Gist in the Mist: What is the Gist of the Mail Fraud Statute and Why Should We Care?

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GIST IN THE MIST: WHAT IS THE GIST OF THE MAIL FRAUD STATUTE, AND WHY SHOULD WE CARE?

By C.J. Williams

It is accepted as a truism under jurisprudence interpreting the mail fraud statute that each separate mailing made in connection with a "scheme or artifice to defraud"

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2The mail fraud statute currently provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or 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 twenty years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

constitutes a separate offense.³ The genesis of this truism lies in the recesses of the mail fraud statute’s unique and enigmatic past.⁴ The Congressional purpose of the mail fraud statute, as originally enacted in 1872, was to punish those who misused a government agency, the United States Post-Office establishment, in the process of executing a fraudulent scheme.⁵ Congressional authority to make mail fraud a federal criminal offense was based upon government’s authority to enact legislation on matters affecting the United States mail.⁶ It was the intentional misuse of the United States mail to carry out a fraud, therefore, and not the underlying fraud, that was then the gist of the mail fraud statute.⁷ It logically followed that each separate use of the United States mail by the perpetrator of a fraudulent scheme constituted a separate offense.

³See, e.g., United States v. Gardner, 65 F.3d 82, 85 (8th Cir. 1995) (it is “not the general plan or scheme that is punished but rather each individual use of the mails in furtherance of that scheme”); United States v. Kennedy, 64 F.3d 1465, 1476 (10th Cir. 1995) (each separate mailing constitutes a separate mail fraud offense); United States v. McClelland, 868 F.2d 704, 706 (5th Cir. 1989) (same); United States v. Vaughn, 797 F.2d 1485, 1493 (9th Cir. 1986) (same); United States v. Stull, 743 F.2d 439, 444 (6th Cir. 1984) (same, and citing other cases for same proposition), cert. denied, 470 U.S. 1062 (1985); United States v. Ledesma, 632 F.2d 670, 679 (7th Cir.), cert. denied, 499 U.S. 998 (1980) (same).

⁴See infra, text accompanying notes 36-45.

⁵See infra, text accompanying notes 37-40.

⁶Specifically, the power of Congress to enact the original mail fraud statute derived from the Postal Power, found in Article I, Section 8, Clause 7 of the United States Constitution, which provides Congress authority “[t]o establish Post Offices and post Roads.” U.S. Const. art. I, § 8, cl. 7.

⁷See, e.g., Mitchell v. United States, 142 F.2d 480, 481 (10th Cir. 1944) (“But the gist and crux of the offense is the use of the mails in the execution of the scheme . . . .”); United States v. Hornman, 118 F. 780, 780-81 (S.D. Ohio 1901), aff’d, 116 F. 350 (6th Cir.) (“[T]he policy of this statute is to prevent the misuse of the mails of the United States, -- the prostitution of the United States in furtherance of dishonest schemes.”), cert. denied, 187 U.S. 641 (1902); United States v. Loring, 91 F. 881, 885 (N.D. Ill. 1884) (“The gist of this offense does not consist in the fraudulent scheme alone, but in
mails for the purpose of carrying out a scheme to defraud others constituted a separate violation of the mail fraud statute.

Nearly a century and a half has elapsed since the enactment of the original mail fraud statute in 1872. During this time, Congress repeatedly has altered the statute’s language, significantly altering the focus and essence of the mail fraud statute.\(^8\) Indeed, use of the United States mail is no longer even necessary to violate the mail fraud statute. Congress amended the statute in 1994 to make it equally offensive to use a private or commercial interstate carrier to execute a fraudulent scheme.\(^9\) The expansion of the mail fraud statute to encompass the use of private or commercial carriers was premised upon the Commerce Clause,\(^{10}\) severing the mail fraud statute’s tether to the power to regulate the United States mails. The current mail fraud statute bears only a vague resemblance to its ancestor.\(^{11}\)

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\(^8\) See infra, text accompanying notes 48, 53-55, 75-78, 89-93.

\(^9\) See infra, text accompanying notes 89-93.

\(^{10}\) U.S. Const. art. I, § 8, cl. 3 (“To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes;”).

\(^{11}\) This is revealed most clearly by a direct comparison of the original mail fraud statute against the current statute. The deletions from the original statute are struck out, and the added language redlined:

That if any person, \(\text{Whoever,}\) having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or
Courts have further broadened the scope and shifted the direction of the statute by interpreting the statute to encompass essentially any fraudulent scheme in which some mailing occurs.\textsuperscript{12} Thus, the use of the United States Mail or a commercial mail carrier, gives rise to federal criminal jurisdiction even when the mailing is tangentially

spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, to be effected by either opening or intending to open correspondence or communication with any other person (whether resident within or outside of the United States), by means of the post-office establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice (or attempting to do so), places any letter or packet in any post-office of the United States or authorized depository for mail matter, any matter or thing whatever to be delivered by any private or commercial interstate carrier, or takes or receives any therefrom, any such matter or thing person, so misusing the post-office establishment 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 guilty of a misdemeanor, and shall be punished with a fined of not more than five hundred dollars, with or without such imprisonment, as the court shall direct, not exceeding eighteen calendar months under this title or imprisoned not more than twenty years or both. The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme or devise. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

In other words, the only common statutory language that remains from the original statute is: “. . . having devised or intending to devise any scheme or artifice to defraud . . . place . . ., or take . . . or receive . . . therefrom, . . . such . . ., shall be . . . under this title or imprisoned not more than twenty years or both.”

\textsuperscript{12} See infra, text accompanying notes 50-52, 56-71, 79-88.
related to the offense\textsuperscript{13} and even when its use not intended by the defendant.\textsuperscript{14} Indeed, the mail fraud statute today is essentially a general federal fraud statute. As a result, today’s mail fraud statute is applied today to cases the could never have been brought under the original mail fraud statute.\textsuperscript{15} The evolution of the statute from a minor, narrowly-tailored act to its current broad wording and expansive judicial interpretation has indeed made it the “true love” of federal prosecutors.\textsuperscript{16}

As a result of these changes, abuse of the United States mails no longer forms the core of the crime. Rather, the “scheme or artifice to defraud” element has appropriately evolved to become the central focus and true “gist” of the mail fraud statute. The use of the United States mail, or some other common carrier engaged in interstate commerce, has become relegated to a jurisdictional element of the crime.

Nevertheless, courts have continued to parrot language from decisions issued more than a century ago when courts, interpreting the original mail fraud statute which relied upon the Postal Power, properly held the mailing element was the gist of the mail

\textsuperscript{13} See infra, text accompanying notes 84-86, 88.

\textsuperscript{14} See infra, text accompanying notes 87.

\textsuperscript{15} See Brian C. Behrens, Note and Comment: 18 U.S.C. Section 1341 and Section 1346: Deciphering the Confusing Letters of the Mail Fraud Statute, 13 St. Louis U. Pub. L. Rev. 489 (1993) (“[T]he mail fraud statute has developed so dramatically over its history that the statute’s original drafters would be somewhat astonished to see the situations in which it is applied today.”).

\textsuperscript{16} “To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart -- and our true love. We may flirt with RICO, show off with 10b-5, and call the conspiracy law darling, but we always come home to the virtues of 18 U.S.C. Section 1341, with its simplicity, adaptability, and comfortable familiarity.” Jed S. Rakoff, The Federal Mail Fraud Statute (Part I), 18 Duq. L. Rev. 771, 771 (1980).
Consequently, we are left with the illogical result that each mailing is treated as a separate offense, though the number of mailings seldom bears a logical relationship to the nature or scope of the underlying fraudulent scheme and is often a matter of pure happenstance. Not only is this result irrational; it lends support to allegations of due process and double jeopardy violations. Further, and perhaps more important, the continued focus on mailing as the unit of prosecution can result in

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17 See, e.g., Parr v. United States, 363 U.S. 370, 389 (1960) (purpose of mail fraud statute is to safeguard United States mails); United States v. Lovett, 811 F.2d 979, 983 (7th Cir. 1987) (objective of mail fraud statute is to protect United States Postal Service); United States v. Lennon, 751 F.2d 737, 741 (5th Cir.) (mail fraud statute designed to protect United States mails from abuse), cert. denied, 471 U.S. 1100 (1985); United States v. Renini, 738 F.2d 530, 533 (1st Cir. 1984) (mail fraud statute designed to protect United States mail); Stull, 743 F.2d at 444 (“[U]se of federal mails is not only a jurisdictional requirement, it is the gist of the crime of mail fraud.”); United States v. O’Malley, 707 F.2d 1240, 1246 (11th Cir. 1983) (gist of mail fraud statute is abuse of United States Mails); United States v. Hopkins, 716 F.2d 739, 746 (10th Cir. 1982) (same); United States v. Grande, 620 F.2d 1026, 1029 (4th Cir.) (thrust of mail fraud statute is misuse of mail to defraud others), cert. denied sub nom, Castagna v. United States, 449 U.S. 830 (1980); United States v. Bohonus, 628 F.2d 1167, 1170 (9th Cir.) (manifest purpose of mail fraud statute is protection of post office from use in execution of frauds), cert. denied, 447 U.S. 928 (1980). But see United States v. Dunning, 929 F.2d 579, 581 (10th Cir. 1991) (“[T]he gist of [the mail fraud statute] is devising a scheme to defraud with a purpose of executing the scheme . . . .”); United States v. Kelly, 929 F.2d. 582, 585 (10th Cir. 1991) (gist of mail fraud statute is scheme to defraud), cert. denied, 502 U.S. 926 (1991).

18 See Ashland Oil Co. v. Arnett, 875 F.2d 1271, 1278 (7th Cir. 1989) (dictum) (because each mailing or use of wires constitutes a separate offense, “the number of offenses is only tangentially related to the underlying fraud, and can be a matter of happenstance.”).

19 Id.

20 The “unit of prosecution” for a criminal statute is that “aspect of criminal activity that the statute aims to punish.” Courtney J. Linn, Redefining the Bank Secrecy Act: Currency Reporting and the Crime of Structuring, 50 Santa Clara L. Rev. 407, 471 (2010).
applications of the statute that are both over-inclusive and under-inclusive. When each mailing is deemed a separate offense, the statute is applied to mailings which can be quite unrelated to the offense. At the same time, making the mailing the unit of prosecution upon which the statute of limitations hinges\textsuperscript{21} can exclude from prosecution schemes to defraud which continue beyond a five-year period after the last mailing.

This article challenges the accepted truism that each mailing made in connection with a scheme or artifice to defraud should constitute a separate mail fraud offense. First, the article delves into the obscure and unique history of the mail fraud statute from its humble beginnings to its current lofty status.\textsuperscript{22} The article studies the evolution of the mail fraud statute, recounting the scope of the statute’s expansion that occurred both as a result of statutory amendment and judicial interpretation.\textsuperscript{23} It further analyzes the origin of the principle that each mailing constitutes a separate violation of the mail fraud statute.\textsuperscript{24} This first section of the article ends with a conclusion that the evolution of the mail fraud statute, especially in light of statutory amendments expanding the scope of the statute to include private and commercial interstate carriers, weighs against the premise upon which rests the conclusion that each mailing constitutes a separate violation of the mail fraud statute.

