St. Thomas Law Review

Volume 25
Issue 3 *Summer 2013*

Article 6

2013

How Consolidating the Circuits Would Have Defined the Borders of Honest Services Fraud

Jorge R. Delgado
Klugar Kaplan Silverman Katzen & Levin

Recommended Citation

Jorge R. Delgado, *How Consolidating the Circuits Would Have Defined the Borders of Honest Services Fraud*, 25 St. Thomas L. Rev. 357 (2013).
Available at: https://scholarship.stu.edu/stlr/vol25/iss3/6

HOW CONSOLIDATING THE CIRCUITS WOULD HAVE DEFINED THE BORDERS OF HONEST SERVICES FRAUD

JORGE R. DELGADO*

I. THE UNITED STATES SUPREME COURT PUNTS THE ISSUE THEN ELECTS TO RECEIVE

A. NO ANSWER FROM *SORICH V. UNITED STATES*[1]

Between 1990 and 1997, the Mayor of Chicago's Office of Intergovernmental Affairs ("IGA") ferreted out over 5,000 patronage civil service jobs to many of the mayor's cronies.[2] The IGA served as a liaison between the city of Chicago and the state and federal governments, and was not meant to serve any role in the hiring of the city's 37,000 jobs.[3] Robert Sorich, the Assistant to the Director of the IGA, relayed certain names received from campaign coordinators to various governmental department heads.[4] The heads then conducted mock interviews and filled out false forms, hiring the persons submitted regardless of merit.[5] Sorich, among others, was charged and convicted of several counts of mail and wire fraud under §§ 1341,[6] 1343,[7] and 1346[8] of the United States Code.

* Jorge Delgado earned his Juris Doctor from St. Thomas University School of Law in 2010. He is currently an associate at Klugar Kaplan Silverman Katzen & Levin.

1. Sorich v. United States, 555 U.S. 1204 (2009).
2. *See* United States v. Sorich, 523 F.3d 702, 705 (7th Cir. 2008).
3. *Id.*
4. *Id.* at 705–06.
5. *Id.* at 706.
6. 18 U.S.C. § 1341 (2006). In short terms, § 1341 states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting so to do, places . . . or knowingly causes to be delivered by mail . . . any such matter . . . shall be fined under this title or imprisoned not more than 20 years, or both.

Id.

7. 18 U.S.C. § 1343 (2006). In short terms, § 1343 states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud . . . transmits or causes to be transmitted by means of wire . . . any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

Id.

8. 18 U.S.C. § 1346 (2006). Section 1346 states in its entirety that "[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." *Id.*

By way of introduction, the government must prove several elements to sustain a conviction of mail and wire fraud: (1) a scheme or artifice to defraud, (2) intent to defraud by the defendant, and (3) use of the mails in furtherance of the scheme.[9] A scheme or artifice to defraud could encompass two different theories, both of which the government used to convict Sorich. The first, or traditional theory, is when the defendant perpetrates a fraud intended to deprive a person of money or property.[10] The second theory is when a defendant perpetrates a fraud intended to deprive a person of the intangible right of the defendant's honest services as a public official, also termed "honest services fraud."[11] By its terms, honest services fraud requires a breach of fiduciary duty between the public official and the person or persons deprived of honest services.[12]

During Sorich's trial, the court instructed the jury that it could find honest services fraud where there is "an intent 'to deprive a governmental entity of the honest services of its employees for personal gain to a member of the scheme *or another*.'"[13] On appeal to the Seventh Circuit, Sorich's two-fold argument centered on this instruction. First, he argued that his conduct did not amount to honest services fraud because (1) the "private gain" requirement of the Seventh Circuit[14] required that "another" be a co-schemer, and (2) he did not misuse his office for any private gain since the jobs were ill gotten by others.[15] Alternatively, Sorich argued that if a non-schemer could satisfy the private gain requirement then § 1346 lacked any notice of what activity was criminal and was therefore void for vagueness.[16]

---

9. United States v. Murphy, 323 F.3d 102, 110 (3d Cir. 2003); *see, e.g., Sorich*, 523 F.3d at 705–06. In *Sorich*, the mails were used in the delivery of the false forms and patronage names. *Sorich*, 523 F.3d at 705–06.

10. *See Sorich*, 523 F.3d at 712–13 (holding that jobs are property for the purpose of mail and wire fraud and therefore a false hiring scheme is considered a deprivation of property).

11. *Id.* at 707.

12. *See id.* at 706–07.

13. *Id.* at 708.

14. *See* United States v. Bloom, 149 F.3d 649, 655 (7th Cir. 1998) (holding 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"). The private gain requirement represents one side of the split between the circuit courts regarding what limiting principles should apply to § 1346.

15. *Sorich*, 523 F.3d at 709; *see* United States v. Thompson, 484 F.3d 877, 882 (7th Cir. 2007) (illustrating that the Seventh Circuit had previously held that job security did not constitute a private gain).

