

9-1-2007

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#### Recommended Citation

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**MISSING THE FOREST FOR THE TREES: THE SEVENTH CIRCUIT'S REFINEMENT OF *BLOOM'S* PRIVATE GAIN TEST FOR HONEST SERVICES FRAUD IN *UNITED STATES V. THOMPSON***

ROBERT J. LAPOINTE\*

Cite as: Robert J. Lapointe, *Missing the Forest for the Trees: The Seventh Circuit's Refinement of Bloom's Private Gain Test for Honest Services Fraud in United States v. Thompson*, 3 SEVENTH CIRCUIT REV. 86 (2007), at <http://www.kentlaw.edu/7cr/v3-1/lapointe.pdf>.

INTRODUCTION

The mail fraud statute, once described as the federal prosecutor's "Colt 45 [or] Louisville Slugger"<sup>1</sup> is one of the federal government's major weapons in the fight against political corruption.<sup>2</sup> The statute proscribes using the mails to carry out "any scheme or artifice to defraud."<sup>3</sup> When first enacted, the mail fraud statute was limited to traditional frauds involving money or property.<sup>4</sup> At the turn of the twentieth century, however, the United States Supreme Court

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<sup>1</sup> Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 771 (1980).

<sup>2</sup> See Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. CIN. L. REV. 1, 2 (1998); Joshua A. Kobrin, Note, *Betraying Honest Services: Theories of Trust and Betrayal Applied to the Mail Fraud Statute and §§ 1346*, 61 N.Y.U. ANN. SURV. AM. L. 779, 792 (2006); Carrie A. Tandler, Note, *An Indictment of Bright Line Tests for Honest Services Mail Fraud*, 72 FORDHAM L. REV. 2729, 2729 (2004).

<sup>3</sup> 18 U.S.C. § 1341 (2000).

<sup>4</sup> *McNally v. United States*, 483 U.S. 350, 356 (1987).

concluded that certain fraud statutes were not limited to the loss of money or property. In *Hammerschmidt v. United States*, the Court concluded that the government was defrauded when someone interferes with its “lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest.”<sup>5</sup> *Hammerschmidt* and its progeny led to the creation of the “intangible rights theory” through which the mail fraud statute was used to reach non-pecuniary frauds.<sup>6</sup>

In the mid twentieth century prosecutors developed the “honest services” theory.<sup>7</sup> Under this theory, public officials owe fiduciary duties to the citizenry.<sup>8</sup> One of their fiduciary duties is to provide the public their “honest services.”<sup>9</sup> In the battle against public corruption, prosecutors charged public officials with mail fraud when they utilized the mails in connection with breaching their fiduciary duties.<sup>10</sup> Typical breaches of fiduciary duty involved the acceptance of bribes or the participation in kickback schemes.<sup>11</sup> Until the 1970s, the honest services theory was used in connection with pecuniary frauds.<sup>12</sup> But after Watergate, when federal prosecutors were specifically charged with fighting public corruption at the state and local levels, innovative prosecutors combined the intangible rights theory with the honest services theory and created the honest services fraud doctrine.<sup>13</sup> Under this doctrine public officials could be indicted for mail fraud when

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<sup>5</sup> 265 U.S. 182, 188 (1924).

<sup>6</sup> Kobrin, *supra* note 2, at 790 n.50 (2006).

<sup>7</sup> See *Shushan v. United States*, 117 F.2d 110 (5th Cir. 1941); Kobrin, *supra* note 2, at 791.

<sup>8</sup> *McNally*, 483 U.S. at 355.

<sup>9</sup> See, e.g., *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974); *Shushan*, 117 F.2d at 115 (“[n]o trustee has more sacred duties than a public official”).

<sup>10</sup> See, e.g., *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979); *Isaacs*, 493 F.2d 1124.

<sup>11</sup> See *United States v. Antico*, 275 F.3d 245, 262-63 (3d Cir. 2001); *United States v. Woodward*, 149 F.3d 46, 54-55 (1st Cir. 1998).

<sup>12</sup> Kobrin, *supra* note 2, at 791.

<sup>13</sup> Moohr, *supra* note 2, at 2-8; Kobrin, *supra* note 2, at 790-94; Tandler, *supra* note 2, at 2730-34.

they breached their fiduciary duties regardless of whether or not the public suffered a tangible loss.<sup>14</sup> Although the honest services fraud doctrine began in the public sector it was later extended to the private sector.<sup>15</sup>

Over the next two decades each Circuit accepted the honest services fraud doctrine.<sup>16</sup> But in 1987, the Supreme Court struck the doctrine down in *McNally v. United States*, holding that the mail fraud statute was limited to frauds involving money or property.<sup>17</sup> One year later, Congress resurrected the honest services fraud doctrine through the enactment of 18 U.S.C. § 1346.<sup>18</sup> Section 1346 states that “[f]or 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.”<sup>19</sup> Congress, however, failed to define the terms “intangible rights” and “honest services.” As a result the statute is frequently challenged on vagueness and federalism grounds.<sup>20</sup> To counter these concerns, the lower courts have adopted various limiting principles to help limit prosecutorial overreach and to prevent minor

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<sup>14</sup> See, e.g., *Mandel*, 591 F.2d 1347; *Isaacs*, 493 F.2d 1124.

<sup>15</sup> See, e.g., *United States v. Welch*, 327 F.3d 1081 (10th Cir. 2003); *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997); *United States v. Jain*, 93 F.3d 436 (8th Cir. 1996); *United States v. Bronston*, 658 F.2d 920 (2d Cir. 1981). Two articles discussing honest services fraud in the private sector include John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427 (1998) and Tandler, *supra* note 2. Honest services fraud in the private sector is beyond the scope of this Note.

<sup>16</sup> *United States v. Sawyer*, 85 F.3d 713, 723 (1st Cir. 1996); see also Sara Sun Beale, *Comparing the Scope of the Federal Government's Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal*, 51 HASTINGS L. J. 699, 711 (2000); Kobrin, *supra* note 2, at 794.

<sup>17</sup> 483 U.S. 350, 358-59 (1987).

<sup>18</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4508 (1988) (codified at 18 U.S.C. § 1346).

<sup>19</sup> 18 U.S.C. § 1346 (2000).

<sup>20</sup> See, e.g., *United States v. Warner*, 498 F.3d 666 (7th Cir. 2007); *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc); *United States v. Bryan*, 58 F.3d 933 (4th Cir. 1995); *United States v. Waymer* 55 F.3d 564 (11th Cir. 1995).

breaches of fiduciary duties from becoming federal crimes.<sup>21</sup> In *United States v. Bloom* the United States Court of Appeals for the Seventh Circuit established its limiting principle as the “misuse of office . . . for private gain.”<sup>22</sup> The Seventh Circuit is the only Circuit that has adopted this standard.<sup>23</sup>

Recently, the Seventh Circuit refined its *Bloom* standard in *United States v. Thompson*.<sup>24</sup> In *Thompson*, Georgia Thompson, a state civil servant steered a contract to a business whose owner gave political donations to the Wisconsin Governor’s reelection campaign, both prior to and after the award of the contract.<sup>25</sup> The political contributions, however, were fully disclosed and there was no evidence that Thompson or anyone else accepted a bribe or was involved in a kickback scheme.<sup>26</sup> Although the Seventh Circuit has long held that “[n]ot every breach of every fiduciary duty works a criminal fraud,”<sup>27</sup> in *Thompson* the government’s theory was that “any politically motivated departure from state administrative rules is a federal crime,

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<sup>21</sup> See, e.g., *United States v. Welch*, 327 F.3d 1081, 1104-07 (10th Cir. 2003) (requiring that the government prove an intent to defraud); *United States v. Panarella*, 277 F.3d 678, 692-93 (3d Cir. 2002) (adopting a state law limiting principle); *United States v. Bloom*, 149 F.3d 649, 655 (7th Cir. 1998) (adopting the misuse of office for private gain limiting principle); *United States v. Brumley*, 116 F.3d 728, 733-34 (5th Cir. 1997) (en banc) (requiring that the government prove that services owed under state law were not delivered); *United States v. Sawyer*, 85 F.3d 713, 732 (1st Cir. 1996) (requiring that the government prove “a demonstrated intent to deceive”).

<sup>22</sup> *Bloom*, 149 F.3d at 655.

<sup>23</sup> *United States v. Malone*, No. 02:03-CR-00500-LRH-LRL, 2006 WL 2583293, at \*3 (D. Nev. Sept. 6, 2006); Albert W. Alschuler, *The Mail Fraud & RICO Racket: Thoughts on the Trial of George Ryan*, 9 GREEN BAG 2d 113, 115 (2006).

<sup>24</sup> 484 F.3d 877 (7th Cir. 2007).

<sup>25</sup> *Id.* at 878-79.

<sup>26</sup> *Id.* at 879, 881. Thompson was also charged with violating 18 U.S.C. § 666 entitled “Theft or bribery concerning programs receiving Federal funds,” but she was not charged with bribery. *Id.* at 880-81. Rather the government’s theory was that she “misapplied” federal funds. *Id.*

<sup>27</sup> *Bloom*, 149 F.3d at 645 (citing *United States v. George*, 477 F.2d 508, 512 (7th Cir. 1973)).

when the mails . . . are involved.”<sup>28</sup> The government further argued that Thompson “deprived Wisconsin of her ‘honest services’ [when she failed] to implement state law the way the administrative code laid it down.”<sup>29</sup>

In deciding *Thompson* the Seventh Circuit rejected the government’s theory that all politically motivated violations of administrative rules are federal crimes.<sup>30</sup> The court stated “[t]he idea that it is a federal crime for any official in state or local government to take account of political considerations when deciding how to spend public money is preposterous.”<sup>31</sup> The Seventh Circuit concluded that Ms. Thompson was innocent, reversed her conviction, and ordered her immediate release from prison—even prior to issuing its formal opinion.<sup>32</sup>

Although the Thompson facts were exceptional,<sup>33</sup> from a legal perspective the case appears to be rather ordinary. In deciding the case, the Seventh Circuit applied and followed the limiting principle it announced in *Bloom*.<sup>34</sup> The court found that Thompson neither

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<sup>28</sup> *Thompson*, 484 F.3d at 878.

<sup>29</sup> *Id.* at 882.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 883.

<sup>32</sup> *Id.* at 878.

<sup>33</sup> Wisconsin Governor, and former state attorney general, Jim Doyle was quoted as saying “the three judges did an ‘extraordinary thing’ by entering an order finding Thompson innocent and ordering her immediate release.” Steven Walters & John Diedrich, *Federal Appeals Court Tosses Thompson Case: Ex-state official freed: Judge calls evidence she steered travel contract ‘beyond thin’*, MILWAUKEE J. SENTINEL, Apr. 6, 2007, at A1. Some commentators have argued that the case was prosecuted, in a heated election year, solely for political reasons in an effort to help defeat Governor Doyle’s re-election bid. Adam Cohen, Editorial, *A Woman Wrongly Convicted and a U.S. Attorney Who Kept His Job*, N.Y. TIMES, Apr. 16, 2007, at A18; Steven Walters & Patrick Marley, *Conviction may cost Thompson \$300,000: Former state employee in seclusion after release*, MILWAUKEE J. SENTINEL, Apr. 7, 2007, at A1; Stephanie Francis Ward, *When Honesty Is Not Best Politics: Courts struggle with honest-services charges in bribery cases*, ABA J., Aug. 2007, at 18, 20.

<sup>34</sup> *Thompson*, 484 F.3d at 883-84.

misused her office, nor had a private gain.<sup>35</sup> In doing so, the Seventh Circuit further clarified the *Bloom* standard holding “that neither an increase in salary for doing what one’s superiors deem a good job, nor an addition to one’s peace of mind, is a ‘private benefit’ for the purpose of § 1346.”<sup>36</sup>

But a more nuanced reading of the opinion suggests that, in refining the *Bloom* standard, the court may have inadvertently opened the door to future abuses of the public trust by civil servants. Prior to the Seventh Circuit’s decision in *Thompson*, the Northern District of Illinois held, on three prior occasions, that one’s job or the prospect of future employment may serve as a private gain under the *Bloom* standard.<sup>37</sup> The first case in which this reasoning appeared was *United States v. Bauer*,<sup>38</sup> later followed by *United v States Munson*,<sup>39</sup> and *United States v. Sorich*.<sup>40</sup> The government cited to *Sorich* and *Munson* in support of its position in *Thompson*.<sup>41</sup> The Seventh Circuit found these cases “unpersuasive.”<sup>42</sup> But the court did not explain its reasoning.<sup>43</sup>

*Munson* is not readily distinguishable from *Thompson*, leading to the conclusion that *Thompson* simply overrules *Sorich*, *Munson*, and *Bauer*. Cutting against this conclusion is the court’s language finding the cases “unpersuasive” rather than simply stating that the cases are overruled.<sup>44</sup> Therefore, it is arguable, and more likely, that the court was distinguishing *Thompson* from *Sorich*, *Munson*, and *Bauer*. *Sorich*

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<sup>35</sup> *Id.* at 884.

<sup>36</sup> *Id.* at 884.

<sup>37</sup> *United States v. Sorich*, 427 F. Supp. 2d 820 (N.D. Ill. 2006); *United States v. Munson*, No. 03 CR 1153-4, 2004 U.S. Dist. LEXIS 14274 (N.D. Ill. July 27, 2004); *United States v. Bauer*, No. 00 CR 81, 2000 U.S. Dist. LEXIS 16784 (N.D. Ill. Nov. 14, 2000).

<sup>38</sup> 2000 U.S. Dist. LEXIS 16784, at \*10-12.