\textsuperscript{21} For purposes of mail fraud statute, the statute of limitations begins to run as of the date of the last mailing in furtherance of the scheme to defraud. \textit{See, e.g.}, United States v. Crossley, 224, F.3d 847, 859 (6\textsuperscript{th} Cir. 2000) (statute of limitations for mail fraud statute begins on date of last mailing); United States v. Barger, 178 F.3d 844, 847 (7\textsuperscript{th} Cir. 1999) (same); United States v. Pemberton, 121 F.3d 1157, 1163 (8\textsuperscript{th} Cir. 1997) (same); United States v. Eisen, 974 F.2d 246, 263 (2\textsuperscript{nd} Cir. 1992).

\textsuperscript{22} \textit{See infra}, text accompanying notes 32-97.

\textsuperscript{23} \textit{See infra}, text accompanying notes 33-97.

\textsuperscript{24} \textit{See infra}, text accompanying notes 36-45.
The article next addresses the wire fraud statute which was modeled after the mail fraud statute and contains essentially identical language.\textsuperscript{25} The wire fraud statute makes it a federal offense to use the wires, telephones, television or other means of interstate electronic communication for the purpose of executing a fraudulent scheme.\textsuperscript{26} The article points out that Congress amended the mail fraud statute based upon its authority under the Commerce Clause, not the Postal Power. Nevertheless, courts have relied upon the mail fraud cases to hold that each use of wire communication for the purpose of executing a scheme or artifice to defraud constitutes a separate offense.\textsuperscript{27} This section of the article reveals that this conclusion is not only built upon the shaky foundation of the mail fraud jurisprudence, it is even less justifiable given its rooting in the Commerce Clause.\textsuperscript{28}

The article turns, then, to other statutes modeled on the mail fraud statute. As noted, courts have tracked the mail fraud jurisprudence when determining the unit of prosecution for the wire fraud statute. With regard to other statutes, such as the bank fraud and bankruptcy fraud statutes, however, courts have not followed the same analysis in determining the unit of prosecution.\textsuperscript{29} Rather, there, courts have focused on

\begin{itemize}
\item \textsuperscript{25} See infra, text accompanying notes 97-105.
\item \textsuperscript{26} See infra, text accompanying notes 98.
\item \textsuperscript{27} See infra, text accompanying note 99.
\item \textsuperscript{28} See infra, text accompanying notes 100-105.
\item \textsuperscript{29} See infra, text accompanying notes 106-116, 122-130.
\end{itemize}
the scheme to defraud as the appropriate unit of prosecution. The divergence in judicial interpretation can be explained and justified in large part by parsing statutory language. The contrasting conclusions regarding the appropriate unit of prosecution with regard to these various statutes, all of which seek to criminalize schemes to defraud, highlights the need to reconsider the appropriate unit of prosecution under the mail and wire fraud statutes.

Having reviewed the legislative history and jurisprudence of the mail fraud statute, and analyzed the contrasting approaches taken with similar statutes, the article proposes abandoning the worn, threadbare truism that each mailing constitutes a separate criminal offense. The gist of the mail fraud statute is, and ought to be, the scheme to defraud, not the individual mailings. Therefore, the unit of prosecution under the mail fraud statute should be the fraudulent scheme itself. The use of the mail, or interstate commercial carrier, or for that matter the use of the wires, should be seen for what it is – a federal jurisdictional nexus. The article proposes slight alterations in the language of the mail fraud statute to make it clear the gist of the mail fraud statute is the scheme to defraud. The article concludes the time is ripe for abandoning a worn and untenable legal fiction. Each mail or wire fraud charge should be based on each execution of a scheme to defraud, regardless of how many mailings or uses of the wires occurred.

30 See infra, text accompanying notes 113, 130.
31 See infra, notes 112, 127-128.
32 See infra, text accompanying notes 131-151.
I.  **EVOLUTION OF THE MAIL FRAUD STATUTE**

The Mail Fraud statute has a unique, unusual, and convoluted history.\(^{33}\) The mail fraud statute, one of the broadest of all federal criminal statutes, had a modest origin. In the aftermath of the Civil War and during the tumultuous Reconstruction era, Congress first began to enact criminal legislation for protecting the integrity of the United States Post Office establishment. In 1865, Congress revised the postal laws\(^{34}\) primarily for the purpose of enacting legislation designed to prevent obscene and other inappropriate materials from being sent through the United States Mail.\(^{35}\) In 1868 Congress made it a federal offense to use the United States Postal Service to promote lotteries.\(^{36}\) These were narrowly tailored statutes with little lasting influence on the scope of federal criminal law. Nevertheless, they were the progenitors of the modern mail fraud statute, which, in contrast, has had a far broader application under federal criminal law.

A.  **The Original Mail Fraud Statute and Its Early Interpretation**

\(^{33}\) For an excellent, detailed history of the evolution of the mail fraud statute and judicial interpretation of the mail fraud statute through the 1970s, see generally Rakoff, supra note 21. See also John C. Coffee, Jr., The Metastasis of Mail Fraud: The Continuing Story of the “Evolution of a White Collar Crime, 21 Am. Crim. L. Rev. 1 (1983).

\(^{34}\) Act of March 3, 1865, Section 13, 13 Stat. 507.


\(^{36}\) Act of July 27, 1868, ch. 246, Section 13, 15 Stat. 194, 196. This statute made it a federal offense to use the United States Postal Service to send circulars or letters “concerning [illegal] lotteries, so called gift concerts, or other similar enterprise offering prizes of any kind on any pretext whatsoever.” Id.
The modern mail fraud statute’s most direct descendent was a recodification of the postal laws in 1872. Congress enacted the mail fraud statute primarily to address the sale of counterfeit currency through the United States Mail. The statutory language was clearly broader than simply prohibiting the use of the mails for counterfeiting, however, making it a federal offense to use the mails in the execution of any “scheme or artifice to defraud.” Courts looked to the title of the statute, “Penalty for Misusing the Post-Office Establishment,” and to the “mail-emphasizing” language in the

\[\text{Act of June 8, 1872, ch. 335, Section 149, 17 Stat. 283, 302. The original mail fraud statute provided:}\]

That if any person having devised or intending to devise any scheme or artifice to defraud, to be effected by either opening or intending to open correspondence or communication with any other person (whether resident within or outside of the United States), by means of the post-office establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice (or attempting to do so), place any letter or packet in any post-office of the United States, or take or receive any therefrom, such person, so misusing the post-office establishment, shall be guilty of a misdemeanor, and shall be punished with a fine of not more than five hundred dollars, with or without such imprisonment, as the court shall direct, not exceeding eighteen calendar months. The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme or devise.

\[\text{Id.}\]

\[\text{See McNally v. United States, 483 U.S. 350, 356 (1987) (“The sponsor of the recodification stated, in apparent reference to the anti-fraud provision, that measures were needed ‘to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country.’”) (quoting Cong. Globe, 41st Cong., 3d Sess., 35 (1870) (remarks of Rep. Farnsworth)). See also Geraldine Moohr, Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us, 31 Harv. J. on Legis. 153, 158 (1994) (hereinafter "Moohr") (statute designed to redress schemes for selling counterfeit currency through mail).}\]
statute, in concluding that Congress intended the mail fraud statute to protect the United States mail from criminals' use and abuse.\textsuperscript{39} Thus, courts found the original mail fraud statute had three elements:

(1) That the persons charged must have devised a scheme or artifice to defraud;

(2) That they must have intended to effect this scheme by opening or intending to open correspondence with some other person through the post-office establishment or by inciting such other person to open communication with them; and

(3) that, in carrying out such scheme, such person must have either deposited a letter or packet in the post-office, or taken or received one therefrom.\textsuperscript{40}

The essence of the mail fraud statute, then, was not so much the nature of the fraud as the degree of the misuse of the mails.\textsuperscript{41} Thus, as interpreted by the courts, the statute required a showing that the defendant intended to use the mails to execute the fraudulent scheme. Moreover, the statutory language explicitly addressed the number of counts that could be brought based on the number of mailings, limiting the number to three within a six-month period. By doing so, the statute explicitly established each mailing as a separate unit of prosecution. It could not be more clear that congress intended to criminalize abuse of the United States mail in the process of executing a scheme to defraud, as opposed to criminalizing fraudulent schemes in which the United

\textsuperscript{39} See cases cited at note 7, supra. See also Rakoff, supra note 16 at 783; Moohr, supra note 37 at 159.


\textsuperscript{41} Rakoff, supra note 16 at 784.
States mail happened to be involved.

The Supreme Court confronted the mail fraud statute for the first time in 1887, fifteen years after its enactment. In *Ex Parte Henry*, the Supreme Court addressed the narrow issue of whether the court should count only those charges contained within a single indictment in calculating the permissible number of counts within a six-month period for purposes of determining the appropriate penalty as required under the unique language of the original mail fraud act. In deciding this issue in the affirmative, the Court made it clear that it was not attempting to rule on the broader issue of the statute’s scope or purpose. Nevertheless, in dicta the Court did approve the district court’s finding that “[e]ach letter taken out or put in constitutes a separate and distinct violation of the act.”

In the century following *Ex Parte Henry*, courts repeatedly held that each

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42 123 U.S. 372 (1887).

43 *Id.* at 374.

44 The pertinent language was: “The indictment, information, or complaint may severally charge offense to the number of three when committed within the same six calendar months.” *Act of June 8, 1872, ch. 335, Section 149, 17 Stat. 283, 302.* Arguably, one could read into this limitation that Congress realized the potential for prosecutors to abuse the statute by bringing large number of mail fraud charges for each mailing, though it may bear no relation to the scope of the fraudulent scheme. Accordingly, Congress created an arbitrary limitation of three charges to prevent such abuse. Unfortunately, there is no legislative history that sheds any light on the intent of this strange penalty section, nor are any cases enlightening.

45 *Id.* at 374-75.

46 *Id.* at 374 (quoting the district court opinion).
separate mailing constitutes a separate offense.\textsuperscript{47} If one delves into the authority upon which courts rely in reaching this holding, one can ultimately trace the authority back to \textit{Ex Parte Henry}, that is, when they cite authority for the proposition.\textsuperscript{48} In the 120 years since \textit{Ex Parte Henry}, however, both the statutory language of the mail fraud statute, and judicial interpretation of the statute, have changed significantly.

B. Early Amendments to the Mail Fraud Statute

\textsuperscript{47} Every circuit court of appeal has held each mailing constitutes a separate offense. \textit{See, e.g., United States v. Alston, 609 F.2d 531, 535-36 (D.C. Cir. 1979); United States v. Luongo, 11 F.3d 7, 9 (1st Cir. 1993); United States v. Eskow, 422 F.2d 1060, 1064 (2nd Cir. 1970); Francis v. United States, 152 F. 155, 155 (3rd Cir. 1907); United States v. Bakker, 925 F.2d 728, 739 (4th Cir. 1991); United States v. Shaid, 730 F.2d 225, 230 (5th Cir. 1984); United States v. Stull, 743 F.2d 439, 444 (6th Cir. 1984); United States v. Joyce, 499 F.2d 9, 18 (7th Cir. 1974); United States v. Calvert, 523 F.2d 895, 914 (8th Cir. 1975); United States v. Vaughn, 797 F.2d 1485, 1492 (9th Cir. 1986) (each mailing constitutes a separate offense); Marvin v. United States, 279 F.2d 451, 453 n.3 (10th Cir. 1960); United States v. Edmondson, 818 F.2d 768, 769 (11th Cir. 1987).}

\textsuperscript{48} This point can be illustrated by tracing the authority courts relied upon when holding that each mailing constitutes a separate offense.

