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The Curious Case of Honest Services Fraud: How Consolidating the Circuits could Define the Borders § 1346

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Act I. Setting the Stage:
No Answer from the Sorich v. US

Between 1990 and 1997, the mayor of Chicago’s Office of Intergovernmental Affairs (“IGA”) ferreted out over 5,000 patronage civil service jobs to many of the mayor’s cronies. The IGA served as the liaison between the city of Chicago and the state and federal government, and was not meant to serve any role in the hiring of the city’s 37,000 jobs. Robert Sorich, the Assistant to the Director of the IGA, would relay certain names received from campaign coordinators to various governmental department heads. The heads would then conduct mock interviews and fill out false forms, hiring the persons submitted regardless of merit. Sorich, among others, was charged and convicted of several counts of mail and wire fraud under sections 1341, 1343, and 1346 of the United States Code.

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2 U.S. v. Sorich, 523 F.3d 702, 705 (7th Cir. 2008) [hereinafter Sorich I].
3 Id. at 705.
4 Id. at 705—06.
5 Id. at 706.
6 In short terms, § 1341 states that:
   Whoever, having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting so to do, places . . . or knowingly causes to be delivered by mail . . . any such matter . . . shall be fined under this title or imprisoned not more than 20 years, or both.
7 In short terms, § 1343 states that:
   Whoever, having devised or intending to devise any scheme or artifice to defraud . . . transmits or causes to be transmitted by means of wire . . . any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.
Several elements must be proven to sustain a conviction of mail and wire fraud: 1) a scheme or artifice to defraud, 2) intent to defraud by the defendant, and 3) use of the mails in furtherance of the scheme.\(^9\) A scheme or artifice to defraud could encompass two different theories, both of which were used to convict Sorich. The first or traditional theory is when the defendant perpetrates a fraud intended to deprive a person of money or property.\(^{10}\) The second theory is when a defendant perpetrates a fraud intended to deprive a person of the intangible right of the defendant’s honest services as public officials (hereinafter “honest services fraud”).\(^{11}\) By its terms, honest services fraud requires a breach of fiduciary duty between the public official and the person(s) deprived of honest services.\(^{12}\)

During Sorich’s trial, the jury was instructed that honest services fraud is found where there is “an intent to ‘deprive a governmental entity of the honest services of its employees for personal gain to a member of the scheme or another.’”\(^{13}\) Sorich’s chief argument centered on this instruction and was two-fold. To begin, he argued that his conduct did not amount to honest services fraud because A) the “private gain” requirement of the Seventh Circuit\(^{14}\) requires that “another” be a co-schemer, and B) he did not misuse his office for any private gain since it was

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\(^8\) In full terms, § 1346 states that “[f]or the purposes of this chapter, the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.” 18 U.S.C.A. § 1346 (1988).

\(^9\) See U.S. v. Murphy, 323 F.3d 102, 110 (3d Cir. 2003). In the instant case, the mails were used in the delivery of the false forms and patronage names. Sorich I, 523 F.3d at 705.

\(^{10}\) See Sorich I, 523 F.3d at 713 (holding that jobs are property for the purpose of the mail and wire fraud, so a false hiring scheme was a deprivation of property).

\(^{11}\) Id. at 713.

\(^{12}\) Id. at 706.

\(^{13}\) Id. (emphasis in original).

\(^{14}\) See US v. Bloom, 149 F.3d 649, 665 (7th Cir. 1998) (holding that “[m]isuse of office (more broadly, misuse of position) for private gain is the line that separates run of the mill violations of state-law fiduciary duty . . . from federal crime.”). The private gain requirement represents one side of the split between the Circuit Courts regarding what limiting principles should apply to § 1346, and will be discussed in detail in Part II infra.
other persons who received jobs. Conversely, he argued that if a non-schemer could satisfy the private gain requirement, then § 1346 lacks any notice of what activity could be criminalized, and therefore is void for vagueness. Furthermore, Sorich also argued that the government had failed to show any fiduciary duty between him and the peoples of Chicago, and that only state law could provide such a duty.

