102 and accompanying text.

17. See *infra* notes 83-92 and accompanying text.

18. See, e.g., *Parr v. United States*, 363 U.S. 370, 389 (1960) (finding the purpose of the mail fraud statute is to protect the United States mails); *United States v. Lovett*, 811 F.2d 979, 983 (7th Cir. 1987) (“The objective of the mail fraud statute is to safeguard the United States Postal Service[]”); *United States v. Lennon*, 751 F.2d 737, 741 (5th Cir. 1985) (establishing that the mail fraud statute was designed to protect United States mails from abuse).

19. *United States v. Dunning*, 929 F.2d 579, 581 (10th Cir. 1991) (“[T]he gist of [the mail fraud statute] is devising a scheme to defraud with a purpose of executing the scheme”); *United States v. Kelley*, 929 F.2d 582, 585 (10th Cir. 1991) (holding that the gist of the mail fraud statute is the scheme to defraud).

20. See *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1278 (7th Cir. 1989) (dictum) (stating that, because each mailing or use of wires constitutes a separate offense, “the

Not only is this result irrational, it lends support to allegations of due process and double jeopardy violations.²¹ Further, and perhaps more importantly, the continued focus on a mailing as the unit of prosecution results in applications of the statute that are both over- and underinclusive.²² When each mailing is deemed a separate offense, the statute could be applied to mailings quite unrelated to the offense. At the same time, making the mailing the unit of prosecution upon which the statute of limitations hinges can exclude from prosecution schemes to defraud which continue beyond a five-year period after the last mailing.²³

The time has come to recognize the need to change the focus of the mail fraud statute from the use of the mail to the scheme to defraud. To illustrate this, Part I of this article shows that the mail fraud statute, as originally enacted by Congress, was based on the Postal Power Clause and focused on the abuse of the mail system to commit fraud, but it has since been substantially amended such that the use of the mails is just one basis for federal jurisdiction. Part II shows how courts illogically adopted the same unit of prosecution analysis for the wire fraud statute, even though its jurisdiction was based on the Commerce Clause. Part III relates that, in contrast, courts have adopted a different unit of prosecution for other criminal statutes even though they were modeled on the mail fraud statute. Finally, Part IV argues that a slight change in the statutory language can make clear what is obvious—the gist of the mail fraud statute is the scheme to defraud.

number of offenses is only tangentially related to the underlying fraud, and can be a matter of happenstance.”).

21. *Id.* See also *infra* Part IV.

22. The “unit of prosecution” for a criminal statute is that “aspect of criminal activity that the statute aims to punish.” Courtney J. Linn, *Redefining the Bank Secrecy Act: Currency Reporting and the Crime of Structuring*, 50 SANTA CLARA L. REV. 407, 471 (2010). In other words, a unit of prosecution is an act for which a new charge can be lodged against the defendant. See *United States v. Taylor*, 13 F.3d 986, 994 (6th Cir. 1994).

23. For purposes of the mail fraud statute, the statute of limitations begins to run as of the date of the last mailing in furtherance of the scheme to defraud. See, e.g., *United States v. Crossley*, 224 F.3d 847, 859 (6th Cir. 2000); *United States v. Barger*, 178 F.3d 844, 847 (7th Cir. 1999); *United States v. Pemberton*, 121 F.3d 1157, 1163 (8th Cir. 1997); *United States v. Eisen*, 974 F.2d 246, 263 (2d Cir. 1992).

I. Evolution of the Mail Fraud Statute

The mail fraud statute has a unique, unusual, and convoluted history.²⁴ The statute, one of the broadest of all federal criminal statutes, had a modest origin. In the aftermath of the Civil War and during the tumultuous Reconstruction era, Congress first began to enact criminal legislation to protect the integrity of the United States Post Office. In 1865, Congress revised the postal laws²⁵ by prohibiting the mailing of obscene and other inappropriate material.²⁶ Shortly thereafter, Congress made it a federal offense to use the United States Postal Service to promote lotteries.²⁷ These were narrowly tailored statutes with little lasting influence on the scope of federal criminal law.²⁸ But they were the progenitors of the modern mail fraud statute, which, in contrast, has had a broader influence on federal criminal law.

A. The Original Mail Fraud Statute and Its Early Interpretation

Congress enacted the mail fraud statute²⁹ in 1872 primarily to address the sale of counterfeit currency through the United States Mail.³⁰ The statutory

24. For an excellent, detailed history of the evolution of the mail fraud statute and judicial interpretation of the mail fraud statute through the 1970s, see generally Rakoff, *supra* note 15. See also John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White-Collar Crime*, 21 AM. CRIM. L. REV. 1 (1983).

25. Act of Mar. 3, 1865, § 16, 13 Stat. 504, 507.

26. See also DOROTHY GANFIELD FOWLER, UNMAILABLE: CONGRESS AND THE POST OFFICE 57 (1977) (citing CONG. GLOBE, 38TH CONG., 2D SESS. 661-62, 965-66, 1256-57, 1311, 1391 (1865)).

27. Act of July 27, 1868, ch. 246, § 13, 15 Stat. 194, 196. This statute made it a federal offense to use the United States Postal Service to send circulars or letters "concerning [illegal] lotteries, so called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatsoever." *Id.*

28. See Jason T. Elder, Comment, *Federal Mail Fraud Unleashed: Revisiting the Criminal Catch-All*, 77 OR. L. REV. 707, 709-10 (1998) (recounting early statutes addressing the abuse of the mails for the purpose of sending obscene materials and promoting lotteries, concluding the "limited legislation achieved little success," and noting that Congress responded by enacting the mail fraud statute).

29. Act of June 8, 1872, ch. 335, § 149, 17 Stat. 283, 302.

30. See *McNally v. United States*, 483 U.S. 350, 356 (1987) ("The sponsor of the recodification stated, in apparent reference to the antifraud provision, that measures were needed 'to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rascallions generally, for the purpose of deceiving and fleecing the innocent people in the country.'") (quoting CONG. GLOBE, 41ST CONG., 3D SESS. 35 (1870) (remarks of Rep. Farnsworth)); see also Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 158 (1994) (stating that the statute was designed to redress schemes for selling counterfeit currency through mail).

language was clearly broader than simply prohibiting the use of the mails for counterfeiting, however, making it a federal offense to use the mails in the execution of any “scheme or artifice to defraud.”³¹ Courts looked to the title of the statute, “Penalty for Misusing the Post-Office Establishment,” and to the mail-emphasizing language in the statute,³² in concluding that Congress intended the mail fraud statute to protect the United States mail from criminals’ use and abuse.³³ Thus, courts found the original mail fraud statute had three elements:

(1) . . . [T]he persons charged must have devised a scheme or artifice to defraud[;]

(2) . . . [T]hey must have intended to effect this scheme by opening or intending to open correspondence with some other persons through the post office establishment, or by inciting such other person to open communication with them[; and]

(3) . . . [I]n carrying out such scheme, such person must have either deposited a letter or packet in the post office, or taken or received one therefrom.³⁴

The essence of the mail fraud statute, then, was “not so much on the degree of the fraud as on the degree of misuse of the mails.”³⁵ Thus, courts required a showing that the defendant intended to use the mails to execute the fraudulent scheme.³⁶ Moreover, the statutory language restricted the number of counts that could be charged, limiting it to three counts for a six-

31. Act of June 8, 1872 § 301.

32. *Id.* The mail-emphasizing language included “misusing the post office establishment” and “proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme” *Id.*

33. *See supra* note 5; *see also* Rakoff, *supra* note 15, at 783; Moohr, *supra* note 30, at 159.

34. *Stokes v. United States*, 157 U.S. 187, 188-89 (1895); *see also* *United States v. Young*, 232 U.S. 155, 159 (1914).

35. Rakoff, *supra* note 15, at 784.

36. *See, e.g., Stokes*, 157 U.S. at 188 (listing as an element the intent to use the mails to effectuate the scheme to defraud); *Farmer v. United States*, 223 F. 903, 907 (2d Cir. 1915) (reversing conviction where there was insufficient evidence to prove the defendant intended to use the mails to effectuate the fraudulent scheme); *Tyner v. United States*, 23 App. D.C. 324, 341 (1904) (finding indictment defective for failing to allege defendant intended to use the mails).

month period, regardless of the number of mailings that occurred.³⁷ By doing so, it explicitly established each mailing as a separate unit of prosecution. Thus, with the language of the original mail fraud statute, Congress could not have been clearer that it intended to criminalize abuse of the United States mail in the process of executing a scheme to defraud, and not to criminalize fraudulent schemes in which the United States mail happened to be involved.

The Supreme Court did not confront the mail fraud statute until fifteen years after its enactment. In *Ex parte Henry*,³⁸ the Court addressed the narrow issue of the number of permissible charges under the statute. The defendant had been indicted two times, each indictment charging him with mail fraud counts for six mailings, all of which occurred in the same six-month period.³⁹ The unique language of the original mail fraud statute permitted only three charges for any fraud scheme that occurred in a six-month period.⁴⁰ The question, then, was whether the government could bypass this limitation by bringing multiple indictments.⁴¹ In answering this question in the affirmative, the Court made clear that it was not attempting to rule on the broader issue of the statute's scope or purpose.⁴² Nevertheless, although in dicta, the Court approved the district court's finding that "[e]ach letter so taken out or put in constitutes a separate and distinct violation of the act."⁴³

In the century following *Ex parte Henry*, courts repeatedly held that each separate mailing constituted a separate offense.⁴⁴ If one delves into the

37. See Act of June 8, 1872 § 301 ("The indictment, information, or complaint may severally charge offences [sic] to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence . . ."). Arguably, one could surmise from this limitation that Congress realized the potential for prosecutors to abuse the statute by bringing one charge for each mailing regardless of the relation between the number of mailings and the scope of the fraudulent scheme. This theory would explain why Congress created an arbitrary limitation of three charges: to prevent such abuse. Unfortunately, there is no legislative history that sheds any light on the intent of this strange penalty section.

38. 123 U.S. 372 (1887).

39. *Id.* at 373-74.

40. The pertinent language was: "The indictment, information, or complaint may severally charge offences [sic] to the number of three when committed within the same six calendar months." Act of June 8, 1872 § 301.

41. *Henry*, 123 U.S. at 374.

42. *Id.* at 374-75.

43. *Id.* at 374 (quoting the district court opinion).

44. Every circuit court of appeal has held each mailing constitutes a separate offense. See, e.g., *United States v. Alston*, 609 F.2d 531, 535-36 (D.C. Cir. 1979); *United States v.*

authority upon which courts relied in reaching this holding, one can ultimately trace the authority back to *Ex parte Henry* (that is, when they cite authority for the proposition).⁴⁵ In other words, when courts cite authority for the proposition that each mailing constitutes a separate offense, that authority ultimately relies on the Supreme Court's holding in *Ex parte Henry*, which, of course, interpreted the very different original mail fraud statute. Thus, courts have misinterpreted the current version of the mail fraud and wire fraud statutes by relying on authority interpreting an old and very different version of the mail fraud statute. In reality, in the 120 years since *Ex parte Henry*, both the statutory language of the mail fraud statute, and judicial interpretation of the statute, have changed significantly.