16. *Sorich*, 523 F.3d at 711. S*ee generally* Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (finding the statute unconstitutional for vagueness). A statute is unduly vague when it is unclear to a person whether the conduct he or she is engaging in is criminal. *Coates*, 402 U.S. at 614. To illustrate, a statute that criminalized any activity within a public sidewalk that may "annoy" others was held unduly vague by the U.S. Supreme Court because there was no telling what activities may annoy others, and such speech may very well be protected under the First

Additionally, Sorich argued that the government had failed to show that any fiduciary duty between him and the people of Chicago and that only state law could provide such a duty.[17]

The Seventh Circuit rejected all of Sorich's arguments and held that "'private gain' . . . simply mean[s] illegitimate gain, which usually will go to the defendant, but need not."[18] In its reasoning, the court pointed to several past examples of mail fraud convictions where defendants did not receive private gains.[19] Surprisingly, the court upheld these examples as legitimate exercises of § 1346 because of their rarity, reasoning that, because most schemes to defraud directly benefit the schemers, honest services fraud would not become unlimited and consequently unduly vague.[20] Furthermore, the court reasoned that the focus of the private gain requirement was not on who received the spoils of the fraud, but in parsing out those actionable breaches of a fiduciary duty that come from misuse of a public office or position.[21] To the court, that focus clearly defined the boundaries of § 1346, which should have put Sorich on notice that his job scheme was a clear abuse of his office and probably illegal. In addition, concerning the state-law limiting principle, the court held that no state law was required in creating a fiduciary duty because "*merely by virtue of being public officials* the defendants *inherently* owed the public a fiduciary duty to discharge their offices in the public's best interest."[22]

Amendment. *Id.*

17. *Sorich*, 523 F.3d at 711–12; *see also* United States v. Murphy, 323 F.3d 102, 115–16 (3d Cir. 2003) (second omission in original) (internal quotation marks omitted) (stating that a "state law . . . addresses rule of lenity concerns . . . more [readily] than . . . [a] misuse of office for personal gain"); United States v. Brumley, 116 F.3d 728, 734 (5th Cir. 1997) (stating 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"). In essence, Sorich was urging the court to adopt the state-law limiting principle, which represents the other side of the split between the circuit courts regarding what limiting principles should apply to § 1346.

18. *Sorich*, 523 F.3d at 709 (relying in part on United States v. Spano, 421 F.3d 599, 603 (7th Cir. 2005)) ("A participant in a scheme to defraud is guilty even if he is an altruist and all the benefits of the fraud accrue to other participants . . . ."). Sorich also contended that the "other participants" language in *Spano* required a private gain to go to a schemer, but the court likewise rejected this argument, stating that "Robin Hood may [have] be[en] a noble criminal, but he is still a criminal." *Id.* at 709–10.

19. *See* Ginsburg v. United States, 909 F.2d 982, 983 (7th Cir. 1990) (attorney's bribery scheme with state court to expedite his clients' claims); Lombardo v. United States, 865 F.2d 155, 159–60 (7th Cir. 1989) (union bidding scheme with a state senator for the exchange of union property for favorable votes).

20. *Sorich*, 523 F.3d at 710.

21. *Id.* (citing United States v. Czubinski, 106 F.3d 1069, 1077 (1st Cir. 1997)) (reversing a mail fraud conviction where an "IRS employee improperly accessed confidential tax records but did not misuse them for gain in any way").

22. *Id.* at 712 (emphasis added).

Sorich and some of his co-defendants filed for certiorari with the U.S. Supreme Court, which was denied.[23] Justice Antonin Scalia, however, strongly dissented from the denial, accusing the majority of acting "irresponsible" in refusing to define the borders of § 1346.[24] He argued that, by its terms, honest services fraud could logically criminalize, for example, a state legislator's vote meant to curry favor with a faction of his constituency, a mayor's attempt to obtain a restaurant table without a reservation by the power of his office, or even a public employee phoning in sick to attend a sporting event.[25] In fact, if one agrees with the Seventh Circuit that public officials are bound to "[act] in the public's best interest"[26] even absent a preexisting state-defined fiduciary duty, there is no differentiating the aforementioned misuses of office from more traditional illegitimate gains such as briberies or conflicts of interests. In short, Justice Scalia declared that:

> Without some *coherent* limiting principle to define what "the intangible right of honest services" is, whence it derives, and how it is violated, this expansive phrase invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct.[27]

B. § 1346 IS RE-WRITTEN IN *UNITED STATES V. SKILLING*[28]

Only a year after giving the cold-shoulder in *Sorich*, the U.S. Supreme Court granted certiorari in three different cases regarding honest services fraud: *United States v. Skilling*,[29] *United States v. Weyhrauch*,[30] and *United States v. Black*.[31] The result—present in the opinion in *Skilling*—was a virtual re-write of § 1346 under the guise of a limiting interpretation. Ironically, Justice Scalia, who before had dissented from the Court's refusal to attempt to define the borders of honest services fraud, now disagreed with the Court's attempt at doing so.