The court rejected both of these arguments, holding that “private gain simply means illegitimate gain, which usually goes to the defendant, but need not.” In its reasoning, the court pointed to several examples of mail fraud convictions that had previously been used against defendants who did not receive private gains. Surprisingly, the court upheld these examples as legitimate exercises of § 1346 because of their rarity, reasoning that because most schemes to

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15 Sorich I, 523 F.3d at 709. The 7th Circuit had previously held that job security not a private gain. U.S. v. Thompson, 484 F.3d 877, 882 (7th Cir. 2007).
16 Sorich I, 523 F.3d at 709. A statute is unduly vague when it is unclear to a person whether the conduct he or she is engaging in is criminal or not. A clear example of the vagueness doctrine can be seen in the context of free speech where, for example, a statute which criminalized any activity within a public sidewalk that may “annoy” others was held unduly vague because there is no telling what activities may annoy others. See Coates v. City of Cincinnati, 402 U.S. 611 (1971).
17 Sorich I, 523 F.3d at 709 (7th Cir. 2008). In essence, Sorich was urging the court to adopt the state law limiting principle, which represents the other side of the split between the Circuit Courts regarding what limiting principles should apply to § 1346, and will be discussed in detail in Part II infra. See Murphy, 323 F.3d at 114 (stating that “[a] state law that criminalized nondisclosure of his sources of income addresses rule of lenity concerns more readily than a misuse of office for private gain.”); U.S. v. Brumley, 116 F.3d 728, 734 (5th Cir. 1997) (stating that “if the official does all that is required under state law, alleging that the services were not otherwise done honestly does not charge a violation of the mail fraud statute.”).
18 Sorich I, 523 F.3d at 709 (citing U.S. v. Spano, 421 F.3d 599, 603 (7th Cir. 2005) (“[a] participant in a scheme to defraud is guilty even if he is an altruist and all the benefits of the fraud accrue to other participants.”)) (emphasis added). Sorich furthered contended that the “other participants” language of Spano requires a private gain to go to a schemer, but the court also rejected this argument, stating that “Robin Hood may have been a noble criminal, but he is still a criminal.” Id. at 710.
19 See Ginsburg v. U.S., 909 F.2d 982 (7th Cir. 1990) (attorney’s bribery scheme with a court to expedite his client’s claims); see also Lombardo v. U.S., 865 F.2d 155, 159-60 (7th Cir. 1989) (union bidding scheme with a state senator exchanging union property for favorable votes).
defraud directly benefit the schemers, the honest services fraud would not become unlimited and consequently unduly vague.\textsuperscript{20} Furthermore, the court reasoned that the focus of the private gain requirement was not who received the spoils of the fraud, but in separating out those actionable breaches of a fiduciary duty which come from misuse of a public office or position.\textsuperscript{21} To the court, that focus clearly defined the boundaries § 1346, which should have put Sorich on notice that his parsing of jobs to undeserving peoples was a clear abuse of his office and probably illegal. In addition, concerning the state limiting principle, the court held that no state law was required in creating a fiduciary duty because “\textit{merely by virtue of being public officials} the defendants \textit{inherently} owed the public a fiduciary duty to discharge their offices in the public's best interest.”\textsuperscript{22}

Sorich and some of his co-defendants filed for certiorari from the U.S. Supreme Court, which was denied earlier this year.\textsuperscript{23} However, Justice Antonin Scalia strongly dissented from the denial, accusing the majority of acting “irresponsible” in refusing to define the borders of § 1346.\textsuperscript{24} He argued that, by its terms, honest services fraud could logically criminalize, for example, a state legislator’s vote meant to curry favor with a faction of his constituency, a mayor’s attempt to obtain a restaurant table without a reservation by the power of his office, or even a public employee phoning in sick to attend a sporting event.\textsuperscript{25} In fact, if one agrees with the Seventh Circuit that public officials are bound to “act in the public's best interest,”\textsuperscript{26} even

