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Criminal Law - Mail Fraud - Statutory Interpretation - Scope

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CRIMINAL LAW—MAIL FRAUD—STATUTORY INTERPRETATION—SCOPE—The United States Supreme Court has held that the coverage of the mail fraud statute, 18 U.S.C. § 1341, is limited to the prosecution of fraudulent schemes utilizing the mails that lead to the deprivation of monetary and property interests, while the deprivation of intangible rights, such as the right to honest and impartial government, is not included within the scope of the mail fraud statute.

McNally v. United States, 107 S. Ct. 2875 (1987).

In 1974, Julian M. Carroll became governor of the Commonwealth of Kentucky and one of his initial appointments was that of Howard P. Hunt as Kentucky Democratic Party Chairman.¹ Hunt was given substantial influence in the procurement of state insurance policies.² In January of 1976, Governor Carroll appointed James E. Gray as Secretary of Public Protection and Regulation.³ While in this office, Gray had supervisory authority over the Insurance Commissioner of the state government.⁴

In 1975, the Wombwell Insurance Company of Lexington, Kentucky, which has secured workmen's compensation insurance for the commonwealth since 1971,⁵ struck an agreement with Howard Hunt.⁶

1. *McNally v. United States*, 107 S. Ct. 2875 (1987). Howard P. "Sonny" Hunt was politically active in the Democratic Party in the Commonwealth of Kentucky during the 1970's. *Id.* at 2877.

2. *Id.* at 2877. Howard Hunt was given *de facto* control by Governor Carroll over the selection of insurance companies from which the Commonwealth of Kentucky would purchase its policies. *Id.*

3. *Id.* at 2878. James E. Gray also served as Secretary of Governor Carroll's cabinet from January of 1977 until August of 1978. *Id.*

4. *United States v. Gray*, 790 F.2d 1290, 1293 (6th Cir. 1986). The Insurance Commissioner during the Carroll Administration was Harold McGuffey. *Id.* at 1293.

5. 107 S. Ct. at 2877. The policy was awarded to Wombwell in 1971 after its vice president, Robert Tabeling, agreed with certain political leaders in office at that time to pay a percentage of the commissions resulting from the policy to other insurance agents designated by those government officials. 790 F.2d at 1292.

6. 107 S. Ct. at 2877. To ensure a continued relationship with the Commonwealth of Kentucky, Robert Tabeling and Joseph H. Wombwell conferred with Hunt on several occasions during the spring of 1975. 790 F.2d at 1292.

In exchange for a continued agency relationship. Wombwell agreed to service the policy for \$50,000 per year and to pay all commissions it received in excess of \$50,000 per year to insurance agencies designated by Hunt.⁷ From 1975 to 1979, pursuant to the agreement, Wombwell distributed \$851,000 in commissions to twenty-one insurance agencies designated by Hunt.⁸ One of the recipients of these payments was Seton Investments, Inc., a company controlled by Hunt and Gray⁹ and nominally owned and operated by Charles J. McNally.¹⁰ Wombwell issued nine checks totalling \$200,000 to Seton Investments, Inc. for the benefit of Gray and Hunt.¹¹ McNally received aggregate payments of \$77,500 in return for acting as Seton's frontman.¹² The success of this entire scheme depended upon the use of the mails to convey commission checks from the home office of the underwriting company, Hartford Insurance, in Connecticut to Wombwell's office in Kentucky.¹³

On account of this insurance kickback scheme, Howard Hunt was charged with mail and tax fraud, and after entering a guilty plea, was sentenced to three years imprisonment.¹⁴ Petitioners McNally

7. 107 S. Ct. at 2877. The commissions were paid to Wombwell by the large insurance companies from which it secured coverage for the commonwealth. *Id.* at 2877. This arrangement was maintained, with limited adjustments throughout the Carroll Administration. 790 F.2d at 1292.

8. 107 S. Ct. at 2877. During this period there was a set procedure for the annual award of the workmen's compensation insurance policy. The Insurance Commissioner, McGuffey, was directed by Hunt to award the policy to Wombwell, and McGuffey complied. Wombwell would then contract with an insurance underwriting company, the Hartford Insurance Group, to write the policy. 790 F.2d at 1292-93.

9. 107 S. Ct. at 2877-78. Prior to his 1976 appointment as Secretary of Public Protection and Regulation, Gray and Hunt formed Seton Investments, Inc. for the singular purpose of sharing in the commissions distributed by Wombwell. *Id.* at 2878.

10. *Id.* Charles J. McNally was a Prestonburg, Kentucky businessman and a staunch political ally of Governor Carroll. McNally did not become associated with Seton until late 1977 or 1978. 790 F.2d at 1293.

11. *Id.* The payments received by Seton were used to purchase condominiums in Lexington, Kentucky and in Juno Beach, Florida and to purchase a 1976 Ford Country Squire station wagon. The condominiums and station wagon were at the exclusive disposal of Gray and Hunt. Seton also gratuitously provided Hunt's son with seven checks totaling \$38,500. *Id.*

12. *Id.* McNally received the payments through the Snodgrass Insurance Agency, which received commission checks from Wombwell at Hunt's direction. McNally had used his friendship with Ronald Snodgrass to obtain the use of his agency as a conduit for the payments. McNally had assured Snodgrass that the procedure was not in violation of law. *Id.*

13. *Id.*

14. 107 S. Ct. at 2878.

and Gray were indicted by a federal grand jury on June 30, 1983 for one count of conspiracy and seven counts of mail fraud.¹⁵ After dismissal of six of the counts of mail fraud,¹⁶ the sole remaining mail fraud count was based on the interstate mailing of a commission check to Wombwell from the Hartford agency from which it had secured coverage.¹⁷

The jury convicted petitioners on both the mail fraud and conspiracy counts, and the Court of Appeals for the Sixth Circuit affirmed the convictions.¹⁸ In affirming the mail fraud conviction, the court followed a line of precedents holding that the mail fraud statute prohibits schemes that defraud citizens of the right to honest and impartial government.¹⁹ These cases hold that a public official has a fiduciary duty to the citizens, and misuse of his authority for private gain is fraudulent.²⁰

The United States Supreme Court granted certiorari,²¹ and reversed the convictions of petitioners, McNally and Gray.²² In writing for the majority,²³ Justice White held that the mail fraud statute protects

15. 790 F.2d at 1293. See 18 U.S.C. § 1341 which provides: Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do [uses the mails or causes them to be used,] shall be fined not more than \$1,000 or imprisoned not more than five years or both.

