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NOTES

IF ALL POLITICIANS ARE CORRUPT, BUT ALL DEFENDANTS ARE PRESUMED INNOCENT, THEN WHAT? A CASE FOR CHANGE IN HONEST SERVICES FRAUD PROSECUTIONS

*Joseph E. Huigens**

Who steals my purse steals trash; 't is something, nothing;
'T was mine, 't is his, and has been slave to thousands;
But he that filches from me my good name
Robs me of that which not enriches him,
And makes me poor indeed.¹

PROLOGUE

On December 8, 2009, the Supreme Court heard arguments in *United States v. Black*² and *United States v. Weyhrauch*.³ The Court has

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1 WILLIAM SHAKESPEARE, *OTHELLO, THE MOOR OF VENICE* act 3, sc. 3. Shakespeare's father, an alderman, was removed from office by an act that was most likely persecution by "tyrannical justices of the period." T. CARTER, *SHAKESPEARE: PURITAN AND RECUSANT* 145 (1897).

2 530 F.3d 596 (7th Cir. 2008), *cert. granted*, 129 S. Ct. 2379 (U.S. May 18, 2009) (No. 08-876); *see also* Petition for a Writ of Certiorari at i, *Black*, No. 08-876 (U.S. Jan. 9, 2009) ("Whether 18 U.S.C. § 1346 applies to the conduct of a private individual whose alleged 'scheme to defraud' did not contemplate economic or other property harm to the private party to whom honest services were owed.").

3 548 F.3d 1237 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 2863 (U.S. June 29, 2009) (No. 08-1196); *see also* Petition for a Writ of Certiorari at i, *Weyhrauch*, No. 08-1196 (U.S. Mar. 25, 2009) [hereinafter *Weyhrauch* Cert. Petition] ("Whether 18 U.S.C. § 1346 . . . mandates the creation . . . of a federal common law defining the disclosure obligations of state government officials.").

also granted certiorari in *United States v. Skilling*,⁴ which it will hear this Term. Each case requires the Court to interpret 18 U.S.C. § 1346, an arrow in the Department of Justice's quiver for prosecuting corrupt politicians and businessmen.⁵ Considering the issues presented, it seems that the Court intends to throw light on a subject it admonished Congress to "speak more clearly" about nearly twenty-two years ago in *McNally v. United States*,⁶ in which the Court refused to extend federal mail fraud⁷ to schemes to deprive the public of its right to honest and fair government.⁸ Congress subsequently amended the statute in 1988 to include frauds that "deprive another of the intangible right of honest services,"⁹ thereby reinstating any "honest services" jurisprudence preceding *McNally*.¹⁰ Ever since, the question of what

4 554 F.3d 529 (5th Cir. 2009), *cert. granted*, 130 S. Ct. 393 (U.S. Oct. 13, 2009) (No. 08-1394); *see also* Petition for a Writ of Certiorari *in*, *Skilling*, No. 08-1394 (U.S. May 11, 2009) [hereinafter *Skilling Cert. Petition*] ("Whether the federal 'honest services' fraud statute, [§ 1346,] . . . is unconstitutionally vague.").

5 *See supra* notes 2–4. These cases give the Court an opportunity to consider limits on § 1346, e.g., the requirement of a state law violation and private gain. *See infra* Part III.B.

6 483 U.S. 350, 360 (1987), *superseded by statute*, Pub. L. No. 100-690, § 7603, 102 Stat. 4181 (1988). *See id.* ("[W]e read [mail fraud] as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.").

7 18 U.S.C. § 1341 (2006). The mail fraud statute reads, in relevant part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, 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 deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier 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 under this title or imprisoned not more than 20 years, or both . . .

Id.

Because "honest services" applies equally to mail and wire fraud, references to "mail fraud" herein include wire fraud. *See* 18 U.S.C. §§ 1341, 1343, 1346. Except for the jurisdictional element of each offense, mail and wire fraud are equivalent. *See* *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987) ("The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here.").

8 *McNally*, 483 U.S. at 361; *see infra* Part I.C.

9 Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508, 4181 (codified at 18 U.S.C. § 1346 (2006)); *see infra* Part I.D.

10 *See infra* Part I.D.

constitutes “honest services” has festered in the courts of appeals, which have adopted a variety of principles to limit the statute’s reach, albeit not uniformly.¹¹ The resulting circuit split and post-*McNally* caselaw evinces concerns regarding vagueness, federalism, and how best to preserve the force of § 1346.¹² And so, regardless of how the Court decides these issues, this much is certain: a unifying definition for the “outer boundaries”¹³ of honest services fraud, in light of § 1346’s enactment, is long overdue.

INTRODUCTION

Are all politicians crooked? Are all captains of industry thieves? In the United States, where scandals in Washington, D.C. and on Wall Street make headlines¹⁴ and movie plots,¹⁵ can anyone be blamed for answering those questions affirmatively? Between print, television, radio, film, and Internet, Americans are regularly reminded that even white-collared professionals often have evil-meaning minds and evil-doing hands. Indeed, many Americans assume that politicians and businessmen are corrupt—they are presumed guilty.¹⁶ Certainly, an

11 See *infra* Part II.C; see also Adam Liptak, *Justices Will Hear Skilling Case*, N.Y. TIMES, Oct. 14, 2009, at B1 (noting the circuit split over principles used to cabin § 1346); Adam Liptak, *Elusive Line Between ‘Obnoxious’ Dishonesty and the Criminal Kind*, N.Y. TIMES, Oct. 13, 2009, at A14 [hereinafter Liptak, *Obnoxious Dishonesty*] (same).

12 See *infra* Part II.C. According to Adam Liptak, “[i]f you can make sense of [the] phrase, [‘to deprive another of the intangible right of honest services,’] you have achieved something that has so far eluded the nation’s appeals courts.” Liptak, *Obnoxious Dishonesty*, *supra* note 11.

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

14 See, e.g., Monica Davey & Susan Saulny, *Blagojevich Indictment Lays Out Broad ‘Enterprise’ of Corruption*, N.Y. TIMES, Apr. 3, 2009, at A1; Maureen Dowd, *President Rebut New Accusations over Whitewater*, N.Y. TIMES, Mar. 25, 1994, at A1; Diana B. Henriques, *Suit in Madoff Case Says a Manager Was Favored*, N.Y. TIMES, May 2, 2009, at B1; Jim Rutenberg, *Acorn’s Woes Strain Its Ties To Democrats*, N.Y. TIMES, Oct. 16, 2009, at A1.

15 See, e.g., ALL THE KING’S MEN (Columbia Pictures 2006); CITIZEN KANE (Mercury Productions 1941); FROST/NIXON (Universal Pictures 2008); WALL STREET (Twentieth Century-Fox 1987).

16 According to Professor Michael Johnston, who has written extensively on political corruption, “[m]any Americans believe corruption runs rampant in political life.” Michael Johnston, *The Elite Culture of Corruption in American Politics*, in ARGENT, POLITIQUE ET CORRUPTION 49, 49 (Anne Deysine & Donna Kesselman eds., 1999). But disenchantment with politicians and a lack of public trust are not new phenomena attributable to modern, readily accessible media—they predate the Internet by decades.

In 1944, the National Opinion Research Center (NORC) reported that seven out of ten American adults “would [not] like to see their sons embark upon a political career.” NAT’L OPINION RESEARCH CTR., UNIV. OF DENVER, REPORT NO. 20, THE PUBLIC

LOOKS AT POLITICS AND POLITICIANS 3 (1944) (reporting that sixty-nine percent of persons answered “no” when asked: “If you had a son just getting out of school, would you like to see him go into politics as a life work?”). Moreover, nearly five out of ten American adults believed that “it is almost impossible for a man to stay honest if he goes into politics.” *Id.* at 11.

The NORC Report also included a selection of respondents’ quotes, which are illustrative of the sentiments influencing their answers. It seems evident that those Americans viewed politics with a suspicious eye. *See, e.g., id.* at 5 (quoting survey respondents as saying that “[t]here is so much graft in politics and it makes a dishonest man out of an honest one” and that it is “[s]ort of an American prejudice that political life is tainted” (internal quotation marks and emphasis omitted)). Those who believed that politicians cannot remain honest emphasized the allure of “graft, bribery, and easy money,” and some simply spoke in terms of crookedness. *See id.* at 12 (quoting survey respondents as saying that “every man in politics has his price,” “[p]eople value money and position more than honesty,” and “[p]oliticians are all crooked” (internal quotation marks omitted)).

Watergate had a crystallizing effect on public opinion about government corruption. *See* Hazel Erskine, *The Polls: Corruption in Government*, 37 PUB. OPINION Q. 628, 630–44 (1973). As opinion soured in the scandal’s wake, Erskine analyzed a wealth of poll data pertaining to government corruption. *Id.* That data included findings from Gallup Poll, Roper Organization, Harris and Associates, and NORC, *id.* at 630; represented a cross-section of Americans, *id.*; and spanned six presidential administrations from Roosevelt to Nixon, *id.* at 628. Whereas the proportion of “people [who] would advise youngsters to enter politics as a career” peaked at thirty-six percent in 1965, by June 1973 that number dropped to only twenty-three percent. *Id.* “Until Watergate, corruption was never mentioned [as a pressing national issue] by more than three percent[,]” but in May 1973, it was sixteen percent. *Id.* An April 1973 Harris poll asked: “How serious a problem do you think corruption is on the federal/state/local level . . . ?” *Id.* at 640. The results were demonstrative:

TABLE 1.

	FEDERAL	STATE	LOCAL
VERY SERIOUS	52%	37%	31%
SOMEWHAT SERIOUS	29	36	29
NOT REALLY SERIOUS	11	18	32
NOT SURE	8	9	8

Id. According to another Harris poll, by late 1973, sixty-three percent of the public agreed “most politicians are in politics to make money for themselves.” *Id.* at 628. The belief that politicians use their position for private gain figured in many Americans’ assessments of public integrity.

Given the multitude of scandals since Watergate—including Whitewater, Enron, Bernie Madoff, Rod Blagojevich, and ACORN, to name a few—and the advent of Internet and the 24-hour news network, it is illogical to think that Americans’ conceptions of political integrity have improved. For example, a 2003 study suggests Americans generally distrust civil servants. *See* Christopher J. Anderson & Yuliya V. Tverdova, *Corruption, Political Allegiances, and Attitudes Toward Government in Contemporary Democracies*, 41 AM. J. POL. SCI. 91, 96 fig.1 (2003); *id.* at 105 (asking respondents

unsettling number of politicians misuse their offices—be it for money or interns—and lately Wall Street seems chock-full of swindlers looking to fleece unsuspecting investors. Nevertheless, honest politicians and fair-dealing businessmen do exist.¹⁷

Regardless of how their cases are decided, Bruce Weyhrauch, Conrad Black, and Jeffrey Skilling fit the bill of high-profile citizens who are widely regarded as corrupt.¹⁸ Weyhrauch was a lawyer and member of the Alaska House of Representatives,¹⁹ Black was CEO of Hollinger International,²⁰ and Skilling was CEO of Enron Corporation.²¹ Each man was indicted pursuant to 18 U.S.C. § 1346 for honest services mail fraud.²² Another such individual is former Alabama governor, Don Siegelman, who was also indicted (and convicted) under § 1346.²³ Each man was charged with the same federal crime in a different circuit, and now seeks Supreme Court review of his case to decide whether honest services fraud may be fairly enforced against him.²⁴

What constitutes a “scheme or artifice to deprive another of the intangible right of honest services”?²⁵ The answer varies depending on the federal circuit in which a defendant is charged, and then it

how much they agreed or disagreed with the statement: “Most civil servants can be trusted to do what is best for the country”); see also Wendy M. Rahn & Thomas J. Rudolph, *A Tale of Political Trust in American Cities*, 69 PUB. OPINION Q. 530, 540–43 (2005) (analyzing trust in local government with data from fifty-five U.S. cities). A 2006 news agency poll reported that fifty-eight percent of Americans believed corruption was “widespread” in Washington, D.C. See Jon Cohen & Gary Langer, *Majorities See Widespread Corruption, Want Tougher Lobbying Restrictions*, ABC NEWS, Jan. 9, 2006, <http://abcnews.go.com/images/Politics/1003a2LobbyingandCorruption.pdf>.

17 For purposes of this Note, we may assume there are honest politicians and businessmen for whom it would be salutary to adopt limitations on honest services fraud prosecutions.

18 See *supra* note 16.

19 See *United States v. Weyhrauch*, 548 F.3d 1237, 1239 (9th Cir. 2008).

20 See *United States v. Black*, 530 F.3d 596, 599 (7th Cir. 2008).

21 See *United States v. Skilling*, 554 F.3d 529, 534 (5th Cir. 2009).

22 *Skilling*, 554 F.3d at 542; *Weyhrauch*, 548 F.3d at 1243; *Black*, 530 F.3d at 598. Black and Skilling were found guilty and their convictions upheld on appeal. *Skilling*, 554 F.3d at 542, 546; *Black*, 530 F.3d at 598, 606. Weyhrauch’s appeal has not been decided due to interlocutory appeal by the government, *Weyhrauch*, 548 F.3d at 1239, and the grant of his cert petition.

