COMMENT

MAIL FRAUD, THE INTANGIBLE RIGHTS DOCTRINE, AND THE INFUSION OF STATE LAW: A BERMUDA TRIANGLE OF SORTS*

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I. INTRODUCTION

The United States government utilizes two primary tools to target questionable activity conducted through the mails and interstate wires: the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343 respectively.[1] Originally, federal prosecutors employed the statutes to prosecute those persons

1. The mail fraud statute originated in provisions of the postal code. Refer to Part II.A *infra* (discussing Congress's original revision of the postal code, its subsequent amendments, and its broad judicial interpretation). The current mail fraud statute was enacted in 1948. *See* Act of June 25, 1948, ch. 645, 62 Stat. 763 (codified as amended at 18 U.S.C. § 1341 (1994)). The current wire fraud statute was enacted in 1952. *See* Act of July 16, 1952, ch. 879, § 18(a), 66 Stat. 722 (codified as amended at 18 U.S.C. § 1343 (1994)). Although the statutes target different media, traditionally they are analyzed similarly. *See* Carpenter v. United States, 484 U.S. 19, 25 n.6 (1987) ("The mail and wire fraud statutes share the same language in relevant part, and accordingly [courts] apply the same analysis to both . . . ."). This Comment discusses the mail fraud statute exclusively. However, as technology progresses, the wire fraud statute may emerge as the tool of choice for federal prosecutors.

using the mails or wires to defraud others of property or money.[2] Subsequently, the statutes gained power as courts expanded their reach to prohibit public officials and private employees from using the interstate mails or wires to assist in the disregard of duties to perform their jobs honestly and faithfully.[3] This dimension of the statutes, known as the intangible rights doctrine, was legislatively recognized by Congress in 1988 with the enactment of 18 U.S.C. § 1346.[4]

The development of the intangible rights doctrine continues to generate discussion.[5] Consequently, suggestions on ways to clarify the scope of the mail fraud statute have surfaced, including advocating the use of state law to determine the appropriateness and validity of federal mail fraud prosecutions.[6] The United States Court of Appeals for the Fifth Circuit, sitting en banc, determined that federal mail fraud prosecutions targeting a deprivation of honest services must be based upon an underlying violation of state law.[7] The unprecedented opinion,[8] *United States v. Brumley*, brings the state law issue to the forefront of mail fraud analysis.[9]

This Comment explores the use of state law in federal honest services mail fraud prosecutions and argues that it is problematic. Part II surveys the birth and development of the mail fraud statute, the arrival of the intangible rights doctrine

2. Refer to Part II.A *infra* (noting that federal prosecutions grew rapidly under the mail fraud statute).

3. Refer to Part II.B.1 *infra* (discussing the expansion of prosecutions through the intangible rights doctrine).

4. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4508 (codified as amended at 18 U.S.C. § 1346 (1994)).

5. *See, e.g.*, John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 432 (1998) [hereinafter Coffee, *Modern Mail Fraud*] (arguing that state law should form the basis for federal prosecutions of private fiduciaries but that federal common law should guide prosecutions of public fiduciaries); Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 157 (1994).

6. *See* United States v. Brumley, 116 F.3d 728, 734–35 (5th Cir. 1997) (en banc) (*Brumley III*) (requiring violation of a state-owed duty as defined by state law but not reaching the question of whether state criminal law must be violated); George D. Brown, *Should Federalism Shield Corruption?—Mail Fraud, State Law and Post-*Lopez *Analysis*, 82 CORNELL L. REV. 225, 286 (1997) (suggesting that the use of state law "is worth a try").

7. *Brumley III*, 116 F.3d at 734–35.

8. *See* United States v. Martin, 195 F.3d 961, 966 (7th Cir. 1999) (noting that *Brumley* is "contrary to the law" in the jurisdictions that have examined the necessity of a state law violation in a federal mail fraud prosecution).

9. *See* Brown, *supra* note 6, at 231 & n.54 (discussing the state law issue after the decision in *United States v. Brumley*, 79 F.3d 1430 (5th Cir. 1996) (*Brumley II*), *reh'g en banc granted and vacated by* 91 F.3d 676 (5th Cir. 1996), *on reh'g en banc*, 116 F.3d 728 (5th Cir. 1997), a precursor opinion superseded by the centerpiece case of this Comment, *United States v. Brumley*, 116 F.3d 728 (5th Cir. 1997) (en banc) (*Brumley III*)).

and its growth through opinions of the courts of appeals, the intervention of the United States Supreme Court, and Congress's response. Part III examines a significant development involving the state law issue, namely the Fifth Circuit's decision in *United States v. Brumley*. As such, *Brumley* serves as the centerpiece case of this Comment.

Part IV suggests that using state law to guide federal mail and wire fraud prosecutions raises federalism and uniformity concerns, is contrary to the intent of both Congress and numerous courts, and may lead to completely different results than those envisioned by proponents. Federal prosecutors may be forced to develop novel theories of prosecution, and the protection the mail fraud statute affords to the public could be eviscerated. Part IV analyzes each of these potential problems, illustrates the probable effects, and ultimately criticizes the *Brumley* decision for adding confusion to mail fraud law.

Part V suggests that courts have adequately devised limits on the scope of the mail fraud statute without resorting to state law. These limits in honest services mail fraud law include considering the degree of reliance placed on the defendant, the materiality of any deprivation, and the existence of any fiduciary relationship between the defendant and the victim. These limits allow the statute to protect potential fraud victims while allaying the concerns of vagueness and overbreadth that constantly shadow the statute.[10] Part VI concludes that requiring federal prosecutors to prove a violation of state law in order to bring a federal mail fraud prosecution is inappropriate and does not serve those the statute was designed to protect.

10. Refer to Part V *infra*.

II. A CONCISE HISTORY OF THE MAIL FRAUD STATUTE

A. Origins of the Statute: Early Legislation and Judicial Interpretation[11]

The mail fraud statute originated in the late 1800s.[12] Congress, in revising the postal code,[13] introduced legislation that made it a misdemeanor for "any person . . . to devise any scheme or artifice to defraud, or be effected by either opening or intending to open correspondence or communication with any other person . . . by means of the post-office establishment of the United States."[14] The provision was the first of its kind and had no legislative history of substance.[15] Shortly thereafter, courts began having trouble defining precisely what activity the statute's language proscribed.[16]

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11. Several commentators have provided expansive coverage of the mail fraud statute's colorful history. *See, e.g.*, 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, 4–10 (1983) [hereinafter Coffee, *Metastasis*] (proposing several methods by which the statute's reach might be limited); Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 441–45 (1995) (exploring early Supreme Court decisions that determined several schemes to defraud as being prohibited under the mail fraud statute); Daniel J. Hurson, *Limiting the Federal Mail Fraud Statute? A Legislative Approach*, 20 AM. CRIM. L. REV. 423, 426–31 (1983) (examining the rapid growth of federal prosecutions under the mail fraud statute); Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 779–86 (1980) (tracking the statute's birth and early legislative and judicial development).

12. *See* Coffee, *Metastasis*, *supra* note 11, at 4 & n.12 (discussing Congress's intent to have the mail fraud statute evolve so novel crimes could be prosecuted, as interpreted by Chief Justice Burger); Henning, *supra* note 11, at 441–50 (providing a detailed account of the mail fraud statute's origins and early amendments); Hurson, *supra* note 11, at 423–24, 426–28 (examining the genesis of the mail fraud statute); Rakoff, *supra* note 11, at 779–821 (describing the origins of the mail fraud statute, including case law and congressional reaction in amending the statute).

13. Congress appointed a commission in 1866 to re-examine all the federal statutes, including the postal laws. *See* Act of June 27, 1866, ch. 140, 14 Stat. 74. Though the Post Office Department operated under authority to regulate obscene materials, Congress quickly discovered that materials related to lotteries and other schemes also needed to be curtailed. *See* Jason T. Elder, Comment, *Federal Mail Fraud Unleashed: Revisiting the Criminal Catch-All*, 77 OR. L. REV. 707, 710 (1998) (noting congressional reaction to the expanding frauds).

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

15. *See* Rakoff, *supra* note 11, at 779 (discussing the absence of legislative history).

16. *See* Hurson, *supra* note 11, at 426–27 (describing how the courts at the time either exhibited a "strict constructionist" or "broad constructionist" approach in reading the statute, especially in deciding whether the statute's intention was to prohibit schemes whose primary effect involved defrauding the post office or to prohibit schemes that used the mails in some furtherance of a broader effort to defraud (quoting Rakoff, *supra* note 11, at 790–802)).

In 1889, Congress attempted to alleviate the confusion by amending the statute.[17] Although the amendments added detail, confusion still persisted.[18] Despite the confusion, however, a series of Supreme Court cases and additional congressional amendments in 1909 expanded the reach of the mail fraud statute.[19] This growth marked the foundation for extremely broad judicial interpretation,[20] eventually making the mail fraud statute one of the most criticized yet utilized of federal criminal statutes.[21]

17. *See* Act of March 2, 1889, ch. 393, § 5480, 25 Stat. 873. The revised language prohibited schemes involving "spurious coin, bank notes, paper money . . . or any scheme or artifice to obtain money . . . 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 cigars', or any other names or terms intended to be understood as relating to such counterfeit or spurious articles." *Id.*

18. *See* Hurson, *supra* note 11, at 427 (mentioning that courts still disagreed as to whether the 1889 amendments "expanded or contracted the scope of the statute").

19. The first Supreme Court decision significantly developing mail fraud jurisprudence was *Durland v. United States*, in which the Court affirmed a mail fraud conviction stemming from a scheme whereby bonds were sold under an installment contract in exchange for a promise to pay purchasers when the bonds matured. 161 U.S. 306, 307–08, 315 (1896). The Court looked at the "scheme or artifice to defraud" language of the statute and concluded that the statute was broad in application. *Id.* at 313. "[T]he statute must be read . . . [to] include[] everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose." *Id. But see* Neder v. United States, 527 U.S. 1, 24 (1999) (distinguishing *Durland* by noting that the case did not extend the mail fraud statute to "encompass[] more than common-law fraud"). Congress amended the statute in 1909 to remove the requirement that the scheme be fully realized exclusively through use of the mails and added the phrase "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130; Hurson, *supra* note 11, at 427. Interpretive case law was forthcoming in later years. *See* Parr v. United States, 363 U.S. 370, 389 (1960) (rejecting the argument that if Congress normally cannot forbid such schemes because state law controls, then Congress cannot criminalize them via mail fraud, because Congress may control the mails, and thus has transitive jurisdiction over any fraudulent schemes executed through the mails); Badders v. United States, 240 U.S. 391, 393–94 (1916) (declaring that Congress may regulate the act of mailing a letter, which includes forbidding mailing a letter to further a scheme Congress regards as contrary to public policy); United States v. Young, 232 U.S. 155, 161 (1914) (noting that in light of the 1909 amendments, a mail fraud violation only requires a scheme to defraud and the placing of a letter in the mails to "execut[e] such scheme or attempt[] to do so"). Both Rakoff and Hurson note that the *Badders* opinion has been used by numerous courts to avoid defining "scheme to defraud," instead allowing a focus on actual abuse of the mails to justify a conviction. *See* Hurson, *supra* note 11, at 428; Rakoff, *supra* note 11, at 818–19.

20. Refer to notes 32–33 *infra* (noting cases prosecuting those in both the private and public sectors).

21. *See* Brown, *supra* note 6, at 225–28 (contending that the present mail fraud statute raises serious federalism issues in the wake of *United States v. Lopez*); Moohr, *supra* note 5, at 153–56 (arguing that the intangible rights doctrine of the mail fraud statute is void for vagueness and violates federalism, separation of powers, and First Amendment principles). Judge Rakoff noted the statute's popularity with prosecutors in words that have become a staple for any article discussing mail fraud:

B. Refinement via the Appellate Courts: Introducing the Intangible Rights Doctrine

1. Gradual Development in the Appellate Courts. Over the course of nearly one hundred twenty-five years, the mail fraud statute has been scrutinized by both courts and commentators.[22] For the first fifty years of the statute's existence, most federal mail fraud prosecutions targeted schemes whose purpose was to deprive another of money or property through use of the mails.[23] This has long been one of the basic purposes of the statute,[24] leading to numerous prosecutions.[25] However, scholarly analysis of the statute in the last sixty years has focused nearly exclusively on what has become known as the intangible rights doctrine.[26]

The intangible rights doctrine developed through decisions of the federal courts of appeals and was eventually codified by Congress.[27] The doctrine is based on the belief that certain

> 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. § 1341, with its simplicity, adaptability, and comfortable familiarity. It understands us and, like many a foolish spouse, we like to think we understand it.

