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Matthew Modell

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ARTICLES

(DIS)HONEST SERVICES FRAUD: “BAD MEN, LIKE GOOD MEN, ARE ENTITLED TO BE TRIED AND SENTENCED IN ACCORDANCE WITH LAW”¹

MATTHEW MODELL*

INTRODUCTION

Without explicitly saying, we have left the impression that the use of political patronage in personnel hiring by the City of Chicago is a crime. Although no legislatively defined criminal offense outlaws patronage hiring by government entities in Illinois, such hiring is now seen as a crime because it violates the *Shakman* decrees (-a series of civil consent decrees subject only to civil penalties, and imposition of contempt if willfully [sic] violated.) Now, by judicial fiat, the *Shakman* decrees can operate to create a fiduciary duty, which, if violated, deprives the public of “honest services,” and thus is a basis for a federal crime under the mail-fraud statute, 18 U.S.C. § 1346.²

The legal system in the United States prides itself on the rule of law. Unlike other countries, the United States has not adopted a common law system in part because of our Founding Fathers’ belief that no man should be punished for an act that was not clearly delineated as a crime prior to the act.³ Honest services fraud, as prescribed under 18 U.S.C. § 1346, arises from a hazy part of the law and teeters on the edge of reading a common law crime into the codified American legal system. This statute, broadly defines “public officials” as politicians and other government employees. The main purpose of the honest services fraud statute is to punish public officials who betray the public’s trust. The statute represents a belief that intangible rights, such as good government, should be protected. This statute has served as a

* Matt Modell is a graduate from the University of North Carolina School of Law. He is currently clerking for United States District Court Judge Terrence W. Boyle in the Eastern District of North Carolina.

1. *Sorich v. United States*, 129 S. Ct. 1308, 1311 (2009), *cert. denied*, (Scalia, J., dissenting), *citing* *Green v. United States*, 365 U.S. 301, 309 (1961) (Black, J., dissenting).

2. *United States v. Sorich*, 531 F.3d 501, 502 (7th Cir. 2008), *en banc denied*, (Kanne, J., dissenting), 129 S. Ct. 1308 (Scalia, J., dissenting).

3. *United States v. Hudson & Goodwin*, 11 U.S. 32, 34 (1812).

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catch-all for the government to prosecute officials whose behavior does not fit the elements of another crime, such as bribery.⁴ Courts have overly broadly interpreted the honest services fraud statute and are in effect enforcing common law. The Supreme Court has yet to rule on § 1346, and despite a rare plea by Justice Antonin Scalia in a six-page dissent⁵ of a denial of certiorari in *Sorich v. United States*,⁶ the statute's future remains in limbo.

This article will examine the background of honest services fraud as originally derived from 18 U.S.C. §1341, the U.S. Supreme Court ruling *United States v. McNally*,⁷ which led Congress to propose 18 U.S.C. § 1346, and how the statute has been construed over the past twenty years. It will then briefly address whether § 1346 creates a new substantive offense or if it was simply meant to expand § 1341 to include intangible rights. I will examine the conflicts among the federal circuits and the longstanding confusion over the breadth of the statute. § 1346 raises a number of due process concerns, including questions over the scope of the statute, vagueness of the language, and issues of federalism, including bicameralism and presentment that must be addressed. This article will not discuss whether there is a serious federalism question presented when a circuit court requires a predicate state law offense.⁸ Finally, this article will use *United States v. Sorich* as a brief case study into the problems § 1346 presents.

The honest services fraud should be construed narrowly. A defendant should not be punished *post hoc* for 'violation' of a law that was not explicitly spelled out in the statute. The Supreme Court should interpret the statute to require three elements in order for § 1346 to be constitutionally sound: 1) proof of private gain, as was required and defined by *United States v. Bloom* in the Seventh Circuit;⁹ 2) a predicate state law violation, as required by the Third Circuit;¹⁰ and 3) that prior to a charge, whether a public official or private individual, there must have been a clear duty owed to the public. This duty cannot be established by presumption, but must be gleaned from the language of

4. *Sorich*, 129 S. Ct. 1308 (Scalia, J., dissenting).

5. *In Dissent, Scalia Argues Supreme Court Should Clarify Honest-Services Fraud Statute*, The Bureau of National Affairs, Inc. White Collar Crime Report. Vol. 4, No. 05 (Feb. 27, 2009).

6. *Sorich*, 129 S. Ct. 1308, (Scalia, J., dissenting).

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

8. *United States v. Panarella*, 277 F.3d 678, 693 (3d Cir. Pa. 2002) (this issue could be a whole discussion unto itself, better left for another time. I am sufficiently satisfied by the rationale given by the Third Circuit that "the intrusion into state autonomy is significantly muted, since the conduct that amounts to honest services fraud is conduct that the state itself has chosen to criminalize.").

9. *Sorich*, 129 S. Ct. 1308, 1309 (Scalia, J., dissenting), citing *United States v. Bloom*, 149 F.3d 649, 655 (7th Cir. 1998).

10. *United States v. Murphy*, 323 F.3d 102, 114 (3d Cir. 2003).

an underlying state statute, as required by the Fifth Circuit.¹¹ If the Court does not read these three elements into the statute, then § 1346 should be considered unconstitutionally vague and Congress should take the opportunity to rewrite the statute with greater specificity, or, rewrite other statutes so as to not keep this impermissible overbroad 'do not be a bad person' statute.¹²

BACKGROUND

Prior to the enactment of 18 U.S.C. § 1346, prosecutors used the Federal Mail Fraud Statute, § 1341, to pursue honest services fraud charges against public officials.¹³

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives there from, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than 5 years, or both.¹⁴

The prosecution of these crimes changed after the Supreme Court decided to address the prosecution of intangible honest services in *United States v. McNally*.¹⁵

McNally involved three different individuals in Democratic politics in Kentucky.¹⁶ McNally and Gray, the petitioners in this proceeding, and another individual, Hunt, who became the chair of the Democratic Party in Kentucky, were involved in a scheme whereby Hunt selected which insurance companies would receive state insurance contracts.¹⁷ The largest company, Wombwell, agreed to funnel some of its proceeds to a company that was controlled by Hunt, and in part,

11. *Sorich*, 129 S. Ct. at 1309 (Scalia, J., dissenting), *citing* *United States v. Brumley*, 116 F.3d 728, 735 (5th Cir. 1997) (*en banc*).

12. *Sec'y of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 964-65 (1984).

13. Brief of Respondent-Appellant at *19, *McNally v. United States*, 483 U.S. 350 (1987) (Nos. 86-234, 86-286), *citing* *United States v. O'Malley*, 707 F.2d 1240, 1247 (11th Cir. 1983); *United States v. Bush*, 522 F.2d 641, 651 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976).

14. 18 U.S.C. § 1341 (1987).

15. *McNally*, 483 U.S. at 350.

16. *See generally id.* at 352.

17. *Id.* at 352-53.

owned and operated by the petitioners.¹⁸ Charges against Hunt eventually led to a guilty plea and a three year jail sentence.¹⁹ A check from their company mailed to Wombwell allowed the petitioners to be charged with mail fraud, and a claim that the petitioners “had devised a scheme . . . to defraud the citizens and government of Kentucky of their right have the Commonwealth’s affairs conducted honestly,” as well as claims they received money under false pretenses and concealed material facts.²⁰ Both petitioners were convicted and these convictions were upheld by the Sixth Circuit.²¹

In granting certiorari, the Supreme Court looked specifically at whether § 1341 protected not only property rights, but also intangible rights, including broad ideals such as good government.²² This was of particular import in this case where the defendants were not elected officials²³ and thus the argument that they had a fiduciary duty to the citizens of Kentucky was more tenuous.

In a 7-2 decision, the Court rejected this theory.²⁴ The Court held that § 1341 cannot be read so broadly as to infer the protection of intangible rights.²⁵ The Court was unwilling to infer such a broad statutory reading because the legislative history did not indicate that the intent of Congress was anything other than to protect against fraud that deprived citizens of money or property.²⁶ The Court stated, “when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.”²⁷ However, the Court also made it clear that this was not a constitutional ruling, but a statutory ruling which Congress was free to override through more explicit language.

Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.²⁸

18. *Id.*, at 353.

19. *Id.*

20. *Id.*, at 353-54.

21. *Id.*, at 355.

22. *Id.*, at 356.

23. *Id.*, at 355.

24. *Id.*, at 351.

25. *Id.*, at 356.

26. *Id.*

27. *Id.*, at 359-60, citing *United States v. Bass*, 404 U.S. 336, 347 (1971); *United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221-22 (1952). See also *Rewis v. United States*, 401 U.S. 808, 812 (1971).

28. *Id.*, at 360.

Within eighteen months of the *McNally* ruling, Congress passed 18 U.S.C. § 1346, which defined “scheme or artifice to defraud.” The precise language used by Congress was, “[f]or the purposes of this chapter, the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.”

