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Whose Rights? Why States Should Set the Parameters for Federal Honest Services Mail and Wire Fraud Prosecutions

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WHOSE RIGHTS? WHY STATES SHOULD SET THE PARAMETERS FOR FEDERAL HONEST SERVICES MAIL AND WIRE FRAUD PROSECUTIONS

Abstract: The citizens and governments of states and localities have a federal statutory right to the "honest services" of their public officials. The federal statutes that criminalize conduct impinging on this right, however, do not clearly define the parameters of the term "honest services," and, as a result, the U.S. Courts of Appeals have differed in their interpretation of what conduct comprises a violation of the statute. The U.S. Courts of Appeals for the Third and Fifth Circuits have held that, in order for there to be a federal crime, the "honest services" must be owed under state or local law. Meanwhile, the First Circuit has held that such a state or local law violation is not a necessary prerequisite to the federal crime. This Note argues that, due to federalism and the nature of public corruption, the former approach strikes the appropriate balance between state sovereignty and the federal interest in good government.

INTRODUCTION

On August 21, 1997, plaintiffs' lawyer Paul Minor stormed into a Kmart store in Jackson, Mississippi.[1] Minor had recently won a $3.4 million verdict against the mega retailer for three of his clients, but Kmart had not taken any steps toward paying that judgment.[2] Minor intended to collect the judgment by emptying the store's registers.[3] As local television cameras rolled, he lambasted Kmart for its inaction.[4] The brash attorney did not leave the store with a bag of cash, but his tactics did prove to be successful; Kmart posted a bond that same day.[5]

Paul Minor's behavior often pushes boundaries, but he has been accused recently of going too far.[6] In 2003, the Bush administration targeted Mississippi as fertile ground for tort reform.[7] To this end, FBI agents began looking into the campaign funding sources of Missis-

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[1] *See* Andrew Longstreth, *Mississippi Maelstrom*, 11 CORP. COUNS. 150, 150 (Nov. 2004).

[2] *See id.*

[3] *See id.*

[4] *See id.*

[5] *See id.*

[6] *See* Longstreth, *supra* note 1, at 150; Scott Horton, *A Minor Injustice: Why Paul Minor?*, HARPER'S MAG., Oct. 5, 2007, http://www.harpers.org/archive/2007/10/hbc-90001343.

[7] *See* Longstreth, *supra* note 1, at 150; Horton, *supra* note 6.

sippi judges, and Minor's name surfaced.[8] He had guaranteed a loan to help Mississippi Supreme Court Justice Oliver Diaz secure election financing.[9] Pursuant to this investigation, the Department of Justice ("DOJ") filed charges against Minor, alleging that, because he practiced in front of Justice Diaz, his guaranty violated federal laws prohibiting an individual from participating in a scheme intended to deprive a state and/or its citizens of the honest services of a public official.[10]

Although Minor's actions may appear unseemly, there is no Mississippi state law prohibiting an attorney who practices in front of a judge from financially assisting that judge in a campaign.[11] This indicates that the citizens or the government of Mississippi, or both, do not feel that such actions defraud them of their right to the honest services of their judges.[12] Furthermore, courts such as the U.S. Court of Appeals for the Eleventh Circuit have overturned state laws attempting to limit judges' capacity to raise funds in this manner.[13] The federal government nonetheless prosecuted Minor, and the absence of an applicable Mississippi state law brought the case under a federal common law standard of good government.[14]

To complicate matters further, this common law standard was asserted by a Republican-headed DOJ, and Paul Minor is the son of a locally well-known liberal newspaper columnist and has made substantial financial contributions to the Democratic Party.[15] Consequently, many commentators allege that Minor's prosecution was politically motivated.[16] Motivations aside, Minor's case is illustrative of the dan-

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[8] *See* Longstreth, *supra* note 1, at 150; Horton, *supra* note 6.

[9] *See* Longstreth, *supra* note 1, at 153; Horton, *supra* note 6; *see also* Letter from Paul Minor to U.S. House of Representatives Comm. on the Judiciary (Oct. 22, 2007), *available at* http://judiciary.house.gov/Media/PDFS/Minor071022.pdf (explaining that Minor guaranteed the loan in an attempt to help offset money contributed to Diaz's opponent by the U.S. Chamber of Commerce, which had identified Diaz as "anti-business").

[10] *See* Longstreth, *supra* note 1, at 150, 152; Horton, *supra* note 6.

[11] *See* Horton, *supra* note 6 (explaining that, not only is there no such Mississippi law, but that the practice is commonplace).

[12] *See id.*

[13] *See* Weaver v. Bonner, 309 F.3d 1312, 1322–23 (11th Cir. 2002) (holding that section (B)(2) of Canon 7 of the Georgia Code of Judicial Conduct, which prohibits judicial candidates from personally soliciting campaign contributions, impermissibly chilled candidates' speech and thus violated the First Amendment).

[14] *See* Longstreth, *supra* note 1, at 150; Horton, *supra* note 6.

[15] *See* Longstreth, *supra* note 1, at 152; Horton, *supra* note 6.

[16] *See* Horton, *supra* note 6; *see also* Legal Schnauzer, http://legalschnauzer.blogspot.com (Sept. 24, 2007, 12:30 EST) [hereinafter Mississippi Churning]. Mississippi Churning is a series of approximately forty postings written by Roger Shuler, an Alabama journalist, appearing on his blog, Legal Schnauzer. *See generally* Legal Schnauzer, http://legalschnauzer.

gers to state sovereignty posed by federal prosecution of state and local corruption, particularly when such prosecutions are governed by a federal common law standard.[17]

Minor was indicted and charged under 18 U.S.C. §§ 1341, 1343, and 1346.[18] Together, these statutes form the basis of what is known as "honest services mail or wire fraud."[19] Currently, the United States Courts of Appeals have split on whether the behavior of a defendant such as Paul Minor must violate state or local law before it can be prosecuted within the federal framework.[20] The Fifth Circuit has held that a violation of state or local law is a necessary prerequisite to a federal honest services fraud prosecution, and the Third Circuit has noted its approval of this position.[21] Meanwhile, the First Circuit and other circuits have held that such a requirement is not only unnecessary, but that a discussion of state law at a federal trial presents the opportunity for unfair prejudice to the defendant.[22]

This Note addresses this circuit split and argues that the proper approach is to require that a defendant's conduct violate state or local

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blogspot.com. Throughout the postings, Shuler argues that Minor and a series of other prominent southern Democrats have been the victims of politically motivated selective prosecutions brought by the Bush administration. *See id.*; *cf.* Dan Eggen, *Ex-Attorney General Says Politics Drove Federal Prosecution*, WASH. POST, Oct. 24, 2007, at A3 (detailing claims of politically motivated prosecutions for mail and wire fraud, including a former U.S. Attorney General's accusation that the Bush administration's DOJ had political motivations when it prosecuted an outspoken and highly visible Democratic figure in Pennsylvania for mail fraud and other crimes).

[17] *See* Horton, *supra* note 6; Mississippi Churning, *supra* note 16. Both Horton and Shuler's accounts of Minor's prosecution demonstrate that a federal prosecutor can bring charges in connection with the actions of a state or local public official quite easily and that the choice to undertake such a prosecution may not always align with the values of the state or local electorate. *See* Horton, *supra* note 6; Mississippi Churning, *supra* note 16.

[18] *See* Third Superceding Indictment at 3–4, United States v. Minor, No. 3:03cr120WS (S.D. Miss. Dec. 6, 2005).

[19] *See* 18 U.S.C.A. §§ 1341, 1343 (West 2000 & Supp. 2008); 18 U.S.C. § 1346 (2000).

[20] *See* United States v. Murphy, 323 F.3d 102, 117 (3d Cir. 2003) (demonstrating support, in dicta, for an approach requiring a state law limiting principle for honest services fraud); United States v. Panarella, 277 F.3d 678, 692–93 (3d Cir. 2002) (noting that state law, rather than federal common law, offers a better limiting principle of determining when an official's failure to disclose a conflict of interest amounts to honest services fraud); United States v. Sawyer (*Sawyer II*), 239 F.3d 31, 35 (1st Cir. 2001); United States v. Brumley, 116 F.3d 728, 734 (5th Cir. 1997) (holding that, in order for conduct to constitute honest services fraud, the services must be owed under state law); United States v. Sawyer (*Sawyer I*), 85 F.3d 713, 726 (1st Cir. 1996) (holding that a violation of common law may suffice as the basis for honest services fraud); United States v. Bryan, 58 F.3d 933, 940 (4th Cir. 1995) (holding that a scheme to defraud need not violate state law in order to constitute honest services fraud).