\begin{itemize}
\item \textsuperscript{20} \textit{Sorich I}, 523 F.3d at 710.
\item \textsuperscript{21} \textit{Id.} (citing U.S. v. Czubinski, 106 F.3d 1069, 1077 (1st Cir. 1997) (mail fraud conviction reversed where IRS employee improperly accessed confidential tax records but did not misuse them for any gain)).
\item \textsuperscript{22} \textit{Id.} at 712.
\item \textsuperscript{23} \textit{Sorich II}, 129 S.Ct. at 1308.
\item \textsuperscript{24} \textit{Id.}
\item \textsuperscript{25} \textit{Id.} (Scalia, J., dissenting).
\item \textsuperscript{26} \textit{Sorich I}, 523 F.3d at 712.
\end{itemize}
absent a preexisting state defined fiduciary duty, there is no differentiating the aforementioned misuses of office from more traditional illegitimate gains, such as briberies or conflicts of interests. In short, Justice Scalia declared that:

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

This article seeks to provide such a coherent principle through the consolidation of the two major limiting principles enunciated by the different Circuit Courts, namely, the private gain requirement and the state law limitation principle. In this author’s opinion, it is only through combination of both of these limiting principles that § 1346 can remain an effective and constitutional prosecutorial tool.

Act II. Introducing the Players:  
The History of Honest Services Fraud and its Limiting Principles

In McNally v. U.S., the U.S. Supreme Court held that “the mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government.”28 McNally concerned a self-dealing patronage scheme in Kentucky where the then Chairman of the state Democratic Party ensured that a certain insurance company would continue to provide the state with its worker’s compensation policy in exchange for any resulting commission above 50,000 dollars a year to be paid to other insurance agencies designated by the chairman.29 One of such agencies was nominally operated and owned by McNally, a private individual, and others, who were public officials.30

27 Sorich II, 129 S.Ct. at 1308 (J. Scalia dissenting) (emphasis added).
29 Id. at 352.
30 Id.
McNally was charged with several counts of mail fraud, although only one count based on the mailing of a commission check survived dismissal.31 The count was pursued on the two mail fraud theories: 1) fraud through the procurement of insurance monies, and 2) fraud “on the citizens and government of Kentucky of their right to have the Commonwealth’s affairs conducted honestly.”32 Concerning the second theory, the government argued that McNally aided and abetted the public officials who owned the receiving agency, who in turn failed to disclose their interests in the agency, which would have affected the actions of the Kentucky government.33

The U.S. Supreme Court characterized the government’s second theory as standing for the proposition that “a public official [or private individual with a ‘special relationship in the government’] owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud.”34 However, such a proposition, in the Court’s opinion, was unsupportable. The Court reasoned that the sparse legislative history of the mail fraud statute showed that “original impetus” of the mail fraud statute was the prevention of the depravation of property, and not the promotion of honest services.35 The Court explained that the movement of the Circuit Courts towards the latter theory was due to the disjunctive language of the statute, which criminalized “any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.”36 The Court dismissed this interpretation by looking at the common meaning of fraud, previously defined by the Court as “usually signif[ing]…
the deprivation of *something of value* by trick, deceit, chicane or overreaching."  

Most importantly, however, the Court was concerned with the potential limits of honest services fraud and its potential for abuse. It tersely stated that:

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

One year later, Congress did speak. Section 1346 was enacted, effectively overruling *McNally* and reinstating honest services fraud. However, “[w]hether that terse amendment qualifies as speaking ‘more clearly’ or in any way lessens the vagueness and federalism concerns that produced . . . *McNally* is another matter.”