It is presumed that the relatively swift passing of § 1346 was due to Congress’ strong disagreement with the Court’s interpretation of § 1341 in *McNally*. This may be the case. Supporters of this interpretation of the Congressional action point to the fact that the year following the Court’s ruling there were five bills introduced in Congress that addressed this issue specifically.²⁹ However, none of these bills made it out of committee. The legislation that was actually passed did not actually specifically incorporate *any* of these proposals, but was inserted as part of a larger omnibus bill that became Public Law No: 100-690.³⁰ This more than 300 page piece legislation dealt with everything from AIDS and academic performance to weapons and X-rays.³¹ In total, the Congressional Research Service lists 558 different index terms on this bill entitled, “A Bill to Prevent the Manufacturing, Distribution, and Use of Illegal Drugs.” This bill also had a number of provisions which focused on increasing the number of drug related capital offenses.³² There were no committee reports on § 1346, and in fact, only two members of Congress even inserted comments into the Congressional Record discussing the honest services mail fraud statute.³³

The point is not to question the procedural legitimacy of Congress’ passage of § 1346 as a valid statute, or to argue that it does not in fact overrule *McNally*; § 1346 clearly does overrule *McNally*. Rather, the point is that the presumption of a strong Congressional intent to use

29. A Bill to Amend Title 18 of the United States Code to Punish Corruption, S. 2793, 100th Cong. § 2 (1988) (Sen. Joseph R. Biden, Jr. introduced the bill. The Bill had some bipartisan support. It was co-sponsored by Sen. Dennis DeConcini (D, AZ), Sen. Mitch McConnell (R, KY), Sen. Howard M. Metzenbaum (D, OH), Sen. Paul Simon (D IL), and Sen. Strom Thurmond (R, SC)); A Bill to Strengthen the Enforcement of Laws Against Fraud, Corruption, and Other Illegal Acts in Connection with Federal, State, and Local Elections, and for Other Purposes, S. 1837, 100th Cong. § 2 (1988); *See also* A Bill to Amend Title 18 of the United States Code to Create a Criminal Offense for Public Corruption, S. 2531, 100th Cong. § 2 (1988) (Sen. McConnell introduced these two pieces of legislation); A Bill to Amend Title 18 of the United States Code to Create a Criminal Offense for Public Corruption, H.R. 4871, 100th Cong. § 2 (1988); *See also* A Bill to Amend Title 18 of the United States Code to Punish Corruption, H.R. 5498, 100th Cong. § 2 (1988) (Rep. George W. Gekas (PA-17) introduced these two bills in the House to address the Court’s decision).

30. A Bill to Prevent the Manufacturing, Distribution, and Use of Illegal Drugs, and for Other Purposes, H.R. 5210, 100th Cong. § 2 (1988) (as passed by the House of representatives, November 18, 1998).

31. *Id.*

32. *Id.*

33. *United States v. Berg*, 710 F.Supp. 438, 442 (E.D.N.Y. 1989).

§ 1346 to overrule the *McNally* ruling and expand the statute, may be overstated.

With the passage of § 1346, the question became how broadly the statute should be read. Should § 1346 be read narrowly to only deal with an intangible right to honest services, or should the statute be read more broadly as to Congress' intent to give greater latitude to "the 'mailing' or 'transmission' element of a mail or wire fraud scheme"?³⁴ To satisfy the requirements of § 1346, it is clear that there must be a scheme to deprive honest services. However, the statute is part of the larger chapter. Does this mean that for § 1341 to be satisfied the act must also "involve a deprivation of money, property, or property rights"?³⁵ These are questions with which the circuit courts have struggled, and they will remain in question unless, or until, the Supreme Court decides to either weigh in again on their understanding of Congress' statutory construction of intangible rights, or decide that the statute is unconstitutional as applied.

DEFINITIONAL NATURE OF § 1346

The notion that § 1346 expands § 1341 in some way other than to include the intangible right to honest services is an untenable interpretation based upon an examination of the statutory language, title of the statute, and placement within the U.S. Code. Despite this evidence, many courts have been willing to read the statute as encompassing these rights.³⁶ The question presented in *McNally* was in part,

Whether petitioners were properly convicted of violating the federal mail fraud statute, 18 U.S.C. 1341, where the jury was instructed that it could only convict if it found that petitioners had devised a scheme for the dual purposes of (1) defrauding the state and citizens of Kentucky of their right to have the government's business conducted honestly.³⁷

The Supreme Court expressly rejected the government's contention that § 1341 was, from the beginning, designed to include intangible deprivations of honest services.³⁸ Instead the Court chose to put the onus back on Congress to decide whether or not they intended to in-

34. James Lockhart, *Validity, Construction, and Application of 18 U.S.C.A. § 1346, Providing that, for Purposes of Some Federal Criminal Statutes, Term "Scheme or Artifice to Defraud" Includes Scheme or Artifice to Reprive Another of Intangible Right to Honest Services*, 172 A.L.R. Fed. 109, 17 (originally published in 2001, last accessed Mar. 21, 2009) [hereinafter "Lockhart"].

35. 18 U.S.C. § 1341 (2009).

36. See *United States v. Bortnovsky*, 879 F.2d 30, 39 (2d Cir. 1989). ("[I]t is of some significance that Congress has not . . . acted to narrow its scope . . . In fact, to the extent that Congress has amended the mail fraud statute . . . it has done so to ensure a broader construction than that of the Supreme Court.")

37. Brief of Respondent-Appellant at *1, *McNally v. United States*, 483 U.S. 350 (1987) (1987 WL 880955).

38. *Id.*, at *23.

clude intangible rights by requiring more definite language in the statute.³⁹

§ 1346 clearly falls within the mail fraud chapter of the U.S. Code.⁴⁰ Indeed, this was the intent of Rep. John Conyers (MI-14), who inserted the language into Pub. L. No. 100-690.⁴¹ In his statement for the Congressional Record, Mr. Conyers stated,

This amendment restores the mail fraud provision to where that provision was before the *McNally* decision. The amendment also applies to the wire fraud provision, and precludes the *McNally* result with respect to that provision This amendment is intended merely to overturn the *McNally* decision. No other change in the law is intended.⁴²

While these statements may give some insight into Congress' intentions; courts that read more into them must be careful not to give them undue weight, as "the Supreme Court has never attributed a great deal of significance to contemporaneous remarks of a sponsor of legislation."⁴³

A number of courts have agreed with this analysis that § 1346 is limited to mail fraud cases and does not create any new substantive offenses. In *United States v. Goldberg*,⁴⁴ a defendant challenged the charges against him, arguing that a charge under both § 1341 and § 1346 were duplicious.⁴⁵ The district court rejected his claim "[b]ecause § 1346 merely explains the theory of honest services mail fraud, it is not a distinct factual offense for which the jury could punish [the defendant]."⁴⁶ Expanding the definitional nature of § 1346 has also previously been rejected in the Fifth Circuit.⁴⁷ In *United States v. Hooten*,⁴⁸ the Fifth Circuit emphasized the definitional placement within the statute, "[t]he statute plainly amends chapter 63 to

39. *McNally v. United States*, 483 U.S. 350, 360 (1987).

40. 18 U.S.C. § 1341-1351 (2009) (This chapter includes ten statutes § 1341 - § 1350, and only one, § 1346, is entitled as purely definitional, "Definition of 'scheme or artifice to defraud.'" available at http://www4.law.cornell.edu/uscode/18/usc_sup_01_18_10_I_20_63.html (last visited Apr 11, 2009).

41. Berg, 710 F. Supp. at 442.

42. *Id.* (citing 134 CONG. REC. H 11108, 111251 (daily ed. Oct. 21, 1988) (statement of Rep. Conyers). Sen. Biden also made similar remarks 20 days later when he said the intent of § 1346 was "to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change." 134 CONG. . REC. S17360-02 (daily ed. Nov. 10, 1988) (statement of Sen. Biden).

43. *United States v. Brumley*, 79 F.3d 1430, 1437 (5th Cir. 1996) quoting Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 118 (1980); *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979).

44. *United States v. Goldberg*, 913 F.Supp. 629 (D. Mass. 1996).

45. *Id.* at 635.

46. *Id.* at 636.

47. Lockhart, 172 A.L.R. Fed. 109, 38, citing *United States v. Hooten*, 933 F.2d 293 (5th Cir. 1991).

48. *Hooten*, 933 F.2d 293 (5th Cir. 1991).

state, ‘For the purposes of this chapter, the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.’”⁴⁹

CONFLICTS AMONGST THE CIRCUITS

There are several competing views among the federal circuits that are the cause of confusion on the role and breadth of § 1346. The Fifth Circuit believes § 1346 “criminalizes only a deprivation of services that is unlawful under state law[.]”⁵⁰ The Third Circuit holds a similar view, but makes it clear that in addition to a predicate violation of state law, there must be a fiduciary relationship explicit within a relevant state statute before a mail fraud charge under § 1346 is permitted to proceed.⁵¹ The Seventh Circuit, prior to *Sorich*, also took a narrow view by requiring proof of a private personal gain for the statute to be violated.⁵² The Second Circuit has a materiality test, looking at “whether the misrepresentation ‘has the natural tendency to influence or is capable of influencing the employer to change his behavior.’”⁵³ Finally, the Fourth, Ninth, and Eleventh Circuits have all rejected the principle that in order to sustain an honest services fraud charge, an underlying state statute must be shown to have been violated.⁵⁴ Instead, these circuits have adopted a rule that there was a “uniform federal standard inherent in § 1346”, by which every public official is thus held to a standard of honest services.⁵⁵ These competing views justify Justice Scalia’s desire for the Court to take a closer look at the statute and attempt to bring uniformity in its application across the circuits.⁵⁶

Third and Fifth Circuits

The Fifth Circuit held in *United States v. Brumley*⁵⁷ that § 1346 “criminalizes only a deprivation of services that is unlawful under

49. *Id.* at 296 [emphasis added in original opinion].

50. *Sorich*, 129 S. Ct. at 1309 (Scalia, J., dissenting), citing *Brumley*, 116 F.3d 728, 735 (5th Cir. 1997) (*en banc*).

51. *United States v. Murphy*, 323 F.3d 102, 114 (3d Cir. 2003).

52. *United States v. Weyhrauch*, 548 F.3d 1237, 1244 (9th Cir. 2008),). (citing *United States v. Sorich* 523 F.3d 702 (7th Cir. 2008)).

53. *United States v. Rybicki*, 354 F.3d 124, 145 (2nd Cir. 2003), citing *United States v. Vinyard*, 266 F.3d 320, 327-28 (4th Cir. 2001).

54. *Weyhrauch*, 548 F.3d at 1244, 45 (See also *United States v. Bryan*, 58 F.3d 933, 942 (4th Cir. 1995); *United States v. Louderman*, 576 F.2d 1383, 1387 (9th Cir. 1978); *United States v. Walker*, 490 F.3d 1282, 1299 (11th Cir. 2007)).