<sup>39</sup> 2004 U.S. Dist. LEXIS 14274, at \*3.

<sup>40</sup> *Sorich*, 427 F. Supp. 2d at 828-30.

<sup>41</sup> *Thompson*, 484 F.3d at 884.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

and *Bauer* can be readily distinguished from *Thompson* on the grounds that Sorich and Bauer held politically appointed policy-making jobs whose job security depended on the continued election of their political patrons.<sup>45</sup> In contrast, Thompson held a civil servant position with independent job security,<sup>46</sup> and was hired by the previous administration of the opposing political party.<sup>47</sup> Thus, one reading of *Thompson* is that a political appointee's job may serve as a private gain, but a state civil servant's job may not. This outcome has the potential to create an environment where civil servants can make—in perhaps subtle or Machiavellian ways—political decisions to help further the careers or reward the friends of their current political supervisors. In turn, the civil servants can be rewarded as a part of their normal compensation without the threat of punishment.<sup>48</sup> This outcome potentially continues the graft, or minimally the perception of corruption, that increases the public's mistrust of government and decreases its faith in the political process. Furthermore, this outcome will undercut the main purpose behind the enactment of § 1346—to help fight public corruption at the state and local levels.

This Note argues that the Seventh Circuit could have avoided the problems raised by *Thompson* if it had first decided as a threshold matter whether or not a “scheme” existed. Although not defined in the mail fraud statute, one of the dictionary definitions of scheme is “[a]n artful plot or plan, [usually] to deceive others.”<sup>49</sup> When used in a fraud

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<sup>45</sup> *Sorich*, 427 F. Supp. 2d at 829-30; *United States v. Bauer*, No. 00 CR 81, 2000 U.S. Dist. LEXIS 16784, at \*11-12 (N.D. Ill. Nov. 16, 2000).

<sup>46</sup> *Thompson*, 484 F.3d at 882.

<sup>47</sup> *Walters & Diedrich*, *supra* note 33.

<sup>48</sup> *See Thompson*, 484 F.3d at 884 (“[i]t would stretch the ordinary understanding of language . . . to call a public employee's *regular compensation*, *approved through above-board channels*, a kind of ‘private gain’” (emphasis added)).

<sup>49</sup> BLACK'S LAW DICTIONARY 1372 (8th ed. 2004); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2029 (1964) (defining scheme as “a crafty or unethical project”). Artifice has a similar definition. *See* BLACK'S LAW DICTIONARY 120 (8th ed. 2004) defining artifice as “[a] clever plan or idea, esp. one intended to deceive.”



statute it becomes clear that this is the intended meaning of scheme, as opposed to it meaning “a plan or program of something to be done.”<sup>50</sup> Simply put, a “scheme” as defined in the mail fraud statute requires some nefarious ends.<sup>51</sup> An analysis of *Thompson* will show that there was no “scheme.” In contrast, an analysis of *Sorich*, *Munson*, and *Bauer* will show that a “scheme” did exist. In the grand scheme<sup>52</sup> of honest services mail fraud analyses, making the determination of whether or not a “scheme” exists may be of limited use because most cases result from bribery or kickback schemes.<sup>53</sup> But, *Thompson* was prosecuted for honest services fraud in a case where there were no allegations that she or anyone else had taken a bribe or participated in a kickback scheme.<sup>54</sup> Therefore, it is worth reminding the court to take a step back and view the whole picture before delving into detailed legal tests.

Section I of this Note will briefly chronicle the history of the mail fraud statute, detail the rise of the honest services fraud doctrine, and review the reasons behind the Supreme Court’s rejection of the doctrine in *McNally* and Congress’s restoration of the doctrine through the enactment of 18 U.S.C. § 1346. Section II will discuss the Seventh Circuit’s treatment of honest services fraud *post-McNally*, and lay out the Seventh Circuit’s reasons for adopting the misuse of office for private gain limiting principle in *Bloom*. The Third Circuit has criticized and rejected the Seventh Circuit’s *Bloom* standard, and instead has adopted a state law limiting principle. Section II will also examine the reasoning behind the Third Circuit’s position.

Section III will compare the Seventh and Third Circuits’ standards to determine if either standard is practically or theoretically superior, and if the concerns raised by *Thompson* can be solved by adopting the

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<sup>50</sup> WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2029 (1964).

<sup>51</sup> *See, e.g.*, *United States v. Sawyer*, 85 F.3d 713, 729 (1st Cir. 1996) (the intent of the scheme must be the deprivation of honest services).

<sup>52</sup> Using scheme under its definition of “a combination of elements . . . that are connected, adjusted, and integrated by design.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2029 (1964).

<sup>53</sup> *See supra* note 11.

<sup>54</sup> *See supra* note 26.

Third Circuit's standard. Section III will conclude that the concerns raised in *Thompson* could have been averted by adopting the Third Circuit's standard. But adopting the Third Circuit's standard would raise a different set of problems. Therefore, that is not a long-term solution to the overall questions raised by § 1346. Furthermore it is likely that both standards lead to the same outcomes under the same set of facts. Therefore, Section III cannot conclude that either test is practically or theoretically superior.

Because the Seventh Circuit would gain little benefit from adopting the Third Circuit's standard, Section IV examines the private gain aspect of the *Bloom* standard. Section IV first details the conclusions reached by courts in the Northern District of Illinois in the *Sorich*, *Munson*, and *Bauer* cases—that one's job or the prospect of future employment can serve as a private gain under *Bloom*. Next, Section IV analyzes how *Thompson's* opposite conclusion can lead to the “subtle schemes” problem based on the political appointee/civil servant dichotomy that distinguishes *Thompson* from *Sorich* and *Bauer*.

Section V describes how the Seventh Circuit could have prevented the “subtle scheme” problem if it had determined as a threshold matter whether or not a “scheme” existed. Had the court made this threshold determination it could have reached the same result in *Thompson* without having to discuss the private gain issue because Section V will show that there was no “scheme” in *Thompson*, while a “scheme” did exist in *Sorich*, *Munson*, and *Bauer*. Making the threshold determination, however, may be difficult in cases, such as *Thompson* and *Bauer*, where only one civil servant is acting. Section V deals with the problem by proposing the adoption of a business judgment rule to assist in determining whether or not a scheme exists.

## I. BACKGROUND

### A. *Early History*

The current mail fraud statute traces its origins to the 1872 reorganization and recodification of the then existing postal laws.<sup>55</sup> In the years after the Civil War, along with the growth of the national economy, the country experienced an increase in the number of large-scale financial frauds.<sup>56</sup> Prior to the Civil War, despite Congress's power to establish the post office,<sup>57</sup> the prevailing view was that it lacked the power to regulate any material, including objectionable material, placed in the mails.<sup>58</sup> After the Civil War, the northern view of federal power—that Congress had the power to prevent the mails from being used for illegal purposes—prevailed, although certain tactics were prohibited.<sup>59</sup>

Despite this new view of federal power, the language of the original mail fraud statute suggests that Congress was still concerned that the law might be struck down as unconstitutional.<sup>60</sup> In an effort to prevent this outcome, Congress relied heavily on its power to prevent the misuse of the mails, perhaps explaining much of the superfluous “mail-emphasizing” language.<sup>61</sup> Ultimately, the Supreme Court's

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<sup>55</sup> *McNally v. United States*, 483 U.S. 350, 356 (1987). For a detailed history of the mail fraud statute see Rakoff, *supra* note 1.

<sup>56</sup> *See Ex parte Jackson*, 96 U.S. 727 (1878); Rakoff, *supra* note 1, at 780.

<sup>57</sup> U.S. CONST. art. I, § 8, cl. 7.

<sup>58</sup> Rakoff, *supra* note 1, at 781.

<sup>59</sup> Rakoff, *supra* note 1, at 781. Tactics that were prohibited included the opening of sealed letters. *Id.*

<sup>60</sup> *Id.* at 785-86.

<sup>61</sup> *See id.* The original mail fraud statute stated:

That if any person having devised or intending to devise any scheme or artifice to defraud, [to] be effected by either opening or intending to open correspondence or communication with any other person (whether resident within or outside the United States),

ruling in *Ex parte Jackson*<sup>62</sup> put to rest the idea that the mail-emphasizing language was needed.<sup>63</sup> But because the language existed, it led to divergent statutory interpretations in the lower courts.<sup>64</sup> Under the strict view, the mail emphasizing language allowed for the prosecution of only those frauds that were “dependent” on the

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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 so to do), place any letter or packet in any post-office of the United States, or take or receive any therefrom, such person, *so misusing the post-office establishment*, 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. 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 and device.

Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323 (1872) (codified at U.S. Rev. Stat. § 5480 (1875) (emphasis added). See Rakoff, *supra* note 1, at 785-86 (explaining why the emphasized language is unnecessary, and speculating that Congress included it to ground the statute in its powers to prevent the misuse of the mails because of its fear that the statute would be struck down as unconstitutional).

<sup>62</sup> 96 U.S. 727 (1877).

<sup>63</sup> See *id.* (upholding the illegal lottery statute). The illegal lottery statute was incorporated in the same Act as the mail fraud statute, but was contained in a separate section. Act of June 8, 1872, ch. 335, § 149, 17 Stat. 302 (1872) (codified at U.S. Rev. Stat. § 3894 (1875)). In upholding the power of Congress to prevent illegal lottery material from being sent through the mails, the Court stated “[t]he power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded.” *Ex parte Jackson*, 96 U.S. at 732. For a discussion of the effect of the Court’s decision in *Ex parte Jackson* on the interpretation of the mail fraud statute see Rakoff, *supra* note 1, at 787-90.

<sup>64</sup> Rakoff, *supra* note 1, at 789-90.

mails.<sup>65</sup> But under the broad view the mail fraud statute could be used to punish any fraud so long as it was furthered by the “abuse” of the mails.<sup>66</sup>

For nearly two decades, the lower courts were split between the strict and broad interpretations, and the Supreme Court did not take any cases to resolve the dispute.<sup>67</sup> In 1889, Congress amended the mail fraud statute to include a list of specific schemes.<sup>68</sup> If this was an attempt to resolve the issue of strict versus broad interpretation, it probably would have failed.<sup>69</sup> We will never know because the lower courts did not get the opportunity to interpret the new language.<sup>70</sup> Instead, in 1896, the Supreme Court’s decision in *Durland v. United States*<sup>71</sup> undercut the support for the strict view and set the stage for the broad interpretation of the mail fraud statute.<sup>72</sup>

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<sup>65</sup> *Id.* at 790. For a discussion of the strict view of the original mail fraud statute see *id.* at 790-95.

<sup>66</sup> *Id.* For a discussion of the broad view of the original mail fraud statute see *id.* at 795-801.

<sup>67</sup> *Id.* at 809. During this time two cases, *In re Henry*, 123 U.S. 372 (1887) and *United States v. Hess*, 124 U.S. 483 (1888), did come before the Supreme Court, but they were decided on technical matters, and not on the scope of the mail fraud statute. *Id.* at 808.

<sup>68</sup> *Id.* at 809 (citing Act of March 2, 1889, ch. 393 § 1, 25 Stat. 873).

<sup>69</sup> *Id.* The courts that had broadly interpreted the statute likely would have continued to do so under the belief that this was what Congress intended when it continued to add to the list of frauds. *Id.* But, the new list of items could also confirm the strict constructionist view that only the listed frauds were intended to be covered. *Id.*

<sup>70</sup> *Id.* at 810.

<sup>71</sup> 161 U.S. 306 (1896).

<sup>72</sup> See Rakoff, *supra* note 1, at 811 (“the broad and conclusory language used by Justice Brewer exemplifies reasoning typical of the broad constructionist decisions and gives not the slightest hint of support for the strict constructionists’ approach”); Moohr, *supra* note 2, at 7-8 (discussion expansive interpretations of the mail fraud statute). See also *McNally v. United States*, 483 U.S. 350, 356 (1987) (“the phrase [scheme or artifice to defraud] is to be interpreted broadly insofar as property rights are concerned”).

In *Durland*, the first case to interpret the language<sup>73</sup> “any scheme or artifice to defraud,” the defendant argued that the mail fraud statute was limited to the common law definition of “false pretenses”—that only past conduct, but not future conduct could be punished.<sup>74</sup> The Court rejected this argument and held that the mail fraud statute reached to both past and present conduct, as well as to future promises.<sup>75</sup> The *Durland* holding was later codified in the 1909 amendment to the mail fraud statute.<sup>76</sup> After *Durland*, the mail fraud statute remained virtually unchanged, except for a revision in 1948 to modernize the language, remove surplusage, and to recodify the statute at its present location—18 U.S.C. § 1341.<sup>77</sup>

In the nearly hundred years since the 1909 amendment, the mailing element has been reduced to nothing more than a means of providing federal jurisdiction.<sup>78</sup> Despite this development, some courts continue to misplace emphasis on the mailing element instead of focusing on the core issue: the definition of the term “scheme to defraud.”<sup>79</sup> Perhaps courts have not defined “scheme to defraud” because they want to adhere to Congress’s intent—arguably its intent from the very beginning—to apply the mail fraud statute broadly.<sup>80</sup> By defining a “scheme to defraud” the courts might leave something outside of the definition that Congress intended to include. Chief Justice Burger characterized the mail fraud statute as the “first line of

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<sup>73</sup> *McNally*, 483 U.S. at 356.

<sup>74</sup> *Durland*, 161 U.S. at 312.

<sup>75</sup> *Id.* at 313.

