RIGHTFUL PROSECUTION OR WRONGFUL PERSECUTION? ABUSE OF HONEST SERVICES FRAUD FOR POLITICAL PURPOSE

ALEXA LAWSON-REMER*

I. INTRODUCTION

The limitless expansion of the mail fraud statute subjects virtually every active participant in the political process to potential criminal investigation and prosecution. I am not predicting the imminent arrival of the totalitarian night or the wholesale indictment of candidates, public officials and party leaders. To the contrary, what profoundly troubles me is the potential for abuse through selective prosecution and the degree of raw political power the freewheeling club of mail fraud affords federal prosecutors.¹

Last year, the country watched incredulously as Congress investigated whether the Department of Justice and the White House had used the U.S. Attorneys' Office for political advantage.² As congressional hearings examined the unprecedented midterm dismissal of nine U.S. Attorneys—many of whom had positive performance reviews³—allegations emerged that they were dismissed to impede investigations of Republican politicians.

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* Class of 2009, University of Southern California Gould School of Law; B.A., Spanish and Psychology 2004, Amherst College. I owe sincere thanks to Professor Elizabeth Garrett for her guidance and invaluable insight throughout this project. Thank you also to Professor Rebecca Lonergan for her helpful comments on earlier drafts, the editors and staff of the Southern California Law Review for their hard work and assistance, and my family and friends for their unending support and encouragement. This Note is dedicated to my father.

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or for their failure to initiate investigations that would damage Democratic politicians. During the hearings, emails and other documents revealed that the Department of Justice and the White House engaged in extensive consultations over which U.S. Attorneys were to be removed, including a plan to retain prosecutors who were "loyal Bushies." Whether the Department of Justice is a cog in a partisan machine or a pristine and impartial servant of the law, the clamor for Alberto Gonzales's resignation brought with it calls from politicos and legal scholars alike for reform of the legal system to purge it of unseemly political influence and to prevent future instances of politics improperly influencing prosecutorial decisionmaking.

Regardless of which political party is in power or accused of improperly exercising its influence to further a partisan agenda, allegations that politics play a role in determining which elected officials and candidates are charged with political corruption are particularly alarming considering the significant number of corruption cases U.S. Attorneys bring each year and the vagueness of the statute under which charges are often brought. While political corruption schemes come in many shapes and sizes and can violate several different sections of the federal criminal code, almost inevitably they are charged as schemes to defraud the public of "the intangible right of honest services."

Deemed a powerful tool for fighting public corruption, 18 U.S.C.
§ 1346, or the "honest services fraud statute," expands the definition of a "scheme or artifice to defraud" for the purposes of the federal mail and wire fraud statutes to include "a scheme or artifice to deprive another of the intangible right of honest services." The honest services fraud statute is often used in conjunction with the mail and wire fraud statutes, and federal prosecutors have relied on the three fraud statutes to successfully combat a variety of schemes and deal with newly developed frauds until particularized legislation is enacted to directly address the problem. Even after legislation is passed in response to a specific problem, prosecutors continue to charge defendants under the mail and wire fraud statutes because of their simplicity and familiarity. By prosecuting under the broad mail, wire, and honest services fraud statutes rather than a more specific statute, prosecutors are able to "outflank[] special defenses, minimum loss requirements or other procedural or substantive obstacles" that the legislature believed were necessary to establish.

But here's the rub: the ductile wording of the statute is both its virtue and its vice; while the broadness of the statute allows prosecutors to combat a variety of schemes, the vague language of the provision leaves too much room for prosecutorial discretion. With so much discretion vested in prosecutors, credible allegations of systemic abuse are especially worrisome. Certainly, a bad prosecutor can abuse even a good law, and because what falls within this statute is not always clear, some of the activities recently charged under the statute have left many defendants, defense attorneys, and legal scholars worried and confused. The potential

11. As former federal prosecutor and current U.S. district court judge Jed Rakoff explained: 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.
14. E.g., United States v. Thompson, 484 F.3d 877, 884 (7th Cir. 2007) (discussing the "open-ended quality" of § 1346, which "makes it possible for prosecutors to believe, and public employees to deny, that a crime has occurred, and for both sides to act in good faith with support in the case law"); Posting of Rick Hills to PrawfsBlawg, http://p rawfsblawg.blogs.com/p rawfsblawg/2009/02/the-
that prosecutors may abuse the "intangible right of honest services" language for partisan or personal political ends has also alarmed members of the judiciary from across the political spectrum. As recently as February 2009, Justice Antonin Scalia added his own scathing remarks regarding the honest services fraud statute, complaining that "this expansive phrase invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct."15

Concern over broad prosecutorial discretion is not new,16 nor is discussion of the honest services fraud statute, which has been hotly debated since the 1980s, if not longer.17 But most legal commentary on honest services fraud has focused on its implications for businesses and private fiduciary relationships, seeming to accept without hesitation that the statute's application to political conduct is largely in legitimate pursuit of unsavory public corruption schemes.18 Similarly, scholarly inquiries into the problems caused by abuse of prosecutorial discretion have focused primarily on elected state prosecutors or the Office of the Independent Counsel19 and seem to assume that, as unelected appointees, federal prosecutors are free from political pressures. Moreover, the limited commentary that actually addresses federal prosecutorial decisionmaking has characterized the potential for abuse at the federal level as a problem stemming from prosecutorial overreaching by individual U.S. Attorneys.20

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In light of the recent improper influence of politics in the Department of Justice by a White House pursuing a partisan political agenda, prior assumptions about the danger of systematic abuse because of political pressure need reassessment.21

This Note examines the problem of political influence on federal prosecutorial discretion and assesses how the honest services fraud statute is at a particular risk of being used as a political tool. The White House's recent aggressive and overt actions highlight the potential for widespread abuse because of political pressure in manners much more subtle than were imposed here. In the context of public corruption prosecutions, an environment where partisan pressures are maximized, the likelihood that U.S. Attorneys may be pressured or give into political temptations is especially high. Because the honest services fraud statute covers public corruption, and its ambiguity expands upon the already broad discretion afforded federal prosecutors, the danger is that partisan politics will influence and interfere with federal prosecutorial discretion; specifically, improper political forces could abuse the broad and malleable nature of honest services fraud to further a partisan political agenda.

Part II of this Note outlines the development of honest services fraud, tracing it from the first mail fraud statute in 1872, through codification of 18 U.S.C. § 1346 in 1988,22 and into today, where it is in danger of exploitation by partisan political forces. Part III.A reviews the federal prosecutor's broad discretionary authority, evaluating the inefficacy of current restrictions on prosecutorial discretion, and highlighting some areas where the honest services fraud statute enhances the federal prosecutor's broad discretion even further. Part III.B first identifies two sources of partisan politics that can improperly influence and interfere with federal prosecutors' decisionmaking, and then illustrates how the honest services fraud statute exacerbates the potential for abuse by either of these political forces. Part IV then examines the solutions proposed thus far, explains why they are inadequate, and proposes a two-part solution that could help

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21. H. W. Perry, Jr., United States Attorneys—Whom Shall They Serve?, LAW & CONTEMP. PROBS., Winter & Spring 1998, at 129, 131 ("Although arguments for a truly 'independent' Justice Department peaked after Watergate, the concept of the apolitical government lawyer remains an often expressed ideal.").

prevent political influences from affecting prosecutorial decisionmaking while still preserving the flexibility of the statute. Part IV.A advocates for a centralized administration of honest services fraud and other public corruption statutes within the Department of Justice’s Public Integrity Section (“PIN”). Part IV.B calls for increased transparency through the creation of a federal public corruption registry and expansion of the Attorney General’s annual reports to Congress on the Justice Department’s PIN.23

A centralized administration of honest services fraud prosecutions within the PIN achieves the desired uniformity in the application of honest services fraud, while the courts’ power to decide whether to give deference to the PIN’s interpretations provides an additional check on individual and systematic prosecutorial overreaching. Simultaneously, a federal public corruption registry and expansion of the Attorney General’s annual report to Congress on the PIN24 would make the Department of Justice’s and U.S. Attorneys’ actions more transparent. Together, these solutions would help prevent partisan politics from influencing the overly broad discretion currently afforded federal prosecutors due to the ambiguity inherent in the honest services fraud statute.