23 See *United States v. Siegelman*, 561 F.3d 1215, 1219 (11th Cir. 2009).

24 See *supra* notes 2–4. Siegelman has filed a petition for a writ of certiorari, but the Court has yet to issue a decision. See *Petition for Writ of Certiorari, Siegelman*, No. 09-182 (U.S. Aug. 10, 2009). Because Siegelman’s case implicates protected speech (campaign contributions), the Court should grant cert and review § 1346 under a facial vagueness analysis. See *infra* Part II.A.

25 18 U.S.C. § 1346 (2006).

may be based on state law or subject to interpretation by a federal court.²⁶ At its core, the problem is that a comprehensive definition for “honest services” cannot be gleaned from the language of § 1346, or from case law, or from legislative history.²⁷ Each circuit has had to establish a judicial construction of honest services,²⁸ and the resultant split has been criticized as subjecting defendants to ad hoc standards of culpability by federal prosecutors and judges.²⁹

A politician whose conduct is legal (though not commendable) in one circuit may amount to honest services fraud in another. Weyhrauch, for example, was indicted under § 1346 because he “failed to disclose that he was soliciting work from a company with business before the Legislature,” an undisclosed conflict-of-interest that “did not violate a state criminal law.”³⁰ In the Ninth Circuit, where Weyhrauch was charged, culpability pursuant to § 1346 is independent of state law, and he may therefore be found guilty.³¹ But if Weyhrauch served in the Fifth Circuit, all other things being equal, his actions could not sustain an honest services fraud charge because they do not breach a fiduciary duty owed under state law.³²

Unlike the Fifth Circuit, most courts of appeals hold that honest services are determined by a uniform federal standard based on Congress’s interest in ensuring unbiased decisionmaking at the subnational levels of government.³³ That interpretation has been criticized as violating federalism, because it affords federal prosecutors latitude to police state and local officials under a vaguely defined, open-ended criminal standard.³⁴ It has been said that such power “opens the door for abuse through selective prosecution” by prosecutors with “career-

26 The Third and Fifth Circuits define “honest services” according to state law, whereas circuits like the Ninth, Tenth, and Eleventh have held that “honest services” are subject to a federal common-law standard. See *infra* Part II.C.

27 See *infra* Part I.

28 See *infra* Part II.C.

29 See Liptak, *Obnoxious Dishonesty*, *supra* note 11.

30 *Id.* While in office, Weyhrauch sought post-term employment at a company affected by a pending tax bill. *United States v. Weyhrauch*, 548 F.3d 1237, 1239 (9th Cir. 2008). He mailed his resume to the company, but did not disclose the conflict-of-interest created by his solicitation. *Id.* The prosecution’s theory was that Weyhrauch then took a position on the bill that was favorable to the company in exchange for future employment. *Id.* He was charged with 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.” *Id.* (alterations in original) (internal quotation marks omitted).

31 See *Weyhrauch*, 548 F.3d at 1246; *infra* Part II.C.

32 See *United States v. Brumley*, 116 F.3d 728, 735 (5th Cir. 1997); *infra* Part II.C.

33 See *infra* Part II.C.

34 See *infra* Part II.B.

ist motives to stalk the big kill.”³⁵ Justice Scalia has expressed similar concern that the statute “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.”³⁶ Ominous power is, indeed, conferred upon prosecutors when the foremost limiting principle of a criminal statute is their discretion. As former U.S. Attorney General Robert H. Jackson wrote:

The [federal] prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations.

. . . .

If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. . . . It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to . . . the prosecutor himself.³⁷

This Note is not about extramarital affairs of politicians or furtive dealings of corporate officers. Suffice it to say that dishonest behavior, whether unlawful or not, should be neither applauded nor condoned. But not all failings of character amount to federal criminal law violations, even if the person is a politician. Politicians make easy targets for mudslingers—particularly when the mudslinger has political aspirations of his own. In politics, where the mere suggestion of impropriety can damage one’s reputation, a prosecutor wielding the specter of an honest services fraud charge has the power to end careers and influence elections.³⁸ On the other hand, corruption may

35 Kristen Kate Orr, Note, *Fencing in the Frontier: A Look Into the Limits of Mail Fraud*, 95 Ky. L.J. 789, 795 (2007) (internal quotation marks omitted).

36 *Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari). For a discussion on the entanglement of politics and prosecutorial discretion, and its attendant ramifications, see generally Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369 (2009).

37 Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC’Y 18, 18–19 (1940).

38 Cf. Liptak, *Obnoxious Dishonesty*, *supra* note 11 (“[Section 1346] allows federal prosecutors vast discretion to go after people they don’t like or people they disagree with politically.” (internal quotation marks omitted)); Letter from Rep. John Conyers, Jr., Chair of the House Committee on the Judiciary, to Eric H. Holder, Attorney Gen-

be so entrenched at the state or local level that the responsible investigative agencies and prosecutors, averse to upsetting the established order, are effectively deterred from building cases and filing indictments.³⁹ Indeed, that possibility influenced Congress's decision to enact § 1346,⁴⁰ and remains a strong argument for sustaining honest services fraud as a federal prosecutorial tool. But given the circuit split on § 1346,⁴¹ whereby state politicians may face federal criminal charges for conduct that does not amount even to a state law violation or that confers nothing more than de minimis private gain, some measure of restraint is warranted.

Accordingly, this Note advocates substantive legal limits on honest services fraud; namely, required violation of a state criminal law and existence of a material private gain. In view of the widespread belief that politicians and businessmen are corrupt, this Note also recommends evidentiary safeguards against prejudicial juries and judges. This Note proceeds in three parts. Part I presents a history of mail fraud and the honest services doctrine, including § 1346's seldom acknowledged legislative history. Part II surveys the federal circuits' interpretations of § 1346 and criticisms fueling that split. Part III makes a case for adopting unifying limitations on honest services fraud prosecutions, including substantive legal requirements and evidentiary safeguards. While I recognize that private § 1346 cases implicate more concerns than addressed by this Note, I contend that the limitations espoused herein constitute the base of a restraining touchstone equally befitting of public and private honest services fraud

eral of the United States (Sept. 25, 2009), available at http://www.donsiegelman.org/files/Letter_JohnConyers_to_AG_Holder.pdf (expressing concern that Siegelman's prosecution was "politically-influenced," and that "'people who have worked in the Department of Justice . . . see a disturbing trend . . . that involves partisan politics'" (quoting *Allegations of Selective Prosecution: The Erosion of Public Confidence in Our Federal Justice System: Joint Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security and the Subcomm. on Commercial and Admin. Law*, 110th Cong. 273 (2007) (testimony of G. Douglas Jones, Attorney, Whatley, Drake and Kallas))).

³⁹ See, e.g., 134 CONG. REC. 15,046 (1988) (statement of Sen. McConnell) ("State or local law enforcement officials themselves may . . . be so corrupted as to undermine their effectiveness.").

For an appraisal of the state inadequacy justification for federal prosecution of subnational corruption, see Michael K. Avery, Note, *Whose Rights? Why States Should Set the Parameters for Federal Honest Services Mail and Wire Fraud Prosecutions*, 49 B.C. L. REV. 1431, 1447-54 (2008). The nature of political corruption, and its tendency to involve law enforcement, presents a barrier to prosecution at the state and local levels. See *id.* at 1450-51.

⁴⁰ See 133 CONG. REC. 32,959-61 (1987) (statement of Rep. Conyers); *infra* Part I.D.

⁴¹ See *infra* Part II.C.

cases. As such, this Note proceeds from the context of § 1346 cases involving politicians only.

I. MAIL FRAUD AND HONEST SERVICES: A BRIEF HISTORY

This Part is an account of milestones that eventuated in the honest services doctrine and crystallized issues upon which the federal circuits are split.⁴² This Part begins with the original mail fraud statute and ends with Congress's enactment of 18 U.S.C. § 1346.

A. *The Mail Fraud Statute and Durland v. United States*⁴³

The original mail fraud statute was enacted in 1872,⁴⁴ making it “one of the oldest federal criminal statutes in continuous use.”⁴⁵ Although the legislative history is sparse,⁴⁶ Congress evidently sought to prevent the postal system from being used to facilitate “the sale of counterfeit currency”⁴⁷ and scheming “lottery swindlers.”⁴⁸ The Supreme Court has attributed Congress's reasons for the statute to “measures [that] were needed ‘to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapsallions generally, for the purpose of deceiving and fleecing the innocent people in the country.’”⁴⁹ Accordingly, the statute's language made it a crime for “any person to . . . devise any scheme or artifice to

42 For additional historical accounts of the mail fraud statute, honest services and the intangible rights doctrine, *McNally*, Congress's response to *McNally*, and case law interpreting § 1346, see Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 158–70 (1994); Daniel C. Cleveland, Note, *Once Again, It Is Time to “Speak More Clearly” About § 1346 and the Intangible Rights of Honest Services Doctrine in Mail and Wire Fraud*, 34 N. KY. L. REV. 117, 119–39 (2007); Daniel W. Hurson, Note, *Mail Fraud, The Intangible Rights Doctrine, and the Infusion of State Law: A Bermuda Triangle of Sorts*, 38 HOUS. L. REV. 297, 301–10 (2001); Carrie A. Tandler, Note, *An Indictment of Bright Line Tests for Honest Services Mail Fraud*, 72 FORDHAM L. REV. 2729, 2731–40 (2004).

43 161 U.S. 306 (1896).

44 Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323.

45 Orr, *supra* note 35, at 789; *see also* Stacy Jaye Kanter, *Mail Fraud and the De Facto Public Official: The Second Circuit Protects Citizens' Rights to Honest Government*, 49 BROOK. L. REV. 933, 933 (1983) (noting that mail fraud has existed for over a century).

46 *See* Hurson, *supra* note 42, at 301; Tandler, *supra* note 42, at 2732.

47 Moohr, *supra* note 42, at 158.

48 Kanter, *supra* note 45, at 935.

49 *McNally v. United States*, 483 U.S. 350, 356 (1987) (quoting CONG. GLOBE, 41st Cong., 3d Sess., 35 (1870) (remarks of Rep. Farnsworth)). *But see id.* at 365 (Stevens, J., dissenting) (“Congress sought to protect the integrity of the United States mails by not allowing them to be used as instruments of crime.” (internal quotation marks omitted)).

defraud . . . by means of the post-office establishment of the United States.”⁵⁰ Thus, to commit mail fraud, a person had to have *specific intent* to use the mail for executing a scheme or artifice to defraud.⁵¹ The federal interest was the postal system itself; the statute did not proscribe frauds in general.⁵² Interpretation by the Court and amendments by Congress, however, broadened mail fraud’s reach.⁵³

The Court had its first opportunity to interpret the mail fraud statute in 1896 in *Durland v. United States*.⁵⁴ Durland intentionally used the postal service to mail solicitations encouraging investors to buy bonds.⁵⁵ There were no misrepresentations as to his company’s legitimacy, the bond maturity schedule, or the terms of bond redemption, and bonds were, in fact, issued to every purchaser.⁵⁶ Durland, however, never intended to make good on the payment of redeemed bonds; he did not undertake a good-faith effort to invest monies received and advanced false statements regarding future promises to pay returns.⁵⁷ He maintained that his actions were merely a breach of contract.⁵⁸

Durland was convicted of mail fraud, but appealed on valid grounds that, at common law, false statements as to future promises did not constitute fraud.⁵⁹ The Court disagreed, stating that “[t]he statute is broader than is claimed.”⁶⁰ In so doing, the Court arguably severed the statute from its common law moorings.⁶¹ It went on to

50 Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323.

51 *Id.*; see also Moohr, *supra* note 42, at 158–59 (discussing original elements of mail fraud).

52 See Moohr, *supra* note 42, at 159.

53 See *Badders v. United States*, 240 U.S. 391 (1916); *Durland v. United States*, 161 U.S. 306 (1896); Kanter, *supra* note 45, at 935–37; Moohr, *supra* note 42, at 158–59.

54 Congress amended the mail fraud statute in 1889 to add a list of specifically named schemes, e.g., “sawdust swindle.” Act of Mar. 2, 1889, ch. 393, § 5480, 25 Stat. 873, *amending* Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323. Durland was charged under § 5480 (not § 301).

55 See *Durland*, 161 U.S. at 309–10.

56 *Id.* at 312.

57 *Id.* at 314.

58 *Id.* at 312–13.