Rakoff, *supra* note 11, at 771 (footnotes omitted).

22. Refer to note 21 *supra* and note 200 *infra*.

23. *See* Rakoff, *supra* note 11, at 815–16 (noting that prior to the 1909 revision, prosecutors looked to Congress to clarify the statute's confusing language). The doctrine assuring another of the intangible right to honest and faithful services did not appear in case law until the cases *Shushan v. United States*, 117 F.2d 110, 115–16 (5th Cir. 1941), and *United States v. Proctor & Gamble Co.*, 47 F. Supp. 676, 678–79 (D. Mass. 1942), both some sixty-eight years after Congress enacted the first statute prohibiting mail fraud.

24. *See* United States v. McNeive, 536 F.2d 1245, 1248 (8th Cir. 1976) (declaring that "deceptive schemes which are intended to defraud individuals of money or other tangible property interests" are the target of most mail fraud prosecutions). 18 U.S.C. § 1341 (1994) states in part, "Whoever, having devised or intending to devise any scheme or artifice to defraud, *or for obtaining money or property* by means of false or fraudulent pretenses . . . ." 18 U.S.C. § 1341 (emphasis added).

25. *See, e.g.*, United States v. Maze, 414 U.S. 395, 396 (1974) (stating that the defendant was prosecuted for defrauding a bank and several merchants of goods and services after using a stolen credit card); Pereira v. United States, 347 U.S. 1, 8–9 (1954) (noting that the defendant was charged with fraud to deceive a wealthy widow of money and property); Durland v. United States, 161 U.S. 306, 312 (1896) (stating that the defendant's indictments included fraud to obtain money from unsuspecting purchasers of bonds).

26. *See* Hurson, *supra* note 11, at 428–29 (declaring that the development of the statute in later times is of "more immediate concern" than early developments and that these later decisions introducing the intangible rights doctrine "started the mail fraud statute on its march to prosecutorial prominence").

27. *See* 18 U.S.C. § 1346 ("[T]he term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services.").

individuals are entitled to the honest and faithful services of another.[28] "Another" is usually a public official or a private fiduciary.[29] Failure to provide the entitled services, coupled with use of the mails in furtherance of the failure, is a crime subject to prosecution under the mail fraud statute.[30] The doctrine provides another dimension separate from traditional, tangible loss (money or property) mail fraud prosecutions.[31]

Courts have long interpreted the intangible rights doctrine broadly, often making public and private fraudulent activity at the state and local levels the target of federal criminal prosecution.[32] In the private context, most situations involve a fiduciary, employee, or agent who owes the intangible right of "honest and faithful services" to a beneficiary, employer, or principal.[33] More often and with more notoriety, prosecutions in

28. *See* Moohr, *supra* note 5, at 155 (explaining that a public official violates his fiduciary obligations to the public by depriving the public of honest services merely by failing to disclose "material information").

29. *See id.* at 163–64 (stating that, under the intangible rights doctrine, a fiduciary, agent, or employee can be prosecuted under the statute for material deception or for failing to disclose, and a politician can be prosecuted for breaching his duty of honesty and loyalty owed to the public).

30. *See id.* at 158–59 (reciting the elements needed to prove a violation of the mail fraud statute).

31. Refer to notes 23–25 *supra* and accompanying text (discussing early mail fraud prosecutions, most of which targeted schemes to defraud victims of money or tangible property).

32. *See* United States v. Bryza, 522 F.2d 414, 422 (7th Cir. 1975) (relating that "a deprivation of an employee's loyal services" to an employer can constitute "actual fraud under the mail fraud statute"); Moohr, *supra* note 5, at 163–64 (noting that prosecutions of public officials "are based on the notion that a public official is a fiduciary of the citizenry and owes fiduciary duties of honesty and loyalty" and that failure to uphold those duties "deprives citizens of the intangible right to . . . honest government").

33. *See* Hurson, *supra* note 11, at 429 (noting that "[a]lmost any action" taken by a person in the private context that involves material deception and "causes detriment to his beneficiary, principal, or employer" brings the individual within the scope of prosecution under the mail fraud statute). The case law is significant. *See, e.g.*, United States v. Weiss, 752 F.2d 777, 784–85 (2d Cir. 1985) (upholding the conviction of a corporate officer who secretly created an illegal securities cash fund); United States v. Bronston, 658 F.2d 920, 926–30 (2d Cir. 1981) (affirming the conviction of an attorney with a conflict of interest); United States v. Barta, 635 F.2d 999, 1001–03 (2d Cir. 1980) (finding that a bond trader who abused his employer's trust by concealing information defrauded the employer of its intangible right to honest and faithful services); *Bryza*, 522 F.2d at 421–22 (affirming the mail fraud conviction of a buyer because he deprived his employer of his honest and faithful services by failing to disclose kickbacks received from suppliers); United States v. George, 477 F.2d 508, 511–15 (7th Cir. 1973) (concluding that a company purchasing agent's receipt of kickbacks and subsequent concealment deprived his employer of his loyal and honest services); United States v. Buckner, 108 F.2d 921, 926–27 (2d Cir. 1940) (upholding the mail fraud convictions of bond protective committee members who fraudulently converted trust funds to their own use); United States v. Proctor & Gamble Co., 47 F. Supp. 676, 678–79 (D. Mass. 1942) (affirming the conviction under the mail fraud statute of corporate officers who paid employees of a rival company to turn over trade secrets).

the public sector usually target a public or quasi-public official who owes, and has allegedly failed to provide, honest and faithful services to the citizens of a body politic.[34] Even an individual

34. *See* United States v. Holzer, 816 F.2d 304, 307–10 (7th Cir. 1987) (affirming the conviction of a county court judge who concealed loans made or arranged by lawyers with matters before his court); United States v. Silvano, 812 F.2d 754, 755, 758–60 (1st Cir. 1987) (upholding the conviction of the acting budget director for the City of Boston for using his position to "extort" funds from a contractor and failing to disclose his friend's interest in a city contract); United States v. Girdner, 754 F.2d 877, 878–80 (10th Cir. 1985) (holding that a candidate for the Oklahoma House of Representatives who used the postal system in his absentee ballot fraud scheme violated the mail fraud statute); United States v. Odom, 736 F.2d 104, 106–09 (4th Cir. 1984) (upholding the conviction of a county court sheriff and clerk candidates' workers who cast absentee ballots of nursing home residents); United States v. Clapps, 732 F.2d 1148, 1149–53 (3d Cir. 1984) (affirming the conviction of a county political party chairman who fraudulently procured and marked absentee ballots from nursing home residents); United States v. Cavale, 688 F.2d 1098, 1100–05, 1110–11 (7th Cir. 1982) (affirming the mail fraud conviction of the chief of the City of Chicago Police Department maintenance division who fraudulently billed the department for vehicle repairs); United States v. Boffa, 688 F.2d 919, 923–31 (3d Cir. 1982) (holding "that a scheme to deprive employees of [NLRA] section 7 rights does not constitute a crime under the mail fraud statute" but that a scheme by corporate officers "to defraud employees of the loyal, faithful, and honest services of their union official" is a crime under the statute); United States v. Curry, 681 F.2d 406, 408–18 (5th Cir. 1982) (finding sufficient evidence of mail fraud by the chairman of a citizens' political action organization who converted its funds to his own use but reversing on other grounds); United States v. Margiotta, 688 F.2d 108, 112–13, 120–30, 138 (2d Cir. 1982) (upholding the conviction of the chairman of the Republican Committees of Nassau County and Town of Hempstead, New York who fraudulently enriched his associates); United States v. Barber, 668 F.2d 778, 780, 784–85 (4th Cir. 1982) (affirming the conviction of a former West Virginia Alcoholic Beverage Control commissioner who accepted illegal cash and liquor payments); United States v. Lee Stoller Enters., Inc., 652 F.2d 1313, 1316, 1321 (7th Cir. 1981) (affirming the conviction of a county sheriff who received prostitution and automobile towing ring payoffs and embezzled fundraising proceeds of a social and charitable organization); United States v. Diggs, 613 F.2d 988, 990–91, 994, 997–99, 1002–03 (D.C. Cir. 1979) (upholding the conviction of a United States congressman from Michigan who misapplied funds allotted to pay congressional employees); United States v. Mandel, 591 F.2d 1347, 1352–53, 1357–65 (4th Cir. 1979) (affirming the application of the mail fraud statute to the Governor of Maryland who participated in a concealed scheme to bring a certain racetrack to Maryland); United States v. Brown, 540 F.2d 364, 368, 373–77 (8th Cir. 1976) (affirming the conviction of the building commissioner of the City of St. Louis who participated in a rental payment scheme); United States v. Rauhoff, 525 F.2d 1170, 1175–76 (7th Cir. 1975) (affirming the conviction of an individual who attempted to bribe the Secretary of State of Illinois); United States v. Bush, 522 F.2d 641, 646–49 (7th Cir. 1975) (upholding the conviction of the press secretary and director of public relations for the Mayor of Chicago who concealed his interest in a contractor for the city); United States v. Keane, 522 F.2d 534, 544–53 (7th Cir. 1975) (upholding the conviction of the alderman of Chicago who used his office for his own benefit in acquiring and disposing of parcels of land); United States v. Isaacs, 493 F.2d 1124, 1149–52 (7th Cir. 1974) (affirming the conviction of a former governor of Illinois and a former director of the Illinois State Department of Revenue who actively participated in a bribery scheme); United States v. States, 488 F.2d 761, 763–67 (8th Cir. 1973) (affirming the convictions of candidates for party committees of the City of St. Louis who fraudulently registered fictitious voters and marked the associated "absentee ballots" to benefit their own campaigns); Bradford v. United States, 129 F.2d 274, 276–77 (5th Cir. 1942) (affirming the convictions of the former finance commissioner of Alexandria, Louisiana and a Louisiana state legislator who used their offices to sell

state or state agency as an entity in itself may be owed services, as decided in *United States v. Brumley*,[35] where the United States Court of Appeals for the Fifth Circuit, sitting en banc, declared, "We are persuaded that a governmental entity qualifies as 'another' within the meaning of § 1346 . . . ."[36]

2. The Stakes Rise: United States v. Margiotta *and* United States v. Bronston. The Second Circuit, in deciding two cases, *United States v. Margiotta*[37] and *United States v. Bronston*,[38] dramatically expanded the scope of the intangible rights doctrine in the public and private sectors.[39]

In *Margiotta*, the court affirmed, inter alia, the mail fraud conviction of the powerful former Chairman of the Republican Party Committees of Nassau County and the Town of Hempstead, New York.[40] Margiotta was indicted for allegedly devising "a scheme to defraud the Town of Hempstead, Nassau County, New York State, and their citizens (1) of the right to have the affairs of the Town, County and State conducted honestly, free from corruption, fraud and dishonesty, and (2) of the right to [his] honest and faithful participation in the governmental affairs of the Town, County and State."[41]

The court found that although Margiotta was not a per se public official, his mail fraud prosecution for failure to uphold the fiduciary duties of a public official was permissible.[42] Additionally, the court found that Margiotta owed a fiduciary

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buses to the city at fraudulent prices); Shushan v. United States, 117 F.2d 110, 114–15, 121 (5th Cir. 1941) (affirming the conviction of a member of the Orleans Parish, Louisiana Levee Board who accepted kickback payments); United States v. Faser, 303 F. Supp. 380, 381–85 (E.D. La. 1969) (denying a motion to dismiss by a former executive secretary to the governor of Louisiana who received money to deposit state funds in a particular bank).

35. 116 F.3d 728 (5th Cir. 1997) (en banc) (*Brumley III*). *Brumley III* is analyzed at length in Part III of this Comment.