II. HISTORY AND DEVELOPMENT OF HONEST SERVICES FRAUD

A. ELEMENTS OF A MAIL OR WIRE FRAUD OFFENSE

The codified version of the mail fraud statute, 18 U.S.C. § 1341, together with the related wire fraud statute, 18 U.S.C. § 1343, proscribes the use of mails or wires in furtherance of fraudulent activity.25 Because

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\text{Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter . . . or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier . . . shall be fined under this title or imprisoned not more than 20 years, or both.}
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The wire fraud statute provides:

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\text{Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation . . . affects a financial institution,}
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23. See, e.g., 2006 DOJ PINS REPORT, supra note 7, at i.

24. See, e.g., id.

25. The mail fraud statute provides in pertinent part:

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\text{Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter . . . or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier . . . shall be fined under this title or imprisoned not more than 20 years, or both.}
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they share the same operative language and only differ in the means by which a fraud is perpetrated, the statutes receive similar analyses. Under the federal mail and wire fraud statutes, the government must prove beyond a reasonable doubt two elements: (1) a scheme devised or intending to defraud and (2) the mailing of a letter or use of interstate wire communications in furtherance of the scheme. Through judicial construction, the definitions and scope of these two elements developed inversely to one another. Courts gradually tapered the mailing or wire transmission requirement to primarily a jurisdictional element liberally construed by the courts, while expanding the “scheme to defraud” element to include the loss of intangible rights. This broad definition of fraud was justified as necessary to achieve the statute’s fundamental purpose of prohibiting the misuse of the mails to further fraudulent schemes.

Though the central focus of a mail or wire fraud violation is the “scheme or artifice to defraud,” neither the mail nor the wire fraud statute defines what constitutes a scheme to defraud, and the legislative history

such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both. Id. § 1343.

26. 18 U.S.C. §§ 1341, 1343. Mail fraud requires use of the U.S. Postal Service (either inter- or intrastate) or a private carrier equivalent, id. § 1341, while wire fraud requires interstate transmission of an electronic communication such as a phone call or an email, id. § 1343. Together, the two statutes ensure the law is not circumvented with the advent of new technology and achieve the requisite jurisdictional component necessary for the federal legislation to be constitutional. See Sean Hewens, Mail and Wire Fraud, 41 AM. CRIM. L. REV. 865, 868–69 (2004) (explaining that Congress has plenary power to regulate the mails but must rely on the Commerce Clause for wires).

27. See Carpenter v. United States, 484 U.S. 19, 25 n.6 (1987) (noting that “[t]he mail and wire fraud statutes share the same language in relevant part”). This Note refers to the mail and wire fraud provisions interchangeably to explain the implications of “honest services fraud.” 18 U.S.C. § 1346.

28. See 18 U.S.C. §§ 1341, 1343; Carter v. United States, 530 U.S. 255, 261 (2000) (listing the two elements required to prove mail fraud). The second element links the first element’s “scheme to defraud” with an actual act such that use of the mails in furtherance of the charged scheme is “reasonably foreseeable.” See Pereira v. United States, 347 U.S. 1, 8–9 (1954) (explaining that by doing an act with knowledge that the use of the mails will follow, or where such use can be reasonably foreseen, even though not actually intended, the person “causes” the mails to be used, and the mailing is “sufficiently closely related” to the charged scheme (internal quotation marks omitted) (quoting United States v. Maze, 414 U.S. 395, 399 (1974))).


30. Rakoff, supra note 11, at 819. For commentary questioning the propriety of defining federal criminal conduct in terms of the fortuity of a jurisdictional component, see L. B. Schwartz, Federal Criminal Jurisdiction and Prosecutors’ Discretion, 13 LAW & CONTEMP. PROBS. 64, 79–81 (1948).

31. Rakoff, supra note 11, at 794 (noting that as the mailing requirement was strictly construed, the term “scheme to defraud” was given a broad construction).

32. Moohr, supra note 29, at 159 (citing Durland v. United States, 161 U.S. 306 (1896)).
with respect to this issue is sparse. Courts have thus identified a myriad and ever-increasing number of frauds as violative of the statutes. These various schemes fall into two general categories: (1) traditional frauds "intended to defraud individuals of money or other tangible property interests" and (2) frauds directed to deprive individuals of intangible rights and interests. In either category, the government must prove the defendant had the specific intent to defraud, meaning the defendant was a knowing participant in the scheme to defraud.

The first category of "traditional" frauds, which is clearly covered by the mail and wire fraud statutes, "involve[s] calculated efforts to use misrepresentations or other deceptive practices" to deprive victims of "some tangible interest." Frauds in this category include insurance fraud, check-kiting schemes, credit card schemes, and referral plan schemes. The second category of schemes to defraud is comprised of "those which operate to deprive individuals of intangible rights or interests." Though not considered prosecutable offenses within the original mail fraud statute, intangible rights and interests have been the basis for cases involving an array of bribery and kickback schemes, voting fraud, employee fraud, and public corruption. Expansion of "scheme to defraud" to include this category of intangible rights and interests is discussed in

33. United States v. McNeive, 536 F.2d 1245, 1248 (8th Cir. 1976) ("At no time throughout the evolutionary development of the mail fraud statute did Congress attempt to define or establish the precise parameters of the term 'scheme to defraud.'").
34. See generally John C. Coffee, Jr., The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White-Collar Crime, 21 AM. CRIM. L. REV. 1 (1983) (claiming that the reach of the statute continues to extend to areas not previously thought to be subject to criminal fraud laws).
35. McNeive, 536 F.2d at 1248–49.
36. See, e.g., United States v. Rivera, 295 F.3d 461, 466 (5th Cir. 2002) (holding that specific intent to defraud or deceive must be proven for a wire fraud conviction).
37. McNeive, 536 F.2d at 1248–49.
38. Id. (listing these and "any other type of nefarious scheme in which the defendant solicits funds or tangible property interests from innocent or misinformed investors by engaging in a deceptive course of action" as comprising the first category of frauds that falls within the scope of the mail fraud statute).
39. Id. at 1249.
40. McNally v. United States, 483 U.S. 350, 357 (1987) (reasoning that Congress's addition of the words "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" after the phrase "any scheme or artifice to defraud" is an "indication that the [mail fraud] statute's purpose is protecting property rights" (citing Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1088, 1130–31)).
41. E.g., United States v. Rybicki, 287 F.3d 257, 261 (2d Cir. 2002) (referring to Congress's "intent to bring within the scope of the mail and wire fraud provisions fraudulent conduct that did not have as its object the deprivation of money or property of another"); United States v. States, 488 F.2d 761, 765 (8th Cir. 1973) (voting fraud was within mail fraud because the scheme deprived citizens of "certain intangible political and civil rights").
B. EARLY EXPANSION OF "SCHEME TO DEFRAUD"

Because honest services fraud developed from mail fraud, any attempt to understand the risks posed by honest services fraud's broad language begins with the historical development of the mail fraud statute. The current version of the mail fraud statute, 18 U.S.C. § 1341, originated in Section 301 of the Act of June 8, 1872. This Act was not intended to regulate public corruption but was part of a larger set of revisions to the postal laws relating to congressional efforts to provide the Postal Service with greater latitude in preventing fraud that utilized the mail. The original version of the mail fraud statute criminalized "devis[ing] or intending to devise any scheme or artifice to defraud...by means of the post-office establishment of the United States." Though Congress has revised the mail fraud statute several times over the last 130 years to expand its coverage, the "scheme or artifice to defraud" language is retained in § 1341 today.