16. *Id.* at 1294. Six of the seven counts of mail fraud were dismissed before trial. These six counts were based on the mailing of Seton's tax returns. The Court of Appeals for the Sixth Circuit held that mailings required by law cannot be a basis for liability under § 1341 unless the documents are false, and that the six counts were properly dismissed since the indictment did not allege the falsity of the tax returns. 107 S. Ct. at 2878 n.2.

17. *Id.* at 2878. This count alleged that petitioners had devised a scheme: (1) to defraud the citizens and government of Kentucky of their right to have the commonwealth's affairs conducted honestly, and (2) to obtain, directly and indirectly, money and other things of value by means of false pretenses and the concealment of material facts. The conspiracy count alleged that the petitioners had: (1) conspired to violate the mail fraud statute through the scheme just described and (2) conspired to defraud the United States by obstructing the collection of federal taxes. *Id.*

18. *United States v. Gray*, 790 F.2d 1290 (6th Cir. 1986).

19. 107 S.Ct. at 2879. See, e.g., *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979), *aff'd* in relevant part, 602 F.2d 653 (4th Cir. 1979) (en banc), *cert. denied*, 445 U.S. 961 (1980).

20. 107 S.Ct. at 2879.

21. *McNally v. United States*, 107 S. Ct. 642 (1986).

22. 107 S.Ct. at 2879.

23. *Id.* at 2877. Justice White's opinion was joined by Chief Justice Rehnquist and Justices Brennan, Marshall, Blackmun, Powell and Scalia. Justice Stevens filed a dissent, which was joined in all but Part IV by Justice O'Connor.

property rights, but makes no reference to the intangible right to honest and impartial government.²⁴ The Court based this holding partly on the sparse legislative history which indicated that the original objective behind the mail fraud statute was to prohibit schemes that would deprive people of their money or property.²⁵

The Court pointed to statutory analysis in *Durland v. United States*,²⁶ which construed the mail fraud statutory language "any scheme or artifice to defraud" as demanding a broad interpretation regarding *property* rights.²⁷ The codification of the holding in *Durland*, according to the Court, was a further indication that the statute protected property rights alone.²⁸ The amendment added the words "or for obtaining money or property by means of false or fraudulent pretenses, representations or promises" after the original language "any scheme or artifice to defraud."²⁹ The words "to defraud" had a traditional reference "to wronging one in his property rights by dishonest methods or schemes," and "usually signify the deprivation of something of value by trick, deceit, chicane or overreaching."³⁰ The Court stated that the codification of the *Durland* holding did not depart from this traditional analysis.³¹

24. *Id.* at 2879.

25. *Id.* The mail fraud statute was enacted in 1872 as part of a recodification of the postal laws. The sponsor of the recodification, Representative Farnsworth, stated, in apparent reference to the anti-fraud provision, that measures were needed "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rascallions generally, for the purpose of deceiving and fleeing the innocent people in the country." Cong. Globe, 41st Cong., 3d Sess., 35 (1870). This discourse was made during the debate on H.R. 2295, the recodification of the postal laws, introduced during the 41st Congress. Representative Farnsworth, subsequent to the preceding remarks, described a scheme whereby the mail was used to solicit the purchase by greedy and unwary individuals of counterfeit bills, which were never delivered.

This legislation was not passed by the 41st Congress, but was reintroduced and passed in the 42nd Congress with the anti-fraud section intact. Act of June 8, 1872, ch. 335, sections 149 and 301, 17 Stat. 302 and 323. 107 S. Ct. at 2879 n. 5.

26. 161 U.S. 306 (1896).

27. 107 S. Ct. at 2880.

28. *Id.*

29. Act of Mar. 4, 1909, ch. 321, section 215, 35 Stat. 1130.

30. 107 S. Ct. at 2881. See *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924). *Hammerschmidt* dealt with the scope of the predecessor of 18 U.S.C. § 371, which criminalized any conspiracy "to defraud the United States, or any agency thereof in any manner or for any purpose." *Hammerschmidt* held, in relation to that statute, that while "to conspire to defraud the United States means primarily to cheat the Government out of property or money, . . . it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest." 265 U.S. at 188.

31. 107 S. Ct. at 2881. The language in the amendment is based on the

The phrase added by the amendment simply emphasized that the mail fraud statute applied to false promises and future misrepresentations as well as other frauds involving property.³²

The Court perceived that the congressional intent behind the mail fraud statute was to prevent the utilization of the mails in the perpetration of such schemes.³³ Rather than interpreting the statute in an ambiguous manner as to its contours and forcing the federal government to set standards of good government for local and state public officials, the Court limited the scope of the mail fraud statute to the protection of property rights.³⁴

Justice Stevens, in his dissent, stressed that nothing in the words "any scheme or artifice to defraud," or in the legislative intent, justified limiting its application to schemes aimed at the deprivation of property.³⁵ In addition, the three prohibitory clauses in the statute³⁶

statement in *Durland* that the statute applies to "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future." 161 U.S. at 313.

32. 107 S. Ct. at 2881. The language in the amendment was suggested in the Report of the Commission to Revise and Codify the Criminal and Penal Laws of the United States, which included a citation of *Durland* in the margin. See S. Doc. No. 68, pt. 2, 57th Cong., 1st Sess., 63-64 (1901).