Skilling involved the now infamous Jeffrey Skilling, former president and CEO of Enron.[32] Skilling and his co-conspirators engaged in an

23. Sorich v. United States, 555 U.S. 1204, 1204 (2009).
24. *Id.* at 1204–05, 1208 (Scalia, J., dissenting).
25. *Id.* at 1206.
26. *Sorich*, 523 F.3d at 712.
27. *Sorich*, 555 U.S. at 1207 (Scalia, J., dissenting) (emphasis added).
28. Skilling v. United States, 130 S. Ct. 2896 (2010).
29. United States v. Skilling, 554 F.3d 529 (5th Cir. 2009).
30. United States v. Weyhrauch, 548 F.3d 1237 (9th Cir. 2008).
31. United States v. Black, 530 F.3d 596 (7th Cir. 2008).
32. *See Skilling*, 130 S. Ct. at 2907.

expansive scheme to deceive the public and Enron's shareholders regarding the viability of Enron by manipulating publicly reported financial results, and making false and misleading public statements and representations about Enron's financial performance.[33] The parties then "enriched themselves as a result of the scheme through salary, bonuses, grants of stock and stock options, other profits, and prestige."[34] Count One of the indictment charged Skilling with conspiracy to commit securities and wire fraud, and in particular, of "depriv[ing] Enron and its shareholders of the intangible right of [his] honest services."[35] He was found guilty.[36] The Fifth Circuit Court of Appeals subsequently rejected Skilling's claim that his conduct did not indicate any conspiracy to commit honest services fraud, holding that the jury was entitled to convict Skilling based on "(1) a material breach of a fiduciary duty . . . (2) that results in a detriment to the employer," including one occasioned by an employee's decision "to withhold material information, i.e., information that he had reason to believe would lead a reasonable employer to change its conduct."[37] The Fifth Circuit, however, did not address Skilling's void-for-vagueness argument.[38]

The Supreme Court, however, agreed with Skilling that his conviction was likely constitutionally infirm due to the statute's seeming overreach. But rather than strike § 1346 in its entirety, the Court opted for a limiting interpretation:

> We agree that § 1346 should be construed rather than invalidated. First, we look to the doctrine developed in pre-*McNally* cases in an endeavor to ascertain the meaning of the phrase "the intangible right of honest services." Second, to preserve what Congress certainly intended the statute to cover, we pare that body of precedent down to its core: In the main, the pre-*McNally* cases involved fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived. Confined to these paramount applications, § 1346 presents no vagueness problem.[39]

Accordingly, the Court concluded: "To preserve the statute without transgressing constitutional limitations, we now hold that § 1346

33. *Id.* at 2908.
34. *Id.* (internal quotation marks omitted).
35. *Id.* (second alteration in original).
36. *Id.* at 2911.
37. United States v. Skilling, 554 F.3d 529, 547 (5th Cir. 2009); *see also Skilling*, 130 S. Ct. at 2912.
38. *Skilling*, 130 S. Ct. at 2912.
39. *Id.* at 2928.

criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law."[40] In doing so, the Court paid mere lip service to the various limiting principles created by the various circuits, observing that "[a]lthough some applications of the pre-*McNally* honest-services doctrine occasioned disagreement among the Courts of Appeals, these cases do not cloud the doctrine's solid core: The 'vast majority' of the honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes."[41] The Court's decision, however, effectively overruled some, if not all, of those limiting principles.[42]

Of course, per its terms, § 1346 is not merely limited to bribes and kickbacks. In Justice Scalia's concurring opinion, "[a]rriving at that conclusion requires not interpretation but invention."[43] Accordingly, Justice Scalia charged the majority with defining new federal crimes, a power that courts are without. Moreover, Justice Scalia saw the irony in referring to pre-*McNally* cases in defining § 1346 since it was *McNally* itself—as will be explained below—that refused to see the mail fraud statute as encompassing the deprivation of one's honest services. In his words, "[A]dopting by reference 'the pre-*McNally* honest-services doctrine' is adopting by reference nothing more precise than the referring term itself ('the intangible right of honest services')."[44] In the end, Justice Scalia agreed with the majority that Skilling's conviction for honest services fraud should be reversed, but not with a "stroke of our pen"[45] rather, because § 1346 "fails to define the conduct it prohibits."[46]

---

40. *Id.* at 2931.

41. *Id.* at 2930.