The earliest expansion of the mail fraud statute occurred in Durland v. United States, when the Supreme Court first construed the meaning of "scheme to defraud." Focusing on the word "any," the Court held that "any scheme or artifice to defraud" included not only past and present frauds, but future acts to defraud as well. The Court justified this broad interpretation, reasoning that "[s]ome schemes may be promoted through mere representations and promises as to the future, yet are none the less

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42. See McNally, 483 U.S. at 357.
44. Rakoff, supra note 11, at 779–80 (noting that the revisions were the result of an increased perception of federal power and a growing national economy, which led to the perceived need for federal intervention to dispel widespread fraud).
45. Act of June 8, 1872 § 301, 17 Stat. at 323.
47. Durland v. United States, 161 U.S. 306, 313 (1896) (holding that the mail fraud statute reaches "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future").
48. Id. (emphasis added).
schemes and artifices to defraud. Thus, the Court concluded, the "fraud" in the statute was broader than common law fraud because of the breadth of the "evil sought to be remedied" by Congress.

To reflect Durland's inclusion of future fraud, Congress amended the mail fraud statute in 1909. But rather than use Durland's phrase, "everything designed to defraud," Congress amended the statute to read, "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses." Although introduction of the word "or" into the statutory language seemed inconsequential to the drafters at the time, its addition proved pivotal in the expansion of mail fraud. Courts began to construe the statute as containing independent phrases, prohibiting either "schemes or artifices 'to defraud' or 'for obtaining money or property by false or fraudulent pretenses.'" Viewing them as independent phrases disconnected "scheme or artifice to defraud" from the property language and made it possible to introduce intangible frauds into the first phrase, including frauds designed to deprive a victim of the right to have "public officials perform their duties honestly."

C. WIDENING THE SCOPE OF "SCHEME TO DEFRAUD"

1. Foundations of the "Intangible Rights" Doctrine

The judicial interpretations following the 1909 amendment to the mail fraud statute seemingly endorsed the "intangible rights" doctrine by holding that an act of fraud did not require a material loss. Relying on the

49. Id.
50. Id. The Court did not indicate, however, that the statute's inclusion of future frauds had a more extensive reach beyond the already covered tangible property rights. Id. See also McNally v. United States, 483 U.S. 350, 356-67 (1987) (noting that Congress's codification of the Durland holding in 1909 was "further indication that the statute's purpose is protecting property rights" (citing Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1088, 1130-31)).
51. McNally, 483 U.S. at 358 (emphasis added).
52. See 42 CONG. REC. 1026 (1908) (statement of Sen. Heyburn). While discussing the statute, Senator Heyburn felt the need to explain only a small change regarding the law's application to mailings made outside the United States, stating, "I do not think there is any other change, which is not obvious upon the face of the bill, that needs any further explanation." Id. See also McNally, 483 U.S. at 357 n.7 ("The sponsor of the 1909 legislation did not address the significance of the new language, stating that it was self-explanatory. ").
53. McNally, 483 U.S. at 358 (emphasis added).
54. Id. ("Because the two phrases identifying the proscribed schemes appear in the disjunctive, it is arguable that they are to be construed independently and that the money-or-property requirement of the latter phrase does not limit schemes to defraud to those aimed at causing deprivation of money or property.").
55. See, e.g., Hammerschmidt v. United States, 265 U.S. 182, 188 (1924) ("It is not necessary
"or" language, this expansive interpretation was deemed justified because "limiting [mail fraud] to deprivations of tangible interests alone would weaken the efficacy of the statute by excluding from its scope the multifarious schemes which deprive innocent victims of significant, often constitutionally protected, intangible rights." Yet in most of the cases embracing the broad language supporting an intangible rights theory of mail fraud, the defendants still realized some form of financial gain at the expense of the victims, and the distinction between actual and constructive fraud for purposes of the statute remained intact.

Use of an intangible rights theory of mail fraud to prosecute public corruption was first suggested in *Shushan v. United States* in 1941. In *Shushan*, members of the Orleans Parish Levee Board conspired with bond businessmen to pass a bond-refunding plan, charging the parish exorbitant fees, which were then pocketed by the conspirators. In rejecting the argument that no actual fraud had occurred because the refunding operation had actually been profitable to the Board, the court stated: "No trustee has more sacred duties than a public official and any scheme to obtain an advantage by corrupting such [a] one must in the federal law be considered a scheme to defraud." Though the facts of *Shushan* showed that the parish's Board received kickbacks from the bond businessmen, judges in later years would cite the court's dicta regarding a public official's "sacred duties" in order to support application of the mail fraud statute to situations where a politician's alleged scheme did not cause any financial damage but rather deprived the citizens of their intangible right to honest services.

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56. United States v. McNeive, 536 F.2d 1245, 1249 (8th Cir. 1976).
57. *Shushan*, 117 F.2d at 116. See also *McNeive*, 536 F.2d at 1250 (citing several opinions with broad statements on intangible rights where the defendant still had some material gain).
58. See, e.g., Epstein v. United States, 174 F.2d 754, 765–66 (6th Cir. 1949). In *Epstein*, the directors of two brewing companies failed to disclose their interests in companies with whom the breweries subcontracted to the financial benefit of the directors. In reversing the conviction, the court held that mail fraud could only apply to actual fraud and not constructive fraud. The court defined constructive fraud as "a breach of legal or equitable duty which, in spite of the fact that there is no moral guilt resulting from the breach of duty, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests." *Id.* at 766.
60. *Id.* at 114–15.
61. *Id.* at 115.
62. Gray, supra note 17, at 562–64.
2. Extending “Intangible Rights” to Include the Right to Honest Government

In the 1970s, as Americans increasingly lost faith in their government, the Department of Justice responded by making prosecution of public corruption a top priority—an effort that was formalized with the creation of the Department of Justice’s PIN in 1976.\(^{63}\) In many of the cases, prosecution under the bribery or extortion provisions would have been difficult because there was not strong evidence of a quid pro quo\(^{64}\) or use of “fear and intimidation” to obtain or induce payment.\(^{65}\) Because actual pecuniary loss to the public was not always evident in the public corruption cases, prosecutors relied on the theory of honest services fraud, in which the denial of honest services provided both the illegal scheme and the loss for which the victim is defrauded.\(^{66}\) Beginning with United States v. States in 1973—which ruled that a voting fraud scheme was a proper subject for a mail fraud prosecution because the scheme defrauded citizens of “certain intangible political and civil rights”\(^{67}\)—courts upheld application of the mail fraud statute to situations in which politicians did not deprive citizens of anything of economic value, instead “defrauding citizens of their rights to honest government.”\(^{68}\)

United States v. Isaacs\(^{69}\) and United States v. Mandel\(^{70}\) demonstrate application of the “intangible right to honest services” theory to mail fraud.