33. 107 S. Ct. at 2881. The Court indicated that when there are two rational interpretations of a criminal statute, one harsher than the other, they would maintain the precedent of the selection of the harsher one only when the congressional intent is evident in clear and definite language. *Id.* See *United States v. Bass*, 404 U.S. 336, 347 (1971); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952). See also *Rewis v. United States*, 401 U.S. 808, 812 (1971).

34. 107 S. Ct. at 2881. The Court stated that if Congress intended a broader interpretation of § 1341 beyond the protection of property rights, it must speak more clearly than it has. *Id.*

35. *Id.* at 2884. Justice Stevens noted various constructions of this statutory language in a variety of contexts involving "intangible rights." In the public sector, these include state and federal officials convicted of defrauding citizens of their right to honest and impartial governmental service. See, e.g., *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983) (party leader); *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980) (Governor of Maryland).

Elected officials and their campaign workers have been convicted under the mail fraud statute for using the mails to accomplish many fraudulent ends including falsifying votes and debasing the public's right to a fair election. See, e.g., *United States v. Clapps*, 732 F.2d 1148 (3d Cir. 1984), *cert. denied*, 469 U.S. 1085 (1984) (party chairman); *United States v. States*, 488 F.2d 761 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974) (candidates for city office).

In the private sector, those with fiduciary duties to their employers or unions have been found guilty of fraud for accepting kickbacks or selling confidential information. See, e.g., *United States v. Curry*, 681 F.2d 406 (5th Cir. 1982) (chairman of political action committee); *United States v. Von Barta*, 635 F.2d 999 (2d Cir. 1980),

were interpreted by the dissent as independent, thus allowing the existence of a violation of the first clause by devising a scheme or artifice to defraud without a violation of the second clause seeking to obtain property from a victim through false pretenses.³⁷ The majority opinion chose not to accept this construction despite a long line of previous holdings to this effect.³⁸

The original federal mail fraud statute was enacted on June 8, 1872 as part of a 327-section omnibus act³⁹ revising and recodifying the various laws relating to the postal service.⁴⁰ During the past century, both Congress and the United States Supreme Court have approved of the expansive use of the mail fraud statute.⁴¹ As evidence

cert. denied, 450 U.S. 998 (1981) (securities trader).

In other cases, there have been convictions for using the mails to defraud individuals of their privacy rights and similar nonpecuniary rights. *See, e.g.*, *United States v. Louderman*, 576 F.2d 1383 (9th Cir. 1978), *cert. denied*, 439 U.S. 896 (1978) (scheme to fraudulently obtain confidential personal information). 107 S. Ct. at 2882-84.

36. *Id.* at 2884. The three clauses in question read as follows: "(1) any scheme or artifice to defraud; (2) or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises; (3) or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article" 18 U.S.C. § 1341 (emphasis and brackets added). *Id.*

37. *Id.* at 2884. The construction of the clauses as independent would similarly support a violation of the second clause—obtaining money or property by false pretenses—even though there is no violation of the third clause—counterfeiting. Alternatively, there could exist a violation of the first clause—devising a scheme or artifice to defraud—without a violation of the counterfeiting provision. *Id.*

38. *Id.* The imposition of the requirement that a scheme or artifice to defraud is not violative of the statute unless its objective is to defraud an individual of money or property is contrary to long-standing constructions of the mail fraud statute. *See, e.g.*, *United States v. Clapps*, 732 F.2d 1148, 1152 (3d Cir. 1984); *United States v. Scott*, 701 F.2d 1340 (11th Cir. 1983), *cert. denied*, 464 U.S. 856 (1983). 107 S. Ct. at 2884 n.5.

39. Act of June 8, 1872, ch. 335, section 301, 17 Stat. 323.

40. Rakoff, *The Federal Mail Fraud Statute* (Part 1), 18 Duq. L. Rev. 779 (1980). The mail fraud statute, § 301, was distinct from the other sections of the act, in that it had no obvious precursor. *Id.* at 779.

The mail fraud statute was similar to the extensive federal legislation enacted during the Reconstruction Period following the Civil War that extended federal power to areas formerly reserved to the states. *Id.* at 779.

The concerns which generated the enactment of the mail fraud statute included the accelerating growth of a national economy in the post-Civil War period and a correlative growth in large-scale swindles, get-rich-quick schemes, and financial frauds. *See* Dunning, RECONSTRUCTION, POLITICS AND ECONOMICS, 224-37 (1962); Faulkner, AMERICAN ECONOMIC HISTORY, 482-86, 516-17 (1960); Franklin, RECONSTRUCTION AFTER THE CIVIL WAR, 8-9, 141-49, 174-77 (1961).

41. Rakoff, 18 Duq. L. Rev. at 772.

of this development, each of the five legislative revisions of the statute has served to enlarge its coverage.⁴²

The early strict constructionist view of the mail fraud statute by the courts included a mail-dependence requirement which few schemes satisfied.⁴³ Hence, there was rarely a need to inquire whether the involved scheme was also a scheme to defraud.⁴⁴ In 1909, Congress, adhering to the strict constructionist view, deleted the mail-emphasizing statutory language.⁴⁵ There was no viable precedential authority at that time applying a narrow interpretation of the term "scheme to defraud," but only case law providing a broad construction.⁴⁶

In *Durland v. United States*,⁴⁷ the Court appeared to lend its support to the broad constructionist approach in regard to the scope of the mail fraud statute.⁴⁸ *Durland* involved two fraudulent invest-

42. See Act of March 2, 1889, ch. 393, section 1, 25 Stat. 873; Act of March 4, 1909, ch. 321, section 215, 35 Stat. 1130; Act of June 25, 1948, ch. 645, section 1347, 62 Stat. 763; Act of May 24, 1949, ch. 139, section 34, 63 Stat. 94; Act of August 12, 1970, Pub. L. No. 91-375, section 12(11), 84 Stat. 778.

