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Criminal Law—Mail Fraud Requires Loss of Property of Money

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CRIMINAL LAW—MAIL FRAUD REQUIRES LOSS OF PROPERTY OR MONEY. *McNally v. United States*, 107 S. Ct. 2875 (1987).

Shortly after his election, the governor of Kentucky gave Howard P. "Sonny" Hunt, Jr., the state chairman of the Democratic Party, de facto control over the selection of the insurance agent from which the State would purchase its policies. Hunt selected Wombwell Insurance Company of Lexington, Kentucky (Wombwell) after Wombwell agreed with Hunt to "kick back" a percentage of the resulting commissions in excess of \$50,000 a year in exchange for a continued agency relationship. Hunt designated twenty-one separate insurance agencies to receive these "excess commissions" from Wombwell.¹ Seton Investments, Inc., (Seton) was one of the businesses designated to receive funds from the kickback. Hunt and James E. Gray, a member of the governor's cabinet with the express authority to select and oversee the state's insurance agent, owned and controlled Seton. Charles J. McNally, a private businessman, acted as the frontman for Seton. Wombwell sent payments of over \$200,000 in "excess commissions" through the mail to Seton. Neither Hunt nor Gray disclosed the "kickback" arrangement to anyone in state government.

The United States charged Hunt with mail fraud, tax fraud, and conspiracy. Hunt pleaded guilty to the charges and received a sentence of three years' imprisonment.² The United States charged Gray and McNally with conspiring to and committing mail fraud³ by devis-

1. The vice president of Wombwell agreed to and maintained this same arrangement with political leaders in the previous administration. *United States v. Gray*, 790 F.2d 1290 (6th Cir. 1986). The patronage system and its place as an institution in American politics is discussed in Coffee, *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117, 144 (1981).

2. "Although unclear from the case, Hunt also pleaded guilty to conspiracy." Telephone interview with Jane Graham, Assistant United States Attorney, Lexington, Kentucky (Nov. 5, 1987).

3. The United States originally charged the defendants with seven counts of mail fraud, six of which the district court dismissed. *United States v. Gray*, 790 F.2d at 1293-94. The six counts dismissed were based on the mailing of Seton's tax returns. *Id.* at 1294. The Court of Appeals for the Sixth Circuit held that the district court properly dismissed the six counts of mail fraud because mailings required by law cannot constitute the basis for liability under 18 U.S.C. § 1341 (1982), unless the documents themselves are false. *Id.* at 1298 (relying on *Parr v. United States*, 363 U.S. 370 (1960) ("mailings of documents which are required by law to be mailed, and which are not themselves false and fraudulent, cannot be regarded as mail for the purpose of executing a fraudulent scheme")). After the district court dismissed the six counts

ing a scheme to defraud the citizens of the state of their right to have the government's business conducted honestly and obtaining money and other things of value by false pretenses and the concealment of material facts.⁴ The district court instructed the jury that this scheme could be established by either of two sets of findings: (1) that Hunt had de facto control over the award of the insurance contract to Wombwell, that he directed payments from this contract to Seton, that this arrangement benefitted him personally and monetarily, that he failed to disclose this arrangement and his interest in Seton in persons in state government, and that Gray and McNally aided and abetted him; or (2) that Gray had supervisory authority regarding the selection of the insurance agent at a time when he received payments through Seton, that he failed to disclose the facts regarding Wombwell and his interest in Seton to persons in state government, and that McNally aided and abetted him. The jury found Gray and McNally guilty of conspiracy and mail fraud.

Because the jury did not specify which of the two findings it predicated guilt upon, Gray and McNally appealed their convictions arguing that Hunt did not hold public office, had no fiduciary duty to the public, and therefore could not have "defrauded" the public.⁵ The Court of Appeals for the Sixth Circuit affirmed, relying on the intangible rights doctrine. According to this doctrine, courts can hold persons such as public officials, who owe a fiduciary duty to the public, criminally liable under the mail fraud statute if they engage in schemes to defraud citizens of their intangible rights to honest and impartial government. Although Hunt did not hold a formal public office, the Sixth Circuit extended the fiduciary duty to him because he

of mail fraud, one count of conspiracy and one count of mail fraud remained. 790 F.2d at 1294.