36. *Id.* at 731. Congress added 18 U.S.C. § 1346, the codified version of the intangible rights doctrine, in 1988. Refer to Part II.D *infra*.

37. 688 F.2d 108 (2d Cir. 1982).

38. 658 F.2d 920 (2d Cir. 1981).

39. *See* Coffee, *Modern Mail Fraud*, *supra* note 5, at 432 (arguing that these cases represent the "high water mark" of the intangible rights doctrine).

40. 688 F.2d at 130.

41. *Id.* at 114.

42. *Id.* at 122. The court noted that applying a longstanding two-part test is helpful in deciding whether a fiduciary duty is owed: "(1) a reliance test, under which one may be a fiduciary when others rely upon him because of a special relationship in the government, and (2) a de facto control test, under which a person who in fact makes governmental decisions may be held to be a governmental fiduciary." *Id.* The court concluded that both of these prongs were met and that, therefore, Margiotta's prosecution was valid. *See id.*

duty to the citizens.[43] More important, the court stated that an individual acting in a de facto governmental capacity might be held responsible under the mail fraud statute for actions performed within that capacity.[44] Because nearly every public sector mail fraud prosecution preceding *Margiotta* targeted a full-fledged public official, the *Margiotta* holding dramatically expanded the ability of federal prosecutors to utilize 18 U.S.C. § 1341 in the public sector.[45]

In *Bronston*, the court affirmed the mail fraud conviction of a New York lawyer and state senator who had personally represented a client whose interests were in direct conflict with a client of the lawyer's firm.[46] The court concluded that the jury was given evidence that Bronston owed a fiduciary duty and breached that duty, had specific intent to defraud, that he concealed a material fact, intended to cause actual economic harm to the victim, and used the mails in furtherance of the scheme to defraud.[47] These, the court held, were all necessary standards that supported a finding of conviction.[48]

Bronston marked an important development in private sector mail fraud prosecutions because the decision was apparently based only on the fact that Bronston failed to disclose the conflict.[49] It did not matter to the court that his conduct

43. *Id.* at 124–25. *But see* Part IV *infra* (analyzing the court's statement that no state law need be violated in order to find a fiduciary duty owed).

44. *Margiotta*, 688 F.2d at 123 ("[T]here is no merit to Margiotta's claim that the language of the federal mail fraud statute cannot embrace a theory of fiduciary fraud by one, like the appellant, who has de facto control over the processes of government and is relied upon by others in the rendering of essential governmental decisions.").

45. *See id.* at 139 (Winter, J., concurring in part and dissenting in part) (stating that the majority gave the mail fraud statute "a more sweeping interpretation than any court which has addressed the statute to date"); Hurson, *supra* note 11, at 439 (observing that the *Margiotta* case "opened the door" for the government to criminally prosecute anyone involved in the political process "who merits the prosecutor's disfavor"). Refer to note 34 *supra* (listing numerous cases in which public and quasi-public figures were prosecuted under the intangible rights doctrine).

46. United States v. Bronston, 658 F.2d 920, 922, 930 (2d Cir. 1981). The lawyer in *Bronston* requested that his law firm represent a client, Convenience and Safety Corporation ("C & S"), who wished to become the franchise designated to build bus stop shelters in New York City. *Id.* at 922–23. The firm rejected the offer because it already represented a rival bus stop shelter construction company, BusTop Shelters, Inc. ("BusTop"), who, at the time, was the existing franchise for New York City bus stop shelters. *Id.* Despite the rejection, the lawyer continued to secretly represent C & S on his own and even sent a letter to an official in the New York City Comptrollers Office on his official New York State Senate stationery recommending that BusTop's existing franchise not be renewed. *Id.* at 922–25.

47. *Id.* at 927–29 (discussing the standards in turn and how Bronston violated each).

48. *Id.* at 929–30 (concluding that Bronston's violations supported his conviction).

49. *See id.* at 926 (arguing that failure to disclose when the duty to disclose exists

failed to cause the victim any harm.[50] Although the possible consequences of the case vary, at least one commentator believes that after *Bronston*, any lawyer who has a conflict, no matter how small, may be subject to federal prosecution.[51]

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

As the intangible rights doctrine, and particularly the judicial definition of "scheme to defraud," continued to hemorrhage in the various courts of appeals, the United States Supreme Court intervened. Citing federalism concerns, the Court overturned the opinions of numerous circuit courts. In *McNally v. United States*,[52] the federal government prosecuted several individuals for, inter alia, allegedly concocting a scheme to defraud the citizens and government of Kentucky of various "intangible rights," including the right to conduct state affairs honestly.[53] At trial, the petitioners, Gray and McNally, were convicted of mail fraud and conspiracy.[54] Relying on previous appellate decisions interpreting the scope of the "honest services" doctrine, the United States Court of Appeals for the Sixth Circuit affirmed the mail fraud conviction.[55]

The Supreme Court diverted from the reasoning of the courts of appeals and reversed the conviction on the grounds that the mail fraud statute was intended only to protect the government's interest in property rights and nothing further, thereby excluding from protection the intangible right to honest services by state and local officials.[56] The Court first noted that

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creates liability when the failure could or does harm the fiduciary).

50. *See id.* at 926–27 (noting that actual harm or injury must be contemplated, though harm in fact is not a requirement).

51. *See* Coffee, *Modern Mail Fraud*, *supra* note 5, at 433 (suggesting that a "lack of candor or good faith" to a client represented in only one transaction could now be violative of federal fraud statutes).

> *Bronston* thus crossed a critical threshold: before it, cases in which there was only a conflict of interests, but neither a transaction between the fiduciary and the client nor any misappropriation of information or property by the fiduciary from the client, had been considered merely "constructive fraud," which did not amount to the type of "actual fraud" that transgressed the federal mail and wire fraud statutes.

Id. at 434.

52. 483 U.S. 350 (1987).

53. *Id.* at 352.

54. *Id.* at 355.

55. *Id.* The Sixth Circuit cited *Mandel* and quoted *Margiotta* in support. United States v. Gray, 790 F.2d 1290, 1295–96 (6th Cir. 1986), *rev'd sub nom*. McNally v. United States, 483 U.S. 350 (1987).

56. *See McNally*, 483 U.S. at 360–61 (holding that the jury instruction on honest and faithful services permitted a conviction for conduct not within the reach of 18 U.S.C. §

although the language of the mail fraud statute after the 1909 amendments was disjunctive and could arguably support a prosecution for a scheme to defraud another of something other than money or property,[57] precedent suggested that the term "to defraud" implied a deprivation of something of value.[58] In addition, the Court opined that the doctrine of lenity dictated that the deprivation of honest and faithful services was not conduct proscribed by the mail fraud statute.[59] Finally, in what turned out to be prophetic words, the court stated:

> Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read [18 U.S.C.] § 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.[60]

Justice Stevens, in dissent, noted the numerous times courts had found public officials, private employees, and those involved in voter fraud guilty of depriving another of the intangible right to honest and faithful services.[61] He also urged the majority to look at the mail fraud statute in its plain language and recognize that the inclusion of "or" meant that the statute envisioned a prosecution for a scheme to defraud that did not involve the loss of money or property.[62] In frustration, Justice Stevens

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1341).

57. Refer to note 19 *supra* (describing the 1909 addition of "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" to the already existing prohibition on "schemes or artifices to defraud").

58. *McNally*, 483 U.S. at 358 (elucidating that "the words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching'") (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)).

59. *Id.* at 359–60 (stating that a reading of 18 U.S.C. § 1341 that proscribes a deprivation of honest services would be harsher than a reading limited to money or property deprivation, and that because Congress had not "spoken in clear and definite language" as to whether the harsher reading should prevail, the Supreme Court would apply the less harsh reading). *See also* Cleveland v. United States, 121 S. Ct. 365, 373 (2000) (noting that "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity'") (quoting Rewis v. United States, 401 U.S. 808, 812 (1971)).

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

61. *Id.* at 362–64 & nn.1–4 (Stevens, J., dissenting) (listing the three following kinds of intangible rights deprivations warranting a mail fraud conviction: public officials who defrauded citizens of the right to honest government services, including elected officials and campaign workers who used the mails to falsify votes and deprive the public of a fair election; private employees, agents, union leaders, and corporate officials who deprived their employers, beneficiaries, or others by "accepting kickbacks or selling confidential information"; and individuals who deprived others of nonmonetary, intangible interests).

62. *Id.* at 373 (Stevens, J., dissenting) ("There is no evidence to suggest that

proclaimed, "Perhaps the most distressing aspect of the Court's action today is its casual? almost summary? rejection of the accumulated wisdom of the many distinguished federal judges who have thoughtfully considered and correctly answered the question these cases present."[63]

D. Congress Accepts the Invitation: The Enactment of 18 U.S.C. § 1346— The Restoration of the Intangible Rights Doctrine

A little over a year after the Supreme Court invited Congress to "speak more clearly,"[64] Congress responded by enacting 18 U.S.C. § 1346, which succinctly states: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[65] 18 U.S.C. § 1346 was enacted quickly, without much comment and with virtually no legislative history (a fact that has been persistent in mail fraud legislation).[66] However, one facet was clear: a mail fraud prosecution based on the deprivation of honest services would remain a powerful arrow in the federal prosecutor's quiver.[67]

III. RAISING THE STOCK OF STATE LAW: *UNITED STATES V. BRUMLEY*

A. Procedural Background

Michael Bryant Brumley was convicted on three counts of wire fraud, three counts of money laundering, one count of

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Congress sought to limit the scope of the original prohibition, and its use of the disjunctive 'or' demonstrates that it was adding to, not modifying, the original prohibition.").

63. *Id.* at 376 (Stevens, J., dissenting). Three months later, the Supreme Court reaffirmed and clarified *McNally* in *Carpenter v. United States*, 484 U.S. 19 (1987). In *Carpenter*, the Court expanded the definition of property interests protected under the mail fraud statute to include intangible property rights. *Id.* at 25 (declaring that the intangible nature of certain things does not mean they are not property, subject to protection under the federal mail fraud statute). This holding, however, was still limited to deprivation of forms of property, not services. *See id.* at 24.

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

65. 18 U.S.C. § 1346 (1994).

66. *See* Hurson, *supra* note 11, at 425–26 (discussing the mail fraud statute's broad language and limited legislative history).

67. *See* Cleveland v. United States, 121 S. Ct. 365, 371 (2000). The United States Supreme Court has apparently conceded that Congress has effectively reinstated this aspect of the mail fraud statute. *See id.* (noting that, following the decision in *McNally*, "Congress amended the law specifically to cover [the intangible right to honest services] that lower courts had protected under [18 U.S.C.] § 1341 prior to *McNally*").

conspiracy to commit mail fraud and wire fraud, and two counts of making a false financial statement to a financial institution.[68] A panel of the United States Court of Appeals for the Fifth Circuit reversed all of the convictions except the two false statement counts.[69] Eight months later, the same Fifth Circuit panel withdrew and superseded its original opinion with another opinion based on different reasoning, namely that the federal wire fraud statute, 18 U.S.C. § 1343, and its addendum, 18 U.S.C. § 1346, did not forbid the activity for which Brumley was indicted.[70] After granting the Government's motion for rehearing, the Fifth Circuit, sitting en banc, affirmed Brumley's convictions on the grounds that the statutes did prohibit Brumley's conduct.[71]

B. Majority Opinion

Judge Higginbotham, writing for the court, detailed the facts and circumstances of Brumley's illegal conduct.[72] Brumley was an employee of the Texas Industrial Accident Board (IAB), a state agency that administered Texas's workers' compensation program.[73] Working out of Beaumont, Texas, Brumley assisted the IAB in dealing with workers' compensation claimants, their attorneys, and the insurers of the employers involved in the various claims.[74] In 1990, under directive from the Texas legislature, the responsibility for administering the workers' compensation program shifted from the IAB to the newly formed Texas Workers' Compensation Commission (TWCC).[75] Brumley

68. United States v. Brumley, 116 F.3d 728, 730 (5th Cir. 1997) (en banc) (*Brumley III*).

69. United States v. Brumley, 59 F.3d 517, 523 (5th Cir. 1995) (*Brumley I*), *withdrawn and superseded on reh'g by* United States v. Brumley, 79 F.3d 1430 (5th Cir. 1996), *reh'g en banc granted and vacated by* 91 F.3d 676 (5th Cir. 1996), *on reh'g en banc*, 116 F.3d 728 (5th Cir. 1997). The court found no evidence to prove that Brumley could have foreseen the interstate character of the wire transmissions at issue in the case, a requirement for conviction under the federal wire fraud statute. *Brumley I*, 59 F.3d at 523. The panel noted that without sufficient evidence to support the wire fraud conviction, the conspiracy to commit wire fraud and the money laundering convictions could not stand either. *Id.* at 522–23.