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64. Section 201(b) punishes anyone who “corruptly gives, offers or promises anything of value to any public official . . . with intent . . . to influence any official act.” 18 U.S.C. § 201(b)(1) (2006). In United States v. Jennings, the Fourth Circuit explained that for § 201 “[t]he quid pro quo requirement is satisfied so long as the evidence shows a course of conduct of favors and gifts flowing to a public official in exchange for a pattern of official actions favorable to the donor.” United States v. Jennings, 160 F.3d 1006, 1014 (4th Cir. 1998) (emphasis omitted) (internal quotation marks omitted).

65. The federal extortion statute makes it a federal criminal offense to obstruct, delay, or affect commerce by extortion. 18 U.S.C. § 1951. Popularly known as the “Hobbs Act,” the statute is used to address public corruption by making it a crime for a public official to obtain “property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.” Id. § 1951(b)(2).


68. Gray, supra note 17, at 563.

69. United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974).

In both cases, the defendants were charged with engaging in patronage schemes to favor horse-racing enterprises owned by political supporters.71 None of the defendants in either case engaged in actual misrepresentation, and neither the state of Illinois nor the state of Maryland experienced any economic loss during the period in question.72

Conceding that a fiduciary duty existed, the defendants asserted that with no tangible loss to the state, their breach of duty amounted to constructive fraud, which past cases had excluded from the mail fraud statute.73 Rejecting this distinction, both the Seventh and Fourth Circuits cited the dicta of past decisions for the notion that a public official’s corrupt activities could always serve as a scheme to defraud.74 The Fourth Circuit explained this analysis, asserting, “[T]he fraud involved in the bribery of a public official lies in the fact that the public official is not exercising his independent judgment in passing on official matters. A fraud is perpetrated upon the public to whom the official owes fiduciary duties, [for example], honest, faithful and disinterested service.”75 The Fourth Circuit then went one step further: “Provided the requisite intent is shown, [an] official’s failure to disclose the existence of a direct interest in a matter that he is passing on defrauds the public and pertinent public bodies of their intangible right to honest, loyal, faithful and disinterested government.”76

The basic principles of Isaacs and Mandel were adopted in United States v. Margiotta,77 when the Second Circuit extended the honest services theory of mail fraud even further by affirmatively answering the question of whether the fiduciary duty of a public official to the citizenry may be imposed on a private citizen who is apparently conducting the business of government.78 In a powerful and prescient dissent, Judge Winter charged the majority with converting the mail fraud statute into “a catch-all

71. Id. at 1354; Isaacs, 493 F.2d at 1132. The circumstances in Mandel were actually much more subtle than those in Isaacs. Unlike Isaacs, the case alleging a fraudulent scheme in Mandel consisted entirely of indirect evidence. As the Fourth Circuit stated, “It is . . . apparent that the case could not have been submitted on the theory that Governor Mandel had a direct interest in the race track business, for no direct connection on his part was either alleged or proven.” Mandel, 591 F.2d at 1364.
73. Isaacs, 493 F.2d at 1149. See also supra note 58 (discussing Epstein).
74. Mandel, 591 F.2d at 1362; Isaacs, 493 F.2d at 1150 (citing Shushan v. United States, 117 F.2d 110 (5th Cir. 1941) (holding that any scheme to corrupt a public official is a fraud against the public), overruled on other grounds by United States v. Cruz, 478 F.2d 408 (5th Cir. 1973)).
75. Mandel, 591 F.2d at 1362 (citation omitted).
76. Id. at 1363.
78. Id. at 122.
prohibition of political disingenuousness [that] expands [mail fraud] legislation beyond any colorable claim of Congressional intent and creates a real danger of prosecutorial abuse for partisan political purposes."  

Judge Winter conceded that the majority’s reading of prior cases involving the fiduciary obligations of public officials had “substantial and direct precedent.” But he argued that “[a] reading of the cases in this area...shows how little definition there is to these newly created [fiduciary] obligations which carry criminal sanctions.” “One searches in vain,” he added, “for even the vaguest contours of the legal obligations created beyond the obligation to conduct governmental affairs ‘honestly’ or ‘impartially,’ to ensure one’s ‘honest and faithful participation’ in government...” Under the majority’s sweeping interpretation of the mail fraud statute, he argued, “there is no end to the common political practices which may now be swept within the ambit of mail fraud.”

These precedent-setting cases led to a deluge of intangible rights prosecutions. Early cases relied on a duty to provide honest services inherent in an elected official’s relationship to the public and typically involved these officials accepting bribes or failing to disclose conflicts of interest. By the late 1980s, the broad language of the statute served as the basis for prosecution of a wide range of allegedly fraudulent activity, including new schemes not yet specifically regulated. In essence, the mail fraud statute became a basis for prescribing through prosecutorial action, rather than legislation, federal codes of conduct for state and local government officials.

79. Id. at 139 (Winter, J., dissenting).
80. Id. at 141.
81. Id. at 142.
82. Id. at 142–43.
83. Id. at 140.
84. See United States v. McNeive, 536 F.2d 1245, 1248–50 (8th Cir. 1976) (discussing the cases brought under § 1341).
86. Kobrin, supra note 66, at 794 (“[M]ail fraud evolved from a means of preventing crimes that utilized the postal service into a statute of choice for criminalizing public betrayals. When a local official breached the public trust, regardless of whether his specific act was illegal, he often found that he had committed honest services fraud.”).
3. Pulling in the Reins: *McNally v. United States*\(^{87}\)

Roughly one hundred years after Congress's first amendment expanding mail fraud,\(^{88}\) the statute's expansion came to an abrupt, albeit temporary, halt in 1987 when the Supreme Court held that the mail fraud statute "does not refer to the intangible right of the citizenry to good government."\(^{89}\) In *McNally v. United States*, the defendants and a third individual, Howard "Sonny" Hunt, used Hunt's de facto control over selecting the insurance agencies for Kentucky's policies to fashion an agreement with an insurance company. The agreement was to maintain a continued agency relationship with the company, provided it shared its resulting commissions with other insurance agencies specified by Hunt, including one company controlled by Hunt and defendant Gray and nominally owned and operated by defendant McNally.\(^{90}\)

As a result of the foregoing activities, defendants Gray and McNally were charged with seven counts of mail fraud, six of which were dismissed before trial.\(^{91}\) The remaining mail fraud count was not based on loss of money or property of the Commonwealth of Kentucky;\(^{92}\) indeed, the commissions the defendants received were not the commonwealth's money, the legislature had already allocated a predetermined amount for insurance, the premiums charged were no higher than the market rate of other insurance companies, and the insurance company provided full insurance coverage to the state.\(^{93}\) Without an easily identifiable, tangible loss to the state, the indictment alleged that the defendants had "devised a scheme (1) to defraud the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly, and (2) to obtain, directly and indirectly, money and other things of value by means of false pretenses and the concealment of material facts."\(^{94}\)


\(^{88}\) In 1889, Congress amended the mail fraud statute to clarify "scheme or artifice to defraud," defining situations in which the law should apply and including a long list of specific offenses. Act of Mar. 2, 1889, ch. 393, § 1, 25 Stat. 873, 873. The legislative history of the amendment indicates that the terms were added at the request of postal authorities, who felt the amendment was needed to reach certain counterfeiting schemes. Gray, supra note 17, at 568–69.

\(^{89}\) McNally, 483 U.S. 356.

\(^{90}\) Id. at 352. The commissions in question were paid to the insurance company by the larger insurance companies from which it secured coverage for Kentucky. Id.