<sup>76</sup> *McNally*, 483 U.S. at 357. The 1909 amendment also eliminated the list of schemes added in 1889 and removed the second element, which required proof that the defendant intended to both defraud and misuse the mails. Rakoff, *supra* note 1, at 816.

<sup>77</sup> Brian C. Behrens, Note, *18 U.S.C. section 1341 and section 1346: Deciphering the Confusing Letters of the Mail Fraud Statute*, 13 ST. LOUIS U. PUB. L. REV. 489, 497 (1993).

<sup>78</sup> Moohr, *supra* note 2, at 6-7.

<sup>79</sup> Rakoff, *supra* note 1, at 822 (concluding that the focus on the mailing element is “misplaced and serves no useful function”).

<sup>80</sup> *Id.*

defense” against new types of fraud.<sup>81</sup> He described the mail fraud statute as a “stopgap device to deal on a temporary basis with the new [frauds], until particularized legislation can be developed and passed to deal directly with the evil.”<sup>82</sup> Although not new, public corruption is a type of fraud that came under the ambit of the mail fraud statute beginning in the 1970s, under the honest services fraud doctrine.<sup>83</sup>

### *B. Development of the Honest Services Fraud Doctrine*

The honest services fraud doctrine resulted from federal prosecutors’ novel combination of the “intangible rights” and “honest services” theories.<sup>84</sup> The intangible rights theory was predicated upon the court’s removal of the pecuniary loss requirement for obtaining a fraud conviction.<sup>85</sup> Traditionally, the words “to defraud” referred to the harming of one’s property rights.<sup>86</sup> But in the early twentieth century, the Supreme Court removed the requirement of a pecuniary loss in a series of decisions interpreting various fraud statutes, but not in the mail fraud statute.<sup>87</sup> For example, in *Hammerschmidt v. United States*,

<sup>81</sup> *United States v. Maze*, 414 U.S. 395, 405 (1974) (Burger, C.J., dissenting).

<sup>82</sup> *Id.* at 405.

<sup>83</sup> Moorh, *supra* note 2, at 2; Kobrin, *supra* note 2, at 792-93; Tandler, *supra* note 2, at 2730.

<sup>84</sup> Moorh, *supra* note 2, at 8; Kobrin, *supra* note 2, at 790-94; Tandler, *supra* note 2, at 2733-34.

<sup>85</sup> Kobrin, *supra* note 2, at 790.

<sup>86</sup> *McNally v. United States*, 483 U.S. 350, 358 (1987) (citing *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)); see also Geraldine Szott Moorh, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 163 (1994) [hereinafter Moorh, *Someone to Watch Over Us*].

<sup>87</sup> *Haas v. Henkel*, 216 U.S. 462, 479 (1910) (construing the conspiracy to defraud statute as broad enough to reach “any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government”). See also Kobrin *supra* note 2, at 790 n.50 citing to *United States v. Barnow*, 239 U.S. 74, 79-80 (1915) (government does not have to prove that a defrauded victim of a defendant impersonating a federal employee or officer lost anything of value) and *United States v. Plyler*, 222 U.S. 15, 16 (1911) (government does not have to prove a financial loss to bring a case against a defendant who

the Supreme Court, interpreting the conspiracy to defraud statute, concluded that the government was not only defrauded when it was cheated out of money or property, but also when someone interferes with its “lawful governmental functions.”<sup>88</sup> The Court further stated that “[i]t is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by the misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention.”<sup>89</sup>

The honest services theory traces its origins to the Fifth Circuit’s decision in *Shushan v. United States*.<sup>90</sup> In *Sushan*, members of the Orleans Parish Levee Board, two bond dealers, and a public accountant engaged in a scheme to charge excessive fees in a bond refinancing deal.<sup>91</sup> They were convicted of violating the mail fraud statute under the theory that their representations were false because of the excessive fees, and because the Levee Board was “deprived of [the] fair judgment of one of its members,” as a result of the bribes that were paid as part of the scheme.<sup>92</sup> The court stated that a scheme

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forged and presented papers certifying his character to the Civil Service Commission) that based their holdings on *Haas*.

<sup>88</sup> 265 U.S. 182, 188 (1924).

<sup>89</sup> *Id.*

<sup>90</sup> 117 F.2d 110 (5th Cir. 1941). *See, e.g.*, *United States v. Isaacs*, 493 F.2d 1124, 1150 (7th Cir. 1974); *United States v. States*, 488 F.2d 761 (8th Cir. 1973). “In *Shushan* there is the implication that a scheme to gain personal favors from public officials is a scheme to defraud the public, although the interest lost by the public can be described no more concretely than as an intangible right to the proper and honest administration of government.” *States*, 488 F.2d at 766. *Shushan* is often cited to as the basis for the intangible rights doctrine as well. Kobrin, *supra* note 2, at 792-93. For the argument that courts misinterpreted *Shushan* as the basis for the intangible rights doctrine, and a prescient view of the Supreme Court’s holding in *McNally* that the mail fraud is limited to frauds that result in the gain of money or property, see W. Robert Gray, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. CHI. L. REV. 562, 584-88 (1980).

<sup>91</sup> 117 F.2d at 114.

<sup>92</sup> *Id.* at 113-15.



to defraud exists even in the absence of any misrepresentations if one betrays another or corrupts another's advisor to gain money unfairly.<sup>93</sup> It further stated that a person who bribes a public official to obtain more favorable terms in a public contract not only commits the crime of bribery, but also engages in a "scheme to defraud the public."<sup>94</sup> Finally, in what ultimately became the basis for the honest services theory, the court stated, "[n]o trustee has more sacred duties than a public official and any scheme to obtain an advantage by corrupting [a public official] must in the federal law be considered a scheme to defraud."<sup>95</sup>

While *Shushan* may have planted the seeds for the honest services fraud doctrine, it was not until the 1970s, when federal prosecutors were specifically charged with fighting public corruption, that the doctrine took root and started to bear fruit.<sup>96</sup> To battle public corruption, innovative prosecutors combined the "intangible rights" theory that fraud is not limited to the loss of money or property with the "honest services" theory that governmental officials owe fiduciary duties to the public.<sup>97</sup> The combination of the two theories resulted in the birth of the honest services fraud doctrine under which the mere breach of a fiduciary duty could be punished under the mail fraud statute, regardless of whether or not the public has suffered a tangible harm.<sup>98</sup> One of the first cases prosecuted under the honest services fraud doctrine, and perhaps a paradigm case of the doctrine, was *United States v. Isaacs*.<sup>99</sup>

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Moohr, *supra* note 2, at 8-11; Kobrin, *supra* note 2, at 792-93.

<sup>97</sup> Moohr, *supra* note 2, at 8-11; Kobrin, *supra* note 2, at 792-93.

<sup>98</sup> Moohr, *supra* note 2, at 8-11; Kobrin, *supra* note 2, at 792-93. Although *Shushan* is sometimes cited as the origin of the intangible rights theory, the intangible rights language in the case is likely dictum given that the court found that the Orleans Parish Levee Board suffered a tangible loss. *Shushan*, 117 F.2d at 119; *see also* Kobrin, *supra* note 2, at 790.

<sup>99</sup> 493 F.2d 1124 (7th Cir. 1974). *See* Kobrin, *supra* note 2, at 793.

In 1973, Otto Kerner,<sup>100</sup> former Illinois Governor, and Theodore Isaacs, Illinois Director of Revenue under Kerner, were convicted on a variety of charges, including honest services mail fraud, for accepting bribes in return for promoting certain horse racing interests.<sup>101</sup> Kerner and Isaacs challenged their mail fraud convictions arguing that neither the State of Illinois nor its citizens were defrauded of money or property.<sup>102</sup> In fact, as result of their actions, state revenue from horse racing doubled.<sup>103</sup> Despite the increase in state revenue, the Seventh Circuit upheld their convictions. The court first quoted the language in *Hammerschmidt* that for fraud it is not necessary that the government suffer a pecuniary loss, but only that its legitimate actions are defeated.<sup>104</sup> The court next quoted the “sacred duties” language in *Shushan*, and the language stating that a scheme to bribe a public official is also a scheme to defraud the public.<sup>105</sup> Finally, the court concluded that Kerner deprived the State of Illinois and its citizens of his honest services.<sup>106</sup>

After *Isaacs* and a few additional groundbreaking cases,<sup>107</sup> the honest service fraud doctrine was frequently used in the fight against public corruption, and was later extended to private breaches of fiduciary duty, most notably in the corporate context.<sup>108</sup> During this time, each of the Circuits adopted some form of the honest services

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<sup>100</sup> At the time of his conviction, Otto Kerner was a sitting United States Circuit Judge in the Seventh Circuit. *Id.* at 1140.

<sup>101</sup> *Id.* at 1131.

<sup>102</sup> *Id.* at 1149.

<sup>103</sup> *Id.* at 1139.

<sup>104</sup> *Id.* at 1150.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> See, e.g., *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979); *United States v. States*, 488 F.2d 761 (8th Cir. 1973).

<sup>108</sup> Kobrin, *supra* note 2, at 794; Tendler, *supra* note 2, at 2733-35.

fraud doctrine.<sup>109</sup> But, the doctrine suffered a major blow in 1987 when the Supreme Court decided *McNally v. United States*.<sup>110</sup>

### *C. Rejection and Restoration of the Honest Services Fraud Doctrine*

*McNally* arose out of an insurance kickback scheme between a Kentucky state official and Charles McNally, the nominal owner of the insurance agency through which the payments were funneled.<sup>111</sup> The Sixth Circuit affirmed both of their convictions for mail fraud under the honest services fraud doctrine, and the Supreme Court granted certiorari to determine the doctrine's validity.<sup>112</sup> The Court rejected the honest services fraud doctrine, holding that the mail fraud statute was limited to frauds involving money or property.<sup>113</sup>

In reaching this conclusion, the Court first noted that the text of the statute clearly protects property rights, but does not mention the citizenry's right to good government.<sup>114</sup> Reviewing the history of the statute, the Court concluded that under *Durland*, the term "scheme or artifice to defraud" was to be given a broad reading only in the context of property rights; nothing "indicate[d] that the statute had a more extensive reach."<sup>115</sup> Next, the Court recognized that, in 1909, Congress codified *Durland's* holding by "add[ing] the words 'or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises' after the original phrase 'any scheme or artifice to defraud.'"<sup>116</sup> The question the Court faced was whether Congress intended to reach nontraditional frauds under the mail fraud statute when it used the word "or" between the original language and

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<sup>109</sup> See *supra* note 16.

<sup>110</sup> 483 U.S. 350 (1987).

<sup>111</sup> *Id.* at 352-53.

<sup>112</sup> *Id.* at 355-56.

<sup>113</sup> *Id.* at 359-60.

<sup>114</sup> *Id.* at 356.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 357.

the 1909 Amendment.<sup>117</sup> The Court concluded it did not, and that Congress was instead following the common understanding that the mail fraud statute was limited to the protection of property rights.<sup>118</sup>

The Court began its legal analysis by stating “[b]ecause the two phrases identifying the proscribed schemes appear in the disjunctive, it is arguable that they are to be construed independently and that the money-or-property requirement of the latter phrase does not limit schemes to defraud to those aimed at causing deprivation of money or property.”<sup>119</sup> The Court explained that this was the reading given to the statute by the Courts of Appeals in approving the honest services fraud doctrine.<sup>120</sup> The Court then concluded that when Congress amended the mail fraud statute in 1909 it was not departing from the common understanding that fraud was limited to harming one’s property rights.<sup>121</sup> In reaching this conclusion the Court analyzed the language from *Hammerschmidt* stating that it was fraudulent to interfere with lawful government functions.<sup>122</sup> The Court, however, concluded that the *Hammerschmidt* language was “based on a consideration not

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<sup>117</sup> *Id.* at 358. The mail fraud statute in effect at the time of *McNally* read in pertinent part:

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, . . . for the purpose of executing such scheme or artifice or attempting so to do, [uses the mails or causes them to be used], shall be fined not more than \$ 1,000 or imprisoned not more than five years, or both.

*Id.* at 352 (emphasis added) (citing 18 U.S.C. § 1341).

<sup>118</sup> *McNally*, 483 U.S. at 358-59.

<sup>119</sup> *Id.* at 358.

<sup>120</sup> *Id.*; *see, e.g.*, *United States v. States*, 488 F.2d 761, 764 (8th Cir. 1973) (rejecting the appellant’s conjunctive reading of the statute and stating, “[t]he more natural construction of the wording in the statute is to view the two phrases independently.”)

<sup>121</sup> *McNally*, 483 U.S. at 358.

<sup>122</sup> *Id.* at 359 n.8.

applicable to the mail fraud statute.”<sup>123</sup> Finally, the Court, noting federalism as well as vagueness concerns, invoked the rule of lenity to limit the mail fraud statute to “the protection of property rights.”<sup>124</sup> Before applying its holding to the to *McNally* facts, the Court stated that “[i]f Congress desires to go further, it must speak more clearly than it has.”<sup>125</sup>

The following year Congress expressed its disapproval of the Supreme Court’s decision in *McNally* by resurrecting the honest services fraud doctrine through an amendment to the mail fraud statute that it buried in one of the provisions of the Anti-Drug Abuse Act of 1988 (“ADAA”).<sup>126</sup> Although Congress had previously considered bills with more comprehensive language recognizing the citizenry’s right to good government,<sup>127</sup> the amendment in the ADAA, codified at 18 U.S.C. § 1346, simply states “[f]or 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.”<sup>128</sup> Noticeably lacking, however, is a definition of the terms “intangible rights” and “honest services.” Thus, while courts agree that § 1346 was intended to legislatively override *McNally*,<sup>129</sup> its imprecise

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 360.