By its terms, § 1346 criminalizes an outstanding array of behavior, leading one commentator to deem it “the hottest little criminal statute in federal court.” For example, the statute has been used to punish conflicts of interests, bribes for legislative influence, bribes by lawyers in exchange for expedient processing of client’s claims, and even a scheme between students and professors to turn in plagiarized work. It has even been suggested as a

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38 *McNally*, 483 U.S. at 358.
39 *Sorich I*, 523 F.3d at 707.
40 *Sorich II*, 129 S.Ct. at 1308 (2009) (Scalia, J., dissenting); see *Bloom*, 149 F.3d at 654 (stating that the line separating those breaches of a fiduciary duty that amount to a federal crime “cannot be found by parsing § 1341 or § 1346 . . . .”).
42 U.S. v. Hasner, 340 F.3d 1261, 1271 (11 Cir. 2003).
43 U.S. v. Potter, 463 F.3d 9, 18 (1st Cir. 2006).
44 U.S. v. Rybicki, 354 F.3d 124, 142 (2d Cir. 2003).
45 U.S. v. Frost, 125 F.3d 346, 369 (6th Cir. 1997).
prosecutorial tool against the Roman Catholic archbishop of Los Angeles for concealing to his parishioners the molestation of children by parish priests.\textsuperscript{46}

This sheer breadth of honest services fraud has led to multidirectional attempts by the different Circuits to define its boundaries. Two clear limiting principles have emerged: 1) the private gain requirement, and 2) the state law limiting principle. To begin, the private gain requirement was adopted by the Seventh Circuit in \textit{U.S. v. Bloom}, where a former Chicago alderman and lawyer advised one of his clients to use a proxy bidder at a tax auction in direct contravention of state law.\textsuperscript{47} High bidders for delinquent properties at such auctions could receive a tax deed after the original owner’s period to redeem expired.\textsuperscript{48} Potentially, the high bidder could thereafter sell the property back to the original owners and thereby extinguish a large amount of their debt.\textsuperscript{49} To prevent the latter result, counties in Illinois adopted a statute requiring all bidders to certify that they were not bidding for a delinquent party.\textsuperscript{50}

The government argued that “Bloom [as alderman] was a fiduciary who owed the City a duty of loyalty and therefore was required, \textit{when practicing law}, to refrain from participating in or giving advice about any transaction that could reduce the City's revenues.”\textsuperscript{51} The court rejected this argument, reasoning that it was analogous to criminalizing a public official’s decision to shop outside of Illinois for the reason that such would also reduce county revenue.\textsuperscript{52} Still, the court recognized that some limiting principle was required because if every breach of a fiduciary duty turned into mail fraud just because the mails were used, then this in effect would

\textsuperscript{46} Levenson, \textit{supra} note 41, at 14.
\textsuperscript{47} \textit{Bloom}, 149 F.3d at 650.
\textsuperscript{48} \textit{Id}.
\textsuperscript{49} \textit{Id}. at 651.
\textsuperscript{50} \textit{Id}.
\textsuperscript{51} \textit{Id}.
\textsuperscript{52} \textit{Bloom}, 149 F.3d at 651 (emphasis added).
create common law crimes.\textsuperscript{53} The court first rejected the possibility of adopting the state law limiting principle, reasoning that honest services fraud adds the possibility that a public employee can commit a crime even “when the state law allows the client to do what the lawyer recommends.”\textsuperscript{54} Instead, the court dug from the ashes \textit{McNally’s} description of honest services fraud, namely, “misuse of [ones] office for private gain,” and adopted it as its defining line.\textsuperscript{55} Accordingly, the court reversed Bloom’s conviction since he did not misuse his alderman position when he misguided his client, but was merely acting in his capacity as a lawyer.\textsuperscript{56} The divisive line becomes clearer when Bloom’s luck is compared to Sorich’s misfortune. While both Bloom and Sorich acted unethically, Bloom was merely an unethical lawyer, while Sorich was an unethical public official. The distinction is key because, at least in the Seventh Circuit, absent some statutory provision, a lawyer does not have hold a fiduciary duty to the public, while a public official \textit{inherently} does. This distinction is most remarkable when one considers that Bloom is the only person that has arguably broken any state law.\textsuperscript{57}