55. *Weyhrauch*, 548 F.3d at 1248.

56. See generally *Sorich v. United States*, 129 S. Ct. 1308 (2009), *cert. denied*, (Scalia, J., dissenting).

57. *Brumley*, 116 F.3d 728).

state law[.]”⁵⁸ The defendant, Brumley, was a Regional Associate Director for the Texas Workers’ Compensation Commission, had solicited “loans” from lawyers who had hearings before him and had the funds wired to him throughout the state.⁵⁹ Brumley was convicted for conspiracy to deprive the state’s citizens of honest services.⁶⁰ The court in *Brumley* 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 delivered.”⁶¹ However, the court in *Brumley* chose not to address whether the breach of duty had to actually violate a criminal law.⁶²

The Third Circuit, similar to the Fifth, took a narrow view of § 1346. In *United States v. Murphy*,⁶³ the defendant, a former local political party chairman, appealed his conviction of mail fraud under § 1341 and § 1346.⁶⁴ The government’s theory was that Murphy’s conduct violated the County’s right to his honest services when he was part of a contracts-for-payments scheme that influenced how some county contracts were procured.⁶⁵ The court examined this case and said there must be a violation of state law to uphold a charge under § 1346. “[A] violation of state law serves as an important limiting principle on the scope of § 1346 honest services fraud, which might be necessary to avoid lenity and federalism concerns in federal prosecutions of state or local political officials.”⁶⁶ The court also distinguished the use of the honest services fraud statute against an individual who was not a public official *per se*.⁶⁷ The court said that prior to a charge, whether against a public official or private individual as in this case, there must have been a clear duty owed to the public and that duty cannot be assumed without more specific language from the state bribery statute.⁶⁸ To assume otherwise, held the court, is to leave the outer boundaries of § 1346 ambiguous, and “absent a ‘clear statement’ from Congress, a court should not construe the [federal mail fraud] statute in a manner that leaves its outer boundaries ambiguous and involves

58. Sorich, 129 S. Ct. at 1309 (Scalia, J., dissenting), *citing* Brumley, 116 F.3d at 735

59. The loans in question were never repaid. Brumley, 116 F.3d at 731.

60. *Id.*, at 730.

61. *Id.*, at 734.

62. *Id.* (Court decided to rule on only what was necessary. Since it was clear in *Brumley* that there was a violation of state law, this was not a debatable question. While there may be a case where services are owed under state law that were not delivered, there cannot be a case where there was a breach of a criminal law that will not also be a breach of a duty owed under state law. By definition a violation of state criminal law is a breach owed under state law.)

63. Murphy, 323 F.3d 102.).

64. *Id.*, at 103.

65. *Id.*

66. *Id.* at 114.

67. *Id.* at 113.

68. *Id.* at 115-16.

the Federal Government in setting standards of disclosure and good government for local and state officials.⁶⁹ Thus, the Third Circuit held that § 1346 must be construed narrowly, as there must be a predicate violation of state law, and the fiduciary relationship must be explicit within a relevant state statute before a mail fraud charge under § 1346 is permitted to proceed.⁷⁰

Seventh Circuit pre-Sorich

The Seventh Circuit's reading of § 1346 prior to *Sorich* was also narrow, but in a different manner than the Third Circuit, arguing in *United States v. Bloom* that the statute "prohibit[s] only the abuse of position 'for private gain.'"⁷¹ Bloom was an attorney and alderman in Chicago's Fifth Ward.⁷² In his law practice, he had a client who owed significant back taxes to the county on a piece of real estate the client owned.⁷³ Bloom advised one of his clients to unlawfully have a third party bid the real estate his client owed back taxes on at a special auction.⁷⁴ The third party would then be permitted to sell the rights to the original owner, which would thereby allow the original owner to wipe out his delinquent tax debt owed to the county.⁷⁵ The government attempted to prosecute Bloom under the mail fraud and honest services fraud statutes, § 1341 and § 1346, arguing that he tried to deprive Chicago of its right to his honest services by scheming to deprive the city of its tax revenues.⁷⁶ Rejecting the government's claim, the Seventh Circuit upheld the district court's ruling that the rule of lenity requires a narrow reading of the statute and the benefit of the doubt to go to the accused, particularly since § 1346 is unclear as to "how far the intangible rights theory of criminal responsibility really extends[.]"⁷⁷ and thus "[a]n employee deprives his employer of his honest services only if he misuses his position (or the information he

69. *Id.* at 116 (citing *McNally v. United States*, 483 U.S. 350 (1987)).

70. *Murphy*, 323 F.3d at 116 (*See generally* *United States v. Cochran*, 109 F.3d 660 (10th Cir. 1997) (Looked at § 1346 in the context of the private sector, and concurred with the Eighth Circuit "that § 1346 must be read against a backdrop of the mail and wire fraud statutes, thereby requiring fraudulent intent and a showing of materiality." The Court did acknowledge that if actual harm existed, then there were circumstances where fraudulent intent could be inferred, but that without actual harm there must be independent evidence of the alleged scheme showing the fraudulent intent and the government must be able to make out the elements of the underlying wire fraud charge)).

71. *Sorich v. United States*, 129 S. Ct. 1308, 1309 (2009), *cert. denied*, (Scalia, J., dissenting), *citing* *United States v. Bloom*, 149 F.3d 649, 655 (7th Cir. 1998).

72. *Bloom*, 149 F.3d at 650.

73. *Id.* at 651.

74. *Id.*

75. *Id.*

76. *Id.* at 650.

77. *Id.* at 656.

obtained in it) for personal gain.”⁷⁸ In this instance, while Bloom’s behavior may have been unethical, he was not breaking the law himself, and he did not personally benefit from the scheme.⁷⁹ The fact that he may owe some fiduciary duties as an alderman part-time, did not mean that his behavior as an attorney also required a fiduciary duty to the City at times when his work as an attorney had no relation to his position as an alderman, and did not involve the use of private information he gained from holding public office.⁸⁰

The Seventh Circuit looks to draw the narrow construction by requiring personal gain. In *United States v. Panarella*, the Third Circuit explicitly rejected the notion that personal gain must be a prerequisite. in:⁸¹

[W]e believe that the notion of misuse of office for personal gain adds little clarity to the scope of § 1346 . . . this standard, rather than clarifying the meaning of “scheme or artifice to deprive another of the intangible right of honest services,” 18 U.S.C. § 1346, adds an extra layer of unnecessary complexity to the inquiry.⁸²

Fourth, Ninth, and Eleventh Circuits

While the Third, Fifth, Seventh, and Tenth Circuits all argue for a narrow construction, the Fourth, Ninth and Eleventh Circuits consistently hold that § 1346 should be broadly construed.⁸³ In *United States v. Weyhrauch*,⁸⁴ the defendant, a lawyer and representative in the Alaska State House, was accused of helping an oil production company while at the same time negotiating future legal work with that company.⁸⁵ Among the charges against the defendant was one accusing him of “devising ‘a scheme and artifice to defraud and deprive the State of Alaska of its intangible right to [his] honest services . . . performed free from deceit, self-dealing, bias, and concealment.’”⁸⁶ The government attempted to introduce evidence suggesting it was customary for legislators to disclose potential conflicts on the State House floor. It also sought to introduce evidence of the ethics training the defendant had received, including pamphlets that discussed

78. *Id.* at 656-57.

79. *Id.* at 651, 656.

80. *Id.* at 656-57.

81. *United States v. Panarella*, 277 F.3d 678 (3d Cir. 2002).

82. *Id.* at 692.

83. See *United States v. Weyhrauch*, 548 F.3d 1237, 1244 (2008), (citing *United States v. Walker*, 490 F.3d 1282, 1299 (11th Cir. 2007) (holding that an honest services fraud conviction “does not require proof of a state law violation”); *United States v. Bryan*, 58 F.3d 933, 942 (4th Cir. 1994)) (holding that the duty of honesty is defined irrespective of the existence of state law).

84. *United States v. Weyhrauch*, 548 F.3d 1237 (9th Cir. 2008), *petition for cert. filed* (U.S. Mar. 25, 2009) (No. 08-1196).

85. *Id.* at 1239.

86. *Id.*

ethics rules. However, the district court denied the admissibility of this evidence.⁸⁷ The district court adopted the Fifth Circuit's approach and held that only disclosure requirements under state law would be permitted. Since Weyhrauch was not required under any state law to disclose these conflicts, the court found a charge under § 1346 could not be sustained.⁸⁸

The Ninth Circuit, acknowledging that there was no precedent in the circuit, and reviewing the district court's decision under an "abuse of discretion" standard of review,⁸⁹ still reversed the decision.⁹⁰ The Ninth Circuit rejected the principle that in order to sustain an honest services fraud charge, an underlying state statute must have been violated.⁹¹ Instead, the Court adopted the rule that there was a "uniform federal standard inherent in § 1346."⁹² The Court concluded that every public official is held to a standard of honest services and there did not have to be an underlying law broken to sustain a conviction under § 1346.⁹³ "We hold that 18 U.S.C. § 1346 establishes a uniform standard for 'honest services' that governs *every* public official and that the government does not need to prove an independent violation of state law to sustain an honest services fraud conviction."⁹⁴ The Ninth Circuit's interpretation of § 1346 was a significant departure from the position taken in the Third, Fifth, Seventh, and Tenth Circuits.⁹⁵

SCOPE OF THE HONEST SERVICES FRAUD STATUTE

The question of the scope of § 1346, whether a predicate violation of state law is required and whether the defendant's acquisition of some sort of personal gain is required, are questions that have been addressed by the circuit courts, but they have not come to a common agreement. The differences are significant. Whether a predicate act is required to violate the honest services statute; and whether a personal gain is also required, are distinctions that make either a narrow statute or a broad statute. These distinctions are the difference between

87. *Id.* at 1239-40.

88. *Id.* at 1240, (citing *United States v. Brumley*, 116 F.3d 728 (5th Cir. 1997)).