4. The indictment uses the language taken from the original false pretenses statute. See *infra* note 18.

5. 790 F.2d at 1295. The appeal challenged liability under § 1341 predicated on Hunt's fiduciary status as a de facto public official. *Id.* According to a long line of cases, § 1341 proscribed schemes by public officials to defraud citizens of their intangible rights to honest and impartial government. See, e.g., *United States v. Von Barta*, 635 F.2d 999, 1005-06 (2d Cir. 1980), *cert. denied*, 450 U.S. 998 (1981); *United States v. Mandel*, 591 F.2d 1347, 1362 (4th Cir.), *aff'd in relevant part*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); *United States v. States*, 488 F.2d 761, 766 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974); *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir.), *cert. denied*, 313 U.S. 574 (1941). Because Gray was an elected official, Gray and McNally clearly are liable according to the foregoing authority. Only the Second Circuit extended the fiduciary status and duty to an individual without public office (such as Hunt) who has a special relationship with the government and in fact makes government decisions. *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983). Gray and McNally challenge the validity of that extension. 790 F.2d at 1295.

substantially participated in governmental affairs by exercising exclusive control over the awarding of the state's insurance contracts. The court of appeals held that the district court properly convicted Gray and McNally since the fiduciary duty of one member in a conspiracy extends to all members.⁶

The United States Supreme Court reversed, expressly rejecting the intangible rights doctrine. The Court held that the mail fraud statute protects only property rights. *McNally v. United States*, 107 S. Ct. 2875 (1987).

The Federal Mail Fraud Statute⁷ originated in 1872 as part of an act⁸ which consolidated and recodified the postal laws.⁹ The provision in the statute which proscribes "any scheme or artifice to defraud" had no predecessor.¹⁰ Section 1341 retains this language today.¹¹

The legislative history of the mail fraud statute is sparse. Congressman Farnsworth, the sponsor of the legislation, stated that the section was intended "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rascallions generally, for the purposes of deceiving and fleecing the innocent people in the country."¹² This background suggests that the term "fraud" was not used in a new or technical way, but rather that it carried the conventional meaning of the term.¹³

6. 790 F.2d at 1295 (citing *United States v. Alexander*, 741 F.2d 962, 964 (7th Cir. 1984)).

7. 18 U.S.C. § 1341 (1982). Section 1341 provides in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do [uses the mails or causes them to be used] . . . shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

Id.

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

9. *Id.* See also Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 779-86 (1980); Comment, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. CHI. L. REV. 562, 567 (1980).

10. See M. BEAMAN & A. MCNAMARA, INDEX ANALYSIS OF THE FEDERAL STATUTES, 1789-1873, 525-46 (1909) (cited in Comment, *supra* note 9, at 567 n.35); Rakoff, *supra* note 9, at 779.

11. 18 U.S.C. § 1341 (1982).

12. CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870); Comment, *supra* note 9, at 568. The remarks were made during the debate on the recodification legislation introduced during the 41st Congress. The recodification bill was not passed by the 41st Congress, but was reintroduced and passed by the 42nd Congress with the anti-fraud section intact. Act of June 8, 1872, ch. 335, §§ 149, 301, 17 Stat. 302, 323; Comment, *supra* note 9, at 568 n.47.

13. See Comment, *supra* note 9, at 568. "[I]n the nineteenth century, the prominent forms of fraud were embezzlement, false pretenses, forgery, and larceny by trick." *Id.* at 573.

