Deprivation of Honest Services as a Basis for Federal Mail and Wire Fraud Convictions

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Summary

The federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, impose criminal penalties for the use of mail or interstate wire communications to further a "scheme or artifice to defraud." In 1988, Congress enacted the "honest services" statute, 18 U.S.C. § 1346, which amended the mail and wire fraud statutes to include within the definition of "scheme or artifice to defraud" frauds which "deprive another of the intangible right of honest services." Based in part on case law predating its enactment, the statute has been interpreted to amend the mail and wire fraud statutes in cases arising in both the public and private sectors. It does not extend to non-pecuniary intangible rights other than the right of honest services. H.R. 1825, a bill introduced in the 111th Congress, would make the mail and wire fraud statutes applicable to other intangible rights. Types of fraudulent schemes which might be prosecuted using an honest services theory include, among other things, a corporate officer's attempt to defraud corporate shareholders, the bribery of a public official, or the failure of a public official to disclose a conflict of interest.

Federal courts have noted various concerns—for example, a potential for excessive federal intrusion into state political affairs—regarding the breadth of the honest services statute. In response, the federal courts of appeals have adopted interpretations which narrow its scope. However, they have employed differing standards to do so. Three prominent approaches include: (1) the private gain test, which requires a showing that a defendant intended to obtain a private gain for himself or another; (2) the state law limiting principle, which conditions federal liability on a violation of state law; and (3) the foreseeable harm test, wherein a prosecutor must typically prove that a defendant intended or was at least indifferent to the possibility that a scheme would cause harm to economic or property rights. Several federal courts of appeals have rejected these tests, having determined that they are unnecessary in light of existing limitations—namely requirements that a defendant have a specific intent to commit fraud and that a fraud have a material effect—inherent in the general framework for mail and wire fraud convictions.

In its 2009 term, the U.S. Supreme Court will interpret the honest services statute for the first time since its enactment. The Court has granted writs of certiorari in two cases. In both cases, a court of appeal rejected one of the limiting principles mentioned above. In *Weyhrauch v. United States*, a public corruption case, the Court will consider the state law limiting principle. In *Black v. United States*, it will review the foreseeable harm test in the context of private sector honest services fraud. The decisions are likely to have far-reaching impact regarding the scope of federal prosecutorial jurisdiction in mail and wire fraud cases.

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Introduction

The federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, have been described as federal prosecutors' "true love," because they provide a basis for criminal liability in a broad spectrum of instances.[1] For the purpose of mail and wire fraud prosecutions, federal jurisdiction is triggered when a person utilizes the federal postal service or an interstate carrier or sends a wire or radio communication. For example, the statutes may apply to schemes in which a FedEx package or an e-mail was sent. Convictions are obtained after a prosecutor achieves the more difficult step of proving that an intent to further a "scheme or artifice to defraud" accompanied the use of mail or wire. Over time, the scope of "scheme or artifice to defraud" has been a subject of contentious debate, particularly with regard to schemes to defraud victims of rights unrelated to pecuniary assets.

Congress enacted the honest services statute, 18 U.S.C. § 1346, in 1988 to incorporate within the ambit of the federal mail and wire fraud statutes schemes infringing on a victim's right to an official's or employee's "honest services"—i.e., an employee's honest work on behalf of a company or a public official's honest representation of constituents. High-profile examples include a guilty plea by the lobbyist Jack Abramoff to conspiracy to commit honest services fraud and the indictment of former Illinois Governor Rod Blagojevich on honest services fraud and related charges.[2] In the private sector, a notable case involved the conviction of Jeffrey Skilling, a former Enron executive.[3]

Although it is generally agreed that Congress has the authority to regulate the federal mail system and interstate wire communications, the sparse text and potential breadth of the honest services statute have prompted concerns regarding its constitutionality and scope. Critics of the statute have argued that its mere "28 words" form a vague and unfair basis for federal criminal jurisdiction in many cases.[4] Likewise, in an opinion dissenting from the Supreme Court's decision to deny review in a 2008 honest services case, Justice Scalia suggested that the statute's vague language invites federal prosecution of seemingly commonplace actions, such as "a mayor's attempt to use the prestige of his office to obtain a restaurant table without a reservation."[5] Prompted by these and other considerations, federal courts have employed judicial interpretation techniques to avoid an overly broad reading of the statute. However, the federal courts of appeals disagree regarding the appropriate approach.

Perhaps in part to address the disagreement among the courts of appeals, the U.S. Supreme Court granted writs of certiorari in two cases, *Weyhrauch v. United States*[6] and *Black v. United States*,[7] which present questions regarding the scope of the honest services statute. The cases will provide

[1] *See* Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. Cin. L. Rev. 1, 1 (1998-1999) (citing Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771, 771-72 (1980)).

[2] *See* Susan Schmidt and James V. Grimaldi, *Abramoff Pleads Guilty to Three Counts: Lobbyist to Testify About Lawmakers in Corruption Probe*, Wash. Post, Jan. 4, 2006, at A1; U.S. Fed. News Service, *Former Illinois Gov. Blagojevich, His Brother, Two Former Top Aides, Two Businessmen Indicted*, Apr. 4, 2009.

[3] *See* United States v. Skilling, 554 F.3d. 529 (5th Cir. 2009).

[4] *See, e.g.*, Mike Robinson, *Federal Law Under Attack*, Dubuque Telegraph-Herald, Sep. 13, 2009, at A20.

[5] Sorich v. United States, 129 S. Ct. 1308 (2009) (Scalia, J., dissenting from the denial of certiorari).

[6] 129 S. Ct. 2863 (2009) (No. 08-1196).

[7] 129 S. Ct. 2379 (2009) (No. 08-876).

the U.S. Supreme Court's first opportunity to interpret the honest services fraud statute since it was enacted and will likely shape its breadth in federal mail and wire fraud cases.

Background: Mail and Wire Fraud

In 1872, Congress enacted the mail fraud statute "to curtail an epidemic of 'large-scale swindles, get-rich-quick schemes, and financial frauds.'"[8] In 1952, it established an analogous federal crime, wire fraud, which applies to frauds committed by the use of wire, radio, or television communications in interstate commerce. Because the triggering activities for federal jurisdiction—use of mail or wire, including the Internet—are very common modes of communication, the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, provide federal criminal jurisdiction over a broad range of fraudulent schemes.[9]

Except for the instrument (the mail system versus radio or wire) used to trigger federal jurisdiction, the mail and wire fraud statutes involve identical criminal conduct and are generally interpreted in the same manner by the federal courts.[10] The mail fraud statute subjects anyone to criminal liability who, "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," deposits or causes to be deposited, knowingly causes to be delivered, or takes or receives, any "matter or thing whatever" in a post office or "authorized mail depository" or with "any private or commercial interstate carrier ... for the purpose of executing [a fraudulent] scheme."[11] The wire fraud statute includes the same "having devised or intending to devise any scheme or artifice to defraud ..." and "for the purpose of executing such scheme" language but applies to transmittals of "any writings, signs, signals, pictures, or sounds" "by means of wire, radio, or television communication in interstate or foreign commerce."[12]

Generally speaking, criminal convictions require the government to prove both an *actus reus* (action) and a *mens rea* (mental state). As mentioned, the *actus reus* component of the federal

[8] United States v. Svete, 556 F.3d 1157, 1162 (11th Cir. 2009) (quoting Jed S. Rakoff, *The Federal Mail Fraud Statute* (Part I), 18 Duq. L. Rev. 771, 780 (1980)). The focus in the legislative history on financial frauds provides some indication that Congress initially intended to limit the statute's scope to those activities involving money or property. In 1909, it appeared to codify this limitation when it amended the statute to clarify that it covered schemes for the purpose of "obtaining money or property" through fraud. Act of Mar. 4, 1909, 35 Stat. 1130.