B. Early Amendments to the Mail Fraud Statute

Congress first altered the mail fraud statute in 1889 by expressly including specific counterfeiting and swindling schemes under the definition of a "scheme or artifice to defraud."⁴⁶ For example, Congress included such schemes as those involving "counterfeit or spurious coin, bank notes, [or] paper money," schemes "commonly called the 'sawdust swindle,'" and schemes "dealing or pretending to deal in what is commonly

Luongo, 11 F.3d 7, 9 (1st Cir. 1993); *United States v. Eskow*, 422 F.2d 1060, 1064 (2d Cir. 1970); *Francis v. United States*, 152 F. 155, 155 (3d Cir. 1907); *United States v. Bakker*, 925 F.2d 728, 739 (4th Cir. 1991); *United States v. Shaid*, 730 F.2d 225, 230 (5th Cir. 1984); *United States v. Stull*, 743 F.2d 439, 444-45 (6th Cir. 1984); *United States v. Joyce*, 499 F.2d 9, 18 (7th Cir. 1974); *United States v. Calvert*, 523 F.2d 895, 914 (8th Cir. 1975); *United States v. Vaughn*, 797 F.2d 1485, 1493 (9th Cir. 1986); *Marvin v. United States*, 279 F.2d 451, 453 n.3 (10th Cir. 1960); *United States v. Edmondson*, 818 F.2d 768, 769 (11th Cir. 1987).

45. In *United States v. Gardner*, 65 F.3d 82, 85 (8th Cir. 1995), the court cited directly to *Ex parte Henry* for authority. In *Kennedy*, 64 F.3d 1465, 1476 (10th Cir. 1995), the court cited *Palmer v. United States*, 229 F.2d 861, 867 (10th Cir. 1955), which in turn cited *Badders v. United States*, 240 U.S. 391, 394 (1916), which in turn cited *Ex parte Henry*. In *McClelland*, 868 F.2d 704, 706 (5th Cir. 1989), the court cited no authority. In *Vaughn*, 797 F.2d 1485, 1493 (9th Cir. 1986), the court cited *United States v. Weatherspoon*, 581 F.2d 595, 602 (7th Cir. 1978), and *United States v. Jones*, 712 F.2d 1316, 1320 (9th Cir. 1983). *Weatherspoon* in turn cited *United States v. Joyce*, 499 F.2d 9, 18 (7th Cir. 1974), which in turn relied upon *Badders*, which in turn cited *Ex parte Henry*. *Jones*, on the other hand, while it involved a prosecution using several mail fraud counts under a single scheme to defraud, does not support *Vaughn* in that the *Jones* court does not specifically state that each mailing constitutes a separate offense. In *Stull*, 743 F.2d at 444, the court relied upon *Badders* for its authority that each mailing constitutes a separate offense, which, of course, cited *Ex parte Henry* for authority. Finally, in *Ledesma*, 632 F.2d 670, 679 (7th Cir. 1980), the court similarly cited *Badders*, which finds its authority in *Ex parte Henry*.

46. Act of Mar. 2, 1889, ch. 393, § 1, 25 Stat. 873, 873.

called ‘green articles,’ ‘green coin,’ ‘bills,’ ‘paper goods,’ ‘spurious treasury notes,’ ‘United States goods,’ [or] ‘green cigars,’” among other things.⁴⁷ The legislative history fails to reveal any explanation of Congress’s intent in amending the statute.⁴⁸ Consequently, courts interpreted the changes to either expand or narrow the scope of the statute depending on the particular court’s predisposition.⁴⁹

The only decision of any lasting importance interpreting the 1889 version of the mail fraud statute was *Durland v. United States*.⁵⁰ In *Durland*, the Supreme Court adopted a broad construction of the mail fraud statute, loosening the statute from its moorings to the abuse of the United States mail as the focus of the statute.⁵¹ In the midst of a national depression, caused in part by fraud and unbridled speculation in stocks and bonds, the Court was asked to determine whether the mail fraud statute reached a scheme to issue bonds to investors with no intention of ever returning the money to the investors.⁵² In concluding that the mail fraud statute departed from common law and reached misrepresentations of future facts, the Court stated that “beyond the letter of the statute is the evil sought to be remedied.”⁵³

A decade after the Supreme Court sanctioned a broad interpretation of the mail fraud statute in *Durland*, Congress again amended the statute, significantly shifting its focus even further toward the “scheme and artifice to defraud” element and away from the mailing element.⁵⁴ This 1909 amendment eliminated the mail-emphasizing language from the statute, including the language describing the prohibited conduct as “misusing the Post-Office establishment” and the language limiting the number of counts during a sixth-month period.⁵⁵ The amendment further struck from the

47. *Id.*

48. This is a part of a pattern of omission maintained by Congress to this day when amending the mail fraud statute.

49. Rakoff, *supra* note 15, at 809-11 (reviewing decisions adopting various interpretations of the amended mail fraud statute).

50. 161 U.S. 306 (1896).

51. *Id.* at 310-15.

52. *Id.* at 310.

53. *Id.* at 313. At the time of the *Durland* decision, the Court had not yet dismissed the mailing element to only jurisdictional status. While it agreed “the indictment would [have been] more satisfactory” had it focused more on the actual mailings, it held that it was still sufficient and the defendant could have filed a motion for a bill of particulars anyway. *Id.* at 315.

54. Act of Mar. 4, 1909, Pub. L. No. 60-350, ch. 321, § 215, 35 Stat. 1088, 1130.

55. *Id.*

original mail fraud statute language requiring proof the defendant “open[ed] or intend[ed] to open correspondence or communication with any person . . . by means of the Post-Office Establishment.”⁵⁶ Instead, it inserted language providing that a person could commit mail fraud if it “caused” the mails to be used.⁵⁷ Thus, the amendment eliminated the second essential element, the element requiring the defendant intended to use the mails to carry out the fraudulent scheme.⁵⁸ It was this element that made central to the offense abuse of the United States mail. Consequently, since 1909 the mailing element has no longer been the gist of the mail fraud offense, instead it has merely functioned to establish federal jurisdiction.⁵⁹

Five years after the 1909 amendment to the mail fraud statute, a unanimous Supreme Court approved the amended statute’s broadened scope. In *United States v. Young*,⁶⁰ the Court rejected a narrow interpretation of the statute, finding that after the 1909 amendment, the elements of the mail fraud statute had become:

. . . (a) a scheme devised or intended to be devised to defraud, or for obtaining money or property by means of false pretenses, and,

(b) for the purpose of executing such scheme or attempting to do so, the placing of any letter in any post office of the United States to be sent or delivered by the Post Office Establishment.⁶¹

The Court thereby clarified that the mailing element served a purely jurisdictional function.⁶² Nevertheless, though the effect of its holding was just the opposite, in dicta the Court parroted the worn-out phrase that “[t]he gist of the offense is the use of the United States mails in the execution of the scheme, or in attempting to do so.”⁶³

56. *Id.*

57. *Id.*

58. An annotated version of the statute, available in Appendix B, exposes the alterations more readily.

59. See Rakoff, *supra* note 15, at 816-17 (“[I]t no longer made sense to say that the statute aimed to deter the abuse of the mail system, because the defendant no longer had to intend any use of the mails whatsoever; the minimal use of the mails that would trigger the statute could, within broad limits, be an incidental or even accidental accompaniment of the defendant’s fraudulent scheme.”).

60. 232 U.S. 155 (1914).

61. *Id.* at 161.

62. See Rakoff, *supra* note 15, at 817 (stating that the *Young* Court construed the mailing requirement as a “jurisdictional element”).

63. *Young*, 232 U.S. at 159.

The Supreme Court soon compounded the confusion over the focus of the mail fraud statute by its statements in the *Badders v. United States* case.⁶⁴ In *Badders*, the Supreme Court unanimously rejected a vagueness challenge to the 1909 version of the mail fraud statute.⁶⁵ In dicta again, however, the Court cited *Ex parte Henry*, which relied on the unamended statute, for the proposition that “there is no doubt that the law may make each putting of a letter into the postoffice [sic] a separate offence [sic].”⁶⁶ Although it is true the law may make each mailing a separate offense, the Court failed to note that the 1909 amendment eliminated the mail-emphasizing language such that the mail fraud statute no longer made each mailing a separate offense.

After 1909, Congress made no further substantive changes to the language of the mail fraud statute until 1987. During this nearly eighty-year period, the lower courts expanded the scope of the mail fraud statute, building on the broad interpretation the Supreme Court sanctioned in *Young*.⁶⁷ At the end of this period, nearly any fraudulent scheme in which the United States mail was somehow involved now fell within the reach of the mail fraud statute, so long as the use of the mail “[could] reasonably be foreseen.”⁶⁸

Although initially the mail fraud statute was applied only to schemes to deprive citizens of money or property, in the 1940s, courts began allowing an expansion of the mail fraud statute’s scope by including within the “scheme or artifice to defraud” element the concept of intangible rights.⁶⁹ It was not until the 1970s, however, that prosecutors utilized the intangible rights concept on a regular basis, primarily to prosecute public corruption at

64. 240 U.S. 391 (1916).

65. *Id.* at 393.

66. *Id.* at 394.

67. See Moohr, *supra* note 30, at 159; see also Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 HARV. J.L. & PUB. POL’Y 117, 121 (1987) (stating that judicial decisions have turned the mail fraud statute “into a vehicle for the prosecution of an almost unlimited number of offenses bearing very little connection to the mails”).

68. *Pereira v. United States*, 347 U.S. 1, 9 (1954).

69. See, e.g., *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1942) (expanding scope of statute to include any scheme by corruption of public officials), *overruled on other grounds* by *United States v. Cruz*, 478 F.2d 408 (5th Cir. 1973); *United States v. Classic*, 35 F. Supp. 457, 458 (E.D. La. 1940) (using intangible rights concept to bring election commission’s scheme to defraud within scope of mail fraud statute); see also Michael R. Dreeben, *Insider Trading and Intangible Rights: Redefinition of the Mail Fraud Statute*, 26 AM. CRIM. L. REV. 181, 185-87 (1988) (discussing the development of the intangible rights doctrine).

the state and local levels.⁷⁰ The courts approved the expansion by interpreting the “scheme or artifice to defraud” element to encompass not just property, but also the intangible right of honest services.⁷¹ In time, the intangible rights doctrine was extended to cover not only public fiduciary duties, but private fiduciary duties as well.⁷² By 1987, all federal courts of appeal had accepted an expansive interpretation of the statute and sanctioned the intangible rights doctrine,⁷³ though not without some criticism of the danger posed by the expanded scope of the mail fraud statute.⁷⁴ The courts continued, however, to cite earlier cases citing the unamended statute that held the mailing element was the gist of the mail fraud offense.⁷⁵

C. McNally, Congress’s Response, and Schmuck

In 1987, the Supreme Court attempted to narrow the scope of the mail fraud statute, at least with regard to the intangible rights doctrine. In

70. See Dreeben, *supra* note 69, at 185 (“The intangible rights doctrine was developed primarily to prosecute corrupt political officials who furthered their personal or financial interests at the expense of their obligation to act in the interest of the public.”). One of the early influential cases establishing the intangible rights doctrine was *United States v. States*, 488 F.2d 761, 765 (8th Cir. 1973), in which the court held that the mail fraud statute covered a scheme to defraud citizens of “intangible political and civil rights” through election fraud. See Peter M. Oxman, Note, *The Federal Mail Fraud Statute After McNally v. United States*, 107 S. Ct. 2875 (1987): *The Remains of the Intangible Rights Doctrine and Its Proposed Congressional Restoration*, 25 AM. CRIM. L. REV. 743, 749 (1988) (reviewing the history of the doctrine and the influential role played by the *States* case).

71. See, e.g., *United States v. Bronston*, 658 F.2d 920, 926 (2d Cir. 1981); *United States v. George*, 477 F.2d 508, 512 (7th Cir. 1973).

72. See, e.g., *Bronston*, 658 F.2d at 922 (finding a lawyer guilty of mail fraud for secretly representing client whose interests were adverse to other firm clients); *George*, 477 F.2d at 510 (finding purchasing agent of private company guilty of mail fraud for accepting kickbacks from supplier).