43. Rakoff, 18 DUQ. L. REV. at 794. See *United States v. Clark*, 121 F. 190 (M.D. Pa. 1903), where the defendants were indicted for allegedly mailing fraudulent circulars, falsely promising that in return for payment they would provide individualized instruction through the mails. The court held that although the fraud utilized the mails, it was not of the class of schemes whose success was absolutely dependent on the use of the mails. The circulars were only mailed to local individuals who could just as expediently have been "sought out and induced through canvassers or solicitors or by advertisement in the public prints." 121 F. at 191.

44. Rakoff, 18 DUQ. L. REV. at 794.

45. Act of March 4, 1909, ch. 321, section 215, 35 Stat. 1130. Congress deleted the language describing the conduct of an individual who committed the offense as "misusing the post-office establishment." The penalty provision by which courts were directed to "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" was similarly deleted. The most significant deletion was that of the whole second element of the crime—the requirement that the fraudulent scheme be intended to be carried out through the use of the mails. Rakoff 18 DUQ. L. REV. at 816.

46. *Id.* at 794. Eventually, the balance was tipped in favor of the broad constructionist view because of the failure of the strict constructionists to develop a viable definition of those types of schemes to defraud which were within the scope of the mail fraud statute and the reaction of the public, Congress, and even the Supreme Court in opposition to various strict constructionist decisions excluding de minimis but prevalent swindles from the coverage of the mail fraud statute. *Id.* at 807-08.

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

48. Rakoff, 18 DUQ. L. REV. at 811. *Durland* was a member of a trilogy of cases, decided in the space of less than one year, which interpreted the mail fraud statute after an 1889 amendment. The first case, *Stokes v. United States*, 157 U.S. 187 (1895), answered whether a particular mail fraud indictment was sufficiently specific and whether the admission of certain evidence was proper. The second case,

ment schemes in which individuals were induced, by prospectuses mailed to them, to make periodic investments in the bonds of the defendant's companies, in return for promises that when the bonds achieved maturity, the investors would realize a substantial rate of return.⁴⁹ In actuality, the defendants intended to misappropriate the money and to continue misleading the investors.⁵⁰

In *Durland*, the defendant's primary argument was that the statute was only applicable to those frauds that were criminally punishable at common law, "in order to make out which there must be a misrepresentation as to some existing fact and not a mere (false) promise as to the future."⁵¹ The Court interpreted the statute to "include everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future."⁵² The defendant's use of the mails to fraudulently sell bonds was found to be within the statute.⁵³

In 1909, Congress codified the holding of *Durland* that the mail fraud statute reaches "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future."⁵⁴ The language of the amendment was not identical to that of the *Durland* holding, however, in that instead of the phrase "everything designed to defraud" Congress used the words "any scheme or artifice for obtaining money or property."⁵⁵

Streep v. United States, 160 U.S. 128 (1895), dealt primarily with the statute of limitations. In addition, *Streep*, held that a scheme to sell counterfeit obligations required "no proof of a scheme to defraud . . . to support it." This holding could be perceived as a strict constructionist view, since any scheme to dispose of counterfeit obligations was *ipso facto* a scheme to defraud the public. Any possible inference of support for the strict constructionist view found in *Street* was eliminated by *Durland*. *Id.* at 810-11.

49. *Durland*, 161 U.S. at 312.

50. *Id.*

51. *Id.*

52. *Id.* at 313. The Court clearly refuted counsel's primary argument. "The statute is broader than is claimed. Its letter shows this: 'Any scheme or artifice to defraud.' Some schemes may be promoted through mere representations and promises as to the future, yet are none the less schemes and artifices to defraud. Punishment because of the fraudulent purpose is no new thing." *Id.*

53. *Id.* at 315. The Court explained that "it was with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect, that this statute was passed. . . ." *Id.* at 314.

54. *Id.* at 313. The amendment added the words "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" after the original phrase "any scheme or artifice to defraud." Act of March 4, 1909, ch. 321, section 215, 35 Stat. 1130.

55. 161 U.S. at 313. After the 1909 amendment, the mail fraud statute

The two phrases identifying the proscribed schemes are in the disjunctive which has precipitated the argument for an independent construction that the money-or-property requirement of the amended phrase does not limit schemes to defraud exclusively to those projected at the deprivation of money or property.⁵⁶ The *McNally* Court refutes this construction because of the common understanding attached to the words "to defraud" whose plain reference is "to wronging one in his property rights by dishonest methods or schemes," and "usually signify the deprivation of something of value by trick, deceit, chicane or overreaching."⁵⁷ According to the *McNally* Court, the codification of the *Durland* holding does not evidence that Congress was departing from the common understanding of the words "to defraud," but by adding the second phrase, Congress unmistakably extended the statute to false promises and misrepresentations as to the future in addition to frauds aimed at the deprivation of money or property.⁵⁸

criminalized schemes or artifices "to defraud" or "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises. . . ." *McNally*, 107 S. Ct. at 2880.

56. 107 S. Ct. at 2880. *See, e.g.*, *United States v. Clapps*, 732 F.2d 1148 (3d Cir. 1984); *United States v. States*, 488 F.2d 761 (8th Cir. 1973).

57. *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924). The *Hammerschmidt* Court dealt with the scope of the predecessor of 18 U.S.C. § 371, which criminalized any conspiracy "to defraud the United States, or any agency thereof in any manner or for any purpose." The Court stated, in regard to that statute, that while "[t]o conspire to defraud the United States means primarily to cheat the Government out of property or money, . . . it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft, or trickery, or at least by means that are dishonest." 265 U.S. at 188.