- In Gardner, 65 F.3d at 85, the court cited directly to \textit{Ex Parte Henry} for authority.
- In Kennedy, 64 F.3d at 1476, the court cited Palmer v. United States, 229 F.2d 861, 867 (10th Cir. 1955), \textit{cert. denied}, 350 U.S. 996 (1956), which in turn cited Baders v. United States, 240 U.S. 391 (1916), which in turn cites \textit{Ex Parte Henry}.
- In McClelland, 868 F.2d at 706, the court cited no authority.
- In Vaughn, 797 F.2d at 1493, the court cited United States v. Weatherspoon, 581 F.2d 595, 602 (7th Cir. 1978) and United States v. Jones, 712 F.2d 1316, 1320 (9th Cir.), \textit{cert. denied}, 464 U.S. 986 (1983). Weatherspoon in turn cited United States v. Joyce, 499 F.2d 9, 18 (7th Cir.), \textit{cert. denied}, 419 U.S. 1031 (1974), which in turn relied on Badders, which in turn cited \textit{Ex Parte Henry}. Jones, on the other hand, while it involved a prosecution using several mail fraud counts under a single scheme to defraud, does not support \textit{Vaughn} in that the Jones court does not specifically state that each mailing constitutes a separate offense.
- In United States v. Stull, 743 F.2d 439, 444 (6th Cir. 1984), the court relied upon Baders for its authority that each mailing constitutes a separate offense, which, of course, cited \textit{Ex Parte Henry} for authority.
- Finally, in Ledesma, 632 F.2d at 679, the court similarly cited Baders which finds its authority in \textit{Ex Parte Henry}. 
The first statutory change came in 1889 when Congress amended the statute expressly to include under the “scheme or artifice to defraud” element certain specific counterfeiting and swindling schemes.\(^{49}\) There was no express legislative history explaining Congressional intent in amending the statute, (a pattern of omission maintained by Congress to this day when amending the mail fraud statute). Consequently, courts interpreted the changes to either expand or narrow the scope of the statute depending on the particular court’s predisposition.\(^{50}\) The only decision of any lasting importance interpreting the 1889 version of the mail fraud statute was *Durland v. United States*.\(^{51}\)

In *Durland*, the Supreme Court adopted a broad construction of the mail fraud statute, loosening the mail fraud statute from its moorings to the abuse of the United

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\(^{49}\) Specifically, the 1889 amendment defined “scheme or artifice to defraud as including:

any scheme or artifice to defraud, or to sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlawful use any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money, by or through correspondence, by what is commonly called the “sawdust swindle,” or “counterfeit money fraud,” or by dealing or pretending to deal in what is commonly called “green articles,” “green coin,” “bills,” “paper goods,” “spurious Treasury notes,” “United States goods,” “green cigars,” or any other names or terms intended to be understood as relating to such counterfeit or spurious articles . . .”

Act of March 2, 1889, ch. 393, Section 1, 25 Stat. 873.

\(^{50}\) Rakoff, *supra* note 16 at 809-11 (reviewing decisions adopting various interpretations of the amended mail fraud statute).

\(^{51}\) 161 U.S. 306 (1896).
States mail as the focus of the statute. Arising in the context of a national depression caused in part by fraud and unbridled speculation in stocks and bonds, the Court was asked to determine whether the mail fraud statute reached a scheme to issue bonds to investors with no intention of ever returning the money to the investors. In concluding that the mail fraud statute, unlike common law, reached misrepresentations of future facts, the Court stated that “beyond the letter of the statute is the evil sought to be remedied, which is always significant in determining the meaning.”

A decade after the Supreme Court sanctioned a broad interpretation of the mail fraud statute in *Durland*, Congress again amended the statute, significantly shifting the focus of the statute even further toward the “scheme and artifice to defraud” element.

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52 161 U.S. at 310.

53 161 U.S. at 315. At the time of the *Durland* decision, the Court had not yet dismissed the mailing element to only jurisdictional status. While it agreed that “the indictment would have been more satisfactory” had it focused more on the actual mailings, it held that it was still sufficient and the defendant could have filed a motion for a bill of particulars anyway. *Id.*

54 Act of March 4, 1909, ch. 321, Section 215, 35 Stat. 1130. After the 1909 amendment, the mail fraud statute read, in pertinent part, as follows:

> 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 . . . shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or without the United States, in any post-office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both.

*Id.*
and away from the mailing element. This 1909 amendment eliminated the mail-emphasizing language from the statute, such as that describing the prohibited conduct as “misusing the post-office establishment” and the limitations on the permitted number of counts tied to the number of mailings within a six-month period. The amendment thus eliminated the second essential element from the offense, the requirement that the defendant intended to use the mails to carry out the fraudulent scheme. It was this element that made abuse of the United States mail central to the offense. Once it was no longer necessary to prove that a defendant intended to use the United States mails, it became less clear that the purpose of the statute was to protect the United States mail

55 A redline version of the statute exposes more readily the alterations.

That if any person, being a person who has 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, . . . to be effected by either opening or intending to open correspondence or communication with any other person (whether resident within or outside of the United States), by means of the post-office establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall for the purpose of, in and for executing such scheme or artifice (or attempting to do so), place or caused to be placed, any letter or packet, postal card, package, writing, circular, pamphlet, or advertisement whether addressed to any person residing within or without the United States, in any post-office, or station thereof, or street or other letter box of the United States, or authorized depository for mail mater, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States . . . such person, so misusing the post-office establishment, shall be fined not more than $1,000 or imprisoned not more than five years, or both guilty of a misdemeanor, and shall be punished with a fine of not more than five hundred dollars, with or without such imprisonment, as the court shall direct, not exceeding eighteen calendar months. The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme or devise.
from abuse. Consequently, since 1909 the mailing element has only served the function of establishing federal jurisdiction and has no longer been the gist of the mail fraud offense.56

Five years after the 1909 amendment to the mail fraud statute, a unanimous Supreme Court approved the amended statute’s broadened scope. In United States v. Young,57 the Court rejected a narrow interpretation of the statute, finding that after the 1909 amendment, the elements of the mail fraud statute had become:

(a) a scheme devised or intended to be devised to defraud, or for obtaining money or property by means of false pretenses, and
(b) for the purpose of executing such scheme or attempting to do so, the placing of any letter in any post office of the United States to be sent or delivered by the Post Office Establishment.58

The Court thereby clarified that the mailing element served a purely jurisdictional function.59 Nevertheless, though the effect of its holding was just the opposite, in dicta the Court parroted the worn-out phrase that “[t]he gist of the offense is the use of the mails in the execution of the scheme, or in attempting to do so.”60

The Supreme Court soon compounded the confusion over the focus of the mail

56 See Rakoff, supra note 16 at 816-817 (“[I]t no longer made sense to say that the statute aimed to deter the abuse of the mail system, because the defendant no longer had to intend any use of the mails whatsoever; the minimal use of the mails that would trigger the statute could, within broad limits, be an incidental or even accidental accompaniment of the defendant’s fraudulent scheme.”).

57 232 U.S. 155 (1914).

58 Id. at 161-62.

59 See Rakoff, supra note 16 at 817 (mailing requirement construed by Young Court as “jurisdictional element”).

60 232 U.S. at 159.
fraud statute by its statements in the *Badders v. United States* case.\(^{61}\) In *Badders*, Supreme Court unanimously rejected a vagueness challenge to the 1909 version of the mail fraud statute.\(^{62}\) In dicta again, however, the Court cited *Ex Parte Henry* (which the Court had decided in relation to the language contained in the original mail fraud statute) for the proposition that “there is no doubt that the law may make each putting of a letter into the post-office a separate offense.”\(^{63}\) Fortunately, there was every reason to doubt this conclusion, given that the 1909 amendment eliminated the mail-emphasizing language of the mail fraud statute and thereby eliminated the intent to use the United States mails as an element of the offense.

After 1909, Congress made no further substantive changes to the language of the mail fraud statute until 1987. Building on the broad interpretation of the mail fraud statute sanctioned by the Supreme Court in *Young*, however, there followed a period of seventy years during which the lower courts gradually expanded the scope of the mail fraud statute.\(^{64}\) Nearly any fraudulent scheme in which the United States mail was somehow involved soon fell within the reach of the mail fraud statutes so long as the use of the mail was “reasonably foreseeable” by the defendants.\(^{65}\)

\(^{61}\) 240 U.S. 391 (1916).
\(^{62}\) Id. at 393.
\(^{63}\) Id. at 394.
\(^{64}\) See Moohr, *supra* note 37 at 159. See also Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 Harv. J.L. & Pub. Pol'y 117, 121 (1987) (judicial decisions have turned mail fraud statute into a “vehicle for the prosecution of an almost unlimited number of offenses bearing very little connection to the mails.”).
\(^{65}\) Pereira v. United States, 347 U.S. 1, 8-9 (1954).
The major expansion of the mail fraud statute occurred, though, when the courts extended its scope to reach schemes to defraud people of intangible rights. While initially the mail fraud statute was applied only to schemes to deprive citizens of money or property, beginning in the 1940s courts began allowing an expansion of the mail fraud statute’s scope by including within the “scheme or artifice to defraud” element the concept of intangible rights.  

It was not until the 1970s, however, that prosecutors utilized the intangible rights concept on a regular basis, primarily to prosecute public corruption at the state and local levels. The courts approved the expansion by interpreting the “scheme or artifice to defraud” element to encompass not just property, but also the intangible right of honest services. In time, the intangible rights doctrine was found to extend coverage over not 


68 See, e.g., United States v. George, 477 F.2d 508 (7th Cir.), cert. denied, 414 U.S.
only public fiduciary duties, but private fiduciary duties as well. By 1987, all federal courts of appeal had accepted an expansive interpretation of the statute and sanctioned the Intangible Rights Doctrine, though not without some criticism of the danger posed by the expanded scope of the mail fraud statute. The courts continued, however, to parrot earlier cases which, interpreting the original mail fraud statute, held that the mailing element was the gist of the mail fraud offense.

C. McNally and the Congressional Response

In 1987 the Supreme Court narrowed the scope of the mail fraud statute, at least with regard to the Intangible Rights Doctrine. In *McNally v. United States*, the


69 See, e.g., United States v. Bronston, 658 F.2d 920 (2nd Cir. 1981), *cert. denied*, 456 U.S. 915 (1982) (lawyer found guilty of mail fraud for secretly representing client whose interests were adverse to other firm clients); United States v. George, 477 F.2d 508 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973) (purchasing agent of private company found guilty of mail fraud for accepting kickbacks from supplier).


72 See cases cited at note 3, *supra*. At most, some courts made passing suggestions that prosecutors use judgment in arriving at the number of mail fraud counts charged in relation to a single fraudulent scheme. See United States v. Joyce, 499 F.2d 9, 25 (7th Cir. 1974) (Swygert, C.J., concurring in relevant part, joined by the Court) (encouraging prosecutors to exercise restraint in number of mail or wire fraud charges indicted under single fraudulent scheme).

Supreme Court held that the "scheme to defraud" element “did not reach ‘schemes to defraud citizens of their intangible rights to honest and impartial government's and that the statute is limited in scope to the protection of property rights.”

The *McNally* Court invited Congress to change the statute if it wanted to expand the scope of the statute to include intangible rights, but noted that “[i]f Congress desires to go further, it must speak more clearly than it has.”