<sup>125</sup> *Id.*

<sup>126</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4508 (1988) (codified at 18 U.S.C. § 1346). *See also* Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367, 488-91 (1989); Moohr, *Someone To Watch Over Us*, *supra* note 86, at 169. For the argument that the court did not “speak more clearly” see Judge Jolly’s dissenting opinion in *United States v. Brumley*, 116 F.3d 728, 736-49 (5th Cir. 1997) (en banc) (Jolly, J., dissenting).

<sup>127</sup> *Brumley*, 116 F.3d at 742-45 (Jolly, J., dissenting).

<sup>128</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4508 (1988) (codified at 18 U.S.C. § 1346).

<sup>129</sup> *See, e.g.*, *United States v. Rybicki*, 354 F.3d 124, 134-36 (2d Cir. 2003) (en banc); *United States v. Panarella*, 277 F.3d 678, 689-90 (3d Cir. 2002); *United States v. Bloom*, 149 F.3d 649, 655 (7th Cir. 1998); *United States v. Frost*, 125 F.3d 346, 363-64 (6th Cir. 1997); *United States v. Sawyer*, 85 F.3d 713, 723-24 (1st Cir. 1996).

language has led to new problems, while simultaneously leaving prior problems unresolved.<sup>130</sup>

Section 1346 has been frequently challenged on vagueness grounds,<sup>131</sup> and that it violates the principles of federalism because it involves the federal government in matters that are primarily a state concern.<sup>132</sup> Because courts are concerned that the boundaries of § 1346 remain unclear, they have adopted limiting principles to uphold the constitutionality of the statute and to counter the vagueness and federalism concerns.<sup>133</sup>

## II. POST-MCNALLY HONEST SERVICES FRAUD

### A. *Seventh Circuit's Decision in Bloom*

The Seventh Circuit adopted the limiting principle of “misuse of office . . . for private gain” in *United States v. Bloom*.<sup>134</sup> In *Bloom*, Lawrence Bloom, a Chicago alderman and part-time private attorney, was accused of giving legal advice to a private client about how to retain its real property without paying a large portion of its past-due

<sup>130</sup> Behrens, *supra* note 77, at 515; Kurland, *supra* note 126, at 490; Moohr, *Someone To Watch Over Us*, *supra* note 86, at 170.

<sup>131</sup> See *United States v. Warner*, 498 F.3d 666, 698-699 (7th Cir. 2007) (§ 1346 is not unconstitutional as applied); *Rybicki*, 354 F.3d at 137 n.10; *Frost*, 125 F.3d at 371 (§ 1346 is not facially unconstitutional); *United States v. Waymer*, 55 F.3d 564, 568-569 (11th Cir. 1995) (§ 1346 is not unconstitutional as applied). A panel of the Second Circuit is the only court to have found § 1346 unconstitutionally vague as applied. *United States v. Handakas*, 286 F.3d 92, 112 (2d Cir. 2002). The *Handakas* court would have also found § 1346 facially unconstitutional if it had been the first panel in the Second Circuit to address the issue. *Id.* at 104. *Handakas*, however, was overruled by the Second Circuit sitting en banc in *Rybicki*. 354 F.3d at 144 (although not deciding the vagueness issue on its merits, the en banc court held the *Handakas* panel should not have reached the constitutional question; therefore, its vagueness holding was overruled).

<sup>132</sup> See, e.g., *United States v. Brumley*, 116 F.3d 728, (5th Cir. 1997) (en banc); Beale, *supra* note 16; Moohr, *Someone to Watch Over Us*, *supra* note 86.

<sup>133</sup> See *supra* note 21.

<sup>134</sup> 149 F.3d at 655 (1998).

property taxes.<sup>135</sup> Bloom allegedly informed his client that, although illegal, it could avoid paying back taxes by sending a straw bidder to the tax scavenger sale to purchase the property, and then having the straw bidder re-convey the property back to the client after the expiration of the redemption period.<sup>136</sup> As a result of giving this advice, Bloom was charged under § 1346 of depriving the City of Chicago of his honest services.<sup>137</sup>

The honest services fraud charge was dismissed by the district court, and came before the Seventh Circuit on the government's interlocutory appeal.<sup>138</sup> In affirming the district court, the Seventh Circuit rejected the government's position that "public employees may not do anything in their private lives that acts against the City's interests."<sup>139</sup> The court believed that the government's position would result in the creation of an "impermissible federal common-law crime," and noted that it has long been held that "[n]ot every breach of every fiduciary duty works a criminal fraud."<sup>140</sup> Because not every breach of a fiduciary duty is a criminal fraud, the Seventh Circuit next faced the difficult task of determining where to draw the line between fiduciary duty breaches that work a criminal fraud and those that do not.<sup>141</sup>

<sup>135</sup> *Id.* at 650-51. In Chicago, aldermanic positions are part-time. *Id.* at 650.

<sup>136</sup> *Id.* at 651. Under Illinois law a bidder at a tax scavenger sale takes the property free and clear of the tax lien at the expiration of the redemption period. *Id.* The original owner can redeem the property during the redemption period by paying all back taxes and interest. *Id.* Illinois law also allows the winning bidder to sell the property back to the original owner, despite its effect of wiping out the back taxes. *Id.* But it is illegal for the original owner or her agent to bid on the property during the scavenger sale, and bidders must certify that they are not associated with the original owner. *Id.*

<sup>137</sup> *Id.* Although the property taxes were owed to the county, the prosecutor's theory was that the City of Chicago was deprived of Bloom's honest services because the property tax money collected by the county flows through to the City. *Id.* at 650.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 654.

<sup>140</sup> *Id.* (citing *United States v. George*, 477 F.2d 508, 512 (7th Cir. 1973)).

<sup>141</sup> *Id.*

The court first looked to the language of the §§ 1341 and 1346, but found no help in the text of either statute. Next, the court considered the breach of a fiduciary duty and the violation of “some other rule of law” as a limiting principle.<sup>142</sup> The court rejected this approach based on two shortcomings when applied to Bloom’s situation.<sup>143</sup> First, Bloom did not violate the tax scavenger sale law, his client and the straw purchaser did; and second, the client’s violation of the law had nothing to do with Bloom’s status as an alderman.<sup>144</sup>

The court went on to express its concern that the government’s theory would turn lawful actions under state law into federal crimes.<sup>145</sup> According to the court, that is the situation where the fiduciary status would matter because under the honest services fraud doctrine the government does not have to lose money or property, but only its employee’s loyalty.<sup>146</sup> The court gave as an example the hypothetical situation where Bloom only explained the scavenger sale law to his client, and told the client not to send a straw purchaser, but instead purchase the property back from the independent winning bidder.<sup>147</sup> Another situation hypothesized by the court was where Bloom advised his client to move to the suburbs where taxes are cheaper. Under these situations, although acting lawfully, according to the prosecution’s theory he still deprived City of Chicago of his “complete loyalty.”<sup>148</sup> The court found that this outcome would stretch the honest services fraud doctrine “beyond sensible bounds.”<sup>149</sup>

The weakness of this analysis is that the court does not articulate why the limiting principle of the violation of another law along with the fiduciary duty breach would not address this concern.<sup>150</sup> If that

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 655.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *See, e.g.,* United States v. Panarella, 277 F.3d 678, 691-93 (3d Cir. 2002).



standard had been adopted then there can be no concern that the public official was acting lawfully. In fact, the dissenting opinion highlights that Bloom likely violated an independent law concerning an official's interest in the purchase of property sold for tax assessments.<sup>151</sup> If Bloom did indeed violate this law, then he was acting unlawfully while simultaneously breaching his fiduciary duty and the majority's hypothetical concern that Bloom was acting lawfully and breaching a fiduciary duty is negated.

But the dissenting opinion is based on the assumption that a lawyer has an interest in the results of his advice.<sup>152</sup> If one takes this assumption and applies it to the majority's hypo where Bloom acts lawfully by just describing the scavenger sale law and explaining how the client can purchase the property from the winning bidder, then Bloom may have still committed honest services fraud. If he has an interest in his advice, even if that advice was to act lawfully, and that

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<sup>151</sup> *Bloom*, 149 F.3d at 657-59 (Bauer, J., dissenting). Judge Bauer believes that Bloom violated 65 ILCS 5/3.1-55-10. The pertinent part of the statute cited by Judge Bauer is:

Interests in contracts

(a) A municipal officer shall not be interested, directly or indirectly, in the officer's own name or in the name of any other person, association, trust, or corporation, in any contract, work or business of the municipality or in the sale of any article whenever the expense, price, or consideration of the contract, work business, or sale is paid either from the treasury or by an assessment levied by statute or ordinance. *A municipal officer shall not be interested, directly or indirectly, in the purchase of any property that (i) belongs to the municipality, (ii) is sold for taxes or assessments, or (iii) is sold by virtue of legal process at the suit of the municipality.*

...

(e) An officer who violates this Section is guilty of a Class 4 felony. In addition, any office held by an officer so convicted shall become vacant and shall be so declared as part of the judgment of the court.

*Id.* at 658 (emphasis in original).

<sup>152</sup> *Id.* at 657-58.

advice was used for the purchase of property sold for taxes, then he has violated another law and breached his fiduciary duty. Thus, he could be charged with honest services fraud despite giving proper legal advice. This appears to be the absurd result with which the majority was concerned in rejecting the limiting principle of the violation of another law and the breach of a fiduciary duty.<sup>153</sup>

To determine fiduciary duty breaches that are frauds from those that are not, the Seventh Circuit held that the “[m]isuse of office (more broadly, misuse of position) for private gain is the line that separates run of the mill violations of state-law fiduciary duty . . . from federal crime.”<sup>154</sup> The court reached this conclusion based on the Supreme Court’s description of the honest services fraud doctrine in *McNally*, where the Court stated “a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud.”<sup>155</sup> In reaching this conclusion the Seventh Circuit found that § 1346 did not make lawful *pre-McNally* conduct unlawful *post-McNally*.<sup>156</sup> Thus, because Bloom was not charged with misusing his public office for private gain, the honest services fraud charge was properly dismissed by the district court.<sup>157</sup>

Although many appellate courts agree that limiting principles need to be applied to § 1346 in order to cabin its reach and to reduce federalism and vagueness concerns,<sup>158</sup> the Seventh Circuit is the only circuit to adopt the “misuse of office for private gain” standard.<sup>159</sup> The

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<sup>153</sup> *See id.* at 654-55 (majority opinion).

<sup>154</sup> *Id.* at 655.

<sup>155</sup> *Id.* (citing *McNally v. United States*, 483 U.S. 350, 355 (1987)).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *See, e.g.,* *United States v. Welch*, 327 F.3d 1081, 1107 (10th Cir. 2003); *United States v. Panarella*, 277 F.3d 678, 692-93 (3d Cir. 2002); *Bloom*, 149 F.3d at 654-55; *United States v. Brumley*, 116 F.3d 728, 732-34 (5th Cir. 1997) (en banc); *United States v. Sawyer*, 85 F.3d 713, 725 (1st Cir. 1996).

<sup>159</sup> *United States v. Malone*, No. 02:03-CR-00500-LRH-LRL, 2006 WL 2583293, at \*3 (D. Nev. Sept. 6, 2006); Albert W. Alschuler, *The Mail Fraud & RICO Racket: Thoughts on the Trial of George Ryan*, 9 GREEN BAG 2d 113, 115 (2006).

Third Circuit has expressly criticized the Seventh Circuit's *Bloom* standard.<sup>160</sup>

### B. THIRD CIRCUIT CRITICISM OF BLOOM

In *United States v. Panarella*, the Third Circuit rejected the Seventh Circuit's *Bloom* standard, and adopted the violation of a state law as its limiting principle.<sup>161</sup> In *Panarella*, Nicholas Panarella ran a tax collection business that had expertise in collecting Pennsylvania's business privilege tax from non-Pennsylvania businesses.<sup>162</sup> Panarella hired Pennsylvania Senate Majority Leader F. Joseph Loeper as a consultant for his business.<sup>163</sup> Loeper supported the business by attending meetings between Panarella and local governments and state agencies.<sup>164</sup> Loeper also spoke and voted against legislation that would have been detrimental to Panarella's business.<sup>165</sup> Loeper and Panarella ran into trouble when Loeper failed to disclose, as required under Pennsylvania law, the income that he received from Panarella.<sup>166</sup> They dug themselves a deeper hole when together they tried to cover-up the arrangement from a reporter investigating the payments.<sup>167</sup> Panarella was indicted by the grand jury on honest services fraud charges for depriving the public of Loeper's honest services.<sup>168</sup> He pled guilty, but appealed arguing that Loeper did not deprive the public of his honest services.<sup>169</sup>

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<sup>160</sup> *Panarella*, 277 F.3d at 691-93.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 681.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* In addition to the mail fraud charges, Panarella was also indicted on wire fraud charges. *Id.* The wire fraud statute and the mail fraud statute are read together. *United States v. Brumley*, 59 F.3d 517, 520 (5th Cir. 1995).

<sup>169</sup> *Panarella*, 277 F.3d at 679.