70. *Brumley II*, 79 F.3d at 1432.

71. *Brumley III*, 116 F.3d at 730 (rejecting the argument that 18 U.S.C. § 1346 does not successfully expand the federal mail and wire fraud statutes to reach the deprivation of honest services).

72. *Id.* at 730–31 (detailing Brumley's employment at the time of the conduct for which he was indicted).

73. *Id.* at 730.

74. *Id.*

75. *Id.*

became a TWCC Regional Associate Director and relocated to the TWCC's Houston office.[76]

One of Brumley's primary duties at the TWCC was to identify and monitor attorneys and insurance carriers who failed to abide by the old IAB or new TWCC rules and regulations.[77] In the early 1980s, Brumley began to solicit and receive "loans" from attorneys who appeared before him at both IAB and TWCC hearings.[78] Brumley received the money via wire transfers initiated from Lufkin, Texas, to various other cities within Texas.[79] The transactions were electronically processed from a location outside of Texas.[80] Brumley never repaid the attorneys any of the money borrowed.[81] The United States charged Brumley with creating and carrying out "a scheme to defraud 'the citizens of the State of Texas, including the members of the Texas Industrial Accident Board . . ., an agency of the State of Texas, from receiving the intangible right to honest services.'"[82]

Brumley first argued that Congress did not intend the mail and wire fraud statutes to reach any scheme or artifice to defraud an entity of state government from honest services.[83] Brumley supported his argument[84] by suggesting that the word "another" in 18 U.S.C. § 1346 had a similar meaning to the word "whoever" in 18 U.S.C. §§ 1343 and 1341.[85] Under that meaning, Brumley claimed that "another" did not include a state employer or the citizens of a state.[86] In refuting Brumley's first argument, the court referred to *Brumley II*, in which it had previously noted that 1 U.S.C. § 1's definition of "whoever" included individuals

76. *Id.* at 730–31.

77. *Id.* at 731 (noting that, "according to the indictment, . . . [Brumley was to] 'identify[] attorneys and insurance carriers who failed to follow TWCC or IAB rules and regulations'").

78. *Id.* Brumley also sought the various attorneys' help in securing loans from lending institutions. *Id.*

79. *Id.*

80. *Id.* The transactions were processed from a Western Union computer in Bridgeton, Missouri. United States v. Brumley, 79 F.3d 1430, 1433 (5th Cir. 1996), *reh'g en banc granted and vacated by* 91 F.3d 676 (5th Cir. 1996), *on reh'g en banc*, 116 F.3d 728 (5th Cir. 1997).

81. *Brumley III*, 116 F.3d at 731 (indicating that Brumley borrowed and never repaid over $112,000 from eleven attorneys).

82. *Id.* (quoting the federal government's indictment).

83. *Id.*

84. Brumley borrowed heavily from the arguments made by the majority in *Brumley II*, now the dissenters in *Brumley III*. *Id.*

85. *Id.*

86. *Id.* (illustrating that Brumley believed the words "another" and "whoever" had similar meanings for purposes of the fraud chapter within Title 18, Chapter 63 of the federal criminal code).

but not a state, citizens of a state, a government, or a government agency within the definition of "whoever."[87] Judge Higginbotham concluded that Brumley was an "individual" and qualified as a "whoever" within the parameters of 18 U.S.C. § 1343; therefore, he could be prosecuted for depriving "another" of the intangible right to honest services.[88] The court supported this conclusion by stating that the case did not involve prosecution of a government agency, but of an individual "who abused his position as an employee of a state commission."[89] It further noted that 1 U.S.C. § 1's definition of "whoever" included the terms listed within that statute and not necessarily any other term.[90] "Otherwise, Congress would have said something [different] . . . ."[91] The court finalized its conclusion by stressing that it makes no sense to define the perpetrator of a crime by the definition of the victim of that crime.[92]

Judge Higginbotham next addressed Brumley's argument that regardless of whether "another" was not related to "whoever," "another" did not include the citizens of a state.[93] The court recognized that the thrust behind Brumley's argument stemmed from the proposition that the meaning of "another" in 18 U.S.C. § 1343 was uncertain enough as to invoke principles of lenity and clear statement.[94] This, the court noted, would suggest that citizens of a state were not within the meaning of the statute.[95] The court rejected the argument and instead explained that Congress, in enacting 18 U.S.C. § 1346, accepted the Supreme Court's invitation in *McNally* and that the language of the statute was clear enough to apply to state officials such as

87. *Id.* (referring to the *Brumley II* panel's remark that "there is nothing that could even remotely be interpreted or construed to mean 'a state,' 'a political subdivision of a state,' 'a government,' 'a governmental agency,' or 'the citizens of a state as a body politic'".

88. *Id.* at 731–32 ("Brumley is himself an 'individual,' and we think he must qualify as a 'whoever' within the meaning of the statute, in which case he can be prosecuted for depriving 'another' of his intangible right of honest services.").

89. *Id.* at 732.

90. *Id.* "Section 1 of Title I provides that 'person' and 'whoever' *include* the listed terms. We read this to mean that 'person' and 'whoever' include the listed terms without deciding whether other non-mentioned entities may qualify as a 'person' or a 'whoever.'" *Id.*

91. *Id.*

92. *See id.*

93. *Id.*

94. *Id.*

95. *Id.* (detailing the argument that a court following lenity and clear statement doctrines would not include citizens of a political unit as members of a protected class under the federal mail and wire fraud statutes).

Brumley.[96] Judge Higginbotham noted that the legislative history of the statute did not suggest that the intangible right to honest services went unprotected.[97] He also agreed with other circuit courts that rejected such arguments.[98] Lastly, he addressed the dissent's concern that the statute failed to provide adequate notice of criminal behavior.[99] Judge Higginbotham explained that Brumley had notice of Congress's rejection of the *McNally* holding[100] and that, even if the statute may prove vague for a small sample of individuals engaged in certain conduct, Brumley and his conduct did not fall within that sample.[101]

Continuing its analysis, the court set out to define "honest services" as found in 18 U.S.C. § 1346.[102] First, it mentioned that no evidence existed to suggest Congress wished to give the federal government the job of determining the appropriate ethical guidelines for employees of state agencies.[103] Instead, the court remarked, prosecution under the statute was appropriate only when the employee acted contrary to his or her job requirements under state law.[104] The court clarified its remarks by stating that "'honest services' contemplates that, in rendering some particular service or services, the defendant was conscious of the fact that his actions were something less than in the best interests of the employer."[105] Putting a premium on the existence of underlying state law, the court held that, for actions to be subject to federal prosecution under 18 U.S.C. §§ 1341, 1343, and 1346, the "services must be owed under state law and . . . the government must prove . . . that they were in fact not

96. *Id.* (referring to Congress's enactment of 18 U.S.C. § 1346 in response to *McNally*'s "Congress . . . must speak more clearly" invitation).

97. *Id.* (suggesting that Congress did intend 18 U.S.C. § 1346 to overturn *McNally*).

98. *Id.* (stating that the First Circuit in *United States v. Sawyer*, 85 F.3d 713, 723–24 (1st Cir. 1996), the Fourth Circuit in *United States v. Bryan*, 58 F.3d 933, 939–43 (4th Cir. 1995), and the Eleventh Circuit in *United States v. Waymer*, 55 F.3d 564, 568 n.3 (11th Cir. 1995), rejected arguments that 18 U.S.C. § 1346 did not protect the intangible right to honest services).

99. *Id.* at 732–33.

100. *Id.* (basing this observation on the implicit announcement that "Congress . . . wanted the courts to enforce the honest-services doctrine developed in the years leading up to *McNally*").

101. *Id.* at 733 (recognizing that, while not every situation would be clear, Brumley's was).

102. *Id.*; *see also* 18 U.S.C. § 1346 (1994) (stating that "'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services").

103. *Id.* at 734 (recognizing that such a structure would violate the constitutional maxims of separation of powers and federalism).

104. *Id.* (noting that an employee who performs all job duties under state law is not subject to mail fraud prosecution merely because of alleged other dishonesty).

105. *Id.*

delivered."[106] Importantly, though, the court emphasized that it would not decide the question of whether the lack of performance must also violate a state *criminal* law to be susceptible to federal prosecution.[107]

In defining "scheme or artifice to defraud," the court noted that both the principles of federalism and the legislative history of the statute showed that the phrase was not intended to be a creature of state law but rather a staple of federal criminal law.[108] The court reiterated, however, that any "rights" to honest services that citizens might possess were solely defined by state law and were limited to services owed to a state employer.[109] The court applied these principles to Brumley by noting that he owed his state employer certain services that he failed to deliver, which violated Texas law.[110] The court then overruled any previous cases that did not agree with the interpretation of the role it gave state law in an 18 U.S.C. § 1346 prosecution.[111]

Finally, the court addressed Brumley's argument that his actions did not violate any state-owed duty.[112] Judge Higginbotham reviewed the evidence presented at trial, namely that Brumley received numerous payments from attorneys seeking favors from the IAB and the TWCC,[113] made favorable comments to IAB colleagues concerning one attorney in particular when that attorney was being investigated by the IAB,[114] tried to stop the investigation,[115] provided the attorney

106. *Id.*

107. *Id.* ("We do not reach the question of whether a breach of a duty to perform must violate the criminal law of the state.").

108. *Id.* (explaining that the elements of a "scheme or artifice to defraud" arose from the federal common law). The court believed that these federal elements, when coupled with the basing of "service" on state law, satisfied the federal interest in combating mail fraud without infringing on the state's ability to govern, thereby maintaining a federalist system. *See id.*

109. *Id.* at 735 (emphasizing that if the meaning of "rights" ventures outside of state law, the federal government risks promoting its own agenda for "good government" at the state and local level, a move too laden with overtones of federal interference into state concerns and "genuine difficulties of vagueness").

110. *Id.* at 735–36 (finding that Brumley's conduct violated TEX. PEN. CODE ANN. § 36.08(e) (Vernon 1994), which makes it a "Class A misdemeanor for a public servant with judicial authority to 'solicit[], accept[], or agree[] to accept any benefit from a person the public servant knows is interested in or likely to become interested in any matter before the public servant or [his] tribunal'"). The penalty for such conduct is imprisonment for up to one year and a fine of up to $4000. *Id.* at 735; TEX. PEN. CODE ANN. § 12.21 (Vernon 1994).

111. *Brumley III*, 116 F.3d at 735.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

with valuable information about document alteration so that the attorney's violations would be concealed,[116] and used his position to attempt to coax TWCC officials into leasing select property from the attorney.[117] Relying on this information and the fact that the district court based its decision on Brumley's violation of Texas law, the court ruled that Brumley failed to provide services owed under state law, thus justifying his conviction.[118]

C. Dissenting Opinion

Judges Jolly and DeMoss, joined by Judge Smith, wrote a lengthy and blistering dissent based largely on the grounds contained in the Fifth Circuit's second *Brumley* decision.[119] The dissenters accused the majority of ignoring lenity principles,[120] due process requirements,[121] the intent of Congress,[122] and the related legislative history of 18 U.S.C. § 1346.[123] In addition, the dissent asserted that the majority partook in unfavorable judicial legislation by affirming Brumley's conviction.[124]

The dissent began by recalling an important stage in the history of mail fraud jurisprudence[125]—the Supreme Court decisions of *McNally v. United States*[126] and *Carpenter v. United States*.[127] The dissent stated that *McNally* clearly demonstrated that the Supreme Court did not believe the mail fraud statute reached schemes to defraud citizens of the intangible right to honest services.[128] In addition, the dissent noted that in

116. *Id.*

117. *Id.*

118. *Id.* at 735–36.