73. See *United States v. Berg*, 710 F. Supp. 438, 441 n.3 (E.D.N.Y. 1989) (containing a list of circuit court cases approving of intangible rights doctrine), *rev’d on other grounds sub nom. United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991).

74. See *United States v. Margiotta*, 688 F.2d 108, 140 n.3 (2d Cir. 1982) (Winter, J., concurring in part and dissenting in part) (listing cases critical of expansion of mail fraud statute).

75. See *supra* note 5. At most, some courts made passing suggestions that prosecutors use their judgment in arriving at the number of mail fraud counts charged in relation to a single fraudulent scheme. See *United States v. Joyce*, 499 F.2d 9, 25 (7th Cir. 1974) (Swygert, C.J., concurring in relevant part, joined by the Court) (encouraging prosecutors to exercise restraint in number of mail or wire fraud charges indicted under single fraudulent scheme).

McNally v. United States,⁷⁶ the Supreme Court held that the “scheme to defraud” element “clearly protects property rights, but does not refer to [] intangible right[s].”⁷⁷ The *McNally* Court invited Congress to change the statute if it wanted to expand the scope of the statute to include intangible rights, but noted that “[i]f Congress desires to go further, it must speak more clearly than it has.”⁷⁸

Within a year after the Court issued its decision in *McNally*, Congress attempted to overturn the *McNally* decision. In 1988, Congress enacted 18 U.S.C. § 1346 via an eleventh-hour rider to an unrelated bill.⁷⁹ The one-sentence amendment reads: “For the purposes of this chapter, the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.”⁸⁰ As a consequence of the manner of Congress’s response to *McNally*, there is almost no legislative history, and what little exists tends to cloud rather than clarify the meaning of the amendment.⁸¹ The general tenor of comments made by members of Congress suggests an intention to overturn *McNally*. For example, Representative Conyers stated that the “amendment restores the mail fraud provision to where [it] was before the *McNally* decision” such that it would “no longer [be] necessary to determine whether or not the scheme . . . involved money or property.”⁸² While the precise scope of the

76. 483 U.S. 350 (1987).

77. *Id.* at 356; *see also* *Carpenter v. United States*, 484 U.S. 19, 25 (1987) (describing its holding in *McNally* as concluding that the scheme to defraud element did “not reach ‘schemes to defraud citizens of their intangible rights to honest and impartial government’ and that the statute is ‘limited in scope to the protection of property rights’”).

78. 483 U.S. at 360.

79. Act of Nov. 18, 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508. The text of the amendment was added to the bill on the same day Congress passed it. *United States v. Brumley*, 79 F.3d 1430, 1434 (5th Cir. 1996).

80. Act of Nov. 18, 1988 § 7603.

81. As the Fifth Circuit stated in *Brumley*:

The text of what is now § 1346 was never included in any bill filed in either the House of Representatives or the Senate . . . was never the subject of any committee report from either the House or the Senate and was never the subject of any floor debate reported in the Congressional Record.

Brumley, 79 F.3d at 1436.

82. *United States v. Brumley*, 116 F.3d 728, 742 (5th Cir. 1997) (quoting 134 CONG. REC. H11,108-01 (daily ed. Oct. 21, 1988)); *see also* *United States v. Antico*, 275 F.3d 245 (3d Cir. 2001) (citing 134 CONG. REC. S17360-02 (daily ed., Nov. 10, 1988) (noting that Senator Biden, Chair of the Judiciary Committee, asserted the amendment intended to: “overturn[] the decision in *McNally v. United States*”). These comments may be of questionable value in determining congressional intent. Representative Conyer’s comment, for example, was actually made in reference to another similar proposed amendment, but the

“scheme or artifice to defraud” element of the mail fraud statute remains for courts to define, it is clear that in enacting the one-sentence amendment Congress emphasized its focus on the “scheme and artifice to defraud” element as the central feature of the mail fraud statute.

The following year, in *Schmuck v. United States*,⁸³ the Court similarly turned the focus of the mail fraud statute toward the fraudulent scheme when it unmistakably relegated the use of the mails to an incidental jurisdictional element.⁸⁴ In *Schmuck*, the Court held that a mailing occurring after a scheme was consummated was still sufficient to create federal jurisdiction so long as the scheme was ongoing and continuous.⁸⁵ In announcing this holding, the Court articulated a test whereby a fraudulent scheme falls within the parameters of the mail fraud statute whenever “the mailing is part of the execution of the scheme as conceived by the perpetrator at the time.”⁸⁶ In dissent, Justice Scalia protested, unsuccessfully, that the mail fraud statute was originally supposed to prohibit “mail fraud, and not mail and fraud.”⁸⁷ *Schmuck* thus marked the end of any plausible argument that the mailing element remained the gist of the mail fraud statute.

After *Schmuck*, lower courts found mailings sufficient to invoke federal jurisdiction in a wider variety of circumstances, even when the mailings had little relationship to the underlying fraud. Courts have held the mailing itself need not be false or fraudulent.⁸⁸ Thus, even routine mailings are

representative ultimately did not vote in favor the amendment as passed. *Brumley*, 79 F.3d at 1437 n.6. Conyers made his comments with respect to a bill he and Senator Spector introduced which used far more expansive language and would have covered schemes to “defraud[] another . . . of intangible rights of any kind whatsoever in any manner or for any purpose whatsoever” 133 CONG. REC. E3240-02 (daily ed. Aug. 4, 1987) (quoting H.R. 3089, 100th Cong. (1st Sess. 1987)). This bill was never enacted. Further, Senator Biden’s comments came after passage of the Act, entitling them to little consideration. *Brumley*, 79 F.3d at 1437.

83. 489 U.S. 705 (1989).

84. See Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 458 (1995) (“The Court’s analysis in *Schmuck* effectively reduces the mailing element to a mere jurisdictional requirement.”); see also Kristen Kate Orr, Note, *Fencing in the Frontier: A Look into the Limits of Mail Fraud*, 95 KY. L.J. 789, 803 (2007) (“But now the breadth of the mailing element has reduced the element to nothing but a jurisdictional hook, and the statute has become a generic fraud statute.”).

85. 489 U.S. at 712.

86. *Id.* at 715.

87. *Id.* at 723 (Scalia, J., dissenting).

88. See, e.g., *United States v. Martin*, 228 F.3d 1, 18 (1st Cir. 2000) (holding that mailing itself need not be deceptive); *United States v. Hawkey*, 148 F.3d 920, 924 (8th Cir.

sufficient to invoke federal jurisdiction even when they were innocent mailings.⁸⁹ Similarly, courts have found mailings sufficient when they were made after the allegedly fraudulent activity.⁹⁰ Courts also found that it was not necessary for the defendants to contemplate the use of the mails as a part of the scheme to defraud.⁹¹ The government need not even prove defendants used the mails themselves to satisfy the mailing element—it is sufficient if it was reasonably foreseeable that any individual would use the mail.⁹²

This is not to criticize the scope of the mail fraud statute. Indeed, based on the language of the current version of the mail fraud statute, the use of the mails *should* only constitute a jurisdictional element.⁹³ *McNally*, Congress’s responsive amendment, and *Schmuck* only reflect the reality that the focus of the mail fraud statute is the scheme to defraud element, not the abuse of the United States mail. Indeed, Congress would soon make the use of the United States mail unnecessary for a violation of the mail fraud statute.

1998) (same); *United States v. Coyle*, 63 F.3d 1239, 1243 (3rd Cir. 1995) (same); *United States v. Morrow*, 39 F.3d 1228, 1237 (1st Cir. 1994) (same); *United States v. Oldfield*, 859 F.2d 392, 400 (6th Cir. 1988) (same); *United States v. Kwiat*, 817 F.2d 440, 443 (7th Cir. 1987) (same); *United States v. Benny*, 786 F.2d 1410, 1420 (9th Cir. 1986) (same).

89. *See United States v. Frey*, 42 F.3d 795, 798 (3d Cir. 1994) (finding that a routine mailing is sufficient); *United States v. Nelson*, 988 F.2d 798, 804 (8th Cir. 1993) (“A mailing may be routine or even sent for a legitimate business purpose so long as it assists in carrying out the fraud.”); *United States v. Brocksmith*, 991 F.2d 1363, 1368 (7th Cir. 1993) (same).

90. *See United States v. Griffith*, 17 F.3d 865, 874 (6th Cir. 1994) (holding a mailing sufficient even if it occurs after fraudulent acts); *Brocksmith*, 991 F.2d at 1367-68 (finding a mailing sent to lull victims into inaction after already victimized by scheme sufficient to invoke jurisdiction under mail fraud statute); *United States v. Wallach*, 935 F.2d 445, 465 (2d Cir. 1991) (holding mailings after fraud to cover up scheme sufficient under mail fraud statute).

91. *See Griffith*, 17 F.3d at 874 (stating that the foreseeable use of mails was sufficient); *Nelson*, 988 F.2d at 798 (finding that the use of mails need not be contemplated, only foreseeable); *United States v. Hollis*, 971 F.2d 1441, 1448 (10th Cir. 1992) (holding that the reasonable foreseeability that mails will be used is sufficient).

92. *See United States v. Pazos*, 24 F.3d 660, 665 (5th Cir. 1994) (finding a letter from defendant’s insurance adjuster to insurer’s adjuster); *United States v. United Med. & Surgical Supply Corp.*, 989 F.2d 1390, 1404 (4th Cir. 1993) (finding a mailing by the agent sufficient when foreseen or intended by the principal); *United States v. Koen*, 982 F.2d 1101, 1107 (7th Cir. 1992) (“[I]t is irrelevant that the defendant did not personally mail the letters . . .”).

93. 18 U.S.C. § 1341 (2012).

D. The 1994 Amendment to the Mail Fraud Statute

If there was any question after *Schmuck* that the use of the United States mails in connection with a scheme to defraud was only a jurisdictional element, Congress put that matter to rest by amendment. In 1994, Congress broadened the mail fraud statute to cover fraudulent schemes where use of “private or commercial interstate carrier[s]” were involved.⁹⁴ Thus, abuse of the United States mail is not only no longer the gist of the mail fraud statute. It isn’t even necessary. The amended mail fraud statute arguably creates a general federal fraud offense.⁹⁵

The amendment was an outgrowth of debate surrounding the passage of the Senior Citizens Against Marketing Scams Act, which was passed by the Senate in 1993 and incorporated by the House of Representatives into the Violent Crimes Control and Law Enforcement Act of 1994.⁹⁶ The congressional hearings relating to passage of these acts reflected the concern that telemarketers were evading the mail fraud statute by using private and commercial carriers to perpetrate frauds.⁹⁷ Congress did not define the term “private or commercial interstate carrier,” but courts have found it encompasses such common carriers as Federal Express and DHL.⁹⁸ Nor did Congress clarify whether such a carrier must transport the letter or

94. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-332, § 250006, 108 Stat. 1796, 2087 (codified at 18 U.S.C. § 1341 (1994)).

95. See generally Henning, *supra* note 84 (arguing that the 1994 amendment broadens the scope of mail fraud statute such that it has become a general federal fraud statute). Of course, Congress could make it plain by enacting a general fraud statute, simply making it a federal offense to commit a fraud that affects interstate or foreign commerce.

96. §§ 250001-250008, 108 Stat. at 2081-88.

97. See *Mail Fraud: Hearings Before the Subcomm. on Postal Operations and Servs. of the H. Comm. on Post Office and Civil Serv.*, 103d Cong. 246-300 (1993); *International Consumer Fraud: Can Consumers Be Protected: Hearings Before the Subcomm. on Regulation and Gov’t Info. of the S. Comm. on Governmental Affairs*, 103d Cong. 12-22, 50-59 (1993).