The Third Circuit began its analysis by noting that honest services fraud typically results from either bribery or the failure to disclose a conflict of interest that results in private gain.<sup>170</sup> Panarella involved the latter issue and the court held that “where a public official takes discretionary action that the official knows will directly benefit a financial interest that the official has concealed in violation of a state criminal law, that official has deprived the public of his honest services under 18 U.S.C. § 1346.”<sup>171</sup> On appeal, Panarella argued that the Third Circuit should adopt the Seventh Circuit’s *Bloom* standard.<sup>172</sup> The Third Circuit refused because it believed that the violation of state law served as a better limiting principle.<sup>173</sup>

In rejecting the *Bloom* standard, the Third Circuit first noted that *Bloom* was factually distinguishable from *Panarella* because Bloom’s actions were not taken as part of his official duties, while Loeper’s actions were taken in his official capacity.<sup>174</sup> But more importantly, the Third Circuit found that the *Bloom* standard offered “little clarity” in determining the scope of § 1346.<sup>175</sup> The court went on to state that the dispute over the “misuse of office” and the “private gain” added “an extra layer of unnecessary complexity to the inquiry.”<sup>176</sup> Furthermore, the Third Circuit reasoned that the *Bloom* standard was both over-inclusive and under-inclusive.<sup>177</sup> The court reasoned that the standard was over-inclusive because it could hypothetically cover an official who seduces an intern or takes home office supplies for personal use.<sup>178</sup> It was under-inclusive because if the court adopted Panarella’s position—that a public official does not misuse his office when he

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<sup>170</sup> *Id.* at 690. (citing *United States v. Antico*, 275 F.3d 245, 262-63 (3d Cir. 2001) and *United States v. Woodward*, 149 F.3d 46, 54-55 (1st Cir. 1998)).

<sup>171</sup> *Id.* at 691.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 692-93.

<sup>174</sup> *Id.* at 691.

<sup>175</sup> *Id.* at 692.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

fails to disclose a conflict of interest—then the *Bloom* standard would not cover a classic fraudulent situation.<sup>179</sup>

In adopting state law as its limiting principle, the Third Circuit’s answer to the Seventh Circuit’s concerns about the principle’s shortcomings was that under a state law limiting principle *Bloom* simply did not commit honest services mail fraud. The Third Circuit further concluded that state law better handles vagueness and federalism concerns.<sup>180</sup> Because Pennsylvania criminal law required Loeper to disclose the income he received from *Panarella*, both parties had “unambiguous notice that Loeper’s nondisclosure was criminal.”<sup>181</sup> Thus, according to the Third Circuit, vagueness concerns were not present in *Panarella*.<sup>182</sup> Additionally, federalism concerns were mitigated because the additional violation of a state law is “conduct that the state itself has chosen to criminalize.”<sup>183</sup> Moreover, federal prosecutions in the area of political corruption can play a “beneficial role” because state officials are often either unwilling or unable to prosecute these cases.<sup>184</sup>

Two issues were left unresolved by the Third Circuit’s decision in *Panarella*. First, whether nondisclosure always requires the violation of a state law in order to amount to honest services fraud,<sup>185</sup> and second, whether the violated state law must be a criminal law. The second question was answered in the negative in *United States v.*

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<sup>179</sup> *Id.* A traditional fraudulent situation occurs when a fiduciary fails to disclose a conflict of interest. *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 698.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 694.

<sup>184</sup> *Id.* For a detailed analysis of this problem see Michael W. Carey et al., *Federal Prosecution of State and Local Public Officials: Obstacles to Punishing Breaches of the Public Trust and a Proposal for Reform, Part One*, 94 W. VA. L. REV. 301 (1992).

<sup>185</sup> *Panarella*, 277 F.3d at 699 n.9. The Third Circuit further declined to answer the question in *United States v. Murphy*, 323 F.3d 102, 117 (3d Cir. 2003).

*Gordon*, when the Third Circuit held that honest services fraud only requires the violation of a state-created fiduciary duty.<sup>186</sup>

After *Gordon*, the Third Circuit's standard for determining the outer reaches of the honest services fraud doctrine seems to be somewhat settled, although certain questions remain.<sup>187</sup> Likewise, after *Thompson*, the same can be said of the Seventh Circuit.<sup>188</sup> The extraordinary facts of *Thompson*, however, suggest that the case lies at the outer edges of the honest services fraud doctrine. Therefore, the

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<sup>186</sup> 183 Fed. Appx. 202, 211, No. 05-3927, 2006 WL 1558952, at \*8 (3d Cir. 2006). *Gordon* was not selected to be published and is therefore not precedent in the Third Circuit. 3d Cir. Internal Operating P. 5.7 (citation of non-precedential 3d Cir. opinions).

<sup>187</sup> For example, it is at least arguable that the Third Circuit has left open the question of whether a violation of a state-law-created fiduciary duty is required in non-disclosure cases. In *Gordon*, the Third Circuit states that in *Murphy*, 323 F.3d 102, the court approved of the Fifth Circuit's reasoning in *United States v. Brumley*, 116 F.3d 728 (5th Cir. 1997) (en banc), that "§ 1346 'contemplates that there must first be a breach of a state-owned duty.'" *Gordon*, 183 Fed. Appx. at 211 n.6, 2006 WL 1558952, at \*7 n.6. But in *Murphy*, the court says that it will not address the issue of whether a violation of a state-law-created fiduciary is required. *Murphy*, 323 F.3d at 117. Thus, the holding in *Gordon* is potentially weakened because the *Murphy* court specifically stated that it would not address the issue. Furthermore, the Third Circuit potentially misreads *Brumley*, 116 F.3d 728. In *Brumley* the Fifth Circuit held that for honest services fraud the "services must be owed under state law and the government must prove . . . that they were not delivered. 116 F.3d at 734. Therefore, the language quoted by the Third Circuit in *Gordon* that the Fifth Circuit requires a breach of a fiduciary duty is likely dictum in the Fifth Circuit because the Fifth Circuit did not reach the question of whether a breach of a state created fiduciary duty is required; it simply held that state-owed "services" must not have been delivered. *Id.* at 734. The Third Circuit is not the only court to make this mistake. *See, e.g., United States v. Kott*, No. 3:07-cr-00056 JWS, 2007 U.S. Dist. LEXIS 66125, at \*12-13 (D. Alaska Sept. 4, 2007).

Another open question is which state laws create fiduciary duties and under what circumstances. *See, e.g., Murphy*, 323 F.3d at 117 (rejecting the government's argument that the New Jersey Bribery Act creates a fiduciary duty between a political party official and the public).

<sup>188</sup> Although the Seventh Circuit held that neither salary increases (for doing a good job) nor psychic benefits are a private gain, the ultimate contours of the private gain test remain unclear. *See United States v. Thompson*, 484 F.3d 877, 884 (7th Cir. 2007).

*Thompson* case provides an opportunity to compare and contrast the Seventh Circuit's *Bloom* standard with the Third Circuit's *Panarella* standard to determine if one of the tests is theoretically or practically better than the other.

### III. COMPARISON OF THE SEVENTH CIRCUIT'S *BLOOM* STANDARD WITH THE THIRD CIRCUIT'S *PANARELLA* STANDARD

#### A. Applying the Third Circuit's Test to the Facts of *Thompson*

In *Thompson*, a Wisconsin civil servant supervised the process of awarding a state travel contract.<sup>189</sup> Administrative rules dictated that the contract was to be awarded to the company with the greatest number of points out of three weighted categories.<sup>190</sup> Two companies emerged as the leading bidders for the contract.<sup>191</sup> The first, Adelman Travel, was a local Wisconsin company that had made political donations to the governor; the other company, Omega World Travel, was based on the East Coast.<sup>192</sup> After the evaluation process, although the Adelman had the lowest price and a better service score, Omega received the highest overall score because they delivered a better oral presentation.<sup>193</sup>

But, for unstated "political reasons," *Thompson* did not want to award the contract to Omega.<sup>194</sup> To prevent this outcome, she first negotiated with the other members of the evaluation committee in an attempt to get them to change their scores.<sup>195</sup> Her negotiations failed, but another member of the committee suggested that the contract be

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<sup>189</sup> *Thompson*, 484 F.3d at 878.

<sup>190</sup> *Id.* The points scale provided for 1200 maximum points: 300 points for price, 700 points for service, and 200 points for the oral presentation. *Id.*

<sup>191</sup> *Id.* at 878-79.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 879.

re-bid on a best-and-final basis, as permitted by state law.<sup>196</sup> Adelman lowered its price, and a virtual tie with Omega ensued.<sup>197</sup> Thompson then used Wisconsin's administrative tie-breaking procedure to award the contract to Adelman with the consent of her political appointee supervisor.<sup>198</sup> As a result of steering the contract to Adelman, Thompson was convicted of honest services mail fraud.<sup>199</sup> The Seventh Circuit reversed Thompson's conviction, finding that under the *Bloom* standard she neither misused her office, nor had a private gain.<sup>200</sup> But how would this case have come out if it had arisen in the Third Circuit?

First, the government would have had to find a state-law-created fiduciary duty that Thompson might have violated.<sup>201</sup> Assuming that government found one, it would next have to prove that she breached that duty. As the Third Circuit and others have noted, most cases of honest services fraud result from either bribery or the failure to disclose a conflict of interest.<sup>202</sup> Although Thompson was also convicted under a bribery and theft statute, she was convicted under the theory that she "misapplied" federal funds and not on a bribery theory.<sup>203</sup> The Seventh Circuit found that there was no indication that

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<sup>196</sup> *Id.*

<sup>197</sup> *Id.* "The tie depended on rounding to the nearest whole number. [Adelman's] score was 1026.6, while [Omega's] score was 1027.3". *Id.*

<sup>198</sup> *Id.* The tie-breaking procedure "gave weight to items not previously figured into the price comparison." *Id.*

<sup>199</sup> *Id.* at 878.

<sup>200</sup> *Id.* at 883-84.

<sup>201</sup> See *United States v. Gordon*, 183 Fed. Appx. 202, 211, No. 05-3927, 2006 WL 1558952, at \*8 (3d Cir. June 8, 2006). One possible option is the section of the Wisconsin Ethics Code that states in pertinent part that "[n]o state public official may use or attempt to use the public position held by the public official to influence or gain unlawful benefits, advantages or privileges personally or for others." WIS. STAT. ANN. § 19.45(5) (2003).

<sup>202</sup> See, e.g., *United States v. Panarella*, 277 F.3d 678, 690 (3d Cir. 2002); *United States v. Antico*, 275 F.3d 245, 262-63 (3d Cir. 2001); *United States v. Woodward*, 149 F.3d 46, 54-55 (1st Cir. 1998).

<sup>203</sup> See *supra* note 26.



Thompson or anyone else had accepted a bribe.<sup>204</sup> Thus, the government would likely have had to rely on the “failure to disclose a conflict of interest” theory.

Building a case on the failure to disclose theory would be problematic for the government for several reasons. First, as a civil servant, it is questionable whether Thompson would be subject to the same disclosure requirements as an elected official under Wisconsin law.<sup>205</sup> Second, it is debatable whether her “political” motivations created a conflict in the first place because she was not bribed and did not have any connection to Adelman.<sup>206</sup> But perhaps most fatal to the government’s case is the fact that Thompson did disclose her “political concerns” to the evaluation committee.<sup>207</sup>

A problem that arises in analyzing *Thompson* under Third Circuit precedent in non-disclosure cases is that Wisconsin’s disclosure laws appear more lenient than Pennsylvania’s disclosure laws.<sup>208</sup> For example, Pennsylvania defines the term “public employee” in a way that would clearly cover Thompson, and require her to comply with its disclosure laws.<sup>209</sup> Wisconsin’s disclosure laws do not define the term “public employee,” and it is not as clear if she would have to comply with them.<sup>210</sup> But the Third Circuit’s language in *United States v. Antico*—that “[d]uties to disclose material information affecting an official’s impartial decision-making . . . exist . . . regardless of a state

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<sup>204</sup> *Id.*

<sup>205</sup> The Wisconsin Code of Ethics does not define the term “public employee” so it is unclear whether or not a Thompson would have to file a disclosure statement. WIS. STAT. ANN. § 19.42 (West Supp. 2007). See WIS. STAT. ANN. § 19.43 (West Supp. 2007) for Wisconsin’s disclosure requirements. On the other hand, Pennsylvania, the location of *Panarella*, does define the term “public employee” in its ethical code. 65 PA. CONS. STAT. ANN. § 1102 (West Supp. 2007). Public employees are required to file disclosure statements. 65 PA. CONS. STAT. ANN. § 1104(a) (2000).

<sup>206</sup> See *Thompson*, 484 F.3d at 879.

<sup>207</sup> *Id.* at 878-79.

<sup>208</sup> See *supra* note 205.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

or local law codifying a conflict of interest”—makes clear that some type of disclosure is needed.<sup>211</sup> Thus, if Thompson did not have to comply with Wisconsin's disclosure laws, to who was she supposed to disclose the potential conflict.

In this circumstance, *Antico* suggests that disclosing to a supervisor may be sufficient.<sup>212</sup> In that case Frank Antico worked in various positions in Philadelphia's Department of Licenses and Inspections.<sup>213</sup> In several of the positions he held “discretionary authority to approve zoning and use permits and licenses.”<sup>214</sup> Antico failed to pay child support to his children living with his ex-girlfriend.<sup>215</sup> She sued and was awarded child support.<sup>216</sup> After making several payments, Antico, with her consent, set her up in a business expediting permits and licenses for other businesses so that he did not have to continue paying child support.<sup>217</sup> To support her business Antico referred clients to her, and then he would complete all of the paperwork in her name.<sup>218</sup> Antico's co-workers knew about the arrangement, but his supervisors did not.<sup>219</sup> The court stated that the fact that Antico's co-workers knew about the arrangement “does not vindicate his failure to disclose” the relationship to his supervisors.<sup>220</sup>

Two complications arise in comparing *Thompson* and *Antico*. First, Antico was required to comply with disclosure laws.<sup>221</sup> It is not as clear, as stated above, that Thompson was under a similar requirement. Second, assuming there was a conflict, disclosing it to

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<sup>211</sup> *United States v. Antico*, 275 F.3d 245, 264 (3d Cir. 2001) (citing to *United States v. Holzer*, 816 F.2d 304, 309 (7th Cir. 1987)).

