Campbell Law Review

Volume 32
Issue 2 *Winter 2010*

Article 2

January 2010

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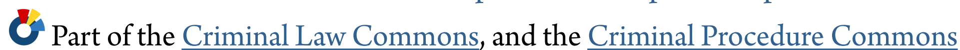
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Recommended Citation

George E.B. Holding, Dennis M. Duffy, and John Stuart Bruce, *Federal Prosecution of State and Local Officials Using Honest Services Mail Fraud: Where's the Line?*, 32 Campbell L. Rev. 191 (2010).

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Federal Prosecution of State and Local Officials Using Honest Services Mail Fraud: Where's the Line?

GEORGE E.B. HOLDING, DENNIS M. DUFFY, & JOHN STUART BRUCE*

INTRODUCTION

On the evening of September 21, 2005, North Carolina Speaker of the House Jim Black enjoyed a relaxing meal at an upscale steakhouse in Raleigh, North Carolina. Joining Speaker Black were two representatives of Scientific Games, Inc. (SGI). As a major lottery vendor, SGI was hoping to secure the lucrative contract to run the nascent North Carolina Lottery. Sometime during the meal, which was paid for by SGI,[1] it was tentatively decided that Speaker Black would appoint Kevin L. Geddings as a Commissioner of the North Carolina Lottery Commission. Geddings, a successful political consultant and public relations expert, was then under contract as a consultant with SGI.[2]

Exactly one year after Speaker Black dined with representatives of SGI, Geddings sat in United States District Court and listened to opening statements in his criminal trial on charges of honest services mail and wire fraud. After a thirteen day trial, a jury found Geddings guilty of five counts of honest services mail fraud.[3] On May 19, 2008, the

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1. At the conclusion of the meal, Norris used her personal credit card to pay the $241.38 dinner tab. *See* Trial Transcript at Exs. 159, 160, United States v. Geddings, No. 5:06-CR-136-D3, 2007 U.S. Dist. LEXIS 95456 (E.D.N.C. May 7, 2007). Norris was later reimbursed for this expense by SGI. *Id.* at Exs. 163, 167. During the meal, Norris, Middleton, and Speaker Black consumed three glasses of Henriot champagne, four vodka martinis, two vodka tonics (with Grey Goose), one Manhattan with Crown Royal, and one glass of Bailey's Irish Whiskey. *Id.* at Ex. 159.

2. *See* United States v. Geddings, 278 F. App'x 281, 282-83 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 435 (2008).

3. *See id.* at 285.

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Fourth Circuit Court of Appeals affirmed Geddings' conviction on five counts of honest services mail fraud.[4] The goal of this Article is to provide a historical perspective of the development of honest services mail fraud and address issues raised by federal prosecutors' use of this statute to ferret out corrupt state and local officials. Or, stated another way, to determine where the line should be drawn between what constitutes a federal crime, as opposed to merely bad government.

Although there is little dispute that the mail fraud statute has become a valuable part of a federal prosecutor's arsenal,[5] for years legal scholars have debated the extent to which the mail fraud statute should be used to prosecute corrupt state and local officials.[6] In recent years, largely in response to the large number of high profile honest services fraud prosecutions, even members of the mainstream news media are beginning to seek guidance regarding the definition of honest services mail fraud.[7] As noted by Professor George Brown,

4. *Id.* at 288.

5. The value of the mail fraud statute to the federal prosecutor is best captured from the following passage by one commentator in an article discussing the federal mail fraud statute:

> To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love. We may flirt with RICO, show off with 10b-5, and call the conspiracy law 'darling,' but we always come home to the virtues of 18 U.S.C. § 1341, with its simplicity, adaptability, and comfortable familiarity. It understands us and, like many a foolish spouse, we like to think we understand it.

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

6. George D. Brown, *New Federalism's Unanswered Question: Who Should Prosecute State and Local Officials for Political Corruptions?*, 60 WASH. & LEE L. REV. 417, 511 (2003) ("A serious tension exists between the Supreme Court's desire to elevate state and local governments to sovereign status and the federal government's continued practice of prosecuting their officials for corruption."); Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 437 (1995) ("This use of the mail fraud statute [to prosecute local corruption crimes] raises a substantial question as to whether that expansion is the best use of federal resources in an era of shrinking budgets."); Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 156 (1994) ("[T]he benefits of federal prosecutions do not outweigh the long-term interest in protecting [federalism, separation of powers, and First Amendment rights].").

7. For example, in a newspaper article discussing the recent honest services fraud charges brought against Illinois Governor Rod R. Blagojevich, it was noted that "[e]ver since the country's founding, prosecutors, defense lawyers and juries have been trying to define the difference between criminality and political deal-making. They have never established a clear-cut line between the offensive and the illegal . . . ." David

though the controversy over whether the national government should be responsible for prosecuting state and local corruption is not new, "it seems increasingly important as the Supreme Court expands the reach of its federalism decisions, sometimes applying the 'new federalism' with a vengeance."[8] In recent months, the Supreme Court has broken its silence on this issue and appears poised to consider this issue for the first time in twenty-two years.[9]

Part I of this Article examines the evolution of the traditional mail fraud statute from a law aimed at preventing the misuse of the mail to a weapon used to prosecute corrupt state and local officials. Following a thorough consideration of the early split between the courts regarding how broadly to interpret the mail fraud statute, this Article examines the expansion of the statute to combat schemes aimed at defrauding others of intangible rights. After examining decades of settled case law approving prosecution of corrupt state and local officials under the intangible rights doctrine, this part of the Article culminates with the Supreme Court's decision in *McNally v. United States*[10] rejecting the concept of honest services fraud.

Part II analyzes the legislative fix used by Congress (often referred to as the *McNally* fix) to plug the hole in federal public corruption prosecutions that resulted from the Supreme Court's abrupt rejection of the intangible rights doctrine. Because *McNally* held that honest services mail fraud prosecutions violated the statutory meaning of the mail fraud statute, rather than the Constitution, Congress was able to negate *McNally* by simply adding § 1346 to specifically criminalize "a scheme or artifice to deprive another of the intangible right of honest services."[11] This is followed by an analysis of the issues addressed by lower courts in interpreting § 1346; specifically, who falls within the definition of public official, what constitutes an official act, whether the corrupt conduct in question must also constitute a violation of state law, and whether intent to privately gain from such corrupt conduct is a prerequisite for an honest services fraud prosecution.

Part III contains a detailed discussion of the facts leading to the conviction of former Lottery Commissioner Kevin Geddings for committing honest services mail fraud. This discussion provides an exam-

Johnston, *In Blagojevich Case, Is It a Crime, or Just Talk?*, N.Y. TIMES, Dec. 15, 2008, at A1.

8. Brown, *supra* note 6, at 419 (citations omitted).

9. *See* Weyhrauch v. United States, 129 S. Ct. 2863 (2009); *see also* Black v. United States, 129 S. Ct. 2379 (2009).

10. McNally v. United States, 483 U.S. 350 (1987).

11. 18 U.S.C. § 1346 (2006).

ple of conduct that falls within the purview of the honest services mail fraud statute.

Finally, Part IV highlights how far this federal statute reaches in prosecutions of corrupt state and local politicians. For instance, does a public official violate § 1346 by merely concealing a conflict of interest relating to his or her official acts? As this discussion will show, under present law, a public official can be properly prosecuted under § 1346 if the public official materially participated in the decision-making process while under the cloud of the concealed conflict of interest. In concluding, this Article touches upon recent indications that the Supreme Court might be ready to take on these thorny questions.

I. EVOLUTION OF HONEST SERVICES MAIL FRAUD

As noted by Jed Rakoff in his seminal law review article on the history of the mail fraud statute, "the mail fraud statute was not unlike a host of federal legislation (both criminal and civil) enacted in the Reconstruction Period immediately following the Civil War, that extended federal authority to areas previously reserved to the states."[12] During this time, Congress passed a number of statutes that began to address how to battle a number of financial frauds perpetrated through the misuse of the United States mail.[13] In response to this problem, Congress, as part of a re-codification of the postal laws, passed the first mail fraud statute on June 8, 1872.[14] The original statute read as follows:

> That if any person having devised or intending to devise any scheme or artifice to defraud, or be effected by either opening or attempting to open correspondence or communication with any other person . . . 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 postal-office establishment*, shall be guilty of [a crime,] . . . [the court] 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.[15]

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12. Rakoff, *supra* note 5, at 779.

13. *See* Gregory Howard Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137, 140-41 (1990).

14. *McNally*, 483 U.S. at 356.

15. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323 (emphasis added).

Although there is no legislative history which ties directly to the 1870 mail fraud statute, Representative John Farnsworth of Illinois, speaking in support of a mail fraud statute which was proposed, but failed to pass in the previous Congress, stated that the new postal laws were needed "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country."[16] However, Representative Farnsworth's statements did not address whether the proposed statute was intended to limit the mail fraud statute to situations in which a mailing is integral to the fraudulent scheme in question. Most of the commentators agree that the original mail fraud statute was aimed more at the misuse of the mail than the frauds being perpetrated through the mail.[17] This view is supported by the statute's use of the words "misuse of the post-office establishment."[18] Further support is offered by the fact the statute directs the court to increase a person's punishment in proportion to the extent to which such person misuses the mail.[19]

Five years after the enactment of the mail fraud statute, the Supreme Court addressed a challenge to the constitutionality of federal postal statutes.[20] In *Ex parte Jackson*, the Supreme Court addressed a statute prohibiting persons from mailing a "letter or circular concerning illegal lotteries."[21] After acknowledging Congress's power to establish and maintain a postal system,[22] the Court held that

16. *McNally*, 483 U.S. at 356 (citations omitted) (internal quotation marks omitted).

17. *See* Henning, *supra* note 6, at 442 ("It appears highly unlikely, however, that Congress in 1872 believed that the Federal Government should prosecute traditional state matters that did not involve directly the federal post office."); *see also* Moohr, *supra* note 6, at 159 ("The original statute was grounded on the federal interest in protecting the integrity of the mail, and this interest potentially limited the use of the statute."); *see also* Michael C. Bennett, Borre v. United States: *An Improper Interpretation of Property Rights*, 42 DEPAUL L. REV. 1499, 1502 (1993) ("Looking at the language of the statute, however, Congress seemed to be more concerned with the degree of mail abuse than with the degree of fraud."). *But see* Rakoff, *supra* note 5, at 784-85 (acknowledging that the statute was aimed at "deter[ring] the actual and intentional misuse of the mails in furtherance of a truly mail fraud scheme," yet arguing that the mail requirement was inserted to provide federal jurisdiction for the criminal statute).