Congress amended the mail fraud statute in 1889 to prohibit specific schemes with names such as "Green Articles," "Green Goods," or "Green Cigars" which involved counterfeit currency.¹⁴ A typical scheme involved a solicitation of one dollar bills with a promise of an exchange for bills of a higher denomination. The exchanged bills turned out to be counterfeit.¹⁵ The amending legislation, which uses specific language, shows that the original prohibition proscribed conventional types of fraud and was never intended as a broad prohibition of all schemes to defraud.¹⁶

The United States Supreme Court interpreted "a scheme to defraud" in *Durland v. United States*,¹⁷ decided in 1896. The defendant's scheme in *Durland* involved false promises about the future return on bonds which he had for sale. The defendant argued that the statute received only those cases which came within the common law definition of false pretenses.¹⁸ At common law, fraud involved the misrepresentation of existing fact, not the false promises as to a future event. The court rejected this argument, stating that "[t]he statute is broader than is claimed. Its letter shows this: 'Any scheme or artifice to defraud.' Some schemes may be promoted through mere representations and promises as to the future, yet are none the less schemes and artifices to defraud."¹⁹

Congress codified the holding of *Durland* in 1909.²⁰ It added the words "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" after the original clause "any scheme or artifice to defraud."²¹ The sponsor of the

14. Act of Mar. 2, 1889, ch. 393, § 1, 25 Stat. 873; Comment, *supra* note 9, at 568-69.

15. For typical cases which dealt with the counterfeiting schemes at which the statute was aimed, see generally *People v. Marvin*, 29 N.Y.S. 381 (Sup. Ct. 1894) and *People v. Reilly*, 4 N.Y.S. 81 (Sup. Ct. 1889).

16. Comment, *supra* note 9, at 569.

17. 161 U.S. 306 (1896).

18. *Id.* at 310-13. "A criminal false pretense is a false representation of a past or existing fact, which is calculated and intended to deceive, and does in fact deceive, and by means of which one person obtains value from another without compensation." 35 C.J.S. *False Pretenses* § 1 (1960); see also 30 GEO. 2, c. 24, § 1 (1757) (The original English false-pretenses statute, which is part of the common law in some American jurisdictions, provides "all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person or persons, money, good, wares, or merchandizes, with intent to cheat or defraud any person or persons of the same . . . shall be . . . fined and imprisoned.") (cited in Comment, *supra* note 9, at 574 n.71).

19. 161 U.S. at 313.

20. Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130; Comment, *supra* note 9, at 570.

21. *Id.*

amendment stated that the Act was self-explanatory.²²

After *Durland* the lower federal courts began to expand the scope of the mail fraud statute. This expansion²³ occurred primarily in three ways. First, the lower courts interpreted the mail fraud statute broadly based on the authority of *Durland*²⁴ and construed the phrase "a scheme or artifice to defraud" broadly.²⁵ As a result, schemes contrary to public policy²⁶ and those that failed to measure up to accepted moral standards and notions of honesty and fair play²⁷ came within the ambit of the mail fraud statute.

Second, the courts expanded the mail fraud statute by analogizing it to fraud under section 371,²⁸ which criminalizes any conspiracy "to defraud the United States, or any agency thereof in any manner or

22. 42 CONG. REC. 1026 (1908) (remarks of Senator Heyburn); Comment, *supra* note 9, at 569 n.51.

23. The reason this expansion occurred is because "where legislatures have sometimes been slow to enact specific prohibitory legislation, the mail fraud statute has frequently represented the sole instrument of justice that could be wielded against the ever-innovative practitioners of deceit." Rakoff, *supra* note 9, at 772. In combatting a numerous catalog of fraudulent offenses, the mail fraud statute is popular with prosecutors:

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.

Id. at 771. Other possible reasons for the expansive use of § 1341 are discussed *infra* note 80.

24. *United States v. McNeive*, 536 F.2d 1245, 1247 n.3 (8th Cir. 1976) (*Durland* relevant to intangible theory because *Durland* recognized that Congress intended a broad definition of fraud in the statute, broader than the definition of fraud at common law); *United States v. States*, 488 F.2d 761, 764 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974) (Courts should construe the definition of fraud in § 1341 broadly and liberally to further the purpose of the statute.); *United States v. Buckner*, 108 F.2d 921, 926 (2d Cir.), *cert. denied*, 309 U.S. 669 (1940) (citing *Durland* as holding that the term "defraud" must be construed broadly).