98. See, e.g., *United States v. Kieffer*, 621 F.3d 825, 832-33 (8th Cir. 2010) (finding sufficient evidence regarding use of the mails when evidence showed document delivered by the United States Mail, Federal Express, or United Parcel Service); *United States v. Coughlin*, 610 F.3d 89, 97 (D.C. Cir. 2010) (finding sufficient evidence of use of the mails when mail was delivered either by United States Mail or Federal Express); *United States v. Sharpe*, 438 F.3d 1257, 1264 (11th Cir. 2006) (finding indictment sufficient when it alleged defendant used mails through commercial carrier Federal Express); *United States v. Silvestri*, 409 F.3d 1311, 1334 n.14 (11th Cir. 2005) (holding that DHL Worldwide Express is a “commercial interstate carrier” for purposes of the mail fraud statute); *United States v. Gil*, 297 F.3d 93, 99-100 (2d Cir. 2002) (finding use of commercial carrier Federal Express constitutes use of the mails).

package across a state line, or whether an intrastate delivery suffices so long as the carrier itself is engaged in interstate commerce.

Courts have answered in the negative the question of whether the letter or package must cross a state line. Courts have found that, under the instrumentality of interstate commerce approach, jurisdiction exists if the commercial carrier was generally engaged in interstate commerce; it is not necessary that the letter or package actually cross state lines.⁹⁹ Under this statutory interpretation, the number of actual mailings becomes insignificant because the government need only show the fraudulent scheme involved a commercial carrier engaged in interstate commerce to establish federal jurisdiction.¹⁰⁰

When the government can obtain federal jurisdiction by the use of an interstate carrier, whether one or many letters were sent becomes secondary. The effect of the amendment was to make it clear that the gist of the mail fraud statute was the fraudulent scheme itself and that protection of the United States mail from abuse was no longer the focus. The amendment created two possible jurisdictional hooks for federal prosecution, either one of which is sufficient depending on the facts: (1) if the United States Postal Service was used, federal jurisdiction is premised on the Postal Power Clause; or (2) if a commercial carrier was used, federal jurisdiction is premised on the Commerce Clause.¹⁰¹ By expanding the

99. *See, e.g.*, *United States v. Hasner*, 340 F.3d 1261, 1270 (11th Cir. 2003) (holding that mail fraud by use of a private or commercial carrier applies even if the conduct took place entirely intrastate); *Gil*, 297 F.3d at 100 (upholding mail fraud count against a Commerce Clause challenge, reasoning that “private and commercial interstate carriers, which carry mailings between and among states and countries, are instrumentalities of interstate commerce, notwithstanding the fact that they also deliver mailings intrastate”); *United States v. Photogrammetric Data Servs., Inc.*, 259 F.3d 229, 249 (4th Cir. 2001) (upholding constitutionality of the mail fraud statute as applied to intrastate mailing placed with private or commercial interstate carrier), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004); *see also* Henning, *supra* note 84, at 471-73 (arguing persuasively that Congress intended the amendment to allow for federal jurisdiction when carrier was instrumentality of interstate commerce and did not intend to require proof of actual interstate transportation of mailing at issue).

100. *See, e.g.*, *Hasner*, 340 F.3d at 1270 (finding jurisdiction based on the interstate nature of the commercial carrier’s business generally, and not based on the movement of the actual mailings involved in the fraudulent scheme); *Gil*, 297 F.3d at 100 (same).

101. *See United States v. Louper-Morris*, 672 F.3d 539, 563 (8th Cir. 2012) (holding that “Congress’s Postal Power provides the jurisdictional basis for . . . the mail fraud statute” when the United States Postal Service is involved); *Hasner*, 340 F.3d at 1270 (holding that when Congress amended the mail fraud statute in 1994 to include commercial carriers, “Congress properly exercised its power under the Commerce Clause”).

scope of the mail fraud statute to include commercial carriers, the mail fraud statute targets any fraudulent scheme in which mail is used, regardless of whether the scheme involved the United States Postal Service.

The evolution of the mail fraud statute from an act designed to protect the integrity of the United State Postal Service, to a broad catchall statute used against any type of fraudulent scheme, has eroded support for the oft-repeated holding that Congress intended each separate mailing constitute a separate offense.¹⁰² When Congress amended the mail fraud statute in 1994 to include private and commercial mail carriers, it put beyond debate the conclusion that the mailing element serves only a jurisdictional function. Moreover, the conclusion that the mailing element is no longer the gist of the mail fraud statute is further apparent in light of the jurisprudence regarding its sister wire fraud statute.

II. *The Wire Fraud Statute*

Courts have also concluded that the same rule exists with respect to the less frequently used¹⁰³ wire fraud statute:¹⁰⁴ that is, each use of the wires constitutes a separate offense.¹⁰⁵ If the reasoning supporting the mail fraud

102. The mail fraud statute has been characterized as the “first line of defense” against new areas of fraud for which Congress has not yet enacted specific prohibitions. *See United States v. Maze*, 414 U.S. 395, 405 (1974) (Burger, C.J., dissenting); *see also Rakoff*, *supra* note 15, at 772 (stating that the mail fraud statute’s uses are “too numerous to catalog, [but includes] not only the full range of consumer frauds, stock frauds, land frauds, bank frauds, insurance frauds, and commodity frauds, but have extended even to such areas as blackmail, counterfeiting, election fraud, and bribery”); Kathleen Flavin & Kathleen Corrigan, *Mail and Wire Fraud*, 33 AM. CRIM. L. REV. 861, 862 (1996) (“When legislatures have been slow to act in particular areas, these [mail and wire fraud] statutes have ‘frequently represented the sole instrument of justice that could be wielded against the ever-innovative practitioners of deceit.’”) (quoting Rakoff, *supra* note 15, at 772).

103. *See Flavin & Corrigan*, *supra* note 102, at 862-63 (stating that the mail fraud statute “has traditionally been utilized more frequently than its wire fraud companion”).

104. 18 U.S.C. § 1343 (2012).

105. *See, e.g., United States v. Williams*, 527 F.3d 1235, 1241 (11th Cir. 2008) (holding that each interstate wire transmission constitutes a separate offense); *United States v. Garlick*, 240 F.3d 789, 792 (9th Cir. 2001) (“Insofar as we have never expressly held that each use of the wires constitutes a separate violation of 18 U.S.C. § 1343, we do so now.”); *United States v. Luongo*, 11 F.3d 7, 9 (1st Cir. 1993) (“It is well established that each use of the wires constitutes a separate crime”) (quoting *United States v. Fermin Castillo*, 829 F.2d 1194, 1199 (1st Cir. 1987)); *United States v. Syal*, 963 F.2d 900, 907 (6th Cir. 1992) (rejecting multiplicity challenge to multiple wire fraud counts); *United States v. St. Gelais*, 952 F.2d 90, 96-97 (5th Cir. 1992) (“Each wire transmission in furtherance of a scheme to defraud constitutes a separate crime.”); *United States v. Heffington*, 682 F.2d 1075, 1081

statute's unit of prosecution is faulty, application of the same unit of prosecution to the wire fraud statute is likewise without salvation.

While the legislative history is sparse, Congress enacted the wire fraud statute in 1952 and explicitly modeled it after the mail fraud statute.¹⁰⁶ The statutory language was identical in all principal respects, save the jurisdictional element.¹⁰⁷ Whereas the mail fraud statute premised federal jurisdiction on the use of the United States mails originally, and recently added use of a private or commercial interstate carrier, the wire fraud statute rests federal jurisdiction upon the Commerce Clause and the actual crossing of state lines.¹⁰⁸ The statutes are considered so identical in all material respects, however, that cases ruling on one statute constitute authority with respect to the other.¹⁰⁹

(5th Cir. 1982) (“The law is clear, however, that each separate use of wire communications constitutes a separate offense under § 1343.”); *United States v. Giovengo*, 637 F.2d 941, 943-44 (3d Cir. 1980) (finding the wire fraud statute to be *in pari materia* with mail fraud and consequently giving wire fraud statute broad construction); *United States v. Calvert*, 523 F.2d 895, 903 n.6 (8th Cir. 1975) (finding that each use of wires constitutes a separate offense, just like each use of mails); *Henderson v. United States*, 425 F.2d 134, 138 n.4 (5th Cir. 1970) (allowing separate counts for multiple uses of wires in construction fraud).

106. See S. REP. NO. 44, at 14 (1951) (stating 18 U.S.C. § 1344 was designed as “a parallel [to the] provision now in the law for fraud by mail”).

107. Compare the mail fraud statute, 18 U.S.C. § 1341, to the wire fraud statute, 18 U.S.C. § 1343. The operative language, “Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises,” is identical and is followed a reference to the means of executing the fraud, either by use of the mails or by a wire transmission.

108. Thus, while one may violate the mail fraud statute though the letter may never leave the state, to violate the wire fraud statute, the wire communication must actually cross state lines. See, e.g., *United States v. Schaefer*, 501 F.3d 1197, 1202 (10th Cir. 2007) (holding the wire fraud statute requires wire communication cross state lines), *overruled on other grounds by United States v. Sturm*, 672 F.3d 891 (10th Cir. 2012); *United States v. Izydore*, 167 F.3d 213, 219 (5th Cir. 1999) (reversing conviction on wire fraud count where there was no evidence the phone call crossed state lines); *United States v. Cardall*, 885 F.2d 656, 675 (10th Cir. 1989) (finding that the government proved wire communication crossed state lines); *Smith v. Ayres*, 845 F.2d 1360, 1366 (5th Cir. 1988) (stating that the language in the wire fraud statute requires wire communication cross state lines).

109. See *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987) (“The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here.”); see also *Garlick*, 240 F.3d at 793 (relying on authority from mail fraud statutes in ruling on wire fraud case); *United States v. Mills*, 199 F.3d 184, 188 (5th Cir. 1999) (applying mail fraud case law to wire fraud case); *United States v. Manarite*, 44 F.3d 1407, 1411 n.5 (9th Cir. 1995) (“[T]he mail fraud and wire fraud statutes ‘share identical language,’ . . . so [the] wire fraud statute is read in light of the case law on mail fraud.”); *Belt v. United States*, 868 F.2d 1208, 1211 (11th Cir. 1989) (stating

The principle that each use of the wires constitutes a separate offense is not premised upon a careful analysis of the wire fraud statute itself, but, rather, it was simply applied to the wire fraud statute because it was the accepted rule under the mail fraud statute. Wire fraud cases that hold each wiring constitutes a separate offense cite to mail fraud cases holding that each mailing constitutes a separate offense,¹¹⁰ which was shown above to be based on *Ex parte Henry*.¹¹¹ Because it has been demonstrated above that the principle of separate offenses for each mailing is flawed because the mail fraud statute has changed over time, the same principle with respect to wire communications is equally flawed. In fact, it is even more flawed.

The original logic for concluding each mailing should constitute a separate offense was that each mailing was a separate abuse of the United States mail, property of the United States government.¹¹² That logic simply does not apply to the use of the wires. The wires are not government property. As a result, jurisdiction for the wire fraud statute is premised on

that the wire fraud statute and the mail fraud statute “are given a similar construction and are subject to the same substantive analysis”); *Hofstetter v. Fletcher*, 905 F.2d 897, 902 (6th Cir. 1988) (treating the mail and wire fraud statutes in a parallel fashion).

110. This point can be demonstrated again (for the original demonstration, see *supra* note 105) by tracing the authority that courts have cited for the proposition that each use of the wires constitutes a separate offense.