119. *Id.* at 736–47 (Jolly & DeMoss, JJ., dissenting); *see also* United States v. Brumley, 79 F.3d 1430, 1432–43 (5th Cir. 1996), *reh'g en banc granted and vacated by* 91 F.3d 676 (5th Cir. 1996), *on reh'g en banc*, 116 F.3d 728 (5th Cir. 1997).

120. *Brumley III*, 116 F.3d at 736 (Jolly & DeMoss, JJ., dissenting) (explaining that when courts interpret a criminal statute they must favor the narrower interpretation unless Congress speaks to the contrary in clear and definite language).

121. *Id.* at 736, 745–46 (Jolly & DeMoss, JJ., dissenting) (asserting that 18 U.S.C. § 1346 fails to give average citizens fair notice of a change in the law).

122. *Id.* at 746 (Jolly & DeMoss, JJ., dissenting) (noting that neither the statute's words nor its legislative history indicate Congress's intent with regard to delegating to the courts the task of defining "honest services").

123. *Id.* at 736–37 (Jolly & DeMoss, JJ., dissenting) (noting that the majority does not address the legislative history of 18 U.S.C. § 1346 although the legislative history does not reflect Congress's intent to police state officers' integrity).

124. *Id.* at 736 (Jolly & DeMoss, JJ., dissenting).

133. *See id.* at 738–39 (Jolly & DeMoss, JJ., dissenting).

126. 483 U.S. 350 (1987). Refer to Part II.C *supra* (discussing the *McNally* case).

127. 484 U.S. 19 (1987).

128. *Brumley III*, 116 F.3d at 738 (Jolly & DeMoss, JJ., dissenting) (discussing the Supreme Court's reversal of the Court of Appeals' decision that the mail fraud statute prohibits defrauding citizens' intangible rights to an honest and impartial government).

Carpenter the Supreme Court reiterated the *McNally* holding and clarified that the mail and wire fraud statutes protected both tangible and intangible *property* rights.[129] The dissent believed these cases were important in part because "an employer's contractual right to an employee's honest and faithful services [w]as 'an interest too ethereal in itself to fall within the protection of the mail fraud statute,'" and the majority had put great emphasis on the nature of Brumley's relationship with the TWCC.[130]

The dissent continued by examining 18 U.S.C. § 1346 and the circumstances surrounding its enactment.[131] It stressed that any court, in examining possible federal encroachment on state matters, must look for clear statutory language to that extent.[132] In arguing that the statute failed to provide the clear language required to meet the standards, the dissent noted that the term "another" as found in 18 U.S.C. § 1346 can arguably be defined by examining the definition of "whoever" as found in 1 U.S.C. § 1 and that the definition of "whoever" does not include any mention of a state, citizens of a state, a governmental agency, or any employee of a governmental agency.[133] Therefore, the dissent argued, Congress did not clearly state that it intended to afford the State of Texas and its citizens protection under the mail or wire fraud statutes.[134]

"'Rather than construe the statute . . . in a manner that leaves its outer boundaries ambiguous and *involves the Federal Government in setting standards of disclosure and good government for local and state officials*, we read § 1341 as limited in scope to the protection of property rights." *Id.* (Jolly & DeMoss, JJ., dissenting) (quoting McNally v. United States, 483 U.S. 350, 360 (1987) (internal quotation marks omitted)).

129. *Id.* at 739 (Jolly & DeMoss, JJ., dissenting) (stressing that "*Carpenter* clearly reaffirms the majority opinion in *McNally*" and extends mail and wire fraud protection to both tangible and intangible property rights).

130. *Id.* (Jolly & DeMoss, JJ., dissenting) (quoting Carpenter v. United States, 484 U.S. 19, 25 (1987)). The dissent's purpose was to discredit the majority's analysis by pointing to language in *Carpenter*. *See id.* (Jolly & DeMoss, JJ., dissenting).

131. *Id.* (Jolly & DeMoss, JJ., dissenting) (explaining that the statute was tacked on as a rider to a larger drug bill passed on the last day of the 100th Congress and that the court must decide whether the congressional statute "answered" the Supreme Court's call for more specificity as outlined in *McNally*).

132. *Id.* at 740 (Jolly & DeMoss, JJ., dissenting). "'If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so *unmistakably clear in the language* of the statute.'" *Id.* (Jolly & DeMoss, JJ., dissenting) (quoting Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)).

133. *Id.* at 741 (Jolly & DeMoss, JJ., dissenting) (observing that 1 U.S.C. § 1 defines "whoever" as "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals").

134. *Id.* at 741–42 (Jolly & DeMoss, JJ., dissenting) (finding it "incomprehensible" to conclude "that the inclusion of the words '[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'" in the statute reflects Congress's clear intention to

In analyzing the legislative history of 18 U.S.C. § 1346, the dissent noted that only the following two items of any interest existed: remarks made on the floor of the House of Representatives by Representative Conyers, and a report written by the Senate Judiciary Committee detailing Congress's intent in passing the mail fraud statute addendum.[135] The dissent observed that although both items spoke to specifically overturning the *McNally* decision, Representative Conyers never mentioned the words "state," "state employee," or "citizens of a state" in his remarks.[136] The dissent stated that the Senate Judiciary Report, a post-enactment report, besides not being entitled to much deference, must be viewed in light of the fact that Congress had previously scuttled legislation addressed at conduct by public officials.[137] The dissent believed these events illustrated that Congress, in enacting 18 U.S.C. § 1346, did not clearly change the language in *McNally* forbidding prosecution under the mail fraud statute for "'schemes to defraud citizens of their intangible rights to honest and impartial government.'"[138]

The dissent ended with two points. First, the dissent argued that 18 U.S.C. § 1346 did not give proper notice to the average citizen or state employee that certain conduct could be subject to federal mail fraud prosecution.[139] Congress, the dissent noted, had the opportunity to clearly define the statutory language of 18 U.S.C. § 1346 but refused to do so when it rejected alternate legislation.[140] Second, the dissent disagreed with the majority's definition of "honest services."[141] It questioned the majority's methods, relating that the majority could not cite any precedent allowing Congress to delegate to the courts the job of "defining the key terms and coverage of a criminal statute."[142] Furthermore, the dissent asserted that the majority contradicted itself several times in its opinion.[143] Overall, the dissent

protect states' citizens from corrupt state officials).

135. *Id.* at 742–43 (Jolly & DeMoss, JJ., dissenting).

136. *Id.* at 743 (Jolly & DeMoss, JJ., dissenting).

137. *Id.* (Jolly & DeMoss, JJ., dissenting).

138. *Id.* at 745 (Jolly & DeMoss, JJ., dissenting).

139. *Id.* (Jolly & DeMoss, JJ., dissenting).

140. *Id.* at 746 (Jolly & DeMoss, JJ., dissenting) (explaining that Senate Bill 2793 would have clearly notified state officials and that the House of Representatives' refusal to adopt the bill implicitly demonstrated its unwillingness to reach state employees' conduct).

141. *Id.* (Jolly & DeMoss, JJ., dissenting) (arguing that the majority defined "honest services'" with its "own subjective notions" but not with Congress's words).

142. *Id.* (Jolly & DeMoss, JJ., dissenting).

143. *Id.* (Jolly & DeMoss, JJ., dissenting).

concluded, the opinion of the court was "issue-evasive and jurisprudentially flawed."[144]

IV. POTENTIAL PROBLEMS IN REQUIRING A STATE LAW VIOLATION

The Fifth Circuit's approach in *United States v. Brumley*, requiring the violation of a state-owed duty in order to federally prosecute an individual for honest services mail fraud, may prove problematic for a number of reasons.

A. The Federal Criminalization of State Law

Forcing prosecutors to craft their mail fraud prosecutions on underlying state law essentially leads to the de facto federal criminalization of state law.[145] In the wake of *Brumley*, the body of honest services federal mail fraud law in the Fifth Circuit seems inextricably intertwined with the law of the states. Public officials whose conduct previously may at best have violated a state law (even one without significant penalties) will now have to be extra vigilant of the federal avengers, for a violation of a state law may now be all that the federal government needs to initiate an honest services mail fraud prosecution.[146] This differs from the pre-*Brumley* situation in which a public official who violated a minor state law (perhaps a misdemeanor) could possibly be spared prosecution because the federal government wished to spend its limited resources on prosecuting others who, despite the failure to violate a clear state-owed duty, had engaged in illicit activity against which federal prosecutors placed a higher priority.[147] Indeed, past mail fraud prosecutions that appeared to derive most of their "scheme to defraud" fuel from the violation of minor state laws (for example, nonbribery) were often reversed or vacated and remanded on appeal.[148] Post-*Brumley*, this may not be the case.

144. *Id.* at 736 (Jolly & DeMoss, JJ., dissenting) (prefacing their dissent).

145. By basing federal prosecutions on state law, federal prosecutors are essentially stating that certain state law violations are actually prohibited by federal law.

154. *See* Brown, *supra* note 6, at 286 & n.516 (stating that "potential defendants . . . may be uncertain about how to proceed against a backdrop of possible federal criminal action").

147. However, it is important to note that federal prosecutors have used violations of state laws as required "predicate offenses" to get federal convictions under the Racketeer Influenced and Corrupt Organization (RICO) Act, 18 U.S.C. § 1961.

148. *See, e.g.*, United States v. Sawyer, 85 F.3d 713, 728 (1st Cir. 1996) (vacating and remanding a mail fraud conviction and noting that even the intentional violation of a state gift statute does not alone equate to the deprivation of honest services). "To allow every transgression of state governmental obligations to amount to mail fraud would

B. Uniformity Concerns

One potential result of *Brumley* is the possibility that, at least within the Fifth Circuit, there may no longer be uniformity in federal mail fraud law. Indeed, one could enter Texas, Louisiana, and Mississippi all on a given day and, depending on the duties owed according to the laws of each state, engage in activity that could be subject to mail fraud prosecution in one state while being insulated from prosecution in a neighboring state.[149] The furtherance of uniformity in federal criminal law is well settled.[150] *Brumley* may upset uniformity because its holding could mean that an essential element of a federal criminal law is subject to the vagaries of state laws and the conflicting priorities of various state legislatures.[151] This wrinkle in the federal law could shift prosecution of questionable activity by public officials or private fiduciaries away from states that do not have comprehensive bribery, conflict of interest, or election laws (or where judicial interpretation of such laws makes prosecution difficult), because the federal prosecutor and the courts in such jurisdictions may conclude that actors in such schemes are possibly immune from federal prosecution utilizing an applicable state law.[152] Conceivably, sophisticated actors, such as influential political contributors and fundraisers, telemarketers, or others, may, if cleverly counseled, concentrate activities in states where they perceive federal fraud prosecutions as less likely to be initiated.[153]

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effectively turn every such violation into a federal felony; this cannot be countenanced." *Id.*

149. *See, e.g.*, United States v. Shotts, 145 F.3d 1289, 1294–95 (11th Cir. 1998) (noting that the use of state law allows for different results depending upon the circuit in which the activity in question took place and stating that "what constitutes mail fraud apparently is susceptible to fifty different interpretations"); Brown, *supra* note 6, at 285 (acknowledging uniformity concerns inherent in a mail fraud jurisprudence based on state law).

150. *See* Ableman v. Booth, 62 U.S. 506, 517–18 (1858) (describing the supremacy of the Constitution and the laws of the United States over any particular state law and noting the dangers inherent without uniform interpretation of federal law throughout the United States).

151. *See Shotts*, 145 F.3d at 1295–96 (observing that basing mail fraud on state laws that vary from state to state could lead to "fifty different interpretations" of what constitutes mail fraud).

160. *See* Brown, *supra* note 6, at 298 (noting that if no state law exists for federal prosecutors to utilize, or if existing state law is inadequate, thus "is the price we pay for federalism").

153. *See Shotts*, 145 F.3d at 1295 n.8 (stating that "one who embarks upon fraud would do well to consult state law").