<sup>212</sup> *See id.* at 264-65.

<sup>213</sup> *Id.* at 249.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 253.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 253-54.

<sup>219</sup> *Id.* at 265.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 263.

her supervisor may not have solved the problem because he may have wanted to reward one of the governor's political supporters.<sup>222</sup> But Thompson did disclose her "political" concerns to the other members of the evaluation committee.<sup>223</sup> Although the committee members may be more like the co-workers in *Antico*, the disclosure in Thompson seems address the Third Circuit's concern in *Antico* that non-disclosure evinces an "intent to deceive."<sup>224</sup>

In Thompson, each of the committee members scored the proposals on the same criteria, and there is no evidence to suggest that any one member could overrule another.<sup>225</sup> Otherwise, there would have been no reason for Thompson to attempt to negotiate with the other members of the evaluation committee to get them to change their scores.<sup>226</sup> The only reason that Adelman was awarded the contract was because when the contract was put out for re-bid, as permitted by state law, they lowered their score and a tie with Omega ensued.<sup>227</sup> If Aldeman did not lower their score, thus allowing Thompson to award them the contract based on the state law tie-breaking procedure that allowed other factors to be considered, it is almost certain that Omega would have been awarded the contract regardless of Thompson's actions.<sup>228</sup> In contrast, *Antico* had the discretionary power to approve permits and licenses without requiring someone else's approval or knowledge.<sup>229</sup> And he used the power to benefit himself so that he would not have to pay child support.<sup>230</sup>

The policy behind disclosure is that the public should be assured that elected officials and public employees are making decisions in the

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<sup>222</sup> See *Thompson*, 484 F.3d 877, 879 (7th Cir. 2007).

<sup>223</sup> *Id.* at 878-79.

<sup>224</sup> *Antico*, 275 F.3d at 265.

<sup>225</sup> *Thompson*, 484 F.3d at 878-79.

<sup>226</sup> See *id.* at 879.

<sup>227</sup> *Id.*

<sup>228</sup> See *id.*

<sup>229</sup> *Antico*, 275 F.3d at 249.

<sup>230</sup> *Id.* at 263.

best interest of the public, and not in their own self-interest.<sup>231</sup> Because Thompson's disclosed her "political" concerns to the evaluation committee, her actions seem to comply with this policy concern. Therefore, based upon the above considerations, it appears likely that if *Thompson* had been convicted of honest services fraud in the Third Circuit, that court too would have reversed her conviction because her disclosure to the evaluation committee seems to negate their concern that she had an intent to deceive. Because it appears that the Third Circuit and the Seventh Circuit would come to the same conclusion under the *Thompson* facts, the next question is whether the facts of *Panarella* would lead to the same results if they had arisen in the Seventh Circuit.

### *B. Applying the Seventh Circuit's Test to the Facts of Panarella*

In *Panarella*, a business owner (Panarella) hired a State Senator (Loeper) as a consultant.<sup>232</sup> Loeper failed to disclose his \$330,000 in income from this arrangement, as required under Pennsylvania law, and both Panarella and the Loeper took actions to conceal the relationship from the press.<sup>233</sup> Panarella pled guilty to the charge that he engaged in a scheme to deprive the public of the Loeper's honest services.<sup>234</sup> But, on appeal, he argued that Loeper's actions did not amount to honest services fraud because there was no evidence that he either bought, or that their arrangement influenced, Loeper's vote on a bill that if enacted would have been detrimental to Panarella's business.<sup>235</sup>

If *Panarella* had arisen in the Seventh Circuit, it is very likely that the court would have found that Loeper misused his office for private

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<sup>231</sup> *United States v. Panarella*, 277 F.3d 678, 697 (3d Cir. 2002) (citing to the purpose behind Pennsylvania's Public Official and Employee Ethics Act).

<sup>232</sup> *Panarella*, 277 F.3d at 681.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 690-91.

gain and upheld Panarella's conviction, as the Third Circuit did.<sup>236</sup> The facts of *Panarella* are very similar to the facts of *Isaacs*, where the Seventh Circuit upheld former Illinois governor Otto Kerner's conviction for honest services fraud.<sup>237</sup> In *Isaacs*, Kerner engaged in a complicated scheme involving stock transactions that netted him a profit of over \$150,000 in exchange for helping various racing interests.<sup>238</sup> Kerner claimed he did not commit honest services fraud because the state did not lose any money.<sup>239</sup> The Seventh Circuit disagreed, and upheld the conviction, finding that "[t]here was evidence [that both] the State of Illinois and its citizens were deprived of the loyal and honest services of their governor, [and] that the defendants actually did exert special influence in favor of and bestowed preferential treatment on [certain racing interests]."<sup>240</sup>

Like Kerner, Panarella engaged in a scheme to use the power of government to benefit his private interests.<sup>241</sup> The only difference between the two defendants is that they were on different sides of the transaction. Kerner was a public official who purchased and sold stock in a corporation, and used his position and the power of government to benefit that corporation.<sup>242</sup> Panarella was a business owner, who hired Loeper, the State Senate Majority Leader, to promote his business interests.<sup>243</sup> Loeper promoted Panarella's business interests by attending meetings between Panarella and state and local officials.<sup>244</sup> Additionally, Loeper furthered Panarella's business interests by voting against and helping to defeat legislation that would have had a

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<sup>236</sup> *Id.* at 680-81.

<sup>237</sup> *United States v. Isaacs*, 493 F.2d 1124, 1152 (7th Cir. 1974).

<sup>238</sup> *Id.* at 1139.

<sup>239</sup> *Id.* at 1149. Not only did the state not lose any money, but in fact its racing revenues doubled as a result of Kerner's actions. *Id.* at 1139.

<sup>240</sup> *Id.* at 1150.

<sup>241</sup> *Id.* at 1131-40; *Panarella*, 277 F.3d at 680-82.

<sup>242</sup> *Isaacs*, 493 F.2d at 1135-39.

<sup>243</sup> *Panarella*, 277 F.3d at 681.

<sup>244</sup> *Id.*

substantial negative impact on the business.<sup>245</sup> Finally, like Kerner, Panarella and Loeper took clandestine steps—that included making the payments through a third party—to hide the arrangement from the public.<sup>246</sup>

*Isaacs*, however, was decided before *McNally*; therefore, one must examine *post-McNally* law to ensure an accurate comparison. As previously stated, the Seventh Circuit determined in *Bloom* that the misuse of office for private gain is its standard for delineating criminal from non-criminal behavior.<sup>247</sup> In discussing the “misuse of office” in *Bloom*, the Seventh Circuit stated, “[i]n almost all of the intangible rights cases this circuit has decided (before *McNally* or since § 1346), the defendant used his office for private gain, as by accepting a bribe in exchange for official action.”<sup>248</sup> The court cited to *Isaacs* in support of this proposition.<sup>249</sup>

In *Thompson*, the Seventh Circuit noted that “the history of honest-services prosecutions is one in which the ‘private gain’ comes from third parties who suborn the employee with side payments, often derived via kickbacks skimmed from a public contract.”<sup>250</sup> The facts of *Panarella* do not suggest that the \$330,000 in “consulting fees” that Panarella paid to Loeper were part of a kickback scheme.<sup>251</sup> Nevertheless, the Seventh Circuit would likely have found that Panarella’s payments to Loeper were bribes. First the payments were made to Loeper through a third party,<sup>252</sup> and this seems very similar to the stock payment scheme that the court found to be a bribe in

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<sup>245</sup> *Id.*

<sup>246</sup> *Isaacs*, 493 F.2d at 1152 (noting that the scheme depended upon “continued concealment” and “devious and complicated [financial] devices”); *Panarella*, 277 F.3d at 681.

<sup>247</sup> *United States v. Bloom*, 149 F.3d 649, 655 (7th Cir. 1998).

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *United States v. Thompson*, 484 F.3d 877, 884 (7th Cir. 2007)

<sup>251</sup> 277 F.3d 678, 681 (3d Cir. 2002).

<sup>252</sup> *Id.*

*Isaacs*.<sup>253</sup> Second, as a result of the payments, Loeper took actions as a public official to benefit his private interests.<sup>254</sup> Thus, *Panarella* involves a situation where a public official received a private gain from a third party and in exchange for taking action in his official capacity, and thereby satisfying the *Bloom* standard. Therefore, the Seventh Circuit, like the Third Circuit, would likely uphold *Panarella*'s conviction for engaging in a scheme to deprive the public of Loeper's honest services.

*C. Analysis of the Seventh Circuit's and the Third Circuit's Differing Standards for Honest Services Fraud*

The above analyses have shown that, at least under the limited facts of *Thompson* and *Panarella*, both the Seventh Circuit's "misuse of office for private gain" standard and the Third Circuit's "state law" standard likely lead to the same outcomes. Because *Thompson* lies at the other edges of the honest services doctrine, this suggests that in most cases neither of the tests is better in practice than the other. This, of course, assumes that the courts reached the right outcomes in both cases. One possible conclusion is that the courts have generally gotten the right answer despite applying different standards.<sup>255</sup> But, if neither of the tests is better in practice, the next question is whether one of the tests is better in theory.

The answer to that question appears to be no. Both courts agree with the theory that public officials owe fiduciary duties to the citizenry.<sup>256</sup> What they appear to disagree on, however, is the semantics of how to define the fiduciary duties that are owed to the public, and what other elements are necessary, if any, to limit the reach of § 1346 and to prevent minor infractions from becoming major federal crimes.<sup>257</sup> The Third Circuit believes that limiting fiduciary

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<sup>253</sup> See *United States v. Isaacs*, 493 F.2d 1124, 1144-46 (7th Cir. 1974).

<sup>254</sup> *Panarella*, 277 F.3d at 681.

<sup>255</sup> Tandler, *supra* note 2, at 2765.

<sup>256</sup> *Panarella*, 277 F.3d at 692; *Bloom*, 149 F.3d 654-55.

<sup>257</sup> *Panarella*, 277 F.3d at 692-93; *Bloom*, 149 F.3d at 654-55.

duties to those that arise under state law is the best way to resolve vagueness and federalism concerns.<sup>258</sup> The vagueness concern is abated because the defendants have knowledge that their actions are illegal.<sup>259</sup> The federalism concerns are lessened because the state has spoken on what actions it considers illegal.<sup>260</sup>

On the other hand, the Seventh Circuit does not limit fiduciary duties only to those that arise under state law, but leaves open the possibility of reaching that conclusion in the future.<sup>261</sup> But because the Seventh Circuit does not limit the fiduciary duties to those created by state law, and therefore allows for the breach of more fiduciary duties, it needs a way to prevent the breach of every fiduciary duty from becoming a federal crime. The Seventh Circuit does this by adding the private gain requirement.<sup>262</sup> Furthermore, *Thompson* indicates that the private gain must come from a third party.<sup>263</sup>

Although different, both courts' standards are grounded in sound principles of statutory interpretation. The Seventh Circuit concluded by passing § 1346 Congress intended only to criminalize conduct that would have been criminal prior to *McNally*.<sup>264</sup> To determine what was criminal prior to *McNally*, the Seventh Circuit relied on the Supreme Court's description of the honest services fraud doctrine that in *McNally*.<sup>265</sup> The Seventh Circuit then reasoned that this description of the honest services fraud doctrine is what Congress resurrected in passing § 1346.<sup>266</sup> Conversely, the Third Circuit has relied more on

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<sup>258</sup> *Panarella*, 277 F.3d at 692-93.

<sup>259</sup> *Id.* at 698.

<sup>260</sup> *Id.* at 694.

<sup>261</sup> *See* *United States v. Martin*, 195 F.3d 961, 967 (7th Cir. 1999).

<sup>262</sup> *Bloom*, 149 F.3d at 655. Under this reading of the *Bloom* standard the "misuse of office" element is the breach of the fiduciary duty.

<sup>263</sup> *United States v. Thompson*, 484 F.3d 877, 884 (7th Cir. 2007).

<sup>264</sup> *Bloom*, 149 F.3d at 655.

<sup>265</sup> *Id.* ("[i]n *McNally* the Supreme Court described the intangible rights theory this way: 'a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud'") (citing to *McNally v. United States*, 483 U.S. 350, 355 (1987)).

<sup>266</sup> *Id.*



criminal and political theory to determine that state law is the better line for determining what conduct amounts to honest services fraud.<sup>267</sup> Because both standards have sound theoretical bases, and appear to lead to same outcomes under the same set of facts, it is difficult to conclude that either standard is better in theory.

One simple solution to the problem raised by *Thompson*,<sup>268</sup> is for the Seventh Circuit to simply adopt the Third Circuit's state law limiting principal. This solution has the benefit of preventing the problem raised by *Thompson* because a different standard not involving private gain is used. But this recommendation is inadequate as a long-term solution to general problems raised by the honest services doctrine because the state law limiting principle raises its own set of problems, although separate and distinct from the problems raised by the misuse of office for private gain limiting principle. For example, the Third Circuit struggles with determining which state laws create fiduciary duties and which laws do not, and under what circumstances those duties arise and under what circumstances they do not arise.<sup>269</sup> On the other hand, the Seventh Circuit wrestles with defining what constitutes a "misuse of office" and a "private gain."<sup>270</sup> Ultimately, these are issues that the Supreme Court will face if it grants certiorari to an honest services fraud case.