59 *Id.*

60 *Id.*

61 See Kanter, *supra* note 45, at 936 n.22; Hurson, *supra* note 42, at 302 n.19. *But see* *Neder v. United States*, 527 U.S. 1, 24 (1999) (“Although *Durland* held that the mail fraud statute reaches conduct that would not have constituted ‘false pretenses’ at common law, it did not hold . . . that the statute encompasses more than common-law fraud.”). *Neder’s* distinguishing of *Durland* is circular. If, in 1896, mail fraud encompassed “false pretenses” and *Durland* applied it beyond common law, then “mail

explain that “beyond the letter of the statute is the evil sought to be remedied, which is *always significant* in determining the meaning,” and that, in “light of this[,] the statute must be read . . . [to] include[] everything designed to defraud.”⁶² *Durland* made an impression on lower courts, which read its recourse to the statute’s purpose, rather than common-law underpinnings, as expanding mail fraud to include schemes to deprive another of intangible rights.⁶³

Congress subsequently modified mail fraud in 1909 to codify the holding in *Durland* and tone down the nexus between the statute’s fraud and mailing elements.⁶⁴ As amended, the law proscribed “any scheme or artifice to defraud, *or for obtaining money or property by means of false pretenses, representations, or promises.*”⁶⁵ Congress also modified the jurisdictional basis of the statute to read “*for the purpose of executing such scheme or artifice . . . [uses the mails or causes the mails to be used],*” thereby eliminating specific intent from the mailing element.⁶⁶ Two cases following that amendment set the stage for expansive interpretation of mail fraud by the lower courts. In *United States v. Young*,⁶⁷ the Court held that “it is only necessary that the scheme should be devised . . . and a letter be placed in the postoffice for the purpose of executing the scheme.”⁶⁸ *Young* thereby ended any debate⁶⁹ over whether the statute only applied to schemes that intentionally relied on the mails—it did not. The question then became whether mail fraud exceeded Congress’s authority to regulate the pos-

fraud” reached more than common law fraud. If false pretenses did not constitute mail fraud, then *Durland* broadened the statute. Either way, *Durland* holds that mail fraud reaches more than common law fraud. See *infra* note 63.

62 *Durland*, 161 U.S. at 313 (emphasis added).

63 See *United States v. McNeive*, 536 F.2d 1245, 1247 n.3 (8th Cir. 1976) (“This court, citing *Durland*, has stated that the definition of fraud in § 1341 is to be broadly and liberally construed to further the purpose of the statute As *Durland* recognized, the definition of fraud in the mail fraud statute was intended by Congress to be broader than the definition of fraud recognized at common law.” (internal quotation marks omitted)).

64 See Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1088, 1130, *amending* Act of Mar. 2, 1889, ch. 393, § 5480, 25 Stat. 873; see also *McNally v. United States*, 483 U.S. 350, 357 (1987) (discussing 1909 amendment to mail fraud statute); *McNeive*, 536 F.2d at 1248 (same).

65 Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130 (emphasis added).

66 *Id.* (emphasis added). Under the statute’s original language, a person arguably had to devise a scheme that specifically made use of the postal service an essential element of its execution, i.e., mail fraud required specific intent for use of the mail, not just fraud.

67 232 U.S. 155 (1914).

68 *Id.* at 161 (emphasis added).

69 See *Kanter*, *supra* note 45, at 936 n.23.

tal service, since use of the mails no longer was an essential element of the scheme or artifice. But in *Badders v. United States*,⁷⁰ Justice Holmes explained: "Whatever the limits to [Congress's] power, it may forbid any such acts done in furtherance of a scheme that it regards as contrary to *public policy*, whether it can forbid the scheme or not."⁷¹ And so, *Durland*, *Young*, and *Badders* expanded mail fraud beyond common law while relaxing the mail element, essentially relegating it to a jurisdictional hook.

The mail fraud statute was further amended on several occasions before reaching its form as codified at 18 U.S.C. § 1341;⁷² however, its elements remain largely unchanged. Specifically, mail fraud requires (1) a scheme or artifice to defraud, (2) specific intent to defraud, and (3) use of the mails in connection with the scheme.⁷³ But although mail fraud was predominantly used to prosecute conventional frauds, i.e., depriving money or property, prosecutors and courts began taking an expansive view of the statute that included schemes to deprive intangible rights.

B. *Emergence of the Intangible Rights (Honest Services) Theory of Mail Fraud*

The intangible rights theory of mail fraud holds that schemes to defraud are not limited to those depriving another of money or property—divesting one of his intangible rights is just as contemptible as wronging him in his property.⁷⁴ For example, the right of citizens to honest government is an intangible right.⁷⁵ The first proposition that

70 240 U.S. 391 (1916).

71 *Id.* at 393 (emphasis added).

72 See Tendler, *supra* note 42, at 2732 n.25.

73 18 U.S.C. § 1341 (2006); see Orr, *supra* note 35, at 793 & n.36; Cleveland, *supra* note 42, at 119–20. Cleveland states the third element of mail fraud as "use of the mails . . . in furtherance of [the] scheme." Cleveland, *supra* note 42, at 119 (emphasis added). Orr uses similar language. See Orr, *supra* note 35, at 793. I assert the third element of mail fraud as "use of the mails in connection with the scheme" for two reasons: (1) § 1341's language does not indicate a legislative preference for the "in furtherance" construction, and (2) the holding of *Schmuck v. United States*, 489 U.S. 705 (1989), does not indicate a judicial preference for such a construction. See *id.* at 710–15; *infra* note 221. Indeed, the issue is unsettled, and neither Orr nor Cleveland is incorrect, but without direction from the Court, only good sense requires use of the mails to be in furtherance of the scheme. For a discussion of *Schmuck* and its implications, see Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C. L. REV. 223, 254–63 (1992).

74 See *McNally v. United States*, 483 U.S. 350, 358 (1987); *United States v. McNeive*, 536 F.2d 1245, 1248–50 (8th Cir. 1976) (describing intangible rights cases).

75 See *McNally*, 483 U.S. at 358.

mail fraud could reach public corruption emerged in 1941 in *Shushan v. United States*.⁷⁶ *Shushan* involved conventional fraud, and was decided on that basis,⁷⁷ but the Fifth Circuit used the opportunity to state that a scheme intended to corruptly influence government “must in the federal law be considered a scheme to defraud.”⁷⁸ But despite *Shushan*’s emphatic language, nearly thirty years passed before the intangible rights theory of mail fraud fully bloomed in the courts of appeals.

Beginning in the late 1960s, throughout the 1970s, and well into the 1980s, federal prosecutors took aim at corruption using an intangible rights theory of mail fraud—namely, the public’s right to honest services of their elected officials.⁷⁹ Such cases proceeded on the basis that public officials have a fiduciary duty to give “honest, faithful, and disinterested service.”⁸⁰ The courts of appeals validated that tack on the basis of *Shushan*⁸¹ and by reading Congress’s post-*Durland* addition to the mail fraud statute⁸² as independent of—not a limitation

76 117 F.2d 110, 115 (5th Cir. 1941).

77 See *id.* at 121 (discussing evidence of defendants’ scheme to deprive money).

78 *Id.* at 115. Specifically, the Fifth Circuit in *Shushan* stated:

A scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public. . . . No trustee has more sacred duties than a public official and any scheme to obtain an advantage by corrupting such an [sic] one must in the federal law be considered a scheme to defraud.

Id.

79 See, e.g., *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982); *United States v. Mandel*, 591 F.2d 1347 (4th Cir.), *aff’d per curiam in relevant part on reh’g en banc*, 602 F.2d 653 (4th Cir. 1979); see also *McNally*, 483 U.S. at 362 n.1 (Stevens, J., dissenting) (listing cases where “state and federal officials ha[d] been convicted of defrauding citizens of their right to . . . honest services”). For additional “intangible rights” cases, see *Kanter*, *supra* note 45, at 934 n.6; *id.* at 938 n.34; *Hurson*, *supra* note 42, at 304–05 nn.32–34.

80 *Mandel*, 591 F.2d at 1362. Mandel was charged with scheming to defraud the citizens “of their right to the conscientious, loyal, faithful, disinterested and unbiased services, actions and performance of [his] official duties.” *Id.* at 1353. The indictment characterized the intangible right as the “right to have the state’s business and its affairs conducted honestly, impartially, free from bribery, corruption, bias, dishonesty, deceit, official misconduct and fraud.” *Id.*

81 See, e.g., *id.* at 1362; *United States v. Brown*, 540 F.2d 364, 374 (8th Cir. 1976).

82 See Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1088, 1130, *amending* Act of Mar. 2, 1889, ch. 393, § 5480, 25 Stat. 873; *supra* notes 63–66 and accompanying text. As amended, the proscribed conduct appears disjunctive such that courts have interpreted the statute to confer liability on one who, having satisfied the jurisdictional element: (1) devises a scheme or artifice to defraud, or (2) obtains (or attempts to

on—the phrase “any scheme or artifice to defraud.”⁸³ As such, mail fraud came to include schemes depriving the public of its right to the “honest services” of elected officials.

A paradigmatic case endorsing the honest services theory of mail fraud to prosecute political corruption⁸⁴ was *United States v. Mandel*.⁸⁵ In that case, Mandel, then governor of Maryland, was convicted of mail fraud for allegedly taking bribes and concealing material information.⁸⁶ Mandel favored a controversial bill that would significantly increase the number of racing days authorized for a particular racetrack.⁸⁷ The trial evidence tended to show that he had received numerous gifts and a concealed interest in two real estate companies given to him by the racetrack owners.⁸⁸ Evidence also indicated that efforts were made by the racetrack owners to conceal the fact of their ownership from the state racing commission.⁸⁹ They chose an outsider to serve as company president and act as its public nominee, including representations before the commission.⁹⁰ At the time, however, such use of a public nominee was a “common and legal practice.”⁹¹ Moreover, there was no direct evidence that Mandel even knew that his benefactors were the racetrack’s true owners.⁹² That “disputed issue of fact”⁹³ formed a partial basis of the court’s decision to vacate his conviction and remand.⁹⁴ Nevertheless, the Fourth Cir-

obtain) money or property by means of false pretenses, representations, or promises. See 18 U.S.C. § 1341 (2006); *McNally*, 483 U.S. at 357–58.

83 See *McNally*, 483 U.S. at 357–58; see also *United States v. Clapps*, 732 F.2d 1148, 1152 (3d Cir. 1984) (reading “scheme or artifice to defraud” clause independent of “money or property”).

84 See, e.g., *Kanter*, *supra* note 45, at 933–34 (“As a result of [*Mandel*’s] expansive reading, federal prosecutors have successfully relied upon the mail fraud statute to combat political corruption.”); *Moohr*, *supra* note 42, at 166 (prosecutors use the statute extensively).

85 591 F.2d 1347 (4th Cir.), *aff’d per curiam in relevant part on reh’g en banc*, 602 F.2d 653 (4th Cir. 1979). The facts in *Mandel* are similar to those in *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974). In *Isaacs*, former Illinois governor, Otto Kerner, was convicted of mail fraud for accepting bribes to obtain racing days for two racetracks. See *id.* at 1131–39, 1149.

86 *Mandel*, 591 F.2d at 1353.

87 *Id.* at 1355.

88 *Id.* at 1356.

89 *Id.* at 1354.

90 *Id.*

91 *Id.* at 1355.

92 *Id.* at 1354.

93 *Id.*

94 *Id.* at 1365–66 & 1376.

cuit sanctioned the use of “honest services” mail fraud to prosecute corrupt politicians,⁹⁵ and set a precedent for subsequent cases.⁹⁶

C. *The Supreme Court Speaks: McNally v. United States*

Federal prosecutions of intangible rights mail fraud cases came to an abrupt, albeit short-lived, halt in 1987 when the Court held in *McNally v. United States* that the “any scheme or artifice” language of the mail fraud statute could not be construed apart from a “money-or-property requirement.”⁹⁷ The decision tapped the brakes on intangible-rights mail-fraud jurisprudence,⁹⁸ particularly as applied against political corruption, since pecuniary loss to the public, e.g., state or local coffers, does not necessarily accompany honest services frauds,⁹⁹ as was the case in *Mandel*.¹⁰⁰

The scheme in *McNally* embroiled a private individual, McNally, who was the nominal owner of an investment company (Seton), and a public official, Gray, who had a nondisclosed ownership interest in Seton.¹⁰¹ The government’s theory was that McNally and Gray, along with a third person, Hunt (also a public official), engaged in a self-

95 See *id.* at 1355–64 (analyzing schemes to deprive honest services of government in context of mail fraud); *id.* at 1361 (“[S]chemes involving bribery and some schemes of nondisclosure and concealment of material information come within the purview of the mail fraud statute.”).

96 See, e.g., *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982). *Margiotta* extended the honest services theory to a private individual who, by virtue of his position and influence over government affairs, acted as a de facto public official. *Id.* at 122. That court held that Margiotta had a duty to disclose material conflicts of interest. *Id.* at 127.

97 *McNally v. United States*, 483 U.S. 350 (1987); see *id.* at 360 (stating that § 1341 only protects property rights).