18. *See infra* note 42 and accompanying text. As noted below, this language was removed in the 1909 amendment to the mail fraud statute. Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1115, 1130 (codified as amended at 18 U.S.C. § 1341 (2006)).

19. Henning, *supra* note 6, at 442.

20. *See Ex parte* Jackson, 96 U.S. 727 (1877).

21. *Id.* at 728.

22. *Id.* at 732 (citing U.S. CONST. art. I, § 8).

Congress is also empowered "to designate what shall be carried necessarily involves the right to determine what shall be excluded."[23] Based on this reasoning, the Court upheld the statute and affirmed Congress's right to "prescribe regulations as to what shall constitute mail matter."[24]

As courts began to interpret the mail fraud statute, a split developed regarding the extent to which a scheme must be tied to the misuse of the mail in order to fall within the purview of the mail fraud statute.[25] On the one hand, a number of district courts issued rulings limiting the scope of the mail fraud statute. For example, in *United States v. Owens*, the district court held that the use of the mail to trick a creditor into providing a receipt of payment to a debtor was not mail fraud.[26] Using a strict statutory interpretation of the mail fraud statute, the district court stated that the mail fraud statute was not intended to cover "attempt[s] to cheat, cognizable, possibly, by some state statutes or a common law."[27] Instead, the district court reasoned that the use of the mail fraud statute was aimed at "common schemes of fraud, whereby, through the post-office, circulars, etc., are distributed, generally to entrap and defraud the unwary . . . ."[28]

A separate line of cases interpreted the mail fraud statute more broadly. For example, in *United States v. Loring*, the district court held that it was not necessary for the mailing in question to violate a specific federal statute, as long as the scheme was intended to defraud a victim of money.[29] The *Loring* court then stated "[t]he object of the law was to prevent persons having fraudulent designs on others from using the post office as a means of effecting such fraud."[30]

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23. *Id.*

24. *Id.* The Supreme Court did, however, warn that the Government would need to enforce such criminal postal statutes "consistently with rights reserved to the people, of far greater importance than the transportation of the mail." *Id.* Specifically, the Court noted that the Government would not be allowed to open sealed letters and packages without a warrant. *Id.* at 733.

25. Henning, *supra* note 6, at 443 ("Although *Ex parte Jackson* eliminated most doubts as to the constitutionality of the mail fraud statute, defendants challenged the nature of the schemes charged in indictments as falling outside of the scope of the statute because of their attenuated relation to the post office.").

26. United States v. Owens, 17 F. 72, 73-74 (E.D. Mo. 1883).

27. *Id.* at 74; *cf.* United States v. Mitchell, 36 F. 492, 493 (W.D. Pa. 1888) ("To constitute the statutory offense, then, something more is necessary than the mere sending through the mail of a letter forming part, or designed to aid in the perpetration, of a fraud.").

28. *Owens*, 17 F. at 74.

29. United States v. Loring, 91 F. 881, 887 (N.D. Ill. 1884).

30. *Id.*

In 1889, in the midst of the confusion over the interpretation of the mail fraud statute, Congress amended the statute to provide clarification in three areas. First, the amendment added a long list of schemes covered by the mail fraud statute.[31] Next, the amendment expanded the list of mailed items covered by the statute to include any "writing, circular, pamphlet, or advertisement."[32] Finally, the amendment expanded the locations from which an item must be mailed to include a "branch postoffice, or street or hotel letter box of the United States."[33] Notwithstanding these clarifications, the 1889 Amendment did nothing to clarify the extent to which the fraud in question was required to be dependent upon the use of the mails. Consequently, following the 1889 Amendment, district courts continued to split regarding the scope of the mail fraud statute.[34]

In 1895, the Supreme Court, in *Stokes v. United States*, rejected the defendant's argument that the indictment charging him with mail fraud was defective.[35] In reaching this conclusion, the Court found

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31. After the phrase "scheme and artifice to defraud," the statute added the following language:

> or to sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlawful use any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States, or of any state, territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "sawdust swindle," or "counterfeit money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "bills," "paper goods," "spurious Treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles . . . .

Act of Mar. 2, 1889, ch. 393, sec. 1, § 5480, 25 Stat. 873, 873 (codified as amended at 18 U.S.C. § 1341 (2006)).

32. *Id.*

33. *Id.*

34. *See* United States v. Smith, 45 F. 561, 562 (E.D. Wis. 1891) (stating that the mail fraud statute requires "as an essential part of the scheme, the opening, or design to open, correspondence by mail"); *see also* United States v. Clark, 121 F. 190, 190-91 (M.D. Pa. 1903) ("It is not every fraudulent scheme in which the mails may happen to be employed that is made an offense against the federal law, but only such as are 'to be effected' through that medium as an essential part."). *But cf.* United States v. Horman, 118 F. 780, 782 (S.D. Ohio 1901) (rejecting a challenge to an indictment charging mail fraud in connection with a blackmail scheme because such a narrow construction of the mail fraud statute would allow most fraudulent schemes to fall outside of the statute contrary to "the policy of the law, and the broad purposes it was intended to serve").

35. Stokes v. United States, 157 U.S. 187, 188, 195 (1895).

that the Government had established each of the following elements which were necessary to prove mail fraud: (1) that the defendant "devised a scheme or artifice to defraud"; (2) that the defendant "intended to effect this scheme by opening, or intending to open, correspondence . . . through the post-office establishment"; and (3) that the defendant, in carrying out the scheme, "must have either deposited [or received] a letter or packet in the post office."[36]

One year later in *Durland v. United States*,[37] the Supreme Court provided some guidance as to the definition of the first element set forth in *Stokes*.[38] The question addressed by the Court was the applicability of the mail fraud statute to mailed advertisements containing misrepresentations regarding the potential return of investment on certain bonds offered for sale.[39] The Court rejected the argument that the phrase "scheme and artifice to defraud" was limited to instances of misrepresentation of past or present facts and held that the "[mail fraud] statute is broader than is claimed" and also covers false "representations and promises as to the future."[40] The Court then provided the following clarification regarding the extent to which the fraud was required to be dependent upon the use of the mails:

> We do not wish to be understood as intimating that, in order to constitute the offense, it must be shown that the letters so mailed were of a nature calculated to be effective in carrying out the fraudulent scheme. It is enough if, having devised a scheme to defraud, the defendant, with a view of executing it, deposits in the post office letters which he thinks may assist in carrying it into effect, although, in the judgment of the jury, they may be absolutely ineffective therefor.[41]

In 1909, the mail fraud statute was amended to make a number of changes consistent with the Supreme Court's ruling in *Durland*.[42] First, the nature of the fraud covered by the statute was expanded from "scheme or artifice to defraud," to "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[43] This change made it clear that the mail fraud statute covered false representations as to future facts,

36. *Id.* at 188-89.

37. Durland v. United States, 161 U.S. 306 (1896).

38. *Id.* at 312; *cf.* McNally v. United States, 483 U.S. 350, 356 (1987).

39. *Durland*, 161 U.S. at 312 ("[The defendant] was trying to entrap the unwary, and to secure money from them on the faith of a scheme glittering and attractive in form, yet unreal and deceptive in fact, and known to him to be such.").

40. *Id.* at 313.

41. *Id.* at 315.

42. *McNally*, 483 U.S. at 357.

43. 18 U.S.C. § 1341 (2006).

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as well as present and past facts.[44] Next, Congress refined the intent element as to the mailing by replacing the language requiring the "misuse of the post-office establishment" with a requirement that an item be mailed "for the purpose of executing such scheme or artifice."[45]

In 1914, the Supreme Court had the opportunity in *United States v. Young* to address the amended mail fraud statute in the context of a fraudulent scheme engaged in by a money broker under which false financial statements were sent to potential investors through the mail.[46] The Court reversed a lower court's dismissal of an indictment due to the failure to specifically allege that the scheme was to be executed through the use of the mails.[47] It also rejected the lower court's finding that "[i]t is not an unlawful scheme unless the use of the mails was a part of the scheme"[48] and held that, under the amended statute mail, fraud requires proof of the following: (1) "a scheme devised or intended to be devised to defraud, or for obtaining money or property by means of false pretenses;" and (2) "for the purpose of executing such scheme or attempting to do so, the placing of any letter in any postoffice of the United States, to be sent or delivered by the Postoffice Establishment."[49] Two years later, in *Badders v. United States*, the Supreme Court went even further by holding that Congress may prohibit any mailing done "in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not."[50]

The holding in *Badders* opened the door for a broad application of the mail fraud statute in prosecuting a large variety of economic crimes and also planted the seeds for the later use of the statute to prosecute crimes aimed at the theft of honest services, which is often referred to as the "'intangible rights' doctrine."[51] However, it took approximately twenty-five years before a circuit court, in 1941, addressed the concept of applying the mail fraud statute to prosecute

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44. It also, arguably, expanded the statute's coverage to cover both schemes for obtaining money or property and other more general schemes to defraud. *See* United States v. Clapps, 732 F.2d 1148, 1152 (3d Cir. 1984); United States v. States, 488 F.2d 761, 764 (8th Cir. 1973). *But see McNally*, 483 U.S. at 360.

45. In addition to eliminating the lengthy listing of fraudulent schemes covered by the statute, the 1909 Amendment removed the language tying the severity of the punishment to the extent to which a defendant misused the mail. *See* sources cited *supra* notes 18, 43.

46. United States v. Young, 232 U.S. 155, 156 (1914).

47. *Id.* at 158-59.

48. *Id.* at 159.

49. *Id.* at 161.

50. Badders v. United States, 240 US. 391, 393 (1916).

51. United States v. Murphy, 323 F.3d 102, 110 (3d Cir. 2003).

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corrupt state and local officials under the intangible rights doctrine. In *Shushan v. United States*, the defendants used the mail to facilitate a plan to pay kickbacks to public officials in exchange for the adoption of the defendants' plan for the refund of bonds that had been issued by the Board of Levee Commissioners of Orleans Levee District in Louisiana.[52] Following their conviction of mail fraud and other charges, the defendants challenged their convictions claiming that bribing public officials to award a contract does not fall within the mail fraud statute because the fraud did not involve false representations.[53] In response to this argument, the Fifth Circuit reasoned that "[a] scheme to get money unfairly by obtaining and then betraying the confidence of another, or by corrupting one who acts for another or advises him, would be a scheme to defraud though no lies were told."[54] In discussing the scope of the term "scheme to defraud" in the context of public officials, the Fifth Circuit noted that "[n]o trustee has more sacred duties than a public official and any scheme to obtain an advantage by corrupting such an one must in the federal law be considered a scheme to defraud."[55] Based on this reasoning, the Fifth Circuit held that such a scheme "would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public."[56] Thus, a scheme to defraud the public of its intangible rights to honest services of its elected officials was recognized as falling within the mail fraud statute.