42. *See* Ryan v. United States, 688 F.3d 845, 847 (7th Cir. 2012) ("The theory behind the second method of conviction was that the state had an intangible right to Ryan's honest services, and that secret payments interfered with the state's enjoyment of that right even if Ryan did not take the money in exchange for decisions over which he had control on behalf of the state. The instructions were accurate statements of the law under 18 U.S.C. § 1341 and § 1346, as this court understood the mail-fraud offense at the time. But in *Skilling v. United States*, the Supreme Court disagreed with *Bloom*. It held that only bribery or kickbacks can be used to show honest-services fraud.") (internal citations omitted).

43. *Skilling*, 130 S. Ct. at 2939 (Scalia, J., concurring).

44. *Id.* at 2938 (citation omitted).

45. *Id.* at 2940.

46. *Id.* It should be noted that despite his opinions on § 1346, Justice Scalia also did not believe that invalidating the statute was an appropriate remedy (at least for the moment):

> A brief word about the appropriate remedy. As I noted *supra* . . . Skilling has argued that § 1346 cannot be constitutionally applied to him because it affords no definition of the right whose deprivation it prohibits. Though this reasoning is categorical, it does not make Skilling's challenge a "facial" one, in the sense that it seeks invalidation of the statute in all its applications, as opposed to preventing its enforcement against him. I continue to doubt whether "striking down" a statute is ever an appropriate exercise of our Article III power. In the present case, the

Now, I must confess, seldom do I find myself in agreement with Justice Scalia's jurisprudential views. But this instance is one of those exceptions. Despite the Court's defenses to the contrary, limiting § 1346 to pre-*McNally* body of precedent seems not only a work of fiction, but poor fiction. Moreover, there seems no sense in ignoring the various limiting principles that many learned judges since *McNally* have applied to § 1346 (albeit with varying success). Thus, this article seeks to provide one coherent limiting principle to define the borders of § 1346 through the consolidation of the two major limiting principles already enunciated by the different circuit courts, namely, the private gain requirement and the state-law limitation principle.

II. THE HISTORY OF HONEST SERVICES FRAUD AND ITS LIMITING PRINCIPLES

B. MCNALLY V. § 1346

In *McNally v. United States*, the U.S. Supreme Court held that "[t]he mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government."[47] *McNally* concerned a self-dealing patronage scheme in Kentucky where the then Chairman of the state Democratic Party ensured that a certain insurance company would continue to provide the state with its workers' compensation policy in exchange for any resulting commission above $50,000 a year to be paid to other insurance agencies designated by the Chairman.[48] One of such agencies was nominally operated and owned by McNally, a private individual, and others, who were public officials.[49]

McNally was charged with several counts of mail fraud, although only one count based on the mailing of a commission check survived

> universality of the infirmity Skilling identifies in § 1346 may mean that if he wins, anyone else prosecuted under the statute will win as well. But Skilling only asks that *his* conviction be reversed, so *the remedy* he seeks is not facial invalidation.
>
> I would therefore reverse Skilling's conviction under § 1346 on the ground that it fails to define the conduct it prohibits. The fate of the statute in future prosecutions—obvious from my reasoning in the case—would be a matter for *stare decisis*.

Id. (internal citations omitted).

47. McNally v. United States, 483 U.S. 350, 356 (1987), *superseded by statute*, Act of Nov. 18, 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508 (codified at 18 U.S.C. § 1346 (1988)), *as recognized in Skilling*, 130 S. Ct. at 2927–29.

48. *McNally*, 483 U.S. at 352.

49. *Id.*

dismissal.[50] The count was pursued on the two mail fraud theories: fraud through the procurement of insurance monies, and fraud on "the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly."[51] Concerning the second theory, the government argued that McNally aided and abetted the public officials who owned the receiving agency, who in turn failed to disclose their interests in the agency, which would have affected the actions of the Kentucky government.[52]

The U.S. Supreme Court characterized the government's second theory as standing for the proposition that "a public official [or private individual with a 'special relationship in the government'] owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud."[53] However, such a proposition, in the Court's opinion, was unsupportable. The Court reasoned that the sparse legislative history of the mail fraud statute showed that the "original impetus" of the mail fraud statute was the prevention of the deprivation of property, and not the promotion of honest services.[54] The Court explained that the movement of the circuit courts towards the latter theory was due to the disjunctive language of the statute, which criminalized "[any] scheme[] or artifice[] to defraud *or* for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[55] The Court dismissed that interpretation by looking at the common meaning of fraud, previously defined by the Court as "usually signify[ing] the deprivation of *something of value* by trick, deceit, chicane, or overreaching."[56] Most importantly, however, the Court was concerned with the limits of honest services fraud and its potential for abuse. The Court held,

> 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.[57]

50. *Id.* at 353.
51. *Id.* at 353–54.
52. *Id.* at 354–55.
53. *Id.* at 355.
54. *McNally*, 483 U.S. at 356.
55. *Id.* at 358 (emphasis added) (internal quotation marks omitted).
56. Hammerschmidt v. United States, 265 U.S. 182, 188 (1924) (emphasis added).
57. *McNally*, 483 U.S. at 360.