98 *McNally* overturned the series of decisions that had established an intangible rights theory of mail fraud. See Moohr, *supra* note 42, at 167; Podgor, *supra* note 73, at 233. The decision reset judicial interpretation of § 1341 back to the Court’s purported common-law definition of fraud, which applied only to schemes involving money or property. *McNally*, 483 U.S. at 358.

99 See 133 CONG. REC. 33,254 (1987) (statement of Sen. Specter) (“In many of these cases it is difficult, if not impossible, to prove that the State or local government’s treasury was adversely impacted . . . even though it is clear that the official has abused his power and deprived the citizens of the services to which they are entitled.”).

100 A politician who accepts bribes or fails to disclose a conflict of interest may accrue a private gain without depriving the state of a pecuniary interest. If Mandel succeeded in obtaining racing days for the racetrack owners—i.e., if the bill passed—it would have increased state tax revenue. But since his vote was the product of self-interest, it nevertheless breached his fiduciary duty of honest services. See *Mandel*, 591 F.2d at 1355; *supra* notes 86–96 and accompanying text.

101 *McNally*, 483 U.S. at 352–55.

dealing patronage scheme that leveraged Hunt's and Gray's authority to secure unearned insurance commissions to Seton.¹⁰² The men allegedly directed one of the state's primary insurance agents—chosen to purchase its workers' compensation policies—to pay a share of the commissions to Seton in exchange for a continued agency relationship with the state.¹⁰³ Since payments to Seton came from commissions that would have been paid regardless of the scheme, the state was not deprived of any money it would not have otherwise spent.¹⁰⁴ Moreover, the scheme—including Gray's failure to disclose his interest in Seton—did not violate state or federal law.¹⁰⁵ McNally and Gray's convictions were based on the theory that their actions were a scheme "to defraud the citizens of their intangible rights to honest and impartial government."¹⁰⁶ But unlike the Fourth Circuit in *Mandel* or the Fifth Circuit in *Shushan*, the Court in *McNally* held that the mail fraud statute "does not refer to the intangible right of the citizenry to good government"¹⁰⁷ and reversed.

Justice Stevens, dissenting, was quick to point out that, given its interest in protecting the integrity of the Postal Service,¹⁰⁸ it is illogical that Congress sought to criminalize petty money schemes but was indifferent of schemes to deprive citizens of honest, unbiased government.¹⁰⁹ Citing *Hammerschmidt v. United States*,¹¹⁰ *Durland*, legal dictionaries, and a treatise,¹¹¹ Stevens also raised doubt as to whether Congress intended such a narrow meaning of "defraud" when it enacted the statute in 1872.¹¹² He also gainsaid the majority's federalism concerns as overblown in light of the series of appellate decisions validating the honest services theory of mail fraud, which, Stevens urged, provided sufficient notice to dispel any ambiguity in the statute.¹¹³ The *McNally* Court, however, had the final word on federalism and mail fraud:

102 *Id.*

103 *Id.* at 353–55.

104 *Id.* at 360.

105 *See* Moohr, *supra* note 42, at 167 ("The scheme did not result in any monetary or property loss to Kentucky, violate Kentucky law, or violate any other federal law." (footnote omitted)).

106 *McNally*, 483 U.S. at 355.

107 *Id.*

108 *See id.* at 365–66 (Stevens, J., dissenting).

109 *Id.* at 366.

110 265 U.S. 182 (1924); *see McNally*, 483 U.S. at 368 & n.6 (Stevens, J., dissenting).

111 *McNally*, 483 U.S. at 368–71 (Stevens, J., dissenting).

112 *See id.* at 368–74.

113 *See id.* at 375–76.

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.*¹¹⁴

D. Congress Responds: 18 U.S.C. § 1346 and Honest Services

Congress desired to go further, and answered the Court less than one year after *McNally* by passing 18 U.S.C. § 1346,¹¹⁵ which amended the mail and wire fraud statutes to include schemes to “deprive another of the intangible right of honest services.”¹¹⁶ Although the amendment was a last minute addition tacked onto an omnibus drug bill,¹¹⁷ Congress’s intent was nevertheless clear: the mail fraud statute is not limited by a money or property requirement and pre-*McNally* intangible rights jurisprudence is restored. After noting that the *McNally* decision resulted in dismissal of numerous political corruption prosecutions involving bribery, money laundering, and fraud,¹¹⁸ Representative Conyers, the amendment’s chief proponent in the House, stated:

Prior to the *McNally* decision, every Federal appellate court that had considered the scope of the mail and wire fraud provisions held that those provisions protect the right of the public to the honest services of public officials and others responsible for the conduct of public or public affairs, the right of a member of an organization to the honest services of the leaders of that organization, and the right of employers to the honest service of their employees.

This amendment restores the mail fraud provision to where that provision was before the *McNally* decision. . . .

. . . [I]t is no longer necessary to determine whether or not the scheme or artifice to defraud involved money or property. This

114 *Id.* at 360 (majority opinion) (emphasis added).

115 Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508.

116 18 U.S.C. § 1346 (2006).

117 *See* Moohr, *supra* note 42, at 169; *see also* United States v. Brumley, 116 F.3d 728, 742 (5th Cir. 1997) (Jolly & DeMoss, JJ., dissenting) (“[Section] 1346 was inserted in the Omnibus Drug Bill for the first time on the very day that the Omnibus Drug Bill was finally passed . . .”).

118 Rep. Conyers referred to a Subcommittee on Criminal Justice hearing held on May 12, 1988 at which John C. Keeney, the Acting Assistant Attorney General for the Criminal Division of the DOJ testified on the impact of the *McNally* decision on federal prosecutions of political corruption. *See Mail Fraud: Hearing on H.R. 3089 and H.R. 3050 Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 100th Cong. 47 (1988) [hereinafter *Hearing on H.R. 3089 and H.R. 3050*].

amendment is intended merely to overturn the McNally decision.¹¹⁹

Conyers's remarks are virtually¹²⁰ the only legislative history specifically related to § 1346's enactment, but evidence of Congress's purpose to stem political corruption is hardly lacking.

The first indication of Congress's desire to combat public corruption came just over a month after *McNally*, when Representatives Mfume and Synar introduced the Mail Fraud Amendment Act of 1987.¹²¹ Their proposed legislation characterized "good government," i.e., honest services, as "public business conducted honestly, impartially, free from bribery, corruption, bias, dishonesty, deceit, official misconduct, and fraud."¹²² One week later, Representative Conyers introduced a bill¹²³ that defined "fraud" to include depriving another of

intangible rights of any kind whatsoever in any manner or for any purpose whatsoever; or by using material private information wrongfully stolen, converted, or misappropriated in breach of any statutory, common law, contractual, employment, personal, or other fiduciary relationship.¹²⁴

Conyers also submitted a report describing the Founders' concerns about political corruption and the importance of the Guarantee

119 134 CONG. REC. 33,296-97 (1988) (statement of Rep. Conyers) (internal citations omitted). Rep. Conyers provided case citations as examples of the forms of intangible rights envisioned by Congress in the amendment. *Id.*

120 Senator Biden also submitted a section-by-section analysis of the Anti-Drug Abuse Act of 1988 that included the honest services amendment to mail fraud. His report confirms:

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.

134 CONG. REC. 32,708 (1988) (report of Sen. Biden).

121 H.R. 3050, 100th Cong.

122 133 CONG. REC. 21,466 (1987) (statement of Rep. Mfume).

123 Fraud Amendments Act of 1987, H.R. 3089, 100th Cong. Senator Specter introduced companion legislation in the Senate. Fraud Amendments Act of 1987, S. 1898, 100th Cong. Both bills would have broadly defined "fraud" and "defraud" at 1 U.S.C. § 7, applying the definition throughout the entire U.S. Code. *See* 133 CONG. REC. 33,254 (1987).

124 133 CONG. REC. 22,339-41 (1987) (statement of Rep. Conyers).

Clause¹²⁵ as support for his bill.¹²⁶ Conyers, among others, regarded the Guarantee Clause as the appropriate authority for a federal anticorruption statute. Furthermore, congressional hearings were held on the *McNally* decision, its impact on federal prosecutions of public corruption, and the necessity of legislation like that proposed by Mfume and Conyers.¹²⁷ Anticorruption legislation was also introduced in the Senate—e.g., the Anti-Public Corruption Act of 1988¹²⁸ and the Anti-Corruption Act of 1988.¹²⁹

Although none of the proposed anticorruption bills ever became law, the fact remains that Congress *did* enact § 1346, which reflects concerns about corruption that were repeatedly voiced in the House and Senate. Some commentators have suggested that Congress's failure to pass any of the proposed bills indicates an unwillingness between the House and Senate to agree on a precise definition of

125 U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”).

126 See 133 CONG. REC. 32,959–61 (1987) (statement of Rep. Conyers). Based on the content of that report, Conyers stated:

I draw from these materials the firm judgment that the Congress has, as a matter of original intent, the power to act to protect State and local governments, not only from foreign intrigue or domestic violence, but also corruption. . . . [W]e not only have the power to act, we have the duty to act. The Constitution does not say we “may.” It says that we “shall” guarantee to every State a republican form of government.

Id. at 32,961.

127 See *Hearing on H.R. 3089 and H.R. 3050, supra* note 118, at 1 (opening statement of Rep. Conyers).

128 Anti-Public Corruption Act of 1988, S. 2531, 100th Cong. The bill would have made it:

a crime for any person to endeavor, by any scheme or artifice, corruptly to deprive or to defraud the inhabitants of a State or political subdivision of a State of the honest services of an official or employee of such State or political subdivision. Conduct to be proscribed by [the statute] would include bribery and graft, and would allow for the prosecution of corrupt politicians who did not deprive the inhabitants of anything of readily identifiable economic value, as well as nondisclosure and concealment of material information.

134 CONG. REC. 15,046 (1988) (statement of Sen. McConnell).

129 Anti-Corruption Act of 1988, S. 2793, 100th Cong. That bill proposed a new section to title 18 that “would punish schemes to deprive or defraud the inhabitants of the United States or a State of the *honest services* of their public officials and employees, both elected and appointed.” 134 CONG. REC. 24,152 (1988) (letter of Dick Thornburgh, U.S. Attorney Gen.) (emphasis added).

political corruption.¹³⁰ Unfortunately, no part of this expanded legislative history helps to discern a precise meaning of “honest services,” but it does evince Congress’s intent to reinstate pre-*McNally* case law and federally criminalize political corruption. Had the Omnibus Drug Bill not been center-stage in an election year, Congress may well have passed a comprehensively defined anticorruption statute.

II. GENESIS OF THE CIRCUIT SPLIT: HOW TO LIMIT?

This Part rebuts two foremost criticisms of § 1346—namely, that it is unconstitutionally vague and that it violates federalism—and then surveys the treatment of those criticisms by the courts of appeals. It shows that vagueness challenges have not persuaded courts to invalidate § 1346, and it further suggests that the proscription of federal common-law crimes, as opposed to pure federalism, is the primary reason courts have adopted limitations on the statute. Finally, the circuit split on the meaning (and limits) of honest services fraud is summarized.

A. *Section 1346 and the Void-for-Vagueness Question*¹³¹

Whether § 1346 is unconstitutionally vague is an issue that has been flogged by courts of appeals,¹³² commentators,¹³³ and petition-

130 See, e.g., *United States v. Brumley*, 116 F.3d 728, 744 (5th Cir. 1997) (Jolly & DeMoss, JJ., dissenting).

131 This Note does not purport to make an in-depth analysis of the void-for-vagueness doctrine in general or as applied to 18 U.S.C. § 1346. How such a challenge might play out in the Supreme Court is better left for discussion elsewhere. For a fantastic analysis of the Court’s void-for-vagueness jurisprudence, however, see Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

132 See, e.g., *United States v. Sorich*, 523 F.3d 702, 711 (7th Cir. 2008) (stating that § 1346 is not unconstitutionally vague); *United States v. Williams*, 441 F.3d 716, 724–25 (9th Cir. 2006) (same); *United States v. Welch*, 327 F.3d 1081, 1109 n.29 (10th Cir. 2003) (same); *United States v. Rybicki*, 354 F.3d 124, 142–44 (2d Cir. 2003) (en banc) (stating that § 1346 is neither facially vague nor vague as applied in that case); *United States v. Frost*, 125 F.3d 346, 371 (6th Cir. 1997) (stating that § 1346 is not vague); *United States v. Bryan*, 58 F.3d 933, 941 (4th Cir. 1995) (same); see also *United States v. Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008) (stating that § 1346 is unclear, but “judicial glosses” may “clarify and focus” its language). But see *Sorich v. United States*, 129 S. Ct. 1308, 1311 (2009) (Scalia, J., dissenting from denial of certiorari) (“In light of the . . . serious due process and federalism interests affected by the [potential] expansion of criminal liability . . . I would grant the petition for certiorari and squarely confront both the meaning and the constitutionality of § 1346.”); *United States v. Brown*, 459 F.3d 509, 534 (5th Cir. 2006) (DeMoss, J., dissenting) (“[T]he constitutionality of § 1346 may well be in serious doubt.”); *Rybicki*, 354 F.3d at 157 (Jacobs, J., dissenting) (“[Section 1346] imposes insufficient constraint on prose-

ers,¹³⁴ alike. But although § 1346 could be vague *as applied* to a specific case,¹³⁵ and despite much criticism of the phrase, “honest services,”¹³⁶ the courts of appeals have not yet declared the statute to be facially vague.¹³⁷ Moreover, unless an honest services fraud case implicates a First Amendment protection, the Supreme Court likely cannot conclude that the statute is facially vague, either.¹³⁸

If an honest services fraud case implicates a First Amendment guarantee, then a facial vagueness challenge to § 1346 may succeed under the Court’s heightened scrutiny.¹³⁹ For example, an honest services prosecution based on a politician’s acceptance, or use, of campaign contributions—perhaps characterizing those funds as bribes—would embroil protected speech.¹⁴⁰ In such a case, the Court would not undertake a purely as-applied analysis of the statute; strict

cutors, gives insufficient guidance to judges, and affords insufficient notice to defendants.”).