Conversely, both the Third and Fifth Circuits have focused on the source of the fiduciary duty owed by the public official as a limiting principle, and not on the status of the official himself. In short, both circuits have held that § 1346 requires a violation of a state law that creates a fiduciary duty between the defendant and the public. The Third Circuit’s decision in \textit{U.S. v. Murphy} is illustrative of this principle. In \textit{Murphy}, the former Chairman of the Republican Party in Passaic County, New Jersey, orchestrated a bribery scheme using his

\begin{itemize}
\item \textsuperscript{53} \textit{Id.} at 656.
\item \textsuperscript{54} \textit{Id.} at 655. The court also reasoned that, in reality, the certification statute would be inapplicable against Bloom because 1) it was his client and the straw bidder who actually broke the law, and 2) the statute is completely unrelated to Bloom’s position as an alderman. \textit{Id.}
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} \textit{Id.}
\item \textsuperscript{57} This divergence of decision is illustrative of the problem with adopting only one limiting principle, and will be discussed in further detail in Part III \textit{infra}.
\end{itemize}
influence over Passaic County officials to get contracts for a certain medical company, which then siphoned monies to four individuals chosen by Murphy. This scheme was in violation of New Jersey’s anti-bribery statute. The government argued that Murphy had attained such a dominant role in the political system of Passaic County that he could be considered equivalent to a publicly elected official, and therefore he had a fiduciary duty to inform County officials of the nature of the contracts-for-payments scheme.

The court rejected the government’s contention as overly broad and unduly vague, reasoning that if mere influence created a fiduciary duty between a party official and the general public, then lawful activities such as lobbying would be criminalized. However, just like in Bloom, the Third Circuit recognized the need for some limiting principle to wrangle § 1346. In fact, both the Seventh and Third Circuits were focused on the same problem: how to imposed honest services fraud on individuals, a lawyer and a party official, respectively, that cannot easily be classified as public officials. But there is where the similarities end, because while Seventh Circuit felt comfortable in imputing a fiduciary duty to a private individual with a sufficient relationship with the government, the Third Circuit saw the party official as needing more

58 Murphy, 323 F.3d at 104. The Fifth Circuit’s adoption of the state law limiting principle was prompted by a lawyer and former Texas Worker’s Compensation Commission official who “borrowed” over 112,000 dollars from other workers compensation lawyers without repayment in exchange favoritism towards those lawyers when they had to deal with the Commission. Brumley, 116 F.3d at 731.

59 Murphy, 323 F.3d at 104. Likewise, in Brumley, the defendant was charged with violating a gratuity statute, which made it a misdemeanor for a public servant to accept any benefit from anyone likely to have an interest in any manner before that servant. Brumley, 116 F.3d at 731.

60 Murphy, 323 F.3d at 104. By contrast, the government in Brumley did not have to argue that the defendant should be considered a public official since his status was clear, and simply contended that he deprived the citizens of Texas and the Texas Industrial Board of the right to honest services. Brumley, 116 F.3d at 731.

61 Murphy, 323 F.3d at 114. Conversely, the court in Brumley was not particularly worried with application of § 1346 on the defendant himself, reasoning that Brumley’s behavior was a clear violation of state imposed duties of a public official. Brumley, 116 F.3d at 733.
guidance. Accordingly, the Third Circuit held that the New Jersey anti-bribery act did not create the necessary fiduciary duty between Murphy and the peoples of Passaic County. If found otherwise, the court reasoned, then any criminal statute could be said to create a fiduciary duty between all criminals and the public to not break the law.

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

Act III. Curtain Call:
Consolidating the Private Gain Requirement with the State-Law Principle

The quandary presented by the divergent results from the various Circuits above is plain to see. Apparently, it is the location of one’s unethical conduct, as opposed to the implicated federal statute itself, which plays the largest role in deciding whether any given conduct rises to the level of a federal crime. Even then, the decisions are not easy to predict. For example, if

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62 Murphy, 323 F.3d at 114 (stating that for “party officials there is no clear line between patronage and mail fraud.”).
63 Murphy, 323 F.3d at 114. By contrast, the court in Brumley did find that the Texas gratuity statute provided the necessary fiduciary duty to convict the defendant. Brumley, 116 F.3d at 733. As was the case between Bloom and Sorich I supra, these divergent decisions also illustrates one of the problems with adopting only one limiting principle, which will be discussed in detail in Part III infra.
64 Murphy, 323 F.3d at 114.
certain unethical conduct by a public official arises in Illinois, that official could be convicted of mail fraud even if he or she does not break any state law. By contrast, another public official in Illinois could actively advise a person to avoid state taxes, yet not be convicted of mail fraud because the public official was not speaking . . . officially. Likewise, in New Jersey, a public official could actually violate a bribery statute and still not be convicted of mail fraud, even though New Jersey claims to follow a different path than Illinois. Yet at the same time, a public official in Texas could simply exchange favors for gratuities and be convicted of wire fraud, even though Texas purports to follow the same rule as New Jersey.