One year later, Congress did speak. Section 1346 was enacted, effectively overruling *McNally* and reinstating honest services fraud.[58]

However, "[w]hether that terse amendment qualifies as speaking 'more clearly' or in any way lessens the vagueness and federalism concerns that produced . . . *McNally* is another matter."[59] By its terms, § 1346 criminalizes an outstanding array of behavior, leading one commentator to deem it "the hottest little criminal statute in federal court."[60] For example, the statute has been used to punish conflicts of interests,[61] bribes for legislative influence,[62] bribes by lawyers in exchange for expedient processing of clients' claims,[63] and even a scheme between students and professors to turn in plagiarized work.[64] It has even been suggested that the statute could be used as a prosecutorial tool against the Roman Catholic archbishop of Los Angeles for concealing from his parishioners the molestation of children by parish priests.[65] This sheer breadth of honest services fraud has led to multidirectional attempts by the different circuits to define its boundaries. Two clear limiting principles have emerged: (1) the private gain requirement, and (2) the state-law limiting principle.

B. THE PRIVATE GAIN REQUIREMENT

The private gain requirement was adopted by the Seventh Circuit in *United States v. Bloom*, where a former Chicago alderman and lawyer advised one of his clients to use a proxy bidder at a tax auction in direct contravention of state law.[66] High bidders for delinquent properties at such auctions could receive a tax deed after the original owner's period to redeem expired.[67] Potentially, the high bidder could thereafter sell the property back to the original owners and thereby extinguish a large amount of their debt.[68] To prevent this, counties in Illinois adopted a statute

58. United States v. Sorich, 523 F.3d 702, 707 (7th Cir. 2008).

59. Sorich v. United States, 555 U.S. 1204, 1205 (2009) (Scalia, J., dissenting); *see* United States v. Bloom, 149 F.3d 649, 654 (7th Cir. 1998) (stating that the line separating those breaches of a fiduciary duty that amount to a federal crime "cannot be found by parsing § 1341 or § 1346").

60. Laurie L. Levenson, *Honest Services Fraud*, NAT'L L.J., Mar. 9, 2009, at 14.

61. *See* United States v. Hasner, 340 F.3d 1261, 1271 (11th Cir. 2003).

62. United States v. Potter, 463 F.3d 9, 15, 18 (1st Cir. 2006).

63. United States v. Rybicki, 354 F.3d 124, 142 (2d Cir. 2003).

64. United States v. Frost, 125 F.3d 346, 369 (6th Cir. 1997).

65. Levenson, *supra* note 60, at 14.

66. United States v. Bloom, 149 F.3d 649, 650 (7th Cir. 1998).

67. *Id.* at 651.

68. *Id.*

requiring all bidders to certify that they were not bidding for a delinquent party.[69]

The government argued that, "Bloom [as alderman] was a fiduciary who owed the City a duty of loyalty and therefore was required, *when practicing law*, to refrain from participating in or giving advice about any transaction that could reduce the City's revenues."[70] The court rejected this argument, reasoning that it was analogous to criminalizing a public official's decision to shop outside of Illinois because it reduces county revenue.[71] Still, the court recognized that some limiting principle was required, given that if every breach of a fiduciary duty turned into mail fraud just because the mails were used, then this in effect would create common law crimes.[72]

The court first rejected the possibility of adopting the state-law limiting principle, reasoning that honest services fraud adds the possibility that a public employee can commit a crime even "when [the] state law allows the client to do what the lawyer recommends."[73] Instead, the court dug from the ashes *McNally*'s description of honest services fraud, namely, "misuse of [one's] office for private gain," and adopted it as its defining line.[74] Accordingly, the court reversed Bloom's conviction since he did not misuse his alderman position when he misguided his client, but was merely acting in his capacity as a lawyer.[75] The divisive line becomes clearer when Bloom's luck is compared to Sorich's misfortune.[76] While both Bloom and Sorich acted unethically, Bloom was merely an unethical lawyer, while Sorich was an unethical public official. The distinction is key because in the Seventh Circuit a lawyer does not have a fiduciary duty to the public absent some statutory provision, while a public official *inherently* does.[77] This distinction is most remarkable when one considers that Bloom is the only person that has arguably broken any state law.[78]

---

69. *See id.*

70. *Id.* (emphasis added).

71. *See id.* at 654.

72. *See Bloom*, 149 F.3d at 656.

73. *Id.* at 655 (emphasis omitted). The court also reasoned that, in reality, the certification statute would be inapplicable against Bloom because (1) it was his client and the straw bidder who actually broke the law, and (2) the statute is completely unrelated to Bloom's position as an alderman. *See id.* at 654.