A year later, a federal district court in Massachusetts used the intangible rights doctrine to support the use of the mail fraud statute to prosecute private citizens who engaged in a fraudulent scheme to defraud their employers of the right to honest services.[57] In *United States v. Procter & Gamble Co.*, the defendants engaged in a scheme whereby they paid employees of a competitor named Lever Brothers Company to provide Procter & Gamble Co. with "certain experimental cakes of soap, secret processes, formulas, facts and figures, etc.,

52. Shushan v. United States, 117 F.2d 110, 114 (5th Cir. 1941).

53. *Id.* at 115.

54. *Id.*

55. *Id.* at 114.

56. *Id.*

57. In *United States v. Procter & Gamble Co.*, the court recognized the use of the mail fraud statute to prosecute the theft of honest services owed by an employee to his or her employer, that is, even in the situations involving non-public officials. 47 F. Supp. 676, 678-79 (D. Mass. 1942). This aspect of the intangible rights doctrine, which is often referred to as "private sector" honest services fraud, is beyond the scope of this Article.

belonging to Lever Brothers Company."[58] The defendants filed motions to dismiss the mail fraud charges claiming that the conduct in question did not constitute a "scheme to defraud" under the mail fraud statute.[59] Judge Sweeney noted that while older cases tended to limit the use of mail fraud to cases where the victim was deprived of money or goods, the more recent decisions broadly construed the scope of the mail fraud statute.[60] Judge Sweeney then recognized that employers have an intangible right of loyal and honest service under which employees "will not wrongfully divulge to others the confidential information, trade secrets, etc., belonging to his employer."[61] "When one tampers with that relationship for the purpose of causing the employee to breach his duty he in effect is defrauding the employer of a lawful right."[62]

Approximately thirty years after the Fifth Circuit's decision in *Shushan*, federal prosecutors began utilizing the intangible rights doctrine to prosecute corrupt public officials under the mail fraud statute.[63] In 1973, the Eighth Circuit affirmed a conviction under such a theory of prosecution in *United States v. States*.[64] In *States*, two candidates for Committeeman from different wards in the City of St. Louis falsified voter registration and absentee ballots in order to fraudulently inflate their respective vote total.[65] After the district court denied a motion to dismiss the charges, the defendants, following a bench trial, were convicted of mail fraud.[66] In support of their appeal, the defendants argued that the phrase "or for obtaining money or property by means of false or fraudulent pretences, representations or promises," which was added in the 1909 Amendment immediately following the words "scheme or artifice to defraud" was intended to be read conjunc-

58. *Id.* at 678.

59. *Id.* at 679.

60. *Id.* at 678. The court then aptly summarized the danger of narrowly interpreting the mail fraud statute by reference to the following quote from the Eighth Circuit: "To try to delimit 'fraud' by definition would tend to reward subtle and ingenious circumvention and is not done." *Id.* (quoting Foshay v. United States, 68 F.2d 205, 211 (8th Cir. 1933)) (internal quotation marks omitted).

61. *Id.*

62. *Id.*

63. Although the mail fraud statute was further amended in 1948, the "enactment modified none of the operative provisions of the 1909 statute and merely deleted some superfluous language characterized as the 'obsolete argot of the underworld.'" United States v. McNeive, 536 F.2d 1245, 1248 (8th Cir. 1976).

64. United States v. States, 488 F.2d 761 (8th Cir. 1973).

65. *Id.* at 763.

66. *Id.* at 762.

tively.[67] Based on such a reading, the defendants argued, "there is an offense under the [mail fraud] statute only if money or property is involved in the scheme to defraud."[68] The Eighth Circuit rejected the argument based on the implication found in the Fifth Circuit's holding in *Shushan* 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."[69] The *States* court then held that "it is a violation of the statute in question [mail fraud] if a person defrauds the State out of the 'loyal and faithful services of an employee.'"[70] Furthermore, the court held that a valid mail fraud charge exists "even if the thing out of which the State was allegedly defrauded was not susceptible of measurement in terms of money or physical property."[71]

Soon after the Eighth Circuit's ruling in *States*, the Seventh Circuit followed suit in affirming a number of public corruption convictions obtained under the mail fraud statute. In *United States v. Isaacs*,[72] the Seventh Circuit affirmed the conviction of the former Governor of Illinois, Otto Kerner, Jr.,[73] and the former Director of the Illinois Department of Revenue, Theodore Isaacs, for accepting bribes for a number of horse racing interests in exchange for certain official acts, including the setting of racing dates.[74] The defendants argued that they were improperly charged with mail fraud because the indictment failed to

67. *Id.* at 763-64 (quoting United State v. Classic, 35 F. Supp. 457, 458 (D. La. 1940)).

68. *Id.*

69. *Id.* at 766.

70. *Id.* (quoting United States v. Faser, 303 F. Supp. 380, 384 (E.D. La. 1969)).

71. *Id.* In a concurring opinion, Judge Ross noted that while he reluctantly concurred because the law leaves no alternative but to affirm the conviction, he did not believe that "it was the original intent of Congress that the Federal Government should take over the prosecution of every state crime involving fraud just because the mails have been used in furtherance of that crime." *Id.* at 767 (Ross, J., concurring). Two years later the Eighth Circuit reversed the mail fraud conviction of a city plumbing inspector who accepted unsolicited gratuities from a contractor in connection with the issuance of some plumbing permits. United States v. McNeive, 536 F.2d 1245, 1246, 1251 (8th Cir. 1976). Noting that the permits in question were legally granted and that "'not every breach of every fiduciary duty works a criminal fraud,'" the court concluded that the defendant's conduct was "beyond the pale of the statute." *Id.* at 1250, 1251 (quoting United States v. George, 477 F.2d 508, 512 (7th Cir. 1973)).

72. United States v. Issacs, 493 F.2d 1124 (7th Cir. 1974) (per curium).

73. Defendant Kerner served as Governor of Illinois from 1961 until 1968, when he resigned to accept an appointment to the Seventh Circuit Court of Appeals. *Id.* at 1131, 1139.

74. *Id.* at 1131-39.

allege that the victims of the fraud were defrauded out of "something of definable value, money or property."[75] The Seventh Circuit rejected this argument and held that "[t]he mail fraud statute is not restricted in its application to cases in which the victim has suffered actual monetary or property loss."[76]

Similarly, in *United States v. Keane* and *United States v. Bush*, the Seventh Circuit affirmed mail fraud convictions pertaining to corrupt officials in Chicago using the intangible rights doctrine.[77] In *Keane*, the court held that the mail fraud conviction was proper where a Chicago town alderman who, while concealing his financial interest in certain property, participated in official proceedings relating to such property.[78] In *Bush*, the defendant, who served as press secretary for Mayor Richard Daley, concealed his financial interest in an advertising company, which received the city contract for display advertising at O'Hare Airport in Chicago.[79] The court held that although the defendant was not directly responsible for awarding the contract, his ability to exert influence on the decision-makers due to his official position in Mayor Daley's inner circle constituted fraud.[80] At trial, the defendant argued that the city did not lose money on the contract and that it was one of the best in the country.[81] The trial court rejected that argument, stating that "the mail fraud statute seeks to prohibit fraudulent conduct regardless of ultimate loss or damage to the victims of the crime."[82]

In *United States v. Mandel*, the Fourth Circuit affirmed the conviction of the former governor of Maryland, Marvin Mandel, on mail fraud charges relating to actions he took in favor of race track owners in exchange for financial benefits, as violating the public right to honest services from its public officials.[83] The court rejected Mandel's

75. *Id.* at 1149 (stating the defendants argument that "[a]bsent a monetary loss . . . the breach of fiduciary duty which occurred here amounts to no more than a constructive fraud and not a violation of § 1341").

76. *Id.* at 1149-50.

77. United States v. Keane, 522 F.2d 534, 538, 561 (7th Cir. 1975); United States v. Bush, 522 F.2d 641, 643, 653 (7th Cir. 1975).

78. *Keane*, 522 F.2d at 538, 546, 561. According to the court in *Keane*, "[w]e have no doubts that use by a public official of his position and influence to obtain personal benefits can, under appropriate circumstances, constitute a fraudulent scheme in violation of the mail fraud statute." *Id.* at 551.

79. *Bush*, 522 F.2d at 643.

80. *Id.* at 647.

81. *Id.* at 646.

82. *Id.* at 648 (citing United States v. Reicin, 497 F.2d 563 (7th Cir. 1974)).

83. United States v. Mandel, 591 F.2d 1347, 1356, 1362 (4th Cir. 1979).

argument that his conviction constituted "an unwarranted overextension of the [mail fraud] statute and an impermissible federal intrusion into the political affairs of the State of Maryland."[84] While noting that it was "cognizant of the problem of the ever expanding use of the mail fraud statute to reach activities that heretofore were considered within the exclusive domain of State regulation," the court concluded that "a scheme involving the bribery of a public official satisfies the fraud element of the mail fraud statute."[85]

In 1982, the Second Circuit extended the intangible rights doctrine to cover Joseph M. Margiotta, the Chairman of the Republican Committees of both Nassau County and the Town of Hempstead, New York, for violating his duty to the citizens of Nassau County and the Town of Hempstead.[86] Margiotta, who did not hold public office, used his political clout to obtain the appointment of an insurance company as broker for Nassau County and the Town of Hempstead in exchange for kickbacks to be made from the insurance company to persons and entities designated by Margiotta.[87] In *United States v. Margiotta*, the Second Circuit noted that a review of the reasoning employed by the number of courts approving the use of mail fraud to prosecute public officials, who have deprived citizens of the right to honest services, evidences a basic principle that "a public official may be prosecuted under 18 U.S.C. § 1341 when his alleged scheme to defraud has as its sole object the deprivation of intangible and abstract political and civil

84. *Id.* at 1357.