\(^{91}\) Hunt was charged with and pleaded guilty to mail and tax fraud. Id. at 353.

\(^{92}\) This count was based on the mailing of a commission check to the insurance company from one of the companies for which it had secured coverage for the state. Id.

\(^{93}\) Id. at 360–61.

\(^{94}\) Id. at 353–54.
Writing for seven of the Justices, Justice White acknowledged that the addition of the word "or" to the mail fraud statute in 1909 "arguabl[y]" meant that the statute's two phrases could "be construed independently and that the money-or-property requirement of the latter phrase does not limit schemes to defraud to those aimed at causing deprivation of money or property." He ultimately rejected this interpretation, however, concluding that the history of the statute, including the 1909 amendment, did not indicate a congressional intent to depart from the common law understanding of fraud as affecting property or monetary rights. Instead, "adding the second phrase simply made it unmistakable that the statute reached false promises and misrepresentations as to the future, as well as other frauds involving money or property." Invoking the rule of lenity and notions of federalism, Justice White explained:

The Court has often stated that when 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. . . . 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.


Within a year of McNally, both houses of Congress responded to the Court's call to "speak more clearly." On June 17, 1988, anticorruption legislation intended to overrule McNally was introduced in the Senate in the form of a bill that only covered official corruption and relied on a nexus to the mails or interstate commerce for its jurisdictional basis. Another broader anticorruption bill, S. 2793, extended beyond public corruption and was introduced in the Senate separately on September 15, 1988. This bill

95. Id. at 358.
96. Id. at 358–59.
97. Id. at 359.
98. Id. at 359–60 (emphasis added) (citations omitted).
99. Id. at 360.
101. Id. at 23,951–57. The public corruption provisions of this bill provided in relevant part: Whoever . . . deprives or defrauds, or attempts to deprive or to defraud, by any scheme or artifice, the inhabitants of a State or political subdivision of a State of the honest services of an official or employee of such State or subdivision, shall be fined under this title, or
expanded the intangible rights theory to include a variety of activities that Congress could otherwise only reach through the Commerce Clause and thus went beyond merely overruling *McNally*.102 With virtually no public debate, S. 2793 passed the Senate on October 14, 1988.103

Attached as one of thirty unrelated provisions to the omnibus drug bill,104 S. 2793 was then sent to the House, which effectively preempted other post-*McNally* anticorruption bills that had been subject to careful consideration by the House Subcommittee on Criminal Justice, but had not yet been reported out of committee.105 After some eleventh-hour reconciliation deliberations with House and Senate leaders, the final form of the anticorruption provisions emerged in the form of 18 U.S.C. § 1346, which purported to define the critical term "scheme or artifice to defraud."106 The one-sentence statute merely stated that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."107 The only remarks regarding the passage of the amendment came from Representative Conyers, Chairman of the Subcommittee on Criminal Justice.108 Although he voted against the general omnibus drug bill, he voiced support for the honest services amendment, claiming that aside from "overturn[ing] the McNally decision," "[n]o other change in the law is intended."109

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102. In addition, the bill added "concealments" to the scope of the substantive offense and added several new sections not solely related to public corruption, including one concerning election fraud (Section 2), another expanding the wire fraud statute to intrastate communications (Section 5), and yet another that criminalized and federalized significant areas of private employer-employee relations (Section 3). *Id.* at 23,953–54. The Justice Department, which had originally belatedly endorsed only a public corruption bill, endorsed S. 2793 in its entirety. Its switch in position reflected the considered views of new Attorney General Richard Thornburgh. See, e.g., *Id.* at 23,955–56 (comments of Sen. McConnell noting that the bill had the support of Attorney General Thornburgh).

103. *See id.* at 29,975 (listing amendments to a drug bill, including S. 2793, Anti-Corruption Act of 1988); *Id.* at 30,748, 30,766–68 (labeling S. 2793 as item 16 in en bloc amendments No. 3699); *Id.* at 30,781 (authorizing No. 3699 en bloc amendments); *Id.* at 31,071–73 (passing S. 2793).


109. *Id.* at 33,297. The problem, Representative Conyers explained, was that as a result of the McNally decision many significant prosecutions of political corruption brought under the mail and wire fraud statutes have been dismissed or overturned on appeal. . . . [Specifically,] cases involving bribery, money laundering, election fraud, and licensing fraud have been dismissed because there was no monetary loss to any victim.

*Id.*
Unfortunately, reverting to the pre-\textit{McNally} case law is not as simple as the statute’s legislative history implies. Not only does the pre-\textit{McNally} case law fail to capture a coherent definition of honest services fraud and differ greatly from circuit to circuit, but the ever-expanding body of case law also includes successful prosecutions that many now regard as overreaching and no longer within the statute. For example, pre-\textit{McNally} cases held that voting fraud involving the use of mails to falsify vote counts fell within the mail fraud statute’s purview;\footnote{See, e.g., United States v. Girdner, 754 F.2d 877, 878 (10th Cir. 1985) (effort to return false ballots from individuals not eligible to vote); United States v. Odom, 736 F.2d 104, 106 (4th Cir. 1984) (casting absentee votes of infirm elderly residents of a nursing home on a “straight Democratic ticket”); United States v. Clapps, 732 F.2d 1148, 1150 (3d Cir. 1984) (fraudulently obtaining and marking ballots of the elderly in a nursing home). See also supra note 67 and accompanying text (discussing United States v. States, 488 F.2d 761 (8th Cir. 1973) (use of fraudulent requests for absentee ballots)).} the Sixth Circuit recently interpreted honest services more narrowly, finding “that Congressional enactment of § 1346 did not revive those cases involving prosecutions under the mail fraud statute for deprivations of the intangible right of honest elections.”\footnote{United States v. Turner, 465 F.3d 667, 674 (6th Cir. 2006). Instead, the right to honest elections is separate and distinct from the right to honest services. \textit{Id.} at 673.} Though this kind of narrower interpretation of honest services fraud is an important step toward refining its scope, decisions like this are not consistent among the circuits.

Thus, rather than resolve the vagueness and federalism concerns that triggered the Supreme Court’s decision in \textit{McNally},\footnote{McNally v. United States, 483 U.S. 350, 359–60 (1987) (declining to “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”).} since the enactment of § 1346, courts have continued in their struggle to define the nature of the frauds regulated by, and the limits of, the honest services theory of mail and wire fraud. As the First Circuit explained, “The central problem is that the concept of ‘honest services’ is vague and undefined by the statute. So, as one moves beyond core misconduct covered by the statute [for example, taking a bribe for a legislative vote], difficult questions arise in giving coherent content to the phrase through judicial glosses.”\footnote{United States v. Urciuoli, 513 F.3d 290, 294 (1st Cir. 2008).} Despite attempts by the courts of appeals over the last two decades to curb § 1346’s expansion through a variety of limiting principles, no consensus has emerged. The result has been a number of circuit splits surrounding § 1346’s appropriate scope and application, including the appropriate test for a § 1346 violation,\footnote{Compare United States v. Cochran, 109 F.3d 660, 667 (10th Cir. 1997) (using the materiality test), with United States v. Vinyard, 266 F.3d 320 (4th Cir. 2001) (applying the foreseeable harm test).} whether some form of personal gain should be a
required element of the fraud, and whether state or federal law should be used to define the offense.