Clearly, these two limiting principles by themselves are inadequate to clearly define the boundaries of § 1346. To be sure, both approaches do have their merit. Bloom clearly stated that its private gain principle stems from the U.S. Supreme Court’s own understanding of honest services fraud in McNally. Therefore, if Congress thereafter accepted the Court’s invitation to speak clearly, and reinstated honest services fraud, then the Court’s description should be sufficient to define § 1346. Likewise, there is also some support in McNally for the state law limiting principle, albeit in dicta. Responding to Justice Steven’s contention that he would affirm the McNally’s conviction even absent a violation of state law, the majority stated that “if state law expressly permitted or did not forbid [the patronage scheme], it would take a much clearer indication than the mail fraud statute evidences to convince us that having and concealing such an interest defrauds the State and is forbidden under federal law.”

However, both approaches also have significant disadvantages. The private gain requirement has been criticized by the 10th Circuit for adding an element to honest services

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65 Bloom, 149 F.3d at 655.
66 Even the Fifth Circuit could agree on that point. See Brumley, 116 F.3d at 732 (“Congress accepted the [U.S. Supreme] Court’s invitation and was clear in its purpose.”).
67 McNally, 483 U.S. at 354 (emphasis added).
fraud that does not exist.\textsuperscript{68} By contrast, the state-law liming principle simply provides a fiduciary duty that is implicit within honest services fraud.\textsuperscript{69} However, adding an extra element to honest services fraud may be necessary to define the boundaries of § 1346 because, as aforementioned, all Circuits and Justice Scalia himself have expressed doubt as to whether the answer to this predicament can be wrought from § 1346 itself. This also erodes the Seventh Circuit’s purported \textit{McNally} foundation since it was that Court’s very description of honest services fraud that led to its short demise. Furthermore, the private gain requirement has also been critiqued as being under inclusive seeing as any number of frauds could not yield a private gain.\textsuperscript{70} This critique seems to hold less water after \textit{Sorich I}, however, given that the Seventh Circuit has chosen to define private gain as akin to misuse of office. On the other hand, the state law limiting principle could be regarded as under inclusive because, as \textit{Bloom} stated, honest services fraud adds the possibility that a public employee can commit a crime even when the state law allows the given behavior.\textsuperscript{71}

Still, the biggest disadvantage that both of these approaches have is that they are \textit{singular} in focus, while the concerns originally raised in \textit{McNally} are \textit{dual} in nature. As stated above, the seemingly endless prosecutorial possibilities of honest services fraud raises numerous concerns. However, the most important and dire of these concerns are two-fold, and found, ironically, in \textit{McNally} itself. In fact, one commentator has suggested that “[i]n deciding the scope of [§ 1346], some justices may hear the ghost of \textit{McNally} whispering in their ears.”\textsuperscript{72} These dual concerns are: 1) that the unclear boundaries of § 1346 does not give fair warning to defendants as to what

\begin{itemize}
\item \textsuperscript{68} U.S. v. Welch, 327 F.3d 1081, 1107 (10th Cir. 2003).
\item \textsuperscript{69} \textit{Sorich I}, 523 F.3d at 706.
\item \textsuperscript{70} U.S. v. Panarella, 277 F.3d 678, 691—92 (3d Cir. 2002).
\item \textsuperscript{71} \textit{Bloom}, 149 F.3d at 655.
\item \textsuperscript{72} Levenson, \textit{supra} note 41, at 14.
\end{itemize}
conduct constitutes a crime, and the statute is therefore void-for-vagueness; and 2) that federal prosecutors could use § 1346 to create ethical duties for state and local officials, and therefore break the bounds of federalism by creating common law crimes. The problem with each of the limiting principles is that they primarily stem from the need to fix one of these concerns, as opposed to both.