Within a year after the Court issued its decision in *McNally*, Congress spoke clearly in an attempt to overturn the Supreme Court’s *McNally* decision. In 1988 Congress enacted Title 18, United States Code, Section 1346 via an eleventh-hour amendment to the Anti-Drug Abuse Act of 1988. The one-sentence amendment reads, in its entirety: “For the purpose 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.” As a consequence of the manner in which Congress responded to *McNally*, there is almost no legislative history and what little exists tends to cloud rather than

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75 483 U.S. at 360.

76 Pub. L. No. 100-690, Section 7603, 102 Stat. 4181, 4508. The text of the amendment was added to the Bill on the same day it was passed by Congress. United States v. Brumley, 79 F.3d 1430, 1434 (5th Cir. 1996).

77 18 U.S.C. Section 1346.

78 The “text of what is now Section 1346 was never included in any bill filed in either the House of Representatives or the Senate . . ., was never the subject of any committee report from either the House or the Senate and was never the subject of any floor debate reported in the Congressional Record.” United States v. Brumley, 79 F.3d 1430, 1436 (5th Cir. 1996).
clarify the meaning of the amendment. The general tenor of comments made by members of Congress suggests that Congress intended to overturn *McNally*. While the precise scope of the “scheme or artifice to defraud” element of the mail fraud statute remains for courts to define, it is clear that in enacting Section 1346 Congress emphasized its focus on the "scheme and artifice to defraud" element as the central feature of the mail fraud statute.

In *Schmuck v. United States*, the Court unmistakably relegated the mailing element to an incidental jurisdictional element. In *Schmuck* the Court held that a

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79 Representative Conyers stated that “the amendment restores the mail fraud provision to where [it] was before the *McNally* decision” such that it would “no longer be necessary to determine whether or not the scheme . . . involved money or property.” 134 Cong. Rec. H11251 (daily ed. Oct. 21, 1988). After passage of the Omnibus Drug Act, Senator Biden, Chair of the Judiciary Committee, asserted that the amendment intended to: “overturn[ ] the decision in *McNally v. United States* . . .. Under the amendment, those statutes will protect any person’s right of the public to the honest services of public officials. The intent is to reinstate all of the pre-*McNally* case law pertaining to the mail and wire fraud statutes without change.” 134 Cong. Rec. S17360-02 (daily ed., Nov. 10, 1988).

The comments are of questionable value in determining Congressional intent, however, because one of the oft-quoted comments was actually made in reference to another similar proposed amendment, but the representative ultimately did not vote in favor the amendment as passed. Brumley, 79 F.3d at 1437 n.6. Conyers made his comments with respect to a bill he and Senator Spector introduced which used far more expansive language and would have covered schemes to “defraud [ ] another . . . of intangible rights of any kind whatsoever in any manner or for any purpose whatsoever . . ..” HR3089, 100th Cong., 1st Sess., in 133 Cong. Rec. E3242 (daily ed., Aug. 4, 1987). This bill was never enacted. Further, Senator Biden’s comments came after passage of the Act, entitling them to little consideration. Brumley, 79 F.3d at 1437.


mailing which occurred after the scheme was consummated was still sufficient to create federal jurisdiction so long as the scheme was ongoing and continuous. In announcing this holding the Court articulated a test whereby a fraudulent scheme falls within the parameters of the mail fraud statute whenever “the mailing is part of the execution of the scheme as conceived by the perpetrator at the time.” In dissent, Justice Scalia protested, unsuccessfully, that the mail fraud statute was originally supposed to prohibit "mail fraud" and not "mail and fraud." Schmuck thus marks the end of any argument that the mailing element is still the gist of the mail fraud statute.

As a result of the Court’s ruling in Schmuck, lower courts have since found mailings sufficient to invoke federal jurisdiction in a wider variety of circumstances when the mailings have little relationship to the underlying fraud. The mailing itself need not be false or fraudulent. Thus, even routine mailings are sufficient to invoke federal jurisdiction even when they were innocent mailings. Similarly, courts have found element has reduced the element to nothing but a jurisdictional hook, and the statute has become a generic fraud statute”.

82 489 U.S. at 706.

83 489 U.S. at 715.

84 Id. at 723 (Scalia, J., dissenting).

85 See, e.g., United States v. Martin, 228 F.3d 1, 18 (1st Cir. 2000) (mailing itself need not be deceptive); United States v. Hawkey, 148 F.3d 920, 924 (8th Cir. 1998) (same); United States v. Coyle, 63 F.3d 1239, 1243 (3rd Cir. 1995) (same); United States v. Morrow, 39 F.3d 1228, 1237 (1st Cir. 1994) (same); United States v. Goodman, 984 F.2d 235, 237 (8th Cir. 1993) (same); United States v. Oldfield, 859 F.2d 392, 400 (6th Cir. 1988) (same); United States v. Kwiat, 817 F.2d 440, 443 (7th Cir. 1987) (same); United States v. Benny, 786 F.2d 1410, 1420 (9th Cir. 1986) (same).

86 See United States v. Frey, 42 F.3d 795, 798 (3rd Cir. 1994) (routine mailing
mailings sufficient even when they were made after the allegedly fraudulent activity.\textsuperscript{87} Courts also found that it was not necessary that the defendants contemplated the use of the mails as a part of the scheme to defraud.\textsuperscript{88} The government need not even prove defendants used the mails themselves to satisfy the mailing element – it is sufficient if it was reasonably foreseeable that someone else would use the mail.\textsuperscript{89} This is not to criticize the scope of the mail fraud statute – indeed, based on the language of the current version of the mail fraud statute the use of the mails should only constitute a jurisdictional element.

\textbf{D. The 1994 Amendment to the Mail Fraud Statute}

If there was any question after \textit{Scmuck} that the use of the United States mails in

\textsuperscript{87} \textit{See} United States v. Griffith, 17 F.3d 865, 874 (6th Cir.) (mailing sufficient even if it occurs after fraudulent acts), \textit{cert. denied}, 513 U.S. 850 (1994); United States v. Brocksmith, 991 F.2d 1363, 1367-68 (7th Cir.) (mailing sent to lull victims into inaction after already victimized by scheme sufficient to invoke jurisdiction under mail fraud statute), \textit{cert. denied}, 510 U.S. 999 (1993); United States v. Wallach, 935 F.2d 445, 465 (2nd Cir. 1991) (mailings after fraud to cover up scheme sufficient under mail fraud statute), \textit{cert. denied}, 508 U.S. 939 (1993).

\textsuperscript{88} \textit{See} Griffith, 17 F.3d at 874 (foreseeable use of mails sufficient); Nelson, 988 F.2d at 798 (use of mails need not be contemplated, only foreseeable); United States v. Hollis, 971 F.2d 1441, 1448 (10th Cir. 1992) (reasonable foreseeability that mails will be used is sufficient), \textit{cert. denied}, 507 U.S. 985 (1993).

\textsuperscript{89} \textit{See} United States v. Pazos, 24 F.3d 660, 665 (5th Cir. 1994) (letter from defendant’s insurance adjuster to insurer’s adjuster); United States v. United Medical and Surgical Supply Corp., 989 F.2d 1390, 1404 (4th Cir. 1993) (mailing by agent sufficient when foreseen or intended by principal); United States v. Koen, 982 F.2d 1101, 1107 (7th Cir. 1992) (“irrelevant” that defendant did not mail letters personally).
connection with a scheme to defraud was only a jurisdictional element, Congress put that matter to rest with another amendment which severed the connection between the statute and the abuse of the United States mail. In 1994, Congress amended the mail fraud statute, broadening it to cover fraudulent schemes where use of "private or commercial interstate carrier[s]" were involved.\footnote{Pub. L. No. 103-332, Sections 250001-250008, 108 Stat. 1796, 2081-88. The 1994 amendment added the italicized language to the mail fraud statute:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or 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 \textit{fined under this title} or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. Section 1341 (1994).} Thus, abuse of the United States mail is not only no longer the gist of the mail fraud statute, – it isn’t even necessary. The amended mail fraud statute arguably creates a general federal fraud offense.\footnote{See generally Henning, supra note 80 (author argues that 1994 amendment broadens the scope of mail fraud statute such that it has become a general federal fraud statute). Of course, Congress could make it plain by enacting a general fraud statute, simply making it a federal offense to commit a fraud that affects interstate or foreign commerce.}

The amendment began as part of the Senior Citizens Against Marketing Scams

In the Congressional hearings relating to this provision, the expressed concern motivating the change was a perception that telemarketers were evading the mail fraud statute by using private and commercial carriers, such as Federal Express and United Parcel Service, to perpetrate frauds. Congress did not define the term “private or commercial interstate carrier,” but courts have found it encompasses such common carriers as Federal Express and DHL. Nor did Congress clarify whether such a carrier must transport the letter or package across a state line, or whether an intrastate delivery suffices so long as the carrier itself is engaged in interstate commerce.

Courts have answered this question, however, finding that under the instrumentality of interstate commerce approach, jurisdiction exists if the private or


94 See, e.g., United States v. Kieffer, 621 F.3d 825, 833 (8th Cir. 2010) (sufficient evidence regarding “use of the mails” when evidence showed document delivered by the United States Mail, Federal Express, or United Parcel Service); United States v. Coughlin, 610 F.3d 89, 97 (D.C. Cir. 2010) (sufficient evidence of use of the mails when mail was delivered either by United States Mail or Federal Express); United States v. Sharpe, 438 F.3d 1257, 1264 (11th Cir. 2006) (indictment sufficient when it alleged defendant used mails through commercial carrier Federal Express); United States v. Silvestri, 409 F.3d 1311, 1334 n.11 (11th Cir.) (DHL Worldwide Express is a “commercial carrier” for purposes of the mail fraud statute), cert. denied, 546 U.S. 1048 (2005); United States v. Gil, 297 F.3d 93, 99 (3rd Cir. 2002) (use of commercial carrier Federal Express constitutes use of the mails).
commercial carrier was generally engaged in interstate mailings, regardless of whether the particular mailing at issue crossed state lines.\(^{95}\) Under this statutory interpretation, the number of actual mailings becomes irrelevant. Rather, only the use of an instrumentality of interstate commerce becomes relevant, regardless of whether it involved one or multiple mailings. The effect of the amendment was to make it clear that the gist of the mail fraud statute was the fraudulent scheme itself. Protection of the United States mails was no longer the focus. The amendment created two possible jurisdictional hooks for federal prosecution: to the extent the United States Postal Service is used, federal jurisdiction is premised on the use of federal property; to the extent commercial carriers are used, federal jurisdiction is premised on the Commerce Clause. Thus, by expanding the scope of the mail fraud statute to include commercial carriers, the mail fraud statute targets any fraudulent scheme in which mail is used, regardless of whether the scheme involved the United States Postal Service.