[9] *See* Jack E. Robinson, *The Federal Mail and Wire Fraud Statutes: Correct Standards for Determining Jurisdiction and Venue*, 44 Willamette L. Rev. 479 (2007-2008) (noting that "[t]he federal mail and wire fraud statutes, particularly since their amendment in 2002, have become the most prevalent and lethal weapon in the federal prosecutor's arsenal" and have enabled the U.S. Department of Justice to "root out new and increasingly more sophisticated frauds," but arguing that the expanded federal authority "has also led to the 'federalization' of fraudulent conduct that is more appropriately dealt with by state prosecutors under state law").

[10] *See* Pasquantino v. United States, 544 U.S. 349, 355 n.2 (2005) ("we have construed identical language in the wire and mail fraud statutes *in pari materia*") (citing Neder v. United States, 527 U.S. 1, 20 (1999), Carpenter v. United States, 484 U.S. 19, 25 and n.6 (1987)). *See also* United States v. Ward, 486 F.3d 1212, 1221 (11th Cir. 2007) ("Aside from the means by which a fraud is effectuated, the elements of mail fraud, 18 U.S.C. 1341, and wire fraud, 18 U.S.C. 1343, are identical."). However, one difference is that the wire fraud provision is based on Congress's commerce clause authority, whereas the mail fraud statute also applies in cases involving only intrastate communications. *See* United States v. Elliott, 89 F.3d 1360, 1364 (8th Cir. 1996); United States v. Photogrammertric Data Services, Inc., 259 F.3d 229, 247 (4th Cir. 2001).

[11] 18 U.S.C. §1341.

[12] 18 U.S.C. §1343.

mail and wire fraud statutes is satisfied with proof of a relatively innocuous action—namely, the very common act of using mail or telecommunications. For example, in *United States v. Weyhrauch*,[13] the defendant's alleged scheme involved voting a particular way on state legislation regarding taxation of oil companies in exchange for an oil company hiring the defendant to provide legal services. However, the event triggering jurisdiction for purposes of the mail fraud statute was the defendant mailing his resumé to the oil company. Furthermore, in most cases, a prosecutor need not prove that a person actually used the mail or sent a wire or radio communication. Instead, it is generally sufficient that a defendant knew or should have foreseen that mail or wire would be used.[14] In addition, it is usually not necessary to prove that a victim was actually harmed—i.e., that a person was deprived of property or other rights.[15]

Thus, the success of mail or wire fraud prosecutions typically turns on whether a defendant had the requisite mental state—namely, whether he or she intended to devise a "scheme or artifice to defraud." For both crimes, a prosecutor must prove that a defendant had specifically intended to perpetrate a fraud.[16] Thus, the statutes are sometimes described as having a "specific intent" requirement.[17] In the public corruption context, some courts of appeals have adopted relatively strict interpretations of this requirement. For example, the U.S. Court of Appeals for the First Circuit has noted that the intent requirement in the mail and wire fraud statutes requires that a prosecutor "indicate wrongdoing by a public official, [but] also demonstrate that the wrongdoing at issue [was] intended to prevent or call into question the proper or impartial performance of that public servant's official duties."[18] Other decisions have tempered the extent of the specific intent hurdle, however. In a later case, the First Circuit allowed that the "prosecution may prove this requisite intent to defraud through circumstantial evidence."[19] In addition, the scope of activities which may constitute fraud for the purpose of fulfilling the intent requirement is relatively broad. The Supreme Court has held that "scheme or artifice to defraud" extends to "any act or omission that 'wrong[s] one in his property rights by dishonest methods or schemes and usually signif[ies] the deprivation of something of value by trick, deceit, chicane or overreaching.'"[20]

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[13] 548 F.3d 1237 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 2863 (2009).

[14] *See* Pereira v. United States, 347 U.S. 1, 8-9 (1954) ("Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used.") (citing United States v. Kenofskey, 243 U.S. 440 (1917)).

[15] In that regard, the mail and wire fraud statutes resemble "inchoate offenses," such as attempt and conspiracy, for which a prosecutor must prove only that a defendant took sufficient steps toward the commission of a crime and had the requisite intent to commit the crime, rather than any particular outcome. However, unlike the crimes of attempt and conspiracy, the federal mail and wire fraud crimes also address crimes in which the fraud was "successful"—i.e., where harm actually occurred.

[16] *See* United States v. Galex, 2009 U.S. App. LEXIS 17800 (3d Cir. 2009) (requiring proof beyond a reasonable doubt that a defendant knowingly and willfully participated in a scheme or artifice to defraud "'with the specific intent to defraud.'") (quoting United States v. Antico, 275 F.3d 245, 261 (3d Cir. 2001); United States v. Sloan, 492 F.3d 884, 891 (7th Cir. 2007) ("To show an intent to defraud, we require a willful act by the defendant with the specific intent to deceive or cheat, usually for the purpose of getting financial gain for one's self or causing financial loss to another.").

[17] *See* United States v. Sawyer, 239 F.3d 31, 46-47 (1st Cir. 2001).

[18] United States v. Czubinski, 106 F.3d 1069, 1076 (1st Cir. 1997). *But see* United States v. Woodward, 149 F.3d 46, 61-62 (1st Cir. 1998) (distinguishing *Czubinski* where the defendant had received tangible benefits in the form of gratuities and a "connection between the gratuities and [the defendant]'s official acts could have been justifiably inferred from the fact that [he] had discretion to act or not act in ways that would further the insurance industry's interests").

[19] *Sawyer*, 239 F.3d at 46-47 (citing United States v. Ervasti, 201 F.3d 1029, 1037 (8th Cir. 2000)).

[20] McNally v. United States, 483 U.S. 350, 358 (1987) (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)).

Materiality presents a final component to the analysis in mail and wire fraud cases. In general, federal courts require that a scheme to defraud must be material; that is, it must have a natural tendency to induce reliance to the victim's detriment or to the offender's benefit.[21] However, as discussed, mail and wire fraud are typically punishable regardless of the ultimate success of a fraudulent scheme.[22]

Congress substantially increased the penalties associated with the federal mail and wire fraud statutes as part of the Sarbanes-Oxley Act of 2002.[23] The maximum penalties for the statutes, including in cases proceeding under an honest services theory, now include imprisonment for up to 20 years.[24]

Honest Services Statute

The honest services statute, 18 U.S.C. § 1346, states that for the purposes of the federal crimes 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." As discussed, because of the sparse text but broad application, questions remain regarding the scope of the statute and the range of situations to which it applies.[25] The provision's historical context, together with case law predating the provision and various constitutional considerations, inform judicial interpretation of the statute.