The *Luongo* court cites *United States v. Fermin Castillo*, 829 F.2d 1194, 1199 (1st Cir. 1987), for its authority, which in turn cites *United States v. Calvert*, 523 F.2d 895, 903 n.6 (8th Cir. 1975), which in turn relies upon *Henderson v. United States*, 425 F.2d 134, 138 n. 4 (5th Cir. 1970), which cites for authority two cases, *Atkinson v. United States*, 418 F.2d 1311, 1313 (8th Cir. 1969), which involved mail fraud and not wire fraud, and *Sibley v. United States*, 344 F.2d 103, 105 (5th Cir. 1965), which relies on *United States v. Freeling*, 31 F.R.D. 540, 549 (S.D.N.Y. 1962). The *Freeling* court did not rely on any other authority, but rather, reasoned that it was “difficult to fathom” why, because each separate mailing constitutes a separate offense, the same rule ought not to apply to the wire fraud statute because they use identical language.

The *Syal* Court cites two cases for authority, *United States v. Stull*, 743 F.2d 439 (6th Cir. 1984), a mail fraud case, and *Fermin Castillo*, whose history is treated above.

The *St. Gelais* court cites *United States v. Blankenship*, 746 F.2d 233, 236 (5th Cir. 1984), a mail fraud case, to support its conclusion that each wire transmission constitutes a separate offense.

The *Heffington* court cites two cases for authority, *United States v. Crockett*, 534 F.2d 589 (5th Cir. 1976), which involved no wire fraud charges but only mail fraud charges, and *Henderson*, which as discussed above traces its authority back to the district court’s reasoning in *Freeling* that what was good for the goose was good for the gander.

111. See *supra* notes 44-45 and accompanying text.

112. See *supra* text accompanying notes 29-45.

the Commerce Clause.¹¹³ Thus, whether one uses the wires once or multiple times to perpetrate a fraud, each use of the wire does not infringe upon United States property. It is even clearer, therefore, that the gist of the wire fraud statute is not each use of the wires, but the fraudulent scheme itself.¹¹⁴ The use of the wires is only a jurisdictional hook to allow for federal prosecution of a fraudulent scheme that involved use of the wires.

III. Comparison of Other Statutes Involving Schemes or Artifices to Defraud

In order to fully comprehend why the gist of the mail and wire fraud statutes should be the fraudulent scheme, it is helpful to consider other criminal statutes where Congress has used the phrase “scheme or artifice to defraud.”

Congress has enacted almost a dozen statutes where it has used that phrase.¹¹⁵ Several of those statutes are criminal statutes where it is necessary to determine the unit of prosecution. In other words, the statutes fail to define whether the unit of prosecution is the fraudulent scheme itself, or some act, like mailing or wiring, in furtherance of the scheme. Courts have been inconsistent in determining the unit of prosecution for these statutes, even though most were explicitly modeled on the mail fraud statute.¹¹⁶ Among those are the securities fraud, bank fraud, and bankruptcy fraud statutes.

113. *See, e.g.*, *United States v. Louper-Morris*, 672 F.3d 539, 563 (8th Cir. 2012); *United States v. Hook*, 195 F.3d 299, 310 (7th Cir. 1999); *United States v. Darby*, 37 F.3d 1059, 1067 (4th Cir. 1994).

114. *See United States v. Bryan*, 58 F.3d 933, 943 (4th Cir. 1995) (“[T]he gravamen of the offense of wire fraud is simply the execution of a scheme to defraud.”), *abrogated on other grounds by United States v. O’Hagan*, 521 U.S. 642 (1997).

115. Congress has used the phrase “scheme or artifice to defraud” in multiple statutes. *See, e.g.*, 7 U.S.C. § 60(1)(A) (2012) (commodity trading advisors, commodity pool operators, and associated persons); 15 U.S.C. § 77q(a)(1) (2012) (sales of securities); 15 U.S.C. § 78jjj(c)(1)(A) (2012) (liquidation proceedings or direct payment procedures by broker-dealers); 15 U.S.C. § 1703(a)(2)(A) (2012) (interstate land sales); 15 U.S.C. § 80b-6(1) (2012) (investment advisors); 18 U.S.C. § 157 (2012) (bankruptcy fraud); 18 U.S.C. § 981(a)(1)(E) (2012) (civil forfeiture); 18 U.S.C. § 982(a)(4) (2012) (criminal forfeiture); 18 U.S.C. § 1343 (2012) (wire fraud); and 18 U.S.C. § 2314 (2012) (transportation of stolen goods, securities, etc.).

116. *See infra* Part III.A-C.

A. Securities Fraud Statute

The securities fraud statute¹¹⁷ is particularly instructive because it contains a mailing element very similar to the mailing element in the mail fraud statute.¹¹⁸ Securities fraud occurs when false or misleading statements are used in connection with the purchase or sale of securities.¹¹⁹ Again, the statutory language is slightly different from that used in the mail fraud statute. The *actus reus*, that is the act which makes it a crime, is the “use” or “employment” of a manipulative or deceptive device in connection with the purchase or sale of securities.¹²⁰ The use of interstate commerce or the mails to execute the scheme provides the basis for federal jurisdiction.¹²¹ Thus, the appropriate unit of prosecution is the purchase or sale of a security, not the mailing.¹²² In securities fraud cases, the mailing element serves merely a jurisdictional purpose.¹²³ Several purchases or sales may be made within a single manipulative scheme and each may constitute a separate offense if each was made using a false statement of material fact.¹²⁴ Therefore, the unit of prosecution is neither the “scheme”

117. 15 U.S.C. § 78j(b) (2012). This article references the securities fraud statute enacted by the Securities Exchange Act of 1934. For purposes of the unit of prosecution analysis addressed in this article, the 1933 Act contains substantially identical language regarding the unit of prosecution.

118. 15 U.S.C. § 78j. The Securities Exchange Commission promulgated regulation 10b-5, directed at securities fraud, which further speaks in terms of schemes or artifices to defraud. 17 C.F.R. § 240.10b-5 (2012).

119. *See Belmont v. MB Inv. Partners, Inc.*, 708 F.3d 470, 493 (3d Cir. 2013) (“To make out a securities fraud claim under Rule 10b-5, a plaintiff must show [inter alia] that the defendant made a materially false or misleading statement or omitted to state a material fact necessary to make a statement not misleading”) (internal quotation and citation omitted).

120. *See* 15 U.S.C. § 78j(b).

121. *See United States v. Langford*, 946 F.2d 798, 803 n.20 (11th Cir. 1991) (finding mailing element only jurisdictional).

122. *Id.* at 804; *United States v. Rigas*, 281 F. Supp. 2d 660, 667 (S.D.N.Y. 2003) (finding the unit of prosecution under the securities fraud statute is any transaction connected to the purchase or sale of a security). *But see United States v. Mackay*, 491 F.2d 616, 619 (10th Cir. 1974) (“The jurisdictional basis [under both securities fraud and mail fraud] is . . . the use of the mails or an instrumentality of commerce and as such each mailing is regarded as a separate crime even though it relates to essentially the same fraudulent scheme.”). The *Langford* court points out that the *Mackay* court only cited two mail fraud cases in support of its holding. *Langford*, 946 F.2d at 804 n.23.

123. *Langford*, 946 F.2d at 803 n.20 (finding the legislative history of 15 U.S.C. § 78j limits scope to “transactions effected by the use of the mails,” relegating use of mails to a merely jurisdictional function).

124. *Id.* at 803.

nor each mailing, but the purchase or sale of a security.¹²⁵ Of course, this requires courts to carefully evaluate the scope of the scheme to defraud on a case-by-case basis.

Thus, under the securities fraud statute the courts have determined the unit of prosecution based upon the essence of the criminal conduct, that is, the execution of the fraudulent scheme. In contrast to the mail fraud statute, courts have not concluded that each mailing in furtherance of a securities fraud scheme constitutes a separate offense. This highlights the shortcoming of mail fraud jurisprudence's focus on the basis of federal jurisdiction to determine the unit of prosecution.

B. The Bank Fraud Statute

In 1984, Congress enacted the bank fraud statute¹²⁶ in response to the savings and loan crisis to address gaps in federal jurisdiction regarding frauds upon financial institutions.¹²⁷ Congress modeled the statute after the mail and wire fraud statutes.¹²⁸ Jurisdiction for the mail fraud statute, however, is based on the Postal Power Clause and the Commerce Clause, the wire fraud statute is based on the Commerce Clause, but the bank fraud statute is based on the involvement of federal property in the form of federal insurance on deposits.¹²⁹

125. *Id.* Courts have reached the same conclusion with respect to 15 U.S.C. § 77q(a), which provides:

It shall be unlawful for any person in the offer or sale of any securities . . . by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly--

- (1) to employ any device, scheme, or artifice to defraud, or
- (2) to obtain money or property by means of any untrue statement of a material fact . . . necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
- (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q(a); *see* *United States v. Ashdown*, 509 F.2d 793, 800 (5th Cir. 1975).

126. 18 U.S.C. § 1344 (2012).

127. S. REP. NO. 98-225, at 378 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3519.

128. *Id.*; *see also* *United States v. Solomonson*, 908 F.2d 358, 364 (8th Cir. 1990) (“Section 1344 was modeled after the mail and wire fraud statutes.”); *United States v. Bonallo*, 858 F.2d 1427, 1432-33 (9th Cir. 1988) (noting that the Senate Report stated that the bank fraud statute is modeled after the mail fraud statute, and that the House Judiciary Committee, in considering the bank fraud statute, endorsed the broad reading given to mail fraud).

129. S. REP. NO. 98-225, at 378-79 (1983), *reprinted in* 1984 U.S.C.C.A.N. 31282, 3519. Though the 1989 amendment to the bank fraud statute deleted specific references to “federally chartered or insured financial institution” (*see* Act of Aug. 9, 1989, Pub. L. 101-

Initially courts followed the case law with respect to the unit of prosecution under those statutes and found that each financial transaction in furtherance of a bank fraud scheme constituted a separate offense, recognizing the bank fraud statute was modeled on the mail fraud and wire fraud statutes.¹³⁰ That changed, however, with later decisions.¹³¹ In interpreting the bank fraud statute, courts have held that each “execution of a scheme to defraud” constitutes a separate offense, not each financial transaction made in furtherance of the scheme.¹³² Thus, the critical task for a court is defining the scope of the fraudulent scheme.¹³³ The resolution of this issue turns on such fact specific inquiries as whether the loans in question were related, whether they came from a single bank, and the number of movements of money.¹³⁴

73, 103 Stat. 183), it is still necessary to show it as the basis for federal jurisdiction. *See, e.g.,* *United States v. Flanders*, 491 F.3d 1197, 1208 (10th Cir. 2007) (including as an element of the offense of willful misapplication of funds a requirement to show the bank involved in the fraud was federally insured); *United States v. Ragosta*, 970 F.2d 1085, 1089 n.1 (2d Cir. 1992) (explaining that the elements of the offense include showing the financial institution was federally chartered or insured).

130. *See, e.g.,* *United States v. Mason*, 902 F.2d 1434, 1437-38 (9th Cir. 1990) (stating that each check drawn on account constituted a separate offense in furtherance of fraud scheme), *overruled on other grounds by* *United States v. Doe*, 705 F.3d 1134 (9th Cir. 2013); *United States v. Schwartz*, 899 F.2d 243, 248 (3d Cir. 1990) (noting that each deposit constituted a separate offense in furtherance of fraud scheme); *Poliak*, 823 F.2d at 372 (finding language of 18 U.S.C. § 1344 “plainly and unambiguously allows charging each execution of the scheme to defraud as a separate act”).