89. *Weyhrauch*, 548 F.3d at 1240.

90. *Id.* at 1248.

91. *Id.* at 1243-44.

92. *Id.* at 1244.

93. *Id.* at 1248.

94. *Id.* (emphasis added).

95. This view is, however, shared by the Fourth and Eleventh Circuits. See *United States v. Walker*, 490 F.3d 1282, 1299 (11th Cir. 2007), (holding that that a non-criminal ethics rule can be used as a predicate offense to a § 1346 charge) and *United States v. Bryan*, 58 F.3d 933, 942 (4th Cir. 1995) (dismissing the notion that an underlying state law had to be violated or that the defendant must personally gain from his or her conduct).

whether an employee is at risk of violating a federal statute if he does not have his employers' best interests at heart 100 percent of the time, or simply is not the perfect employee. As Justice Scalia points out in his dissent of the denial of certiorari in *Sorich*, the question is whether the Seventh Circuit's new interpretation means that an employee or politician who does not have his employer's or constituents' best interests in mind *at all times* is now prone to federal criminal charges.

To use a simplistic example, consider an employee who calls in sick to go to a baseball game and gets a paid sick day. The interpretation of § 1346 in the Fourth, Ninth, and Eleventh Circuits⁹⁶ would seem to indicate that the employee would be violating § 1346. In this case, there would be (1) a scheme to defraud the employee's honest services since he is skipping work; (2) if the employee notified his employer through the telephone or email, the threshold of using mail or wire services would also be met; and (3) while the behavior is not illegal, it is unethical and the employee is held to common expectation of behavior. Are we really prepared to give prosecutors this much leverage and power? Do we want to criminalize the most innocuous acts, even if they are unethical? The Fifth Circuit's interpretation of the honest services fraud statute would answer that question, no. This would not meet the test for a federal criminal charge of honest services mail fraud in the Fifth Circuit because while the employee may be acting unethically, he did not violate an underlying state criminal statute.⁹⁷

A second example of the problem with a broadly interpreted statute is whether a personal gain should be required for a violation of § 1346. The Ninth Circuit, in *Weyhrauch*,⁹⁸ found that there was a "uniform federal standard inherent in § 1346."⁹⁹ The argument seems to be that a person knows his actions are wrong when one takes an improper benefit for one's self or one's friends. However, in most circuits, where personal gain is not required for an honest services fraud charge, such a simple test for fraud is unavailable. This leads to the question: why would someone knowingly commit such a fraud if there was no benefit to themselves or their friends? To eliminate this requirement only makes it more difficult for a person to know whether they are violating § 1346 and opens the door for prosecutors to charge public officials with federal offenses simply for being bad at their job or not living up to the standards the prosecutor believes a public official should meet.

96. *Weyhrauch*, 548 F.3d 1237; *Walker*, 490 F.3d 1282; *Bryan*, 58 F.3d 933.

97. *Sorich v. United States*, 129 S. Ct. 1308 (2009), *cert. denied*, (Scalia, J., dissenting).

98. *United States v. Weyhrauch*, 548 F.3d 1237 (9th Cir. 2008), *petition for cert. filed* (U.S. Mar. 25, 2009) (No. 08-1196).

99. *Id.* at 1244.

CONSTITUTIONAL CHALLENGES

A broad reading of the honest services fraud statute raises a number of constitutional due process issues. First, the statute is prone to objections for being void for vagueness. Under the vagueness doctrine, a law cannot be used more broadly than it was written.¹⁰⁰ In this instance, the answer to the question relies on the intent of the legislature and how the courts are interpreting the statute. Are the courts finding rights within the honest services fraud statute that are not clearly delineated? Does the defendant have sufficient notice to reasonably know that his conduct is unlawful under the honest services fraud statute? The second constitutional issue is one of federalism. The statute raises the question of bicameralism and presentment, including the delegation of authority. Is the statute what was contemplated when passed by the Congress and signed by the President? Has Congress intentionally or unintentionally left the statute too vague so that the authority to write the laws has unreasonably been delegated to the courts to act on their own without sufficient direction from Congress and the President?

Vagueness

An otherwise constitutional law will be found to be unconstitutional if it is too vague.¹⁰¹ “A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.”¹⁰² This raises three concerns. First, is the honest services fraud statute on its face, narrow enough to avoid being unconstitutionally vague? If the answer is yes, then when construed broadly, as done by the Fourth, Ninth, and Eleventh Circuits, is the statute in jeopardy of being overly vague and thus unconstitutional? And finally, if on its face the statute is constitutionally questionable; does a narrowing in-

100. *Secretary of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 964-965 (1984).

101. *Id.* “‘Substantial overbreadth’ is a criterion the Court has invoked to avoid striking down a statute on its face simply because of the possibility that it might be applied in an unconstitutional manner. It is appropriate in cases where, despite some possibly impermissible application, the remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct. . . .” *Id.* (citing *CSC v. Letter Carriers*, 413 U.S. 548, 580-581 (1973)).” *Parker v. Levy*, 417 U.S. 733, 760 (1974). See also *New York v. Ferber*, 458 U.S. 747, 770, n. 25 (1982).

102. *United States v. Williams*, 128 S. Ct. 1830, 1845 (2008), (citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000)); see also *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). See also “A statute is not unconstitutionally vague if it defines the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *U.S. v. Waymer*, 55 F.3d 564 (11th Cir. 1995).

terpretation remedy this problem and make the statute constitutionally sound? To date, only one court, the Second Circuit in *United States v. Handakas*,¹⁰³ has found the honest services fraud statute to be unconstitutionally vague. This ruling, however, was subsequently overruled in *United States v. Rybicki*,¹⁰⁴ when the court decided that Handakas should not have even been subject to prosecution under § 1346, and thus the court should have never reached the constitutional question.¹⁰⁵ Despite these setbacks, defendants continue to raise the issue of § 1346 being unconstitutionally vague. Justice Scalia has also expressed concern that the statute is being construed too broadly.¹⁰⁶

“Depriv[ing] another of the intangible right of honest services.”¹⁰⁷ These words have been used to impose criminal penalties on housing officials, business men, students, lawyers, and city employees.¹⁰⁸ The three-judge panel that authored the *Handakas* opinion was correct. They first broke down what is required of a statute to not be void for vagueness. The first question “is whether the statute, *as it is written*, provides notice sufficient to alert ‘ordinary people [to] what conduct is prohibited.’”¹⁰⁹ The statute must speak for itself. The second question is whether the language of the statute is “so standardless that it authorizes or encourages seriously discriminatory enforcement.”¹¹⁰

Addressing the first point, the court said,

McNally placed the burden on Congress to put down in statutory form whatever expanded scope it chose to give to the fraud statutes. In effect, Congress was charged with codifying in statutory form the definitions of the conduct which would be prohibited by the concepts of “intangible rights,” “honest services,” and “good and honest government,” and to expressly indicate whether Congress intended to extend these concepts to the conduct of state officials. The requirement imposed by the Supreme Court to speak more clearly was not for the benefit of the Circuit Courts which had, in fact, given birth to these concepts in the first place. Rather, the requirement to speak more clearly, in addition to addressing federalism concerns, was for the benefit of the public, the average citizen, the average mid-level state ad-

103. *United States v. Handakas*, 286 F.3d 92 (2d Cir. 2002), *overruled by* *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003).

104. *Rybicki*, 354 F.3d at 144 (2d Cir. 2003).

105. *Id.*

106. *See generally* *Sorich v. United States*, 129 S. Ct. 1308 (2009), *cert. denied*, (Scalia, J., dissenting).

107. 18 U.S.C. § 1346 (2009) (Defining a “scheme or artifice to defraud”).

108. *Sorich*, 129 S. Ct. at 1309.

109. *Id.* at 104, (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)); *see also* *Chatin v. Coombe*, 186 F.3d 82, 87 (2d Cir. 1999) (emphasis in original).

110. *United States v. Williams*, 128 S. Ct. 1830, 1845 (2008), (citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000)); *see also* *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972).

ministrator like Brumley, who must be forewarned and given notice that certain conduct may subject him to federal prosecution.¹¹¹

The honest services fraud statute, as written, fails on this account. As written, there is no reasonable way for an ordinary citizen to know what will, or what will not, be considered depriving another of their intangible right to honest services and thus the statute should be found to be facially unconstitutional.

Further, “[t]he plain meaning of ‘honest services’ in the text of § 1346 simply provides no guidance to the public or the courts as to what conduct is prohibited under the statute.”¹¹² As was observed in Judge Jolly’s dissent in *United States v. Brumley*, “the terms ‘intangible right’ and ‘honest services’ cannot be found in Black’s Law Dictionary, the United States Code, or (for that matter) any federal statute other than § 1346.”¹¹³ Despite the lack of definitional clarity for the phrases that make up § 1346, the circuit courts, almost all of whom define the statute differently,¹¹⁴ do not believe this statute is unconstitutionally vague.

The Congressional Record is of no help either. There were two statements inserted into the record regarding this statute. Sen. Biden and Rep. Conyers¹¹⁵ both indicated the express purpose of the new statute was to overrule *McNally* and to “restore[] the mail fraud provision to where that provision was before the *McNally* decision.”¹¹⁶ However, the Senators intent is unclear. . How does this logic allow us to follow the Supreme Court’s direction in *Kolender v. Lawson*¹¹⁷ to keep our criminal laws so “ordinary people can understand what conduct is prohibited?”¹¹⁸ It is unreasonable to believe ordinary people¹¹⁹ would know what the mail fraud provision was prior to *McNally* when the U.S. Courts of Appeal cannot agree on this standard. In such a case, an ordinary person would have more judicial foresight than the courts have had to understanding the meaning and parameters of § 1346.

The second issue addressed by the court in *Handakas* was whether the language of the statute is “so standardless that it authorizes or

111. *United States v. Brumley*, 116 F.3d 728, 745-746 (5th Cir. 1997) (Jolly, J., dissenting).