58. *McNally*, 107 S. Ct. at 2887. *But cf.*, other cases have dealt with the scope of 18 U.S.C. § 371 and held that it is applicable to conspiracies other than those involving property interests. *See, e.g.*, *Haas v. Henkel*, 216 U.S. 462, 480 (1910) (predecessor of § 371 reaches conspiracy to defraud the government by bribing a government official to make an advance disclosure of a cotton crop report); *Glasser v. United States*, 315 U.S. 60 (1942) (predecessor of § 371 reaches conspiracy to defraud the United States by bribing a United States Attorney). In *Curled v. United States*, 130 F. 1 (1st Cir. 1904), the court stated: "Quite likely the word 'defraud,' as ordinarily used in the common law, and as utilized in English statutes and in the statutes of our states, enacted with the object of protecting property and property rights of communities and individuals, as well as of municipal governments, which exist largely for the purpose of administering local financial affairs, has reference to frauds relating to money and property." 130 F. at 6-7. The court concluded, however, that "(a) statue which . . . has for its object the protection of the individual property rights of the members of the civic body, is one thing; 'a statute which has for its object the protection and welfare of the government alone, which exists for the purpose of administering itself in the interests of the public,

The United States Supreme Court interpreted that the congressional intent in passage of the mail fraud statute was to facilitate the prevention of the use of the mails to implement schemes involving false promises and misrepresentations as to the future in addition to frauds involving money or property.⁵⁹ The adherence to precedent stating that when there is present two rational interpretations of a criminal statute, one harsher than the other, the harsher interpretation is to be chosen only when congressional intent is clear and definite, was a factor in delimiting the scope of the statute.⁶⁰ The Court stated in *Fasulo v. United States*,⁶¹ a mail fraud case, that "There are no constructive offenses; and before one can be punished, it must be shown that his case is clearly within the statute."⁶² Instead of proffering an interpretation of the statute that would render its scope ambiguous and involve the federal government in creating standards of disclosure and fair and impartial government for local and state officials, the *McNally* Court limited the scope of section 1341 to the protection of monetary interests and property.⁶³

The dissenters in *McNally*,⁶⁴ assert that the majority, in rejecting a long-standing construction of the mail fraud statute by imposing a requirement that a scheme or artifice to defraud is not violative of the statute unless its purpose is to defraud an individual of money or property, ignores the intended congressional purpose in its enactment and is oblivious to the plain and historical meaning which the language of the statute commands.⁶⁵ A significant line of case law has held that a violation of the first clause of the statute could exist if an individual devised a scheme or artifice to defraud, despite no

[is] quite another." *Id.* at 7.

The *McNally* Court indicates that this broad construction of § 371 is based on a consideration inapplicable to the mail fraud statute. Section 371 is a statute directed at the protection of the federal government solely; in contradistinction, the mail fraud statute had its origin in the desire to protect individual property rights, and any benefit derived from the statute by the Government must be limited to its interests as property-holder. *McNally*, 107 S. Ct. at 2881 n.8.

59. *Id.*

60. *Id.* See *United States v. Bass*, 404 U.S. 336, 347 (1971); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952). See also *Rewis v. United States*, 401 U.S. 808, 812 (1971).

61. *Fasulo v. United States*, 272 U.S. 620 (1926).

62. *Id.* at 629.

63. 107 S. Ct. at 2881. The Court indicated that if Congress desires a more inclusive scope, it must speak in more clear and definitive terms. *Id.*

64. Justice Stevens authored the dissenting opinion with whom Justice O'Connor joined as to Parts I, II, and III.

65. *McNally*, 107 S. Ct. at 2884.

existing violation of the second clause, by seeking to obtain money or property from a victim through false pretenses.⁶⁶ The rejection of this line of case law is contrary to the plain independent and disjunctive construction of the statute's prohibitory clauses.⁶⁷

An integral consideration in defining the scope of the mail fraud statute is derived from the congressional intent in its enactment.⁶⁸ The purpose of the mail fraud statute is to facilitate protection of the integrity of the mails by precluding their use as "instruments of crime."⁶⁹ The *McNally* dissent indicated that "The focus of the statute is upon the misuse of the Postal Service, not the regulation of state affairs, and Congress clearly has the authority to regulate such misuse of the mails."⁷⁰ Upon consideration of the underlying purpose of the statute, the construction offered by the *McNally* opinion is unjustifiable in its constriction of that purpose caused by the resultant severe constraints placed on federal prosecutorial efforts against the use of the mails for fraudulent schemes.⁷¹

The cases involving prosecutions of frauds under the "intangible right" theory dictate that "fraud" is in fact the basis of the schemes, and that inclusion of this genre of schemes is an important factor

66. See, e.g., *United States v. Clapps*, 732 F.2d 1148 (3d Cir. 1984), *cert. denied*, 469 U.S. 1085 (1984); *United States v. Frankel*, 721 F.2d 917 (3d Cir. 1983); *United States v. Scott*, 701 F.2d 1340 (11th Cir. 1983), *cert. denied*, 464 U.S. 856 (1983); *United States v. Halbert*, 640 F.2d 1000 (9th Cir. 1981); *United States v. Classic*, 35 F. Supp. 457 (E.D. La. 1940).

67. 107 S. Ct. at 2884. The majority conceded that because the proscribed schemes appear in the disjunctive, it is arguable that they are to be read independently and the money-or-property limitation of the second clause is not applicable to schemes to defraud. Additionally, the majority noted that this interpretation has been utilized by each of the courts of appeals that has considered the issue and held that schemes to defraud include those aimed at depriving the public or the government officials perform their function honestly. *Id.* at 2880.

68. *Id.* at 2884.

69. *Id.* *United States v. Brewer*, 528 F.2d 492, 498 (4th Cir. 1975). See *Durland v. United States*, 161 U.S. 306, 314 (1896); *Parr v. United States*, 363 U.S. 370, 389 (1960); *Gouled v. United States*, 273 F. 506, 508 (2d Cir. 1921), *aff'd*, 255 U.S. 298 (1921).