Historical Context

Beginning in the 1930s and 1940s, federal courts applied the federal mail fraud statute to frauds stemming from a breach of fiduciary duty.[26] During the late 1970s and 1980s, using fiduciary duty as an analogy, federal courts first included public corruption within the types of activities which could give rise to a mail or wire fraud conviction.[27] A theory suggested to justify honest services convictions in the public sector context "relie[d] on the idea that a public official acts as

[21] *See, e.g.*, Neder v. United States, 527 U.S. 1, 21-22 (1999) (holding that materiality is an element of mail, wire, and bank fraud because the statutory language drew from common law, and at common law, "fraud" had to be material).

[22] *See* United States v. Gale, 468 F.3d 929, 937 (6th Cir. 2006); United States v. Schuler, 458 F.3d 1148, 1153 (10th Cir. 2006); United States v. Reifler, 446 F.3d 65, 96 (2d Cir. 2006).

[23] P.L. 107-204, 116 Stat. 745, 800 (2002).

[24] 18 U.S.C. §§ 1341, 1343. Prior to the passage of the Sarbanes-Oxley Act, the maximum prison sentence that could be imposed was five years.

[25] United States v. Urciuoli, 513 F.3d 290, 294 (1st Cir. 2008) ("as one moves beyond core misconduct covered by the statute (e.g., taking a bribe for a legislative vote), difficult questions arise in giving coherent content to the phrase through judicial glosses").

[26] *See, e.g.*, Alexander v. United States, 95 F.2d 873 (8th Cir. 1938) (affirming the conviction for mail fraud of defendants who had mailed fictitious medical licenses, where they were found to have "devised a scheme and artifice to defraud numerous persons, including the public generally, and particularly those persons who would in the future desire the services of legally licensed and professionally competent doctors, surgeons, and chiropractors"); United States v. Procter & Gamble Co., 47 F.Supp. 676, 678 (D.Mass. 1942) (applying the mail fraud statute to a private sector employee's breach of his fiduciary duty).

[27] *See, e.g.*, United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979); United States v. Silvano, 812 F.2d 754 (1st Cir. 1987).

trustee for the citizens and the State ... and thus owes the normal fiduciary duties of a trustee, e.g., honesty and loyalty to them."[28]

In 1987, the Supreme Court halted such "honest services" convictions when it held, in *McNally v. United States*,[29] that the definition of "any scheme or artifice to defraud" extends only to schemes targeting tangible property rights, not intangible ones, such as a breach of fiduciary duty.[30] The Court explained that it had chosen the narrow interpretation, "[r]ather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials."[31] It added that "[i]f Congress desires to go further, it must speak more clearly than it has."[32]

The following year, in response to the *McNally* decision,[33] Congress amended the statutory definition of "scheme or artifice to defraud" for purposes of mail and wire fraud, as discussed, to encompass any "scheme or artifice to deprive another of the *intangible* right of honest services."[34] Some courts have interpreted the new statute as having "reinstated the line of cases preceding [*McNally*]"[35] with respect to the honest services theory, whereas other courts have concluded that Congress could not have intended to reinstate the pre-*McNally* case law.[36]

The honest services fraud amendment has been interpreted as overruling *McNally* only with regard to the right of honest services, and not with regard to other intangible rights.[37] Before Congress enacted the honest services statute, the Supreme Court, in *United States v. Carpenter*,[38] applied the mail fraud statute to intangible property—specifically, to confidential information that would affect stock trading. However, the *Carpenter* holding appeared to extend only to interests that could be construed as property interests, rather than to other intangible rights, such as those contemplated by the honest services provision. Thus, it could be argued that three categories of mail and wire fraud now exist—traditional fraud affecting tangible pecuniary interests, fraud

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[28] United States v. Kincaid-Chauncey, 556 F.3d 923, 939 (9th Cir. 2009) (quoting United States v. Silvano, 812 F.2d 754, 759 (1st Cir. 1987), United States v. Mandel, 591 F.2d 1347, 1363 (4th Cir. 1979) (internal quotation marks omitted)). However, in general, breach of a fiduciary duty is not considered a necessary element for a mail or wire fraud conviction proceeding on an honest services theory. *See* United States v. Ervasti, 201 F.3d 1029, 1036 (8th Cir. 2000).

[29] 483 U.S. 350, 358 (1987).

[30] *Id.* at 358. The Court relied on the legislative history of the mail fraud statute.

[31] *Id.* at 360.

[32] *McNally*, 483 U.S. at 360.

[33] *See* 134 Cong. Rec. S 17,376 (Nov. 10, 1988) (section-by-section analysis inserted into the record by Senator Biden on behalf of the Senate Judiciary Committee) ("This section overturns the decision in *McNally v. United States* in which the Supreme Court held that the mail and wire fraud statutes protect property but not intangible rights. Under the amendment, those statutes 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. The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change.").

[34] P.L. 100-690, § 7603, 102 Stat. 4181 (codified at 18 U.S.C. §1346) (emphasis added).

[35] United States v. Sorich, 523 F.3d 702, 707 (7th Cir. 2008) (citing United States v. Rybicki, 354 F.3d 124, 136-37 (2d Cir. 2003) (en banc)).

[36] *See, e.g.*, United States v. Brumley, 116 F.3d 728, 733 (5th Cir. 1997) ("Congress could not have intended to bless each and every pre-*McNally* lower court 'honest services' opinion.").

[37] *See* Cleveland v. United States, 531 U.S. 12 (2000) ("Congress amended the law specifically to cover one of the 'intangible rights' that lower courts had protected under § 1341 prior to *McNally*: 'the intangible right of honest services.'").

[38] 484 U.S. 19 (1988).

affecting intangible pecuniary interests, and honest services fraud—whereas other types of intangible rights are not included within the ambit of mail and wire fraud. For example, in a 2000 case, *Cleveland v. United States*,[39] the Court overturned a conviction in which the lower courts found that the State of Louisiana was fraudulently induced to issue a video poker license. The Court held that the mail and wire fraud statutes were inapplicable because the license was not "money or property" while in the state's hands, nor was a deprivation of honest services implicated.

Legislative proposals have been introduced that would extend the scope of the mail and wire fraud statutes to apply to other intangible rights such as regulatory interests which might be implicated by election misconduct or licensing schemes. For example, H.R. 1825, a bill introduced in the 111th Congress, would amend the federal mail and wire fraud statutes to include fraudulent behavior in which "any thing of value" was sought or obtained.[40]

Prosecutions

Based in part on the pre-*McNally* case law, federal courts have interpreted the honest services provision as encompassing services owed by both publicly elected officials and private employees. In both private sector and public corruption cases, prosecutions have not been limited to the public official or employee who owes honest services.[41] For example, a third party may be criminally liable for concealing a conflict of interest on behalf of a public official or engaging in a conspiracy with an employee to defraud a corporation.[42]

In the private sector, a typical case might involve various people involved in a fraudulent scheme (e.g., to award a company's contracts or services in exchange for kickbacks).[43] It has been described as applying to schemes that would "enable an officer or employee of a private entity ... purporting to act for and in the interests of his or her employer ... secretly to act in his or her or the defendant's own interests instead."[44] Over time, it has been applied to corporate officers, purchasing agents, stock brokers, "and others with clear fiduciary duties to their employees or unions."[45]

In the public corruption context, honest services cases arise when a defendant is alleged to have deprived the public of its right to an elected official's honest services.[46] Courts have noted that the

[39] 531 U.S. 12 (2000).