[21] *See Murphy*, 323 F.3d at 117; *Panarella*, 277 F.3d at 692–93; *Brumley*, 116 F.3d at 734.

[22] *See Sawyer I*, 85 F.3d at 726; *Bryan*, 58 F.3d at 940.

law before it can be prosecuted federally as honest services mail or wire fraud. Part I of the Note traces the legislative history of the mail and wire fraud statutes and the judicial and legislative actions taken with respect to the inclusion of the right to honest services within the scope of these statutes.[23] Part II discusses the current circuit split and the rationales for the competing positions.[24] Part III addresses potential justifications for allowing the federal government to prosecute state and local corruption in light of the Supreme Court's recent preference for limiting the scope of federal regulatory power.[25] Part IV provides a specific justification for federal honest services mail and wire fraud prosecutions in connection with state and local public corruption.[26] Finally, Part V addresses the need to place sensible limits on such prosecutions and argues that the approach taken by the Third and Fifth Circuits is therefore the most appropriate.[27]

I. The Mail and Wire Fraud Statutes: 18 U.S.C. §§ 1341, 1343, and 1346

The federal mail fraud statute criminalizes the use of the mails in "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[28] The federal wire fraud statute criminalizes any transmission by wire, radio or television in interstate or foreign commerce for the purpose of executing a scheme or artifice to defraud.[29] There have been federal statutes criminalizing this type of behavior since the late 19th century, but, since the inception of the current statutes, the scope of the conduct that they criminalize has remained an unsettled matter.[30]

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[23] *See infra* notes 28–59 and accompanying text.

[24] *See infra* notes 60–130 and accompanying text.

[25] *See infra* notes 131–156 and accompanying text.

[26] *See infra* notes 157–209 and accompanying text.

[27] *See infra* notes 210–236 and accompanying text.

[28] *See* 18 U.S.C.A. § 1341 (West 2000 & Supp. 2008).

[29] *See id.* § 1343.

[30] *See, e.g.*, Alexander v. United States, 95 F.2d 873, 875, 881 (8th Cir. 1938) (affirming conviction under the mail fraud statute where defendants issued false medical diplomas and licenses to persons without medical education); United States v. Randle, 39 F. Supp. 759, 759–60 (W.D. La. 1941) (holding that the mail fraud statute could not be applied to election fraud because neither the voters nor the state had been defrauded of any money or property). *Alexander* and *Randle* are illustrative of the judicial branch's historical struggle to determine if mail, and later wire, fraud criminalize schemes that defraud their victims of only intangible rights and not money or property. *See Alexander*, 95 F.2d at 875, 881; *Randle*, 39 F. Supp. at 759–60.

A. *The First Mail Fraud Statute*

The first mail fraud statute was enacted by the forty-second Congress in 1872.[31] This statute contained broad language making it illegal to use the mails in connection with "any scheme or artifice to defraud."[32] The limited legislative history for this bill indicates that Congress intended to protect citizens from deprivation of only tangible assets, such as money or property.[33]

Thirty-two years later, in 1909, Congress codified this intent more precisely.[34] The statute was amended to say "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . ."[35] In the years following this amendment, federal courts of appeals expanded their interpretation of the scope of the mail fraud statute beyond just those instances where the victim was defrauded of tangible assets, whether money or property.[36] They began to interpret the statute as criminalizing schemes intended to deprive victims of intangible rights as well, such as the right to honest services.[37] Courts eventually decided that this new honest services doctrine included the right of citizens and governments to have to have their public officials perform their duties honestly.[38]

B. *The Addition of Wire Fraud*

In 1952, Congress expanded the coverage of federal fraud protections by enacting the wire fraud statute.[39] Section 1343 criminalizes the transmission of writings, signs, signals, pictures or sounds by means of wire, radio or television, in interstate or foreign commerce, for the purpose of executing a scheme or artifice to defraud.[40] The legislative

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[31] *See* Act of June 8, 1872, ch. 335, §§ 149, 301, 17 Stat. 302, 323.

[32] *See id.*

[33] *See* CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870). The bill's sponsor, Rep. Farnsworth, remarked that such a law was needed to prevent fraud "by thieves, forgers, and rapscallions generally." *Id.*

[34] *See* Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130.

[35] *See id.*

[36] *See, e.g.*, United States v. Clapps, 732 F.2d 1148, 1153 (3d Cir. 1984) (holding that the mail fraud statute protects an electoral body's right to fair elections); United States v. States, 488 F.2d 761, 766 (8th Cir. 1973) (holding that an indictment under the mail fraud statute may state an offense even though it does not contain allegations that anyone was defrauded of money or property).

[37] *See Clapps*, 732 F.2d at 1153; *States*, 488 F.2d at 766.

[38] *See Clapps*, 732 F.2d at 1153.

[39] Act of July 16, 1952, ch. 879, § 18(a), 66 Stat. 722 (current version at 18 U.S.C.A. § 1343 (West 2000 & Supp. 2008)).

[40] *See* 18 U.S.C.A. § 1343.

history of § 1343 is sparse, but courts soon realized that the statute appeared to be closely patterned after the mail fraud statute.[41] These findings were due in large part to the fact that, although the two statutes differ with respect to the elements necessary to trigger federal jurisdiction, they use the identical language to define the criminal conduct.[42]

Relying on the similarity of the language in the two statutes, federal appeals courts have traditionally held that the mail and wire fraud statutes share a common *raison d'etre* and should therefore be interpreted *pari passu*.[43] Thus, those courts have held that the two statutes criminalize different types of behavior within the same types of schemes.[44] Therefore, in early years of the wire fraud statute, it, like the mail fraud statute, was interpreted as protecting intangible rights such as the right to honest services.[45]

C. *Limiting the Reach of the Statutes:* McNally v. United States

Courts continued to enforce citizens' and governments' right to honest political services under § 1341 and § 1343 until the U.S. Supreme Court's 1987 decision in *McNally v. United States*.[46] In *McNally*, a combination of private citizens and Kentucky state officials were convicted of mail fraud under § 1341.[47] The charges were brought in connection with a self-dealing patronage scheme in which the defendants used the mails to defraud the citizens and government of Kentucky of their intangible right to have the Commonwealth's affairs conducted

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[41] *See, e.g.*, United States v. Louderman, 576 F.2d 1383, 1387 n.3, 1388 (9th Cir. 1978) (noting that, although the legislative history of § 1343 is sparse, it appears to be patterned after § 1341, thereby indicating that the two statutes protect against the same types of schemes); United States v. Donahue, 539 F.2d 1131, 1135 (8th Cir. 1976) (noting that § 1343 was patterned after § 1341).

[42] *Compare* 18 U.S.C.A. § 1341, *with id.* § 1343. Both statutes use the language "any scheme or artifice to defraud, or for obtaining money or property" to define the criminal conduct. 18 U.S.C.A. §§ 1341, 1343.

[43] *See Louderman*, 576 F.2d at 1387–88; *Donahue*, 539 F.2d at 1135.

[44] *See Louderman*, 576 F.2d at 1387–88; *Donahue*, 539 F.2d at 1135.

[45] *See Louderman*, 576 F.2d at 1387–88; *Donahue*, 539 F.2d at 1135.

[46] *See* McNally v. United States, 483 U.S. 350, 352 (1987), *superseded by statute*, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (1988); *States*, 488 F.2d at 766; United States v. George, 477 F.2d 508, 512 (7th Cir. 1973) (holding that, in the private context, the government, in order to obtain an honest services conviction, need not show that the victim of the scheme was actually defrauded or suffered a loss); United States v. Faser, 303 F. Supp. 380, 384–85 (E.D. La. 1969) (holding that that the government need not be defrauded of tangible assets such as money or property in order to successfully prosecute an honest services fraud claim).

[47] *See McNally*, 483 U.S. at 352.

honestly.[48] Specifically, a state official instructed a company acting as Kentucky's workers' compensation agent to funnel commission checks to companies owned by the official and the other defendants, in exchange for a continued relationship with the state.[49]

The U.S. Supreme Court reversed the convictions.[50] The Court held that § 1341 and § 1343 were limited to the protection of property rights and did not cover intangible rights such as the right to honest services.[51] In its decision, the Court relied heavily upon the legislative history of the original mail fraud statute.[52] It noted that the phrase added by the 1909 amendment "simply made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property."[53] The Court went on to note that if it were to construe §§ 1341 and 1343 as including honest services fraud, the statutes' outer boundaries would remain ambiguous.[54] As a result, the federal government could possibly become impermissibly involved in setting standards of good government for local and state officials.[55] The Court did, however, invite Congress to speak more clearly regarding whether §§ 1341 and 1343 provided the right to honest services.[56]

D. *Congress Answers the Court*

In response to the *McNally* decision, Congress, in 1988, enacted 18 U.S.C. § 1346.[57] Section 1346 explicitly identifies the intangible right of honest services as within the scope of §§ 1341 and 1343, the mail and wire fraud statutes.[58] In the legislative history of § 1346, Senator Joseph Biden specifically stated that the Congressional intent of the statute was

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[48] *See id.*

[49] *See id.* at 352–53. Interestingly, the Court did not discuss why McNally and his co-defendants were not charged under federal bribery statutes, even though their conduct seemingly violated these statutes as well. *See id.*

[50] *See id.* at 352.