85. *Id.* at 1357, 1362. The court then elaborated that the fraud "lies in the fact that the public official is not exercising his independent judgment in passing on official matters." *Id.* at 1362. The court then began to address, in dicta, "[t]he question of whether non-disclosure or concealment, or both, of material information satisfies the fraud element of the mail fraud statute and, thus, is cognizable as a 'scheme or artifice to defraud' under § 1341 . . . ." *Id.* at 1363. The court reasoned that the breach of fiduciary duty resulting from a public official's concealment of material financial information would only be cognizable under the mail fraud statute if the breach was "linked with some actionable fraud." *Id.* The court then stated that such actionable fraud would include the failure to disclose a direct interest in a matter before the official and the failure to disclose facts "in order to receive a benefit by action of the public body." *Id.* at 1364. However, as recently noted by the Fourth Circuit, because the panel decision in *Mandel* was subject to a rehearing en banc, the "panel opinion has no legal effect" under Fourth Circuit Rule 35(c). United States v. Geddings, 278 F. App'x 281, 286 n.6 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 435 (2008).

86. United States v. Margiotta, 688 F.2d 108, 111-12, 138 (2d Cir. 1982).

87. *Id.* at 114. The evidence at trial made it clear that the defendant had a "stranglehold on the respective governments of Nassau County and the Town of Hempstead" in such a way that one of the defendant's assistants testified that "everything went through his hands." *Id.* at 122 (internal quotation marks omitted).

rights of general citizenry."[88] The court then held that because the defendant "participat[ed] substantially in the operation of government," he could be prosecuted for depriving citizens of their intangible right to honest services.[89]

In 1987, the Seventh Circuit, in *United States v. Holzer*, affirmed the jury conviction of a Cook County, Illinois, circuit judge for committing mail fraud in connection with the extortion of loans from attorneys having cases before him and from an attorney who received receivership appointments from him.[90] The court reasoned that "[a] public official is a fiduciary toward the public . . . and if he deliberately conceals material information from them he is guilty of fraud."[91] Judge Posner, however, disagreed with the proposition that "whatever is not a 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society' is fraud."[92] He also noted, presciently, that the Supreme Court in *McNally v. United States* was considering an appeal that could narrow the mail fraud statute, but that "the 'intangible rights' concept that the argument attacks is too well established in the courts of appeals for us to disturb."[93]

Three months after the Seventh Circuit's ruling in *Holzer*, the Supreme Court, in *McNally*, overturned forty-six years of circuit court precedent and held that the mail fraud statute "is limited in scope to the protection of money or property rights, and does not extend to the intangible right of the citizenry to good government."[94] In *McNally*, Howard Hunt, the chairman of the Kentucky Democratic Party, was "given *de facto* control over selecting the insurance agencies from

88. *Id.* at 121.

89. *Id.* at 121-22. The Second Circuit did warn, however, that courts should be careful not to extend its holding to activities which involve the "mere influence or minimum participation in the processes of government . . . [because] [s]uch a rule would threaten to criminalize a wide range of conduct, from lobbying to political party activities, as to which the public has no right to disinterested service." *Id.* at 122. In a dissent, Judge Winter warned that the majority's finding would impose upon politically active persons a duty to disclose information to the public regarding such activities. *Id.* at 142 (Winter, J., dissenting).

90. United States v. Holzer, 816 F.2d 304 (7th Cir. 1987).

91. *Id.* at 307.

92. *Id.* at 309.

93. *Id.* at 310.

94. McNally v. United States, 483 U.S. 350, 350 (1987). In his dissent, Justice Stevens noted that "[p]erhaps the most distressing aspect of the Court's action today is its casual—almost summary—rejection of the accumulated wisdom of the many distinguished federal judges who have thoughtfully considered and correctly answered the question these cases present." *Id.* at 376 (Stevens, J. dissenting).

which the Commonwealth would purchase its [insurance] policies."[95] Hunt used this position to extort kickbacks from an insurance agent in exchange for a contract to provide the workmen's compensation insurance for Kentucky.[96] In interpreting the portions of § 1341 that read "scheme or artifice to defraud" or "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises,"[97] the Government presented the following argument: "Because 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."[98]

Rejecting this reasoning and decades of circuit court rulings on this issue, the Supreme Court found that § 1341 was limited in scope to the protection of property rights and did not prohibit schemes to defraud citizens of their intangible right to the honest services of public officials.[99] The Court stated,

> [r]ather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.[100]

In his dissent, Justice Stevens also noted that "Congress can, of course, negate [the *McNally* holding] by amending the statute."[101]

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95. *Id.* at 352.

96. *Id.*

97. 18 U.S.C. § 1341 (1982).

98. *McNally*, 483 U.S. at 358.

99. *Id.* at 360.

100. *Id.* Less than five months later, the Supreme Court refused to extend its ruling in *McNally* to exclude from the purview of the mail fraud statute schemes to defraud companies of intangible property. Carpenter v. United States, 484 U.S. 19, 25 (1987). In *Carpenter*, the petitioners challenged their mail fraud convictions for a scheme under which a reporter at the *Wall Street Journal* provided two investment brokers with advance information regarding to the content of his *Heard on the Street* column for their use in attempting to profit off the impact that the column might have on the stock market. *Id.* at 22-23. The Court held that prior to publication the *Wall Street Journal* held an intangible property right in such information and that such property right could support a mail fraud conviction. *Id.* at 25-26.

101. *McNally*, 483 U.S. at 377 (Stevens, J., dissenting).

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II. THE *MCNALLY* FIX AND GROWTH OF HONEST SERVICES FRAUD PROSECUTIONS DURING THE LAST TWENTY YEARS

It would take Congress just under sixteen months to abrogate *McNally*. On November 18, 1988, Congress passed the Anti-Drug Abuse Act of 1988, including a provision that would be codified as 18 U.S.C. § 1346.[102] It contains just twenty-eight words: "For 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."[103]

While Congress specifically reinstated the intangible rights doctrine, it did not take the opportunity to further define the phrase "intangible right of honest services."[104] During hearings before the House Subcommittee on Criminal Justice on the amendment, Representative John Conyers, after noting that due to *McNally* "cases involving bribery, money laundering, election fraud and licensing fraud have been dismissed because there was no monetary loss to any victim,"[105] explained:

> This amendment restores the mail fraud provision to where that provision was before the *McNally* decision. The amendment also applies to the wire fraud provision, and precludes the *McNally* result with respect to that provision. . . . Thus, it is no longer necessary to determine whether or not the scheme or artifice to defraud involved money or property.[106]

As noted in subsequent cases seeking to interpret § 1346, Representative Conyers' statements regarding the intent behind that section constitute "the sole evidence of Congressional intent, other than the text of the amendment."[107]

In the twenty years since the *McNally* fix, many corrupt state and local politicians have been prosecuted for defrauding the public of its right to honest services from public officials. Although the elements necessary to establish mail fraud have remained essentially the

102. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (1988) (codified at 18 U.S.C. § 1346 (2006)).

103. *Id.*

104. *See id.*

105. 134 CONG. REC. H11251 (daily ed. Oct. 21, 1988) (statement of Rep. Conyers).

106. *Id.*

107. United States v. Berg, 710 F. Supp. 438, 442 (E.D.N.Y. 1989). As noted by one commentator, the fact that "Representative Conyers ultimately voted against the bill" makes it "unclear what weight should be accorded his interpretation of the amendment." Moohr, *supra* note 6, at 169 n.69.

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same,[108] courts have continued to grapple with at least four issues pertaining to the scope of activities that fall within the phrase "intangible right of honest services."[109] First, courts have addressed questions regarding the range of persons who fall within the phrase "public official."[110] Second, there is the question of what constitutes an official act for purposes of honest-services fraud prosecutions. Third, courts have split regarding whether a violation of state law is a predicate for the federal prosecution of honest-services fraud. Finally, courts have disagreed regarding whether a defendant must have privately gained something of value as a result of his or her honest-services fraud.

A. *Definition of "Public Official" for Purposes of Honest Services Fraud*

As discussed *infra*, the Second Circuit, in a case decided five years prior to *McNally*,[111] expanded the scope of the intangible rights doctrine to cover quasi-public officials. In *Margiotta*, the Second Circuit, in a two-to-one decision, held the local chairman of a political party constituted a public official because he "participate[d] substantially in the operation of government."[112] However, Judge Winter, in his dissent, warned that "[t]he majority's use of mail fraud as a catch-all prohibition of political disingenuousness expands that legislation beyond

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108. The crime of mail (or wire) fraud requires the Government to establish the following three elements beyond a reasonable doubt: (1) that the defendant devised or participated in a scheme to defraud; (2) that the defendant did so knowingly and with the intent to defraud; and (3) for the purposes of carrying out the scheme or artifice or attempting to do so, the defendant used or caused the use of the United States mail or a private or commercial interstate carrier (or caused interstate wire communications to occur). *See* 18 U.S.C. § 1341 (2006). In 1999, the Supreme Court held that "materiality," though not mentioned in the statutes, is also an element in mail fraud, wire fraud, and bank fraud. Neder v. United States, 527 U.S. 1, 21-22 (1999). The Supreme Court reasoned that the common law meaning of fraud at the time of the creation of such statutes included "materiality" as an element. *Id.* at 22-23.

109. 18 U.S.C. § 1346.

110. *Id.*

111. In interpreting § 1346, courts have looked to the pre-*McNally* intangible rights cases for guidance. *See* United States v. Brown, 459 F.3d 509, 519 (5th Cir. 2006) (noting that because § 1346 was intended to overturn *McNally*, "the meaning of honest services . . . is to be found in the pre-*McNally* case law"); United States v. Williams, 441 F.3d 716, 722 (9th Cir. 2006) (stating that we look to pre-*McNally* cases "because, by overruling *McNally*, Congress restored the pre-*McNally* landscape"); United States v. Rybicki, 354 F.3d 124, 136-37 (2d Cir. 2003) (en banc) (explaining that because § 1346 was clearly intended to reinstate the intangible rights doctrine, "we must therefore look to the case law from the various circuits that *McNally* overruled").