C. Brumley *Wrongly Interprets the Intent of Congress*

18 U.S.C. § 1346 was hastily enacted.[154] Consequently, the legislative history of the statute is sparse.[155] The existing history, however, clearly states that Congress's intent in enacting 18 U.S.C. § 1346 was to overturn *McNally* and reinstate the intangible rights doctrine.[156] This intent included reverting to the numerous circuit court opinions that expanded and defined the doctrine before the *McNally* decision.[157] The *Brumley* court recognized Congress's intent to reinstate the intangible rights doctrine.[158]

Judicial interpretation that Congress enacted 18 U.S.C. § 1346 to overrule *McNally* is well accepted.[159] Therefore, it is somewhat confusing why the en banc Fifth Circuit, after recognizing this intent, also believed that Congress had issued a mandate for the courts to "defin[e] 'honest services.'"[160] It is perplexing that, in its own effort to define "honest services," the *Brumley* court added the violation of state law as an element,

154. Refer to Part II.D *supra* (expounding upon the hasty enactment of § 1346). The statute was part of a 1988 anti-corruption amendment attached to a drug bill passed in the last hours of the 100th Congress. Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 369, 488 n.450 (1989) (providing a thorough look at the events and atmosphere surrounding the passage of 18 U.S.C. § 1346).

155. Refer to Part II.D *supra* (discussing the legislative history of 18 U.S.C. § 1346).

156. 134 CONG. REC. H11,251 (daily ed. Oct. 21, 1988) (statement of Rep. Conyers) ("This amendment restores the mail fraud provision to where that provision was before the *McNally* decision. . . . This amendment is intended merely to overturn the *McNally* decision."). Several days after the bill passed, the Senate Judiciary Committee issued a report to explain the provisions of the bill. Concerning 18 U.S.C. § 1346, the Senate report stated, "This section overturns the decision in *McNally v. United States* . . . . Under the amendment, those statutes will protect any person's intangible right to the honest services of another, including the right of the public to the honest services of public officials." *Id.* at S17,376 (daily ed. Nov. 10, 1988) (statement of Sen. Biden).

157. *Id.* (statement of Sen. Biden) ("The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change.").

158. United States v. Brumley, 116 F.3d 728, 733 (5th Cir. 1997) (en banc) (*Brumley III*) ("Congress, in other words, announced that it wanted the courts to enforce the honest-services doctrine developed in the years leading up to *McNally*.").

159. *See, e.g.*, Cleveland v. United States, 121 S. Ct. 365, 371 (2000) (reasoning that Congress intended to re-establish the intangible rights doctrine by enacting 18 U.S.C. § 1346); United States v. DeVegter, 198 F.3d 1324, 1327 (11th Cir. 1999) (noting that "'Congress passed [§ 1346] to overrule *McNally* and reinstate prior law'") (alteration in original) (quoting United States v. Lopez-Lukis, 102 F.3d 1164, 1168–69 (11th Cir. 1997)), *cert. denied*, 120 S. Ct. 2723 (2000); United States v. Grandmaison, 77 F.3d 555, 566 (1st Cir. 1996) (opining that Congress enacted 18 U.S.C. § 1346 to reverse *McNally*); United States v. Waymer, 55 F.3d 564, 568 n.3 (11th Cir. 1995) (commenting that Congress intended 18 U.S.C. § 1346 to "restore the mail fraud statute to its pre-*McNally* position" and thereby allow a mail fraud conviction for depriving another of honest services).

160. *Brumley III*, 116 F.3d at 733 (declaring that Congress has indirectly instructed the courts of appeals to create a workable definition of "'honest services'").

especially given that Congress never suggested or endorsed such a view.[161] Indeed, the *Brumley* court offered only the following two reasons for such uncharacteristic judicial activism: the belief that the pre-*McNally* honest services doctrine was far from uniform and now must be more clearly developed,[162] and a proposed solution that the combination of an honest services definition bottomed on state law and a federally-defined "scheme . . . to defraud" provides a harmonious balance of state and federal interests.[163] Although interpreting legislative history is an imperfect science, it is difficult to grasp the *Brumley* court's reasoning for reaching a conclusion on congressional intent so different from other circuits that have examined the issue.[164] In total, the *Brumley* court's decision to require a state law violation is misguided given the unequivocal remarks of legislators who, in directly answering an invitation from the United States Supreme Court,[165] codified a simple statement about the intangible rights doctrine.[166] This statement was based on a well-developed body of pre-*McNally* case law that explicitly rejected any "state law violation" requirement.[167]

D. The State Law Requirement is Unprecedented

The *Brumley* court's requirement that the federal mail fraud prosecution of a public official for honest services fraud be prefaced on the defendant's failure to perform duties owed under state law[168] is unprecedented.[169] Although the Fifth Circuit's

161. Refer to notes 153–54 *supra* and notes 166–69 *infra* (observing that the legislative history makes no mention of an intent to require a state law violation).

162. *Brumley III*, 116 F.3d at 733 (justifying the new analysis of the term "honest services" by stating that honest services law before the *McNally* decision was not uniform).

163. *Id.* at 734 (concluding that federal interests are met without infringing on the state's domain when "honest services" is defined through the prism of state law and "scheme . . . to defraud" is based on federal criminal law).

164. *See, e.g.*, United States v. Martin, 195 F.3d 961, 967 (7th Cir. 1999) (ruling, in an opinion written by Chief Justice Posner, that "we shall adhere to our anti-*Brumley* position" and noting the differences between *Brumley* and the other circuits); United States v. Sawyer, 85 F.3d 713, 728 (1st Cir. 1996) (holding that a violation of a Massachusetts law, even if intentional, is simply not honest services fraud).

165. *See* McNally v. United States, 483 U.S. 350, 360 (1987) (inviting Congress to "speak more clearly than it has" in delineating the scope of the intangible rights doctrine).

166. *See, e.g.*, Cleveland v. United States, 121 S. Ct. 365, 371 (2000) (opining that "Congress covered *only* the intangible right of honest services") (emphasis added).

167. Refer to note 169 *infra* and accompanying text.

168. *Brumley III*, 116 F.3d at 734 (holding that honest services must be based on a duty owed under state law and that the government must prove in a mail fraud prosecution that such services were not delivered).

169. *See Martin*, 195 F.3d at 966 (stating that *Brumley*'s analysis is inapposite to the law in other circuits).

language in *Brumley* did not explicitly state that an underlying state law must be violated,[170] it is difficult to interpret the holding otherwise. Indeed, most courts and commentators have read the decision as requiring a violation of state law.[171] If so, the *Brumley* court departed substantially from existing case law because the presence of an underlying violation of state law has been, for the most part, irrelevant in mail fraud jurisprudence.[172] The Fifth Circuit has even said that its use may complicate proceedings.[173] Numerous prosecutions have been undertaken both before and after *McNally* on the accepted theory that only a scheme or artifice to defraud another and use of the United States mails are necessary to fall within the ambit of the statute.[174] Although courts have repeatedly labored to forge a workable definition of what constitutes a "scheme to defraud," at times even considering a state law violation as important evidence,[175] such a violation has never been a required element of this federal criminal statute.[176]

170. *See Brumley III*, 116 F.3d at 734. The language reads duty "owed under state law," not "in violation of a state law." *Id.*

171. *See, e.g.*, Coffee, *Modern Mail Fraud*, *supra* note 5, at 446 (stating that *Brumley* holds "that a state law violation is a necessary element of a mail fraud prosecution").

172. *See* McNally v. United States, 483 U.S. 350, 377 n.10 (1987) (Stevens, J., dissenting) ("The lack of a state statute forbidding the underlying conduct does not immunize a defendant from prosecution when he or she uses the United States mails as part of the scheme."); *Martin*, 195 F.3d at 966 (emphasizing that the *Brumley* decision is "contrary to the law" in every circuit that has addressed the state law issue); United States v. Frost, 125 F.3d 346, 366 (6th Cir. 1997) (opining that the existence of a fiduciary duty is a question of federal law); United States v. Sawyer, 85 F.3d 713, 726 (1st Cir. 1996) (noting that "proof of a state law violation is not required for conviction of honest services fraud"); United States v. Keane, 522 F.2d 534, 544 (7th Cir. 1975) (indicating that a violation of underlying state law is not needed to obtain a mail fraud conviction). The Fifth Circuit itself previously stated in the oft-cited *United States v. Edwards* "that the fact that a scheme may or may not violate State law does not determine whether it is within the proscriptions of the federal statute." 458 F.2d 875, 880 (5th Cir. 1972). The *Brumley* court made no effort to distinguish *Edwards*, but instead categorically overruled any previous Fifth Circuit law on state violations not in agreement with *Brumley*'s state law holding. *See* 116 F.3d at 735.

173. United States v. Washington, 688 F.2d 953, 958 (5th Cir. 1982) (observing that it may be confusing to instruct a jury on the basis of a violation of an underlying state fraud law).

174. Refer to notes 33–34 *supra* (detailing various prosecutions based upon honest services fraud utilizing the mail).

175. *See Sawyer*, 85 F.3d at 728–29 (holding that a violation of state statutes *alone* cannot establish honest services mail fraud).

176. *See id.* at 726 (reporting that a violation of state law was necessary because the indictment was structured as such, but that, generally, violation of a state law is not required and could perhaps be problematic).

E. Confusion Reigns: The Failure to Determine if the Breach of Duty Must ViolateState Criminal Law

Adding to the confusion, if the *Brumley* court was attempting to forge a new, perhaps narrower, path in honest services mail fraud law, why did it stop short of deciding whether a breach of duty owed by state law must also violate a state criminal law?[177] The court's approach inevitably raises the question of whether violation of a state civil law is sufficient to support a federal criminal prosecution in all circumstances. The *Brumley* court declared that the criminal violation issue is one of two uncertainties surrounding the influence, if any, that state law has on the mail fraud statute.[178] Also, Brumley happened to have violated a Texas criminal law.[179] The court stated that because the duties Brumley owed were rooted in state criminal law, it need not decide the importance of a criminal violation.[180] Although courts are reluctant to opine on issues not on appeal,[181] the failure to comment here is unfortunate. The result is an uncertainty that may be contrary to the purpose behind the *Brumley* court's fundamental departure from prior law in requiring a state law violation.[182]

Uncertainty also abounds in the court's declaration that the violation of certain state laws that prohibit the "appearance[] of corruption" will not satisfy its requirement that prosecutions be based on a violation of a state-owed duty.[183] Although the court cites opinions from other circuits in support, the reliance is misplaced.[184] For federal prosecutors, public officials, and trial

177. *See Brumley III*, 116 F.3d at 734 ("We do not reach the question of whether a breach of a duty to perform must violate the criminal law of the state.").

178. *Id.* at 733–34 (mentioning that the two issues concerning the relationship of state law to the federal mail fraud statute are whether the honest services must be owed under state law and whether the violation of that law must be criminal).

179. *Id.* at 735–36 (observing that Brumley violated Section 36.08(e) of the Texas Penal Code).

180. *Id.* at 735 (noting that this particular case "does not then require us to decide whether the amended federal statute criminalizes conduct no part of which is criminal under state law").

181. *See, e.g.*, Davis v. United States, 512 U.S. 452, 464 (1994) (Scalia, J., concurring) (stating that it is "sound prudential practice" not to pass on issues not raised); Yee v. City of Escondido, 503 U.S. 519, 535 (1992) ("[W]e ordinarily do not consider questions outside those presented in the petition for certiorari.").

182. Presumably, the Fifth Circuit was attempting to clarify its standard for what constitutes "honest services" in federal mail fraud prosecutions. However, its failure to decide the criminal violation adds confusion that possibly negates any benefit the court perceived would derive from its "standardization" of what a deprivation of honest services entails.

183. *See Brumley III*, 116 F.3d at 734.