112. *United States v. Handakas*, 286 F.3d 92, 104 (2d Cir. 2002).

113. *Id.* citing *Brumley*, 116 F.3d at 742 (Jolly, J., dissenting).

114. *See generally supra* part entitled “Conflicts Amongst the Circuits.”

115. In a somewhat ironic twist, it should be noted that Rep. Conyers actually voted *against* the bill in which this legislation was a part of. *See United States v. Brumley*, 79 F.3d 1430, 1437 n. 6 (5th Cir. 1996).

116. *See supra* notes 33-34 and accompanying text.

117. *Kolender v. Lawson*, 461 U.S. 352 (1983).

118. *Id.* at 357, (citing *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*; *Smith v. Goguen*, 415 U.S. 566 (1974); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Connally v. General Construction Co.*, 269 U.S. 385 (1926).

119. Or even an ‘ordinary’ attorney for that matter.

encourages seriously discriminatory enforcement.”¹²⁰ The Fourth Circuit’s view of § 1346 is an example of how this statute is standardless. In *United States v. Bryan*, the court dismissed the notion that an underlying state law had to be violated or that the defendant must personally gain from his or her conduct.¹²¹ This suggests that if a state law need not be violated, any ethics breach or broken contract could be considered a breach of a duty to another of honest services. The Sixth Circuit acknowledged so much in *United States v. Frost*,¹²² even though it stubbornly held § 1346 was not unconstitutionally vague. “We recognize . . . the literal terms suggest that dishonesty by an employee, standing alone, is a crime. Courts, however, have refused to interpret the doctrine so broadly. . . . This refusal to carry the intangible rights doctrine to its logical extreme stems from a need to avoid the over-criminalization of private relationships.”¹²³ Herein lies the problem. As Scalia notes,¹²⁴ “[i]t is practically gospel in the lower courts that the statute ‘does not encompass every instance of official misconduct[.]’”¹²⁵ The Tenth Circuit proclaimed the statute is “not violated by every breach of contract, breach of duty, conflict of interest, or misstatement made in the course of dealing[.]”¹²⁶ However, the statute, *as it is written*, can fairly only be interpreted broadly because the twenty-eight words that compose this definitional statute consist only of imprecise phrases such as “deprive another of the intangible right” and “honest services.”¹²⁷ As a result, the circuits are not playing by the same set of rules. And while the more narrow reading of the statute, requiring a predicate state law violation and for the defendant to have sought a personal gain, makes the interpretation narrow and thus easier to understand examples of honest services violations; this language is not actually in the statute. Instead, the courts are requiring a case-by-case analysis. But, in the two decades since the statute was passed, not a single court has found a single case where the statute was unconstitutionally vague as applied.¹²⁸

120. *United States v. Williams*, 128 S. Ct. 1830, 1845 (2008), (citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000)); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) (stating that laws must provide for explicit standards to prevent discriminatory enforcement).

121. *United States v. Bryan*, 58 F.3d 933, 942-43 (4th Cir. 1995). Similar views have been taken in the Ninth and Eleventh Circuits, *see supra* notes 91-95 and accompanying text.

122. *United States v. Frost*, 125 F.3d 346, 368 (6th Cir. 1997).

123. *Id.*

124. *Sorich v. United States*, 129 S. Ct. 1308, 13092 (2009), *cert. denied*, (Scalia, J., dissenting).

125. *United States v. Sawyer*, 85 F.3d 713, 725 (1st Cir. 1996).

126. *United States v. Welch*, 327 F.3d 1081, 1107 (10th Cir. 2003).

127. 18 U.S.C. § 1346 (2009) (defining “scheme or artifice to defraud”).

128. *Save for Handakas*, which the circuit court quickly overruled.

The Second Circuit overruled the only case to date that found § 1346 unconstitutionally vague when it decided *Rybicki*.¹²⁹ The court held that other courts have defined honest services fraud in terms of either “reasonably foreseeable harm” or “materiality.”¹³⁰ The question under the reasonably foreseeable test would be whether it was “reasonably foreseeable that the scheme could cause some economic or pecuniary harm to the victim that [was] more than *de minimis*.”¹³¹ Under the materiality test that some circuits have adopted, the question becomes “whether the misrepresentation ‘has the natural tendency to influence, or is capable of influencing, the employer to change his behavior.’”¹³² The Second Circuit decided to choose the latter, broader, definition of ‘honest services fraud’, though this fails to address the concerns raised in *Handakas*. *Rybicki* was a case in private employment, and so the discussion on material misrepresentation is more difficult to compare with those related to public officials.

The facts in *United States v. Waymer*,¹³³ an Eleventh Circuit case, are also pertinent to how § 1346 has been construed. Waymer was an elected member of the local board of education.¹³⁴ He was partners with a man named Assmar, who was receiving a fifteen percent commission from a man named Allen, for helping Allen get contracts with the local school system.¹³⁵ Assmar practically did not work for his commission, and at the time of his death, Waymer told Allen he would start collecting the commission.¹³⁶ Allen agreed, so long as Waymer received permission from the associate superintendent to serve on the school board and conduct business on Allen’s behalf.¹³⁷ Allen received such permission, provided he fully disclosed his relationship to the school board.¹³⁸ Waymer wrote a disclosure letter to the associate superintendent, but did not fully disclose the extent of his commission or the small amount of work he was actually conducting for said commission.¹³⁹ Waymer was convicted on mail fraud counts that alleged he was involved in “a scheme to defraud the citizens of Atlanta of [his] honest services”¹⁴⁰ He was also convicted on all the money laundering counts, though those counts were all dependent on the mail

129. *United States v. Rybicki*, 354 F.3d 124, 144-45 (2d Cir. 2003).

130. *Id.* at 145 (citing *United States v. Vinyard*, 266 F.3d 320, 327-28 (4th Cir. 2001), *cert. denied*, 536 U.S. 922 (2002)).

131. *Id.* (citing *United States v. Rybicki*, 287 F.3d 257, 266 (2d Cir. 2002)).

132. *Rybicki*, 354 F.3d at 145 (citing *Vinyard*, 266 F.3d at 328).

133. *United States v. Waymer*, 55 F.3d 564, 568 (11th Cir. 1995).

134. *Id.* at 566.

135. *Id.*

136. *Id.* at 567.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

fraud “as the specified unlawful activity.”¹⁴¹ In fact, all the charges on the indictment were dependent on the mail fraud charges. A consistent theme with all the cases challenging section § 1346 for vagueness is that because the petitioner does not include questions that would fall under the First Amendment, the court only reviews the specific facts of the particular case and not the statute generally.¹⁴² The court in *Waymer* held that the mail fraud statute requires the prosecution to show specific intent to defraud; and the jury in this case found Waymer did have such intent to defraud the citizens of Atlanta.¹⁴³ Waymer did not challenge whether the evidence was sufficient to support the jury’s finding that he “specifically intended to defraud the citizens of Atlanta of his honest services. Therefore, his vagueness challenge must fail.”¹⁴⁴

Many circuits, including the Seventh, have found three main reasons to reject challenges of § 1346 as being unconstitutionally vague. First, the circuits only look at the facts of the specific case and will not look at the how the statute could be applied generally.¹⁴⁵ “The boundaries of “intangible rights” may be difficult to discern, but that does not mean that it is difficult to determine whether Brumley in particular violated them.”¹⁴⁶ While these are not First Amendment cases, and thus courts are only looking at the specific individual facts of each case, the court is essentially applying Justice Stewart’s comment when he was discussing obscenity and the First Amendment, “I know it when I see it, and . . . this case is not that.”¹⁴⁷ Second, with respect to the argument that the defendant did not have adequate notice, the court simply points to another case where honest services fraud has been used, and concludes that this other case gives the defendant adequate notice.¹⁴⁸ This means not only is the ordinary person expected to know and understand every statute, but he must also know how even the most vague statutes have been applied within his circuit. Finally, to the claim that the statute allows for arbitrary enforcement, the court finds that if there was a fiduciary duty, then knowing there is a fiduciary duty distinguishes the case from one where the government may be trying to pursue someone for mail or wire fraud simply because of a private contract.¹⁴⁹

141. *Id.*

142. *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988).

143. *Waymer*, 55 F.3d at 568-69.

144. *Id.* at 569.

145. *See supra* note 122 and accompanying text.

146. *United States v. Brumley*, 116 F.3d 728, 733 (5th Cir. 1997).

147. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

148. *United States v. Hausmann*, 345 F.3d 952, 958 (2003)(citing *United States v. Bloom*, 149 F.3d 649, 655-56 (7th Cir. 1999).

149. *Hausmann*, 345 F.3d at 958.

Federalism: The Bicameralism and Presentment Problem

The second constitutional issue is one of federalism. The statute raises questions of bicameralism and presentment, including the delegation of authority. Is the statute what was contemplated when passed by the Congress and signed by the President? Has Congress intentionally or unintentionally left the statute so vague that it has unreasonably delegated its authority to write the laws to the courts to act on their own without sufficient direction from Congress and the President?

The bicameralism and presentment concern is closely tied to the scope of the statute. The judiciary is said to interpret the laws of the United States, but excessive judicial expansion of a statute violates bicameralism and presentment since the statute loses its meaning as it was understood at the time Congress passed the legislation and the President signed it into law. The few statements entered into the Congressional Record indicate a willingness and intent to return to the pre-*McNally* days,¹⁵⁰ but there was no uniformity among the circuits even before *McNally*. The Supreme Court never reached the question of how the intangible services could be constitutionally applied in *McNally*. Rather, it said § 1341 did not contain a clear statement that Congress intended for it to include intangible honest services.¹⁵¹ In this respect, one could argue that we have *exactly* what Congress contemplated when they passed § 1346. However, Congress has missed the mark by failing to produce a clear statement. The result is drivel – four different standards of what is required to have a violation of the statute, and all requiring different expectations.¹⁵² These interpretations, particularly those adopted by the Fourth, Ninth, and Eleventh Circuits are entirely incompatible with the interpretations adopted by the Third, Fifth, and Seventh Circuits pre-*Sorich*.