74. *Id.* at 655 (quoting McNally v. United States, 483 U.S. 350, 355 (1987)).

75. *See id.*

76. *See supra* Part I.A (discussing Sorich's conviction).

77. *See* United States v. Sorich, 523 F.3d 702, 712 (7th Cir. 2008).

78. *See infra* Part III for a further detailed discussion of how this divergence of decision is illustrative of the problem with adopting only one limiting principle.

C. THE STATE-LAW LIMITING PRINCIPLE

In contrast to the Seventh Circuit, both the Third and Fifth Circuits have focused on the source of the fiduciary duty owed by the public official as a limiting principle, and not on the status of the official himself. In short, both circuits have held that § 1346 requires a violation of a state law that creates a fiduciary duty between the defendant and the public. The Third Circuit's decision in *United States v. Murphy* is illustrative of this principle. In *Murphy*, the former Chairman of the Republican Party in Passaic County, New Jersey, was convicted of a bribery scheme using his influence over Passaic County officials to get contracts for a certain medical company, which then siphoned monies to four individuals chosen by Murphy.[79] This scheme was in violation of New Jersey's anti-bribery statute.[80] The government argued "that Murphy had attained such a dominant role in the political system of Passaic County that he could be considered the equivalent of a publicly elected official," and therefore he had a fiduciary duty to inform County officials of the "nature of the contracts-for-payments scheme."[81]

On appeal, the Third Circuit rejected the government's contention as overly broad and unduly vague, reasoning that if mere influence created a fiduciary duty between a party official and the general public, then lawful activities such as lobbying would be criminalized.[82] However, just like in *Bloom*, the Third Circuit recognized the need for some limiting principle to wrangle § 1346. In fact, both the Seventh and Third Circuits were focused on the same problem: how to impose honest services fraud on individuals, a lawyer and a party official, respectively, who cannot easily be classified as public officials. But there is where the similarities end, because while the Seventh Circuit felt comfortable in imputing a fiduciary duty to a private individual with sufficient connections to the government, the Third Circuit saw the party official as needing more guidance.[83] Accordingly, the Third Circuit held that the New Jersey anti-bribery act did not create the necessary fiduciary duty between Murphy and the peoples of Passaic County.[84] If it found otherwise, the court reasoned, then any criminal

79. United States v. Murphy, 323 F.3d 102, 103–04 (3d Cir. 2003).
80. *Id.* at 104.
81. *Id.*
82. *Id.* at 104, 117–18.
83. *Id.* at 114 (stating that for "party officials there is no . . . [clear] line between legitimate patronage and mail fraud").
84. *Id.* at 115.

statute could be said to create a fiduciary duty between all criminals and the public to not break the law.[85]

If one compares this result with the Seventh Circuit approach, a clear separation arises between the private gain requirement and the state-law limiting principle. If Murphy had been an official within a fictional *Illinois* Workers' Compensation Commission, his conviction would not have been overturned. Unlike Bloom, Murphy received his illegitimate funds not through his ability to practice law, but because of his ability within his office to curry favors for the various "donors." Under *Sorich*, his conviction would be even more certain, as Murphy was not an altruist by any means, but received cold, hard cash for his favoritism. As such, no state-sponsored fiduciary duty would be needed to convict Murphy, as one would be imputed on him by virtue of his office.

The Fifth Circuit's adoption of the state-law limiting principle was prompted by a lawyer and former Texas Workers' Compensation Commission official who was convicted after he "borrowed" over $112,000 from other workers' compensation lawyers without repayment in exchange for favoritism towards those lawyers when they had to deal with the Commission.[86] Brumley was charged with and convicted of violating a gratuity statute, which made it a misdemeanor for a public servant to accept any benefit from anyone likely to have an interest in any matter before that servant.[87] Unlike in *Murphy*, the government in *Brumley* did not have to argue that the defendant should be considered a public official since his status was clear, and simply contended that Brumley deprived the citizens of Texas and the Texas Industrial Board of the right to honest services.[88] Thus, on appeal, the Fifth Circuit was not particularly concerned with the application of § 1346 to Brumley himself, reasoning that Brumley's behavior was a clear violation of state-imposed duties of a public official.[89] Accordingly, the court held that the Texas gratuity statute provided the necessary fiduciary duty to convict the defendant.[90]

Unlike in *Murphy*, comparison of *Brumley* and the Seventh Circuit approach is not very illuminating. Brumley sought and received illegitimate gains (*Sorich*), and did so through misuse of his office, and not merely by being a lawyer (*Bloom*). However, when one compares *Brumley*