[51] *See id.* at 359–60.

[52] *McNally*, 483 U.S. at 358–59.

[53] *Id.*

[54] *See id.* at 360.

[55] *See id.*

[56] *See id.*

[57] Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (1988) (codified at 18 U.S.C. § 1346 (2000)).

[58] *See* 18 U.S.C. § 1346. The statute indicates that, for the purposes of mail and wire fraud, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." *Id.*

to reinstate the pre-*McNally* case law pertaining to the scope of the mail and wire fraud statutes.[59]

II. The Current Circuit Split

The enactment of 18 U.S.C. § 1346 expressly legitimized mail and wire fraud prosecutions under the honest services rubric.[60] The definition of honest services, however, remains an unsettled issue, particularly as applied to the conduct of public officials.[61] The federal courts of appeals are split with respect to whether a defendant's conduct must violate a state or local law before he or she can be prosecuted federally for defrauding the citizens of their, or government of its, right to a public official's honest services.[62] The Fifth Circuit has held that a violation of state or local law is a necessary prerequisite to a federal honest services fraud prosecution, and the Third Circuit has noted its approval of this position.[63] Meanwhile, other circuits, including the First Circuit, have held that such a violation is not necessary.[64]

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[59] *See* 134 Cong. Rec. S17,360-02 (1988) (statement of Sen. Biden). Senator Biden remarked specifically that, under the amendment, § 1341 and § 1343 will protect any person's intangible right to the honest services of another, including the right of the public to the honest services of public officials. *Id.* Biden also remarked that the intent of the amendment was to reinstate all of the pre-*McNally* case law pertaining to the mail and wire fraud statutes, without change. *Id.*

[60] *See* 18 U.S.C.A. §§ 1341, 1343 (West 2000 & Supp. 2008); 18 U.S.C. § 1346 (2000); 134 Cong. Rec. S17360-02 (1988) (statement of Sen. Biden).

[61] *See* United States v. Murphy, 323 F.3d 102, 117 (3d Cir. 2003) (demonstrating support, in dicta, for an approach requiring a state law limiting principle for honest services fraud); United States v. Panarella, 277 F.3d 678, 692–93 (3d Cir. 2002) (noting that state law, rather than federal common law, offers a better limiting principle of determining when an official's failure to disclose a conflict of interest amounts to honest services fraud); United States v. Sawyer (*Sawyer II*), 239 F.3d 31, 35 (1st Cir. 2001); United States v. Brumley, 116 F.3d 728, 734 (5th Cir. 1997) (holding that, in order for conduct to constitute honest services fraud, the services must be owed under state law); United States v. Sawyer (*Sawyer I*), 85 F.3d 713, 726 (1st Cir. 1996) (holding that a violation of common law may suffice as the basis for honest services fraud); United States v. Bryan, 58 F.3d 933, 940 (4th Cir. 1995) (holding that a scheme to defraud need not violate state law in order to constitute honest services fraud).

[62] *See Murphy*, 323 F.3d at 117; *Panarella*, 277 F.3d at 692–93; *Brumley*, 116 F.3d at 734; *Sawyer I*, 85 F.3d at 726; *Bryan*, 58 F.3d at 940.

[63] *See Murphy*, 323 F.3d at 117; *Panarella*, 277 F.3d at 692–93; *Brumley*, 116 F.3d at 734.

[64] *See* United States v. Woodward, 149 F.3d 46, 62 (1st Cir. 1998); *Sawyer I*, 85 F.3d at 726.

A. United States v. Sawyer *and* United States v. Woodward: *Confusing State Law with Federal Law*

The First Circuit is the most outspoken federal appeals court to have found that conduct of a public official need not violate state or local law to be prosecuted under the federal mail and wire fraud statutes.[65] The court first shed light on this view in its 1996 decision, *United States v. Sawyer*.[66] In *Sawyer*, the defendant was a lobbyist for the John Hancock Mutual Life Insurance Co. ("Hancock").[67] It was his responsibility to persuade Massachusetts state legislators to adopt positions favorable to Hancock's interests in the insurance industry.[68] In order to achieve this goal, he would pay for meals, rounds of golf, and other entertainment for legislators.[69] He used the mails to submit expense reports to Hancock for reimbursement.[70]

A jury found that this conduct was part of a scheme to defraud the citizens and government of Massachusetts of the honest services of their legislators.[71] The defendant was convicted of fifteen counts of honest services mail fraud and nine counts of honest services wire fraud.[72] He appealed his convictions, arguing that the government's failure to prove that he violated Massachusetts' state law was fatal to its case.[73] The First Circuit noted that, in its view, the framework for establishing honest services mail fraud under § 1341 does not require proof of a violation of any state statute.[74] The court reversed Sawyer's convictions, however, because it found that the instructions given to the jury might have allowed the defendant to be convicted on an improper basis.[75]

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[65] *See Woodward*, 149 F.3d at 62; *Sawyer I*, 85 F.3d at 726.

[66] *See Sawyer I*, 85 F.3d at 726.

[67] *See id.* at 720.

[68] *See id.* at 721.

[69] *See id.*

[70] *See id.*

[71] *See Sawyer I*, 85 F.3d at 722.

[72] *See id.*

[73] *See id.* Specifically, Sawyer alleged that, without a state law violation, his conviction "impermissibly involve[d] the federal government in setting standards of good government for local and state officials." *Id.*

[74] *See id.* at 733 (citing United States v. Silvano, 812 F.2d 754, 758 (1st Cir. 1987)).

[75] *See id.* at 740–42. Specifically, the court held that the jury might have improperly convicted Sawyer because it was not instructed that his conduct did not constitute mail or wire fraud unless the government could also prove it was his intent to defraud the citizens, the government, or both. *See id.* The court focused its reversal primarily upon his convictions under the Travel Act but held that the mail and wire fraud counts were to be retried as well. *See id.*

In holding that a violation of a common law fiduciary duty is sufficient for a prosecution of honest services fraud, the First Circuit cautioned that, in its opinion, the incorporation of a discussion of a state law violation may cause complications in a trial.[76] It noted that an overemphasis on what state law forbids may lead a jury to believe that state law, rather than federal, defines the crime.[77] In the court's opinion, this would open the door to the possibility that defendants would be impermissibly convicted of a state law violation when they are in fact charged with a federal crime.[78]

The First Circuit reiterated its approach in its 1998 decision in *United States v. Woodward*.[79] In *Woodward*, the defendant was convicted of four counts of mail and wire fraud in connection with his failure to disclose potential conflicts of interest in his capacity as a Massachusetts state legislator.[80] In ruling on his appeal, the First Circuit once again noted that a public official's duty to disclose potential conflicts of interest can come not only from specific state disclosure statutes, but also from general common law fiduciary duties that such officials owe to the public.[81] Although the defendant's violation of a Massachusetts disclosure statute saved the *Woodward* court from having to decide whether a violation of the defendant's common law duties would suffice as a basis for a federal prosecution for honest services fraud, the court intimated that, if pressed, it would likely find in the affirmative.[82]

In the wake of *Woodward*, the DOJ decided to prosecute Sawyer again.[83] In the second prosecution, Sawyer pled guilty to one charge of

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[76] *See Sawyer I*, 85 F.3d at 726.

[77] *See id.*

[78] *See id.* It is difficult to imagine such a possibility given that a state law violation appears to be a satisfactory predicate to mail or wire fraud even in those circuits that do not require the defendant's conduct to violate state or local law in order to constitute the federal offense. *See id.*

[79] *See Woodward*, 149 F.3d at 62.

[80] *See id.* at 51–54.

[81] *See id.* at 62 (noting that "separate and apart from the state statute '[t]he obligation to disclose material information inheres in the legislator's general fiduciary duty to the public.'" (quoting *Sawyer I*, 85 F.3d at 733 n.17)).