133 See, e.g., *Moohr*, *supra* note 42, at 187–98 (contending that addition of “honest services” to the mail fraud statute renders it facially void for vagueness).

134 See, e.g., *Skilling* Cert. Petition, *supra* note 4, at 23 (“Even [a private gain] limitation [on § 1346] may not suffice to save the statute from unconstitutional vagueness”); *Weyhrauch* Cert. Petition, *supra* note 3, at 20 (“Defining State Officials’ Disclosure Obligations As A Matter of Federal Common Law Would Raise Serious Constitutional Concerns About The Statute’s Vagueness.” (emphasis omitted)).

135 See, e.g., *United States v. Handakas*, 286 F.3d 92, 112 (2d Cir. 2002) (holding that § 1346 was unconstitutionally vague as applied to the facts of that case), *overruled by Rybicki*, 354 F.3d at 144.

136 See, e.g., *United States v. Weyhrauch*, 548 F.3d 1237, 1243 (9th Cir. 2008) (stating that the “statute’s plain language is inconclusive”); *Urciuoli*, 513 F.3d at 294 (“[T]he concept of ‘honest services’ is vague and undefined by the statute.”); *United States v. Thompson*, 484 F.3d 877, 883 (7th Cir. 2007) (describing the phrase “honest services” as “slippery”); *United States v. Murphy*, 323 F.3d 102, 116 (3d Cir. 2003) (“[T]he plain language of § 1346 provides little guidance as to the conduct it prohibits.”).

137 Aside from the short-lived exception of *Handakas*, “[n]o circuit has ever held . . . that section 1346 is unconstitutionally vague.” *Rybicki*, 354 F.3d at 143.

138 None of the cases for which certiorari has been granted provide the Court an opportunity to reach the issue of facial vagueness under a First Amendment analysis. See *supra* notes 2–4. Don Siegelman’s case (and petition for a writ of certiorari), however, squarely implicates protected speech—campaign contributions—that would afford the Court grounds for such analysis. See *United States v. Siegelman*, 561 F.3d 1215 (11th Cir. 2009).

139 See *Moohr*, *supra* note 42, at 197 (“The vagueness doctrine protects individual civil liberty by authorizing courts to give heightened scrutiny to vague statutes that may chill First Amendment or other constitutionally protected activity.”).

140 See *Buckley v. Valeo*, 424 U.S. 1, 48–58 (1976) (holding that political campaign contributions are protected speech); see, e.g., *United States v. Inzunza*, 580 F.3d 894, 897–98, 901 (9th Cir. 2009) (detailing facts of the case concerning honest services and campaign contributions); *Siegelman*, 561 F.3d at 1220–22 (same).

scrutiny would apply and the complainant would not have to “demonstrate that the law is impermissibly vague in all of its applications.”¹⁴¹ Therefore, § 1346 could be held facially vague as to protected speech, but even in such hypothetical cases the statute would not likely be rendered unconstitutional *in toto*.¹⁴² The force of § 1346 might be nullified insofar as it risks chilling protected speech, but the statute would be preserved for the range of proscribed conduct that does not implicate First Amendment protections.¹⁴³

Absent First Amendment issues, vagueness challenges to § 1346 cannot be sustained under the Court’s existing vagueness jurisprudence. For starters, the argument that § 1346 is unconstitutionally vague has only been successfully made in one circuit case, *United States v. Handakas*,¹⁴⁴ and that decision was overruled shortly thereafter in *United States v. Rybicki*.¹⁴⁵ The Second Circuit, sitting en banc, squarely addressed § 1346 under an as-applied void-for-vagueness analysis and ruled that the statute’s language was sufficiently definite.¹⁴⁶ Despite however “vague and undefined”¹⁴⁷ § 1346 might be, every court of appeals to analyze its constitutionality has chosen to validate honest services fraud rather than refuse its application.¹⁴⁸ Whatever gloss each circuit has adopted to cabin the statute’s reach, they have all nonetheless preserved § 1346 as a viable prosecutorial tool.¹⁴⁹

Congress may have been “terse” in its twenty-eight word amendment to chapter 63 of title 18,¹⁵⁰ but its intent was fairly clear: Congress did not want “defraud,” as understood for purposes of §§ 1341 and 1343, to be limited only to schemes depriving another of money or property.¹⁵¹ Section 1346 was meant to reinstate the intangible

141 *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982).

142 *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985) (stating that, in such cases, “the normal rule [of] partial, rather than facial, invalidation is the required course”).

143 *See id.* at 504.

144 286 F.3d 92 (2d Cir. 2002).

145 354 F.3d 124 (2d Cir. 2003) (en banc).

146 *See Rybicki*, 354 F.3d at 129–44. The Second Circuit also stated, in dicta, that “a conclusion of facial invalidity would be inconsistent with [its] analysis.” *Id.* at 144.

147 *United States v. Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008).

148 *See supra* notes 132, 135.

149 *See infra* Part II.C.

150 *Sorich v. United States*, 129 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting from denial of certiorari).

151 *See supra* Part I.D.

rights theory of mail fraud.¹⁵² Ergo, the phrase “honest services” derives contextual meaning from pre-*McNally* case law¹⁵³—at least sufficient meaning to put it on par with phrases like “moral turpitude”¹⁵⁴ and “political purpose.”¹⁵⁵ And when addressing a vagueness challenge, the Court interprets a statute’s language in light of “narrowing context[] or settled legal meanings.”¹⁵⁶ Arguably then, it is within the Court’s province to interpret and refine—giving consideration to the federal-state balance,¹⁵⁷ pre-*McNally* case law, and Congress’s mandate that intangible rights can be the object of fraud¹⁵⁸—the proper scope of “honest services” as that phrase applies to §§ 1341 and 1343.¹⁵⁹

152 See *supra* Part I.D.

153 See *United States v. Rybicki*, 354 F.3d 124, 138–42 (2d Cir. 2003) (en banc).

154 *Jordan v. DeGeorge*, 341 U.S. 223, 232 (1951) (holding “crime involving moral turpitude” language of deportation statute sufficiently definite). Remarkably, the Court in *DeGeorge* stated, “In deciding the case . . . we look to the manner in which the term ‘moral turpitude’ has been applied by judicial decision.” *Id.* at 227. Moreover, the Court said that “[w]hatever else the phrase . . . may mean in peripheral cases, the decided cases make it plain” that, as applied in that case, the statute was not unconstitutionally vague. *Id.* at 232. The Court relied, in part, on the fact that “[w]ithout exception, federal and state courts” regarded fraud—the crime at issue in the case—as involving moral turpitude. *Id.* at 227. It would seem to follow that, in analyzing “honest services,” the Court should likewise respect treatment of “honest services” by the appellate courts, which have, also without exception, held that § 1346 is not unconstitutionally vague. See *Rybicki*, 354 F.3d at 143.

155 *United States v. Wurzbach*, 280 U.S. 396, 398 (1930) (holding that “contribution for any political purpose whatever” language of federal corruption statute was sufficiently definite). Of note in that case are Justice Holmes’s remarks reiterating the holding in *Badders v. United States*, 240 U.S. 391 (1916), that Congress may “punish a use of the mails for a fraudulent purpose [despite] its inability to punish the intended fraud.” *Wurzbach*, 280 U.S. at 398; accord *Badders*, 240 U.S. at 393. Also of note is Justice Holmes’s rejoinder to the claim that “political purpose” is unconstitutionally vague. He said:

Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so, it is familiar to the criminal law to make him take the risk.

Id. at 399.

156 *United States v. Williams*, 128 S. Ct. 1830, 1846 (2008); see also *Kolender v. Lawson*, 461 U.S. 352, 355 (1983) (“In evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered.” (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982))).

157 See *infra* Part II.B.

158 See *supra* Part I.D.

159 See *Williams*, 128 S. Ct. at 1847 (Stevens, J., concurring) (“[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.”)

Generally, “the void-for-vagueness doctrine requires that a penal statute define 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.”¹⁶⁰ As such, a criminal statute must provide fair notice to defendants and a cognizable standard by which police and prosecutors can determine liability.¹⁶¹ Given that § 1346 incorporates at least some subset of conduct prohibited under pre-*McNally* case law, e.g., federal and state laws proscribing bribery or concealment of material information,¹⁶² it arguably provides a minimum of fair notice and standards of enforcement.¹⁶³ After all, an alleged breach of honest services must still accompany the other elements of mail fraud, i.e., specific intent and use of the mail.¹⁶⁴ Furthermore, every honest services fraud case in the past twenty-two years offers warning of the scope of conduct thought to fall within the ambit of § 1346.¹⁶⁵ The statute cannot, therefore, be said to be “impermissibly vague in all of

(quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)); *United States v. Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008) (“Although one might prefer a more clearly drafted statute, the Supreme Court has regularly used judicial glosses to clarify and focus language in criminal statutes of even greater complexity and breadth [than § 1346].”).

160 *Kolender*, 461 U.S. at 357; *see also Williams*, 128 S. Ct. at 1835 (stating that a criminal statute must provide “fair notice” and not “encourage[] seriously discriminatory enforcement”). *But see Colten v. Kentucky*, 407 U.S. 104, 110 (1972) (“The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.”).

161 *See Moohr*, *supra* note 42, at 190 (discussing two-pronged vagueness test).

162 *See, e.g., United States v. Mandel*, 591 F.2d 1347, 1362–63 (4th Cir. 1979) (holding that bribery and concealment of material information breach a public official’s duty to render honest services).

163 *See United States v. Lanier*, 520 U.S. 259, 267 (1997) (“[T]he touchstone [of sufficiently definite statutory language] is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant’s conduct was criminal.” (emphasis added)); *United States v. Brumley*, 116 F.3d 728, 732 (5th Cir. 1997) (“Constructions of a statute announced by the Supreme Court or lower courts can give citizens fair warning, even if the cases are not ‘fundamentally similar.’” (quoting *Lanier*, 520 U.S. at 268)); *cf. McNally v. United States*, 483 U.S. 350, 375 (1987) (Stevens, J., dissenting) (“[T]he series of Court of Appeals’ opinions applying [§ 1341] to schemes to defraud a State and its citizens of their intangible right to honest and faithful government . . . removed any relevant ambiguity in this statute.”).

164 *See* 18 U.S.C. §§ 1341, 1346 (2006); *supra* Part I.A.

165 *See supra* note 163.

its applications.”¹⁶⁶ It follows that vagueness challenges to § 1346, which do not implicate First Amendment issues, will inevitably be analyzed in light of the specific facts of the case, i.e., applied to the complainant’s conduct.

Although one can imagine a set of facts for which § 1346 may be vague as applied, most challengers will fight an uphill battle. If the complainant’s conduct is clearly proscribed by the statute, “he may not successfully challenge it for vagueness.”¹⁶⁷ Presumably, any § 1346 case involving bribery or concealment of material information would survive a vagueness challenge. Furthermore, fraud requires specific intent, which “mitigate[s] the law’s vagueness, especially with respect to the adequacy of notice.”¹⁶⁸ Where established, the specific intent element of honest services fraud undercuts a complainant’s claim that he did not know his conduct was prohibited.¹⁶⁹ Lastly, the Court may simply not be inclined to invalidate a criminal statute that is neither characterized by strict liability nor used to suppress street crime.¹⁷⁰

In sum, vagueness challenges to § 1346 are unlikely to succeed for several key reasons. For one, the courts of appeals have yet to find the statute facially invalid or even vague as applied—though not for lack of opportunity. Secondly, given the breadth of pre- and post-*McNally* honest services case law, the statute cannot be said to be impermissibly vague in all applications, nor can it be reasonably contended that it fails to provide minimum notice or an ascertainable standard of enforcement. Therefore, unless the First Amendment is implicated in the case under review, the Court will likely assess vagueness challenges *as applied* to the defendant’s conduct. Under that analysis, too many factors, e.g., narrowing contexts such as specific intent, weigh against finding § 1346 unconstitutionally vague. That conclusion has been borne out by the circuits’ nearly universal rejection of § 1346 vagueness challenges.