In the meantime, because neither circuit is likely to adopt another standard, it is beneficial to determine the potential effect of *Thompson* on honest services fraud law in the Seventh Circuit. In *Thompson*, the court held "that neither an increase in salary for doing what one's superiors deem a good job, nor an addition to one's peace of mind, is a

<sup>267</sup> United States v. Panarella, 277 F.3d 678, 692-98 (3d Cir. 2002).

<sup>268</sup> See *infra* Section IV.

<sup>269</sup> See *supra* note 187.

<sup>270</sup> United States v. Rezko, No. 05 CR 691, 2007 U.S. Dist. LEXIS 73517, at \*13-15 (Oct. 2, 2007) (the defendant does not have to personally gain, instead the only requirement is that any participant in the scheme realizes a private gain); United States v. Segal, 495 F.3d 826, 835 (7th Cir. 2007) (affirming *Thompson's* refinement of *Bloom*, but finding the instant case to vary in both degree and kind from *Thompson*; here a \$30 million fraud that the defendant intentionally participated in versus \$1,000 pay raise where the defendant "did not act out of private gain").

'private benefit' for the purpose of § 1346." In the abstract this seems like a logical holding. But this holding has the potential to open a loophole that will perpetuate the graft and corruption that Congress intended to prevent when it reinstated the honest services fraud doctrine through the enactment of § 1346.

#### IV. PRIVATE GAIN IN THE SEVENTH CIRCUIT

##### *A. Northern District of Illinois Decides that Current or Future Jobs can be a Private Gain*

Prior to the Seventh Circuit's decision in *Thompson*, on three occasions, courts in the Northern District of Illinois held that one's job or the potential of future employment can be a private gain under the *Bloom* standard.<sup>271</sup> The first case, *United States v. Bauer*,<sup>272</sup> was one of the first cases to arise out of the Illinois licenses-for-bribes scandal<sup>273</sup> that would ultimately lead to the conviction of former governor George Ryan for honest services fraud.<sup>274</sup> Dean Bauer served as the Inspector General in the Illinois Secretary of State's Office.<sup>275</sup> As Inspector General, one of his duties was to investigate instances of employee misconduct.<sup>276</sup> Bauer was indicted for honest services fraud for failing to investigate, and for his conduct in burying, allegations that various licensing facilities were accepting bribes in exchange for driver's licenses.<sup>277</sup> The court accepted the government's argument

<sup>271</sup> *United States v. Sorich*, 427 F. Supp. 2d 820, 829-30 (N.D. Ill. 2006); *United States v. Munson*, No. 03 CR 1153-4, 2004 U.S. Dist. LEXIS 14274, at \*3 (N.D. Ill. July 27, 2004); *United States v. Bauer*, No. 00 CR 81, 2000 U.S. Dist. LEXIS 16784, at \*9-12 (N.D. Ill. Nov. 16, 2000).

<sup>272</sup> 2000 U.S. Dist. LEXIS 16784 (N.D. Ill. Nov. 16, 2000).

<sup>273</sup> For a partial list of the key dates in the licenses for bribes scandal see *License Scandal Chronology*, ST. J.-REG., Apr. 26, 2002, at 3.

<sup>274</sup> *United States v. Warner*, 498 F.3d 666, 697-99 (7th Cir. 2007) (upholding Governor Ryan's convictions).

<sup>275</sup> *Bauer*, 2000 U.S. Dist. LEXIS at \*1.

<sup>276</sup> *Id.* at \*3.

<sup>277</sup> *Id.* at \*9-13.

that Bauer stood to gain because his actions provided a “political advantage” to his political patron.<sup>278</sup> Thus, he stood to, and did gain, when George Ryan was elected Governor.<sup>279</sup>

The second case, *United States v. Munson*, occurred in the private sector. Michael Munson, an attorney, was indicted for honest services fraud because of a scheme he allegedly engaged in with executives of Nicor Energy in order to manipulate certain financial information.<sup>280</sup> Munson claimed that he could not be charged with honest services fraud because he did not personally gain, or receive any direct monetary compensation, such as a bribe or kickback.<sup>281</sup> The government argued that Munson’s personal gains were the legal fees he received, and his hope that by currying favor with the executives he would receive future independent legal work from Nicor or become its general counsel.<sup>282</sup> The court summarized *Bauer’s* holding as “acts intended to curry political favor in hopes of increasing the defendant’s current job security or of leading to future promotions [are] sufficient personal gain to satisfy § 1346,” and accepted the government’s argument.<sup>283</sup>

The third case, *United States v. Sorich*, arose out of the City of Chicago’s patronage scandal.<sup>284</sup> Robert Sorich, Assistant to the Director of the City’s Office of Intergovernmental Affairs, was indicted for honest services fraud for ensuring that city jobs went to certain political supporters.<sup>285</sup> Sorich argued that charges could not be sustained because the prosecution did not allege that the City of

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<sup>278</sup> *Id.* at \*11-12.

<sup>279</sup> *Id.* After George Ryan was elected Governor, Bauer was promoted to a position in the Illinois Department of Transportation. *Id.* at \*4. A few months later he resigned after having qualified for a state pension. *Id.*

<sup>280</sup> 2004 U.S. Dist. LEXIS 14274, at \*1 (N.D. Ill. July 27, 2004).

<sup>281</sup> *Id.* at \*2.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at \*3.

<sup>284</sup> *United States v. Sorich*, 427 F. Supp. 2d 820, 823-24 (N.D. Ill. 2006). *See also* Rudolph Bush & Dan Mihalopoulos, *Daley Jobs Chief Guilty*, CHI. TRIB., July 7, 2006, at 1.

<sup>285</sup> *Sorich*, 427 F. Supp. 2d 823.

Chicago or its residents suffered a loss, or that he personally gained.<sup>286</sup> The court found that Sorich “[was] well aware of the gains to be had from [his] machinations” and, citing to both *Bauer* and *Munson*, allowed the prosecution to go forward.<sup>287</sup> Additionally, the court found that although “subsequent career security or advancement” is not as easy to quantify as a bribery or kickback scheme, it nevertheless could serve as a private gain for honest services fraud.<sup>288</sup>

In *Thompson*, the government cited to *Sorich* and *Munson* for the proposition that Thompson’s increased salary was a private gain for honest services fraud.<sup>289</sup> The Seventh Circuit disagreed, finding neither case persuasive.<sup>290</sup> But the court did not explain its reason for this finding.<sup>291</sup> The simple explanation could be that the Northern District of Illinois’ holdings in *Sorich*, *Munson* and, by extension, *Bauer* are overruled.<sup>292</sup> But if those holdings are not overruled—and the court’s statement that *Sorich* and *Munson* are “unpersuasive”<sup>293</sup> suggest that they are not—then the Seventh Circuit may have inadvertently opened a loophole that will allow subtle corruption schemes to go unpunished.

### B. Distinguishing Thompson

One way to distinguish *Thompson* from *Sorich* and *Bauer*, but not from *Munson*, is based on the jobs that each defendant held. Thompson held a civil servant job, while both Sorich and Bauer held

<sup>286</sup> *Id.* at 828.

<sup>287</sup> *Id.* at 829.

<sup>288</sup> *Id.* at 830.

<sup>289</sup> *United States v. Thompson*, 484 F.3d 877, 884 (7th Cir. 2007).

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> Some experts believe that this ruling may lead to the reversal of Sorich’s conviction. See Ward, *supra* note 33, at 20.

<sup>293</sup> *Thompson*, 484 F.3d at 884.

politically-appointed positions.<sup>294</sup> As a civil servant, Thompson had independent job security.<sup>295</sup> On the other hand, Sorich's and Bauer's job security rested on their political patrons remaining in power.<sup>296</sup> If *Thompson* is distinguishable from *Sorich* and *Bauer* for this reason, then the Seventh Circuit may have created an opening for "subtle schemes" that now cannot be punished as honest services fraud.

One such scheme is where civil servants engage on their own, and without any pressure from their political supervisors, in conduct such as awarding contracts to or perhaps hiring the friends and supporters of their current political patrons. The political appointees then notice that their friends and supporters are benefiting, and as a result reward the civil servants with extra or higher bonuses through "normal personnel practices."<sup>297</sup> Under *Thompson*, this would not be a private gain because the court stated that "getting a raise through normal personnel practices does not sound like an aspect of a 'scheme or artifice.'"<sup>298</sup> Yet, these "subtle schemes"—where the civil servants are receiving a private gain in the form of salary increase that they would otherwise not have received—would propagate the corruption and graft that § 1346 was enacted to counter.<sup>299</sup> One limitation to this scenario is that the civil servants could not be substantially compensated because their raises or bonuses would have to be given through normal personnel practices. But what is considered normal may vary widely, and this added condition would certainly create another obstacle for the government to consider in determining whether to prosecute, and ultimately for it to prove at trial.

In addition to civil servants acting on their own, another possibility is that the political appointees may create a "wink and nod"

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<sup>294</sup> *Id.* at 882; *Sorich*, 427 F. Supp. 2d at 829-30; *United States v. Bauer*, No. 00 CR 81, 2000 U.S. Dist. LEXIS 16784, at \*11-12 (N.D. Ill. Nov. 16, 2000).

<sup>295</sup> *Thompson*, 484 F.3d at 882.

<sup>296</sup> *Sorich*, 427 F. Supp. 2d at 829-30; *Bauer*, 2000 U.S. Dist. LEXIS 16784, at \*11-12.

<sup>297</sup> *Thompson*, 484 F.3d at 884.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

work environment, or apply subtle pressure so that the civil servants know what to do and are compensated for the effort. Regardless of whether subtle pressure is applied or whether the civil servants create the system on their own, the end result is the same—the continuation of public corruption that can no longer be punished as honest services fraud.

The above scenario rests on the assumption that *Thompson* did not overrule *Sorich* and *Bauer*. But again, the simplest explanation may be that *Thompson* did overrule those cases. Because *Munson* cannot be readily distinguished from *Thompson*, this argument may have more weight. The only apparent distinction between *Thompson* and *Munson* is that *Munson* occurred in the private sector where *Thompson* occurred in the public sector. Other than a public/private distinction, there does not appear to be much difference between the cases. Both defendants received a small financial benefit, but it was not the result of a bribe or a kickback.<sup>300</sup> *Thompson* received a \$1,000 increase to her salary.<sup>301</sup> While *Munson* received the legal fees for working on various documents, and had *hope* of becoming Nicor's General Counsel.<sup>302</sup>

In other circuits, the public/private distinction may matter because it is more difficult to prove private honest services fraud than it is to prove public honest services fraud because the fiduciary duties are different.<sup>303</sup> But the Seventh Circuit appears to treat public and private honest services fraud in the same manner by subjecting both to the *Bloom* standard.<sup>304</sup> If, however, in the Seventh Circuit, the public/private distinction does matter, then *Thompson* almost certainly

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<sup>300</sup> *Id.* at 879; *United States v. Munson*, No. 03 CR 1153-4, 2004 U.S. Dist. LEXIS 14274, at \*2 (N.D. Ill. July 27, 2004).

<sup>301</sup> *Thompson*, 484 F.3d at 879.

<sup>302</sup> *Munson*, 2004 U.S. Dist. LEXIS 14274 at \*2.

<sup>303</sup> *United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996).

<sup>304</sup> *See, e.g., United States v. Warner*, 498 F.3d 666, 697-98 (7th Cir. 2007) (public); *United States v. Segal*, 495 F.3d 826, 834-35 (7th Cir. 2007) (private); *United States v. Hausmann*, 345 F.3d 952, 958 (7th Cir. 2003) (private); *United States v. Rezko*, No. 05 CR 691, 2007 U.S. Dist. LEXIS 73517, at \*10-16 (N.D. Ill. Oct. 2, 2007) (private).

overrules the Northern District cases because otherwise it would turn honest services fraud law on its head. It is simply illogical to say that Thompson's raise was not a private gain, but that Bauer's law fees and hope for new employment was a gain.

But because the Seventh Circuit in *Thompson* only found *Sorich* and *Munson* unpersuasive, and did not explain its reasoning or state that prior law was overruled, the public/private distinction remains an open issue, as does the public servant/political appointee distinction.<sup>305</sup> One solution that may have avoided the "subtle scheme" problem, reached the same outcome as the Seventh Circuit did in *Thompson*, and distinguished *Sorich*, *Muson*, and *Bauer*, would have been to decide as a threshold matter whether Thompson engaged in a "scheme."

#### V. DETERMINING IF THERE IS A "SCHEME" AS A THRESHOLD MATTER

##### A. *Scheme Defined as an Artful Plot or Plan to Deceive Others*

The mail fraud statute states in pertinent part that:

Whoever, having devised or intending to devise any *scheme or artifice* to defraud, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office . . . any matter . . . to be sent or delivered by the Postal Service . . . shall be fined under this title or imprisoned.<sup>306</sup>

The United States Code, however, does not define the terms "scheme" or "artifice." But, the terms may generally be understood to mean "[a]n artful plot or plan, [usually] to deceive others."<sup>307</sup>

Taking the terms under their common meanings, the Seventh Circuit may have avoided the questions raised after *Thompson* if the

<sup>305</sup> *Thompson*, 484 F.3d at 884.

<sup>306</sup> 18 U.S.C. § 1341 (2000) (emphasis added).