131. The change started with the decision in *United States v. Lemons*, in which the Fifth Circuit Court of Appeals distinguished the mail fraud and wire fraud statutory language from the bank fraud statutory language and held that the unit of prosecution for purposes of the bank fraud statute was the “scheme” itself, not each financial transaction made in furtherance of the scheme. 941 F.2d 309 (5th Cir. 1991).

132. *See, e.g.,* *United States v. Wall*, 37 F.3d 1443, 1446 (10th Cir. 1994) (holding that each of multiple loans from a single institution fraudulently obtained as part of common scheme to raise money constituted separate offenses because each loan created a separate risk to the bank); *United States v. Rimell*, 21 F.3d 281, 287 (8th Cir. 1994) (“[E]ach separate execution of a scheme to defraud may be pled as a distinct count of the indictment.”); *United States v. Brandon*, 17 F.3d 409, 422 (1st Cir. 1994) (finding that each loan based on fraudulent, over-valued appraisals constituted separate offenses); *United States v. Heath*, 970 F.2d 1397, 1401-02 (5th Cir. 1992) (holding that two loans taken out in furtherance of single scheme to defraud bank out of ten million dollars constituted one offense of bank fraud); *Lemons*, 941 F.2d at 314 (finding that several transfers of funds in furtherance of single scheme to defraud constituted a single offense).

133. *Wall*, 37 F.3d at 1446; *United States v. Barnhart*, 979 F.2d 647, 651 (8th Cir. 1992).

134. *See Wall*, 37 F.3d at 1446 (reviewing cases evaluating various such factors in determining the scope of the scheme to defraud); *Brandon*, 17 F.3d at 422 (same).

As to the unit of prosecution, in distinguishing the bank fraud statute from the mail and wire fraud statutes courts have focused on the statutory language.¹³⁵ The mail fraud statute speaks in terms of using the mail to execute a scheme to defraud, whereas the bank fraud statute speaks in terms of executing a scheme to defraud using financial transactions.¹³⁶ Thus, courts conclude executing the scheme to defraud is the focus of the bank fraud statute.¹³⁷ This is a legitimate distinction based on subtle differences in the statutory language. This begs the primary question raised by this article: whether the mail fraud statute should be reworded to mirror similar statutes that focus the unit of prosecution on the execution of the scheme to defraud.

C. Bankruptcy Fraud

In 1994, Congress criminalized engagement in a scheme or artifice to defraud in relation to a bankruptcy matter.¹³⁸ There are three subsections to the bankruptcy fraud statute.¹³⁹ A person who has devised a scheme or

135. *See* *United States v. Wiehl*, 904 F. Supp. 81, 86-87 (N.D.N.Y. 1995) (distinguishing the unit of prosecution under the mail fraud statute from the unit of prosecution under the major fraud statute, 18 U.S.C. § 1031, based on nuances in the statutory language, supporting its conclusion by comparison to the statutory language of the bank fraud statute).

136. *Compare* 18 U.S.C. § 1341 (2012) (“Whoever, having devised . . . any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice . . . places in any post office . . . any matter or thing whatever [shall be punished].”), *with* 18 U.S.C. § 1344 (2012) (“Whoever knowingly executes . . . a scheme or artifice . . . to defraud [shall be punished].”).

137. *See, e.g.*, *United States v. De La Mata*, 266 F.3d 1275, 1287 (11th Cir. 2001) (“The unit of the offense created by § 1344 is each execution or attempted execution of the scheme to defraud, not each act in furtherance thereof.”) (citations omitted); *Lemons*, 941 F.2d at 317 (finding that bank fraud language prohibiting the “execution” of a fraudulent scheme sufficient to distinguish it from the mail fraud statute’s language prohibiting “devising” fraudulent schemes); *Heath*, 970 F.2d at 1402 (same).

138. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 312, 108 Stat. 4106, 4138.

139. 18 U.S.C. § 157 provides:

A person who, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so--

- [1]. Files a petition under title 11 . . . ;
2. [F]iles a document in a proceeding under title 11; or
3. [M]akes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of a petition, or in relation to a proceeding falsely asserted to be pending under such title shall be fined under this title, imprisoned not more than 5 years, or both.

artifice to defraud violates the bankruptcy fraud act if, for the purpose of executing or concealing the fraudulent scheme, the person: (1) files a bankruptcy petition;¹⁴⁰ (2) files a document with the bankruptcy court;¹⁴¹ or (3) makes a false or fraudulent representation concerning or in relation to a bankruptcy proceeding.¹⁴² Neither the first nor second subsection requires that the petition or pleading itself be false, fraudulent, or misleading.¹⁴³ In drafting the bankruptcy fraud statute, Congress modeled it after the mail fraud statute.¹⁴⁴ Indeed, the language very closely resembles that of the mail fraud statute. It contains similar introductory, dependent language regarding a requirement that someone have devised a scheme to defraud.¹⁴⁵

Though there is a paucity of case law interpreting this statute, it has now been law for fifteen years. Most courts have interpreted the bankruptcy

18 U.S.C. § 157 (2010).

140. *See, e.g.*, *United States v. Wagner*, 382 F.3d 598, 612 (6th Cir. 2004) (holding that the first subsection of § 157 has three elements: “1) the existence of a scheme to defraud or intent to later formulate a scheme to defraud and 2) the filing of a bankruptcy petition 3) for the purpose of executing or attempting to execute the scheme”) (quoting *United States v. DeSantis*, 237 F.3d 607, 613 (6th Cir. 2001)).

141. *See id.* (stating that the second subsection of § 157 has elements identical to the first except that it requires the filing of a document in a proceeding under Title 11).

142. *DeSantis*, 237 F.3d at 613.

143. *See Wagner*, 382 F.3d at 612 (setting forth elements of bankruptcy fraud under the first two elements).

144. 140 CONG. REC. H10752-01, at H10773 (daily ed. Oct. 4, 1994) (statement of Rep. Howard Berman); *see also Wagner*, 382 F.3d at 613 n.3 (looking to analysis of the mail and wire fraud statutes in holding that actual reliance on the scheme to defraud is not an essential element of the crime); *United States v. Daniels*, 247 F.3d 598, 600 (5th Cir. 2001) (citing the constitutionality of the mail fraud statute in holding the holding the bankruptcy fraud statute constitutional); 1 COLLIER ON BANKRUPTCY § 7.07[1][a], at 7-119 (Alan N. Resnick et al. eds., 16th ed. 2009) (“Section 157 is consciously patterned on the federal mail fraud statute.”).

145. *Compare* 18 U.S.C. § 1341 (2012) (“*Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do.*”) (emphasis added), *with* 18 U.S.C. § 157 (2012) (“A person who, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so.”). Indeed, but for the McNally-fix language regarding intangible rights and archaic language regarding “spurious” items, the language is virtually identical.

fraud statute by borrowing court interpretation of the mail fraud statute.¹⁴⁶ Nevertheless, what little case law exists demonstrates courts have been inconsistent in determining the unit of prosecution. For example, one federal circuit court held that each bankruptcy filing made in relation to a scheme to defraud is a separate violation of § 157.¹⁴⁷ Another appellate court, however, found multiple bankruptcy filings made in relation to a scheme to defraud to be a single violation of § 157.¹⁴⁸

In light of the case law comparing the statutory language of the bank fraud statute with that of the mail fraud statute, it would seem that the bankruptcy fraud statutory construction would track the mail fraud statutory construction. That is, because the mail fraud and bankruptcy fraud statutory language both emphasize the method by which the fraudulent scheme is executed and not the execution of the scheme itself, the unit of prosecution under the bankruptcy fraud statute would have to be each petition or document filed. Following this logic, though there be but one fraudulent scheme to defraud, under the bankruptcy fraud statute it would be a separate crime each time a petition or other document is filed in bankruptcy court.

Should this be the case? When a person engages in a fraudulent scheme in connection with a bankruptcy case, the number of documents that happen to be filed in connection with the bankruptcy may have nothing to do with the extent or nature of the fraudulent conduct. Under the first two subsections of the bankruptcy fraud statute, the petition or document filed with the court need not itself be fraudulent.¹⁴⁹ Thus, the number of documents filed may have no relationship at all with the defendant's criminal culpability. Yet, if the courts follow the statutory construction,

146. *See* *United States v. Milwitt*, 475 F.3d 1150, 1155 n.5 (9th Cir. 2007) (“Most of the few courts that have interpreted 18 U.S.C. § 157 have looked to 18 U.S.C. §§ 1341 and 1343 for guidance” and collecting cases and authorities).

147. *See DeSantis*, 237 F.3d at 613 (holding that if a defendant, having devised a scheme to defraud and filed a bankruptcy petition with the purpose of executing a scheme to defraud, had undertaken a variety of other acts, such as filing a reorganization plan or making a false statement in a meeting of creditors, for the purpose of executing the scheme, he would be subject to additional counts of § 157).

148. *See United States v. Naegele*, 341 B.R. 349, 364 (D.D.C. 2006) (finding indictment which charged a violation of § 157 not improper because, while it alleged a number of acts in furtherance of a single scheme to defraud, they were set out in a “manner and means” section of the indictment and were not alleged as additional counts).

149. *See Wagner*, 382 F.3d at 612 (setting forth the elements of the first two subsections of § 157).

given the almost identical language of the mail fraud statute, courts would have to conclude that each filing constitutes a separate offense.

A comparison of multiple other fraud statutes, each modeled after the mail fraud statute, reflects a multitude of conclusions as to the appropriate unit of prosecution. Although different conclusions might find support based in subtleties in statutory language, the previous discussion shows that these may be distinctions without differences. Moreover, it is only with regard to the mail fraud statute, and its companion wire fraud statute, that courts still cling to the conclusion that the unit of prosecution should be based on the act giving rise to federal jurisdiction. A consistent approach across the “scheme to defraud” statutes is needed.

IV. The Unit of Prosecution Under the Mail Fraud Statute Should Not Be the Use of the Mails

The analysis of the mail fraud statute’s evolution shows its shift from a statute based on the Postal Power Clause and designed to protect the United States Postal Service from abuse, to a statute based on both the Postal Power and Commerce Clauses designed to protect people from fraudulent schemes where mailings are used to execute the fraudulent scheme. This leads to the conclusion that the tired truism that each mailing automatically constitutes a separate offense should be rejected. Established precedent, however, now precludes courts from determining anew whether each mailing should constitute a separate offense of the mail fraud statute or whether there is a more appropriate unit of prosecution.¹⁵⁰ Changing the unit of prosecution would require district courts to untether themselves from the *Ex parte Henry* holding, flout binding precedent, and analyze the nature of the offense itself to determine whether charging each mailing as a separate offense is the appropriate unit of prosecution. Accordingly, a legislative fix is the only option to clarify its intended unit of prosecution.

A. Why It Is Important to Determine the Unit of Prosecution

Determining the unit of prosecution is important to determine whether an indictment is multiplicitous. Treating each mailing as a separate offense makes application of the mail fraud statute potentially overinclusive in the sense that it can include, as separate criminal offenses, conduct which is in furtherance of a single criminal offense. Charging the same criminal

150. *See Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (holding that stare decisis, the policy of courts to stand by precedent and not to disturb a settled point, is to be followed absent “special justification”).

behavior in several counts constitutes multiplicity.¹⁵¹ Determining whether counts are multiplicitous turns on what Congress intended as the appropriate unit of prosecution.¹⁵² Multiplicity analysis therefore requires an evaluation of the statute and its legislative history to determine the gravamen of the offense,¹⁵³ even if each charge appears to require proof of different facts.¹⁵⁴ Unless Congress has clearly and unequivocally indicated that each act constitutes a separate offense, the rule of lenity, which requires “ambiguous criminal laws to be interpreted in favor of the defendants

151. See *United States v. Fleming*, 19 F.3d 1325, 1330 (10th Cir. 1994) (“[M]ultiplicity refers to multiple counts of an indictment which cover the same criminal behavior.”) (quoting *United States v. Dashney*, 937 F.2d 532, 540 n.7 (10th Cir. 1991)); *United States v. Allen*, 13 F.3d 105, 107 (4th Cir. 1993) (defining multiplicity as “the charging of each act in a series of identical acts as though it were a separate crime”); *United States v. Rimell*, 21 F.3d 281, 287 (8th Cir. 1994) (“An indictment which charges a single offense in multiple counts is multiplicitous.”); *United States v. Langford*, 946 F.2d 798, 802 (11th Cir. 1991) (“Multiplicity is the charging of a single offense in more than one count.”); see also 1A CHARLES ALAN WRIGHT & ANDREW D. LEIPOLD, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 142 (4th ed. 2008) (“[M]ultiplicity is charging a single offense in several counts.”).