166 *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982) (stating that in order to sustain a facial vagueness challenge, “the complainant must demonstrate that the law is impermissibly vague in all of its applications”).

167 *Kolender v. Lawson*, 461 U.S. 352, 370 (1983) (White, J., dissenting).

168 *Hoffman Estates*, 455 U.S. at 498–99.

169 *See United States v. Bohonus*, 628 F.2d 1167, 1174 (9th Cir. 1980) (indicating that the specific intent element vitiates notice concerns because judicial explication of the statute and caselaw afford reasonable notice).

170 *Cf. Anthony G. Amsterdam, Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 CRIM. L. BULL. 205, 220–22 (1967) (discussing the Court’s interest in restraining arbitrary police enforcement of street crimes).

B. *Section 1346 and the Federalism/Federal Common Law Question*¹⁷¹

Aside from complaints that § 1346 is incomprehensibly vague, a frequent criticism of the honest services statute is that it contravenes principals of federalism.¹⁷² Critics charge that using mail fraud to prosecute local corruption “constitutes an impermissible federal intrusion into the political affairs” of subnational governments¹⁷³—it accords the federal government a status of *parens patriae* for state and local governments and their citizens.¹⁷⁴ *McNally*, which overturned all prior intangible rights mail fraud convictions—including honest services cases¹⁷⁵—voiced similar concerns, stating that it would not “involve[] the Federal Government in setting standards of . . . good government for local and state officials.”¹⁷⁶ But the Court’s concern in *McNally* might be better characterized as stemming from the proscription against federal common-law crimes, which was established two centuries ago in *United States v. Hudson*.¹⁷⁷

Although the proscription of federal common-law crimes may be swaddled in the blanket of federalism, the two principles are nevertheless distinct and merit separate consideration. At its core, federalism concerns the distribution of authority between state and federal governments.¹⁷⁸ Respecting federalism, *Hudson* held that federal courts do not have common-law criminal jurisdiction—there are no federal crimes unless formally enacted by Congress.¹⁷⁹ But the *Hudson* decision has a broader implication than federalism. To illustrate an issue,

171 As with the question of vagueness, this Note does not purport to fully address the federalism concerns evoked by § 1346. For further discussion of such concerns, see George D. Brown, *Should Federalism Shield Corruption?—Mail Fraud, State Law and Post-Lopez Analysis*, 82 CORNELL L. REV. 225 (1997); Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 369 (1989); Moohr, *supra* note 42, at 172–87.

172 See generally Brown, *supra* note 171, at 231 (noting a “de facto” recognition by the federal courts that honest services mail fraud implicates federalism concerns); Moohr, *supra* note 42, at 157 (concluding that intangible rights mail fraud violates federalism).

173 *United States v. Mandel*, 591 F.2d 1347, 1357 (4th Cir. 1979).

174 See *McNally v. United States*, 483 U.S. 350, 360 (1987); *Mandel*, 591 F.2d at 1357.

175 See *supra* note 98 and accompanying text.

176 *McNally*, 483 U.S. at 360.

177 11 U.S. (7 Cranch) 32 (1812).

178 See *id.* at 33.

179 *Id.* at 34. *Hudson* is generally read as proscribing all federal common law crimes. See, e.g., Brown, *supra* note 171, at 277 n.447. But a narrower reading of *Hudson* may also be plausible. The *Hudson* Court stated:

The only ground on which it has even been contended that [common-law criminal] jurisdiction could be maintained is, that, upon the formation

consider that Congress may enact statutes to curb the corruption of federal officials without offending federalism. Federalism is only an issue where federal statutes intrude upon matters that are traditionally policed at the state level.¹⁸⁰ Punishment of local political corruption is one such matter.¹⁸¹ Now consider *Hudson's* proscription of federal common-law crimes in the context of a federal anticorruption law. If the statute incorporates an ambiguous criminal standard, e.g., one relying on custom, it subjects all defendants to the same uncertainty, regardless of whether they are state or federal public officials. Ergo, if the statute were sufficiently definite, it would not violate *Hudson*, but may still offend federalism. The reverse is also true: a statute may violate *Hudson* without subverting federalism.

Given the ease of satisfying federal jurisdiction,¹⁸² if § 1346 were drafted using more precise, definite language—without micromanaging state affairs—then federalism-based criticisms of honest services fraud might be quieted to a large extent. As far back as *Badders*, the Court upheld the notion that Congress may tangentially reach conduct that it cannot otherwise regulate directly.¹⁸³ Moreover, as Representative Conyers noted before Congress enacted § 1346,¹⁸⁴ the

of any political body, an implied power to preserve its own existence and promote the end and object of its creation, necessarily results to it. . . .

. . . .

Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. . . . [S]o far our Courts no doubt possess powers not immediately derived from statute, but *all* exercise of criminal jurisdiction in common law cases we are of opinion is not within their implied powers.

Hudson, 11 U.S. (7 Cranch) at 33–34 (emphasis added). If “all” is read to mean “any,” then *Hudson* stands for the proposition that there are no federal common-law crimes. If, however, “all” means “every,” then arguably there may exist some common law crimes over which federal courts have jurisdiction. *Cf.* *United States v. Coolidge*, 14 U.S. (1 Wheat) 415 (1816) (discussing ambiguity of the ruling in *Hudson*, and withholding consideration of the matter until argument could be held).

180 *See* Moohr, *supra* note 42, at 172–75.

181 *Id.*

182 *See generally* G. Robert Blakey, *Federal Criminal Law: The Need, Not for Revised Constitutional Theory or New Congressional Statutes, But the Exercise of Responsible Prosecutive Discretion*, 46 HASTINGS L.J. 1175, 1176, 1219–46 (1995) (suggesting that jurisdictional barriers to federalizing criminal law have been eroding since *Champion v. Ames*, 188 U.S. 321 (1903)). *But see* *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) (invalidating a federal gun-control statute on basis of federalism and doubting whether “there will never be a distinction between what is truly national and what is truly local”).

183 *See* *Badders v. United States*, 240 U.S. 391, 393 (1916).

184 *See* 134 CONG. REC. 33,297 (1988) (statement of Rep. Conyers) (“I believe that the guarantee clause of the U.S. Constitution, article IV, section 4 can be used as a

Guarantee Clause provides a constitutional basis for federal criminalization of political corruption. Accepting as much, it follows that the primary motivation for judicially created limiting constructions of honest services fraud¹⁸⁵ must proceed as much (possibly more) from *Hudson* as from sheer federalism.¹⁸⁶ That conclusion is not meant to suggest that federalism is an invalid or petty criticism of honest services fraud, but rather that, presupposing a legitimate and compelling federal interest in curbing subnational political corruption, the proverbial elephant in the room is really *Hudson*.¹⁸⁷ If state and local political corruption does not suffice as a uniquely federal interest—such that would allow creation of a federal common law standard for “honest services”¹⁸⁸—then the circuits are justified in adopting limits that conform § 1346 to *Hudson*.

C. *The Circuit Split: Section 1346's Treatment in the Courts of Appeals*

Despite criticism that § 1346 is vague and offends federalism, the courts of appeals have retained the statute rather than declare it inva-

constitutional basis for Congress to pass criminal legislation relating to corruption in local government.”).

185 See *infra* Part II.C.

186 The Seventh Circuit couched its decision to impose a private gain requirement on § 1346 in such terms. See *United States v. Bloom*, 149 F.3d 649, 654 (7th Cir. 1998) (discussing the need for a “limiting principle” on judicial constructions of § 1346, so as to avoid the creation of a “federal common-law crime,” and citing *Hudson* and other cases).

187 See *supra* note 179. Indeed, there are instances where the Court has found it acceptable to adopt a federal common law. See *Tex. Indus., Inc. v. Radcliff Materials*, 451 U.S. 630, 640 (1981) (“[T]he Court has recognized the need and authority in some limited areas to formulate what has come to be known as ‘federal common law.’”). In *Texas Industries*, the Court explained:

[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States In these instances, *our federal system does not permit the controversy to be resolved under state law*, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.

Id. at 641 (emphasis added). Perhaps subnational political corruption, in view of the Guarantee Clause, implicates “uniquely federal interests of the kind that oblige courts to formulate federal common law.” *Id.* at 642. The federal government is charged with guaranteeing to the states a republican form of government, but subnational corruption is as much a state (or local) concern as it is federal, i.e., it is not “uniquely federal.”

188 See *supra* note 186.

lid.¹⁸⁹ To do so, however, circuits have adopted limiting constructions for the phrase “honest services,” which cure vagueness and federalism issues, and generally restrain prosecutors from overusing the statute. For example, the Fifth Circuit defines honest services according to state law, i.e., a public official’s fiduciary duty to the citizenry is that specified by state law.¹⁹⁰ The Seventh Circuit, by contrast, does not require a state law violation, but, unlike the Fifth Circuit, it does require intent to accrue private gain as a result of the fraudulent scheme.¹⁹¹ Other circuits rely on the specific intent element of mail fraud to discourage arbitrary prosecution under § 1346, yet hold that “honest services” are governed by a uniform federal standard that is not qualified by state law or private gain.¹⁹²

1. State Law Limiting Principle—*United States v. Brumley*¹⁹³

The Fifth Circuit (and possibly the Third Circuit¹⁹⁴) has expressly adopted a *state law* limiting principle to cabin the reach of honest

189 See *supra* notes 132, 137 and accompanying text.

190 See *United States v. Brumley*, 116 F.3d 728, 735 (5th Cir. 1997) (en banc).

191 See *United States v. Sorich*, 523 F.3d 702, 707–08 (7th Cir. 2008).

192 See *United States v. Weyhrauch*, 548 F.3d 1237, 1248 (9th Cir. 2008) (stating that honest services is a uniform federal standard that governs every public official); *United States v. Walker*, 490 F.3d 1282, 1299 (11th Cir. 2007) (stating that § 1346 does not require a state law violation); *United States v. Welch*, 327 F.3d 1081, 1106 (10th Cir. 2003) (stating that § 1346 does not require personal gain); *United States v. Sawyer*, 85 F.3d 713, 725–26 (1st Cir. 1996) (stating that state law violation is not determinative of honest services fraud and private gain is not required).

193 116 F.3d 728 (5th Cir. 1997) (en banc).

194 See *United States v. Murphy*, 323 F.3d 102, 116 (3d Cir. 2003). The Third Circuit stated, “We thus endorse . . . the decisions of other Courts of Appeals that have interpreted § 1346 more stringently and required a state law limiting principle for honest services fraud” *Id.* One year prior, in *United States v. Panarella*, 277 F.3d 678 (3d Cir. 2002), the Third Circuit rejected a private gain interpretation of honest services fraud, reasoning that a standard based solely on the “misuse of office for personal gain” would be “too broad” and “too vague to cure whatever ambiguity exists in the meaning of honest services fraud.” *Id.* at 692. But *Panarella* held that a public official engages in honest services fraud when he “conceals a financial interest in violation of a [state or local] criminal disclosure statute and takes discretionary action in his official capacity that he knows will directly benefit that interest.” *Panarella*, 277 F.3d at 698. That court did not, therefore, decide that violation of a criminal disclosure law is *necessary* for honest services fraud—it merely held that such a violation, coupled with other facts, e.g., private gain, is *sufficient* to sustain a charge under § 1346. *Id.* at 699 n.9. I am thus reluctant to assert that the Third Circuit has affirmatively adopted a state law limiting principle for § 1346. Insofar as *Panarella* may be read as adopting a state law limiting principle, it would also have to be read as requiring intent to accrue private gain—which that court expressly rejected. *Id.* at 692. As a further matter, the court in *Murphy* no more adopted a state law limiting

services fraud.¹⁹⁵ In *Brumley*, the Fifth Circuit, sitting en banc, confronted a ramification of § 1346 on federalism: that its unbounded definition of “honest services” could transform a state official’s “ethical lapses”¹⁹⁶—that do not violate state law—into a federal crime.¹⁹⁷ The court reasoned that Congress did not intend to “establish an ethical regime for state employees” when it enacted § 1346, that federalism precluded such a construction.¹⁹⁸ As such, the Fifth Circuit resolved the issue by holding that “services” owed under § 1346 are limited to those provided by state law.¹⁹⁹ The court explained:

Stated directly, the official must act or fail to act contrary to the requirements of his job under state law. This means that if the official does all that is required under state law, alleging that the services were not otherwise done “honestly” does not charge a violation of the mail fraud statute. The statute contemplates that there must first be a breach of a state-owed duty.²⁰⁰

But violating a state law does not, of itself, bring a politician’s conduct within reach of mail fraud—“honest services” contemplates purposeful departure from one’s official duties, i.e., specific intent to defraud.²⁰¹ The state law limiting principle is not a proxy for substantive elements of mail fraud; state of mind is required.²⁰² Note, however, that *Brumley* did not address whether an official’s duties must be owed under state *criminal law*—whether violation of a civil law suffices is an open question.²⁰³

principle than did the court in *Panarella*—in fact, *Murphy* specifically disclaims doing so. See *Murphy*, 323 F.3d at 117. I concede, however, that at least one appellate court and commentator have concluded that the reasoning of *Panarella* and *Murphy* amount to Third Circuit adoption of the Fifth Circuit standard. See *Sorich*, 523 F.3d at 712; Avery, *supra* note 39, at 1442–44.