112. United States v. Margiotta, 688 F.2d 108, 121 (2d Cir. 1982).

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any colorable claim of Congressional intent and creates a real danger of prosecutorial abuse for partisan political purposes."[113]

In *McNally*, Howard Hunt, the former chairman of a state political party, was convicted of mail fraud under the intangible rights doctrine.[114] As was the case in *Margiotta*, the facts in *McNally* dealt with a private citizen who, due to his political influence, was able to dictate the decisions of public officials.[115] Although the Supreme Court ultimately reversed McNally's conviction, the reversal was based on a rejection of the intangible rights doctrine, rather than due to Hunt's position as a quasi-public official.[116]

Sixteen years after *McNally*, the issue of whether a quasi-public official could be prosecuted under the intangible rights doctrine was brought before the Third Circuit in *United States v. Murphy*.[117] Murphy was convicted of using his position as Chairman of the Republican Party of Passaic County in New Jersey to extort payments from the recipient of a contract from Passaic County.[118] The Government, relying on *Margiotta*, argued in part, "Murphy had attained such a dominant role in the political system of Passaic County that he could be considered the equivalent of a publicly elected official, and . . . Murphy had a fiduciary duty to the County and its citizens to provide honest services . . . ."[119]

The Third Circuit rejected the Government's position and, citing Judge Winter's dissent in *Margiotta*, stated "that *Margiotta* fails to provide any logical rationale for treating private party officials in the same manner as public officials since such a loose interpretation of the mail fraud statute creates 'a catch-all political crime which has no use but

113. *Id.* at 139.

114. McNally v. United States, 483 U.S. 350, 352 (1987).

115. *Id.*

116. *Id.* at 360-61.

117. United States v. Murphy, 323 F.3d 102, 104-05 (3d Cir. 2003).

118. *Id.* at 104.

119. *Id.* With regard to mail fraud, the Government alleged that the defendant committed three separate frauds. *Id.* at 109. First, he defrauded county of money and property. *Id.* Second, he defrauded the county of the honest services of the county administrator. *Id.* Third, he violated his duty to provide the county with honest services. *Id.* The defendant challenged the legality of the third theory, claiming that he was not a public official, and requesting a new trial. *Id.*

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misuse.'"[120] There remains a split between the few circuits that have considered the issue.[121]

B. The Extent to which a Public Official Must Misuse His or Her Position

A second issue that at least three Circuits have struggled with in applying the honest services fraud statute is the extent to which a public official must misuse his or her position in order to fall within the purview of such statutes. As discussed *supra*, in 1987, just months before the Supreme Court decided *McNally*, the Seventh Circuit in *Holzer* addressed a scheme under which a judge solicited loans from attorneys having cases before him and from an attorney to whom the judge made receivership assignments.[122] After posing the question of whether an intangible rights fraud could exist if the facts established that the appellant did not rule any differently in the cases involving the attorney from whom he had solicited loans, Judge Posner stated as follows: "It is irrelevant that, so far as appears, Holzer never ruled differently in a case because of a lawyer's willingness or unwillingness to make him a loan, so that his conduct caused no demonstrable loss either to a litigant or to the public at large."[123]

Ten years later, in *United States v. Lopez-Lukis*, the Eleventh Circuit considered whether honest services fraud exists if the bribed official's vote actually benefited the public.[124] The appellant, a member of the five-person Board of County Commissioners for Lee County, Florida, had sold her vote to a lobbyist and had also agreed to assist the lobbyist in obtaining a majority vote on projects of the lobbyist's clients.[125] The Eleventh Circuit reversed a district court's order granting

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120. *Id.* at 117-18 (citing United States v. Margiotta, 688 F.2d 108, 144 (2d Cir. 1982)). The Third Circuit summarily rejected the Government's reliance on *McNally*, claiming that the Supreme Court "only assumed the facts as the government presented them for the purposes of that case, and then went on to reverse the conviction anyway." *Id.* at 111 n.3. However, this reasoning does not change the fact that the Supreme Court did not note any difficulty with the concept of a quasi-public official being criminally liable under the intangible rights theory.

121. In *United States v. DeVegter*, a case involving private sector honest services mail fraud, the court noted that in public sector honest services mail fraud cases "an individual without formal office may be held to be a public fiduciary if others rely on him because of a special relationship in the government and he in fact makes governmental decisions." 198 F.3d 1324, 1328 n.3 (11th Cir. 2000) (citing McNally v. United States, 483 U.S. 350, 355 (1987)).

122. United States v. Holzer, 816 F.2d 304, 305-07 (7th Cir. 1987).

123. *Id.* at 308.

124. United States v. Lopez-Lukis, 102 F.3d 1164, 1169 n.13 (11th Cir. 1997).

125. *Id.* at 1165.

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the appellant's motion *in limine* to exclude a certain portion of the Government's evidence at trial.[126] In discussing the appellant's agreement to assist the lobbyist in obtaining the votes of other commissioners, the court stated that although "[i]t is entirely possible that they will decide that proposals that [appellant] supports are in fact in the best interest of the electorate and vote accordingly," the appellant is guilty of honest services mail fraud regardless of whether the public actually benefits from the scheme.[127]

In *United States v. Bloom*, the Seventh Circuit addressed whether an attorney, who also served as a part-time alderman, misused his public office by advising a client to illegally bid on a tax sale through a secret proxy in order to cheat the city of tax revenues.[128] In considering whether the district court had erred by dismissing a portion of the indictment charging honest services mail fraud in connection with such conduct, a split panel affirmed the dismissal stating that the indictment "does not charge that he [Bloom] misused his office for private gain. It does not charge that he *used* his office in any way, let alone that he *mis*used it."[129]

However, in *United States v. Urciuoli*, the First Circuit held that the private employment of a part-time legislator could support an honest services mail fraud conviction.[130] In that case, Rhode Island state senator John Celona had sought to supplement his modest legislator's salary by working for the principals of the Roger Williams Medical Center.[131] After noting that it had "wrestled with the statute in a number of cases,"[132] the First Circuit found that Celona's threat—namely, that Blue Cross would encounter potential legislative problems if it did not settle a dispute with Roger Williams Medical Center—constituted a misuse of his office that fit within the honest services fraud statute.[133]

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126. *Id.*

127. *Id.* at 1169.

128. United States v. Bloom, 149 F.3d 649, 650-51 (7th Cir. 1998).

129. *Id.* at 655.

130. United States v. Urciuoli, 513 F.3d 290, 296-97 (1st Cir. 2008). Because the jury instruction improperly stated that other conduct could support a conviction, the case was overturned and remanded for a new trial. *Id.* at 300.

131. *Id.* at 292.

132. *Id.* at 294 (contrasting United States v. Potter, 463 F.3d 9, 18 (1st Cir. 2006) (holding that honest services mail fraud covers informal influence on other legislators), with United States v. Czubinski, 106 F.3d 1069, 1077 (1st Cir. 1997) (holding that an IRS employee who improperly accessed confidential tax information of private citizens merely out of curiosity did not fall within honest services fraud statute)).

133. *Id.* at 296-97.

C. *Split Regarding Whether a Violation of State Law Is a Predicate for the Prosecution of Honest Services Fraud*

The majority of circuits have rejected the argument that in order to convict a state official of defrauding the public of its right to honest services the prosecution must prove that the official violated state law. During the 2009-2010 Supreme Court Term, those circuit courts will find out if they were right. On June 29, 2009, the Supreme Court granted certiorari on the following question: "Whether, to convict a state official for depriving the public of its right to the defendant's honest services through the non-disclosure of material information, in violation of the mail-fraud statute . . . , the government must prove that the defendant violated a disclosure duty imposed by state law."[134] Presumably, the Court's decision in the *Weyhrauch* case will resolve the circuit split on this question that has existed for twelve years, as detailed below.

In 1916, the Supreme Court held in *Badders* that Congress has the constitutional authority to prohibit public officials from using the mail to facilitate a scheme, regardless of whether Congress has the power to outlaw the scheme itself.[135] The Supreme Court's decision in *McNally* did nothing to change its earlier holding in *Badders*. Instead, the Court carefully structured its opinion in *McNally* to rely on statutory construction in finding the intangible rights doctrine inapplicable to honest services fraud that does not involve the loss of money or physical property.[136] The Court went so far as to hint that Congress may want to speak on the issue and overturn *McNally*,[137] which Congress then did by enacting 18 U.S.C. § 1346. Notwithstanding the fact that courts have been unable to "find any basis in the text or legislative history of § 1346 revealing that Congress intended to condition the meaning of 'honest services' on state law,"[138] the first two circuits that spoke on the issue following *McNally* returned different decisions.

In *United States v. Bryan*, the Fourth Circuit considered the appeal of two honest services mail fraud convictions by the former director of the West Virginia Lottery Commission.[139] The court, quoting from the appellant's brief, noted that the appellant asserted that his convictions must be overturned because "there was no evidence that [he] violated

134. Weyhrauch v. United States, 548 F.3d 1237 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 2863 (2009).

135. Badders v. United States, 240 U.S. 391, 393 (1916).

136. McNally v. United States, 483 U.S. 350, 358-60 (1987).

137. *Id.* at 360.

138. *Weyhrauch*, 548 F.3d at 1245-46.

139. United States v. Bryan, 58 F.3d 933, 936, 939 (4th Cir. 1995).

any law, statute or binding regulation in his conduct" with respect to the contracts in issue.[140] The court rejected this contention and held that the honest services mail fraud is not dependent upon the finding of a violation of state law.[141]

In 1997, two years after the Fourth Circuit's decision in *Bryan*, the Fifth Circuit held in *United States v. Brumley* that in order for a corrupt public official's conduct to fall within the purview of the honest services fraud, the public official's "services must be owed under state law and that the government must prove in a federal prosecution that they were in fact not delivered."[142] The Fifth Circuit affirmed, en banc, the conviction of a state administrator empowered to resolve workers' compensation claims for soliciting loans from a number of lawyers who appeared before him.[143] After rejecting the appellant's attempt to read the statute as excluding the government agency and the public as potential victims, the court held—due to a concern that the federal government might begin dictating ethics requirements for state employees—that "a federal prosecutor must prove that conduct of a state official breached a duty respecting the provision of services owed to the official's employer under state law."[144] In 2003, the Third Circuit endorsed the reasoning in *Brumley* but reserved ruling on whether "a violation of a state-law created fiduciary duty is *required* to sustain an honest services fraud conviction."[145]

During the last two years, four circuits have addressed and rejected claims that an honest services fraud conviction must be predicated on a state law violation. In *United States v. Walker*, the Eleventh Circuit affirmed the conviction of a former Georgia legislator who misused his public office for personal gain.[146] In response to the appellants' argument that their convictions must be vacated because the

140. *Id.* at 940 (internal quotation marks omitted).

141. *Id.* at 941.

142. United States v. Brumley, 116 F.3d 728, 734 (5th Cir. 1997) (en banc).

143. *Id.* at 730-32.