[82] *See id.* at 57–62. Specifically, the court found that a reasonable jury could have inferred from the circumstances surrounding the gratuities accepted by Woodward that the fraudulent intent element of § 1341 was met, without mention of a state law violation. *Id.* Although the fact that Woodward's conduct violated a Massachusetts state statute saved the court from having to decide if this evidence alone would suffice to support a finding that the intent element was met, the court's ruling that it at least supported such a finding was evidence that, when faced with this question, it would likely find in the affirmative. *See id.*

[83] *See Sawyer II*, 239 F.3d at 35–36.

honest services mail fraud.[84] After he completed his probation and paid his fines, Sawyer petitioned the First Circuit for a writ of error *coram nobis*.[85] The writ of *coram nobis* is a petition in equity to reverse a judgment against a defendant who has already served his sentence.[86] The First Circuit rejected Sawyer's *coram nobis* petition.[87] It began by noting that the state must prove the defendant violated a state law only if the indictment suggests that the state will use such a violation as the sole means of proving his scheme or artifice to defraud.[88] The court went on to find that Sawyer's indictment was not predicated upon his violation of Massachusetts' state law, and, consequently, that the government's failure to show such a violation was not fatal to the government's case.[89]

B. *State Formed Parameters: The Third and Fifth Circuit Approach*

1. *United States v. Brumley*: The Fifth Circuit Approach

The position taken by the First Circuit in *Sawyer* directly conflicts with the standard established by the Fifth Circuit in its landmark 1997 decision, *United States v. Brumley*.[90] The defendant in that case, Michael Bryant Brumley, was convicted of three counts of wire fraud in violation of § 1343.[91] Brumley worked for the Texas Workers' Compensation Commission.[92] He was responsible for identifying attorneys and insurance carriers who had failed to follow state rules and regulations for the industry.[93] Brumley was alleged to have used these relationships to secure more than $100,000 in unpaid "loans" from eleven lawyers with whom he dealt.[94] The money from these loans was transferred to Brumley via interstate wire, thus bringing the offense within the jurisdiction of § 1343.[95]

In his appeal to the Fifth Circuit, Brumley argued that §§ 1341 and 1343 were unconstitutional.[96] He argued that when Congress enacted

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[84] *See id.*
[85] *See id.* at 36.
[86] *See id.* at 37–38.
[87] *See id.* at 38.
[88] *See Sawyer II*, 239 F.3d at 42.
[89] *See id.* at 43.
[90] *See Brumley*, 116 F.3d at 731; *Sawyer I*, 85 F.3d at 726.
[91] *See Brumley*, 116 F.3d at 731.
[92] *See id.* at 730–31.
[93] *See id.* at 731.
[94] *See id.*
[95] *See id.*
[96] *See Brumley*, 116 F.3d at 731.

these statutes, it failed to state its purpose with the necessary clarity demanded for federal regulation of state affairs.[97] The Fifth Circuit conceded that, by passing § 1346, Congress overturned the U.S. Supreme Court's decision in *McNally* and explicitly expanded the scope of the mail and wire fraud statutes so as to recognize the right to honest services.[98] Nevertheless, the question of whether these services must be provided under state law remained.[99]

In deciding this issue, the court found nothing in § 1346 to support the idea that Congress intended to give the federal government the right to impose a federal vision of appropriate ethical standards on states.[100] The court, therefore, found that, in order for there to be a violation of either § 1341 or § 1343 under the honest services rubric, the services withheld or deprived must be owed under state law.[101] The court explained that, to hold otherwise "would sorely tax separation of powers and erode our federalist structure."[102]

2. *United States v. Panarella* and *United States v. Murphy*: Third Circuit Endorsement of the Fifth Circuit Approach

In its 2002 decision in *United States v. Panarella*, the Third Circuit joined the Fifth Circuit in holding that a violation of either § 1341 or § 1343 under the honest services rubric of § 1346 requires a violation of either state or local law.[103] In *Panarella*, the defendant appealed a conviction of being an accessory after the fact to a wire fraud scheme in violation of §§ 1343 and 1346.[104] The government alleged that the scheme, undertaken with F. Joseph Loeper, Jr., a Pennsylvania state senator, deprived the citizens of Pennsylvania of the senator's honest services as a legislator.[105]

The defendant ran a tax collection business that entered into contracts with various Pennsylvania state and local bodies to collect taxes owed to them under state and local laws.[106] His business depended heav-

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[97] *See id.*

[98] *See id.* at 733.

[99] *See id.* at 733–34.

[100] *See id.* at 734.

[101] *See Brumley*, 116 F.3d at 734–35. The Fifth Circuit did not differentiate between state civil or criminal law, suggesting that, in its view, a violation of either would suffice as a predicate for honest services mail or wire fraud. *Id.*

[102] *See id.* at 734.

[103] *See* 277 F.3d at 692–93; *see also Murphy*, 323 F.3d at 117.

[104] *See* 277 F.3d at 692–93.

[105] *See id.* at 679.

[106] *See id.* at 681.

ily upon its ability to collect Pennsylvania's business privilege tax from nonresident businesses.[107] Beginning in 1993, the defendant hired Senator Loeper, the majority leader of the Pennsylvania Senate, as a business consultant.[108] Senator Loeper helped Panarella's business in a variety of ways, but the conduct that led to the wire fraud charges was his speaking and voting against proposed state legislation that would have restricted the enforcement of the business privilege tax and would have harmed Panarella's business interests.[109] During this period, Senator Loeper also failed to disclose his income from Panarella as required by Pennsylvania state law.[110]

In his appeal, Panarella contended that the facts did not establish that Senator Loeper had committed honest services fraud.[111] Thus, he argued that he could not be an accomplice after the fact.[112] He urged the Third Circuit to adopt a limiting principle established by the Seventh Circuit in its 1998 decision, *United States v. Bloom*.[113] In *Bloom*, the Seventh Circuit held that an employee deprives his employer of his honest services only if he misuses his position for personal gain.[114] Panarella argued that Senator Loeper was an employee of the public and that, because there was no allegation that Senator Loeper sold his vote or that his financial relationship with Panarella influenced his decision to speak and vote against the proposed legislation, he had not misused his position for personal gain.[115] Thus, according to Panarella, under the *Bloom* approach, the scheme could not be prosecuted as fraud under § 1343.[116]

The Third Circuit declined to adopt the Seventh Circuit's limiting principle, noting that it found it too ambiguous in the public honest services context.[117] Instead, the Third Circuit decided that "state law offers a better limiting principle of determining when an official's failure to disclose a conflict of interest amounts to honest services fraud."[118] The court restricted its use of state law parameters for public

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[107] *See id.*
[108] *See id.*
[109] *See Panarella*, 277 F.3d at 681.
[110] *See id.*
[111] *See id.* at 679.
[112] *See id.*
[113] *See id.* at 691; United States v. Bloom, 149 F.3d 649, 656–57 (7th Cir. 1998).
[114] *See* 149 F.3d at 656–57.
[115] *See id.*
[116] *See Panarella*, 277 F.3d at 691; *Bloom*, 149 F.3d at 656–57.
[117] *See Panarella*, 277 F.3d at 692–93.
[118] *See id.*

honest services fraud to cases involving conflicts of interest.[119] The court noted that the facts in *Panarella* did not require it to decide whether state law provided the proper boundaries in all public honest services fraud cases.[120]

The next year, however, in its 2003 decision in *United States v. Murphy*, the Third Circuit intimated that, should it be forced to make such a ruling in the future, it would likely adopt the broad approach announced by the Fifth Circuit in *Brumley*.[121] In *Murphy*, Peter A. Murphy, the Chairman of New Jersey's Passaic County Republican Party, was found to have used his influence on county officials to orchestrate a contracts-for-payments scheme in violation of §§ 1341 and 1346.[122] Murphy used his political influence to ensure that the county freeholders awarded certain municipal contracts to a corporation that would siphon off money received from these contracts to a panel of four individuals whom Murphy had chosen.[123] These individuals performed no useful services in return for the payments.[124]

On appeal, the Third Circuit reversed Murphy's conviction.[125] It decided that the government had failed to identify any clearly established fiduciary relationship or legal duty in either federal or state law between Murphy and Passaic County or its citizens.[126] The government asserted that a state bribery statute created such a fiduciary duty, but the court rejected this proposition.[127] It explained that, under such a reading, all criminal activity would breach a duty to the public not to break the law and could then form the basis of a mail or wire fraud conviction.[128] The court went on to note in dicta that it endorsed the decisions of other courts of appeals that interpreted § 1346 more stringently and required a state law limiting principle for honest services fraud.[129] Thus, although the Third Circuit did not find that the bribery

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[119] *See id.* at 692.