70. 107 S. Ct. at 2884. See *Badders v. United States*, 240 U.S. 391 (1916); *United States v. States*, 488 F.2d 761, 767 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974).

71. 107 S.Ct. at 2885. The dissent questioned: Can it be that Congress sought to purge the mails of schemes to defraud citizens of money but was willing to tolerate schemes to defraud citizens of their right to an honest government, or to unbiased public officials? Is it at all rational to assume that Congress wanted to ensure that the mails not be used for petty crimes, but did not prohibit election fraud accomplished through mailing fraudulent ballots?

Id.

in pursuing the congressional goal of the preservation of the integrity of the Postal Service.⁷²

An examination of the past definitions applied to the term "defraud," which were accepted at the time of the enactment of the statute, makes it evident that Congress' use of the term would include the fraudulent deprivation of "intangible rights."⁷³ The broad use of this definitional basis is evident at common law where frauds beyond those involving "tangible rights" were punishable⁷⁴ and in the inclusion of deceptive seduction in the crime of fraud, despite the usual absence of property or monetary loss.⁷⁵

The broad meaning of the word "defraud" was the basis for upholding the mail fraud conviction of an Illinois judge in a recent decision, despite the absence of any proven deprivation of tangible property.⁷⁶ In *United States v. Holzer*,⁷⁷ the Court of Appeals for the Seventh Circuit, per Judge Posner, explained "Fraud in its elementary common law sense of deceit—and this is one of the meanings that fraud bears in the statute—includes the deliberate concealment of material information in a setting of fiduciary obligation."⁷⁸ The fact that the judge's abuse of his fiduciary obligation

72. *Id.*

73. *Id.* at 2887. Justice Story defined "fraud" as "applied to every artifice made use of by one person for the purpose of deceiving another," or as "any cunning, deception, or artifice used to circumvent, cheat, or deceive another." 1 Story, *Equity Jurisprudence*, § 186, at 189-90 (1870).

The law dictionaries of the latter nineteenth century included broad definitions of the class of interests subject to deprivation by fraudulent action. A leading source stated that "to defraud is to withhold from another that which is justly due to him, or to deprive him of a right by deception or artifice." 1 *Bouvier's Law Dictionary* 530 (1897). Another dictionary defined "defraud" as "to cheat; to deceive; to deprive of a right by an act of fraud . . . to withhold from another what is justly due him, or to deprive him of a right, by deception or artifice." *Anderson, A Dictionary of Law* 474 (1893).

74. 107 S. Ct. at 2887. In a case similar to the one at bar, a public official was convicted for depriving the government of his honest services. *See Trial of Regina v. Valentine Jones*, 31 How. St. Tr. 251 (1809), which has been abstracted: "A, a commissary-general of stores in the West Indies, makes contracts with B to supply stores, on the condition that B should divide the profits with A. A commits a misdemeanor." J. Stephen, *Digest of the Criminal Law*, Art. 121, p.85 (3d ed. 1883).

75. 107 S. Ct. at 2887. *See State v. Parker*, 114 Wash. 428, 195 P. 229 (1921); *cf. United States v. Condolon*, 600 F.2d 7 (4th Cir. 1979).

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

77. *Id.*

78. *Id.* at 307. *See United States v. Dial*, 757 F.2d 163, 168 (7th Cir. 1985). Posner continued: "A public official is a fiduciary toward the public, including, in the case of a judge, the litigants who appear before him, and if he deliberately

caused no demonstrable tangible loss either to a litigant or to the general public was irrelevant to a finding of fraud.⁷⁹ The limitation of the statute to tangible interests is dependent on the acceptance that the meaning of "fraud" in the mail fraud statute was constrained by the conception of "fraud" held by the framers of the original statute.⁸⁰ This is the opposite and equally unjustifiable extreme from the argument that "fraud" includes whatever a judge perceives as bad, and the *Holzer* court adopted neither position while adhering to the protection of "intangible rights" established in the courts of appeals.⁸¹

The long-standing, consistent interpretation of the mail fraud statute is evident in a large body of case law. In *United States v. States*,⁸² two candidates running for office in St. Louis, Missouri, used the mails in their scheme to falsify voter registration affidavits in order to facilitate a sophisticated fraudulent write-in scheme.⁸³ The candidates and one of their aides were convicted of mail fraud for devising a scheme to defraud the voters, the residents and the Board of Election Commissioners.⁸⁴ The defendants contended that no fraud had occurred since they never sought money or property, but the Court of Appeals for the Eighth Circuit rejected this contention in holding that the term "defraud" must be "construed to further the

conceals material information from them he is guilty of fraud. When a judge is busily soliciting loans from counsel to one party, and not telling the opposing counsel (let alone the public), he is concealing material information in violation of his fiduciary obligations." 816 F.2d at 307.

79. *Id.* at 308. See, e.g., *United States v. Keane*, 522 F.2d 534, 541, 546 (7th Cir. 1975); *United States v. Lovett*, 811 F.2d 979, 985 (7th Cir. 1987); *United States v. Manton*, 107 F.2d 834, 846 (2d Cir. 1939).

80. 816 F.2d at 310.

81. *Id.* Even if there was support for a limited definition of "fraud," the limitation of the scope of the mail fraud statute would be contrary to the intent of the Congresses of the late nineteenth century. Statutes like the Sherman Act, the civil rights legislation and the mail fraud statute were penned in general language so that the courts would be able to interpret them broadly to achieve the remedial purposes dictated by Congress. The gaps in these statutes can be seen as implicit delegations of authority to the courts to fill them in the common law tradition of case by case adjudication. 107 S.Ct. at 2888.

82. *States*, *supra* note 56.