---

85. *See Murphy*, 323 F.3d at 117.
86. *See* United States. v. Brumley, 116 F.3d 728, 730–31 (5th Cir. 1997).
87. *Id.* at 735–36.
88. *See id.* at 731–32.
89. *See id.* at 733.
90. *See id.*

to *Murphy* in the same way as *Bloom* and *Sorich*, inexplicable divergent results emerge once again. Apparently, it is the location of one's unethical conduct, as opposed to the implicated federal statute itself, which plays the largest role in deciding whether any given conduct rises to the level of a federal crime. Even then, as shown above, the decisions are not easy to predict. For example, if certain unethical conduct by a public official arises in Illinois, that official could be convicted of mail fraud even if he or she does not break any state law.[91] By contrast, another public official in Illinois could actively advise a person to avoid state taxes, yet not be convicted of mail fraud because the public official was not speaking . . . *officially*.[92] Similarly, in New Jersey, a public official could actually violate a bribery statute and still not be convicted of mail fraud, even though New Jersey claims to follow a different path from Illinois.[93] Yet at the same time, a public official in Texas could simply exchange favors for gratuities and be convicted of wire fraud, even though Texas purports to follow the same rule as New Jersey.[94] Clearly, these two limiting principles by themselves are inadequate to clearly define the boundaries of § 1346. Still, this does not mean that the principles must be discarded and replaced anew. Instead, it is this author's opinion that the boundaries of § 1346 can only be defined through a *consolidation* of both principles.

III. CONSOLIDATING THE PRIVATE GAIN REQUIREMENT WITH THE STATE-LAW PRINCIPLE

Both limiting principles do have their merit. *Bloom* clearly stated that the private gain principle stems from the U.S. Supreme Court's own understanding of honest services fraud in *McNally*.[95] Therefore, if Congress thereafter accepted the Court's invitation to speak clearly, and reinstated honest services fraud, then the Court's description should be sufficient to define § 1346.[96] Likewise, there is also some support in *McNally* for the state-law limiting principle, albeit in dicta. Responding to Justice John Paul Stevens' contention that he would affirm McNally's conviction even absent a violation of state law, the majority stated that "if state law expressly permitted or did not forbid [the patronage scheme], it would take a *much clearer indication* than the mail fraud statute evidences

91. *See* Sorich v. United States, 523 F.3d 702, 712 (7th Cir. 2008).
92. *See* United States v. Bloom, 149 F.3d 649, 655 (7th Cir. 1998).
93. *See* United States v. Murphy, 323 F.3d 102, 115 (3d Cir. 2003).
94. *See Brumley*, 116 F.3d at 732–33.
95. *See Bloom*, 149 F.3d at 655.
96. See *Brumley*, 116 F.3d at 732, for why even the Fifth Circuit could agree on that point, noting, "Congress accepted the [U.S. Supreme] Court's invitation and was clear in its purpose."

to convince us that having and concealing such an interest defrauds the State and is forbidden under federal law."[97]

However, both approaches also have significant disadvantages besides the disparate results illustrated above. The private gain requirement has been criticized by the Tenth Circuit for adding an element to honest services fraud that does not exist.[98] By contrast, the state-law limiting principle simply provides a fiduciary duty that is implicit within honest services fraud.[99] However, adding an extra element to honest services fraud may be necessary to define the boundaries of § 1346 because, as aforementioned, all circuits and Justice Scalia himself have expressed doubt as to whether the answer to this predicament can be wrought from § 1346 itself. This also erodes the Seventh Circuit's purported *McNally* foundation since it was that court's very description of honest services fraud that led to its short demise. Furthermore, the private gain requirement has also been critiqued as being overinclusive seeing as any number of frauds could not yield a private gain.[100] This critique seems to hold less water after *Sorich*, however, given that the Seventh Circuit has chosen to define private gain as akin to misuse of office. On the other hand, the state-law limiting principle could be regarded as underinclusive because, as *Bloom* stated, honest services fraud adds the possibility that a public employee can commit a crime even when the state law allows the given behavior.[101]

Still, the biggest disadvantage of both approaches is that they are *singular* in focus, while the concerns originally raised in *McNally* are *dual* in nature. The seemingly endless prosecutorial possibilities of honest services fraud raise numerous concerns. However, the most important and dire of these concerns are two-fold, and found, ironically, in *McNally* itself. In fact, one commentator has suggested that "[i]n deciding the scope of [§] 1346, some justices may hear the ghost of *McNally* whispering in their ears."[102] These dual concerns are as follows: (1) that the unclear boundaries of § 1346 do not give fair warning to defendants as to what conduct constitutes a crime, and the statute is therefore void-for-vagueness; and (2) that federal prosecutors could use § 1346 to create ethical duties for state and local officials, and therefore break the bounds of federalism by

97. McNally v. United States, 483 U.S. 350, 361 n.9 (1987) (emphasis added).
98. United States v. Welch, 327 F.3d 1081, 1107 (10th Cir. 2003).
99. *See* United States v. Sorich, 523 F.3d 702, 707–08 (7th Cir. 2008).
100. *See* United States v. Panarella, 277 F.3d 678, 691–92 (3d Cir. 2002).
101. United States v. Bloom, 149 F.3d 649, 655 (7th Cir. 1998).
102. Levenson, *supra* note 60, at 14.

creating common law crimes.[103] The problem with each of the limiting principles is that they stem from the need to fix *one* concern at a time, as opposed to both.