[40] Clean Up Government Act of 2009, H.R. 1825, 111th Cong. (2009).

[41] *See* United States v. Sorich, 523 F.3d 702, 707 (7th Cir. 2008) (describing the private sector type of honest services fraud as that in which "an employer is defrauded of its employee's honest services by the employee *or by another*") (emphasis added).

[42] Alternatively, a third party is sometimes charged as an accessory in an honest services case. For example, in *United States v. Panarella*, 277 F.3d 678 (3d Cir. 2002), the Third Circuit upheld the conviction of an owner of a tax collection business on charges of having been an accessory after the fact to an official's commission of honest services fraud.

[43] *See, e.g.*, United States v. George, 477 F.2d 508 (7th Cir. 1973).

[44] United States v. Rybicki, 354 F.3d 124, 126-27 (2d Cir. 2003) (en banc), *cert. denied*, 543 U.S. 809 (2004).

[45] *See* McNally v. United States, 483 U.S. 350, 364 (1987).

[46] *See, e.g.*, United States v. Silvano, 812 F.2d 754, 759 (1st Cir. 1987) (describing courts' pre-*McNally* interpretation of the mail and wire fraud statutes as including an honest services component "premised upon an underlying theory that a public official acts as trustee for the citizens and the State ... and thus owes the normal fiduciary duties of a trustee, e.g., honesty and loyalty to them" (internal quotations omitted)).

two most common situations in which the honest services statute is implicated include bribery of a public official and undisclosed conflicts of interest.[47] Convictions for both types of schemes, as well as patronage schemes, were upheld in various cases prior to *McNally*.[48] Bribery of a public official has been described as the "most obvious" form of honest services fraud,[49] but courts have occasionally characterized the receipt of benefits as a result of an undisclosed conflict of interest as a more subtle version of having accepted a bribe.[50]

Constitutional Considerations

The sparse yet broad text of the honest services statute prompts some special constitutional considerations. Related to the specific issues discussed below are overarching separation-of-powers questions. For example, which branch—Congress or the judiciary—is best suited to delineate the scope of federal criminal jurisdiction in honest services cases?

Federalism

Congress's authority to enact the mail and wire fraud statutes is derived from its Article I powers to establish a postal system and regulate interstate commerce.[51] Principles of federalism may impose outer limits on the reach of federal authority, particularly as applied to state political activities. Federalism, derived from the constitutional structure which creates a federal government of limited powers, and from the Tenth Amendment to the Constitution,[52] recognizes that the states and the federal government exist as dual sovereigns. Although the extent to which the Tenth Amendment or general principles of federalism impose an affirmative limit on the federal government is somewhat unsettled, the Supreme Court has historically invoked these principles to justify a narrow reading of federal criminal statutes.[53] Likewise, in the mail and wire

[47] *See, e.g.*, United States v. Gordon, 183 Fed.Appx. 202, 208 (3d Cir. 2006) ("Honest services fraud typically is found in two situations: '(1) bribery, where a legislator was paid for a particular decision or action; or (2) failure to disclose a conflict of interest resulting in personal gain,' which, '[i]n the public sector ... is oftentimes prescribed by state and local ethics laws.'") (quoting United States v. Antico, 275 F.3d 245, 262-63 (3d Cir. 2001))).

[48] *See, e.g.*, United States v. Isaacs, 493 F.2d 1124 (5th Cir. 1975) (upholding a conviction for the accepting of bribes); United States v. Keane, 522 F.2d 534 (7th Cir. 1975) (upheld a Chicago Alderman's honest services fraud conviction for, among other things, failing to disclose his personal interest in property); United States v. Bush, 522 F.2d 641 (7th Cir. 1975) (upheld the conviction of a Chicago mayor's Press Secretary, who had failed to disclose that his ownership interest in a business that had an exclusive contract with the city); United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982) (upholding the conviction of a political party official in connection with his alleged distribution of insurance commission positions to his political allies).

[49] *See* United States v. Carbo, 572 F.3d 112, 115 (3d Cir. 2009).

[50] United States v. Panarella, 277 F.3d 678, 697 (3d Cir. 2002) ("The only difference between a public official who accepts a bribe and a public official who receives payments while [taking steps to benefit from an undisclosed conflict of interest] is the existence of a quid pro quo whereby the public official and the payor agree that the discretionary action taken by the public official is in exchange for payment. Recognizing the practical difficulties in proving the existence of such a quid pro quo, disclosure laws permit the public to judge for itself whether an official has acted on a conflict of interest.").

[51] *See* U.S. Const. art. I, § 8 ("The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States ... [and] To establish Post Offices and post Roads").

[52] U.S. Const. amdt. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people").

[53] *See, e.g.*, Linder v. United States, 268 U.S. 5, 17 (1925) ("And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted (continued...)

fraud context, in particular, the Court has indicated that it requires a clear statement from Congress before it will interpret the statutes as intruding on areas traditionally governed by the states.[54]

As mentioned, such concerns are perhaps most strongly implicated by the honest services statute in the context of federal prosecutions against state and local officials. They are likely to inform the Supreme Court's decision in *Weyhrauch*, in which the Court will resolve the question "[w]hether, to convict a state official for depriving the public of its right to the defendant's honest services through the disclosure of material information, in violation of the mail-fraud statute ... the government must prove that the defendant violated a disclosure duty imposed by state law."[55] In some cases, federal courts have argued that an approach to the honest services fraud statute that was not subject to the state law limiting principle, rejected by the lower court in *Weyhrauch* and discussed *infra*, might be inconsistent with principles of federalism.[56]

Void-for-Vagueness

Criminal statutes are held to violate the due process clauses of the Fifth and Fourteenth Amendments[57] when they are sufficiently vague that people "of common intelligence must necessarily guess at [their] meaning."[58] This "void-for-vagueness" doctrine is rooted in due process concerns regarding notice to citizens and the arbitrary enforcement of laws.[59] Courts may declare statutes void if the conduct giving rise to criminal liability, the persons to which it applies, or the punishment which may be imposed are unclear.

However, assessments of vagueness are determined in light of judicial precedents that have construed a statute's scope or meaning. Thus, a key question with regard to the honest services statute is whether existing judicial precedents—including case law before and after the Supreme Court's decision in *McNally*—provide a sufficient degree of clarity to satisfy due process requirements. Some commentators argue that the case law is inconsistent and does not provide any firm boundaries for the scope of the statute.[60] As a theoretical matter, vagueness questions

(...continued)

to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced.").

[54] *See* Cleveland v. United States, 531 U.S. 12, 25 (2000) ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes").