[120] *See id.* at 691–92.

[121] *See Murphy*, 323 F.3d at 116.

[122] *See id.* at 104.

[123] *See id.* at 106–08.

[124] *See id.* at 107.

[125] *Id.* at 117.

[126] *See Murphy*, 323 F.3d at 117.

[127] *See id.*

[128] *See id.* In essence, the Third Circuit was rejecting what it perceived to be a potential bootstrapping problem. *See id.* The court felt that honest services fraud would be an impermissibly broad doctrine if *any* violation of state or law could be used by the government to establish a breach of the individual's fiduciary duty to the public, which includes the duty not to violate the law in the first place. *See id.*

[129] *See id.* at 116.

statute created a predicate fiduciary duty for an honest services prosecution, the court endorsed the process of relying on state law to set the parameters.[130]

III. The Preference for Federal Prosecution of Corruption

In recent years, the U.S. Supreme Court has expressed a general preference for limiting the scope of the federal government's regulatory power.[131] There are certain subjects, however, that the Court has excepted from this preference.[132] Regulation of political corruption is one such subject.[133]

Two decisions from the Supreme Court, *McConnell v. Federal Election Commission* and *Sabri v. United States* illustrate this exception.[134] *McConnell* involved a First Amendment challenge to the Bipartisan Campaign Finance Reform Act of 2002 ("BCFRA").[135] In *Sabri*, a private developer accused of offering kickbacks to a city official appealed his conviction under a federal bribery statute.[136]

A. *Limiting Campaign Contributions Not Unconstitutional*

In *McConnell*, the plaintiff challenged BCFRA on a number of grounds.[137] One claim was that restricting campaign contributions at the federal level is an impermissible restriction of freedom of speech in vio-

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[130] *See id.* at 117.

[131] *See* United States v. Morrison, 529 U.S. 598, 617–18 (2000) (holding that Congress may not regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce); Printz v. United States, 521 U.S. 898, 933 (1997) (holding that the federal government may not compel the states to enact or to administer a federal regulatory program); United States v. Lopez, 514 U.S. 549, 551 (1995) (holding that, because its connection with interstate commerce was too attenuated, a federal law criminalizing the knowing possession a firearm in a school district exceeded Congress's authority under the Commerce Clause).

[132] *See* Sabri v. United States, 541 U.S. 600, 606 (2004); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 136 (2003); *see also* George D. Brown, *Should Federalism Shield Corruption?—Mail Fraud, State Law, and Post-*Lopez *Analysis*, 82 Cornell L. Rev. 225, 252–53 (1997). Professor Brown notes that the Court's restriction of the scope of Congress's regulatory power has resulted primarily from challenges to laws promulgated under the authority of the Commerce Clause, but that because the Court found that it is a stretch to go from commerce to regulating guns near schools, they might also find Congress's espoused authority for other statutes to be too attenuated, especially in the realm of regulating corruption. *See* Brown, *supra*, at 252–53.

[133] *See Sabri*, 541 U.S. at 606; *McConnell*, 540 U.S. at 136.

[134] *See Sabri*, 541 U.S. at 606; *McConnell*, 540 U.S. at 136.

[135] *See* 540 U.S. at 114.

[136] *See* 541 U.S. at 606.

[137] *See* 540 U.S. at 114.

lation of the First Amendment.[138] Although the Supreme Court agreed that direct limits on campaign contributions had a "marginal impact on political speech," it held that they did not violate the First Amendment.[139] The Court explained that the burdens that such limits place upon First Amendment freedoms must be weighed against the government's interest in preserving its legitimacy against corruption.[140] Thus, the Court cautioned that, in reviewing Congress's decision to enact such limits, "there is no place for a strong presumption against constitutionality."[141] This portion of the *McConnell* decision represents an exception to the Court's recent preference for restricting Congress's authority when the goal of the regulation is to limit political corruption.[142]

The *McConnell* plaintiffs also claimed that parts of the new law violated the principles of federalism by impairing the authority of the states to regulate their own elections.[143] The Court dismissed this argument, however, noting that, unlike previously stricken regulatory schemes, the BCFRA did not compel state governmental action.[144] The Court decided that the BCFRA simply regulated the behavior of private parties and did not preempt the states' ability to enact further regulations.[145]

B. *Federal Criminalization of Bribery of Local Officials Whose Entities Receive Federal Funding Not Unconstitutional*

In *Sabri*, the defendant appealed his conviction under 18 U.S.C. § 666.[146] Section 666 criminalizes the bribery of state, local, and tribal officials of entities that receive at least $10,000 in federal funds.[147] Sabri, a Minneapolis real estate developer, had offered three separate kickbacks to a city council member in exchange for securing certain regulatory approvals and grants for his business ventures.[148] In his appeal, Sabri argued that § 666 was unconstitutional.[149]

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[138] *See id.* at 138–39.

[139] *See id.* at 140.

[140] *See id.* at 136.

[141] *See id.*

[142] *See* 540 U.S. at 136.

[143] *See id.* at 186. The plaintiffs alleged that, because the law applies to state election candidates, it compels states to implement a federal regulatory scheme in violation of the Tenth Amendment. *See id.*

[144] *See id.*

[145] *See id.*

[146] *See* 541 U.S. at 602.

[147] *See* 18 U.S.C. § 666 (2000); *Sabri*, 541 U.S. at 602.

[148] *See Sabri*, 541 U.S. at 602–03.

[149] *See id.* at 602.

Sabri claimed that § 666 was facially unconstitutional because it failed to establish a nexus between the bribe or kickback and the federal funds received by the public entity.[150] In rejecting this argument, the Supreme Court decided that Congress had the authority to enact laws like § 666 to ensure that the funds it appropriates are in fact spent for the general welfare.[151] This line of reasoning covers prosecutions where the bribe or kickback is skimmed directly from federal funds or is used to influence the spending of federal grant money.[152] The Court went further and held that "corruption does not have to be that limited to affect the federal interest."[153] In its discussion of this holding, the Court explained that the receipt of federal funds establishes a sufficient federal interest in the regulation of potential corruption of the state or local entities' affairs.[154] Therefore, the Court held, federal funds need not be affected for a violation of § 666 to accrue.[155] This holding is another example of the Court's willingness to except corruption from its recent pattern of limiting the scope of Congress's regulatory power.[156]

IV. State Incapacity: Specific Authority for the Federal Prosecution of Sub-National Honest Services Mail and Wire Fraud

In evaluating the current circuit split over the federal prosecution of honest services mail and wire fraud in connection with state and local officials, a threshold question is whether the federal government ought to be prosecuting corruption at the sub-national level at all.[157] If

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[150] *See id.* at 604.

[151] *See id.* at 605.

[152] *See id.* at 605–06.

[153] *See Sabri*, 541 U.S. at 606.

[154] *See id.*

[155] *See id.*

[156] *See id.*

[157] The pervasive nature of the academic discussion of this issue suggests that it is a threshold question that must be answered before further analysis can be undertaken. *See, e.g.*, Andrew T. Baxter, *Federal Discretion in the Prosecution of Local Political Corruption*, 10 Pepp. L. Rev. 321, 334–42 (1983) (detailing the concerns about federal prosecutions that arise from the theories of separation of powers and federalism); Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 Hastings L.J. 979, 983–88 (1995) (discussing the effects that expanding federal criminal jurisdiction has on the workload of federal courts); George D. Brown, *New Federalism's Unanswered Question: Who Should Prosecute State and Local Officials for Corruption?*, 60 Wash. & Lee L. Rev. 417, 440–48 (2003) (outlining much of the academic debate surrounding this question, both before and after the Court's espousal of "new federalism"); Joshua A. Kobrin, *Betraying Honest Services: Theories of Trust and Betrayal Applied to the Mail Fraud Statute*

it should, the next question is whether the rationale for allowing such prosecutions generally can be persuasively used to argue for federal prosecution of honest services mail and wire fraud in connection with sub-national public officials.[158] Assuming that such prosecutions can be justified, the final question is: What limits, if any, are needed in order to protect the states' autonomy within the federalist structure of the U.S. Constitution?[159]

To answer the threshold question of whether the federal government ought to regulate state and local corruption generally, one must look first to recent Supreme Court decisions.[160] *McConnell v. Federal Election Commission* and *Sabri v. United States* both demonstrate that the Supreme Court has been willing to except the realm of political corruption from its preference for a limited federal regulatory power.[161] In each case, the Court found that a federal statute dealing with political corruption withstood a challenge relating to the proper scope of the federal government's regulatory power.[162] Although these cases illustrate the Court's willingness to expand the scope of federal regulatory power in this realm, they do not provide persuasive authority for federal prosecution of sub-national public officials for honest services mail and wire fraud.[163]

In *Sabri*, Justice Souter, writing for the majority, relied on the General Welfare Clause and the Necessary and Proper Clause of Article I, section 8 of the Constitution as authority for a federal statute that criminalizes the bribery of state, local, and tribal officials of entities that receive at least $10,000 in federal funds.[164] The parallels between honest services mail and wire fraud and this federal bribery statute, however, are weak.[165] Although Congress has jurisdiction over the mails and

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and § 1346, 61 N.Y.U. ANN. SURV. AM. L. 779, 782–83 (2006) (noting that federalism has spurred scholarly concern regarding federal prosecutions of state and local officials); Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367, 376–81 (1989) (discussing the rationales for federal involvement in prosecuting state and local corruption); Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch over Us*, 31 HARV. J. ON LEGIS. 153, 171–78 (1994) (discussing federalism concerns regarding the intangible rights theory of honest services fraud).