25. See, e.g., *Badders v. United States*, 240 U.S. 391 (1916). "Whatever the limits to its power, it may forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not." *Id.* at 393. The Court interpreted broadly the constitutional power of Congress to use § 1341 to punish conduct deemed contrary to public policy. Nevertheless, *Badders* is cited as interpreting the concept of fraud broadly. *United States v. Margiotta*, 688 F.2d 108, 124 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983) (the mail fraud statute was enacted to prohibit the use of the mails for promoting schemes deemed contrary to federal public policy); *United States v. Mandel*, 591 F.2d 1347, 1361 (4th Cir.), *aff'd en banc in relevant part*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980) (scheme to defraud includes those that are contrary to public policy); *McLendon v. Continental Group, Inc.*, 602 F. Supp. 1492, 1507 (D.N.J. 1985) (a scheme is fraudulent if it contravenes important public policies).

26. See *Badders*, 240 U.S. at 393.

27. See *Blachy v. United States*, 380 F.2d 665, 671 (5th Cir. 1967); *Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958).

28. 18 U.S.C. § 371 (1982).

for any purpose." In *Haas v. Henkel*²⁹ the United States Supreme Court, interpreting the predecessor to section 371,³⁰ held that a conspiracy to defraud the government includes the situation where a government official is bribed in return for an advanced disclosure of a cotton crop report.³¹ The Court noted that "it is not essential that such a conspiracy shall contemplate a financial loss The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government."³² In *Hammerschmidt v. United States*³³ the Court defined a conspiracy to defraud as one which must "interfere with or obstruct . . . lawful governmental functions by deceit, craft or trickery."³⁴ The Court of Appeals for the Seventh Circuit in *United States v. Isaacs*³⁵ cited both *Haas* and *Hammerschmidt* as support for the intangible rights doctrine.³⁶

Finally, the lower federal courts expanded the mail fraud statute by reading the phrase "or for obtaining money or property" as separate and independent from the phrase "any scheme or artifice to defraud."³⁷ By reading the phrases as independent and not complementary it was unnecessary to prove a loss of tangible property in order to obtain a conviction under the mail fraud statute.³⁸

The first clear appearance of the intangible rights doctrine came in *Shushan v. United States*.³⁹ The United States charged the defendants with executing a scheme to defraud the Louisiana Parish Levee Board of money by accepting kickbacks from the underwriters of a plan to refund the outstanding bonds of the Levee District. A former board member, a current member, and three other defendants conspired to charge an exorbitant fee for the refunding services subsequently rendered.⁴⁰ The conspirators bribed the current member of the board to persuade the other nonconspiring members to agree to the refunding. The court held that these actions resulted in a breach

29. 216 U.S. 462 (1910).

30. REV. STAT. § 5440 (1878).

31. 216 U.S. at 462-63.

32. *Id.* at 479.

33. 265 U.S. 182 (1924).

34. *Id.* at 188.

35. 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

36. *Id.* at 1150.

37. *See, e.g., United States v. Clapps*, 732 F.2d 1148 (3d Cir.), *cert. denied*, 469 U.S. 1085 (1984); *United States v. States*, 488 F.2d 761 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974); *United States v. Classic*, 35 F. Supp. 457 (E.D. La. 1940).

38. 732 F.2d at 1152; 488 F.2d at 764.

39. 117 F.2d 110 (5th Cir.), *cert. denied*, 313 U.S. 574 (1941).

40. *Id.* at 114-15.

of fiduciary duty by all the defendants to the board and to the public, and enunciated the basis for the intangible rights doctrine: “[n]o trustee has more sacred duties than a public official and any scheme to obtain an advantage by corrupting such an one [sic] must in the federal law be considered a scheme to defraud.”⁴¹ Although the Levee Board in *Shushan* suffered economic loss as a result of the fraudulent scheme, the court did not ground its decision on that fact.⁴² Subsequent cases involving political corruption rely on the intangible rights doctrine.⁴³

Fiduciary fraud, such as that condemned in *Shushan*, is the “most significant and expansive use of section 1341”⁴⁴ and is often invoked in successful prosecutions against both public officials⁴⁵ and private employees.⁴⁶ Under *Shushan* and cases following it, a public official may be convicted of defrauding citizens of his honest and faithful services.⁴⁷ This “scheme to defraud” need not result in actual monetary or property loss to the victim,⁴⁸ nor must it be contrary to state law.⁴⁹

41. *Id.* at 115. Other courts embraced this language as stating the basis of the intangible rights doctrine. *See, e.g.*, *United States v. Keane*, 522 F.2d 534, 546 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976); *United States v. Isaacs*, 493 F.2d 1124, 1150 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); *United States v. States*, 488 F.2d 761, 766 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974).