152. See *Langford*, 946 F.2d at 802 (“To determine whether an indictment is multiplicitous, we first determine the allowable unit of prosecution.”).

153. See *United States v. Christner*, 66 F.3d 922, 927 (8th Cir. 1995) (“The yardstick in determining whether there is . . . multiplicity is whether one offense or separate offenses are charged, and . . . this is a difficult and subtle question. The test announced most often in cases is that offenses are separate if each requires proof of an additional fact that the other does not. This seems of little value as a test. The real question is one of legislative intent, to be ascertained from all the data available.”) (quoting 1 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 142 (2d ed. 1982)); *United States v. Bennett*, 44 F.3d 1364, 1373 (8th Cir. 1995) (“First, a court must ask whether Congress ‘intended that each violation be a separate offense.’ If it did not, there is no statutory basis for the two prosecutions, and the double jeopardy inquiry is at an end. Second, if Congress intended separate prosecutions, a court must then determine whether the relevant offenses constitute the ‘same offense’ within the meaning of the Double Jeopardy Clause.”) (citations omitted); *United States v. Meuli*, 8 F.3d 1481, 1485 (10th Cir. 1993) (“In reviewing multiplicity claims we look to the language of the statute to determine whether Congress intended multiple convictions and sentences under the statute.”); see also WRIGHT, *supra* note 151, § 142 (“[A]t its core, the issue of duplicity or multiplicity is one of statutory interpretation.”). *But see Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975) (noting that offenses are considered separate, and therefore not multiplicitous, if each requires proof of a fact not common to the others).

154. See, e.g., *United States v. Woodward*, 469 U.S. 105, 108-10 (1985) (per curiam) (reviewing legislative history to determine congressional intent regarding statutes which, on their face, required proof of different facts); *Albernaz v. United States*, 450 U.S. 333, 340-42 (1981) (explaining that the *Blockburger* test for Double Jeopardy Clause violations is merely a rule of statutory construction, thus making analysis of legislative history necessary to determine congressional intent if possible).

subjected to them,”¹⁵⁵ suggests courts should find a single offense.¹⁵⁶ The rule of lenity comes into play, however, only when a statute is deemed ambiguous.¹⁵⁷ Courts have rejected application of the rule in multiplicity challenges to the mail and wire fraud statutes by merely repeating the truism that each mailing or use of the wires constitutes a separate offense.¹⁵⁸

Determining the appropriate unit of prosecution under the mail fraud and wire fraud statutes is more than an academic exercise. First, multiplicity poses the danger of imposing multiple sentences for a single offense¹⁵⁹ in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. The Double Jeopardy Clause provides that no person shall “be subject for the same offence [sic] to be twice put in jeopardy of life or limb.”¹⁶⁰ When each mailing is a separate offense, multiple charges for multiple mailings do not violate the Double Jeopardy Clause. If this is wrong, however, and each mailing should not constitute a separate offense, then multiple charges for multiple mailings could violate the Double Jeopardy Clause.

Second, charging a defendant in multiple counts for a single offense may improperly “suggest to the jury that the defendant committed more than one

155. *See* *United States v. Santos*, 553 U.S. 507, 514 (2008).

156. *See* *Rewis v. United States*, 401 U.S. 808, 812 (1971) (“[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.”); *Bell v. United States*, 349 U.S. 81, 84 (1955) (“[I]f Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses”); *see also* *United States v. Polouizzi*, 564 F.3d 142, 158 (2d Cir. 2009) (finding the rule of lenity forbids treating as multiple offenses each child pornographic image received in a single transaction because congressional intent as to the unit of prosecution was ambiguous); *United States v. Vargas-Castillo*, 329 F.3d 715, 721-22 (9th Cir. 2003) (stating that the rule of lenity was not violated with regard to indictment on two charges of importation and possession of cocaine and marijuana because Congress unambiguously intended for each controlled substance to be a unit of prosecution).

157. *Bifulco*, 447 U.S. at 387.

158. *See, e.g.*, *United States v. Luongo*, 11 F.3d 7, 9 n.6 (1st Cir. 1993) (“As the wire fraud statute is unambiguous, and the principle that each use of the wires constitutes a separate violation of section 1343 has been widely accepted for many years, we have no occasion to engage the rule of lenity.”) (citations omitted).

159. *See* *United States v. Christner*, 66 F.3d 922, 927 (8th Cir. 1995); *United States v. Brandon*, 17 F.3d 409, 422 (1st Cir. 1994); *United States v. Haddock*, 956 F.2d 1534, 1546 (10th Cir. 1992), *abrogated on other grounds by* *United States v. Wells*, 519 U.S. 482 (1997); *United States v. Langford*, 946 F.2d 798, 802 (11th Cir. 1991); *United States v. Duncan*, 850 F.2d 1104, 1108 n.4 (6th Cir. 1988), *overruled on other grounds by* *Schad v. Arizona*, 501 U.S. 624 (1991); *United States v. Hearod*, 499 F.2d 1003, 1005 (5th Cir. 1974).

160. U.S. CONST. amend. V.

crime” for the purpose of trying improperly to influence the jury.¹⁶¹ In other words, a large number of charges may give the impression of greater criminal activity or culpability than may have actually occurred.¹⁶²

Third, multiplicitous counts can create the possibility of compromise verdicts in which jurors strike deals to find a defendant guilty of one or more counts in exchange for acquitting the defendant on other counts as a means of reaching a verdict.¹⁶³ This is possible if multiple mail fraud counts are charged for each mailing, whereas it would not be possible if a single mail fraud count reflected the scheme to defraud regardless of the number of mailings.

Fourth, when the government charges multiple counts for acts that appear to arise from a single course of conduct, it may create the appearance the government did so in an effort to skew plea bargaining. The argument, for example, is that by charging a defendant with thirty counts of mail fraud arising from a single fraudulent scheme, which resulted in thirty mailings, the government has attempted to intimidate a defendant, creating the appearance of greater exposure to criminal liability.¹⁶⁴

Finally, multiplicitous mail fraud or wire fraud charges pose an additional, perhaps unique danger, when they are used as predicate acts for a Racketeer Influenced and Corrupt Organizations (RICO) charge. Under the RICO Act, prosecutors must prove two or more predicate violations of specific federal and state crimes set forth in the statute.¹⁶⁵ Mail fraud and

161. See *Christner*, 66 F.3d at 927 (quoting *United States v. Dixon*, 921 F.2d 194, 196 (8th Cir. 1990)).

162. See, e.g., *Langford*, 946 F.2d at 802 (“[A] multiplicitous indictment may improperly prejudice a jury by suggesting that a defendant has committed several crimes -- not one.”) (citing *United States v. Reed*, 639 F.2d 896, 904 (2d Cir. 1981)); *Duncan*, 850 F.2d at 1108 n.4 (holding that multiplicity poses the danger that “prolix recitation may falsely suggest to a jury that a defendant has committed not one but several crimes.”); *United States v. Marquardt*, 786 F.2d 771, 778 (7th Cir. 1986) (noting that multiplicity creates a danger of prejudicing jury against defendant by creating impression of more criminal activity than what actually occurred); *Reed*, 639 F.2d at 904 (stating that one vice of multiplicity is that it “may improperly prejudice a jury by suggesting that a defendant has committed not one but several crimes”) (citing *United States v. Carter*, 576 F.2d 1061, 1064 (3d Cir. 1978)).

163. See also Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 PENN ST. L. REV. 1107, 1125-26 (2005).

164. See *id.* at 1126-27.

165. See 18 U.S.C. § 1961(5) (2012); see also *United States v. Tello*, 687 F.3d 785, 792 (7th Cir. 2012) (holding that to violate the RICO statute, “an individual must, among other things, participate in two or more predicate acts of racketeering”).

wire fraud violations constitute predicate offenses under the RICO statute¹⁶⁶ and are often used as predicate offenses in RICO prosecutions.¹⁶⁷ If a RICO charge is based upon alleged multiple violations of the mail fraud statute then, when multiple mailings were made in execution of a single scheme to defraud, a defendant may wrongfully be convicted of violating RICO.¹⁶⁸ For example, courts have recognized that multiple mail and wire fraud charges pose a unique danger when used as predicate offenses under RICO because the number of charges seldom correlates directly to a real pattern of racketeering activity.¹⁶⁹ If each mailing or wiring would no longer constitute a separate offense, it would eliminate this potential problem with using mail and wire fraud offenses as predicate acts under the RICO statute.

Although the mail and wire fraud statutes are overinclusive, treating each mailing or each wiring as a separate offense can be underinclusive by operation of the five-year statute of limitations.¹⁷⁰ Because the mailing or wiring is the unit of prosecution under the mail and wire fraud statutes, “the statute of limitations . . . runs from the date of [the last mailing or wiring] in

166. 18 U.S.C. § 1961(1).

167. *See, e.g.*, *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (mail fraud); *United States v. Whitfield*, 590 F.3d 325, 342 (5th Cir. 2009) (wire fraud); *United States v. Ganim*, 510 F.3d 134, 140-41 (2d Cir. 2007) (mail fraud); *United States v. Johnson*, 440 F.3d 832, 837 (6th Cir. 2006) (mail fraud); *United States v. Peter*, 310 F.3d 709, 711 (11th Cir. 2002) (mail fraud).

168. *See United States v. Horak*, 833 F.2d 1235, 1240 (7th Cir. 1987) (noting that multiple mailings in furtherance of a single scheme to defraud may not constitute a pattern of predicate offenses under the RICO statute, though each mailing may constitute a separate offense).

169. *See Lipin Enters. Inc. v. Lee*, 803 F.2d 322, 325 (7th Cir. 1986) (Cudahy, J., concurring) (“Mail fraud and wire fraud are perhaps unique among the various sorts of ‘racketeering activity’ possible under RICO in that the existence of a multiplicity of predicate acts . . . may be of no indication of the requisite continuity of the underlying fraudulent activity. Thus, a multiplicity of mailings does not necessarily translate into a ‘pattern’ of racketeering activity.”); *accord Elliott v. Chi. Motor Club Ins.*, 809 F.2d 347, 350 (7th Cir. 1986).

170. 18 U.S.C. § 3282 provides for a five-year statute of limitations for most federal offenses, including mail and wire fraud. *See, e.g.*, *United States v. McGowan*, 590 F.3d 446, 456 (7th Cir. 2009); *United States v. Pearson*, 340 F.3d 459, 464 (7th Cir. 2003); *United States v. McDonald*, 576 F.2d 1350, 1357 (9th Cir. 1978). 18 U.S.C. § 3293(2), however, extends the statute of limitations for mail and wire fraud to ten years if the offense affects a financial institution.

furtherance of the scheme.”¹⁷¹ Thus, the statute of limitations may bar prosecutions of ongoing fraudulent schemes simply because the mailing or wiring upon which the offense rests occurred outside the statute of limitations.