144. *Id.* at 731, 734. However, while requiring that the public services in question must be required under state law, the Fifth Circuit noted that "[t]his case does not then require us to decide whether the amended federal statute criminalizes conduct no part of which is criminal under state law." *Id.* at 735.

145. United States v. Murphy, 323 F.3d 102, 116-17 (3d Cir. 2003). *But see* Weyhrauch v. United States, 548 F.3d 1237, 1244 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 2863 (2009) (summarizing the Third Circuit's holding in *Murphy* as adopting a rule "requiring the government to prove the public official violated a fiduciary duty specifically established by state *or* federal law" (emphasis added)).

146. United States v. Walker, 490 F.3d 1282, 1287 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 1649 (2008).

honest services fraud prosecution was predicated on a non-criminal ethics statute, the Eleventh Circuit held that it was not necessary for an honest services fraud prosecution to be predicated upon a state law violation.[147] Soon thereafter, the First Circuit, in *United States v. Urciuoli*, refused to follow the *Brumley* approach in the context of a part-time state legislator who misused his public position to benefit a client.[148] Likewise, both the Seventh and Ninth Circuits have recently refused to adopt the *Brumley* approach.[149]

D. *A Plain Reading of the Honest Services Fraud Statute Dictates Against Adding an Element Requiring Private Gain as a Prerequisite to Prosecution*

Nowhere in the statutes creating the crime of honest services fraud is there any indication that private gain is a prerequisite to obtaining a conviction. As discussed in detail *supra*, mail fraud makes it illegal for a person to use the mail in connection with "any scheme or artifice to defraud."[150] In response to *McNally*, Congress further defined "scheme or artifice to defraud" to include "a scheme or artifice *to deprive* another of the intangible right of honest services."[151] Consequently, the evidence necessary to establish honest services fraud is the intent to deprive, rather that the intent to gain from such actions.[152]

Notwithstanding the plain language of the two statutes creating honest services fraud, the Seventh Circuit, in an effort to narrow the application of honest services fraud, held, in a split decision, that honest services fraud occurs only if a person "misuses his position (or

147. *Id.* at 1299.

148. United States v. Urciuoli, 513 F.3d 290, 298-99 (1st Cir. 2008). Although the First Circuit rejected the *Brumley* approach in this case, it did note that "[t]he issue could be pertinent here *if* the government in this case had chosen to proceed on the theory that a conflict of interest alone (as opposed to a bribe or concealment of a conflict) was a basis for conviction." *Id.*

149. *Weyhrauch*, 548 F.3d at 1246 ("Because pre-*McNally* honest services fraud cases generally did not require state law to create the duty of honesty that public officials owe the public and the plain language of the statute does not refer to state law, we cannot infer that Congress intended to import a state law limitation into § 1346."); United States v. Sorich, 523 F.3d 702, 712 (7th Cir. 2008) (refusing to adopt the "minority 'state law limiting principle' shared by the Third and Fifth Circuits").

150. 18 U.S.C. § 1341 (2006).

151. *Id.* § 1346 (emphasis added).

152. United States v. Welch, 327 F.3d 1081, 1106 (10th Cir. 2003) (citing United States v. Rybicki, 287 F.3d 257, 262 (2d Cir. 2002)).

information he obtained in it) for personal gain."[153] In *Bloom*, the Seventh Circuit affirmed a district court's dismissal of the portion of an indictment charging that a lawyer, who also served as a part-time alderman, had committed honest services mail fraud by advising a client to illegally bid on a tax sale through a secret proxy in order to cheat the city of tax revenues.[154] After voicing a concern that such a theory of prosecution would turn every conflict of interest situation into a federal crime, the Seventh Circuit reasoned that actual misuse of one's public office "for private gain is the line that separates run of the mill violation of state-law fiduciary duty . . . from federal crime."[155]

In the ten years since *Bloom*, the three other Circuits to consider the issue have refused to add a "private gain" element to honest services mail fraud.[156] In *United States v. Rybicki*, the Second Circuit, in a private sector honest services fraud case, held that "the only intent that need be proven in an honest services fraud is the intent to deprive another of the intangible right of honest services.[157]

Likewise, in *United States v. Panarella*, the Third Circuit rejected the appellant's argument that the court should add a "personal gain" element to honest services fraud, noting that "[w]e see several problems with *Bloom*'s definition of honest services fraud as limited to misuse of office for personal gain."[158] The court then noted that such an approach results in a "lack of clarity" and "risks being both over-inclusive and under-inclusive as a limiting principle."[159] By way of example, the court explained that the "private gain" limitation would expose the public official who "takes home pencils from the office supply cabinet for personal use" to criminal liability, but shield the public official who conceals a conflict of interest in a fiduciary setting.[160]

Finally, in *United States v. Welch*, the Tenth Circuit addressed the issue in considering a district court's dismissal of an indictment charging members of a committee which successfully bid to hold the Winter Olympics Games in Utah with multiple crimes including honest services fraud in connection with bribes to members of the International Olympic Committee.[161] The appellants argued that, pursuant to the

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153. United States v. Bloom, 149 F.3d 649, 656-57 (7th Cir. 1998).

154. *Id.* at 650-51, 655.

155. *Id.* at 655.

156. The Supreme Court has granted certiorari to resolve this circuit split. Skilling v. United States, 130 S. Ct. 393 (2009) (mem.).

157. United States v. Rybicki, 287 F.3d at 262.

158. United States v. Panarella, 277 F.3d 678, 691-92 (3d Cir. 2002).

159. *Id.* at 692.

160. *Id.*

161. United States v. Welch, 327 F.3d 1081, 1084-85 (10th Cir. 2003).

reasoning in *Bloom*, the mail and wire honest services fraud counts were improper because they failed to "allege an intent to achieve personal gain."[162] In response, the court firmly rejected the *Bloom* "personal gain" limitation, stating that to do otherwise would "effectively endorse the proposition inherent in Defendants' (and *Bloom*'s) argument that depriving a victim of the intangible right to honest services, no matter how significant the foreseeable harm to the victim or others *might* be, never constitutes honest services fraud in the absence of the perpetrator's personal gain."[163] Accordingly, the Tenth Circuit reversed the district court's dismissal of the indictment and remanded for further proceedings.[164]

Perhaps in reaction to criticism of the "private gain" limitation from other Circuits, the Seventh Circuit recently began to retreat from its position in *Bloom*. In *United States v. Sorich*, the Seventh Circuit considered the conviction of three city workers for committing honest services fraud by engaging in a scheme under which thousands of city jobs were awarded based on political patronage and nepotism.[165] The appellants argued that their honest services fraud convictions were improper under the "private gain" limitation because they did not personally gain from their actions.[166] The Seventh Circuit, after acknowledging that the definition of "private gain" in *Bloom* is somewhat confusing, stated that "[b]y 'private gain' we simply mean illegitimate gain, which usually will go to the defendant, but need not."[167] The court then expanded the definition of "private gain" to include situations in which a defendant merely assists a third party and does not stand to realize financial gain for himself.[168]

In the final analysis, a plain reading of the statutory language underlying honest services fraud, along with the decisions of the majority of cases interpreting § 1346, militates against adding intent to gain from one's fraud as an additional element of honest services fraud. As explained by the courts in *Welch* and *Panarella*, the judicial creation of such an element would serve to further muddle an already ambiguous statutory scheme.[169] "Like proof of harm, proof of poten-

162. *Id.* at 1106.

163. *Id.* at 1107.

164. *Id.* at 1109.

165. United States v. Sorich, 523 F.3d 702, 704-05 (7th Cir. 2008).

166. *Id.* at 708.

167. *Id.* at 709.

168. *Id.*

169. United States v. Welch, 327 F.3d 1081, 1106-07 (10th Cir. 2003); United States v. Panarella, 277 F.3d 678, 692 (3d Cir. 2002).

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tial, actual, or contemplated gain simply is one means of establishing the necessary intent to defraud."[170]

If appellate courts feel that it is necessary "to cabin the reach" of the honest services statute,[171] imposition of a private gain requirement is a poor way to do it. Such a requirement might eliminate prosecutions in which a public official has defrauded the public by taking official actions based on an egregious conflict of interests without eliminating spurious prosecutions based on minor conversions of public property.[172]

This dilemma is illustrated by the Seventh Circuit's recent reversal of an honest services fraud conviction in *United States v. Thompson*.[173] Based on the facts reported in the appellate decision, this case appears to be an overreach by federal prosecutors. Thompson served in Wisconsin's Bureau of Procurement. In the award of a state contract for travel services, Thompson ensured that one vendor (Adelman) got the award even though another vendor (Omega) had a slightly better score in the regulated procurement process.[174] Thompson's reason for doing so was that she thought her boss, a political appointee, wanted Adelman selected.[175] Thompson's "private gain" was a $1000 raise in her annual salary—there was no "whiff of a kickback or any similar impropriety."[176] The opinion first appears to concede that the raise motivated the contract award and that it constituted private gain.[177] However, then the court reversed Thompson's § 1346 conviction, stating, "a raise approved through normal civil-service means is not the sort of 'private gain' to which *Bloom* refers."[178]

But what if Thompson's boss had explicitly told her that her raise was contingent on her manipulating the procurement process to steer the contract to Adelman because its owner had made political contributions to the Governor? The private gain would still be a raise, but then the government's case would be much more compelling. The Seventh Circuit's real beef with Thompson's conviction was not the private-gain issue. It was that Thompson's official act in awarding the contract, though perhaps not "good government," was "not a 'misuse

170. *Welch*, 327 F.3d at 1106.
171. United States v. Thompson, 484 F.3d 877, 882 (7th Cir. 2007).
172. *See Panarella*, 277 F.3d at 691-92.
173. *Thompson*, 484 F.3d at 877, 882, 884.
174. *Id.* at 878-79.
175. *Id.*
176. *Id.* at 879.
177. *Id.* at 882 ("[C]ash is a form of gain.").
178. *Id.* at 883.

of office' in the criminal sense."[179] Thompson favored a vendor that was more local and whose bid was actually lower than the vendor who got the best score in the complicated procurement process. Rather than basing the reversal decision on the questionable judicial gloss of a "private gain" element, the Seventh Circuit would have been better served to find that there was insufficient evidence of intent to defraud, with the lack of the usual form of private gain, such as a bribe or kickback, being but one factor in the paucity of evidence of criminal intent.[180]