[55] 129 S. Ct. 2863 (2009).

[56] *See, e.g.*, United States v. Gordon, 183 Fed. Appx. 202, 210 (3d Cir. 2006) (describing a broad interpretation of the statute as "inconsistent with principles of federalism that are preserved when federal honest services fraud is tied to a violation of a fiduciary relationship arising under state or local law") (citing United States v. Murphy, 323 F.3d 102, 117 (3d Cir. 2003)).

[57] U.S. Const. amdt. V; U.S. Const. amdt. XIV, § 1.

[58] Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

[59] The Supreme Court has noted that the threat of arbitrary or discriminatory enforcement of the laws is the more pressing of the two concerns. *See* Kolender v. Lawson, 461 U.S. 352, 357-58 (1983) ("Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'" (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)).

[60] *See, e.g.*, Andrew B. Matheson, *A Critique of* United States v. Rybicki*: Why Foreseeable Harm Should Be an Aspect of the* Mens Rea *of Honest Services Fraud*, 28 Am. J. Trial Advoc. 355, 356 (2004-2005).

arise in part because judicial opinions in honest services cases have relied upon concepts such as fiduciary duty, which is borrowed from the context of civil liability and arguably does not provide sufficient clarity to satisfy the constitutional requirements for penal statutes, which are subject to a heightened level of scrutiny before the government may place a defendant's life, liberty, or property at stake.

Although it is unclear how the Supreme Court will rule on the question,[61] the federal courts of appeals which have addressed the issue have rejected void-for-vagueness challenges. The most notable case is *United States v. Rybicki*,[62] a 2003 decision in which the U.S. Court of Appeals for the Second Circuit, sitting *en banc*, upheld the honest services statute against a void-for-vagueness challenge. The court noted that case law predating the enactment of the honest services statute clarifies the scope of the crime. In contrast, several dissenting judges argued that the judicial doctrines that the court characterized as having formed the backdrop for the honest services fraud provision are "as standardless as the statute itself."[63] However, that characterization would appear to apply to standards governing the application of the mail and wire fraud statutes, generally, rather than only honest services cases.

To avoid statutory constructions which implicate vagueness or other due process concerns, some courts have invoked the "rule of lenity," which is one of many canons of statutory construction—i.e., "rules of thumb that help courts determine the meaning of legislation"[64]—to reach a narrow interpretation of the honest services statute.[65] Derived from due process guarantees, the rule of lenity requires that legislatures provide a "clear statement" before a statute will be found to provide a basis for criminal liability.

Judicial Limitations on the Scope of the Honest Services Statute

Prompted in part by the constitutional considerations discussed above, the courts of appeals have generally recognized a "need to find limiting principles to cabin the broad scope of § 1346."[66] Despite their agreement on this point, however, they have adopted differing approaches. Some have established special tests which must be satisfied before a defendant may be convicted for mail and wire fraud based on an honest services theory. As discussed, the three most prominent tests include the "private gain" test, the "state law limiting principle," and the "foreseeable harm" test. When explaining the need for such standards, some courts have asserted that the text of the honest services statute would otherwise seemingly justify absurd convictions. For example, at

[61] Justice Scalia has suggested that void-for-vagueness issues are implicated by the honest services fraud provision; *see* Sorich v. United States, 129 S. Ct. 1308 (2009) (Scalia, J., dissenting from the denial of certiorari); but the Court has not yet ruled on the issue.

[62] 354 F.3d 124 (2d Cir. 2003) (en banc), *cert. denied*, 543 U.S. 809 (2004).

[63] *Rybicki*, 354 F.3d at 161 (Jacobs, J., dissenting).

[64] Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992).

[65] *See, e.g.*, United States v. Murphy, 323 F.3d 102, 113 (3d Cir. 2003).

[66] *See* United States v. Inzunza, 2009 WL 2750488, *9 (9th Cir. 2009). *See also* Andrew B. Matheson, *A Critique of* United States v. Rybicki*: Why Foreseeable Harm Should Be an Aspect of the* Mens Rea *of Honest Services Fraud*, 28 Am. J. Trial Advoc. 355, 372 (2004-2005) (noting that a "broad consensus" exists that "there must be a limiting element for honest services fraud, lest every ethical lapse be treated as a crime").

least one court has suggested that in private sector cases, "the plain language of the 'honest services' doctrine codified in § 1346 suggests that 'dishonesty by an employee, standing alone, is a crime.'"[67] Thus, although "[u]nder such an application of the statute, [a defendant's] conduct [might be] clearly within the scope of § 1346 ... courts generally have been reluctant to apply § 1346 in a way that would expose employees to mail fraud prosecution for 'every breach of contract or every misstatement made in the course of dealing.'"[68] Dissenting to denial of certiorari in an honest services case, Justice Scalia appeared to agree that a limiting principle is necessary. He stated: "Without some coherent limiting principle to define what 'the intangible right of honest services' is, whence it derives, and how it is violated, this expansive phrase invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct."[69]

Other courts of appeals have declined to adopt tests which apply only in honest services cases and have relied instead on specific intent and materiality requirements, required elements for mail and wire fraud convictions generally. The U.S. Court of Appeals for the Tenth Circuit has perhaps articulated this view most forcefully. In *United States v. Welch*,[70] it criticized the special tests as requiring courts "to judicially legislate by adding an element to honest services fraud which the text and the structure of the fraud statutes do not justify."[71] Defendants in the case were members of the Salt Lake City Olympic Bid Committee who allegedly bribed members of the International Olympic Committee in an effort to secure Salt Lake City's chances to host the 2002 Winter Olympic Games. In rejecting various proposed limiting principles, the Tenth Circuit noted that the honest services statute "'must be read against a backdrop of the mail and wire fraud statutes, thereby requiring fraudulent intent and a showing of materiality'" and concluded that these existing requirements provided sufficient checks against the statute's potential overbreadth.[72] In September 2009, the U.S. Court of Appeals for the Ninth Circuit took a similar approach in *United States v. Inzunza*,[73] a case involving former members of the San Diego City Council. It joined what it characterized as the "majority rule," holding that the intent and materiality requirements implicit in the mail and wire fraud statutes rendered the private gain and state law limiting principles unnecessary. Although courts sometimes characterize materiality and specific intent requirements as alternatives to the limiting principles established for honest services, they tend to emphasize that such tests are "inherent" in the mail and wire fraud framework.[74]

[67] United States v. Vinyard, 266 F.3d 320, 326-27 (4th Cir. 2001) (quoting United States v. Frost, 125 F.3d 346, 368 (6th Cir. 1997)).

[68] *Id.* (quoting United States v. Cochran, 109 F.3d 660, 667 (10th Cir. 1997)).

[69] Sorich v. United States, 129 S. Ct. 1308 (2009) (Scalia, J., dissenting from the denial of certiorari).

[70] 327 F.3d 1081 (10th Cir. 2003).

[71] *Id.* at 1107.

[72] *Id.* at 1107 (quoting United States v. Cochran, 109 F.3d 660, 667 (10th Cir. 1997)).

[73] 2009 WL 2750488 (9th Cir. 2009).