As *Bloom* stated, "What the prosecutor needs is a way to equate [ethical duties] with a 'scheme or artifice to defraud.'"[104] *Bloom* was concerned with giving adequate warning to individuals of when their ethical duties equated to public duties, and not what the source of those duties were. As far as the court was concerned, this equation was the pinnacle of the § 1346 dilemma because once an individual knew that his or her misconduct was a misuse of public office, then a fiduciary duty followed thereafter. In short, *Bloom* stemmed from a need to fix the first *McNally* concern, and not the second. However, even though the private gain requirement does clarify the line between unethical behavior and a federal crime, it necessarily implicates the second concern of *McNally* by allowing federal prosecutors to define what that fiduciary duty is. As Justice Scalia stated in *Sorich*, any number of seemingly innocent behavior can be considered a misuse of office, such as a public official calling in sick to enjoy a sporting event.[105] In theory, an overzealous federal prosecutor could seek to convict the mischievous sports fan one day, and then former Governor Rod Blagojevich for attempting to sell President Barack Obama's Senate seat the next day. And even if the prosecutor is not fanatical, but cautious in his work, and seeks to convict only traditional briberies and conflicts of interests, this choice itself is impermissible because it presupposes the prosecutor's power to define fiduciary duties.

The state-law limiting principle, on the other hand, eliminates this problem by clearly defining where the fiduciary duty stems from. So "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."[106] Thus, federal prosecutors are not free to decide which dishonest services are actionable, and must instead look to the forum state. However, even though the circuits adopting this approach claim that a "state law . . . addresses rule of lenity concerns . . . more [readily] than . . . [a] misuse of office for personal gain,"[107] their practices beg to differ. As

103. *See id.*

104. *Bloom*, 149 F.3d at 651.

105. *See* Sorich v. United States, 555 U.S. 1204, 1205–06 (2009) (Scalia, J., dissenting).

106. United States. v. Brumley, 116 F.3d 728, 734 (5th Cir. 1997).

107. United States v. Murphy, 323 F.3d 102, 115–16 (3d Cir. 2003) (second omission in original) (internal quotation marks omitted). *See generally Bloom*, 149 F.3d at 656 (explaining the rule of lenity). The rule of lenity requires any doubt in the scope of a criminal statute must be resolved against criminalizing the conduct in question. *Bloom*, 149 F.3d at 656.

aforementioned, *Murphy* and *Brumley* arrived at polar opposite conclusions in deciding whether their implicated respective statutes created a fiduciary duty.[108] Surprisingly, a bribery statute did not create such a duty, while a gratuity statute did. Such results do not alleviate the first concern of *McNally*, namely, the unfairness of a federal statute, which does not give adequate notice of what behavior is criminal. Thus, the state-law limitation principle, by itself, simply brings one back full circle: the scope of § 1346 is once again undefined.

However, if the private gain requirement is combined with the state-law limiting principle, all of these concerns are overcome. Simply stated, for certain unethical behavior to be actionable under § 1346, there must be, (1) a clearly defined fiduciary duty imposed through state law, and (2) a breach of that duty only through misuse of one's office for private gain. By having the state law define the duty, there are no federalism concerns since federal prosecutors cannot impose their own ethical regimes on the states. However, even if certain unethical behavior does not comport with a state imposed fiduciary duty, such does not rise to the level of a federal crime if the behavior does not stem from the misuse of one's office for private gain. Necessarily, this presupposes that the state law defining the duty must bear some relationship to the public official's office, since it would be hard to argue that the public official breached a fiduciary duty *in his capacity* as a public official otherwise. This eliminates the vagueness concerns raised by the decisions in *Murphy* and *Brumley* because public officials and persons intimately connected to public officials should be aware, as a matter of course, of what state laws control their official behavior.

In sum, if one combines the state-law limiting principle and the private gain requirement, § 1346 no longer becomes an "omnibus statute for federal charges,"[109] but a definable and, most importantly, constitutional prosecutorial tool aimed at a specific genre of crimes. This genre can be finally defined as such: a scheme to defraud others of the honest services of public officials [or private persons with a special relationship with the government] by breach of a state-defined fiduciary duty through the misuse of one's office for private gain. With this definition, § 1346 could finally become the "clear statement" that *McNally* asked for in the first place.

108. *Compare Murphy*, 323 F.3d at 115 (no fiduciary duty found), *with Brumley*, 116 F.3d at 733 (fiduciary duty found).

109. Levenson, *supra* note 60, at 14.