Moreover, with no set guidelines governing the statute's scope, federal prosecutors have responded by bringing not only cases based on allegations of bribery, but also based on ethical breaches that would not violate the criminal statutes regulating the conduct of federal officers and would, at most, subject those officers to discipline or removal from office under federal ethical rules. It may be that by enacting § 1346 Congress intended to permit criminal prosecution of behavior that would only violate otherwise-certain ethical rules. Nevertheless, what is important for present purposes is that honest services fraud prosecutions currently have the potential to attack behaviors that, standing alone, may not be criminal, but that, through mail fraud, become felonious "schemes to defraud," defining a new type of illegal conduct with a maximum penalty of twenty years imprisonment.

Although the courts have not yet declared the honest services fraud statute unconstitutionally vague, at least one Supreme Court Justice

115. Compare United States v. Bloom, 149 F.3d 649, 655 (7th Cir. 1998) (construing the statute to prohibit only the abuse of position "for private gain"), with United States v. Panarella, 277 F.3d 678, 692 (3d Cir. 2002) (rejecting the private gain standard).

116. Compare United States v. Brumley, 116 F.3d 728, 733-35 (5th Cir. 1997) (applying state law), with United States v. Frost, 125 F.3d 346, 366 (6th Cir. 1997) ("Federal law governs the existence of fiduciary duty under the mail fraud statute."); and United States v. Martin, 195 F.3d 961, 966 (7th Cir. 1999) (stating that Brumley "is contrary to the law in this circuit, and in the other circuits to have addressed the question" (citations omitted)).

117. Beale, supra note 85, at 712-13. See also Martin, 195 F.3d at 967 ("[A] century of interpretation of the [mail fraud] statute has failed to still the doubts of those who think it dangerously vague.").

118. With such meager legislative history, proscription of anything less than an egregious violation of a staple ethical rule seems like a stretch. While this question is certainly open to debate, see Sorich v. United States, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari) ("Is it the role of the Federal Government to define the fiduciary duties that a town alderman or school board trustee owes to his constituents?"); its analysis is beyond the scope of this Note. For more information on this topic, see George D. Brown, Should Federalism Shield Corruption?—Mail Fraud, State Law and Post-Lopez Analysis, 82 CORNELL L. REV. 225 (1997).

119. See John C. Coffee, Jr., 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, 127 (1981) ("[T]he governing standard seems to be that of fair play, an obviously elusive standard upon which to make the question of criminal liability turn. . . . Under such a definition, cheating at bridge is apparently as much a federal offense as bribing a governor or defrauding investors in a stock swindle, at least if the mails are used to clear the check.").

120. See United States v. Rybicki, 354 F.3d 124, 163-64 (2d Cir. 2003) (Jacobs, J., dissenting) (intimating that the issue may be ripe for consideration by the Supreme Court because "the vagueness of the statute has induced court after court to undertake a rescue operation by fashioning something that (if enacted) would withstand a vagueness challenge. The felt need to do that attests to the constitutional
seems to recognize that the statute treads uncomfortably close to the constitutional border. When the Supreme Court denied certiorari in February to three former Chicago city officials appealing public corruption convictions, Justice Scalia was the lone dissenter, arguing that the Court should "squarely confront both the meaning and the constitutionality of § 1346."\footnote{121} "[I]t seems to me," he added, "quite irresponsible to let the current chaos prevail."\footnote{122}

Justice Scalia offered several reasons for why the Court should interpret § 1346 and decide whether it is unconstitutional, including the conflicts among the circuits, the longstanding confusion over the scope of the statute, and the serious due process and federalism interests affected by the expansion of criminal liability.\footnote{123} While each reason is meritorious in its own right, each is also relevant to this Note's central thesis—that the ambiguous nature of the honest services fraud statute makes it particularly vulnerable to abuse by improper political forces seeking to further a partisan agenda—because many of the current problems with the honest services fraud statute that Justice Scalia identified can be solved through the uniform application of a clearly defined statute.\footnote{124} The dangers of having such a broad and malleable statute, its relationship to prosecutorial discretion, and its susceptibility to abuse by partisan political forces, especially because the statute covers political corruption, are explored in Part III.

\footnote{121}{Sorich, 129 S. Ct. at 1311 (Scalia, J., dissenting from denial of certiorari).

\footnote{122}{Id.}

\footnote{123}{Id. (arguing that the case also squarely presented the issue of § 1346's constitutionality).}

\footnote{124}{Id. at 1310 ("Without some coherent limiting principle to define what 'the intangible right of honest services' is, whence it derives, and how it is violated, this expansive phrase invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct.")}.}
III. THE FEDERAL PROSECUTOR’S BROAD DISCRETIONARY AUTHORITY AND POLITICAL INFLUENCE ON PROSECUTORIAL DECISIONMAKING

The Supreme Court has described the role, and the responsibility, of U.S. Attorneys as follows:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. 125

Commentary suggests that prosecutors act improperly when they fail to act neutrally. 126 While prosecutorial neutrality has many different connotations, this Note focuses on the need for federal prosecutors to be politically neutral, in the sense of political nonpartisanship. Nonpartisanship encompasses both independence from actors who wish to influence prosecutorial decisions and freedom from personal political agendas. 127

While it may be especially difficult for elected state and local prosecutors (whose public has the power to strip them of their position) to remain unaffected by politics in their efforts to seek justice, 128 federal

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126. See Thomas M. DiBiagio, Politics and the Criminal Process: Federal Public Corruption Prosecutions of Popular Public Officials Under the Honest Services Component of the Mail and Wire Fraud Statutes, 105 DICK. L. REV. 57, 64 (2000) ("The public is best served by investigations conducted in a timely and professional manner and decisions to prosecute arising from an honest judgment of the law and quality of the evidence." ); Bruce A. Green & Fred C. Zacharias, Prosecutorial Neutrality, 2004 WIS. L. REV. 837, 860–70 (discussing the different meanings of neutrality as it relates to prosecutors' conduct).
127. See Green & Zacharias, supra note 126, at 860–70. Green and Zacharias advance three possible notions of nonpartisanship: (1) independence, (2) objectivity, and (3) nonpoliticism. Id. They define nonpoliticism to mean that, regardless of anything else prosecutors do, they should act nonpolitically. Included in the category of political actions are acting out of obligations to the political parties with which they are affiliated (and which may have helped them obtain their positions) and allowing themselves to be influenced by the public outcry and frenzy about particular cases. Id.
128. See Robert L. Misner, Recasting Prosecutorial Discretion, 86 J. CRIM. L. & CRIMINOLOGY
prosecutors too are not free from political pressures.\textsuperscript{129} It is well understood that U.S. Attorneys are political appointees who "serve at the pleasure of the President."\textsuperscript{130} At the beginning of a new presidential administration, all ninety-three U.S. Attorneys traditionally submit letters of resignation. When a new president is from a different political party, almost all of the resignations are eventually accepted.\textsuperscript{131} The attorneys are then replaced by new political appointees, typically from the new president's party.\textsuperscript{132}

Embedded in the role of the federal prosecutor is thus a tension between independence and accountability.\textsuperscript{133} On the one hand, federal prosecutors are supposed to be independent from state control, as evidenced by their quasi-judicial role to see that justice is done.\textsuperscript{134} On the other hand, it is impossible to ignore the fact that they occupy their positions because the political system put them there.\textsuperscript{135}

At the core of this tension sits prosecutorial discretion, struggling to find a balance between the twin demands of politics and impartial administration of justice. By promoting case-sensitive decisionmaking, it can protect liberty, but it can also allow politically motivated prosecutions. In this part, Section A briefly reviews the federal prosecutor's broad discretion, highlighting how the honest services fraud statute enhances this discretion even further. Section B demonstrates the way in which two conditions—the ambiguous nature of honest services fraud and the federal prosecutor's broad discretionary authority—exacerbate the danger for partisan politics to influence and interfere with federal prosecutorial


\textsuperscript{129} Perry, \textit{supra} note 21, at 131 ("[G]iven the nature of what attorneys for the United States do, they could never be nonpolitical.").