[74] *See, e.g.*, United States v. Rybicki, 354 F.3d 124, 146 (2003) (en banc) (adopting a "materiality test" in lieu of the foreseeable harm test, "because it has the virtue of arising out of fundamental principles of the law of fraud: A material misrepresentation is an element of the crime").

Private Gain

The "private gain," or "personal gain,"[75] limitation, which has been adopted by the U.S. Court of Appeals for the Seventh Circuit, limits the scope of the honest services provision by requiring a showing that a defendant aimed to secure a private gain for himself or another. In *United States v. Bloom*,[76] a Chicago alderman, who also worked as a private attorney, had advised a client to plant a proxy buyer at a real estate auction as part of a scheme to obtain tax advantages. The court dismissed the honest services count because the prosecutor had not alleged that these actions had been intended for the alderman's personal gain. The Seventh Circuit held that the "[m]isuse of office (more broadly, misuse of position) for private gain is the line that separates run of the mill violations of state-law fiduciary duty ... from federal crime."[77]

A later Seventh Circuit case, *United States v. Sorich*,[78] involved a "corrupt and far-reaching scheme, based out of the [Chicago mayor's office], that doled out thousands of city civil service jobs based on political patronage and nepotism."[79] The court upheld a jury instruction which required proof that the defendants intended "to deprive a governmental entity of the honest services of its employees for personal gain to a member of the scheme or another."[80]

Bloom left unresolved whether conviction may be obtained where a defendant has sought gain on behalf of a third party. In *Sorich*, the court clarified that "private gain ... simply mean[s] illegitimate gain, which usually will go to the defendant, but need not."[81] It then affirmed the convictions resulting from the patronage scheme, signaling that at least in some circumstances, private gain may include gain sought on behalf of third parties. The test's application to third parties has not been further explored.

Other parameters of the Seventh Circuit's conception of "private gain" are not clearly defined. The Seventh Circuit appears to have limited the definition of "private gain" to benefits that are received in secret or outside of regular procedures. In a 2007 case, *United States v. Thompson*,[82] the defendant, a section chief in a state procurement office, was alleged to have influenced the selection process for a state travel agent contract for political reasons. However, the gain that the defendant was alleged to have obtained was characterized as favor with her supervisor and a pay raise through the ordinary compensation process. The court held that strengthened job security and the pay raise could not be construed as a "private gain" for the purpose of a mail fraud conviction. In reaching this conclusion, the court contrasted these alleged gains with examples of

[75] Although other courts of appeals' opinions and earlier Seventh Circuit opinions have in some cases referred to the test as requiring a showing of "personal gain," the Seventh Circuit stated in its most recent honest services case that "private gain" is the more appropriate term for the test. *See* United States v. Sorich, 523 F.3d 702, 709 (7th Cir. 2008) (noting that although the "semantic difference between 'private' and 'personal' gain may be insignificant ... to the extent that 'personal' connotes gain only by the defendant, it is misleading").

[76] 149 F.3d 649 (7th Cir. 1998).

[77] *Id.* at 655.

[78] 523 F.3d 702 (7th Cir. 2008).

[79] *Id.* at 705.

[80] *Id.* at 708-09. The court determined that the phrases "private gain" and "personal gain" were not meaningfully different.

[81] *Id.* at 709.

[82] 484 F.3d 877, 882 (7th Cir. 2007).

"private gain" given in *Bloom*, all of which involved "payoffs outside the proper channels."[83] However, one could imagine factual scenarios in which a gain might be difficult to categorize as being clearly inside or outside the boundaries of typical compensation procedures. For example, it is unclear how the standard would apply in conflict-of-interest cases in which a payment related to an undisclosed interest might be received through "proper channels" within the meaning of that phrase as articulated in *Bloom* and *Thompson*—e.g., in the form of ordinary compensation for services rendered to satisfy a legal contract obligation.

Other federal courts of appeals have explicitly rejected the "private gain" analysis.[84] Reasons for the rejection include a view that it simply "substitut[es] one ambiguous standard for another" and a concern that the private gain test has the potential to make § 1346 under-inclusive, for example by failing to apply in conflict-of-interest cases.[85] As mentioned, in some cases, courts of appeals have rejected the private gain test in favor of reliance on the specific intent requirement inherent in the mail and wire fraud framework. For example, the U.S. Court of Appeals for the Ninth Circuit, in *Inzunza*, stated that "careful attention to the intent element dispels concerns about the statute's overbreadth."[86] However, it held that evidence of intent to obtain a private gain, although not a necessary prerequisite for conviction, provides some evidence of the requisite mental state.[87]

State Law Limiting Principle

A few federal courts of appeals have adopted the "state law limiting principle," which dictates that a conviction for mail or wire fraud on an honest services theory requires a showing that a defendant's activity violated state law. Courts which have adopted the principle emphasize principles of federalism and the importance of state law as a dividing line between criminal behavior and common political maneuvering.[88]

The Fifth Circuit first adopted the principle in *United States v. Brumley*,[89] in which it noted the importance of federalism concerns for its holding.[90] The defendant in *Brumley* had served on the Texas Industrial Accident Board, which administered workers compensation claims in the state.[91] He allegedly borrowed money from several lawyers who represented claimants whose claims were to be resolved by the Board. The court held that "services must be owed under state law" and that "the government must prove in a federal prosecution that they were in fact not

[83] *Id.* at 883.

[84] *See, e.g.*, United States v. Gordon, 183 Fed.Appx. 202, 210 (3d Cir. 2006) (noting that the Third Circuit has "specifically refused to limit the offense to situations in which a public official uses his or her office for personal gain").

[85] United States v. Panarella, 277 F.3d 678, 691-92, 699 (3d Cir. 2002).

[86] 2009 WL 2750488, *10 (9th Cir. 2009) ("Evidence of private gain may bolster a showing of deceptive intent, but such a showing could also rest heavily on evidence of harm and deceit.").

[87] *Id.*

[88] *See, e.g.*, United States v. Carbo, 572 F.3d 112, 118 (3d Cir. 2009) ("[T]he violation of state law is critical to distinguishing between acceptable political deal-making and criminal deprivation of the public's right to the honest services of public officials—in other words, between normal politics and fraud.").

[89] 116 F.3d 728 (5th Cir. 1997).

[90] *See Id.* at 735 ("The federalism arguments that inform the definition of 'honest services' under federal criminal law are powerful, and we acknowledge them in our holdings today.").