195 See *Brumley*, 116 F.3d at 735.

196 *Id.* at 730–31.

197 *Id.* at 734.

198 *Id.*

199 *Id.* at 735. *Brumley* overruled prior cases wherein state law was not violated. *Id.*

200 *Id.* at 734.

201 *Id.* (explaining that the defendant must have “consciously contemplated or intended such actions”).

202 See *id.*

203 *Id.*

2. Misuse of Office for Private Gain—*United States v. Bloom*²⁰⁴

The Seventh Circuit has expressly adopted a *private gain* limiting principle to cabin honest services fraud.²⁰⁵ Similar to the Fifth Circuit in *Brumley*, the Seventh Circuit in *Bloom* was concerned that, absent a limiting construction, § 1346 would amount to a federal common-law crime.²⁰⁶ Whereas *Brumley* focused on the meaning of “services” to limit § 1346,²⁰⁷ the Seventh Circuit chose to qualify the meaning of “honest.”²⁰⁸ Noting that breach of fiduciary duty, without more, is not criminal fraud, the court sought a way of distinguishing between minor violations and those that rise to the level of honest services fraud.²⁰⁹ The Seventh Circuit held that “[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.”²¹⁰

Indeed, *Bloom*’s holding seems to accept, as its premise, an existing violation of fiduciary duty owed under state law (à la *Brumley*); nevertheless, the case has not been read as requiring a state law violation for § 1346.²¹¹ In *United States v. Thompson*,²¹² however, the Seventh Circuit signaled that it might eventually adopt a state law limiting principle. The court admitted that “misuse of office” is almost as “slippery” as “honest services,” and stated it “may need to gloss the phrase to reduce the risk . . . to public servants.”²¹³

204 149 F.3d 649 (7th Cir. 1998).

205 See *id.* at 656–57; *United States v. Thompson*, 484 F.3d 877, 882 (7th Cir. 2007).

206 See *Bloom*, 149 F.3d at 654.

207 See *supra* Part II.C.1.

208 See generally *Bloom*, 149 F.3d at 654–55 (explaining that the dispositive element of misuse is private gain).

209 *Id.* *Bloom* gave short shrift to the state law limiting principle—dismissing it as potentially bringing all breaches of an official’s fiduciary duty within the honest services statute. See *id.* Such analysis neglects the specific intent element, which *Brumley* explained must be present for a state law violation to constitute federal criminal fraud. See *Brumley*, 116 F.3d at 734.

210 *Bloom*, 149 F.3d at 655 (emphasis added). Subsequent cases further explicated the private gain requirement set out in *Bloom*. See *United States v. Sorich*, 523 F.3d 702, 709 (7th Cir. 2008) (explaining that private gain may be personal or go to a third party); *Thompson*, 484 F.3d at 884 (finding that earned pay raises and peace of mind are not “private benefits” for honest services fraud).

211 See, e.g., *Sorich*, 523 F.3d at 707–08 (quoting *Bloom*, but foregoing any discussion of its reference to “violations of state-law fiduciary duty”).

212 484 F.3d 877 (7th Cir. 2007).

213 *Id.* at 883. To disambiguate the phrase “misuse of office,” the court will inevitably have to establish what constitutes the proper use of office. *Brumley* looked to state law. See *supra* note 198 and accompanying text. But see *Sorich*, 523 F.3d at 712 (“[W]e

3. Treatment in Other Circuits

The majority of circuits have eschewed adopting a state law limiting principle for honest services fraud, and none have placed as much emphasis on private gain as the Seventh Circuit.²¹⁴ In *Weyhrauch*, for example, the Ninth Circuit maintained that § 1346 reflects a federal interest in establishing a standard of conduct for public officials that does not depend on geography.²¹⁵ The First Circuit has also read “honest services” as independent of state law,²¹⁶ preferring instead to emphasize the specific intent element of fraud.²¹⁷ In *United States v. Sawyer*,²¹⁸ however, the First Circuit noted that, when the requisite intent to deceive is built into a state law, a violation of that law may suffice for § 1346.²¹⁹ Other circuits have similarly foregone imposing substantive limits on honest services fraud.²²⁰

III. THE CASE FOR CHANGE IN HONEST SERVICES FRAUD PROSECUTIONS

This Part lays out a set of substantive legal limitations, and evidentiary and procedural safeguards, which are recommended as the floor level of a restraining framework that should be adopted for § 1346 prosecutions of politicians.²²¹ Specifically, this Part recommends that

have never held that only state law can supply a fiduciary duty between public official and public . . .”).

214 See *supra* note 192.

215 See *United States v. Weyhrauch*, 548 F.3d 1237, 1246 (9th Cir. 2008). The court stated:

In short, Congress has a legitimate interest in ensuring that state action affecting federal priorities is not improperly influenced by personal motivations of state policymakers and regulators, and the happenstance of whether state law prohibits particular conduct should not control Congress’ ability to protect federal interests through the federal fraud statutes

Id.

216 See *United States v. Sawyer*, 85 F.3d 713, 728–29 (1st Cir. 1996) (stating that mere violation of a state law, even a law concerning the appearance of corruption, does not necessarily deprive the public of its right to honest services).

217 *Id.* at 730 (requiring the government to prove specific intent); see also *United States v. Urciuoli*, 513 F.3d 290, 298–99 (1st Cir. 2008) (same); *United States v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997) (same).

218 85 F.3d 713 (1st Cir. 1996).

219 See *id.* at 729.

220 See, e.g., *United States v. Jain*, 93 F.3d 436, 441 (8th Cir. 1996) (fraudulent intent is essential); see also *supra* note 192 (listing circuits that focus on specific intent to defraud).

221 Potential abuse of § 1346 by “headline-grabbing prosecutors,” *Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari), could be checked if the Court regarded use of the mail as more than a mere jurisdic-

the Court interpret § 1346 to require violation of at least a state criminal law and proof of intent to obtain a private gain that is not de minimis. Furthermore, given that many American jurors are apt to regard politician-defendants as presumptively guilty, this Part recommends that the Court require corroboration of accomplice witness testimony in all honest services fraud prosecutions involving politicians. Where such cases implicate protected speech, the Court is urged to treat sufficiency of evidence in the trial record, upon which the jury may find a defendant's specific intent to defraud, as a question of law that is reviewed de novo.

A. *Practical Consequences of Failing to Adopt Limiting Principles*

The modern American political system is an inherently fertile ground for impropriety.²²² Political life comes with unique power, e.g., influence, which the public entrusts to politicians to use in good faith on its behalf. Party patronage is often accompanied by political favors of varying degrees, some of which amount to trifles whereas others flatly undermine the notions of honesty and fair play central to

tional element of the substantive offense. Cf. *Schmuck v. United States*, 489 U.S. 705, 723 (1989) (Scalia, J., dissenting) (“[I]t is *mail fraud*, not mail and fraud, that incurs liability.” (emphasis added)). Mail fraud prosecutions could be cabined by mandating that use of the mail must be in furtherance of the scheme to defraud. See *id.* at 722–23 (stating that mail fraud occurs when the mailing is for the purpose of executing, and in furtherance of, a fraud). Unfortunately, *Schmuck* seems to shut the door on that limitation. *Schmuck* reiterated that “use of the mails need not be an essential element of the scheme,” *id.* at 710 (majority opinion), and, considering the tenuous link between *Schmuck*'s scheme and the incidental mailings, apparently relegated use of the mail to a formality. See *id.* at 711–15. Ironically, *Schmuck* aggravates the very problem complained of by critics of § 1346—that it allows specious prosecution under § 1341. Justices Scalia, Brennan, Marshall, and O'Connor recognized as much, albeit in a conventional fraud case. See *id.* at 722–25 (Scalia, J., dissenting). That said, requiring a mailing *in furtherance* of the scheme arguably has no bearing on a politician's misuse of office for private gain. That corrupt politicians should be prosecuted has nothing to do with mail or bandwidth—the federal authority to criminalize such conduct is in the Guarantee Clause. Moreover, the near-universal reliance on electronic communication in the United States relegates use of wires to a jurisdictional formality anyway. That bandwidth technology will be used in furtherance of a fraudulent scheme is, today, entirely predictable. As such, I admit that short of reading a purpose requirement into “scheme or artifice,” i.e., purpose to use the mails (or wires) to defraud renewed emphasis on the mailing element would be of little import. In any event, the Court settled the issue long ago in *United States v. Young*, 232 U.S. 155 (1914), holding that the elements of mail fraud are “that the scheme should be devised . . . and a letter be placed in the post office for the purpose of executing the scheme.” *Id.* at 161.

²²² See generally Moohr, *supra* note 42, at 153–54 (discussing political corruption).

our form of government.²²³ When the power of public office is misused to further a politician's self-interest, the public is wronged—its faith in the integrity of government is eroded.²²⁴ Such corruption may involve local law enforcement and prosecutive agencies, or preclude them from redressing corruption for fear of reprisal.²²⁵ As such, a federal crime aimed at uprooting subnational political corruption is warranted and ought to be retained as an instrument of justice. The open-ended, largely ad hoc interpretation of § 1346 in the majority of circuits, however, warrants a uniform measure of restraint.

Arguing from federalism tends to be an academic pursuit, but the practical consequences of allowing § 1346 to go unrestrained in federal circuits are alarming. In most circuits a state politician whose conduct, albeit unethical, complies with that state's laws can be subjected to federal prosecution.²²⁶ Consider Weyhrauch.²²⁷ His failure to disclose a conflict-of-interest may have been intentional, but it was not a criminal offense in Alaska.²²⁸ Although he might have known that his conduct was disfavored, he had no express reason to think it would subject him to federal prosecution. And therein lies the problem: uncertainty.

A politician may have a lawyer's knowledge of the laws in his state and the honest services case law of that circuit, but that may not be enough—the indefiniteness of a federal common law standard may cause him to “steer far wider of the unlawful zone.”²²⁹ Moreover, unscrupulous prosecutors supplant any well-meaning purposes of such a standard.²³⁰ Most of all, the prospect of federal criminal prosecution for conduct that may only be civilly fineable at the state level makes public service a risky proposition. Granted, politicians who intentionally violate state law (even civil law) for private gain should be punished. But for the late middle-aged politician who complies with state law, or even breaches the law in good faith, § 1346 presents an austere hazard. If convicted, he loses his good name, his privilege to practice law (if an attorney),²³¹ and his ability to earn an income

223 *See id.*

224 *See id.* at 185.

225 *See supra* note 39 and accompanying text.

226 *See supra* Part II.C.

227 *See United States v. Weyhrauch*, 548 F.3d 1237 (9th Cir. 2008).

228 *Id.* at 1240.

229 *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

230 *See supra* notes 34–37 and accompanying text.

231 *Siegelman and Weyhrauch are lawyers.*

while incarcerated²³²—he leaves prison as a disreputable, aging paralegal. Rather than a slap on the wrist, he gets a kick in the groin.

B. *On Substantive Legal Limitations*

Criticisms that § 1346 is impermissibly vague, offends federalism, and affords federal prosecutors unchecked discretion to target state and local politicians, could be cured by adopting a circuit-wide state-law limiting principle²³³ along with a material private gain requirement.²³⁴ Absent a further amendment explicating the meaning of “honest services,” state criminal (and possibly civil) laws should define the “outer boundaries” of a politician’s fiduciary duty owed to the public. State laws governing the actions taken in a politician’s official capacity, e.g., laws promoting unbiased and transparent government, should define the “outer boundaries”²³⁵ of “honest services.” Furthermore, to militate against prosecutive theories for § 1346 that are based on inferring a “scheme or artifice to defraud” from a breach of duty (owed under state law) that results in a de minimis private gain, the Court should also impose a material private gain limiting principle, as adopted by the Seventh Circuit.