42. 117 F.2d at 115.

43. *See, e.g.*, *United States v. Diggs*, 613 F.2d 988 (D.C. Cir. 1979) (congressman from Michigan), *cert. denied*, 446 U.S. 982 (1980); *United States v. Mandel*, 591 F.2d 1347 (4th Cir.) (governor of Maryland), *aff'd en banc in relevant part*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); *United States v. Keane*, 522 F.2d 534 (7th Cir. 1975) (Chicago alderman); *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974) (former governor of Illinois).

44. Morano, *The Mail-Fraud Statute: A Procrustean Bed*, 14 J. MARSHALL L. REV. 45, 60 (1980).

45. *See, e.g.*, *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982) (political party leader without official government office), *cert. denied*, 461 U.S. 913 (1983); *United States v. Bush*, 522 F.2d 641 (7th Cir. 1975) (city official fails to disclose material information), *cert. denied*, 424 U.S. 977 (1976).

46. *See, e.g.*, *United States v. Newman*, 664 F.2d 12 (2d Cir. 1981) (securities trader misappropriates confidential inside information), *cert. denied*, 464 U.S. 863 (1983); *United States v. Bronston*, 658 F.2d 920 (2d Cir. 1981) (member of law firm conceals involvement with a client's competitor), *cert. denied*, 456 U.S. 915 (1982); *United States v. George*, 477 F.2d 508 (7th Cir.) (payment by supplier of kickbacks to employer's agent), *cert. denied*, 414 U.S. 827 (1973); *United States v. Proctor & Gamble Co.*, 47 F. Supp. 676, (D. Mass. 1942) (defendant bribes competitors' employees to obtain trade secrets).

47. *United States v. States*, 488 F.2d 761, 764 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974).

48. *United States v. Faser*, 303 F. Supp. 380, 384 (E.D. La. 1969).

49. *See, e.g.*, *United States v. Margiotta*, 688 F.2d at 124; *United States v. Mandel*, 591 F.2d 1347, 1361 (4th Cir.), *aff'd in relevant part*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); *United States v. States*, 488 F.2d 761 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974).

In *United States v. Margiotta*⁵⁰ the Court of Appeals for the Second Circuit extended the fiduciary duty to an unelected quasi-public official. Margiotta, the Republican Party Chairman of Nassau County, Long Island, and the Town of Hempstead, New York, directed a patronage appointee to "kickback" payments to Margiotta and other party officials. The payments were rebates on insurance commissions paid by Nassau County to the appointee in his official position. The court discussed two tests to measure fiduciary status: (1) a reliance test, where one is a fiduciary if others rely upon him because of his "special relationship" in the government,⁵¹ and (2) a de facto control test, under which a person is a fiduciary if he in fact makes government decisions.⁵² The court found that Margiotta was a fiduciary under both tests.⁵³

In the private sector, the intangible rights doctrine can be traced to *United States v. Proctor & Gamble Co.*⁵⁴ In *Proctor & Gamble*, the competitor of a corporation bribed an employee of the corporation to obtain trade secrets. The employee sent the information through the mail. The district court held that causing the disloyalty of an employee can constitute mail fraud and concluded that whoever causes the employee to breach that duty is defrauding the employer of a lawful right.⁵⁵ Following *Proctor & Gamble* lower federal courts held that the employee deprived his employer of his honest and faithful services if the employee failed to disclose material information of outside or conflicting interests which potentially had an impact on the employer.⁵⁶ The failure to disclose breached the employee's fiduciary duty to his employer. Under the intangible rights doctrine of fiduciary fraud, a nonfiduciary, who aids and abets the fiduciary breaches of an employee, is criminally liable under the mail fraud statute.⁵⁷

A few federal courts limited the application of the intangible rights doctrine. The Court of Appeals for the Seventh Circuit in *United States v. Bush*⁵⁸ pointed out that a mere breach of duty with-

50. 688 F.2d 108, 122 (2d Cir. 1982).