[91] *Id.* at 730-31.

delivered."[92] It concluded that the defendant's behavior violated a state statute which prohibited "a public servant with judicial authority" from accepting "any benefit" from a person with an interest in a matter before the public servant.[93]

The Fifth Circuit has reaffirmed the principle in later cases, most recently in several cases involving former executives of Enron. In *United States v. Skilling*,[94] defendant Jeffrey Skilling argued that his actions did not breach his fiduciary duty to his employer, Enron, because he had acted in Enron's interest. The court rejected that argument, primarily because it appeared that no one at Enron had approved measures taken by Skilling. Thus, it clarified that where an employer did not sanction a fraudulent scheme, a defendant may be found to have violated a state law fiduciary duty even if he purports to have acted in his employer's best interest.[95]

Although it has declined to formally adopt it,[96] the U.S. Court of Appeals for the Third Circuit has also followed the state law limiting principle. In *United States v. Panarella*,[97] a state senator had allegedly failed to disclose compensation he had obtained from the owner of a tax collection business. The Third Circuit concluded that "[s]tate law offers a better limiting principle for purposes of determining when an official's failure to disclose a conflict of interest amounts to honest services fraud" than is offered by the private gain test or other alternatives.[98] Applying the principle, it upheld the conviction of an accessory to the senator's crime, holding that the senator had taken a discretionary action which he knew would directly benefit a financial interest that he had concealed in violation of a state criminal law. In a subsequent case, the court clarified that the violation of state law "does not require a violation of *criminal* law, but rather a violation of a state-created fiduciary duty."[99]

In a 2009 case, *United States v Carbo*,[100] the Third Circuit considered what mental state is required in connection with the violation of a state law. Like *Panarella*, the case involved a failure to disclose a conflict of interest. However, in *Carbo*, the defendant was a third party, rather than a public official or his accessory. Specifically, he was a business owner in Norristown, Pennsylvania, who was charged with honest services fraud as a result of a scheme with the borough administrator in which favors were allegedly provided in return for government contracts. The administrator allegedly failed to disclose his interest in the business in violation of state law.[101] An issue on appeal was whether a knowledge requirement—i.e., a showing that a defendant knew that a public official's failure to disclose would violate state law—should be

[92] *Id.* at 734.

[93] *Id.* at 735-36.

[94] 554 F.3d. 529 (5th Cir. 2009).

[95] *Id.* at 545-47.

[96] *See* United States v. Carbo, 572 F.3d 112, 117 n. 4 (3d Cir. 2009) (stating that the court has so far viewed the violation of state law as sufficient to support an honest services conviction but has not yet resolved the question of whether such a violation is necessary).

[97] 277 F.3d 678 (3d Cir. 2002).

[98] *Id.* at 692-93.

[99] United States v. Gordon, 183 Fed.Appx. 202, 211 (2006) (emphasis in original).

[100] 572 F.3d 112 (3d Cir. 2009).

[101] The administrator had purchased a truck, which he rented to local contractors, whom he had the authority to choose for contracts with the borough. The administrator failed to disclose his income from the truck rental business on an annual disclosure form required by the Pennsylvania Public Official and Employee Ethics Act, 65 Pa. Cons. Stat. § 1104(a), and he failed to disclose his interest in businesses proposing to contract with the borough and to recuse himself from decisions regarding such contracts, as was required by the borough's charter.

applied in cases involving a third party defendant.[102] The court adopted such a requirement, but it construed it so as not to present an "insurmountable obstacle to prosecutors."[103] Specifically, the court stated that "it is not necessary to demonstrate that the defendant knew the fine details of an official's reporting requirements."[104] It further clarified that "if the evidence is sufficient for a reasonable jury to conclude that the defendant participated in a scheme to assist a public official in hiding a conflict of interest, and that the defendant knew that the law forbade the official from engaging in that form of undisclosed conflict of interest, a conviction for honest services mail fraud should be upheld."[105]

In *United States v. Murphy*,[106] a 2003 case, the Third Circuit characterized a sister circuit's rejection of the state law limiting principle as an outlier approach and criticized it as having "extend[ed] the mail fraud statute beyond any reasonable bounds."[107] However, since that time, a majority of federal courts which have considered the issue have declined to adopt the principle.[108] A notable example is the opinion by the U.S. Court of Appeals for the Ninth Circuit in *Weyhrauch*,[109] discussed *infra*.

In federal circuits in which the state law limiting principle has been rejected, some courts have applied a "federal common law standard of good government" to determine whether a defendant's actions are covered by the statute.[110] Even in such cases, however, the violation of state law is often viewed as relevant evidence to establish that a defendant had the requisite intent to deprive a government or employer of its right to an official or employee's honest services. This principle has been demonstrated most clearly in the context of conflict-of-interest cases. For example, in *United States v. Woodward*,[111] the U.S. Court of Appeals for the First Circuit held that specific intent was demonstrated by the defendant's failure to disclose a conflict of interest which he was required by law to disclose.

It is unclear whether courts of appeals that have rejected the state law limiting principle in public corruption cases might be willing to apply the principle in private sector honest services cases.[112] Some federal courts have "crafted special requirements in the limited context of honest services fraud in the private sector."[113]

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[102] The court acknowledged that the issue had not arisen in *Panarella* because that case focused on the wrongdoing of a public official, who was presumably aware of state disclosure requirements.

[103] *Carbo*, 572 F.3d at 118.

[104] *Id.*

[105] *Id.*

[106] 323 F.3d 102 (3d Cir. 2003).

[107] *Id.* at 104, 111 (characterizing the Second Circuit's rejection of the state law limiting principle in United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982)).

[108] *See, e.g.*, United States v. Walker, 490 F.3d 1282, 1299 (11th Cir. 2007) ("an honest services mail fraud or mail fraud conviction does not require proof of a state law violation").

[109] 548 F.3d 1237 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 2863 (2009).

[110] See Michael K. Avery, *Whose Rights? Why States Should Set the Parameters for Federal Honest Services Mail and Wire Fraud Prosecutions*, 49 B.C.L. Rev. 1431 (2008).

[111] 149 F.3d 46 (1st Cir. 1998).

[112] *See, e.g.*, *Id.* at 1245 n. 5 ("Although we reject the state law limiting principle in the context of honest services prosecutions of public officials, we express no opinion on the role of state law in honest services fraud prosecutions in the *private* context.") (emphasis in original).

[113] United States v. Sorich, 523 F.3d 702, 708 (7th Cir. 2008).

Foreseeable Harm

Several federal circuit courts have adopted a "foreseeable harm" test to limit the scope of the honest services provision.[114] The U.S. Court of Appeals for the Sixth Circuit adopted the test in *United States v. Frost*,[115] a case involving a professors and graduate students at the University of Tennessee who allegedly defrauded the University and government agencies in order to secure government research contracts. It held that in order for a conviction on an honest services theory to stand, "the prosecution must prove that the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of [a] breach" of fiduciary duty.[116] In *United States v. Vinyard*,[117] the U.S. Court of Appeals for the Fourth Circuit applied the Sixth Circuit's approach to a case involving two brothers who allegedly misrepresented their joint venture's relationship with one brother's employer for the purpose of defrauding the employer.