[158] *See infra* notes 163–174 and accompanying text.

[159] *See infra* notes 210–236 and accompanying text.

[160] *See* Sabri v. United States, 541 U.S. 600, 606 (2004); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 136 (2003).

[161] *See Sabri*, 541 U.S. at 606; *McConnell*, 540 U.S. at 136.

[162] *See Sabri*, 541 U.S. at 606; *McConnell*, 540 U.S. at 136.

[163] *See Sabri*, 541 U.S. at 606; *McConnell*, 540 U.S. at 136.

[164] *See* 541 U.S. at 605.

[165] *See id.*

wires, it would be difficult to establish that fraud schemes utilizing the mails and wires interfere with the smooth operation of such mediums in the same way similar schemes may prevent sub-national governmental entities from using federally appropriated funds for the general welfare.[166]

Justice Stevens advanced this argument in his dissent in *McNally v. United States*.[167] According to Justice Stevens, the mail fraud statute was enacted to protect the United States mails by not allowing them to be used as instruments of crime.[168] Though this may have been Congress's intent at the time the statute was enacted, Stevens went on to note his approval of the expansion of the interpretation through the years to the point that its jurisdictional hook is now used as a means by which Congress can regulate activities it might not otherwise be able to reach.[169]

In *McConnell*, the Court upheld the constitutionality of a federal statute limiting campaign contributions.[170] In so doing, the Court found that, because the law was properly tailored to effectuate the federal interest in good government, it was permissible that it might result in some restrictions on First Amendment rights.[171] The parallels between the honest services mail and wire fraud statutes and the Bipartisan Campaign Finance Reform Act of 2002 ("BCFRA") in *McConnell* are also weak.[172] Although both paradigms owe their existence to the goal of good government, BCFRA's ability to withstand a First Amendment challenge provides little insight into how federal prosecution of sub-national public officials for honest services mail and wire fraud might overcome federalism-based challenges.[173] Therefore, although both *Sabri* and *McConnell* are illustrative of the Court's general willingness to grant the federal government broad power to deal with political cor-

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[166] *See id.*

[167] *See* 483 U.S. 350, 366 (1987) (Stevens, J., dissenting), *superseded by statute*, Act of Nov. 18, 1988, Pub. L. No. 100-690, 102 Stat. 4508.

[168] *See id.*

[169] *See* Brown, *supra* note 157, at 253. Professor Brown notes that the postal power found in Article I, Section 8 "contains the seeds of a mini-national police power over a broad range of activities normally subject to state regulation." *Id.* Thus, although federal prosecution of state and local officials under 18 U.S.C. § 666 may be justified because of a clearly elucidated federal interest in overseeing entities that receive federal funds, federal prosecutions of state and local officials under §§ 1341, 1343, and 1346 struggle to utilize the same rationale because the espoused federal interest is much more attenuated. *See id.*

[170] *See* 540 U.S. at 186.

[171] *See id.* at 136–37.

[172] *See id.*

[173] *See id.*

ruption, the reasoning of the two cases fails to account for the existence of federal honest services mail and wire fraud prosecutions of subnational public officials.[174]

A. *The Incapacity Theory*

A more persuasive argument for the need for federal honest services mail and wire fraud prosecutions of state or local public officials is that the unique nature of political corruption inhibits the states' ability to deal with it internally.[175] This "incapacity to act" theory is typically advanced as an argument in favor of federal intervention in issues that create collective action problems for the states.[176] These issues typically involve business regulation or the distribution of social benefits.[177] Proponents of the theory assert that a state may choose to regulate businesses leniently or not regulate them at all, out of fear that they will lose business to other states with more lax regulations.[178] Likewise, a state may choose not to give certain benefits to disadvantaged groups in order to avoid attracting more of those residents to their borders.[179]

The states' inability to regulate their own political corruption, however, does not arise from such competitive forces.[180] Rather, it is the very nature of public corruption that prevents states from effectively preventing it.[181] Public corruption erodes government, and, because law enforcement bodies are generally part of the government, they too

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[174] *See Sabri*, 541 U.S. at 606; *McConnell*, 540 U.S. at 186.

[175] *See* Baxter, *supra* note 157, at 339 ("If state and local corruption causes the breakdown of local law enforcement, the case for federal intervention is strong."); Brown, *supra* note 157, at 492 n.608 (noting that some scholars have called for federal involvement in state criminal law in areas in which "[t]he national government has a distinct advantage as compared to state criminal justice systems in detecting, prosecuting, or punishing a particular behavior"); *see also* Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1077–81 (1995) (explaining Professor Little's theory that there exists a rebuttable presumption against federal intervention in state criminal affairs that may be overcome by a demonstration of the state and local authorities' failure to adequately deal with the conduct).

[176] *Cf.* Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1212 (1977) (noting that individual states may rationally decline to adopt, unilaterally, high environmental standards that inhibit economic development out of fear that the benefits of a cleaner environment will be outweighed by the economic losses that will result from the movement of businesses to other states with lower standards).

[177] *See id.*

[178] *See id.*

[179] *See* PAUL E. PETERSON, THE PRICE OF FEDERALISM 121–26 (1995).

[180] *See* Brown, *supra* note 157, at 492 n.608.

[181] *See infra* notes 196–206 and accompanying text.

are eroded by the corruption and therefore cannot act to curb it.[182] This discrepancy, however, has not prevented many legal scholars from legitimizing federal regulation of state and local political corruption based upon the states' incapacity to act.[183]

The Supreme Court has accepted the "incapacity to act" argument as a rebuttal to attacks against other broad federal criminal statutes based upon federalism concerns.[184] For example, the Court accepted this line of reasoning in two separate cases, *Perrin v. United States* and *United States v. Turkette*.[185] In *Perrin*, the defendant invoked federalism in asking the Court to narrowly define bribery under the Travel Act.[186] Similarly, in *Turkette*, the defendant asked for a narrow definition of "enterprise" under the federal Racketeer Influenced and Corrupt Organizations Act (the "RICO" Act).[187] In each case, the defendant argued that a broad interpretation of the contested term would upset the federal-state law enforcement balance.[188] In each case, however, the Court accepted state inadequacy as the proper justification for broad federal criminal statutes—and as a satisfactory rebuttal to federalism-based arguments against them.[189]

B. *Operation Greylord: The Incapacity Theory in Practice*

The "incapacity to act" theory provides a persuasive rationale for the federal prosecution of sub-national public officials for honest services mail and wire fraud.[190] The difficulty with accepting this theory on its face, however, is that state inaction may not be indicative of an inability to act.[191] Rather, it might be the case that states accept certain behavior from their public officials and thus *choose* not to prosecute

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[182] *See* Hon. Harold Baer, Jr., *The Mollen Commission and Beyond*, 40 N.Y.L. SCH. L. REV. 5, 5–11 (1995) (expressing frustration with respect to the possibility of effectively eradicating police corruption in New York).

[183] *See* Brown, *supra* note 157, at 492 n.608.

[184] *See* United States v. Turkette, 452 U.S. 576, 579–80 (1981); Perrin v. United States, 444 U.S. 37, 49–50 (1979).

[185] *See Turkette*, 452 U.S. at 579–80; *Perrin*, 444 U.S. at 49–50; Brown, *supra* note 157, at 494–95.

[186] *See* 18 U.S.C. § 1952 (2000 & Supp. V 2005); *Perrin*, 444 U.S. at 49–50.

[187] *See* 18 U.S.C.A. § 1961 (West 2000 & Supp. 2008); *Turkette*, 452 U.S. at 579–80.