It is implausible to suggest Congress could have contemplated a system where to find a violation of the honest services mail fraud statute, a duty could be assumed simply by being a governmental official, or that requiring the duty be specifically laid out in another statute would also be acceptable.¹⁵³ Or that Congress contemplated that whether a predicate state law violation is required, or not, makes no

150. *Supra* notes 43-44 and accompanying text.

151. *McNally v. United States*, 483 U.S. 350, 359-360 (1987).

152. See generally *supra* part entitled “Conflicts Amongst the Circuits.”

153. Compare *United States v. Weyhrauch*, 548 F.3d 1237, 1243-44 (9th Cir. 2008) *petition for cert. filed* (U.S. Mar. 25, 2009) (No. 08-1196) (concluding every public official is held to a standard of honest services under § 1346), with *United States v. Murphy*, 323 F.3d 102, 115-16 (3d Cir. 2003) (rejecting an assumption of duty owed to the public, and finding a duty under § 1346 only where there is specific statutory language).

difference.¹⁵⁴ Or Congress considered whether some type of personal gain is required; or that such a requirement “adds an extra layer of unnecessary complexity to the inquiry” and decided that both these interpretations were fine.¹⁵⁵ These are not minor subtleties. The Fifth Circuit speaks of the same problem,

the plain language of § 1346 provides little guidance as to the conduct it prohibits. . . . Deprivation of honest services is perforce an imprecise standard, and rule of lenity concerns are particularly weighty in the context of prosecutions of political officials, since such prosecution may chill constitutionally protected political activity. Moreover, decisions of our own Court stating that “fraud is a broad concept that ‘is measured in a particular case by determining whether the scheme demonstrated a departure from fundamental honesty, moral uprightness, or fair play and candid dealings in the general life of the community, do little to allay fears that the federal fraud statutes give inadequate notice of criminality and delegate to the judiciary impermissibly broad authority to delineate the contours of criminal liability.”¹⁵⁶

The Eleventh Circuit has gone so far as to say, “[p]ublic officials inherently owe a fiduciary duty to the public to make governmental decisions in the public’s best interest.”¹⁵⁷ If that is the case though, where does it end? The Eleventh Circuit is attempting to equate ‘honest services’ with the ‘public’s best interest.’ This is not a valid comparison. Will it now be up to each politically appointed U.S. Attorney to decide what is in the public’s best interest, rather than the voting electorate, state and federal law, or an employee’s supervisors? This may be a simplistic analysis, but issues of constitutional import rely on our ability to draw this line in the sand. Politicians on the left and the right make decisions every day that enrage the other side of the aisle. Those making the decisions may (or may not, depending on your level of skepticism with the political process) believe what they are doing is in the public’s interest. However, those on the other side of the aisle

154. Compare *United States v. Brumley*, 116 F.3d 728 (5th Cir. 1997) and *Murphy*, 323 F.3d at 114-16 (finding an underlying predicate state law offense is required to serve as a limiting principle on the scope of § 1346), with *Weyhrauch*, 548 F.3d at 1243-44 (rejecting the theory that a predicate state law offense is required and instead finding a uniform federal standard inherent in § 1346).

155. Compare *United States v. Bloom*, 149 F.3d 649, 655 (7th Cir. 1998) (the statute “prohibit[s] only the abuse of position ‘for private gain.’”), with *United States v. Panarella* 277 F.3d 678, 692 (3d Cir. 2002) (“personal gain adds little clarity to the scope of § 1346 . . . adds an extra layer of unnecessary complexity to the inquiry”).

156. *Murphy*, 323 F.3d at 116 [internal quotes omitted] (citing *Panarella*, 277 F.3d at 698); see also *Crandon v. United States*, 494 U.S. 152, 158, 108 L. Ed. 2d 132, 110 S. Ct. 997 (1990) (stating that the rule of lenity “serves to ensure that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability”).

157. *United States v. Hasner*, 340 F.3d 1261, 1271 (11th Cir. 2003) (citing *United States v. DeVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999)).

will frequently believe the decision is the worst thing that could be done for the public.

The *McNally* Court warned of its fear of “construing 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,”¹⁵⁸ and yet that is exactly what is happening today under the honest services mail fraud statute. These incompatible differences among the circuits go to the heart of the scope of the statute and the intent of Congress when they passed the statute and when it was signed by the President. It is therefore important for the Supreme Court to either address this issue, clarifying its understanding of Congress’ intent, or for the Court to strike down the law and send Congress a message that when the Supreme Court says you can clarify, Congress actually needs to clarify and not simply say, ‘do what was done before.’

If Congress wanted the law to simply be what it was before *McNally*, as the two statements in the Congressional Record would indicate,¹⁵⁹ then the Courts should be applying pre-*McNally* case law as precedent. However, for the most part, the courts are not doing this in the honest services cases coming before them because of their recognition that the pre-*McNally* definition was no more clear than it is today under § 1346.¹⁶⁰ “Congress could not have intended to bless each and every pre-*McNally* lower court ‘honest services’ opinion. Many of these opinions have expressions far broader than their holdings.”¹⁶¹ “Congress, then, has set us back on a course of defining ‘honest services,’ and we turn to that task.”¹⁶² Interestingly, the Ninth Circuit does find its broad construction based upon its pre-*McNally* cases. “Because the statute’s plain language is inconclusive, we turn for guidance in construing the statute to our pre-*McNally* case law and any relevant *post-McNally* decisions[.]”¹⁶³ While this reinforces and strengthens the consistency within the circuit’s own rulings, it does not give weight to whether this construction is correct since the Supreme

158. *McNally v. United States*, 483 U.S. 350, 360 (1987).

159. *Supra* notes 43-44 and accompanying text.

160. “What the government must prove to satisfy this element of the offense is defined by Section 1346 — not by judicial decisions that sought to interpret the mail and wire fraud statutes prior to the passage of § 1346.” *United States v. Sancho*, 157 F.3d 918, 922 (2d Cir. 1998) (rejecting the notion that pre-*McNally* cases should be used to help define the meaning of § 1346).

161. *United States v. Brumley*, 116 F.3d 728, 733 (5th Cir. 1997) (citing *United States v. Curry*, 681 F.2d 406, 419 n.1 (5th Cir. 1982) (Garwood, J., concurring)).

162. *Brumley*, 116 F.3d at 733.

163. *United States v. Weyhrauch*, 548 F.3d 1237, 1243 (9th Cir. 2008), (citing *United States v. Williams*, 441 F.3d 716, 722 (2006); see also *United States v. Rybicki*, 354 F.3d 124, 144 (2d Cir. 2003) (Our analysis here is based on pre-*McNally* case law. We therefore reject that dictum in *Sancho* and *Handakas*)).

Court has still not addressed the intent of Congress or the statutory construction of the statute. Indeed, even the Ninth Circuit admits the statute's language is vague and undefined. "The central problem is that the concept of 'honest services' is vague and undefined by the statute."¹⁶⁴

The Ninth Circuit thus acknowledges the problem, and yet ignores the solution. The solution is a more narrow interpretation. While the Second Circuit does not go far enough in their adoption of a materiality test, they do acknowledge the challenge of § 1346:

If the words of a criminal statute insufficiently define the offense, it is no part of deference to Congress for us to intuit or invent the crime.

The courts may not assume the place of the Congress by writing or rewriting criminal laws pursuant to which citizens will be prosecuted.

This is solely the prerogative of Congress.¹⁶⁵

These issues raised by the Second and Ninth Circuits go to the heart of the problem that whether intentional or not, the honest services fraud statute is too vague, resulting in Congress' unreasonable delegation of authority to the courts to write the laws and act on their own without sufficient direction from Congress and the President.

A CASE STUDY

The issue of honest services mail fraud most recently arose when the U.S. Supreme Court denied certiorari of the Seventh Circuit case, *United States v. Sorich*.¹⁶⁶ In response to this denial, Justice Scalia responded with a rare, six-page dissent to the denial of certiorari¹⁶⁷ The facts of *Sorich* speak to the constitutional issues raised above, includ-

164. Wayrauch, 548 F.3d at 1243(citing *United States v. Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008)).

165. *United States v. Hand*, 286 F.3d 92, 109-10 (2d Cir. 2002) *citing* *Brumley*, 116 F.3d at 736, 746 (Jolly, J., dissenting) [internal quotes omitted] (finding no Supreme Court precedent permitting Congress to "delegate to the federal courts the task of defining the key terms and coverage of a criminal statute"); *See also* *Cleveland v. United States*, 531 U.S. 12, 24, ("We resist the Government's reading of [property rights under] § 1341 . . . because it invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress."); *Smith v. Goguen*, 415 U.S. 566, 574-75 (1974); *United States v. Reese*, 92 U.S. 214, 221 (1875)(mem.) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government."); *United States v. Margiotta*, 688 F.2d 108, 141 n.4, 142 (2d Cir. 1982) (Winter, J., dissenting) ("Even if there were not a canon of construction calling upon us to avoid broad construction of criminal statutes, the recent extension of mail fraud by judicial fiat would be unwarranted. . . . The obligations imposed are wholly the creation of recent interpretations of the mail fraud statute itself.").

166. *United States v. Sorich*, 523 F.3d 702 (7th Cir. 2008), *en banc denied*, 531 F.3d 501 (2008), *cert. denied*, 129 S. Ct. 1308 (2009).

167. *Id.*

ing the scope of the statute, the issue of vagueness, and questions surrounding federalism.