It is not difficult to imagine a fraudulent scheme that starts with a mailing or wiring but that is then executed over some period of time by other acts in furtherance of the scheme. For example, a simple scheme to defraud might involve a mailing to a victim soliciting money for a fictitious charity, followed by a personal visit by the criminal to the home of the victim to solicit the charitable contribution. If the mailing took place five years and one day ago, but the personal visit took place four years and 364 days ago, prosecution under the mail fraud statute would be barred.¹⁷² Were the scheme to defraud the unit of prosecution, on the other hand, then the statute of limitations would run from the last act committed in furtherance of that scheme.¹⁷³ This would expand the scope of fraudulent schemes that could be charged under the mail and wire fraud statutes.

Determining the unit of prosecution is not an academic exercise. It implicates defendants’ constitutional rights and can influence everything from plea bargaining to the manner in which juries reach their verdicts. If, as this article posits, the real gist of the mail fraud statute is no longer each separate mailing made in connection with a scheme to defraud, but rather, each execution of a scheme to defraud, then it is important that Congress change the statute.

171. *United States v. Eckhardt*, 843 F.2d 989, 993 (7th Cir. 1988); *see also McDonald*, 576 F.2d at 1357 (finding the statute of limitations for mail fraud runs from last mailing made in furtherance of the fraudulent scheme).

172. Admittedly, there are no reported decisions where the government’s prosecution of a fraudulent scheme was barred in circumstances similar to this hypothetical, but, of course, one would not expect there to be. The government would be unlikely to ever charge this conduct knowing that it was barred by the statute of limitations, or if it did, would have the case dismissed at the district court level.

173. *See United States v. Najjor*, 255 F.3d 979, 983-84 (9th Cir. 2001) (finding that “executing a scheme to defraud” under the bank fraud statute “is a continuing offense” for statute of limitations purposes such that the statute of limitations begins to run when the last act in furtherance of the scheme is committed); *United States v. Anderson*, 188 F.3d 886, 889-90 (7th Cir. 1999) (noting that the defendant’s refinancing of a fraudulent loan within five years of the criminal charge brought the fraudulent scheme within the bank fraud statute of limitations).

B. Reworking the Mail Fraud Statute to Change the Unit of Prosecution

The gravamen of the mail fraud statute as currently written is the execution of the underlying scheme to defraud, not the use of the mails. The appropriate unit of prosecution under the mail and wire fraud statutes, therefore, should focus on the execution of the scheme to defraud, not on the mailings or use of the wires. Like the bank fraud statute, the unit of prosecution should be logically related to the fraudulent scheme. As discussed above, however, courts have seized upon nuanced differences in the language of other statutes, such as the bank fraud statute, to determine that the unit of prosecution is different.¹⁷⁴ It will therefore require a change in the mail fraud statute to make it clear that Congress did not intend to create different units of prosecution under these similar statutes.

The conclusion that the mailing is the gist of the mail fraud statute, such that each mailing constitutes a separate offense, is a matter of judicial misinterpretation of congressional intent.¹⁷⁵ To reverse decades of precedent misinterpreting congressional intent, therefore, Congress needs to clarify the intent of the current version of the mail fraud statute. Congress could recognize the mail fraud statute's unique history, the evolution of its language, and the shift in focus from mailing to the fraudulent scheme and abandon the untenable truism that each mailing constitutes a separate offense. Congress could clarify its intent that the gist of the mail fraud statute, and its sister the wire fraud statute, is the execution of the scheme to defraud.

Because courts have distinguished the mail fraud statute from other similar statutes based on statutory language, the mail fraud jurisprudence may be so entrenched that it is unrealistic to expect courts to abandon their past reasoning. Accordingly, it is necessary for Congress to amend the mail fraud statute. This could be accomplished by changing the language "for the purpose of executing such a scheme" to "executes such a scheme," such that the language matches that of the bank fraud statute.¹⁷⁶ This would indicate clear congressional intent to make the scheme to defraud itself the gist of the mail fraud and wire fraud statutes and free the courts from the burden of its precedent that was based on a prior version of the statute.

The unit of prosecution test used for mail and wire fraud should be the same as used for bank fraud: each execution of a mail or wire fraud scheme should constitute a separate offense, regardless of the number of times the

174. *See supra* notes 130-134 and accompanying text.

175. *See supra* Part I.

176. *See infra* Appendix C.

mails or wires were used. In some cases, each mailing may constitute an execution of a scheme to defraud, while in other instances multiple mailings may simply be multiple acts in furtherance of a single fraudulent scheme. The focus should be on the relationship between the mailing (or wire) and the fraudulent scheme.¹⁷⁷ In determining whether there is one or more schemes to defraud, courts should consider such factors as whether the mailings were related to or dependent on each other and whether each mailing caused, or risked, a separate harm to the victim.

Though courts do not explicitly list “harm” as a factor for consideration, it underlies their analysis in the structuring of bank fraud cases. For example, in addressing the anti-structuring statute, one court determined that whether the defendants made a single deposit or hundreds of deposits was irrelevant in determining their culpability.¹⁷⁸ Similarly, with regard to bank fraud, some courts consider whether the act in question created a separate risk of harm to the bank.¹⁷⁹ The same analysis of harm should be applied to the mail fraud statute. This approach would recognize the fact that sometimes multiple mailings create a greater danger of harm, while in other cases they do not.¹⁸⁰

177. For example, a fraudulent mail order scheme whereby each customer is defrauded should fairly be considered separate schemes to defraud each customer. A separate harm, or risk of harm, is created with respect to each customer defrauded. The number of mailings would then bear a direct, logical relationship to the harm caused. If, however, with respect to defrauding a customer out of \$100 the defendant makes several mailings (the initial solicitation, a follow-up solicitation, and a thank you designed to lull the customer into inaction), it should be treated as a single scheme to defraud in which there were several mailings. Similarly, a scheme to defraud an insurance company by mailing multiple false claims should be treated as a single scheme, not as separate schemes to defraud.

178. *See* *United States v. Davenport*, 929 F.2d 1169, 1171 (7th Cir. 1991) (“The government’s position [that each deposit equals a separate offense] leads to the weird result that if a defendant receives \$10,000 and splits it up into 100 deposits he is ten times guiltier than a defendant who splits up the same amount into ten deposits.”).

179. *See, e.g.*, *United States v. Wall*, 37 F.3d 1443, 1446 (10th Cir. 1994) (“Each [loan] involved a separate movement of money, and each, standing alone, put the bank at risk of loss.”). *But see* *United States v. Heath*, 970 F.2d 1397, 1402 (5th Cir. 1992) (“Although a two-loan scheme may subject an institution to greater risk than a scheme involving only one transaction, it is the execution of the scheme itself that subjects a defendant to criminal liability, not, as we stated in *Lemons*, the execution of each step or transaction in furtherance of the scheme.”).

180. *Compare* *United States v. Helms*, 897 F.2d 1293 (5th Cir. 1990) (charging defendant with forty-one mail and wire fraud counts in connection with selling distributorship in nonexistent business to 629 victims, defrauding them of more than \$5 million), *with* *United States v. Brown*, 948 F.2d 1076 (8th Cir. 1991) (charging defendant

Ultimately, the common-sense question is whether the defendant is more criminally culpable because of each additional mailing.¹⁸¹

V. Conclusion

Over a century ago the Supreme Court held that each separate mailing constituted a separate mail fraud offense. It premised this holding on its understanding that abuse of the United States Mail was the “gist” of the mail fraud statute. That premise no longer rings true. The history of the mail fraud statute demonstrates that the government has slowly transformed the original mail fraud statute from an act designed to protect the United States Post-Office establishment from abuse to a catchall offense for attacking any scheme to defraud, with the use of the United States mail or commercial mail service acting as a jurisdictional basis only. It is clear that at least since the 1994 amendment to the mail fraud statute, the “gist” of the mail fraud statute is the execution of the “scheme or artifice to defraud.” If the foundational premise of the *Ex parte Henry* holding has since eroded, the rule that each mailing constitutes a separate offense sits on shaky ground. To ensure fairness, the time has come for Congress to make clear what is apparent. Each separate mailing made in connection with a scheme and artifice to defraud should no longer constitute a separate mail fraud offense.

with sixty mail and wire fraud counts in connection with making a fraudulent disability claim for monthly benefits of \$3511).

181. See Rakoff, *supra* note 15, at 778 (arguing that the number of mail fraud counts should be related to such factors as “the scope or duration of the fraud, the number of victims, the amount of damage, or any other factor relating to the moral culpability of the perpetrator or the social damage inflicted by his fraud,” as opposed to “the sheer happenstance of how many times the mails have been used in executing the fraud”).

APPENDIX A

The following is a comparison of the original mail fraud statute and the current version of the mail fraud statute. The deletions from the original statute are struck out, and the added language is underlined:

~~That if any person~~ *Whoever*, having devised or intending to devise any scheme or artifice to defraud, *or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimate or held out to be such counterfeit or spurious article* ~~to be effected by either opening or intending to open correspondence or communication with any other person (whether resident within or outside of the United States), by means of the post office establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice (or attempting to do so), places any letter or packet in any post-office of the United States or authorized depository for mail matter, any matter or thing whatever to be delivered by any private or commercial interstate carrier, or takes or receives any therefrom, any such matter or thing~~ person, so misusing the post office establishment or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be guilty of a misdemeanor, and shall be punished with a fine of not more than five hundred dollars, with or without such imprisonment, as the court shall direct, not exceeding eighteen calendar months under this title or imprisoned not more than twenty years or both. The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post office establishment enters as an instrument into such fraudulent scheme or devise. *If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.*

In other words, the only common statutory language that remains from the original statute is: “. . . having devised or intending to devise any scheme or artifice to defraud . . . place . . ., or take . . . or receive . . . therefrom, . . . such . . ., shall be fine[d] under this title or imprisoned not more than twenty years or both.”

APPENDIX B

The below annotated version of the statute readily exposes the alterations between original mail fraud statute and the 1909 amended version of the mail fraud statute.

~~That if any person~~ *Whoever*, having devised or intending to devise any scheme or artifice to defraud, ~~or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . to be effected by either opening or intending to open correspondence or communication with any other person (whether resident within or outside of the United States), by means of the post-office establishment of the United States, or by inciting such other person to open communication with the person so devising or intending,~~ shall *for the purpose of,* ~~in and for~~ executing such scheme or artifice (or attempting to do so), ~~place or caused to be placed,~~ any letter ~~or packet,~~ *postal card, package, writing, circular, pamphlet, or advertisement whether addresses to any person residing within or without the United States,*

~~in any post-office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States . . . such person, so misusing the post-office establishment, shall be fined not more than one thousand dollars or imprisoned not more than five years, or both guilty of a misdemeanor, and shall be punished with a fine of not more than five hundred dollars, with or without such imprisonment, as the court shall direct, not exceeding eighteen calendar months. The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme or devise.~~

APPENDIX C

Amending the language of the mail fraud statute could be accomplished by using the language “for the purpose of executing such a scheme” to “executes such a scheme,” such that the language matches that of the bank fraud statute. There would need to be other minor changes to take into account the change in verb tense. The amendments to the mail fraud statute are as follows (with additions underlined and deletions crossed out):

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, ~~for the purpose of executing~~ *executes* such scheme or artifice or attempting so to do, ~~places~~ *by placing* in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or ~~deposits or causes~~ *by depositing or causing* to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or ~~takes or receives~~ *by taking or receiving* therefrom, any such matter or thing, or by knowingly ~~causes~~ *causing* to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than twenty years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.