[188] *See Turkette*, 452 U.S. at 579–80; *Perrin*, 444 U.S. at 49–50.

[189] *See Turkette*, 452 U.S. at 579–80; *Perrin*, 444 U.S. at 49–50.

[190] *See supra* notes 175–189 and accompanying text.

[191] *See* Brown, *supra* note 157, at 493–95 (noting that Professor Little's theory requires actual proof of state inadequacy in order to rebut the presumption against federal intervention and that such proof is very difficult to obtain).

these officials for corruption.[192] If this is the case, then any federal prosecution would represent a severe restriction of state autonomy within the federalist structure.[193] The states cannot be said to be sovereign entities if the federal government is allowed to fully direct their public policy choices.[194]

There is, however, strong historical evidence that suggests that it is more likely that states are unable, not unwilling, to deal with internal public corruption.[195] A prime example is Operation Greylord.[196] Operation Greylord was the code name for an investigation into judicial corruption in Cook County, Illinois, in the 1980s.[197] The investigation was conducted jointly by the FBI and the IRS.[198] It resulted in the indictment of seventeen judges, forty-eight lawyers, eight policemen, ten deputy sheriffs, eight court officials, and one state legislator on varying charges of racketeering; bribery; and tax, mail, and wire fraud.[199]

Brocton Lockwood, a local judge who rotated through Cook County at the time, blew the whistle for Operation Greylord.[200] Lockwood considered the idea of pursuing the prosecution of the corruption he observed in state or local court.[201] In the end, however, he determined that the judicial nature of the corruption would have made it difficult to secure successful prosecutions and might have jeopardized

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[192] *See id.*

[193] *Cf.* Nat'l Conference of State Legislatures, *Ethics: Nepotism Restrictions for State Legislators* (Dec. 31, 2007), http://www.ncsl.org/programs/ethics/e_nepotism.htm. As of December 31, 2006, state laws varied widely as to the restrictions they place on their legislators with respect to nepotism. *See id.* If a state law violation is not a predicate for honest services, differences amongst the states in such areas would be ignored in favor of a federal policy. *See id.*

[194] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 305–07 (3d ed. 2002). Professor Chemerinsky notes that two of the most frequently invoked benefits of federalism are its protection of state governments from federal tyranny and state governments' more responsive nature with respect to public needs and concerns. *See id.*

[195] *See* BROCTON LOCKWOOD & HARLAN H. MENDENHALL, OPERATION GREYLORD: BROCTON LOCKWOOD'S STORY 36–37 (1989). A special thanks to R. Michael Cassidy, Associate Dean for Academic Affairs and Professor of Law at Boston College Law School for pointing out this excellent illustration of the state incapacity theory.

[196] *See id.*

[197] *See id.* at 57. Specifically, the investigation uncovered a system in which Chicago-area judges were fixing cases in exchange for monetary payments facilitated through prominent community members. *See* Press Release, Federal Bureau of Investigation, Investigations of Public Corruption: Rooting Crookedness Out of Government (Mar. 15, 2004), http://www.fbi.gov/page2/march04/greylord031504.htm.

[198] *See* Federal Bureau of Investigation, *supra* note 197.

[199] *See id.*

[200] *See* LOCKWOOD & MENDENHALL, *supra* note 195, at 36–37, 40–41.

[201] *See id.* at 36–37 (outlining Lockwood's intended plan to alert Illinois officials about the corruption he witnessed in Cook County).

his career on the bench.[202] Therefore, he approached the FBI with the information, which led to federal, rather than state or local, prosecutions for those associated with the corruption in Cook County.[203]

Lockwood's discussion of his motivation for involving federal—rather than state—law enforcement, read along with a series of articles written by Mike Royko of the *Chicago Tribune*, indicate that at least some Illinois residents and public officials sought to regulate public corruption in the state but felt that the state mechanisms were not up to the task.[204] Thus, Operation Greylord is a powerful example of a state's incapacity to act with respect to regulating its own public corruption.[205] As such, it provides further and more concrete backing for the argument that the states' incapacity to act provides a persuasive justification for federal prosecution of state and local honest services mail and wire fraud.[206]

This is not to suggest, however, that the federal government ought to be given carte blanch with respect to such prosecutions.[207] Sensible limits must be placed on the federal government's authority in order to

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[202] *See id.* Lockwood notes that, in considering his option to send a letter to state officials, he "certainly didn't expect to change anything within the Chicago system." *Id.* In his view, "the problems were too deeply entrenched." *Id.* He notes further that sending that letter might have been risky as far as his future was concerned because he was fearful of losing his job. *See id.*

[203] *See id.* at 40–41.

[204] *See id.* at 36–37; *see also* Mike Royko, *An Unqualified Bit of Nonesense*, CHI. TRIB., Nov. 4, 1986, at C3 [hereinafter Royko, *Nonsense*] (referencing a lawyer who, before the Greylord investigation became public, urged voters in upcoming judicial elections not to be swayed by negative stories about certain judges that had appeared in the media, but instead to trust the Chicago Bar Association, which had rated many of these judges as "qualified"; many of these judges were later convicted in connection with the Greylord investigation); Mike Royko, *Greylord Mud Splatters 'Em All*, CHI. TRIB., June 4, 1984, at A3 [hereinafter Royko, *Greylord*] (noting that the commentator felt no sympathy for those "honest" judges and lawyers whose reputations were tarnished by the Greylord scandal because "they knew about the corruption and did nothing about it" and, further, that one prosecutor had told him, off the record, that he would be crazy to blow the whistle on the corruption because it would ruin his chances of becoming a judge). These articles demonstrate not only the public awareness of the judicial corruption in Cook County in the 1980s, but also the general public sentiment that such corruption was unacceptable. *See* Royko, *Nonsense*, *supra*; Royko, *Greylord*, *supra*. Thus, read together with Lockwood's account of his whistle-blowing activities, these articles support the conclusion that not only do states generally not approve of their internal public corruption, but that they are also particularly ill-equipped to deal with such problems internally. *See* LOCKWOOD & MENDENHALL, *supra* note 195, at 36–37, 40–41; Royko, *Nonesense*, *supra*; Royko, *Greylord*, *supra*. According to Professor Little, such a demonstrated failure on the part of the states is a necessary perquisite to a state incapacity justification for federal intervention in state criminal affairs. *See* Little, *supra* note 175, at 1077–81.

[205] *See* LOCKWOOD & MENDENHALL, *supra* note 195, at 36–37, 40–41.

[206] *See id.*

[207] *See supra* note 157 and accompanying text.

protect the states' autonomy within the federalist structure.[208] This is where the Third and Fifth Circuits' approach to honest services mail and wire fraud comes into play.[209]

V. The Third and Fifth Circuits' Approach: Sensible Limits on Federal Power

Although the "incapacity to act" theory provides a justification for federal prosecution of honest services mail and wire fraud in connection with state and local public corruption, it does not answer the question of what limits should be placed on the federal government's authority within this realm.[210] Such limits are necessary because, without them, state sovereignty is threatened.[211] After all, if the federal government is permitted to both define "honest services" and prosecute individuals in connection with state and local public officials not providing such "honest services," the federal government is impermissibly allowed to direct state public policy.[212]

The prosecution in Mississippi of Paul Minor is a good illustration of such threats to state autonomy.[213] Minor was prosecuted in federal district court in Mississippi for honest services mail and wire fraud.[214] He was found to have used the mails and wires to help guarantee a loan that allowed a Mississippi Supreme Court justice, in front

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[208] *See supra* note 157 and accompanying text.

[209] *See* United States v. Murphy, 323 F.3d 102, 117 (3d Cir. 2003); United States v. Panarella, 277 F.3d 678, 691–92 (3d Cir. 2002); United States v. Brumley, 116 F.3d 728, 734 (5th Cir. 1997).

[210] *See supra* notes 157–209 and accompanying text.

[211] *See* Moohr, *supra* note 157, at 172 ("An examination of the benefits of a federalist system leads to the conclusion that the application of the intangible rights doctrine to state and local political corruption diminishes those benefits and damages the federalist system."). Ultimately, Moohr concludes that the incorporation of intangible rights makes the mail fraud statute void for vagueness. *See id.* at 153. Although this Note stops well short of Moohr's conclusion, her discussion of the concerns that honest services mail fraud poses to federalism is indicative of the need to limit the scope of the federal government's power in this realm. *See id*; *see also* Baxter, *supra* note 157, at 336–37 (noting that the broad discretion to prosecute state and local corruption that federal prosecutors enjoy "may result in a radical alteration of the balance of law enforcement responsibility between the states and the federal government, contrary to constitutional notions of federalism").