51. *Id.* at 122.

52. *Id.*

53. *Id.*

54. 47 F. Supp. 676 (D. Mass. 1942) (cited in Coffee, *supra* note 1, at 128 n.60).

55. *Id.* at 678.

56. *United States v. Bronston*, 658 F.2d 920 (2d Cir. 1981), *cert. denied*, 456 U.S. 915 (1982); *United States v. Von Barta*, 635 F.2d 999 (2d Cir. 1980), *cert. denied*, 450 U.S. 998 (1981); *United States v. George*, 477 F.2d 508 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973).

57. *United States v. Newman*, 664 F.2d 12 (2d Cir. 1981).

58. 522 F.2d 641 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976).

out deception or a material misrepresentation is not fraud.⁵⁹ The Court of Appeals for the Eighth Circuit in *United States v. Rabbitt*⁶⁰ required that the charge of fiduciary fraud against an elected public official relate directly to the duties of the office itself.⁶¹ In *United States v. McNeive*⁶² the Eighth Circuit required a showing of monetary loss by a victim to convict an employee in the private sector.⁶³ Also, several commentators have criticized the expansion of the mail fraud statute.⁶⁴ The criticism includes concerns with due process⁶⁵ and fair notice,⁶⁶ misinterpretation of Congress' original intent in passing section 1341,⁶⁷ and concerns with the breadth and possible abuse of criminalizing fiduciary breaches under section 1341.⁶⁸

The United States Supreme Court in *McNally v. United States*⁶⁹ limited the expansion of the mail fraud statute. Justice White, writing for the Court, reasoned that even though the legislative history is sparse, "it indicates that the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property."⁷⁰ *Durland*, which interpreted the statutory language "any scheme or artifice to defraud," is "interpreted broadly insofar as property rights are concerned" but not beyond that.⁷¹ The Court found that the codification and amendment in 1909 "gave further indication that the statute's purpose is protecting property

59. *Id.* at 648. See also *United States v. George*, 477 F.2d 508, 512 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973). Cf. *Santa Fe Indus. v. Green*, 430 U.S. 462 (1977) (a transaction that is adequately disclosed cannot be attacked under rule 10b-5 no matter how unfair its terms).

60. 583 F.2d 1014, 1024 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979).

61. *Id.*

62. 536 F.2d 1245, 1250 (8th Cir. 1976).

63. *Id.*

64. See generally Coffee, *supra* note 1; Coffee, *The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White-Collar Crime*, 21 AM. CRIM. L. REV. 1 (1983); Hurson, *Limiting the Federal Mail Fraud Statute—A Legislative Approach*, 20 AM. CRIM. L. REV. 423 (1983); Morano, *supra* note 44; Comment, *Federal Prosecution of Elected State Officials for Mail Fraud: Creative Prosecution or an Affront to Federalism?*, 28 AM. U.L. REV. 63 (1978); Comment, *supra* note 9.

65. Morano, *supra* note 44, at 87. Instead of using § 1341 as a stopgap, Congress should draft laws that specify the abuses it wants eradicated. Only in this way can the competing objectives of punishing corruption and respecting due process rights be achieved. *Id.*

66. Coffee, *supra* note 64, at 16. The mail fraud evolution covering any new form of misbehavior without the need for congressional action is fundamentally at odds with the principle of fair notice and with the maxim of strict construction of penal statutes. *Id.*

67. Comment, *supra* note 9, at 587. The use of § 1341 in the intangible rights doctrine against corrupt politicians is contrary to Congress' original intent when passing the statute. *Id.*

68. See generally Coffee, *supra* note 1.

69. 107 S. Ct. 2875 (1987).