Reaching more schemes to defraud was the focal point of the 1994 amendment to the mail fraud statute, just as it had been the focus of the enactment of Section 1346

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\(^{95}\) See, e.g., United States v. Hasner, 340 F.3d 1261, 1270 (11th Cir. 2003) (mail fraud by use of a private or commercial carrier applies even if the conduct took place entirely intrastate), cert. denied, 543 U.S. 810 (2004); United States v. Gil, 297 F.3d 93, 100 (2nd Cir. 2002) (upholding mail fraud count against commerce clause challenge, reasoning that "private and commercial carriers" which carry mail between states and other countries, are instrumentalities of interstate commerce, notwithstanding the fact they also make deliveries intrastate); United States v. Photogrammetric Data Servs., Inc., 259 F.3d 229, 249-52 (4th Cir. 2001) (upholding constitutionality of mail fraud statute as applied to intrastate mailing placed with private or commercial interstate carrier), cert. denied, 535 U.S. 926 (2002). See also Henning, supra note 80 at 471-73 (author persuasively argues Congress intended amendment to allow for federal jurisdiction when carrier was instrumentality of interstate commerce and did not intend to require proof of actual interstate transportation of mailing at issue).
and every amendment to the mail fraud statute since 1872. Congress deemed the 1994 amendment necessary to grant federal prosecutors the jurisdictional hook necessary to prosecute fraudulent schemes using private and commercial carriers instead of the United States mail. Thus, the 1994 amendment finally eliminates all doubt, if any remained, that the gist of the so-called mail fraud statute is the fraudulent scheme. The “mailing” element is of minor importance and merely serves as a jurisdictional basis for federal criminal intervention.96

The evolution of the mail fraud statute from an act designed to protect the integrity of the United State Postal Service, to a broad catchall statute used against any type of fraudulent scheme,97 has eroded support for the oft-repeated holding that Congress intended each separate mailing constitutes a separate offense. When Congress amended the mail fraud statute in 1994 to include private and commercial mail carriers, it put beyond debate the conclusion that the mailing element serves only a

96 Congress amended the Mail Fraud statute again in 2002, but only to increase the maximum possible sentence from five years to 20 years. Pub. L. 107-204, § 903(a) (2002). In 2008, Congress amended the statute to include frauds connected to presidentially declared disasters within the enhanced 30-year maximum penalty provision. Pub. L. 110-179, § 4 (2008). Neither of these amendment, however, had any impact on the mailing element of the offense.

97 The mail fraud statute has been characterized as the “first line of defense” against new areas of fraud for which Congress has not yet enacted specific prohibitions. See United States v. Maze, 414 U.S. 395, 405 (1974) (Burger, C.J., dissenting). See also Rakoff, supra note 16 at 772 (mail fraud statute’s use is “too numerous to catalog, [but includes] not only the full range of consumer frauds, stock frauds, land frauds, bank frauds, insurance frauds, and commodity frauds, but have extended even to such areas as blackmail, counterfeiting, election fraud and bribery.”); Kathleen Flavin, Mail and Wire Fraud, 33 Am. Crim. L. Rev. 861, 862 (1996) (“When legislatures have been slow to act in particular areas, these statutes [mail and wire fraud] have ‘frequently represented the sole instrument of justice that could be wielded against the ever-innovative practitioners of deceit.’”).
jurisdictional function. Moreover, the conclusion that the mailing element is no longer the gist of the mail fraud statute is readily apparent when one considers the jurisprudence with regard to its sister wire fraud statute.

II. THE WIRE FRAUD STATUTE

Thus far this article has concentrated on the mail fraud statute and the reasoning behind the judicial consensus that each mailing constitutes a separate offense. Courts have concluded, however, that the same rule exists with respect to the less frequently used wire fraud statute: that is, each use of the wires constitutes a separate offense. If the reasoning behind the unit of prosecution under the mail fraud statute is

98 See Mail and Wire Fraud, 33 Am. Crim. L. Rev. 861, 862-63 (1996) (mail fraud statute traditionally utilized more frequently than its wire fraud companion).

99 The wire fraud statute provides:

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, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, 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 five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.


100 See, e.g., United States v. Williams, 527 F.3d 1235, 1241 (11th Cir. 2008) (each interstate wire transmission constitutes a separate offense); United States v. Garlick, 240 F.3d 789, 792 (9th Cir. 2001) (“Insofar as we have never expressly held that each use of the wires constitutes a separate violation of 18 U.S.C. § 1343, we do so now.”); United States v. Luongo, 11 F.3d 7, 9 (1st Cir. 1993) (“It is well established that each use of the wires constitutes a separate crime . . . .”); United States v. Syal, 963 F.2d 900, 907 (6th Cir. 1992) (rejecting multiplicity challenge to multiple wire fraud counts); United States v. St. Gelais, 952 F.2d 90, 96-97 (5th Cir. 1992) (“Each wire transmission in furtherance of a scheme to defraud constitutes a separate crime.”); United States v. Heffington, 682 F.2d 1075, 1081 (5th Cir. 1982) (“The law is clear, however, that each
faulty, application of the same unit of prosecution to the wire fraud statute is completely without salvation.

While the legislative history is sparse, the wire fraud statute was enacted in 1952 and was explicitly modeled after the mail fraud statute. The statutory language was identical in all principal respects, save the jurisdictional element. Whereas the mail fraud statute premised federal jurisdiction on the use of the United States mails originally, and recently added use of a private or commercial interstate carrier, the wire fraud statute rests federal jurisdiction upon the commerce clause and the actual crossing of state lines. The statutes are considered so identical in all material respects, however, that cases ruling on one statute constitute authority with respect to separate use of wire communications constitutes a separate offense under Section 1343.

See S. REP.NO. 44, 82nd Cong., 1st Sess. 19 (1951) (18 U.S.C. § 1344 was designed as “a parallel [to the] provision now in law for fraud by mail.”).


Thus, while one may violate the mail fraud statute though the letter never leave the state, to violate the wire fraud statute, the wire communication must actually cross state lines. See, e.g., United States v. Schaefer, 501 F.3d 1197, 1202 (10th Cir. 2007) (wire fraud statute requires wire communication cross state lines); United States v. Izydone, 167 F.3d 213, 219 (5th Cir. 1999) (reversing conviction on wire fraud count where there was no evidence the phone call crossed state lines); Smith v. Ayres, 845 F.2d 1360, 1366 (5th Cir. 1988) (language in wire fraud statute requires wire communication cross state lines); United States v. Cardall, 885 F.2d 656, 675-76 (10th Cir. 1989) (government must prove wire communication crossed state lines).
The principle that each use of the wires constitutes a separate offense is not premised upon a careful analysis of the wire fraud statute itself, but, rather, it was simply applied to the wire fraud statute because it was the accepted rule under the mail fraud statute. Thus, just as cases citing the principle with respect to the mail fraud statute trace their authority back to *Ex Parte Henry*, cases citing the principle with respect to the wire fraud statute trace their authority back to the mail fraud statute, which, of course, traces its authority back to *Ex Parte Henry*. Because it has been

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104 See Carpenter v. United States, 484 U.S. 19, 26 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.”). See also United States v. Garlick, 240 F.3d 789, 793 (9th Cir. 2001) (relying on authority from mail fraud statutes in ruling on wire fraud case); United States v. Mills, 199 F.3d 184, 188 (5th Cir. 1999) (applying mail fraud case law to wire fraud case); United States v. Manarite, 44 F.3d 1407, 1412 (9th Cir.) (mail fraud statute and wire fraud statute share identical language, so wire fraud statute is read in light of case law on mail fraud statute), cert. denied, 515 U.S. 1158 (1995); Belt v. United States, 868 F.2d 1208, 1211 (11th Cir. 1989) (wire fraud statute and mail fraud statute are given similar construction and are subject to same substantive analysis); Hofstetter v. Fletcher, 905 F.2d 897, 902 (6th Cir. 1988) (mail and wire fraud statutes treated in parallel fashion).

105 This point can be demonstrated again by tracing the authority, *supra* note 99, that courts have cited for the proposition that each use of the wires constitutes a separate offense.

The *Luongo* Court cites United States v. Fermin Castillo, 829 F.2d 1194, 1199 (1st Cir. 1987), for its authority, which in turn cites United States v. Calvert, 523 F.2d 895, 903 n.6 (8th Cir. 1975), cert. denied, 424 U.S. 911 (1976), which in turn relies upon Henderson v. United States, 425 F.2d 134, 138 n. 4 (5th Cir. 1970), which cites for authority two cases, Atkinson v. United States, 418 F.2d 1311, 1313 (8th Cir. 1969), which involved mail fraud and not wire fraud, and Sibley v. United States, 344 F.2d 103, 105 (5th Cir. 1965), which relies on United States v. Freeling, 31 F.R.D. 540, 549 (S.D.N.Y. 1962). The *Freeling* Court did not rely on any other authority, but rather, reasoned that it was “difficult to fathom” why since each separate mailing constitutes a separate offense that the same rule ought not to apply to the wire fraud statute since they use identical language.

The *Syal* Court cites two cases for authority, United States v. Stull, 743 F.2d 439
demonstrated above that the principle of separate offenses for each mailing is flawed because the mail fraud statute has changed over time, the same principle with respect to wire communications is equally flawed. In fact, it is even more flawed. The original logic for concluding each mailing should constitute a separate offense because it constituted a separate abuse of the United States Mail, property of the United States government.

That logic simply does not apply to the use of the wires. The wires are not government property. Jurisdiction for the wire fraud statute is premised on the commerce clause, not federal property. Thus, whether one uses the wires once or multiple times to perpetrate a fraud, each use of the wire does not infringe upon United States property. It is even more clear, therefore, that the gist of the wire fraud statute is not each use of the wires, but the fraudulent scheme itself.\textsuperscript{106} The use of the wires is only a jurisdictional hook to allow prosecution of the fraudulent scheme that involved use of the wires.

In order to fully comprehend why the gist, the unit of prosecution, of the mail and

\textsuperscript{106} See United States v. Bryan, 58 F.3d 933, 943 (4th Cir. 1995) (gravamen of wire fraud statute is execution of scheme to defraud).
wire fraud statutes should be the fraudulent scheme, it is helpful to consider other
criminal statutes where Congress has used the phrase “scheme or artifice to defraud.”

III. COMPARISON OF OTHER STATUTES INVOLVING SCHEMES TO
DEFRAUD

Congress has enacted almost a dozen statutes where it has used the phrase
“scheme or artifice to defraud.” Several of those statutes are criminal statutes where it
is necessary to determine the unit of prosecution – that is, whether the unit of
prosecution is the fraudulent scheme itself, or some act, like mailing or wiring, in
furtherance of the scheme. Courts have been inconsistent in determining the unit of
prosecution for these statutes, even though most were explicitly modeled on the mail
fraud statute. Among those are the Securities Fraud, Bank Fraud, and Bankruptcy
Fraud statutes.

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107 Congress has used the phrase “scheme or artifice to defraud” in multiple
statutes. See, e.g., 7 U.S.C. § 6 o(1)(A) (commodity trading advisors, commodity pool
operators, and associated persons); 15 U.S.C. § 77q(a)(1) (sales of securities); 15
(investment advisors); 18 U.S.C. § 157 (bankruptcy fraud); 18 U.S.C. § 981(a)(1)(E)
(civil forfeiture); 18 U.S.C. § 982(a)(4) (criminal forfeiture); 18 U.S.C. § 1343 (wire
fraud); and 18 U.S.C. § 2314 (transportation of stolen goods, securities, etc.).
A. Security Fraud Statute

The Security Fraud Statute\textsuperscript{108} contains a mailing element very similar to the mailing element in the mail fraud statute and is therefore particularly instructive. Security fraud occurs when false or misleading statements are used in the purchase or sales of securities. Again, the statutory language is slightly different from that used in the mail fraud statute. The actus res, that is the act which makes it a crime, is the “use” or “employment” of a manipulative or deceptive device in connection with the purchase or sale of securities. The use of interstate commerce or the mails to execute the

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\textsuperscript{108} The Securities Fraud statute provide in pertinent part:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or any facility of any national securities exchange—

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.