[212] *See* Baxter, *supra* note 157, at 336–37; Moohr, *supra* note 157, at 175–76 ("The power federal prosecutors exercise over the political affairs of states and cities [within this framework] is particularly troublesome . . . [because] states traditionally have the 'principal responsibility for defining and prosecuting crimes.'" (quoting Abbate v. United States, 359 U.S. 187, 195 (1959))).

[213] *See* Longstreth, *supra* note 1, at 150; Horton, *supra* note 6.

[214] *See* Third Superceding Indictment, *supra* note 18, at 3–4.

of whom Minor practiced, to secure financing for his re-election campaign.[215] The U.S. Department of Justice ("DOJ") successfully alleged that this scheme deprived the citizens and government of Mississippi of the honest services of the judge.[216]

Had there been a Mississippi state law criminalizing Minor's conduct, it would have indicated that the citizens and government of the state felt that such conduct defrauded them of their right to the honest services of their public officials.[217] This, in conjunction with the state "incapacity to act" theory, would have indicated a need for Minor's prosecution by the federal government.[218] There is, however, no Mississippi state law that prohibits an attorney like Minor from assisting a judge before whom he practices in this manner.[219] Nothing indicates that the citizens and or government of Mississippi feel that such actions defraud them of their right to the honest services of their public officials.[220] Thus, Minor was prosecuted under a federal common law theory of good government.[221] This amounts, in essence, to the federal government not only enacting a Mississippi criminal statute, but also using its own discretion in deciding against whom the statute will be enforced.[222]

Minor's prosecution demonstrates that, when the federal government is permitted to both define "honest services" within states and localities and prosecute individuals who do not provide such "honest services," the states are cut out of the process of crafting their own standards of ethics for their public officials.[223] In Minor's case, the federal government essentially determined what the citizens of Mississippi should demand from their public officials without consult-

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[215] *See* Longstreth, *supra* note 1, at 153; Horton, *supra* note 6; Letter from Paul Minor, *supra* note 9 (explaining that Minor guaranteed the loan in an attempt to help offset money contributed to Diaz's opponent by the U.S. Chamber of Commerce, which had identified Diaz as "anti-business").

[216] *See* Longstreth, *supra* note 1, at 150, 152; Horton, *supra* note 6.

[217] *See* Longstreth, *supra* note 1, at 150, 152; Horton, *supra* note 6.

[218] *See* Longstreth, *supra* note 1, at 150, 152; Horton, *supra* note 6.

[219] *See* Horton, *supra* note 6 (explaining that, not only is there no such Mississippi law, but that the practice is commonplace); *cf.* Weaver v. Bonner, 309 F.3d 1312, 1322–23 (11th Cir. 2002) (holding that Section (B)(2) of Canon 7 of the Georgia Code of Judicial Conduct, which prohibits judicial candidates from personally soliciting campaign contributions, impermissibly chilled candidates' speech and thus violated the First Amendment).

[220] *See* Longstreth, *supra* note 1, at 150, 152; Horton, *supra* note 6.

[221] *See* Longstreth, *supra* note 1, at 150, 152; Horton, *supra* note 6.

[222] *See supra* note 193 and accompanying text.

[223] *See* Nat'l Conference of State Legislatures, *supra* note 193.

ing those very same citizens.[224] Such a usurpation of state sovereignty by the federal government is grossly inappropriate.[225]

Although an appeal of Minor's convictions remains pending as of early 2008, his case is illustrative of the danger to state sovereignty that results when the federal government is given carte blanche to prosecute individuals for honest services mail and wire fraud in connection with state or local public officials.[226] In order to protect state sovereignty, sensible limits must be placed on this federal authority.[227] The approach to such honest services mail and wire fraud prosecutions espoused by the Fifth Circuit in *United States v. Brumley*, and endorsed by the Third Circuit in *United States v. Panarella* and *United States v. Murphy*, provides such limits.[228]

In *Brumley*, the Fifth Circuit held that, in order for the federal government to prosecute an individual for honest services mail or wire fraud in connection with state or local public corruption, the underlying conduct must first violate state or local law in the jurisdiction.[229] Though it has never made such an express holding, the Third Circuit has endorsed this approach.[230] This approach protects state sovereignty because it allows the states to set the parameters of honest services mail and wire fraud prosecutions in connection with public officials.[231]

In order to understand why it is necessary to allow the states to set these parameters, one need look no further than to the rationale for permitting the federal government to prosecute individuals for honest services mail and wire fraud in connection with state and local public

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[224] *See* Horton, *supra* note 6; Mississippi Churning, *supra* note 16. Both Horton's article and Roger Shuler's blog point out that there is no Mississippi state law prohibiting Minor's conduct and thus he was prosecuted under a federal common law standard of good government that was formulated by federal prosecutors without input for the residents of Mississippi. *See* Horton, *supra* note 6; Mississippi Churning, *supra* note 16.

[225] *See* Baxter, *supra* note 157, at 336–37; Moohr, *supra* note 157, at 175–76.

[226] *See* Baxter, *supra* note 157, at 336–37; Moohr, *supra* note 157, at 175–76.

[227] *See supra* notes 157–209, 211, 213 and accompanying text.

[228] *See Murphy*, 323 F.3d at 117; *Panarella*, 277 F.3d at 692–93; *Brumley*, 116 F.3d at 734; *see also* Brown, *supra* note 132, at 282–86 (suggesting state law is likely a proper limiting principle for honest services mail fraud prosecutions in light of concerns that, without such a limiting principle, the law would be void for vagueness).

[229] *See* 116 F.3d at 734.

[230] *See Murphy*, 323 F.3d at 117; *Panarella*, 277 F.3d at 692–93.

[231] *See* Baxter, *supra* note 157, at 336–37; Moohr, *supra* note 157, at 175–76. Specifically, Baxter and Moohr note that allowing the federal government the discretion to both define and prosecute criminal laws raises federalism concerns because this is a function typically reserved for the states. *See* Baxter, *supra* note 157, at 336–37; Moohr, *supra* note 157, at 175–76.

corruption at all.[232] As previously discussed, the rationale for these prosecutions is that the states would prefer to prosecute these crimes, but due to their incapacity to do so, federal enforcement is necessary.[233] This need for third-party enforcement does not, however, charge the federal government with a duty to determine what is criminal in the first place.[234] Thus, it is an unnecessary and inappropriate usurpation of state power for the federal government to both define "honest services" in the public realm, and prosecute schemes that deny such services to the residents and the government of a state.[235] Therefore, the Fifth Circuit's approach appropriately balances law-enforcement powers between the federal and state governments in this realm.[236]

Conclusion

The American history of corrupt public officials is long, storied, and no doubt continues through the present day. Through much of this history, the federal government has sought to criminalize and prosecute this behavior. As *Sabri v. United States* and *McConnell v. Federal Election Commission* demonstrate, such action by the federal government aligns with the generally accepted American public policy goal of regulating public corruption. Further, as Operation Greylord and the "incapacity to act" theory demonstrate, such federal action is often necessary. There is, however, a point at which pervasive federal authority threatens to trample the sovereignty afforded to the states by the federalist structure of the Constitution.

The threats to state sovereignty are particularly acute in the realm of honest services mail or wire fraud prosecutions in connection with state or local public officials. The nature of public corruption requires federal agency intervention in order to successfully prosecute such crimes. This is because federal law enforcement agencies are less susceptible to forces that spur state and local public corruption. For example, Assistant United States Attorney's are not subject to election pressures. The principles of federalism, however, dictate that states ought to de-

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[232] *See supra* notes 157–209 and accompanying text.

[233] *See supra* notes 157–209 and accompanying text.

[234] *See* Baxter, *supra* note 157, at 336–37; Moohr, *supra* note 157, at 175–76 (noting that the power federal prosecutors exercise over the political affairs of states and cities within this framework is particularly troublesome because states traditionally have the principal responsibility for defining and prosecuting crimes).

[235] *See* Baxter, *supra* note 157, at 336–37; Moohr, *supra* note 157, at 175–76.

[236] *See Brumley*, 116 F.3d at 734; Baxter, *supra* note 157, at 336–37; Moohr, *supra* note 157, at 175–76.

termine when such prosecutions are necessary. Thus, the approach to honest services mail and wire fraud prosecutions espoused by the Fifth Circuit in *United States v. Brumley*, and endorsed by the Third Circuit in *United States v. Panarella* and *United States v. Murphy*, should be favored over the more liberal approach taken by the First Circuit in *United States v. Sawyer* and *United States v. Woodward*.

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