III. CONCEALMENT OF A MATERIAL FINANCIAL RELATIONSHIP WHILE TAKING OFFICIAL ACTION: *UNITED STATES v. GEDDINGS*

In order to understand the corruption associated with Geddings' tenure as a Lottery Commissioner, one must consider the events occurring during the weeks leading up to September 21, 2005 when Speaker Jim Black dined with representatives of SGI[181] and tentatively agreed to appoint Geddings as a Lottery Commissioner. On August 30, 2005, after years of debate over whether to pass a law creating a state run lottery, the North Carolina Legislature passed a bill creating the North Carolina Lottery. Just hours before the passage of the lottery bill, Middleton exchanged e-mails with Geddings regarding the likelihood that

179. *Id.* The court added, "The 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." *Id.*

180. The Seventh Circuit's struggles with the honest services statute will get some input from the Supreme Court in its 2009-2010 term. The Supreme Court has granted certiorari in *United States v. Black*. 530 F.3d 596 (7th Cir. 2008), *cert. granted*, 129 S. Ct. 2379 (2009). *Black* is a private sector honest services case. *Id.* The defendants, senior executives of corporate owners of newspapers, argued that the private gain they realized on their scheme did not come at the expense of the entities to whom they owed a duty of honest services, for example, the corporations involved and their shareholders. *Id.* at 600. Rather, they intended only to gain at the expense of the Canadian government, from whom they hoped to receive favorable tax treatment. *Id.* The Seventh Circuit affirmed the conviction, *id.* at 606, and the defendants petitioned for certiorari on two questions, including "[w]hether 18 U.S.C. § 1346 applies to the conduct of a private individual whose alleged 'scheme to defraud' did not contemplate economic or other property harm to the private party to whom honest services were owed." Petition for Writ of Certiorari at *i, Black v. United States, 129 S. Ct. 2379 (Jan. 9, 2009) (No. 08-876), 2009 WL 75563. The Supreme Court granted the petition without further comment. *Black*, 129 S. Ct. at 2379.

181. Joining Speaker Black were Meredith Norris, his former political director and a lobbyist for SGI, and Alan Middleton, SGI's Vice President for Governmental Relations. *See* United States v. Geddings (*Geddings Sentencing Order*), No. 5:06-CR-136-D3, 2007 U.S. Dist. LEXIS 95456, at *9 (E.D.N.C. May 7, 2007).

the lottery bill would pass. Geddings, who had been a close personal friend of Middleton for years, opined that the lottery bill would pass and advised Middleton (who was employed by SGI) to "[g]et ready to move to Raleigh to do start-up!"[182] On August 31, 2005, Governor Mike Easley signed the lottery bill into law.[183] Later that day, Geddings sent the following e-mail to Norris: "congratulations on your lottery success. I know Alan [Middleton] is thrilled with your work."[184]

On September 1, 2005, Norris and Middleton communicated regarding the possible makeup of the nine members of the Lottery Commission.[185] On September 6, 2005, Geddings e-mailed Norris regarding Speaker Black's two appointments to the Lottery Commission and stated that if she wanted "a foot soldier to serve [as a lottery commissioner] who will be loyal to the Speaker, keep me in mind."[186] Norris responded that Speaker Black had already made commitments for his two appointments,[187] but suggested that they push for Geddings to be appointed through the State Senate or the Governor's Office.[188]

On the afternoon of September 21, 2005, Geddings received a call from Middleton informing him that one of Speaker Black's appointments to the Lottery Commission had fallen through and that there might be an opportunity for Geddings to be appointed a lottery commissioner.[189] Middleton then spent the evening dining with Norris and Speaker Black.[190] Minutes prior to paying the check for the meal, Norris sent an e-mail to Geddings, via a hand-held device, stating as follows: "PLEASE CALL US/ALAN: IMPORTANT."[191] According to Geddings' trial testimony, later that same night Speaker Black called and asked if Geddings would be willing to serve as a lottery commissioner.[192] Speaker Black talked to Geddings late the next morning to

182. *Id.* at *13.

183. *Id.* at *8.

184. *Id.* at *8.

185. Transcript of Record at 3641, United States v. Geddings (*Geddings Appeal*), 278 F. App'x 281 (4th Cir. 2008) (No. 07-4544).

186. *Geddings Sentencing Order*, 2007 U.S. Dist. LEXIS 95456, at *9.

187. *Id.*

188. Transcript of Record at 3224, *Geddings Appeal*, 278 F. App'x 281 (No. 07-4544).

189. *Id.* at 1967-68.

190. *Geddings Sentencing Order*, 2007 U.S. Dist. LEXIS 95456, at *9.

191. *Id.*

192. Transcript of Record at 1970-71, *Geddings Appeal*, 278 F. App'x 281 (No. 07-4544). Black disputed this fact, claiming that he did not make contact with Geddings until the next day. *Id.* at 1685, 1692-93. Black also claimed that he did not recall if

confirm that Geddings would be appointed a lottery commissioner.[193] On September 23, 2005, Geddings was formally appointed as a lottery commissioner.[194] Three days later, Geddings sent the following e-mail to his executive secretary: "Pls never acknowledge by phone that sci games is a client . . . ."[195]

Soon after his appointment, Geddings completed an ethics disclosure form pursuant to North Carolina Executive Order No. 76 (2005).[196] In completing the form, Geddings concealed his company's receipt of $163,545 from SGI.[197] On the same day that Geddings executed and mailed his ethics disclosure form, Geddings' company received $9500, the last payment from SGI for work performed in 2005.[198] During his tenure as Lottery Commissioner, Geddings "[t]ook actions benefitting Scientific Games" by submitting negative newspaper articles from other states about SGI's main competitor and also "[p]rovided confidential information to Middleton."[199]

On May 18, 2006, a federal grand jury returned an indictment charging that Geddings devised a scheme to defraud the State of North Carolina and its citizens, the North Carolina Lottery Commission, and the North Carolina Board of Ethics of the intangible right of honest

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he discussed the North Carolina Lottery during his lengthy meal with the two SGI representatives. *Id.* at 1723.

193. *Id.* at 1978-79.

194. *Geddings Sentencing Order*, 2007 U.S. Dist. LEXIS 95456, at *10.

195. *Id.*

196. United States v. Geddings (*Geddings Appeal*), 278 F. App'x 281, 283-84 (4th Cir. 2008).

197. *Id.* at 283, 286. Geddings clearly received private gain from SGI (a total of more than $163,000 over a five-year period), though the Fourth Circuit found no need to consider the question, stating that "neither the statute nor our case law requires that a defendant receive personal gain." *Id.* at 286 n.6. Most conflict-of-interest honest services cases will involve some financial gain to the defendant or his close associates—that is what creates the conflict. Geddings argued that in order to violate § 1346 he had to have received money from SGI while a commissioner for something other than work performed prior to taking office. Reply Brief of Appellant at 4 n.1, *Geddings Appeal*, 278 F. App'x 281 (No. 07-4544), 2007 WL 2680254. The government argued that such an interpretation would render the statute inapplicable to a public official who received undisclosed millions of dollars from an interested party the day before taking office and then took official action affecting that party. *See* Brief of the United States at 39, *Geddings Appeal*, 278 F. App'x 281 (No. 07-4544), 2007 WL 2666948. The Fourth Circuit's notation that Geddings was paid $9500 after he was appointed rendered these dueling arguments moot. *See Geddings Appeal*, 278 F. App'x at 286.

198. *Id.* at 284.

199. *Id.* at 286.

services in violation of 18 U.S.C. § 1346.[200] On October 12, 2006, a jury found Geddings guilty of five counts of honest services mail fraud and not guilty of one count of honest services wire fraud.[201] On May 19, 2008, the Fourth Circuit Court of Appeals affirmed Geddings' conviction.[202] In his appeal, Geddings claimed that "nondisclosure [of a conflict of interest] unaccompanied by corrupt action in office cannot constitute honest-services fraud."[203] The Fourth Circuit rejected this position and found from the record that "Geddings' conflict of interest resulted from a substantial financial relationship with Scientific Games, which he concealed when submitting his Ethics Form,"[204] and that, after becoming Commissioner, "Geddings took actions benefiting Scientific Games" and also "provided confidential information to Middleton."[205] Although, as held by the Fourth Circuit, the facts in *Geddings* established that he concealed a substantial conflict and then took material actions benefiting SGI, would the result have been different if the government had been unable to prove that Geddings' official actions were intended to benefit SGI? Part IV attempts to answer that question.

IV. HONEST SERVICES MAIL FRAUD EXTENDS TO A PUBLIC OFFICIAL'S VIOLATION OF THEIR DUTY TO THE PUBLIC BY FAILING TO PROVIDE DISINTERESTED DECISION-MAKING

Most would agree that public corruption should not be tolerated at either the local, state, or federal levels of our government.[206] The trouble begins, however, in using criminal laws to force such a lofty principle upon our political system. In discussing whether and how a federal statute should be used to prosecute corrupt state and local offi-

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200. *See* United States v. Geddings, No. 5:06-CR-136-1D, 2006 U.S. Dist. LEXIS 96593, at *2 (E.D.N.C. Sept. 6, 2006).

201. *Geddings Appeal*, 278 F. App'x at 285.

202. *Id.* at 287-88. On October 14, 2008, the Supreme Court denied Geddings' petition for writ of certiorari. Geddings v. United States, 129 S. Ct. 435 (2008).

203. Brief of Appellant at 17, *Geddings Appeal*, 278 F. App'x 281 (No. 07-4544), 2007 WL 2227501.

204. *Geddings Appeal*, 278 F. App'x at 286.

205. *Id.* at 286.

206. As aptly noted by one commentator,

> [t]he reality of American politics begins with political favors, progresses through the rewards of party patronage and venial kickback schemes, and too often ends with stuffed ballot boxes. Although political corruption at the state and local levels has long existed in American politics, everyone agrees in principle that it is a "bad thing."

Moohr, *supra* note 6, at 153.

cials, it is necessary to balance two competing concerns. On the one hand, it is clear that local prosecutors often face obstacles, such as lack of an investigative grand jury, that make it difficult to prosecute state and local public corruption. On the other hand, the use of a federal statute to prosecute local corruption raises the spectre of eager federal prosecutors prosecuting every ethical lapse in state government as a federal crime.[207]

In balancing between such concerns, Congress chose to write a broad statute, which focused on the intent to deprive the public of its right to honest services. The wisdom in this approach is best understood from the following statement by the Eighth Circuit in 1933: "To try to delimit 'fraud' by definition would tend to reward subtle and ingenious circumvention and is not done."[208] Thus, the real issue in this line of cases is whether the public official intended to deprive the public of its right to honest services.