The Securities Exchange Commission promulgated regulation 10b-5 directed at securities fraud. It provides:

It shall be unlawful for any person directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. Section 240.10b-5.
scheme is the hook for federal jurisdiction. Thus, the appropriate “unit of prosecution” is the purchase or sale of a security using a false statement of material fact, not the mailing.\textsuperscript{109} In security fraud cases, the mailing element serves merely a jurisdictional purpose.\textsuperscript{110} Several purchases or sales may be made within a single manipulative scheme and each may constitute a separate offense if each was made using a false statement of material fact.\textsuperscript{111} Therefore, the unit of prosecution is neither the “scheme” itself, nor each mailing, but the purchase or sale of a security.\textsuperscript{112} Of course, this requires courts to carefully evaluate the scope of the scheme to defraud on a case by case basis.

\textsuperscript{109} See United States v. Langford, 946 F.2d 798, 804 (11th Cir. 1991), cert. denied, 503 U.S. 960 (1992). But see United States v. Mackay, 491 F.2d 616, 619 (10th Cir.) (“The jurisdictional basis [under both securities fraud and mail fraud] is . . . the use of the mails or an instrumentality of commerce and as such each mailing is regarded as a separate crime even though it relates to essentially the same fraudulent scheme.”), cert. denied, 416 U.S. 972 (1974). The Langford court points out that the Mackay court only cited two mail fraud cases in support of its holding. Langford, 946 F.2d at 803 n.23.

\textsuperscript{110} Langford, 946 F.2d at 803 n. 20 (legislative history of 15 U.S.C. Section 78j limits scope to “transactions” effected by use of mail, relegating use of mails to merely jurisdictional function).

\textsuperscript{111} Id.

\textsuperscript{112} Id. Courts have reached the same conclusion with respect to 15 U.S.C. Section 77q(a), which provides:

\begin{quote}
It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly--
\end{quote}

(1) to employ any device, scheme, or artifice to defraud, or
(2) to obtain money or property by means of any untrue statement of a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

B. The Bank Fraud Statute

In 1984, Congress enacted the Bank Fraud Statute in response to the savings and loan crisis to address gaps in federal jurisdiction regarding frauds upon financial institutions. Congress modeled the Bank Fraud Statute after the mail and wire fraud statutes. While jurisdiction in the mail fraud statute was premised on the use of the United States Mail, and the wire fraud statute jurisdiction was premised on the Commerce Clause, federal jurisdiction for the Bank Fraud statute was premised on victimization of a federally-insured financial institution.

113 18 U.S.C. § 1344, which provides:

Whoever knowingly executes, or attempts to execute, a scheme or artifice –
(1) to defraud a financial institution; or
(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.


115 Id. See also United States v. Solomonson, 908 F.2d 358, 364 (8th Cir. 1990) (“Section 1344 was modeled after the mail and wire fraud statutes.”); United States v. Bonallo, 858 F.2d 1427, 1432-33 (9th Cir. 1988) (noting that the Senate Report stated that the bank fraud statute is modeled after the mail fraud statute, and that the House Judiciary Committee, in considering the bank fraud statute, endorsed the broad reading given to mail fraud); United States v. Poliak, 823 F.2d 371, 372 (9th Cir. 1987) (section 1344 is “patterned” after mail and wire fraud statutes), cert. denied, 485 U.S. 1029 (1988).

Initially courts followed the case law with respect to the unit of prosecution under those statutes and found each financial transaction in furtherance of a bank fraud scheme constituted a separate offense, recognizing the Bank Fraud statute was modeled on the Mail Fraud and Wire Fraud statutes. That changed, however, with later decisions. Courts have more recently held that, under the bank fraud statute, each “execution of a scheme to defraud” constitutes a separate offense, not each financial transaction made in furtherance of the scheme. Thus, the critical task for a

U.S.C.A.N. 31282, 3519. Though the 1989 amendment to the bank fraud statute deleted specific references to “federally chartered or insured financial institution,” (see Pub. L. 107-73 (1989)), it is still necessary to show it as the basis for federal jurisdiction. See, e.g., United States v. Flanders, 491 F.3d 1197, 1208 (10th Cir. 2007) (including as an element of the offense a requirement to show the bank involved in the fraud was federally insured); United States v. Ragosta, 970 F.2d 1085, 1089 n.1 (2nd Cir. 1992) (elements of offense include showing the financial institution was federally chartered or insured).

117 See, e.g., United States v. Mason, 902 F.2d 1434, 1437-38 (9th Cir. 1990) (each check drawn on account constituted a separate offense in furtherance of fraud scheme); United States v. Schwartz, 899 F.2d 243, 248 (3rd Cir. 1990) (each deposit constituted a separate offense in furtherance of fraud scheme); United States v. Poliak, 823 F.2d 371, 372 (9th Cir. 1987) (finding language of 18 U.S.C. s 1344 “plainly and unambiguously allows charging each execution of the scheme to defraud as a separate act.”).

118 The change started with the decision in United States v. Lemons, 941 F.2d 309 (5th Cir. 1991), in which the Fifth Circuit Court of Appeals distinguished the Mail Fraud and Wire Fraud statutory language from the Bank Fraud statutory language, and held that the unit of prosecution for purposes of the Bank Fraud statute was the “scheme” itself, not each financial transaction made in furtherance of the scheme.

119 See, e.g., United States v. Wall, 37 F.3d 1443, 1446 (10th Cir. 1994) (each of multiple loans from a single institution fraudulently obtained as part of common scheme to raise money constituted separate offenses because each loan created a separate risk to the bank); United States v. Rimell, 21 F.3d 281, 287 (8th Cir. 1994) (“[E]ach separate execution of a scheme to defraud may be pled as a distinct count of the indictment.”); United States v. Brandon, 17 F.3d 409, 422 (1st Cir.) (each loan based on fraudulent, over-valued appraisals constituted separate offenses), cert. denied, 115 S.
court is defining the scope of the fraudulent scheme.\textsuperscript{120} The resolution of this issue
turns on such fact specific inquiries as whether the loans in question were related,
whether they came from a single bank, and the number of movements of money.\textsuperscript{121}

In distinguishing the bank fraud statute from the mail and wire fraud statutes as
to the unit of prosecution, courts have focused on the statutory language. The mail
fraud statute speaks in terms of using the mail to execute a scheme a crime, whereas
the bank fraud statute speaks in terms of executing a scheme to defraud using financial
transactions. Thus, courts conclude, executing the scheme to defraud is the focus of
the bank fraud statute.\textsuperscript{122} This is a sound distinction based on the statutory language.
This invites the question raised in this article, however, whether the mail fraud statute
should be reworded to place the focus where, like in the bank fraud statute, it belongs –
on the execution of the scheme to defraud.

C. Bankruptcy Fraud

In 1994, Congress made it a crime to engage in a scheme or artifice to defraud in

\textsuperscript{120} United States v. Wall, 37 F.3d at 1446; United States v. Barnhardt, 979 F.2d 647, 651 (8th Cir. 1994).

\textsuperscript{121} See Wall, 37 F.3d at 1446 (reviewing cases evaluating various such factors in
determining scope of scheme to defraud); Brandon, 17 F.3d at 422 (same).

\textsuperscript{122} See, e.g., Lemons, 941 F.2d at 317 (finding that bank fraud language prohibiting
the “execution” of a fraudulent scheme sufficient to distinguish it from the mail fraud
statute’s language prohibiting “devising” fraudulent schemes).
relation to a bankruptcy matter.\textsuperscript{123} There are three subsections to Title 18, United States Code, Section 157.\textsuperscript{124} A person who has devised a scheme or artifice to defraud violates the bankruptcy fraud act if, for the purpose of executing or concealing the fraudulent scheme, the person: (1) file a bankruptcy petition;\textsuperscript{125} (2) files a document with the bankruptcy court;\textsuperscript{126} or (3) makes a false or fraudulent representation concerning or in relation to a bankruptcy proceeding. Neither the first nor second subsection require that the petition or pleading itself be false, fraudulent or misleading. Congress modeled the bankruptcy fraud statute after the mail fraud statute.\textsuperscript{127} Indeed, the language very


\textsuperscript{124} 18 U.S.C. § 157 provides:

A person who, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so --
1. Files a petition under title 11;
2. Files a document in a proceeding under title 11; or
3. Makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of a petition, or in relation to a proceeding falsely asserted to be pending under such title, shall be fined under this title, imprisoned not more than 5 years, or both.


\textsuperscript{125} See United States v. Wagner, 382 F.3d 598, 612 (6th Cir. 2004) (first subsection of § 157 has three elements: (1) existence of a scheme to defraud or the intent for formulate a scheme to defraud; (2) filing of a bankruptcy petition; (3) for the purpose of executing or attempting to execute the scheme to defraud).

\textsuperscript{126} See Wagner, 382 F.3d at 612 (second subsection of § 157 has three elements: (1) existence of a scheme to defraud or the intent for formulate a scheme to defraud; (2) filing of a document in a proceeding under Title 11 [a bankruptcy proceeding]; (3) for the purpose of executing or attempting to execute the scheme to defraud).

\textsuperscript{127} 140 Cong. Rec. H10752-01, at H10773 (daily ed. Oct. 4, 1994) (Statement of
closely resembles the mail fraud statute, with the similar introductory, dependent language regarding a requirement that someone have devised a scheme to defraud.\textsuperscript{128}

There is a paucity of case law interpreting this statute, however, though it has now been law for 15 years. Most courts have interpreted the bankruptcy fraud statute by looking at how courts have interpreted the mail fraud statute.\textsuperscript{129} Nevertheless, what

\textsuperscript{128} Compare the mail fraud statutory language: "\textbf{Whoever, having devised or intending to devise any scheme or artifice to defraud}, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, \textbf{for the purpose of executing such scheme or artifice or attempting so to do}" (18 U.S.C. § 1341, emphasis added) with the bankruptcy fraud statutory language “\textbf{Whoever}, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so.” (18 U.S.C. § 157). Indeed, but for the McNally-fix language regarding intangible rights and archaic language regarding “spurious” items, the language is identical.

\textsuperscript{129} See United States v. Milwitt, 475 F.3d 1150, 1155 n.5 (9th Cir. 2007) (“Most of the few courts that have interpreted 18 U.S.C. § 157 have looked to 18 U.S.C. §§ 1341 and 1343 for guidance. \textit{See, e.g.}, United States v. Wagner, 382 F.3d 598, 613 n. 3 (6th Cir.2004) (looking to analysis of the mail and wire fraud statutes in holding that actual reliance on the scheme to defraud is not an essential element of the crime); United States v. Daniels, 247 F.3d 598, 600 (5th Cir.2001) (citing the constitutionality of the mail fraud statute in holding the holding the bankruptcy fraud statute constitutional). \textit{See also} 1 Collier on Bankruptcy § 7.07[1][a], at 7-119 (“Section 157 is consciously patterned on the federal mail fraud statute.”).\textit{But see} United States v. Lee, 82 F. Supp.2d 389, 392 (E.D.Pa.2000) (“Similar though the language of the bankruptcy fraud statute is to that of
little case law as exists demonstrates courts have been inconsistent in determining the unit of prosecution. For example, one circuit court of appeal has held that each bankruptcy filing in relation to a scheme to defraud could give rise to separate offenses.\textsuperscript{130} Another appellate court, however, suggested an indictment was not defective for identifying multiple filings in a single bankruptcy fraud count because the indictment merely identified the separate filings as the “manner and means” for executing a single scheme to defraud.\textsuperscript{131}

In light of the case law distinguishing the statutory language of the bank fraud statute from the mail fraud statute, it would seem that the bankruptcy fraud statutory construction must track the mail fraud statutory construction. That is, since the mail fraud and bankruptcy fraud statutory language each emphasize the method by which the fraudulent scheme is executed (mailing in one, filing a petition or other document in the other), and not the execution of the scheme itself, then the unit of prosecution under the bankruptcy fraud statute would have to be each petition or document filed.