Robert Sorich and two other gentlemen were involved in a scheme to give patronage appointments of City of Chicago jobs.¹⁶⁸ It is estimated that more than 5,000 jobs may have been handed out over the years based on patronage.¹⁶⁹ These illegitimate hires sometimes went to less qualified individuals who gained advantage through fake interview forms and even doctored test scores.¹⁷⁰ This patronage system started well before Sorich, but he and two other staffers in the Mayor's Office of Governmental Affairs were the ones caught in the federal inquiry.¹⁷¹ According to the circuit court, the behavior of Sorich was potentially in violation "of multiple laws and personnel regulations forbidding the use of political considerations in hiring for civil service jobs" stemming from the 'Shackman Decrees.'¹⁷² These are federal consent decrees put in place to prevent politics from being involved in hiring decisions in the City of Chicago after litigation in the 1970s and 1980s.¹⁷³ The jury found Sorich guilty of two counts of honest services mail fraud and acquitted him on two other counts.¹⁷⁴ Sorich was sentenced to a term of 46 months in prison.¹⁷⁵

Sorich challenged the government's theory that he received any type of "personal" or "private" gain,¹⁷⁶ as required in the Seventh Circuit honest services mail fraud cases.¹⁷⁷ He also argued that the honest services mail fraud statute was unconstitutionally vague as applied to him and thus he was not on notice to the potential violations of the law.¹⁷⁸ Finally, Sorich argued that in order to be found guilty under § 1346, the scope of the statute requires a fiduciary duty that comes from state law, and that no such fiduciary duty existed in this case.¹⁷⁹

The Seventh Circuit addressed each of the issues raised by Sorich on appeal. First, the court clarified the requirement that a defendant must receive a personal or private gain would include an attempt at a private gain, regardless of whether the fraudulent scheme actually causes harm.¹⁸⁰ The court also recognized Sorich's contention that job security alone is not sufficient to constitute private gain under the

168. *Id.* at 704-06.

169. *Id.* at 710.

170. *Id.* at 704-06.

171. *Id.* at 705.

172. *Id.* at 706.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 709.

177. *Id.* (citing *United States v. Bloom*, 149 F.3d 649, 657 (7th Cir. 1998)).

178. Sorich, 523 F.3d at 707.

179. *Id.*

180. *Id.* at 708.

court's recent decision in *United States v. Thompson*.¹⁸¹ The court then clarified that by 'personal' or 'private' gain, they mean, 'private', as this simply means an illegitimate gain, benefiting the defendant or another party.¹⁸² So long as a defendant's actions directly help a third-party benefit from the scheme, whether or not it was a co-conspirator or even an unknown third-party, this is sufficient private gain to fit within the statute.¹⁸³ "In the case of a successful scheme, the public [or client] is deprived of its servants' [or attorney's] honest services no matter who receives the proceeds."¹⁸⁴ The court also rejected Sorich's contention that § 1346 is unconstitutionally vague.¹⁸⁵ The court noted that in *United States v. Dvorak*,¹⁸⁶ the defendant pled guilty in a similar patronage case under § 1346, and rejected the defense's argument that there was a distinction between a case ending in a guilty plea and one heard before a trier of fact. The circuit court said the defendant "should have taken note."¹⁸⁷ Finally, the court rejected the defendants' argument that they lacked a fiduciary duty to the citizens of Chicago under state law and that the Shakman consent decrees were an insufficient source to create such a duty.¹⁸⁸ The circuit court instead adopted a broad definition of the source of a fiduciary duty, including sources other than state law, such as from an employee handbook, or a power of attorney agreement, and did not foreclose the theory that there is an inherent fiduciary duty merely because one is a public official.¹⁸⁹ This theory is similar to those adopted in the Ninth and Eleventh Circuits.¹⁹⁰ In doing so, the Seventh Circuit expressly declined once again to adopt the "state law limiting principle" used by the Third and Fifth Circuits.¹⁹¹

There are several problems with the *Sorich* decision. Due process requires a defendant know the laws in order to follow them. "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice

181. *Id.* at 708-09, (citing *Thompson*, 484 F.3d 877, 882 (7th Cir. 2007)).

182. *Sorich*, 523 F.3d at 709.

183. *Id.* at 709-10.

184. *Id.* at 710, (citing *United States v. Spano*, 421 F.3d 599, 603 (7th Cir. 2005)).

185. *Sorich*, 523 F.3d at 711.

186. *Id.* (citing *United States v. Dvorak*, 115 F.3d 1339, 1341 (7th Cir. 1997)).

187. *Id.*

188. *Sorich*, 523 F.3d at 712.

189. *Id.*

190. *Id.* (citing *United States v. Williams*, 441 F.3d 716, 723-24 (9th Cir. 2006)) (power of attorney), *United States v. DeVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999) (inherent fiduciary duty owed to the public).

191. *Sorich*, 523 F.3d at 712. Interestingly, despite its incompatibility with the rule adopted in *Sorich*, the court still does not entirely foreclose the idea of overruling previous rulings and adopting the state law limiting principle rule. The court notes that a defendant who wants the court to do this must do more though to convince the court than just citing cases from other circuits. What this 'more' would be remains undefined.

of what is prohibited.”¹⁹² The appellate court’s broad definition of “private gain” is so broad that it engulfs the circuit’s original purpose in requiring there to be a personal gain in order to fall under the statute. Originally decided in *United States v. Bloom*, the Seventh Circuit had upheld the district court’s ruling that the rule of lenity requires the benefit of the doubt go to the accused, particularly since § 1346 is unclear to “how far the intangible rights theory of criminal responsibility really extends[,]”¹⁹³ and thus “[a]n employee deprives his employer of his honest services only if he misuses his position (or the information he obtained in it) for personal gain.”¹⁹⁴ In this instance, while Bloom’s behavior may have been unethical, the trial court concluded he was not breaking the law himself since he did not personally benefit from the scheme.¹⁹⁵ Under the Seventh Circuit’s definition of private gain in *Sorich* though, Bloom would have been susceptible to the honest services mail fraud statute because his client did in fact benefit from his actions. As Judge Kanne noted in his dissent, joined by Judge Posner in the denial of a rehearing *en banc* in *Sorich*, “The panel opinion will allow the federal government to prosecute honest-services cases by invoking a benefit received by unrelated, unaware-of-the-fraud third parties who received contracts or benefits as ‘private gain’ – the actions that we cautioned against making federal crimes in *Bloom* and *Thompson* seem to now come within the statute.”¹⁹⁶

The circuit court’s adoption of a broad definition of the source of a fiduciary duty was criticized by the dissent to the denial of rehearing *en banc* decision.¹⁹⁷ The circuit court’s conclusion that a fiduciary duty can arise from “other sources” than state law actually was supported by citing two cases where a fiduciary duty *did* in fact exist through the nature of the defendants’ employment.¹⁹⁸ The dissent pointed out finding a duty where one existed is quite different from finding a fiduciary duty that can maintain a criminal charge, under the *Shakman* decrees, which are “civil-action consent decrees entered

192. *United States v. Williams*, 128 S. Ct. 1830, 1835 (2008) (citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000)); *See also* *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). “A statute is not unconstitutionally vague if it defines the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *U.S. v. Waymer*, 55 F.3d 564 (11th Cir. 1995).

193. *United States v. Bloom*, 149 F.3d 649, 656 (7th Cir. 1998).

194. *Id.* at 656-57.

195. *Id.* at 651, 656.

196. *United States v. Sorich*, 531 F.3d 501 (7th Cir. 2008), *en banc denied*, (Kanne, J., dissenting), *cert. denied*, 129 S. Ct. 1308 (2009) (Scalia, J., dissenting).

197. *Id.* at 503-04.

198. *Id.* at 503.

against unrelated parties.”¹⁹⁹ Explicitly deciding to not address whether the Seventh Circuit should adopt the state-law limiting principle, the panel at least for the time being has chosen to open itself to the opposite approach adopted by the Ninth Circuit of an assumed fiduciary duty.²⁰⁰

The circuit court in *Sorich* also suggested that § 1346 is not overly vague as applied in this case because a previous defendant under similar circumstances had pled guilty to honest services mail fraud.²⁰¹ However, the court cites no precedent to suggest a previous guilty plea in a criminal case with an entirely different defendant, in an entirely different case, forecloses later attacks on the constitutionality of a statute. There is a legality problem if a statute is not clear *ex ante*.

[L]eaving it to the courts to apply the vague language in a manner that is *ex ante* (if not at the end of the day) highly unpredictable—violates, in my view, the constitutional prohibition against vague criminal laws. Congress has simply abdicated its responsibility when it passes a criminal statute insusceptible of an interpretation that enables principled, predictable application; and this Court has abdicated its responsibility when it allows that.²⁰²

As it stands, the Seventh Circuit’s new definition of private gain, its assumption that a defendant is ‘on-notice’ every time someone pleads guilty to a crime within the circuit, and its more liberal interpretation of when there is a fiduciary duty, have all made the honest services fraud statute more susceptible to constitutional criticism.

SOLUTIONS

In *Sorich*, rather than the government reaching for a constitutionally questionable charge, they could have pursued *Sorich* under the fraud statute. According to the circuit court’s decision, “[t]he present case . . . features a massive scheme to defraud, complete with specific intent and material misrepresentations.”²⁰³ Clearly written, applicable statutes should be used to punish those who violate the law. If Congress and the states believe the statutes as written do not suffice to prosecute alleged criminals, then it is the duty of the Congress and the states to write better laws. It is not the duty of the court to allow

199. *Id.*

200. See generally *id.* at 502-504 (showing that the court failed to adopt a state law limitation for fiduciary duty which appears to be in conflict with the rulings of other circuits).

201. *Id.*

202. *James v. United States*, 550 U.S. 192, 230-31 (2007) (Scalia, J., dissenting).

203. *United States v. Sorich*, 523 F.3d 702, 711 (7th Cir. 2008), *en banc denied*, 531 F.3d 501 (2008) (Kanne, J., dissenting), *cert. denied*, 129 S. Ct. 1308 (2009) (Scalia, J., dissenting).