\textsuperscript{130} McKay, \textit{supra} note 4, at 277.


\textsuperscript{133} See Berger v. United States, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all . . . ").

\textsuperscript{134} \textit{CHARLES W. WOLFRAM, MODERN LEGAL ETHICS} § 13.10.1, at 759 (1986) (noting that "[t]he prosecutor's dual role leaves the office much nearer that of a judicial officer than that of partisan advocate").

\textsuperscript{135} Perry, \textit{supra} note 21, at 131 ("By definition, the Department's mission is political—both in the grand sense, but also in terms of responsiveness. The whole concept of responsible government requires that whom we elect matters and that bureaucracy respond accordingly.").
decisionmaking, specifically in prosecutions under the honest services fraud statute.

A. THE FEDERAL PROSECUTOR'S BROAD DISCRETIONARY AUTHORITY

The federal prosecutor is charged with the responsibility to "prosecute for all offenses against the United States." In seeking these convictions, however, the prosecutor must ensure that "no innocent person is prosecuted, convicted, or punished." In other words, the prosecutor's duty is "to seek justice, not merely to convict." Unfortunately, the law does not prescribe how prosecutors should go about investigating and charging individuals, which means prosecutors "must seek justice by making the right decisions when gaps in the rules leave them with little guidance." From selecting investigative targets to making charging decisions and sentencing recommendations, gaps in the rules guiding the prosecutor's behavior exist in almost every task a prosecutor performs. These gaps represent the tremendous discretion accorded prosecutors in our judicial system. As Kenneth Culp Davis famously stated: "Where law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness."
Such broad discretionary authority is considered essential for multiple reasons. First, prosecutors are exposed to and have the opportunity to review a large number of cases, each of which involves different actors, evidence, and crimes. Because prosecutors have this information before them when determining whether to file charges, they are often in the best position to make this decision. Prosecutorial discretion also serves important efficiency benefits by keeping a check on the judicial system’s limited time and resources and preventing the court system from becoming overburdened by weak evidentiary cases.\textsuperscript{143}

A few limitations do exist on prosecutorial discretion. Most of the limits, however, do not provide a basis for direct regulation of prosecutors, but merely establish norms of conduct or guidelines for how prosecutors should exercise their powers.\textsuperscript{144} The American Bar Association’s ("ABA’s") \textit{Standards for Criminal Justice: Prosecution Function and Defense Function} and the Department of Justice’s \textit{U.S. Attorneys' Manual}, for example, mostly serve as points of consultation, vague and limited in scope.\textsuperscript{145} Thus, despite the ABA’s standards urging prosecutors to only bring charges they believe they can prove beyond a reasonable doubt,\textsuperscript{146} prosecutors frequently charge more and greater offenses than they can prove under the reasonable doubt standard.\textsuperscript{147} Additionally, because of the strong history and culture of autonomy surrounding U.S. Attorneys, for many, disregard of the \textit{U.S. Attorneys' Manual} is "a source of pride."\textsuperscript{148}

The only guidance for U.S. Attorneys regarding mail and wire fraud charges is in the \textit{U.S. Attorneys' Manual}, which does not define "scheme to defraud" or "intangible right to honest services."\textsuperscript{149} Attempts to better

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\textit{Prosecutorial Decision Making}, 13 AM. CRIM. L. REV. 507 (1976). Moreover, although the charging decision is the most obvious exercise of prosecutorial discretion, discretion is also important in plea bargaining and in dismissing charges. \textit{See generally ABRAHAM S. GOLDSTEIN, THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA} (1981) (discussing the broad discretion afforded prosecutors in plea bargaining and dismissing charges).


\textsuperscript{145} \textit{Id.}

\textsuperscript{146} A.B.A. \textit{STANDARDS} § 3-3.9(a) (discretion in the charging decision).

\textsuperscript{147} Davis, \textit{supra} note 19, at 413.

\textsuperscript{148} Kahan, \textit{supra} note 20, at 487. \textit{See also} Moohr, \textit{supra} note 29, at 176 ("Due in part to the decentralized organization of the Department of Justice, federal prosecutors often operate independently, with minimal direction or supervision from their superiors in Washington.").

\textsuperscript{149} \textit{See U.S. ATTORNEYS' MANUAL} § 9-43.000 (Dep't of Justice 1997) (mail fraud and wire
understand “scheme to defraud” by looking through the rest of the Manual are unavailing; the other sections also do not provide guidance for what conduct may or may not constitute a scheme to defraud and merely recite case law that is itself vague. When compared to other efforts to limit the scope of federal criminal statutes, the lack of direction for mail and wire fraud is even starker.\textsuperscript{150} The guidelines for the Racketeer Influenced and Corrupt Organizations Act (“RICO”),\textsuperscript{151} for example, state that the decision to prosecute is based on basic principles; the guidelines also discourage “imaginative” prosecutions because they are contrary to the intent of Congress in enacting the statute.\textsuperscript{152}

Additionally, though informal mechanisms such as public oversight and political realities do sometimes help curb prosecutorial abuse, they generally require the abuse to occur before guidance is triggered. The internal and administrative supervision that normally sets boundaries for prosecutors is even more lax for honest services fraud.\textsuperscript{153} For example, the current general policy of the Department of Justice’s PIN is to automatically approve public corruption prosecutions against low-level government officials.\textsuperscript{154}

Finally, though the courts have constitutional power and supervisory authority to oversee the implementation of the criminal justice system,\textsuperscript{155} which includes regulating overzealous prosecutorial conduct, courts have been hesitant to utilize these powers generally,\textsuperscript{156} let alone to regulate honest services fraud prosecutions. First, many of the most damaging forms of misconduct—inapposite or unethical charging decisions, intimidating conversations with witnesses, and selective prosecutions—all occur behind

\textsuperscript{150} See Gregory Howard Williams, \textit{Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud}, 32 ARIZ. L. REV. 137, 145–47 (1990) (discussing how the RICO prosecutorial guidelines provide much more comprehensive guidance than the guidelines for mail fraud).


\textsuperscript{152} See U.S. ATTORNEYS' MANUAL § 9-110.200 (RICO guidelines preface); id. § 9-110.310 (considerations prior to seeking an indictment). See also Williams, supra note 150, at 145–47.

\textsuperscript{153} See Moohr, supra note 29, at 176 (“Internal guidelines and supervision, which would provide an effective limitation on the discretion of prosecutors to charge mail fraud, are either nonexistent or ineffectual.”).

\textsuperscript{154} Williams, supra note 150, at 145.

\textsuperscript{155} See Pamela Cothran, \textit{Preliminary Proceeding: Prosecutorial Discretion}, 82 GEO. L.J. 771, 773–74 (1994) (stating that “the judiciary has a responsibility to protect individuals from prosecutorial conduct that violates constitutional rights”).