\textsuperscript{130} See United States v. DeSantis, 237 F.3d 607, 613 (6th Cir. 2001) (holding that if a defendant, having devised a scheme to defraud, filed a bankruptcy petition with the purpose of executing a scheme to defraud, had undertaken a variety of other acts, such as filing a reorganization plan or made a false statement in a meeting of creditors, for the purpose of executing the scheme, he would be subject to additional counts of Section 157), \textit{cert. denied}, 543 U.S. 822 (2004).

\textsuperscript{131} See United States v. Naegele, 341 BR 349, 354 (D.D.C. 2006) (finding indictment which charged a violation of Section 157 not improper because, while it alleged a number of acts in furtherance of a single scheme to defraud, they were set out in a “manner and means” section of the indictment and were not alleged as additional counts).
Following this logic, though there be but one fraudulent scheme to defraud, under the bankruptcy fraud statute it would be a separate crime each time a petition or other document is filed in bankruptcy court.

This begs the question, raised in this article, whether that ought to be the case. When a person engages in a fraudulent scheme in connection with a bankruptcy case, the number of documents which happen to be filed in connection with the bankruptcy may have nothing to do with the extent or nature of the fraudulent conduct. Under the first two subsections of the bankruptcy fraud statute, the petition or document filed with the court need not itself be fraudulent. Thus, the number of documents filed may have no relationship at all with the defendant’s criminal culpability. Yet, if the courts follow the statutory construction given the almost identical language of the mail fraud statute, courts would have to conclude that each filing constitutes a separate offense.

II. THE UNIT OF PROSECUTION UNDER THE MAIL FRAUD STATUTE

The analysis of the mail fraud statute’s evolution from a statute based on the Postal Power clause and designed to protect the United States Post-Office establishment, to a statute premised on both the Postal Power and Commerce Clauses designed to protect people from fraudulent schemes where mailings are used to execute the fraudulent scheme, leads to the conclusion that the tired truism that each mailing automatically constitutes a separate offense should be rejected. Established precedent, however, now precludes courts from determining anew whether each mailing should constitute a separate offense of the mail fraud statute or whether there is a more appropriate unit of prosecution. It would require district courts to become untethered to the Ex Parte Henry holding, flout binding precedent, and analyze the nature of the
offense itself to determine whether charging each mailing as a separate offense is the appropriate unit of prosecution. Accordingly, a legislative fix appears to be the only option by which Congress can rewrite the statute to clarify its intended unit of prosecution.

A. **Why is it Important to Determine the Unit of Prosecution**

Determining the unit of prosecution is important to determine if an indictment is either multiplicitous. Treating each mailing as a separate offense makes application of the mail fraud statute potentially over-inclusive in the sense that it can include as separate criminal offenses conduct which is in furtherance of a single criminal offense. Charging the same criminal behavior in several counts constitutes multiplicity.\(^{132}\) Determining whether counts are multiplicitous turns on determining what Congress intended to be the appropriate “unit of prosecution.”\(^{133}\) Multiplicity analysis therefore requires an evaluation of the statute and its legislative history to determine the gravamen of the offense,\(^ {134}\) even if each charge appears to require proof of different

\(^{132}\) See United States v. Flemming, 19 F.3d 1325, 1330 (10th Cir. 1994) (“[M]ultiplicity refers to multiple counts of an indictment which cover the same criminal behavior.”) (quoting United States v. Dashney, 937 F.2d 532, 540 n.7 (10th Cir.), cert. denied, 502 U.S. 951 (1991)); United States v. Allen, 13 F.3d 105, 107 (4th Cir. 1993) (multiplicity “refers to the charging of each act in a series of identical acts as though it were a separate crime.”); United States v. Rimell, 21 F.3d 281, 287 (8th Cir. 1994) (“An indictment which charges a single offense in multiple counts is multiplicitous.”), cert. denied, 513 U.S. 976 (1995); Langford, 946 F.2d at 802 (“Multiplicity is the charging of a single offense in more than one count.”). See also Wright, Federal Practice and Procedure, Criminal 2nd, Section 142, p. 469 (1996) (multiplicity is the charging of a single offense in several counts).

\(^{133}\) See Langford, 946 F.2d at 802 (“To determine whether an indictment is multiplicitous, we first determine the allowable unit of prosecution.”).

\(^{134}\) See Christner, 66 F.3d at 927 (“The yardstick in determining whether there is . . .
facts. Unless Congress has clearly and unequivocally indicated that each act constitutes a separate offense, the rule of lenity requires courts to find a single offense.

Multiplicity is whether one offense or separate offenses are charged, and . . . this is a difficult and subtle question. The test announced most often in cases is that offense are separate if each requires proof of an additional fact that the other does not. This seems of little value as a test. The real question is one of legislative intent, to be ascertained from all the date available.” (quoting 1 Charles A. Wright, *Federal Practice and Procedure* Section 142, at 469, 477-78 (1982)); United States v. Bennett, 44 F.3d 1364, 1373 (8th Cir. 1995) (“First, a court must ask whether Congress “intended that each violation be a separate offense.” . . . If it did not, there is no statutory basis for the two prosecutions, and the double jeopardy inquiry is at an end. . . . Second, if Congress intended separate prosecutions, a court must then determine whether the relevant offenses constitute the “same offense” within the meaning of the Double Jeopardy Clause.”); United States v. Meuli, 8 F.3d 1481, 1485 (10th Cir. 1993) (“In reviewing multiplicity claims we look to the language of the statute to determine whether Congress intended multiple convictions and sentences under the statute.”). See also Wright, *Federal Practice and Procedure*, Section 142, at 469, 473. But see Ianelli v. United States, 420 U.S. 770, 785 n.17 (1975) (offenses are considered separate, and therefore not multiplicitous, if each requires proof of a fact no common to the others).

See, e.g., United States v. Woodward, 469 U.S. 105, 108-110 (per curiam) (Court reviewed legislative history to determine Congressional intent regarding statutes which, on their face, required proof of different facts); Albernaz v. United States, 450 U.S. 333, 340-42 (1981) (*Blockburger* test for Double Jeopardy Clause violations merely rule of statutory construction, thus analysis of legislative history necessary to determine Congressional intent if possible).

See Rewis v. United States, 401 U.S. 808, 812 (1971) (“ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity”); Bell v. United States, 349 U.S. 81, 84 (1955) (“[I]f Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses . . . .”). See also United States v. Polouizzi, 564 F.3d 142, 158 (2nd Cir. 2009) (rule of lenity forbids treating as multiple offenses each child pornographic image received in a single transaction because congressional intent as to the unit of prosecution was ambiguous); United States v. Vargas-Castillo, 329 F.3d 715, 721-22 (9th Cir.) (rule of lenity not violated with regard to indictment on two charges of importation and possession of cocaine and marijuana because Congress unambiguously intended for each controlled substance to be a unit of prosecution), *cert. denied*, 540 U.S. 998 (2003). The Rule of Lenity comes into play only when a statute is deemed ambiguous. See Bifulco v. United States, 447 U.S. 381, 387 (1980). Courts
Determining the appropriate unit of prosecution under the mail fraud and wire fraud statutes is more than an academic exercise. First, multiplicity poses the danger of imposing multiple sentences for a single offense\textsuperscript{137} in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.\textsuperscript{138} Second, charging a defendant in multiple counts for what is arguably a single offense gives rise to arguments that the charging decision was made to improperly "suggest to the jury that the defendant committed more than one crime" for the wholly indefensible reason of trying improperly to influence the jury.\textsuperscript{139} Third, when it appears the government has rejected application of the Rule of Lenity in multiplicity challenges to the mail and wire fraud statutes by merely repeating the truism that each mailing or use of the wires constitutes a separate offense. See, e.g., United States v. Luongo, 11 F.3d 7, 9 n.6 (1st Cir. 1993) ("As the wire fraud statute is unambiguous, and the principle that each use of the wires constitutes a separate violation of section 1343 has been widely accepted for many years, we have no occasion to engage the Rule of Lenity.") (citations omitted).

\textsuperscript{137} See United States v. Christner, 66 F.3d 922, 927 (8th Cir. 1995) (multiplicity poses danger of multiple sentences for single offense); United States v. Brandon, 17 F.3d 409, 422 (1st Cir. 1994) (same); United States v. Haddock, 956 F.2d 1534, 1546 (10th Cir. 1992) (same); Langford, 946 F.2d at 802 (same); United States v. Duncan, 850 F.2d 1104, 1108 n.4 (6th Cir. 1988) (same); United States v. Hearod, 499 F.2d 1003, 1005 (5th Cir. 1974) (multiple sentences for single offense is principle danger of multiplicity).

\textsuperscript{138} The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const., amend. V.

\textsuperscript{139} See United States v. Christner, 66 F.3d 922, 927 (8th Cir. 1995) (quoting United States v. Dixon, 921 F.2d 194, 196 (8th Cir. 1990). See also United States v. Duncan, 850 F.2d 1104, 1108 n. 4 (6th Cir. 1988) (multiplicity poses danger that "prolix recitation may falsely suggest to a jury that a defendant has committed not one but several crimes."); Langford, 946 F.2d at 802 ("Multiplicitous indictment may improperly prejudice a jury by suggesting that a defendant has committed several crimes--not one."); United States v. Marquardt, 786 F.2d 771, 778 (7th Cir. 1986) (multiplicity creates danger of prejudicing jury against defendant by creating impression of more criminal activity than what actually occurred); United States v. Reed, 639 F.2d 896, 904 (2nd Cir. 1981) (one vice of multiplicity is that it "may improperly prejudice a jury by suggesting that a
charged in multiple counts criminal conduct which arose from a single course of
counts of mail fraud arising from a single fraudulent scheme which resulted in 30
mailings, the government has attempted to intimidate a defendant, creating the
appearance of greater exposure.\textsuperscript{140}

Additionally, multiplicitous mail fraud or wire fraud charges pose an additional,
perhaps unique danger, when they are used as predicate acts for a RICO charge.
Under the Racketeer Influence and Corrupt Organizations Act, prosecutors must prove
two or more predicate violations of specific federal and state crimes set forth in the
statute. Mail fraud and wire fraud constitute predicate offenses under the RICO
statute\textsuperscript{141} and are often used as a predicate offense in RICO prosecutions.\textsuperscript{142} If a RICO

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\item \textsuperscript{140} See Seigel & Slobogin, \emph{Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts}, 109 Penn. St. L. Rev. 1107, 1125-26 (2005) (arguing that multiple charges for a single course of conduct raises possibility of compromise verdicts where jurors will agree to convict on one or more counts and acquit on others as a compromise, without realizing that it may have no impact on the sentence).

\item \textsuperscript{141} 18 U.S.C. § 1956(c)(7)(A).