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the government to use a vague 'bad person' statute to prosecute individuals who have arguably violated no criminal law on the books.²⁰⁴

There are three potential solutions to the constitutional problem raised by the honest services statute – any of which would have stronger constitutional support than the statute has in its multiple interpretations today. The Supreme Court has taken the first step in granting certiorari in the Ninth Circuit case, *United States v. Weyhrauch*.²⁰⁵ As discussed, the Ninth Circuit overturned the district court in this case to find a broad reading of the honest services fraud statute.²⁰⁶ The Court can take this opportunity to interpret the statute narrowly, so as to eliminate the issue of vagueness and to address the issues of federalism that surround the four different interpretations the circuit courts are presently using. Second, the Court could strike down the law as being facially invalid because it relies on common law which does not exist in our criminal legal system and Congress can address the issue by writing better laws for the crimes being committed, instead of relying on a 'bad person' catch-all statute. Finally, the Supreme Court could strike down the law as unconstitutional, *as written*, and suggest that Congress can re-write the statute; but this time to actually be clear in its intentions.

The goals of the honest services mail fraud statute are legitimate. Reviewing the cases in which the law has been applied, there are not a lot of 'good' men being charged under § 1346. However, "[b]ad men, like good men, are entitled to be tried and sentenced in accordance with law."²⁰⁷ As previously mentioned, if the Supreme Court wants to maintain this statute, it should interpret the statute narrowly. The Court should interpret the statute to require three things in order to be constitutionally sound: 1) proof of private gain, as required and defined by *Bloom* in the Seventh Circuit;²⁰⁸ 2) a predicate state law violation, as required by the Third Circuit;²⁰⁹ and 3) that prior to a charge, whether a public official or private individual, there must be a clear duty owed to the public and this cannot be assumed without specific language from a state statute, as the Fifth Circuit requires.²¹⁰ By

204. *United States v. Sorich*, 531 F.3d 501, 502 (7th Cir. 2008), *en banc denied*, (Kanne, J., dissenting), *cert. denied*, 129 S. Ct. 1308 (2009) (Scalia, J., dissenting).

205. *United States v. Weyhrauch*, 548 F.3d 1237 (9th Cir. 2008), *petition for cert. filed* (U.S. Mar. 25, 2009) (No. 08-1196).

206. *Supra* notes 91-95 and accompanying text.

207. *Sorich v. United States*, 129 S. Ct. 1308, 1311 (2009), *cert. denied*, (Scalia, J., dissenting) (citing *Green v. United States*, 365 U.S. 301, 309 (1961) (Black, J., dissenting)).

208. *Sorich*, 129 S. Ct. at 1309 (Scalia, J., dissenting) (citing *United States v. Bloom*, 149 F.3d 649, 655 (7th Cir. 1998)).

209. *United States v. Murphy*, 323 F.3d 102, 114 (3d Cir. 2003).

210. *Sorich*, 129 S. Ct. at 1309 (Scalia, J., dissenting) (citing *United States v. Brumley*, 116 F.3d 728, 735 (5th Cir. 1997) (*en banc*)).

setting these limitations, the Court would be clearly delineating what constitutes a violation of the honest services mail fraud statute. These specific requirements would eliminate the constitutional questions of vagueness because the accused would be able to know whether he is receiving a private gain. A person would also be able to know whether he is violating another state law, and would be able to determine if he owes the public or his company a fiduciary duty. If the Court does not require these three elements from the statute, the statute should be considered void for vagueness. The one potential flaw in this proposal however, is the bicameralism and presentment issue. The Court should not on its own volition decide what the standards of the statute should be unless there is a basis in the language of the statutory text. This proposal may not solve this issue, but if the Court is satisfied by the reasoning of each of the circuit courts that have adopted these standards, then this would not present an insurmountable hurdle.

The second option would be for Congress to write more specific statutes. Those being charged with violating the honest services fraud statute are frequently also arguably committing fraud, bribery, and traditional mail or wire fraud. Rather than simply make the government's job easier to prosecute less than honest individuals, the Court should force them to meet their burden in the criminal statutes passed through Congress. If Congress and the President decide these laws are insufficient, then they can write better laws so that the law serves their desire to protect the citizenry. This is underscored in *United States v. Frega*.²¹¹ The defendant was accused of bribery, but the charges included honest services fraud. If a more specific charge is relevant, then honest services fraud should not be permitted to be added on if no additional elements have to be met, nor should it be permissible if it lowers the threshold to convict the defendant. If either of these are the case, then it cannot generally be said that it was clear that what was done was *criminal*. "There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute."²¹² There is a distinct difference between behaving in a criminal manner and doing something morally or ethically questionable.

A third solution would be for the Supreme Court could to strike the law down as unconstitutional, *as written*. The statute as written now is plainly vague.

"The plain meaning of "honest services" in the text of § 1346 simply provides no clue to the public or the courts as to what conduct is pro-

211. *United States v. Frega*, 933 F.Supp. 1536 (S.D. Cal. 1996).

212. *Fasulo v. United States*, 272 U.S. 620, 629 (1926).

hibited under the statute. Judge Jolly observed in 1997 that the terms “intangible right” and “honest services” cannot be found in Black’s Law Dictionary, the United States Code, or (for that matter) any federal statute other than § 1346.²¹³

If § 1346 is Congress’ idea of speaking clearly, they failed. The Supreme Court should declare the statute unconstitutional as written and invite Congress to re-write the statute.²¹⁴ As the Second Circuit noted though in *United States v. Hand*,²¹⁵ more precise language is possible.²¹⁶ In fact, more precise language was considered, before ultimately being rejected by Congress and being replaced with the statute as written today.²¹⁷ The proposed statutory language would have included criminalized two specific behaviors:

(a) depriving or defrauding the inhabitants of a state or a political subdivision of a state of the honest services of an official or employee of such state or subdivision and (b) depriving or defrauding the inhabitants of a state or political subdivision of a state of a fair and impartially conducted election process in any primary, runoff, special or general election.²¹⁸

This statute would answer many of the mysteries surrounding § 1346. First, it would limit the application of the statute to public officials and those working for the government. Second, it clearly describes a fiduciary duty certain officials have, and this would be clear to all reading the statute. Third, it pays particular attention to elections where there may not otherwise be a private gain. This last point actually broadens the statute in one respect, but in a way that puts citizens on notice of what is, and is not a crime, and does not simply give prosecutors a ‘bad person’ statute they can use at their discretion.

Any of these three solutions would provide the government and the people a more constitutionally stable statute and base of prosecution.

CONCLUSION

Deterrence is one of the fundamental goals of the American justice system.²¹⁹ Before behaving in a criminal manner, an individual usually considers a number of factors.²²⁰ These factors typically include the likelihood of getting caught; the likelihood of being punished if caught; and the severity of any punishment handed down. This is all

213. *United States v. Brumley*, 116 F.3d 728, 742 (5th Cir. 1997) (Jolly, J., dissenting) (citing *United States v. Handakas*, 286 F.3d 92,104 (2d Cir. 2002)).

214. *United States v. McNally*, 483 U.S. 350, 360 (1987).

215. *United States v. Handakas*, 286 F.3d 92, 104 (2d Cir. 2002).

216. *Id.*

217. *Id.*

218. *Handakas*, 286 F.3d at 104(citing *Brumley*, 116 F.3d at 744 (Jolly, J., dissenting)).

219. *Kimberlin v. United States DOJ*, 318 F.3d 228, 234-35 (D.C. Cir. 2003).

220. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 42 (Yale University Press 1990).

weighed against the benefit from the behavior in question.²²¹ Sociological research suggests the likelihood of getting caught and punished is the most determinative factor for most individuals.²²² However, if certain behavior is not clearly criminal, there is likely to be no deterrent effect because the defendant may have not even considered that certain behavior was criminal in nature, even if unethical. Fundamental fairness and the goals of the justice system suggest that defendants should not be punished post hoc for ‘violations’ of the law that were not explicitly spelled out in statute.

In Justice Scalia’s dissent of the Court’s denial of certiorari in *Sorich*, he pointed out the inconsistency within the circuits in analyzing the honest services fraud statute.²²³ The different standards for fiduciary duty; private gain versus a materiality test; and whether there must be a predicate state law violation in order to apply § 1346 all raise serious constitutional questions pertaining to vagueness and federalism that the Court should have addressed. Even in *Sorich*, there was disagreement as to whether the defendants had committed any crime.²²⁴ When looking at the honest services mail fraud statute across the federal circuits, there are at least four different standards. Even within the Seventh Circuit, the court is issuing contrary rulings without expressly overruling itself.²²⁵ Until these constitutional issues are addressed, the government will continue to do a disservice to the U.S. Constitution and its citizens.

221. *Id.*

222. *Id.*

223. *Sorich v. United States*, 129 S. Ct. 1308, 1309-1310 (2009), *cert. denied*, (Scalia, J., dissenting).

224. *United States v. Sorich*, 523 F.3d 702, 711 (7th Cir. 2008), *en banc denied*, 531 F.3d 501 (2008), *cert. denied*, 129 S. Ct. 1308 (2009). The circuit court said they were part of a massive fraud. *Id.* Whereas the dissent to the denial of rehearing *en banc*, suggested that these defendants may have behaved immorally, but not illegally under the mail-fraud statute, 18 U.S.C. § 1346. *Sorich*, 531 F.3d at 502 (2008), *en banc denied*, (Kanne, J., dissenting), *cert. denied*, 129 S. Ct. 1308, 1308-11 (2009).

225. *Compare United States v. Bloom*, 149 F.3d 649, 656-57 (7th Cir. 1998) (the rule of lenity requires the benefit of the doubt to the accused, particularly since § 1346 is unclear to “how far the intangible rights theory of criminal responsibility really extends[.]” and thus “[a]n employee deprives his employer of his honest services only if he misuses his position (or the information he obtained in it) for personal gain.) *Id.*; and *Sorich*, 523 F.3d at 709-10. (So long as a defendant’s actions directly help a third party benefit from the scheme, whether or not it was a co-conspirator or even an unknown third party, this is sufficient private gain to fit within the statute.) *Id.*