70. *Id.* at 2879.

71. *Id.* at 2880.

rights."⁷² The added phrase "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" appears separate from the "scheme . . . to defraud."⁷³ Because the two phrases identifying the described schemes appear in the disjunctive, the Court noted "it is arguable that they are to be construed independently."⁷⁴ But the codification of the holding in *Durland* gives no indication that Congress departed from the common understanding that "to defraud" referred to deprivation of property or something of economic value.⁷⁵ Additionally, the Court reasoned, if there are "two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language."⁷⁶ The Court limited the scope of section 1341 to the protection of property rights⁷⁷ because the statute's outer boundaries were ambiguous and fostered unwarranted federal involvement in state and local government.⁷⁸

Justice Stevens noted in his dissent that the Court's ruling in *McNally* rejects a "longstanding construction of the statute."⁷⁹ The mail fraud statute was often the stopgap against newly-conceived forms of fraud until Congress passed appropriate legislation.⁸⁰ Despite Justice Steven's concern the impact of *McNally* is limited since the prosecution need only allege and prove a tangible loss of property or money.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 2881. The Court distinguished the definition of "to defraud" in § 1341 from § 371 fraud.

Section 371 is a statute aimed at protecting the Federal Government alone; however, the mail fraud statute, as we have indicated, had its origin in the desire to protect individual property rights, and any benefit which the Government derives from the statute must be limited to the Government's interests as property-holder.

Id. at 2881 n.8.

76. *Id.* at 2890.

77. *Id.* at 2881.

78. *Id.*

79. *Id.* at 2884 (Stevens, J., dissenting).

80. *United States v. Maze*, 414 U.S. 395 (1974) (Burger, C.J., dissenting). Chief Justice Burger gave examples of how § 1341 has been used as a stopgap: (1) To prosecute securities fraud, until the passage in 1933 of the Securities Act; (2) to prosecute loan sharks, until the enactment in 1968 of 18 U.S.C. §§ 891-96, outlawing extortionate extension of credit; (3) to prosecute fraud in the sale of undeveloped land, until the passage of the Interstate Land Sale Full Disclosure Act, 15 U.S.C. § 1701 in 1969; and (4) to prosecute fraud connected with credit cards, until the passage of 15 U.S.C. § 1644 in 1970. He noted further that, even with the passage by Congress of specific laws to prevent fraud in specific spheres, the mail fraud statute continues to play an important supplemental role in prosecuting such fraud. *Id.* at 405-08 (cited in *Morano*, *supra* note 44, at 48 n.5).

Most earlier cases, including the corruption cases which invoked the intangible rights doctrine, involved an economic loss.

McNally left open the question of what constituted a "loss of property." In *Carpenter v. United States*,⁸¹ decided in November, 1987, the Supreme Court held that intangible property rights were protected under section 1341.⁸² The intangible property right in *Carpenter* was confidential information which belonged to a newspaper. The Court distinguished this intangible property right from the intangible right to honest and impartial government which the Court in *McNally* rejected as beyond the scope of section 1341. "This is not a case like *McNally*, however. The Journal . . . was defrauded of much more than its contractual right to his honest and faithful service, an interest too ethereal in itself to fall within the protection of the mail fraud statute."⁸³ The gray area between an intangible contractual right which is unprotected (e.g. the employee's honest and faithful services) and an intangible protected property right (e.g. confidential information) warrants further delineation.

The significance of *McNally* is that it sends a clear signal to states concerning federal involvement in state and local government.⁸⁴ States must now take the lead in legislating against and prosecuting their own fraud cases involving intangible rights.

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81. 108 S. Ct. 316 (1987). Defendant Winans wrote an investment advice column for the Wall Street Journal. The newspaper had a rule that the column's contents were confidential information which belonged to the Journal prior to publication. Winans and two others used the advance information to buy and sell stocks based on the column's probable impact on the market. The Court held that this constituted a "scheme to defraud" under § 1341. *Id.*

82. *Id.*

83. *Id.* at 320.

84. *McNally v. United States*, 107 S. Ct. 2875, 2881 (1987).