Some courts have characterized the foreseeable harm test as an alternative to a "materiality" test, which appears to be the same as or similar to the test for materiality applied in mail and wire fraud cases generally.[118] Both the Fourth and Sixth Circuits have asserted that the foreseeable harm test is superior to the materiality test for two reasons: (1) its focus on a defendant's mental state ensures that only criminal behavior is included; and (2) it excludes what the Fourth Circuit termed "trivial frauds"—i.e., infractions that are minor but nonetheless instigate a material change in business practices—from the scope of the honest services fraud statute.[119]

Courts' formulations of the foreseeable harm test have varied somewhat.[120] However, the most common approach appears to integrate the test within an examination of a defendant's mental state. A representative articulation requires "that the defendant was at least reckless as to the likelihood that his breach of the duty of honest services would harm the party to whom the duty is owed."[121]

Although some judicial opinions suggest that the foreseeable harm test applies only in private sector cases,[122] some have suggested that the test be employed in all honest services cases.[123] In the private sector cases in which it has primarily been applied, the "harm" contemplated by the test has generally been characterized as harm to economic or property interests.[124] However,

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[114] *See, e.g.*, United States v. Vinyard, 266 F.3d 320 (4th Cir. 2001), *cert. denied*, 536 U.S. 922 (2002) ; United States v. Sun-Diamond Growers, 138 F.3d 961 (D.C. Cir. 1998).

[115] 125 F.3d 346 (6th Cir. 1997).

[116] *Id.* at 368.

[117] 266 F.3d 320 (4th Cir. 2001), *cert. denied*, 536 U.S. 922 (2002).

[118] *See, e.g.*, United States v. Vinyard, 266 F.3d 320, 327 (4th Cir. 2001).

[119] *See Frost*, 125 F.3d at 368-69; *Vinyard*, 266 F.3d at 328-29.

[120] *See* Andrew B. Matheson, *A Critique of* United States v. Rybicki*: Why Foreseeable Harm Should Be an Aspect of the* Mens Rea *of Honest Services Fraud*, 28 Am. J. Trial Advoc. 355 (2004-2005) (asserting that some courts have employed a foreseeable harm test as part of a *mens rea* requirement, whereas others, by introducing an element of "reasonableness" to the foreseeable harm requirement, appear to require foreseeable harm as an element of *actus reus*).

[121] *Id.* at 357.

[122] *See, e.g.*, *Vinyard*, 266 F.3d at 327-328 (describing the foreseeable harm test as its approach "in the private employment context"); United States v. Martin, 228 F.3d 1, 17 (1st Cir. 2000) (characterizing the foreseeable harm test as a court-imposed limit on the honest services statute in cases involving alleged frauds by employees against their employers).

[123] *See, e.g.*, *Matheson*, 28 Am. J. Trial Advoc. 355.

[124] *See, e.g.*, Defendants' Petition for a Writ of Certiorari at 19, Black v. United States, No. 08-876 (Jan. 9, 2009) (continued...)

"property" in this context has been interpreted to include confidential information such as trade secrets.[125]

Some of the courts of appeals have explicitly rejected the foreseeable harm test.[126] Most notably, the U.S. Court of Appeals for the Seventh Circuit joined this latter group in *Black*, discussed *infra*.

Cases in Which the Supreme Court Has Granted Certiorari

The U.S. Supreme Court will consider the honest services statute in two cases, *Weyhrauch v. United States*[127] and *Black v. United States*,[128] in its 2009 term. In both of the lower court decisions, federal courts of appeals explicitly rejected judicial standards created to limit the scope of the honest services statute.

United States v. Weyhrauch

In *United States v. Weyhrauch*,[129] the U.S. Court of Appeals for the Ninth Circuit declined to adopt the state law limiting principle. The defendant was an Alaska state legislator who allegedly failed to disclose a conflict of interest regarding his relationship with an oil company prior to his vote on a bill addressing the taxation of oil production. At trial, federal prosecutors sought to introduce legislative ethics publications which recommend that such conflicts be disclosed, together with evidence suggesting that Alaskan legislators customarily disclose them. However, there was no evidence that the defendant had violated any state statute. The question in the case was whether a mail fraud conviction on an honest services theory required a showing that a defendant's actions violated state law. The court found that no evidence in the statutory text or the legislative history indicated a congressional intent to limit the honest services statute to only those cases that involve a breach of a state-law duty. It also emphasized that Congress has sufficient constitutional authority to regulate and punish the use of mail and interstate wire communications when they are used for fraudulent purposes and that the circuit had "never limited the reach of the federal fraud statutes only to conduct that violates state law."[130]

(...continued)

("Nearly half of the federal courts of appeals that have addressed [the honest services statute] in the private sector context have concluded that the statute requires proof that the defendant intended, or at least reasonably could have foreseen, that the scheme would cause economic or property harm to the victim.").

[125] *See Martin*, 228 F.3d at 16 (requiring that "either some articulable harm must befall the [corporation or other entity] as a result of the defendant's activities, or some gainful use must be intended by the [employee]").

[126] *See, e.g.*, United States v. Brown, 459 F.3d 509 (5th Cir. 2006); United States v. Welch, 327 F.3d 1081 (10th Cir. 2003).

[127] 129 S. Ct. 2863 (2009).

[128] 129 S. Ct. 2379 (2009).

[129] 548 F.3d 1237 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 2863 (2009).

[130] *Id.* at 1245.

United States v. Black

In *United States v. Black*,[131] the U.S. Court of Appeals for the Seventh Circuit rejected the foreseeable harm test. The defendants were executives of a corporation which owned a large number of newspapers. In connection with the corporation's sale of various newspapers in Canada, the defendants received substantial payments from several small newspapers, which they purported had been negotiated in exchange for agreements by the defendants not to compete in the newspapers' markets within a given time frame. The payments were made to the defendants, personally, rather than their corporation. There was a factual dispute regarding the extent to which the corporation's board had knowledge of this arrangement. The defendants argued that the board had been aware of the deal and that the payments they received constituted legitimate compensation for the do-not-compete agreements. In contrast, the government alleged that the do-not-compete payments were actually management payments received without corporate approval.

The defendants urged the court to adopt the foreseeable harm test. They argued that their convictions would fail under that test because they had arranged for the do-not-compete agreements in order to take advantage of a favorable Canadian tax ruling rather than to harm their employer corporation. However, the Seventh Circuit rejected the test, which it characterized as an argument equivalent to "no harm, no foul."[132] Instead, the court applied the private gain test, discussed *supra*. Thus, it focused on whether the defendants intended to reap a private gain by fraudulent means. Affirming a jury instruction which relied on the private gain test, the court upheld the defendants' convictions.

Conclusion

By interpreting what has been called "[q]uite a potent federal prosecutorial tool,"[133] the Supreme Court's upcoming decisions in *Weyhrauch* and *Black* are likely to have far-reaching impact regarding the scope of federal prosecutorial jurisdiction in mail and wire fraud cases. It is possible that the Court will adopt one of the approaches that were rejected by the courts of appeals in those cases. Alternatively, the Court may adopt the view that requirements inherent in the mail and wire fraud statutes provide a sufficient limitation to overcome vagueness problems, principles of federalism, or other concerns which might otherwise call for a narrow statutory construction. Finally, because one of the cases arises in the public corruption context whereas the other is a private sector case, the decisions might also answer questions regarding differing applications of various standards in the public and private contexts.

[131] 530 F.3d 596 (7th Cir. 2008), *cert. granted*, 129 S. Ct. 2379 (2009).

[132] *Id.* at 600.

[133] Sorich v. United States, 129 S. Ct. 1308 (2009) (Scalia, J., dissenting from the denial of certiorari).

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