83. 488 F.2d at 763. The two candidates directed their campaign workers to complete affidavits with fictitious names and addresses, and then record the addresses. The applications for absentee ballots were filed, and upon their arrival via the mails, they were completed with the candidates' names and mailed back to the election board for counting. *Id.*

84. *Id.* at 762.

purpose of the statute; namely, to prohibit the misuse of the mails to further fraudulent enterprises."⁸⁵

In *United States v. Rauhoff*,⁸⁶ the defendant was involved in a scheme using the mails to funnel kickbacks to the Illinois Secretary of State amounting to \$50,000 per annum in exchange for the Secretary's awarding the Illinois license plate contract to a designated company.⁸⁷ Responding to the argument that all involved parties benefitted and no fraud was perpetrated, the *Rauhoff* court explained that the victims of the scheme were the "people of Illinois, who were defrauded of their right to have the business office of the Secretary of State conducted free from bribery."⁸⁸

The use of the term "defraud" in 18 U.S.C. § 371 as consistently construed by courts provides substantial support for a similar interpretation of the terminology in the mail fraud statute when considering the two statutes *in pari materia*.⁸⁹ In *Haas v. Henkel*,⁹⁰ the Court dealt with the predecessor to section 371 and rejected the argument that there could be no conspiracy to defraud without the objective of monetary or property deprivation.⁹¹ The *Henkel* Court indicated that "The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating

85. *Id.* at 764. In *Gouled v. United States*, 273 F. 506, 508 (2d Cir. 1921), the court stated: "As it now stands, any kind or species of scheme or artifice to defraud is punishable in the national courts, if and whenever for the purpose of executing that scheme the postal establishment is used; *United States v. Procter & Gamble Co.*, 47 F. Supp. 676, 678 (D. Mass. 1942).

In *Blachly v. United States*, 380 F.2d 665 (5th Cir. 1967), the court observed: "The crime of mail fraud is broad in scope. The fraudulent aspect of the scheme to 'defraud' is measured by a nontechnical standard. . . . Law puts its imprimatur on the accepted moral standards and condemns conduct which fails to match the 'reflection of moral uprightedness, or fundamental honesty, fair play and right dealing in the general and business life of the members of society.'" This is indeed broad. For as Judge Holmes once observed, "the law does not define fraud; it needs no definition. It is as old as falsehood and as versable as human ingenuity." 380 F.2d at 671.

86. 525 F.2d 1170 (7th Cir. 1975).

87. *Id.* at 1172.

88. *Id.* at 1175. Despite the absence of any proof that the state or its citizens were deprived of money, the court held that the scheme to defraud was clearly within the purview of § 1341. *Id.* at 1176.

There are numerous other cases describing schemes of this genre, although not leading to the deprivation of money or property, which are included within the scope of the mail fraud statute. *See supra* notes 35 and 66.

89. 107 S.Ct at 2886.

90. 216 U.S. 462 (1910).

91. *See supra* note 57.

the lawful function of any department of government.”⁹² Further support is found in *Hammerschmidt v. United States*,⁹³ wherein the Court described the scope of the statute as prohibiting not only conspiracies to “cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft, or trickery, or at least by means that are dishonest.”⁹⁴ The *McNally* Court’s statement that the two statutes can be distinguished, since section 371 is applicable exclusively to frauds against the United States, while section 1341 benefits private individuals, is unjustifiable.⁹⁵ The purpose of the mail fraud statute is to facilitate the protection of the integrity of the United States Postal Service, and it is illogical to surmise that a Congress seeking this form of protection would have limited the connotation of the term “defraud” to schemes involving only money or property interests.⁹⁶

A review of the general history of congressional reaction to judicial interpretation of the mail fraud statute supports the inclusion of the “intangible rights” branch within the scope of the statute.⁹⁷ The expansive phrase “any scheme or artifice to defraud” has consistently been utilized to include the development of novel species of fraudulent schemes, and Congress has similarly expanded the statute upon every occasion it has perceived that an amendment was warranted.⁹⁸

92. 30 S.Ct. at 254.

93. 265 U.S. 182 (1924).

94. 44 S.Ct. at 512. It is evident that a conspiracy to defraud the United States does not require proof of property or monetary loss by the government. 107 S.Ct. at 2886. *See also* *United States v. Barnow*, 239 U.S. 74, 79 (1915).

95. 107 S.Ct. at 2886. *See supra* note 57.

96. *Id.* at 2886-87. There is no basis for the conclusion that the term “defraud” has a distinctive meaning in § 1341, originally enacted in 1872, compared to its use in § 371, first enacted in 1867. *Id.* at 2886.

97. *Id.* at 2889.

98. *Id.* *See supra* note 42. The history and use of the mail fraud statute displays the expansive prosecutorial use of the mail fraud statute and the need for such substantive implementation: “First enacted in 1872, the mail fraud statute, together with its lineal descendant, the wire fraud statute, has been characterized as the ‘first line of defense’ against virtually every new area of fraud to develop in the United States in the past century. Its applications, too numerous to catalog, cover not only the full range of consumer frauds, stock frauds, land frauds, bank frauds, insurance frauds, and commodity stock frauds, but have extended even to such areas as blackmail, counterfeiting, election fraud and bribery. In many of these and other areas, where legislatures have sometimes been slow to enact specific prohibitory legislation, the mail fraud statute has frequently represented the sole instrument of justice that could be wielded against the ever-innovative practitioners of deceit.” Rakoff, 18 DUQ. L. REV. at 772-73 (1980).