\item \textsuperscript{142} See, \textit{e.g.}, Cleveland v. United States, 531 U.S. 12, 25 (2000) (recognizing mail fraud as a predicate offense under the RICO statute); United States v. Whitefield, 590 F.3d 325, 342 (5th Cir. 2009) (wire fraud charged as a predicate RICO offense), \textit{cert. denied}, \textit{549 U.S.} \textit{829} (2006).
\end{footnotes}
\end{footnotesize}
charge is based upon alleged multiple violations of the mail fraud statute, when multiple mailings were made in execution of a single scheme to defraud, a defendant may wrongfully be convicted of violating RICO. Courts have recognized that multiple mail and wire fraud charges pose a unique danger when used predicate offenses under RICO because the number of charges seldom correlates directly to a real pattern of racketeering activity. If each mailing or wiring would no longer constitute a separate offense, it would eliminate this potential problem with using mail and wire fraud offenses as predicate acts under the RICO statute.

At the same time the mail and wire fraud statutes are over-inclusive, treating each mailing or each wiring as a separate offense can be under-inclusive by operation of the statute of limitations. Because the mailing or wiring is the unit of prosecution under the mail and wire fraud statutes, the statute of limitations runs from the date of the last mailing or wiring made in furtherance of the fraudulent scheme. The statute of limitations for mail and wire fraud is generally five years.

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143 See Lipin Enterprises Inc. v. Lee, 803 F.2d 322, 325 (7th Cir. 1986) (Cudahy J., concurring) (“Mail fraud and wire fraud are perhaps unique among the various sorts of ‘racketeering activity’ possible under RICO in that the existence of a multiplicity of predicate acts . . . may be of no indication of the requisite continuity of the underlying fraudulent activity. Thus a multiplicity of mailings does not necessarily translate into a “pattern” of racketeering activity.”). Accord, Elliot v. Chicago Motor Club Ins., 809 F.2d 347, 350 (7th Cir. 1986).

144 See United States v. Eckhardt, 843 F.2d 989, 993 (7th Cir.), cert. denied, 488 U.S. 839 (1988) (statute of limitations for wire and mail fraud runs from the date of mailing or wire communications); United States v. McDonald, 576 F.2d 1350, 1357 (9th Cir. 1978) (statute of limitations for mail fraud runs from last mailing made in furtherance of the fraudulent scheme).

145 Title 18, United States Code, Section 3282 provides for a five-year statute of limitations for most federal offenses, including mail and wire fraud. See, e.g., United
Thus, the statute of limitations may bar prosecutions of ongoing fraudulent schemes simply because the mailing or wiring upon which the offense rests occurred outside the statute of limitations. It is not difficult to imagine a fraudulent scheme that starts with a mailing or wiring, but which is then executed over some period of time by other acts in furtherance of the scheme which did not involve use of the mails or wires. For example, a simple scheme to defraud might involve a mailing to a victim soliciting money for a fictitious charity, followed by a personal visit by the criminal to the home of the victim to solicit the charitable contribution. If the mailing took place five years and one day ago, but the personal visit took place four years and 364 days ago, prosecution under the mail fraud statute would be barred.\textsuperscript{146} Though the fraudulent scheme – the criminal conduct which is core to the mail and wire fraud statute – continued to the detriment of the victim, it would fall outside the reach of federal prosecution if the mailing or wiring took place more than five years ago. Were the scheme to defraud the unit of prosecution, on the other hand, then the statute of limitations would run from the last act committed in furtherance of that scheme.\textsuperscript{147} This would expand the scope of

\textsuperscript{146} Admittedly, there are no reported decisions where the government’s prosecution of a fraudulent scheme was barred in circumstances similar to this hypothetical, but, of course, one would not expect there to be. The government would be unlikely to ever charge this conduct knowing that it was barred by the statute of limitations, or if it did, would have the case dismissed at the district court level.

\textsuperscript{147} See United States v. Najjor, 255 F.3d 979, 983-84 (9th Cir. 2001), cert. denied,
fraudulent schemes which could be charged under the mail and wire fraud statutes.

B. Reworking the Mail Fraud Statute to Change the Unit of Prosecution

The gravamen of the mail fraud statute as currently written is the execution of the underlying scheme to defraud, not the use of the mails. The appropriate unit of prosecution under the mail and wire fraud statutes, therefore, should focus on the execution of the scheme to defraud, not on the mailings or use of the wires. Like the bank fraud, the unit of prosecution should be logically related to the fraudulent scheme.

As discussed above, however, the language in these statutes does differ to some extent from the mail fraud statute. Courts have focused on these differences to distinguish other statutes from the mail fraud statute and thereby reach more logical results with regard to these other statutes, like the bank fraud statute. The conclusion that the mailing is the gist of the mail fraud statute, such that each mailing constitutes a separate offense, is a matter of judicial interpretation of congressional intent. To reverse decades of precedent misinterpreting congressional intent, therefore, Congress needs to clarify the intent of the current version of the mail fraud statute. Congress could recognize the mail fraud statute’s unique history, the evolution of its language, and the shift in focus from mailing to the fraudulent scheme, and abandon the untenable truism that each mailing constitutes a separate offense. Congress could clarify it intent

536 U.S. 961 (2002) (“execution” of a scheme to defraud or obtain money under the bank fraud statute “is a continuing offense” for statute of limitations purposes; therefore, the statute of limitations under the bank fraud statute begins to run when the last act in furtherance of the scheme is committed); United States v. Anderson, 188 F.3d 886, 889-90 (7th Cir. 1999) (defendant’s refinancing of a fraudulent loan within five years of the criminal charge brought the fraudulent scheme within the bank fraud statute of limitations).
that the gist or gravamen of the mail fraud statute, and its sister the wire fraud statute, is
the execution of the scheme to defraud.

The mail fraud jurisprudence may be so entrenched, especially now that courts
have distinguished the mail fraud statute from other similar statutes based on statutory
language, that it is unrealistic to expect courts to abandon the reasoning. Accordingly, it
is necessary for Congress to amend the mail fraud statute. This could be accomplished
by changing the language “for the purpose of executing such a scheme” to “executes
such a scheme” such that the language matches that of the bank fraud statute.148 This
would indicate clear Congressional intent to make the scheme to defraud itself the gist
of the mail fraud and wire fraud statutes, and free the courts from the burden of its

148 There would need to be other minor changes to take into account the change in
verb tense. The amendments to the mail fraud statute would be:

Whoever, having devised or intending to devise any scheme or artifice to
defraud, or for obtaining money or property by means of false or fraudulent pretenses,
representations, or promises, or to sell, dispose of, loan, exchange, alter, give away,
distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin,
obligation, security, or other article, or anything represented to be or intimated or held
out to be such counterfeit or spurious article, for the purpose of executing executes
such scheme or artifice or attempting so to do, places by placing 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 by depositing or causing to be
deposited any matter or thing whatever to be sent or delivered by any private or
commercial interstate carrier, or takes or receives by taking or receiving therefrom, any
such matter or thing, or by knowingly causes causing 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 twenty years, or both. If the violation occurs
in relation to, or involving any benefit authorized, transported, transmitted, transferred,
disbursed, or paid in connection with, a presidentially declared major disaster or
emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster
Relief and Emergency Assistance Act (42 U.S.C. § 5122)), or affects a financial
institution, such person shall be fined not more than $1,000,000 or imprisoned not more
than 30 years, or both.
jurisprudence.

The unit of prosecution test used for mail fraud and wire fraud should be the same as used for bank fraud: each execution of a mail or wire fraud scheme should constitute a separate offense, regardless of how many times the mails or wires were used. In some cases, each mailing may constitute an execution of a scheme to defraud, while in other instances multiple mailings may simply be multiple acts in furtherance of a single fraudulent scheme. The focus of these cases should be on the relationship between the mailing (or wire) and the fraudulent scheme. In determining whether there is one or more scheme to defraud, courts should consider such factors as whether the mailings were related to or dependant on each other and whether each mailing caused, or risked, a separate harm to the victim. Ultimately, the common-

\[149\] For example, a fraudulent mail order scheme whereby each customer is defrauded may fairly be considered separate schemes to defraud each customer. A separate harm, or risk of harm, is created with respect to each customer defrauded. The number of mailings bears a direct, logical relationship to the harm caused. If, however, with respect to defrauding a customer out of $100 the defendant makes several mailings (the initial solicitation, a follow-up solicitation, a thank-you designed to lull the customer into inaction), it should be treated as a single scheme to defraud in which there were several mailings. Similarly, a scheme to defraud an insurance company by mailing multiple false claims should be treated as a single scheme, not as separate schemes to defraud.

\[150\] Though courts do not explicitly list “harm” as a factor for consideration, it underlies their analysis in the structuring and bank fraud cases. For example, in Davenport, with respect to the anti-structuring statute, the court determined that whether the defendants made a single deposit or hundreds of deposits was irrelevant in determining their culpability. See United States v. Davenport, 929 F.2d 1169, 1171 (7th Cir. 1991) (“The government’s position [that each deposit equals a separate offense] leads to the weird result that if a defendant receives $10,000 and splits it up into 100 deposits he is ten times guiltier than a defendant who splits up the same amount into ten deposits.”). Similarly, with regard to bank fraud, a consideration is whether the act in question created a separate risk of harm to the bank. See, e.g., United States v. Wall, 37 F.3d 1443, 1446 (10th Cir. 1994) (“Each [loan] involved a separate movement of money, and each, standing alone, put the bank at risk of loss.”). But see United
sense question is whether defendant is more criminally culpable because of each additional mailing.\footnote{\ref{footnote:53}}

\section*{V. CONCLUSION}

Over a century ago the Supreme Court premised its statement in \textit{Ex Parte Henry}, that each separate mailing constituted a separate mail fraud offense, on an understanding that abuse of the United States Mail was the "gist" of the mail fraud statute. That premise no longer rings true, given the evolution of the statute through legislative amendment and judicial interpretation. The history of the mail fraud statute demonstrates that the government has slowly transformed the original mail fraud statute from an act designed to protect the United States Post-Office Establishment from abuse to a catchall offense for attacking any scheme to defraud, with the use of the United States Mail or a commercial mail service acting as a jurisdictional basis only. It is clear that at least since the 1994 amendment to the mail fraud statute, the "gist" of the mail

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\begin{quote}
\textit{States v. Heath}, 970 F.2d 1397, 1402 (5th Cir. 1992) ("Although a two-loan scheme may subject an institution to greater risk than a scheme involving only one transaction, it is the execution of the scheme itself that subjects a defendant to criminal liability, not, as we states in \textit{Lemons}, the execution of each step or transaction in furtherance of the scheme."). The same analysis of harm should be applied to the mail fraud statute. Sometimes multiple mailings create a greater danger of harm, while in other cases they do not. \textit{Compare} United States v. Helms, 897 F.2d 1293 (5th Cir. 1990) (defendant charged with 41 mail and wire fraud counts in connection with selling distributorship in nonexistent business to 629 victims, defrauding them of more than $5 million), \textit{with} United States v. Brown, 948 F.2d 1076 (8th Cir. 1991) (defendant charged with 41 mail and wire fraud counts in connection with making a fraudulent disability claim involving $______, where each monthly check mailed to defendant charged as separate offense).
\end{quote}

\footnotetext[151]{See \textit{Rakoff, supra} note 16 at 778 (number of mail fraud counts should be related to such factors as “the scope or duration of the fraud, the number of victims, the amount of damage, or any other factor relating to the moral culpability of the perpetrator or the social damage inflicted by his fraud” as opposed to “sheer happenstance of how many times the mails have been used in executing the fraud.”).}
fraud statute is the “scheme or artifice to defraud.” If the premise upon which the *Ex Parte Henry* principle was based has since eroded, the rule that each mailing constitutes a separate offense sits on shaky ground. Each execution of a fraudulent scheme should constitute a separate offense, not each mailing.