<sup>307</sup> *See supra* note 49.

court had decided as a threshold matter whether Thompson had engaged in a “scheme.” If Thompson did not engage in a scheme than the other issues are moot—there would be no need to determine whether she had misused her office or had a private gain because there would be no fraud. Under this analysis, “scheme” becomes a necessary, but not a sufficient condition. If a scheme is not found, then the analysis can stop. Conversely, if a scheme is found the court must continue the analysis to determine if the purpose of the scheme was to defraud another. The analysis could also be applied in the Third Circuit because if there is no scheme, then there is no need to determine whether any fiduciary duties have been breached.

In *Thompson*, the prosecution did not argue that there was any malfeasance regarding the political contributions made by the owner of Adelman, or that there was any form of a kickback scheme.<sup>308</sup> Neither did the prosecution allege that Thompson had knowledge of, or allowed the contributions to enter into her decision making process.<sup>309</sup> To explain the “political” considerations that Thompson referred to, the court assumed that Thompson knew that her boss, a political appointee, preferred Adelman Travel.<sup>310</sup>

The court next speculated that Thompson’s boss might have had three political reasons for wanting to award the contract to Adelman.<sup>311</sup> The first reason was that he might have wanted to reward one of the governor’s supporters.<sup>312</sup> The court stated that if this was the reason it would be problematic.<sup>313</sup> The second reason was that he may have wanted to gain politically by driving down the cost of government, and thus helping his boss—the incumbent governor.<sup>314</sup> This could be accomplished by selecting Adelman because it bid the

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<sup>308</sup> See *supra* note 26.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.* at 879-80.

<sup>312</sup> *Id.* at 879.

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at 879-80.



lowest price.<sup>315</sup> The court stated that this may be good politics and was not a crime.<sup>316</sup> The final political reason might have been to select a local firm over an out-of-state firm.<sup>317</sup> The court stated that this too may have been good politics and did not violate federal law.<sup>318</sup> Finally, the court stated that under the evidence presented no jury could find beyond a reasonable doubt which of the three political reasons was relied on in awarding the contract to Adelman.<sup>319</sup> Moreover, the court concluded that Thompson and her boss may not have shared the same political reason.<sup>320</sup> Furthermore, the court stated that Thompson may have selected Adelman solely to please her boss, regardless of his reasons for wanting to select Adelman.<sup>321</sup>

The Seventh Circuit based its opinion upon on the assumption that Thompson was just trying to please her boss. This is evinced by the court's holding "that neither an increase in salary for doing what *one's superiors deem a good job*, nor an addition to one's peace of mind, is a 'private benefit' for the purpose of § 1346."<sup>322</sup> Based on this holding, it seems clear that the Seventh Circuit would have found that Thompson did not engage in a "scheme" because her actions do not evince any conduct that demonstrates that she devised or participated in a plan to deceive another.

On the other hand, the facts of *Bauer*, *Munson*, and *Sorich* show that each of those defendants did engage in a "scheme." Bauer took steps to bury investigations into the Secretary of State's office in order to spare the office from embarrassment.<sup>323</sup> Hiding information from investigators certainly fits the definition of a plan to deceive others.

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<sup>315</sup> *Id.* at 878.

<sup>316</sup> *Id.* at 880.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.* at 884 (emphasis added).

<sup>323</sup> *United States v. Bauer*, No. 00 CR 81, 2000 U.S. Dist. LEXIS 16784, at \*8 (N.D. Ill. Nov. 14, 2000).

Munson allegedly assisted three Nicor executives in inflating the company's earnings in violation of generally-accepted accounting principles.<sup>324</sup> Munson assisted the endeavor through the manipulation of legal documents.<sup>325</sup> These actions also fit the definition of engaging in a plan to deceive others. Finally, Sorich allegedly participated in the rigging of non-policy-making city jobs.<sup>326</sup> His actions included ordering others to conceal the names of job candidates submitted to his office and the meetings regarding this process, creating a "sham" process for hiring and promotion, and creating a "color-coded" tracking system "to [ensure] that each group jostling for favors remained both relatively satisfied and indebted."<sup>327</sup> Sorich's actions also demonstrate a plan to deceive others.

The above analysis suggests *Thompson* can be distinguished from *Bauer*, *Munson*, and *Sorich* on the ground that Thompson did not, but that Bauer, Munson and Sorich did, participate in a scheme. Thus, if the Seventh Circuit had made this threshold determination it could have avoided the potential problem that arises after *Thompson*. As previously stated, this problem is the Machiavellian or "subtle scheme" engaged in by civil servants to award the friends and supporters of their current political supervisors, and to be rewarded for their efforts through normal compensation procedures.<sup>328</sup> If the civil servant/political appointee dichotomy is the distinction between the *Thompson* case and the lower court cases, then after *Thompson* the government will be unable to prosecute these schemes as honest services fraud.

A potential weakness of the proposed solution is that in *Thompson* the government's position was very similar to the above noted "subtle scheme." In *Thompson*, however, the government took the argument one step further by reasoning that Thompson's objectives were

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<sup>324</sup> United States v. Munson, No. 03 CR 1153-4, 2004 U.S. Dist. LEXIS 14274, at \*1 (N.D. Ill. July 27, 2004).

<sup>325</sup> *Id.* at \*1-2.

<sup>326</sup> United States v. Sorich, 427 F. Supp. 2d 820, 829 (7th Cir. 2006).

<sup>327</sup> *Id.* at 824, 825, 829.

<sup>328</sup> See *supra* Section IV(B).

irrelevant.<sup>329</sup> The government claimed that the only issue that mattered was that she did not follow the administrative rules exactly as they were laid down.<sup>330</sup> Therefore, if the courts are going to make a threshold determination that a defendant engaged in a “scheme,” they will need a method to determine whether the plan is “artful” or “deceptive.” Adopting a business judgment rule for public employees may be one solution to this problem.

### *B. A Business Judgment Rule for Civil Servants*

The business judgment rule is frequently used as a defense in corporate law.<sup>331</sup> Under a typical formulation of the rule, “[corporate] directors will not be held liable for honest mistakes of judgment if they acted with due care, in good faith, without a disabling conflict, and in furtherance of a rational business purpose.”<sup>332</sup> If the courts applied the business judgment rule, or a modified version of it, to decisions of public employees it would help them to delineate between actions that are good for the government and “schemes.” One benefit of this solution is that there currently exists a substantial body of law in this area in the corporate context. A second, and perhaps more important, benefit is that it may prove extremely helpful in cases such as *Thompson* and *Bauer* where only one person acted, especially since the Supreme Court has long held that one person schemes exist.<sup>333</sup>

Applying the business judgment rule to the facts of *Thompson* probably leads to the conclusion that she acted within its scope. First, she did not have any disabling conflicts.<sup>334</sup> Second, the fact that she disclosed her “political” considerations to the evaluation committee

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<sup>329</sup> *United States v. Thompson*, 484 F.3d 877, 880 (7th Cir. 2007).

<sup>330</sup> *Id.*

<sup>331</sup> E. Norman Veasey, *Seeking a Safe Harbor from Judicial Scrutiny of Directors' Business Decisions—An Analytical Framework for Litigation Strategy and Counselling Directors*, 37 *BUS. LAW.* 1247, 1249 (1982).

<sup>332</sup> *Id.*

<sup>333</sup> *Pereira v. United States*, 347 U.S. 1, 11 (1954).

<sup>334</sup> *Thompson*, 484 F.3d at 879.

suggests that she acted with due care and in good faith.<sup>335</sup> Third, if we accept the court's hypothesized political motivation of trying to save the state money, then that motivation would meet the rational business purpose element.<sup>336</sup> Finally, in discussing the bribery count, the court seems to adopt a quasi business judgment rule with the following statement:

Public employees often implement rules with which they disagree, and they are tempted to bend these rules to achieve what they deem better outcomes. As long as the state gets what it contracts for, at the market price, no funds have been misapplied, even if the state's rules should have led it to buy something more expensive (and perhaps of higher quality too).<sup>337</sup>

Of course, it is always possible that Thompson did not act in good faith and was trying to steer the contract to Adelman in the hopes of receiving a bonus for pleasing her boss. But because there currently is no business judgment rule as a defense to honest services mail fraud, the court did not have access to any evidence on the issue. Ultimately, based on the court's finding that Thompsons was innocent, it is very likely that Thompson would have come within the scope of a business judgment rule, but this determination cannot be made with certainty.

Applying the business judgment rule to facts of *Bauer* leads to the conclusion that Bauer's actions fall outside of its scope. First, he did have a disabling conflict in that he was trying to protect his political patron from embarrassing information.<sup>338</sup> Second, by burying investigations into the embarrassing information, Bauer acted with bad faith and without regard for the public's interest in knowing what is

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<sup>335</sup> *See id.*

<sup>336</sup> *Id.* at 879-80.

<sup>337</sup> *Id.* at 881-82.

<sup>338</sup> *See United States v. Bauer*, No. 00 CR 81, 2000 U.S. Dist. LEXIS 16784, at \*8 (N.D. Ill. Nov. 14, 2000).

occurring in state agencies.<sup>339</sup> Thus, his actions would not be protected under the business judgment rule.

In cases where multiple parties are involved, such as *Sorich* and *Munson*, it is probably less necessary to resort to the business judgment rule because it is more likely that there will be extrinsic evidence of a scheme. Because others are involved there is more likely to be other evidence such as communication records, and there is always the possibility of flipping one of the defendants to testify against the others. But, if the business judgment rule were applied to those cases, Sorich's and Munson's actions would be unprotected by the rule. Munson engaged in conduct with three Nicor executives to manipulate the corporation's financial information.<sup>340</sup> Likewise, Sorich took great pains to develop and conceal an elaborate scheme, with at least two other individuals, to create a "sham" hiring and promotion process.<sup>341</sup> Neither action is consistent with concepts of good faith or acting in the best interests of one's employer or the public.

The above analysis has shown that by adopting a business judgment rule for public employees the courts could more readily determine whether a public employee's actions were taken in furtherance of the government's interest, or whether they instead amounted to an artful plot or plan meant to deceive—in other words, a scheme. Furthermore, this type of analysis has been shown to be helpful in the case of a single civil servant's actions where extrinsic evidence may be lacking.

#### CONCLUSION

The mail fraud statute has long been used in the government's fight against public corruption, and is one of its most powerful weapons.<sup>342</sup> Through the enactment of § 1346, Congress approved of

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<sup>339</sup> *Id.*

<sup>340</sup> *United States v. Munson*, No. 03 CR 1153-4, 2004 U.S. Dist. LEXIS 14274, at \*1 (N.D. Ill. July 27, 2004).

<sup>341</sup> *United States v. Sorich*, 427 F. Supp. 2d 820, 823-25 (N.D. Ill. 2006).

<sup>342</sup> *See supra* note 2.

the honest services fraud theory whereby public officials owe fiduciary duties to the public.<sup>343</sup> But because of the broad language in § 1346, courts have adopted limiting principles to cabin the reach of the statute and to counter concerns about vagueness, federalism and prosecutorial overreaching.<sup>344</sup>

The Seventh Circuit and the Third Circuit have adopted separate limiting principles. The Seventh Circuit uses the “misuse of office for private gain” standard,<sup>345</sup> while the Third Circuit uses the “state law fiduciary duty” standard.<sup>346</sup> Despite the differences, this Note has shown that both standards are likely to lead to the same outcomes under the same set of facts. Because of this result, neither standard can be found to be better in theory or in practice. At most it appears that each circuit will grapple with separate issues. The Third Circuit will struggle with determining which state laws create fiduciary duties, and the Seventh Circuit will wrangle with determining what constitutes a “misuse of office” and a “private gain.”

In *Thompson*, the Seventh Circuit determined that raises given in the normal course of business and psychic benefits are not private gains.<sup>347</sup> Previously, however, the Northern District of Illinois had, on three separate occasions, held that one’s job or the possibility of a future job can serve as a private gain.<sup>348</sup> It is possible that the Seventh Circuit’s decision in *Thompson* simply overrules the Northern District cases. But because the Seventh Circuit only found these cases unpersuasive and did not explicitly overrule them, it is arguable that

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<sup>343</sup> *United States v. Panarella*, 277 F.3d 678, 692 (3d Cir. 2002); *United States v. Bloom*, 149 F.3d 649, 654-55 (7th Cir. 1998).

<sup>344</sup> *See supra* note 21.

<sup>345</sup> *Bloom*, 149 F.3d at 55.

<sup>346</sup> *Panarella*, 277 F.3d at 692-93.

<sup>347</sup> *United States v. Thompson*, 484 F.3d 877, 884 (7th Cir. 2007).

<sup>348</sup> *United States v. Sorich*, 427 F. Supp. 2d 820, 828-30 (N.D. Ill. 2006); *United States v. Munson*, No. 03 CR 1153-4, 2004 U.S. Dist. LEXIS 14274, at \*3 (N.D. Ill. 2004); *United States v. Bauer*, No. 00 CR 81, 2000 U.S. Dist. LEXIS 16784, at \*10-12 (N.D. Ill. 2000).

they are distinguishable and remain good law.<sup>349</sup> Thus, the Seventh Circuit's decision in *Thompson* has the potential to create an unintended "subtle scheme" problem whereby civil servants can take actions that benefit the friends and supporters of their current political-appointee supervisors without the threat of punishment. This result has the potential of hampering the very purpose behind the enactment of § 1346.

This Note has argued that this outcome could have been avoided had the Seventh Circuit made a threshold determination of whether a "scheme," defined by its ordinary usage, existed. This Note further concluded that this determination may not entirely rectify the "subtle scheme" problem, especially in the case of a single civil servant. But, this Note has shown that this problem can be addressed through the adoption of a business judgment rule for public employees.

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<sup>349</sup> See *Thompson*, 484 F.3d at 884.