The majority asserts that since there is no definitive evidence that Congress contemplated the "intangible rights" branch when it enacted the mail fraud statute in 1872, any ambiguity regarding the scope of the statute should be resolved in favor of lenity.⁹⁹ The doctrine of lenity is judicious, since fair notice to a citizen regarding the criminality of conduct is commanded by our nation's criminal justice system.¹⁰⁰

The doctrine of lenity is inapplicable to the case at bar, since "although 'criminal statutes are to be construed strictly . . . this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislation.'"¹⁰¹ Given the statutory purpose of the mail fraud statute, it unambiguously prohibits all schemes to defraud that use the mails, regardless of any resultant deprivation of money or property.¹⁰² In this case, the doctrine of lenity would certainly be misapplied to a situation where the petitioners obviously knew it would be unlawful to provide for Kentucky's workmen's compensation coverage with an agent in exchange for the secretive funneling of hundreds of thousands of dollars to the petitioners for their own private use.¹⁰³

The contention that it is more provident to limit the scope of section 1341 to property and monetary interest that to involve the federal government in setting standards of disclosure and good government for local and state officials, is not practical in cases of this

99. 107 S. Ct. at 2889. See *supra* notes 59-60 and accompanying text.

100. *Id.* at 2889.

101. *McElroy v. United States*, 455 U.S. at 658, quoting *United States v. Bramblett*, 348 U.S. 503, 509-10 (1955).

102. 107 S. Ct. at 2889. There is no basis to assert that the connotation of the word "defraud" is shrouded in any ambiguity. Even if the *Hammerschmidt* opinion did not suffice to eliminate the view that a fraud on the public requires the deprivation of "tangible rights," the numerous opinions from the courts of appeals applying the statute to schemes to defraud a state and its citizenry of the intangible right to honest and impartial government, regardless of the absence of tangible loss, certainly removed any relevant ambiguity in defining the scope of the statute. *Id.* at 2889-90.

103. *Id.* at 2890. When deciding on the applicability of the doctrine of lenity, it is important to consider who the class of litigants that will benefit from the majority opinion are. This class of beneficiaries is not composed of uneducated, or even average, citizens. These are the sophisticated parties involved in the operation of government. The presumption that every citizen is given the charge to be cognizant of the law is at best a legal fiction. But the large class of government executives, judges and legislators who have been convicted of mail fraud under the long-standing construction of the statute that the majority renounces in its opinion, are individuals who certainly knew that their conduct was unlawful. *Id.* n.9.

genre. Indeed, there have been instances of over-expansive use of the mail fraud statute in the past, as without the benefit of guidance from the Supreme Court, the courts of appeals have labored to delineate when unethical conduct is also criminal.¹⁰⁴ It is certainly not an easy task to define when there has been a scheme to fraudulently deprive an individual of intangible rights, but it is equally difficult in some instances to identify a tangible loss caused by fraud.¹⁰⁵ The need to make difficult choices does not justify the ignorance of a long-standing doctrine, faithful to congressional intent.¹⁰⁶

The summary rejection of an entire doctrine which has been buttressed by the sound and consistent reasoning of many distinguished jurists in various state and federal courts is simply distressing and unfounded. Considering this interpretative limitation standing alone, it has a specious foundation, but when weighed against the long-standing, consistent interpretation of a federal statute that is prevalent, it is clearly unjustifiable. Support for inclusion of the "intangible rights" branch within the scope of the mail fraud statute is evident in the utilization of every tool for effectual statutory interpretation. The plain meaning and construction of the statute is not dispositive, but the statute certainly lends itself to more clarity when read in the disjunctive. Given this construction, the initial prohibitory clause including the words "scheme or artifice to defraud" commands a broad interpretation derived from the common understanding of the word "defraud," through *in pari materia* consideration of the use of similar terminology in 18 U.S.C. § 371, and the congressional intent actuated through the enactment of the mail fraud statute. The congressional purpose in enacting the mail fraud statute was to substantively protect the integrity of the United States mails by disallowing their use as instruments of crime. The majority opinion as rendered would clearly operate to subvert this legislative directive. Perhaps the most effective alternative to definitely delineate the boundaries of the mail fraud statute, either to negate the potential harmful effects of this decision through incorporation of the "intangible rights" branch within the scope of section 1341, or to validate the limitation to tangible interests alone—in

104. *Id.* at 2890.

105. *Id.*

106. *Id.* In various instances, the criminal nature of a scheme and the fraudulent use of the mails is apparent, such as in voting fraud cases. *Id.*

either instance to interject a measure of clarity into the present interpretative effort—is a task which should be reserved for Congress. In the interim or during the continued acquiescence of Congress, this decision is going to serve to immunize many fraudulent uses of the mails from prosecution. As in the case at bar, the protected class is not going to consist of petty criminals for the most part, instead white collar criminals of the elite segment of our society will most often benefit from this sudden windfall of broad immunity from prosecution for mail fraud. As Oliver Wendell Holmes stated, “the law does not define fraud; it needs no definition. It is as old as falsehood and as versatile as human ingenuity.”¹⁰⁷ This powerful statement displays the potential expansive impact of this decision. The human ingenuity of wayward judges, governors, city aldermen, congressmen, chairmen of political parties and state cabinet officers is now unrestrained in terms of future development of schemes or artifices to defraud citizens through the utilization of the United States mails without the potential for punishment and correlative deterrence, just as long as it is only the “intangible rights” of the public that are debased. In our democratic system, founded upon the effective relationship between public servant and his constituency, is there a situation more destructive of that relationship than ignorance and blatant disregard of the public trust of a citizenry in its representatives at all levels of governmental service? Indeed, the most integral component of the “intangible rights” branch that deserves protection from fraud is the broad connotation of the public interest charged to all public servants. As Cicero declared: “for the administration of the government, like the office of a trustee, must be conducted for the benefit of those entrusted to one’s care not of those to whom it is entrusted.”¹⁰⁸

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107. *See supra* note 85.

108. Fleishman, *PUBLIC DUTIES: THE MORAL OBLIGATIONS OF GOVERNMENT OFFICIALS*, 52 (Harvard University Press, 1981).