C. *On Evidentiary and Procedural Safeguards*

In order to prove mail fraud, a prosecutor must show beyond a reasonable doubt that the defendant formed specific intent to defraud,²³⁶ i.e., he must prove state of mind. There are essentially four ways to do that: by evidence obtained using electronic surveillance, by testimony of an undercover agent, by testimony of an informant, or by circumstantial evidence. When the prosecutive theory involves conventional fraud, the defendant’s conduct may suffice to establish his intent—by virtue of false statements or misrepresentations, he obtains money or property without exchanging something of equal value.²³⁷ In tangible fraud cases, proving conduct is almost on par with proving state of mind. The same cannot be said of honest services cases, however, because the mere fact of the defendant’s conduct is often inconclusive as to his state of mind. In those cases, breach of a politician’s duty to the public does not indicate, ipso facto,

232 Mail fraud carries up to a twenty-year sentence. See 18 U.S.C. § 1341 (2006).

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

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

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

236 See *supra* note 73 and accompanying text (discussing elements of mail fraud).

237 See 18 U.S.C. § 1341 (2006).

that he devised a scheme to defraud.²³⁸ His conduct may deprive “honest services,” even purposely, without being part of a broader scheme to defraud.²³⁹ “*Post hoc ergo propter hoc* is the name of a logical error, not a reason to infer causation.”²⁴⁰

As a practical matter in honest services cases, prosecutors must point to evidence more probative of state of mind than circumstantial happenstances. Without a wiretap or a recording, or an undercover agent, the only option available to a prosecutor is an accomplice’s testimony.²⁴¹ For example, in an honest services case where the defendant has allegedly accepted payment in exchange for a political favor,²⁴² accomplice testimony might be the only evidence of a quid pro quo²⁴³ agreement between the parties.²⁴⁴ Alas, unless the accomplice has an irresistible urge to confess his involvement, the likelihood is that his testimony will be given in exchange for immunity or favorable treatment.²⁴⁵ The government will, in essence, buy accomplice testimony.

Faced with the possibility of being prosecuted himself, a cooperating accomplice has motive to embellish his testimony against the

238 See *Brumley*, 116 F.3d at 734; see also *supra* notes 198–200 and accompanying text (stating that the breach of fiduciary duty is not a proxy for state of mind).

239 See *Brumley*, 116 F.3d at 734; *supra* notes 201–03 and accompanying text. Where a politician’s breach of fiduciary duty accompanies a substantial private gain, the circumstantial evidence is probative of fraud, similar to that in a conventional fraud case. Honest services fraud should require an intent to obtain a material private gain. See *supra* Part III.B.

240 *United States v. Thompson*, 484 F.3d 877, 879 (7th Cir. 2007). Correlation and causation are not synonymous. *Post hoc ergo propter hoc*, and its companion *cum hoc ergo propter hoc*, are valid proofs neither of a scientific hypothesis nor of a prosecutive theory.

241 See, e.g., *United States v. Siegelman*, 561 F.3d 1215, 1227 (11th Cir. 2009); *United States v. Murphy*, 323 F.3d 102, 106 n.1 (3d Cir. 2003); *United States v. Jain*, 93 F.3d 436, 438 (8th Cir. 1996).

242 See, e.g., *United States v. Inzunza*, 580 F.3d 894, 897–98 & 901 (9th Cir. 2009) (alleging that Inzunza took bribes in exchange for official action favoring bribe-payer); *Siegelman*, 561 F.3d at 1219 (alleging Siegelman took bribes to appoint bribe-payer to state board); *United States v. Mandel*, 591 F.2d 1347, 1356–57 & 1359 (4th Cir. 1979) (alleging Mandel took bribes to endorse legislation favorable to bribe-payer).

243 See *McCormick v. United States*, 500 U.S. 257, 273–74 (1991) (holding that color of law extortion under the Hobbs Act requires a quid pro quo agreement to be influenced).

244 See, e.g., *Siegelman*, 561 F.3d at 1227 (relying on accomplice testimony to prove bribery).

245 Hence the term, “unindicted co-conspirator.” See *United States v. Sawyer*, 85 F.3d 713, 722 (1st Cir. 1996). Evidently, Sawyer’s accomplice, Hathaway, received immunity.

defendant in hope of gaining favorable treatment for himself. Many states are cognizant of the risk posed by such bought testimony and therefore do not permit convictions to stand on the basis of uncorroborated accomplice testimony.²⁴⁶ Federal courts, however, do not require that such testimony be corroborated.²⁴⁷ When added to the fact that many Americans believe politicians are corrupt before they enter a courtroom, prosecutions that rely on an accomplice's uncorroborated testimony are inherently prejudicial.

Instead of being "presumed innocent," politician-defendants are subject to the skepticism of American jurors.²⁴⁸ If an accomplice witness's bravado is the only evidence from which a jury can infer the defendant's state of mind, e.g., *quid pro quo* agreement, then he has been dealt an unfair hand, indeed. Paradoxically, federal courts do *not* allow a conviction to rest on the defendant's uncorroborated confession.²⁴⁹ Confessions are treated as inherently unreliable,²⁵⁰ yet fed-

246 See, e.g., *Swinford v. State*, 154 S.W.3d 262, 266–67 (Ark. Ct. App. 2004) (requiring corroboration of accomplice witness testimony); *People v. Carrington*, 211 P.3d 617, 654 (Cal. 2009) (same); *Savage v. State*, 679 S.E.2d 734, 738 (Ga. Ct. App. 2009) (same); *State v. Stone*, 216 P.3d 648, 649 (Idaho Ct. App. 2009) ("This statutory corroboration requirement is intended to protect against the danger that an accomplice may wholly fabricate testimony, incriminating an innocent defendant in order to win more favorable treatment for the accomplice." (quoting *Matthews v. State*, 28 P.3d 387, 390 (Idaho Ct. App. 2001))); *State v. Douglas*, 675 N.W.2d 567, 568 (Iowa 2004) (requiring corroboration of accomplice witness testimony); *In re Anthony W.*, 879 A.2d 717, 724 (Md. 2005) (same); *State v. Evans*, 756 N.W.2d 854, 877 (Minn. 2008) ("A criminal defendant may not be convicted based on the uncorroborated testimony of an accomplice . . . [because] the credibility of an accomplice is inherently untrustworthy."); *State v. Wendler*, 197 P.3d 932, 935 (Mont. 2008) (requiring corroboration of accomplice testimony); *In re J.K.*, 763 N.W.2d 507, 512 (N.D. 2009) (same); *People v. Delgado*, 855 N.Y.S.2d 253, 256 (App. Div. 2008) (same); *State v. Robinson*, 239 S.W.3d 211, 229 (Tenn. Crim. App. 2006) (same).

247 See *United States v. Fuller*, 557 F.3d 859, 863 (8th Cir. 2009) ("Accomplice testimony . . . need not be corroborated to support a conviction."); *United States v. Parada*, 577 F.3d 1275, 1284 (10th Cir. 2009) (uncorroborated testimony of a coconspirator is sufficient evidence on which to base a conviction); *United States v. Arledge*, 553 F.3d 881, 888 (5th Cir. 2008) (same); *United States v. Riggi*, 541 F.3d 94, 110 (2d Cir. 2008) (same); *United States v. Milkintas*, 470 F.3d 1339, 1344 (11th Cir. 2006) (same); *United States v. Ramirez-Robles*, 386 F.3d 1234, 1245 (9th Cir. 2004) (same); *United States v. Ofcky*, 237 F.3d 904, 909 (7th Cir. 2001) (same).

248 See *supra* note 16.

249 See *Wong Sun v. United States*, 371 U.S. 471, 488–89 (1963).

It is a settled principle of the administration of criminal justice in the federal courts that a conviction must rest upon firmer ground than the uncorroborated admission or confession of the accused. . . . [T]he requirement of corroboration is rooted . . . "in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused."

eral courts permit convictions based on an accomplice's bought testimony²⁵¹—a confession by proxy. Why is an accomplice afforded more credibility in federal court than the defendant's own confession? It would seem that the same ideals of "sound law enforcement"²⁵² that require proof beyond the "words of the accused"²⁵³ should reject a rule that allows a self-interested witness to confess on a defendant's behalf.

The Court should require extrinsic evidence to corroborate accomplice witness testimony in honest services cases. Given the negative disposition towards politician-defendants and credibility issues inherent in accomplice testimony, a corroboration requirement is a prudent evidentiary safeguard for § 1346 cases. Another approach would require the government to negate, i.e., disprove, exculpating theories of the defendant's conduct. Such safeguards would countenance the prejudicial circumstances that accompany political corruption cases, and may restrain prosecutor discretion as effectively as substantive limits.

Because the same prejudicial circumstances are at work in political corruption cases that implicate First Amendment concerns, procedural safeguards are also warranted. Prosecutive theories of §§ 1341 and 1346 that involve protected speech, e.g., campaign contributions,²⁵⁴ risk chilling political activities, like party patronage.²⁵⁵ If a campaign supporter believes any subsequent official action that benefits him ideologically or personally might be construed as impropriety and subject him to federal prosecution, he may terminate his patronage entirely.²⁵⁶

Id. (quoting *Smith v. United States*, 348 U.S. 147, 153 (1954)).

250 *See id.*

251 *See supra* notes 245–47 and accompanying text.

252 *Wong Sun*, 371 U.S. at 489.

253 *Id.*

254 *See, e.g.*, *United States v. Siegelman*, 561 F.3d 1215 (11th Cir. 2009). The § 1346 charge in *Siegelman* was based on Siegelman receiving a campaign contribution and the donee later being appointed to a state review board. *Id.* at 1219. By themselves, those separate facts are not proof beyond a reasonable doubt that Siegelman had a quid pro quo agreement with his benefactor—conclusions to the contrary are false byproducts of *post hoc ergo propter hoc*. *See supra* notes 238–40 and accompanying text. Siegelman's alleged accomplice, Bailey, who testified for the government, provided the only direct evidence that the payment was a bribe. *See Siegelman*, 561 F.3d at 1220–23. Bailey essentially confessed on behalf of Siegelman.

255 *See Moohr, supra* note 42, at 180–83 (selective prosecution under § 1341 (and § 1346) may chill First Amendment protected political activities).

256 *See id.*

As the Court recognized in *New York Times Co. v. Sullivan*,²⁵⁷ “[t]he maintenance of the opportunity for free political discussion . . . is a fundamental principle of our constitutional system.”²⁵⁸ The Court regards political speech so highly that in *New York Times* it held that libel can only be established where a defamatory statement is made with “‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”²⁵⁹ The line between libel and protected speech may, perhaps, then be characterized as the professionalism, quality, or due diligence of the statement. Malice is such a crucial element that the Court also established a constitutionally based rule requiring appellate courts to make an independent examination, i.e., de novo review, of the trial record to ensure free expression is not intruded upon.²⁶⁰ Subsequent decisions firmly hold that “actual malice” is a question of law.²⁶¹

Practically speaking, a politician has not violated state law, let alone § 1346, until the government proves its case. Party patronage, for example, does not breach the line of legality until the prosecution proves bribery. Hence, substantive limits on honest services fraud may not be enough to curb the risk that protected speech will be trampled by specious prosecutions. Honest services cases involving protected speech should be treated similarly to the Court’s approach in *New York Times* and the subsequent line of libel decisions.²⁶² Campaign contributions are protected political speech.²⁶³ When an indictment under § 1346 is based on the theory that campaign contributions prompted official action that deprived the public of its right to honest services, the line between fraud and protected speech becomes the professionalism, quality, or due diligence of the government’s case-in-chief.

Ergo, the sufficiency of evidence from which a jury may find the defendant’s specific intent to defraud should be a question of law, the way “malice” is a question of law in libel cases. Moreover, that question of law should be reviewed de novo to ensure that any prejudicial biases of the jury—possibly the trial judge—against politicians “do not

257 376 U.S. 254 (1964).

258 *Id.* at 269 (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

259 *Id.* at 279–80.

260 *Id.* at 285; *see also Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (independent examination applies to federal and state trial court decisions).

261 *See, e.g., Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 685 (1989).

262 *See supra* notes 258–60 and accompanying text.

263 *See Buckley v. Valeo*, 424 U.S. 1, 49–58 (1976).

constitute a forbidden intrusion on the field of free expression."²⁶⁴ Such procedural safeguards constitute yet another manner of restraining federal prosecutors' discretion to abuse § 1346 for base personal or political motives, which are not tantamount to invalidating the theory of honest services mail fraud.

CONCLUSION

Maybe the reason why many Americans believe that politicians are corrupt is because, too often, their belief is confirmed. For that reason alone, 18 U.S.C. § 1346 ought to be preserved as an instrument of justice. Indeed, if the United States is to endure as a republic rather than a pseudomonarchy where politicians are notorious for cashing in on their offices, for hocking governmental authority to feather their nests, then federal and subnational public corruption must be deterred. But a corollary of public corruption—that vengeful prosecution may itself deprive citizens of their right of honest services—obliges the Court to adopt unifying limitations on the statute. At the minimum, honest services prosecutions of state and local politicians should require the violation of a state criminal law respecting fiduciary duties owed to the public or transparency in government, e.g., bribery or disclosure standards. To further qualify prosecutor discretion, the Court should also adopt a material private gain requirement. Complementary limits should also apply to honest services fraud cases involving federal politicians. Moreover, given the widely held belief that politicians are corrupt, evidentiary safeguards should be adopted to raise the bar of proof, thereby deterring bad-faith prosecutions under 18 U.S.C. § 1346.

²⁶⁴ *N.Y. Times*, 376 U.S. at 285.