184. *See id.* at 734 (citing *United States v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir.

courts alike, uncertainty may reign in the wake of *Brumley*. Conduct by a state employee or other public official that violates a state-owed duty may or may not be prosecutable depending on what "type" of state law violation is at issue. The entire basis of the prosecution will inevitably shift to an assessment of which state statutes are available, whether they prohibit more than the "appearance of corruption," what proof can be marshaled for each side, what jury instructions will be given, and an estimate on what a federal appeals court might ultimately decide about a state statute. In all of this haze, the focus and intent of the federal mail fraud statute is grossly contorted. The *Brumley* court, however well intentioned, has unfortunately contributed to an atmosphere of confusion and uncertainty—the very environment it originally wished to dispel.[185]

F. The Addition of a Criminal Element

A scheme to defraud and use of the mails have long been recognized as the elements the government must prove in any mail fraud prosecution, whether the fraud concerns property, money, or honest services.[186] In *Parr v. United States*,[187] the

1997); *United States v. Sawyer*, 85 F.3d 713, 728–29 (1st Cir. 1996); *United States v. Dowling*, 739 F.2d 1445, 1450 (9th Cir. 1984), *rev'd on other grounds*, 473 U.S. 207 (1985); *United States v. Rabbitt*, 583 F.2d 1014, 1026 (8th Cir. 1978); and *United States v. McNeive*, 536 F.2d 1245, 1246 (8th Cir. 1976), to support excluding certain state law violations from its holding). Each of those cases vacated, reversed, or remanded convictions because of flaws or limits in the federal prosecutions involved, not because of the failure to prove any violation of a state civil or criminal law or that the state law violated was "insignificant." *See Czubinski*, 106 F.3d at 1077 (finding that the government failed to prove that the accessing of confidential information constitutes wire fraud); *Sawyer*, 85 F.3d at 729 (ruling that the district court's instructions to the jury erroneously allowed the jury to find that the defendant's violation of a Massachusetts statute alone is enough to prove intent to defraud, and finding that this was reversible error); *Dowling*, 739 F.2d at 1449 (rejecting the government's argument that illegal conduct alone is enough to serve as the predicate for a mail fraud prosecution); *Rabbitt*, 583 F.2d at 1026 (reversing the defendant's conviction for mail fraud on the grounds that the government had failed to prove that the defendant's conduct had deprived the citizens of their right to the honesty and fairness of the defendant government official in the discharge of his duties); *McNeive*, 536 F.2d at 1247 (deciding that "[18 U.S.C.] § 1341 provides no foundation for the pervasive view the Government now affords it" in reversing the defendant's conviction for mail fraud). Indeed, many of these cases note that the existence of a state law violation is not necessary for a federal mail fraud prosecution. *See, e.g.*, *Sawyer*, 85 F.3d at 726 (intimating that "proof of a state law violation is not required for conviction of honest services fraud").

185. Refer to note 146 *supra* and accompanying text (discussing the link between state and federal law post-*Brumley*, contrasted with the distinction between state and federal law prior to *Brumley*).

186. *See* United States v. Suba, 132 F.3d 662, 673 (11th Cir. 1998) (establishing, in a Medicare fraud case, the elements of mail fraud as "(1) intentional[] participat[ion] in a scheme to defraud and (2) use[] [of] the mails to execute the fraudulent scheme"); Dreher v. United States, 115 F.3d 330, 332 (5th Cir. 1997) (articulating the elements of mail

Supreme Court addressed the element issue when it noted that regardless of whether Congress could prohibit the alleged scheme to defraud, it had the authority to control mail fraud because it had control over the mails.[188] Congress has never defined "scheme to defraud,"[189] so the courts of appeals, both before and after the enactment of 18 U.S.C. § 1346, have provided insight into the parameters of a "scheme to defraud," especially in the context of honest services fraud.[190] Unfortunately, in an attempt to restrict prosecutions generally, the *Brumley* court felt compelled to go further.

By holding that the honest services must be owed under an existing state law and that the prosecution must prove beyond a

fraud as a scheme involving an intent to defraud and the use of the federal mails in carrying out the scheme where defendant sought to defraud a contractor for the cost of labor and materials); United States v. Loayza, 107 F.3d 257, 260 (4th Cir. 1997) (holding, where the defendants conspired to defraud investors, that the elements of mail fraud are an intent to defraud coupled with use of the federal mail system in executing the plan); United States v. Ruiz, 105 F.3d 1492, 1501 (1st Cir. 1997) (ruling that the elements of mail fraud are a scheme involving intent to defraud and use of the mails in its execution where the defendants set fire to a building to defraud an insurance company); United States v. Hubbard, 96 F.3d 1223, 1227–28 (9th Cir. 1996) (defining the elements of mail fraud as an intent to defraud along with use of the federal mails in carrying out the scheme, relating to an odometer tampering scheme); United States v. Jain, 93 F.3d 436, 441 (8th Cir. 1996) (setting forth, in a Medicare fraud/anti-kickback case, the elements of mail fraud as an intent to defraud coupled with the use of the federal mail system in perpetrating the scheme); United States v. Strang, 80 F.3d 1214, 1219 (7th Cir. 1996) (establishing the elements of mail fraud as an intent to defraud and the use of the federal mail system in executing the scheme to defraud where defendant sought to defraud investors), *aff'd*, 134 F.3d 374 (7th Cir. 1998); United States v. Ellerbee, 73 F.3d 105, 107 (6th Cir. 1996) (determining, in a case where the defendant defrauded mail order companies of compact discs, the elements of mail fraud are an intent to defraud and the use of the United States mail in perpetrating the fraud); United States v. DeFries, 43 F.3d 707, 708 (D.C. Cir. 1995) (delineating, in a case in which a defendant defrauded union members of certain funds, the elements of mail fraud as an intent to defraud along with use of the United States mail system in carrying out the fraud); United States v. Frey, 42 F.3d 795, 797 (3d Cir. 1994) (defining the elements of mail fraud as an intent to defraud and the use of the federal mail system in executing the scheme to defraud where defendant sought to defraud investors). Recently, the Supreme Court added the requirement of materiality as an element of a "scheme or artifice to defraud," a holding which comports with the necessity of an intent to defraud, an element courts have traditionally required in mail fraud prosecutions. *See* Neder v. United States, 527 U.S. 1, 25 (1999) (stating that "materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes").

187. 363 U.S. 370 (1960).

188. *See id.* at 389 (declaring that Congress "'may forbid any . . . [mailings] . . . in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not'") (alteration in original) (quoting Badders v. United States, 240 U.S. 391, 393 (1916)).

189. *See McNeive*, 536 F.2d at 1248.

190. Refer to notes 158–64 *supra* and accompanying text (noting the Fifth Circuit's treatment of the honest services doctrine).

reasonable doubt that such services were not provided,[191] the *Brumley* court added an essential element that must be proven to gain a conviction under the mail fraud statute. After *Brumley*, mail fraud prosecutions in the Fifth Circuit based on the deprivation of honest services presumably must demonstrate not only the traditional elements of a scheme to defraud and use of the mails in furtherance of the scheme, but also that the honest services in question were "owed" under state law. The addition of this new element may severely hinder certain types of mail fraud prosecutions.[192] First, prosecutors may have to prove the substantial completion of the scheme to defraud another of honest services in violation of underlying state law, an element of proof not previously required.[193] In effect, it is conceivable that any defense permitted under state law, and any failure of proof that would raise reasonable doubt in a state prosecution, could be fatal to the federal case.

Second, the addition of yet another hurdle for federal prosecutors in cases that are by nature often ambitious and politically risky given the prominence of the defendants will no doubt discourage federal prosecutors from seeking to use the federal criminal process to halt many harmful schemes not clearly prohibited by state law. For example, while all states have statutes prohibiting bribery of public officials[194] and most states prohibit conflicts of interest involving public officials,[195]

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191. United States v. Brumley, 116 F.3d 728, 734 (5th Cir. 1997) (en banc) (*Brumley III*) (reasoning that the prosecution must prove the state official breached a duty of honest services owed under state law).

192. Coffee, *Modern Mail Fraud*, *supra* note 5, at 453–54 (stating that if other courts accept *Brumley* the federal government will be less able to target corruption on the state and local level).

193. By requiring the violation of a state law to determine if honest services were deprived, *Brumley* appears to suggest that actual deprivation (for example, completion of the scheme) must have occurred; mere attempts to violate would not suffice because no state law would be violated—unless, perhaps, if the state was a jurisdiction that adopted some form of the Model Penal Code's provisions criminalizing a general attempt to commit a crime. *See* MODEL PENAL CODE § 5.01, *reprinted in* UNIFORM LAWS ANN. (West 1974) (criminalizing general attempts to commit crimes). Actual completion has never been a requirement in federal mail fraud prosecution. *See* United States v. Blumeyer, 114 F.3d 758, 766 (8th Cir. 1997) (noting that honest services have been denied when the defendant "pursue[s] dishonest ends, not merely when . . . achiev[ing] a dishonest goal"); United States v. Jordan, 112 F.3d 14, 18–19 (1st Cir. 1997) (declaring that the scheme to defraud does not need to be successful to warrant federal prosecution); United States v. Briscoe, 65 F.3d 576, 583 (7th Cir. 1995) (explaining that the government need not prove that the scheme to defraud was successful, but only that there was a scheme to defraud, "use of the mails was reasonably foreseeable[,] and that an actual mailing occurred in furtherance of the scheme").

194. *See* Brown, *supra* note 6, at 275 & n.431 (listing the anti-bribery statutes of all fifty states).

195. Kevin V. McAlevy, Note, *Conflicts of Interest and State Legislatures: Virginia as*

some states either do not explicitly forbid commercial bribery (often the scheme of choice in private sector fraud) or do not make it a criminal offense.[196] In the private sector, nearly every state law controlling such activity is civil in nature.[197] The *Brumley* court's failure to decide the necessity of a criminal law violation, coupled with the fact that state laws affecting private sector actors tend to be civil rather than criminal, fosters great uncertainty for private fiduciaries who may be unsure whether their actions could subject them to federal fraud prosecution.[198] In addition, the language from *Brumley* excepting certain state law violations makes it unclear whether activity such as running afoul of a state gift or gratuity statute would be federally prosecutable.[199]

The ability of the federal government to punish improper activity—particularly that of public officials—at the state and local level may be curtailed in the post-*Brumley* Fifth Circuit until the respective state legislatures act to prohibit such activity. This sudden dependency on state action could eviscerate one of the mail fraud statute's recognized advantages.[200] Given the fact patterns set forth in many of the published mail fraud opinions, it may be unrealistic to expect state legislators to draft explicit laws prohibiting much of this activity when the result could be to subject *themselves* to possible federal prosecution.[201]

a Case Study, 5 J.L. & POL. 209, 213 (1988) (finding that as of 1974, thirty-eight states had statutes prohibiting public official conflicts of interest).

196. Coffee, *Modern Mail Fraud*, *supra* note 5, at 452 (advancing that "many (but far from all) states" forbid commercial bribery).

197. *Id.* at 452–53.

198. For example, a private-sector fiduciary who fails to disclose material information to a beneficiary may violate a state civil law on disclosure, but in the wake of *Brumley*, it is unclear whether the fiduciary could be subject to federal mail fraud prosecution absent the violation of a state criminal statute.

199. *See* United States v. Brumley, 116 F.3d 728, 734 (5th Cir. 1997) (en banc) (*Brumley III*) (holding that violation of a gratuity statute does not satisfy the standard for federal fraud prosecution).

200. *See* United States v. Maze, 414 U.S. 395, 405–06 (1974) (Burger, C.J., dissenting) (extolling that the mail fraud statute has traditionally been the "first line of defense" and a "stopgap device" to halt questionable activity until a state legislature directly confronts the activity); United States v. McNeive, 536 F.2d 1245, 1248 n.5 (8th Cir. 1976) (referencing the *Maze* Court's analysis of the mail fraud statute as a stopgap device as a suggestion of congressional intent in enacting 18 U.S.C. § 1346).

201. *See* Kurland, *supra* note 154, at 377–78 & n.29 (observing that one state official may do little in prosecuting another).

G. Unintended Consequences: Brumley *May Actually Increase the Power of Federal Prosecutors in Certain Circumstances*

An enduring criticism of the mail fraud statute is that it is too broad, allowing overzealous federal prosecutors to monitor the activities of state and local officials until they can cobble together a federal case, thereby raising federalism and selective-prosecution concerns.[202] Indeed, the *Brumley* court recognized the federalism concern and apparently crafted its holding around the issue.[203] In its zeal to limit the power of federal prosecutors, though, the *Brumley* court may have opened the door to an opposite result.