As Bloom stated, “[w]hat the prosecutor needs is a way to equate ethical duties with a ‘scheme or artifice to defraud’.” In reaching that question, Bloom was concerned with giving adequate warning to individuals of when their ethical duties equated to public duties, and not what the source of those duties were. As far as the court was concerned, this equation was the pinnacle of the § 1346 because once an individual knew that his conduct was a misuse of his office, then a fiduciary duty is a given. In short, Bloom stemmed from a need to fix the first McNally concern, and not the second. However, the problem is that even though this requirement does clarify the line between unethical behavior and a federal crime, it implicates the second concern of McNally by allowing federal prosecutors to define what that fiduciary duty is. As Justice Scalia stated above, any number of seemingly innocent behavior can be considered a misuse of office, such as a public official calling in sick to enjoy the National Basketball League Playoffs. In theory, an over-zealous federal prosecutor could seek to convict the mischievous sports fan one day, and then former Governor Rod Blagojevich for attempting to sell President Barack Obama’s Senate seat the next day. And even if the prosecutor is not fanatical, but cautious in his work, and seeks to convict only traditional briberies and conflicts of

73 See id.
74 Bloom, 149 F.3d at 655.
75 Sorich II, 129 S.Ct. at 1308.
interests, this choice itself is impermissible because it presupposes the prosecutor’s power to define what a worthy fiduciary duty is.

The state-law limiting principle, however, eliminates this problem by clearly defining where the fiduciary duty stems from. So “if the official does all that is required under state law, alleging that the services were not otherwise done ‘honestly’ does not charge a violation of the mail fraud statute.” Thus, federal prosecutors are not free to decide which dishonest services are actionable, and must instead look to the forum state. However, even though the Circuits adopting this approach claim that “a state law . . . addresses rule of lenity concerns more readily than a misuse of office for private gain,” their practice begs to differ. As aforementioned, Murphy and Brumley arrived at polar opposite conclusions in deciding whether their implicated respective statutes created a fiduciary duty. Surprisingly, a bribery statute did not create such a duty, while a gratuity statute did. These results cannot be said to alleviate the first concern of McNally, namely, the unfairness of a federal statute which does not give adequate notice of what behavior is criminal. Thus, the state-law limitation principle, by itself, simply brings one back full circle: the scope of § 1346 is once again defined geographically.

However, if the private gain requirement is combined with the state law limiting principle, all of these concerns are overcome. Simply stated, for certain unethical behavior to be actionable § 1346, there must be 1) a clearly defined fiduciary duty imposed through state law, and 2) a breach of that duty only through misuse of one’s office for private gain. By having the state law define the duty, there are no federalism concerns since federal prosecutors cannot

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76 Brumley, 116 F.3d at 734.
77 Murphy, 323 F.3d at 114 (3d Cir. 2003). The rule of lenity requires any doubt in the scope of a criminal statute must be resolved against criminalizing the conduct in question. Bloom, 149 F.3d at 656.
78 Compare Murphy, 323 F.3d at 114 (3d Cir. 2003) (no fiduciary duty found); and Brumley, 116 F.3d at 733 (fiduciary duty found).
impose their own ethical regimes on the states. However, even if a certain unethical behavior does not comport with a state imposed duty, such does not rise to the level of a federal crime if the behavior does not stem from the misuse of one’s office for private gain. Necessarily, this presupposes that the state law defining the duty bears some relationship to the public official’s office, since it would be hard to argue that the public official breached a fiduciary duty in his capacity as a public official otherwise. This eliminates the vagueness concerns raised by the decisions in Murphy and Brumley because public officials and persons intimately connected to public officials should be aware, as a matter of course, what state laws control their official behavior.

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

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79 Levenson, supra note 41, at 14.
80 McNally, 483 U.S. at 358.