In considering whether a public official can be prosecuted under § 1346 merely for the concealment of a material financial interest, the critical issue becomes whether the hidden information deprives the public of its right to disinterested and unbiased decision-making. For example, Lottery Commissioner Geddings deprived the public of its right to honest services by willfully concealing payments received from a lottery vendor and then taking material official action while sitting as Lottery Commissioner.[209]

The gravamen of Geddings' legal argument was that an undisclosed conflict of interest is not enough to support a conviction for honest services fraud.[210] Geddings pointed to this excerpt from the final summation of the government at trial:

> When Kevin Geddings took official act[ion] during the 40 days that he was a member of the Lottery Commission, under the cloud of this tremendous conflict of interest, this actual conflict of interest, as testified to by [two North Carolina Ethics Commission officials], when he took

207. As noted by the Court in *Czubinski v. United States*, "[a]lthough a public official might engage in reprehensible misconduct related to an official position, the conviction of that official cannot stand where the conduct does not actually deprive the public of its right to her honest services, and it is not shown to intend that result." 106 F.3d 1069, 1077 (1st Cir. 1997) (internal quotation marks omitted).

208. Foshay v. United States, 68 F.2d 205, 211 (8th Cir. 1933); *see also* Weiss v. United States, 122 F.2d 675, 681 (5th Cir. 1941), *cert. denied*, 314 U.S. 687 (1941) ("The law does not define fraud; it needs no definition; it is as old as falsehood and as versable [sic] as human ingenuity.").

209. *See* United States v. Geddings (*Geddings Appeal*), 278 F. App'x 281, 287 (4th Cir. 2008).

210. *Id.* at 286.

> any action under that cloud, it doesn't matter whether it ended up helping Scientific Games or not, he was breaking the law. He was violating his duty of honest services by taking those official act[ion]s while under this conflict of interest.[211]

The prosecution's argument was based on this portion of the *Geddings* trial court's instructions to the jury:

> A public official has an affirmative duty to disclose material information to the public employer. When an official fails to disclose a personal interest in a matter over which she has decision-making power, the public is deprived of its right either to disinterested decision-making itself or full disclosure as to the official's motivation behind an official act.[212]

Geddings argued to the Fourth Circuit that language from *Mandel* demonstrated that conflict-of-interest plus official action was insufficient to establish honest services fraud.[213] The Fourth Circuit's opinion did not squarely address this issue, noting only that "[n]either the statute nor our case law requires that a defendant receive personal gain"[214] and that "[a]fter becoming a lottery commissioner, Geddings took actions benefiting Scientific Games."[215]

Seemingly every day, federal courts are continuing to struggle to locate the dividing line between merely unethical behavior by public officials and the crime of honest services fraud. Mary Kincaid-Chauncey, a county commissioner in Clark County, Nevada, accepted cash payments from a Las Vegas strip club owner and then voted on matters that affected the owner's ability to expand his operations, without disclosing this conflict of interest.[216] In reviewing her conviction, the Ninth Circuit grappled with whether the honest ser-

211. Transcript of Record at 2708, *Geddings Appeal*, 278 F. App'x 281 (No. 07-4544); *see also* Brief of Appellant, *supra* note 203, at 11-12.

212. Transcript of Record, *supra* note 211, at 2708, 2744. The trial court took this language from United States v. Woodward, 149 F.3d 46, 62 (1st Cir. 1998), *cert. denied*, 525 U.S. 1138 (1999) (citing United States v. Sawyer, 85 F.3d 713, 724 (1st Cir. 1996)).

213. Brief of Appellant, *supra* note 203, at 18 (citing United States v. Mandel, 591 F.2d 1347, 1364 (4th Cir. 1979) ("Although failure by a public official to disclose material information would constitute a breach of fiduciary duty, that breach, standing alone, could never be cognizable under the mail fraud statute . . . ."), *aff'd in relevant part en banc*, 602 F.2d 653 (4th Cir. 1979)). Geddings was hampered in this argument by the fact that the panel opinion in *Mandel* was vacated by the granting of rehearing en banc and "has no legal effect." *Geddings Appeal*, 278 F. App'x at 286 n.6.

214. *Id.*

215. *Id.* at 286.

216. *See* United States v. Kincaid-Chauncey, 556 F.3d 923, 926-30 (9th Cir. 2009).

vices statute has a "*quid pro quo*" requirement.[217] The court said that honest services cases involving public officials fall into two broad categories: "fraud based on a public official's acceptance of a bribe and fraud based on a public official's failure to disclose a material conflict of interest."[218] As to cases prosecuted on a bribery theory (accepting money in exchange for influence) proving a *quid pro quo* is required, though it need not be explicit. As to the second category, "for example, when a government official violates a conflict of interest disclosure requirement," no proof of *quid pro quo* is required.[219] Imposing a *quid pro quo* requirement on all § 1346 cases, the court said, "risks being under-inclusive, because some honest service fraud, such as a failure to disclose a conflict of interest where required, may not confer a direct or easily demonstrated benefit."[220] These theories of honest services fraud "[a]re sufficiently limited by the specific intent requirement . . . long recognized in all mail and wire fraud prosecutions."[221] This is precisely the theory under which the government prosecuted Geddings.

Don Siegelman was the Governor of Alabama. He accepted a $250,000 contribution to his lottery referendum campaign fund from Richard Scrushy, CEO of HealthSouth Corporation, in return for, according to the government's evidence, Siegelman's agreement to appoint Scrushy to Alabama's Certificate of Need Review Board.[222] Siegelman was convicted of honest services fraud, along with federal funds bribery.[223] On appeal, the Eleventh Circuit faced the question of whether, in an honest services case, the government had to show a *quid pro quo* when the payment involved was a campaign contribution, as the Supreme Court has required in political extortion prosecutions.[224] If so, the court said, "[n]o generalized expectation of some future favorable action will do."[225] Because the trial court had instructed the jury that it had to find a *quid pro quo* with respect to the bribery counts against Siegelman, and because the conduct charged in the honest services fraud counts incorporated the conduct alleged in the bribery counts, the Eleventh Circuit said it did not have to decide

217. *See id.* at 942-43 (emphasis added).

218. *Id.* at 942.

219. *Id.* at 943.

220. *Id.* at 940-41.

221. *Id.* at 944.

222. United States v. Siegelman, 561 F.3d 1215, 1219-22 (11th Cir. 2009).

223. *Id.* at 1219; *see also* 18 U.S.C. § 666(a)(1)(B) (2006).

224. *See* McCormick v. United States, 500 U.S. 257 (1991) (interpreting 18 U.S.C. § 1951 (the Hobbs Act)); Evans v. United States, 504 U.S. 255 (1992).

225. *Siegelman*, 561 F.3d at 1226.

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whether proof of a *quid pro quo* was required in order to convict on honest services fraud when a campaign contribution is involved.[226]

Robert Sorich, Timothy McCarthy, and Patrick Slattery were employees of the city of Chicago. They were convicted of honest services fraud for doling out city jobs on behalf of "their political masters" in contravention of city "laws, decrees, and policies" barring patronage hiring for the jobs, despite the fact that the defendants received no direct personal benefit from the scheme.[227] After their conviction was affirmed by the Seventh Circuit,[228] they petitioned the Supreme Court, and certiorari was denied. Justice Scalia dissented, however, and wrote to explain his view that the case presented the Court with a perfect opportunity to resolve conflicts among the circuits and "squarely confront both the meaning and constitutionality of § 1346" rather than let the "current chaos prevail."[229] Justice Scalia pointed out that the case implicated "[t]wo of the limiting principles that the Courts of Appeals have debated—whether the crime of deprivation of 'honest services' requires a predicate violation of state law, and whether it requires the defendant's acquisition of some sort of private gain."[230] Reviewing the myriad of fact patterns to which honest services fraud has been applied, Justice Scalia observed that the current case law could be read broadly enough "[s]eemingly [to] cover a salaried employee's phoning in sick to go to a ball game."[231]

The trial judge in the *Geddings* case surveyed the case law on honest services fraud and concluded that because the honest services fraud statute clearly applied to Geddings' conduct, the court did not need to find "where the 'theoretical' line of unconstitutional vagueness is for an honest services mail fraud case."[232] The truth of that observation meant that *Geddings* was also not the right case in which an appellate court might attempt to draw the statutory interpretation line more clearly setting limits on the reach of § 1346. Perhaps, as eight members of the Supreme Court thought, *Sorich* was not the right case either. But some day, in some case in which the honest services fraud

226. *Id.* at 1227 n.17.

227. Sorich v. United States, 129 S. Ct. 1308, 1310-11 (2009) (Scalia, J., dissenting from denial of certiorari).

228. United States v. Sorich, 523 F.3d 702 (7th Cir. 2008).

229. *Sorich*, 129 S. Ct. at 1311 (Scalia, J., dissenting from denial of certiorari).

230. *Id.* at 1310.

231. *Id.* at 1309.

232. United States v. Geddings, 497 F. Supp. 2d 729, 735 (E.D.N.C. 2007).

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statute is perhaps applied too broadly, those lines will have to be drawn with more clarity.[233]

CONCLUSION

This Article has demonstrated that the honest services statute is a valuable tool for the federal prosecution of public officials in state and local government, but that there are valid questions about the reach of the statute. Generally, the limits that appellate courts have tried to impose have missed the mark. There is no requirement in the statute that the official has to have violated state law, and the attempt by the Fifth and Third Circuits to read such a requirement into the statute has been rejected by other circuits, though the Supreme Court will have the last word when it decides the *Weyhrauch* case. Likewise, there is no requirement of proof that the defendant derived a private gain from the scheme, and the Seventh Circuit's imposition of such a requirement has not found wide acceptance because it fails to make the statute's reach more precise. Arguments like the one advanced by Geddings to the effect that an undisclosed conflict of interest is not enough—that a bribe or kickback must be shown—have rightly failed because the statute prohibits more than bribes and kickbacks. The only limit of the reach of the statute that has worked is the one that is obviously required—proof of a specific intent to defraud.

233. That day may be fast approaching. In *Skilling*, the petitioner is arguing, *inter alia*, that § 1345 is unconstitutionally vague. *See* Petition for a Writ of Certiorari at 23-26, Skilling v. United States, 130 S. Ct. 393 (2009) (mem.) (No. 08-1394), 2009 WL 1339243.