Federal prosecutors, forced by *Brumley* to base their honest services prosecutions on duties owed under state law, may be encouraged to scrutinize state laws, searching for a statutory hook on which to hang the required duty needed to launch a mail fraud prosecution. The details of state law, including obscure administrative regulations, may be sifted in search of a facially plausible state law violation. The product of such forced creativity may actually be an *increase* in mail fraud prosecutions for activity previously thought to be outside the purview of federal prosecution. The *Brumley* court cautioned that mere gratuity violations would not suffice, but seemingly any violation of a duty rooted in state law is suspect as long as the actor otherwise intended to defraud the victim of his honest services.[204] Although the government has supported past mail fraud prosecutions with evidence of underlying state law violations,[205]

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202. *See* United States v. Margiotta, 688 F.2d 108, 139–40 & n.3 (2d Cir. 1982) (Winter, J., concurring in part and dissenting in part) (listing numerous cases commenting, sometimes critically, on the growth of the mail fraud statute). "The limitless expansion of the mail fraud statute subjects virtually every active participant in the political process to potential criminal investigation and prosecution." *Id.* at 143 (Winter, J., concurring in part and dissenting in part).

203. *See Brumley III*, 116 F.3d at 734 ("We find nothing to suggest that Congress was attempting in [18 U.S.C.] § 1346 to garner to the federal government the right to impose upon states a federal vision of appropriate services . . . . Such a taking of power would . . . erode our federalist structure."). *See also* Coffee, *Modern Mail Fraud*, *supra* note 5, at 448 & n.128 (stating that the *Brumley* court was "significantly influenced by the Federalist argument" and wished to avoid allowing the federal government to decide what constituted "good government" for the states).

204. *See Brumley III*, 116 F.3d at 734 (explaining that a defendant must "consciously contemplate[] or intend[]" his conduct to deprive another or be aware that his conduct harms another).

205. *See, e.g.*, United States v. Sawyer, 85 F.3d 713, 725 (1st Cir. 1996) (finding that the government attempted to prove that the defendant committed mail fraud by establishing his violation of two state laws); United States v. Mandel, 591 F.2d 1347, 1362 (4th Cir. 1979) (reasoning that it is not necessary to prove that the defendant violated state bribery laws in order to prove the defendant committed mail fraud).

often the defendant has not explicitly violated a state law, especially a criminal statute.[206] With *Brumley* effectively eliminating prosecutions not grounded in state law, prosecutors faced with activity or particular defendants they feel merit prosecution may vigilantly search for novel ways to fold creative state law violations into the fact pattern in order to bulletproof the prosecution of such state and local officials and, occasionally, private fiduciaries as well. The method of choice may ostensibly be to premise cases on the violation of rarely enforced or otherwise obscure civil, criminal, or hybrid state laws. This approach would give prosecutors an excuse for increased discretion in selecting their schemes and their targets.

H. Scope of Disclosure

Prior to *Brumley*, courts noted the importance of disclosure in the context of public sector cases.[207] Generally, a public official, or someone acting in that capacity, had a duty to disclose to the citizens of the jurisdiction any conflicts of interest, personal gain, or possible improper influence by a contributor.[208] Failure to disclose constituted defrauding the public of its right to the honest and faithful services of its government officials.[209] The *Brumley* court appeared to limit the "disclosure list" to the *employer* of the public official, disregarding any "rights" to disclosure that the public may hold.[210] This has possible far-reaching consequences in terms of the conduct for which a public official may be prosecuted.[211] One commentator notes that this point seemingly overturns previous cases where failure to disclose activity to the citizens was at the heart of the government's case.[212]

206. *See Margiotta*, 688 F.2d at 124 (holding that a violation of New York law is not required as a predicate for mail fraud).

207. *See id.* at 138 (finding that a government official's failure to disclose coupled with use of the mails constituted mail fraud).

208. *See id.* (finding sufficient evidence to support the conclusion that the defendant failed to disclose information in violation of the mail fraud statute).

209. *See id.* (ruling that a government official's failure to disclose information of a "secret agreement" can sustain a conviction of mail fraud).

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

211. Presumably, if the applicable state law of the jurisdiction mentions no requirement of disclosure by public officials to their constituent citizens, the federal government could not bring an honest services mail fraud prosecution based on a public official's failure to disclose to the public.

212. Coffee, *Modern Mail Fraud*, *supra* note 5, at 449, 453 (declaring that the *Brumley* court's limiting disclosure to state law requirements would overturn "*Margiotta*, *Mandel*, and other 'intangible rights' cases" because the common law on a public official's disclosure duties is not well-developed and proclaiming that "if [18 U.S.C.] § 1346 was

V. IN SUPPORT OF EXISTING MEASURES

The use of state law to define the acceptable scope of a federal mail fraud prosecution is not needed. Courts have established intent, causation, and materiality standards that allow the government to punish perpetrators for the kind of fraudulent activity described above yet check the runaway prosecutions that generate so much criticism of the mail fraud statute.

A. Specific Intent to Defraud and the Materiality Requirement

Any mail fraud prosecution must prove that the defendant specifically intended to defraud another.[213] Although courts have liberalized the list of findings that satisfy a showing of intent,[214] the reality is that without intent the government has no case.[215] Indeed, a defendant who can demonstrate a lack of fraudulent intent possibly presents a successful affirmative defense.[216]

The United States Supreme Court recently decided that prosecutors, to garner a conviction for mail fraud, must prove the presence of material falsehoods in any scheme to defraud.[217] Although *Brumley* was decided two years before the Supreme Court ruled, this materiality idea has existed at the appellate level for some time.[218] A materiality standard helps preclude

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intended to mandate a federal standard of . . . disclosure applicable to public officials, it is left in tatters after *Brumley*").

213. *See, e.g.*, United States v. Costanzo, 4 F.3d 658, 664 (8th Cir. 1993) (finding that the proper question is whether the defendant intended to defraud, not whether they intended to break the law). Refer to note 186 *supra* (listing cases that state intent to defraud as a required element).

214. *See, e.g.*, United States v. Berndt, 86 F.3d 803, 809 (8th Cir. 1996) (establishing that a jury may infer intent from circumstantial evidence in a mail fraud case); United States v. Reddeck, 22 F.3d 1504, 1509 (10th Cir. 1994) (explicating the effect of Federal Rule of Evidence 404(b) as allowing the government to introduce evidence of the defendant's prior bad acts to prove intent); *Costanzo*, 4 F.3d at 666 (ruling that the defendant's attempts to conceal activities are a proper predicate for the jury's inference of intent to defraud).

215. *See, e.g.*, United States v. Sawyer, 85 F.3d 713, 725 (1st Cir. 1996) (holding that *intent* to defraud is necessary for the government to prevail in a prosecution for mail fraud).

216. *See, e.g.*, United States v. Morris, 80 F.3d 1151, 1165 (7th. Cir. 1996) (noting that a defendant's genuine good faith belief could be an affirmative defense because of the lack of an intent to defraud).

217. Neder v. United States, 527 U.S. 1, 25 (1999) (holding that the "materiality of falsehood is an element of the federal mail fraud . . . statute[]"). The RESTATEMENT (SECOND) OF TORTS § 538(2)(a) (1977) defines in relevant part something as material if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question."

218. *See* United States v. Cochran, 109 F.3d 660, 667 & n.3 (10th Cir. 1997) (requiring a showing of materiality to effectively prosecute a defendant for mail fraud);

federal prosecutions for minor violations, thus placating critics who decry overutilization of the mail fraud statute.[219] The fact that the Supreme Court has recently spoken on the necessary elements issue lends credence to the argument that *Brumley*'s required element analysis should be revisited.[220]

B. Reliance, Control, and Dominance: Defining Fiduciary Duty

Many mail fraud prosecutions, especially in the private sector, are based on the theory that someone failed to uphold a fiduciary duty to another.[221] Recognizing the importance of this duty to a prosecution, courts have made clear that they will emphasize the scope of this duty when instructing juries.[222] To help define the scope, courts have looked to the reliance that one party places on the other.[223] Courts have also placed emphasis on the amount of domination one party has in a transaction[224] and the extent of de facto control one party exerts over another in a particular relationship.[225] Together, these guidelines assist courts in ensuring that a genuine fiduciary duty existed well before allowing a prosecution based in large part on the "violation" of that duty.

United States v. Jain, 93 F.3d 436, 442 (8th Cir. 1996) (holding that "a fiduciary's nondisclosure must be material to constitute a criminal scheme to defraud").

219. *See* Coffee, *Modern Mail Fraud*, *supra* note 5, at 450 (providing an example of an arguably immaterial violation of the wire fraud statute).

220. Presumably, the United States Supreme Court was aware of the *Brumley III* decision when it ruled in *Neder*. Arguably, therefore, the *Neder* Court's failure to mention the Fifth Circuit's interpretation of the required elements of a mail fraud prosecution may suggest that it does not agree with the *Brumley III* decision.

221. Refer to note 33 *supra* and accompanying text (explaining that mail fraud prosecutions often involve a breach of a fiduciary duty).

222. *See Sawyer*, 85 F.3d at 729 (ruling that the district court's instruction to the jury permitted the jury to find an intent to defraud the public in violation of the official's duties purely from proof of intent to violate the state statute); United States v. Washington, 688 F.2d 953, 958 (5th Cir. 1982) (reasoning that the district court's failure to instruct the jury as to how Mississippi law relates to the federal offense constituted reversible error).

223. *See* United States v. Chestman, 947 F.2d 551, 568–69 (2d Cir. 1991) (in banc) (noting that the extent of one party's reliance on another helps in discerning the scope of the fiduciary duties).

224. *See id.* at 568 (setting forth that the extent of a party's domination of a particular transaction may establish the extent of the party's duty).

225. *See id.* (holding that the extent to which a party exercises *de facto* control over another in a relationship is a factor in determining the duties owed in the relationship).

C. *Private-Sector Protection: Intent to Breach a Fiduciary Duty and Reasonably Foreseeable Economic Harm*

In private-sector mail fraud cases, the courts have been even more vigilant in defining a violation of honest services. Generally, the courts have held that the defendant must have intended to breach a defined fiduciary duty and must have reasonably foreseen an economic harm.[226] Essentially, even if the defendant defrauds an employer of its right to honest and faithful services, the employee must intend to cause economic harm to the employer, or at least reasonably foresee the possibility that the employee's actions could harm the employer economically.[227]

These existing standards set up by the courts act as checks on all mail fraud prosecutions, making sure that the government fulfills its burden of proof. In none of these standards is there any reference to a state law requirement. The result is clear: it should be evident that resorting to state law is essentially an unnecessary endeavor.

VI. CONCLUSION

The use of state law to define the appropriateness of federal mail fraud prosecutions is a concept teeming with more trouble than novelty or benefit. The Fifth Circuit, in *United States v. Brumley*, wished to set an effective tourniquet on errant prosecutions while still leaving intact a tool to prevent ingenious criminals from using the mails to further a fraud. Although clever in its effort, the remedy envisioned by the court is misplaced.

The effects from infusing a state law violation requirement into federal mail fraud law are widespread: The balance of federalism is disturbed, the intent of lawmakers is thwarted, uncertainty in prosecutions develops, unintended results arise, uniformity of federal criminal law evaporates, the very criminal makeup of federal mail fraud is altered, and general confusion ensues. In the aggregate, the state law requirement ends up being more of a disservice to the public than anything else. Granted, the mail fraud statute is arguably overused, and it has

226. *See* United States v. Frost, 125 F.3d 346, 368 (6th Cir. 1997) (illustrating the requirement that the prosecution prove that the defendant intended to breach a fiduciary duty and reasonably foresaw economic harm flowing from the breach in order to prove mail fraud).

227. *See id.* (explaining that, to be convicted of mail fraud, the defendant must have reasonably foreseen that his actions as an employee could economically harm the employer).

received copious amounts of criticism to that effect. Nevertheless, the statute has also allowed authorities to halt schemes that hinted at wrongdoing but perhaps were otherwise unstoppable.

This Comment has attempted to demonstrate the tug-of-war that surrounds the mail fraud statute and its storied past. Additionally, this Comment has attempted to persuade the reader that courts are well aware of this dilemma and have done a capable job of instituting checks and balances on this federal statute without resorting to a judicial activism that involves the body of state law. The mail fraud saga continues throughout the courtrooms of the United States. In the end, though, perhaps the lesson is that a little discretion and common sense by the government, courts, and citizens will calm the waters of what has certainly been a turbulent area of the law.

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