\textsuperscript{156} George, supra note 144, at 745 (stating that the court’s unwillingness to question prosecutorial decisions is “both because it slows down the criminal justice system and requires examination of factors that the court is not well suited to examine” (citing Wayte v. United States, 470 U.S. 598, 607 (1985))).
closed doors in the privacy of the prosecutor’s office, away from the public and the parties whose cases are affected by the harmful behavior, and free from judicial or congressional oversight.157 Second, even where there is some evidence of selective or vindictive prosecution, the likelihood that a court will actually censure a prosecutor is extremely rare.158 When courts have reprimanded overzealous prosecutorial conduct, the evidence showed that the prosecutor engaged in selective prosecution of an individual because of race, ethnicity, origin, or other factors—not for improperly considering partisan politics.159 Instead, courts repeatedly recognize a prosecutor’s discretion as exceptionally broad and are often unwilling to question prosecutorial decisions.160 Thus, “when all is said and done, individual prosecutors’ preferences still control a vast range and number of choices, free of outside or supervisory controls.”161

With such broad discretion, how then does a prosecutor decide whom to prosecute? Bennett L. Gershman delineates a descriptive (as opposed to normative) list of four types of considerations that typically inform and guide the decision to prosecute: legal, experiential, ethical, and political.162 Legal considerations include the strength of the case based on the credibility of witnesses, sufficiency and admissibility of evidence, and the nature and strength of the defense.163 Experiential considerations, such as the prosecutor’s background, training, experience, intuition, judgment, and common sense, also affect the decision to prosecute.164 Ethical considerations require that the prosecutor ask whether justice would be best served by criminal prosecution in a particular case, and that personal or retaliatory motives have not influenced the charging decision.165

Fourth on Gershman’s list of influences on prosecutorial

157. Davis, supra note 19, at 414 (noting that “[t]he courts have shielded many of these behaviors from scrutiny by establishing nearly impossible standards for obtaining the necessary discovery to seek judicial review”); Moohr, supra note 29, at 176–77 (“Further, the secrecy and informality with which prosecutors decide to press charges shield them from both outside scrutiny and internal examination.”).
158. Davis, supra note 19, at 414.
159. Id. at 436. Because selective prosecution violates the Constitution only if race, religion, or some other arbitrary classification motivates prosecution, a defendant raising a claim of selective prosecution has the burden of proving both discriminatory impact and discriminatory intent. Id.
160. George, supra note 144, at 745.
161. Green & Zacharias, supra note 126, at 847.
163. Id. at 513 n.3.
164. Id. at 513 n.5.
165. Id. at 513 n.6.
decisionmaking are political considerations. It is necessary, however, to distinguish between two types of political considerations that affect prosecutors. First, the political considerations Gershman describes include "an assessment of the harm caused by the offense, the availability of investigative and litigation resources, the existence of non-criminal alternatives, and an alertness to relevant social and community concerns." Attention to these political considerations actually may not be harmful to the judicial system because they lead prosecutors to investigate and prosecute crimes that the public or a federal agency deemed a priority. In essence, prosecutors can appropriately use these political considerations to execute the public's will.

But another category of political considerations—partisan political factors that should not affect federal prosecutors but sometimes do—exists as well. Such factors include whether a prosecutor is seeking an elected office, a potential defendant's party affiliation, or a prosecutor's obligations to a political party. Section B addresses the potential for these politically motivated factors to influence and interfere with prosecutorial decisionmaking in prosecutions of honest services fraud.

B. POLITICAL INFLUENCE AND INTERFERENCE WITH PUBLIC CORRUPTION PROSECUTIONS UNDER THE HONEST SERVICES FRAUD STATUTE

As Thomas DiBiagio states,

With no established standards, a federal public corruption prosecution, based on the intangible right to honest services, is particularly vulnerable to being snarled by politics. It is here that politics has the potential to produce one of the most disabling impacts on public confidence in the underlying fairness, integrity and public reputation of the criminal process.

Despite almost universal agreement that prosecutorial decisionmaking should be free from party politics, this admonition is not always followed. The tension between prosecutors' quasi-judicial role and the political constraints inherent in the federal prosecutor's role as a political appointee

166. Id. at 513 n.4.
167. Id.
168. See Green & Zacharias, supra note 126, at 869–71 ("A nonpolitical prosecutor arguably can ignore the public's desires concerning a specific case at a heated moment of time while remaining true to the public will in a more general sense. In other words, the nonpolitical prosecutor will ignore a momentary hue and cry but continue to heed public expectations as they are expressed over time in the law and popular culture." (footnote omitted)).
169. DiBiagio, supra note 126, at 57–58.
creates significant theoretical and practical dilemmas for federal prosecutors and the justice system and raises serious questions about the potential use of prosecutorial discretion to achieve political ends. The potential for partisan politics to improperly influence and interfere with federal prosecutions manifests itself in two ways: (1) through politically calculated investigations and prosecutions aimed at furthering a U.S. Attorney's own career and (2) through pressure on U.S. Attorneys from external forces, such as senators, other elected officials, and the White House. Whether political influence is the result of an individual U.S. Attorney's personal political agenda or external pressures imposed on a U.S. Attorney trying to act impartially, improper political influence over prosecutorial decisionmaking can lead to abuse of the honest services fraud statute through selective investigation and prosecution, inventive and technical frauds, and inapposite charging decisions.

1. Who to Charge? Selective Investigation and Prosecution

As former U.S. Attorney General and U.S. Supreme Court Justice Robert H. Jackson once articulated, "[A] prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone." 170 When politics improperly interfere with prosecutorial decisionmaking, "it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him." 171 Improper political influence on prosecutorial decisionmaking may result in horizontal inequity—dissimilar treatment of similar offenders. 172 Thus, even if evidence exists that the second person engaged in behavior similar to the first—such as an ethical violation that would only be subject to formal reprimand under federal ethical rules—improper political motivations can lead a prosecutor to charge one person with a felony and not another. 173

Although the dangers of selective prosecution are present with any prosecution, the potential for a politically influenced prosecutor to pick
their "target" and wait until something surfaces is exacerbated in the political corruption context, where the danger of abuse from partisan motivations is particularly acute.\textsuperscript{174} Indeed, because the honest services fraud statute is used to prosecute most allegations of political corruption and covers such a wide range of activities, the statute's vague and malleable nature is especially susceptible to abuse of discretion in an environment where partisan pressures are greatest. Though true of other broad statutes as well, with the statute's history as a "stopgap device" to prosecute inventive frauds not proscribed by other measures,\textsuperscript{175} the danger is that improper political influences will exploit the vague and malleable nature of honest services fraud to further a partisan political agenda.

Such was the accusation former Attorney General Richard Thornburgh leveled against U.S. Attorney Mary Beth Buchanan during congressional hearings last year. According to Thornburgh, who served under both the Reagan and the first Bush administrations, Buchanan conducted "highly visible grand jury investigations" of several high-profile and lesser-known Democrats in western Pennsylvania for violations of honest services fraud while ignoring charges implicating Republicans, including allegations that a Republican congressman was using paid staff members in his campaign.\textsuperscript{176} "During the same period not one Republican officeholder was investigated or prosecuted by Ms. Buchanan's office. Not one," he said.\textsuperscript{177} An interview with Buchanan before the House Committee on the Judiciary later confirmed this statement.\textsuperscript{178}

Assuming that an elected official's tendency to engage in corrupt practices has no relationship whatsoever to political party affiliation,\textsuperscript{179}
prosecutors who are improperly influenced by partisan politics may engage in selective investigation and prosecution of members of the opposing political party. In fact, a political communications study of federal investigations of elected officials and candidates revealed that the U.S. Attorneys’ Office investigated nearly six times as many Democratic officials as Republican officials under former U.S. Attorneys John Ashcroft and Alberto Gonzales.\textsuperscript{180} Though the study’s findings are not without flaws,\textsuperscript{181} at the very least it underscores the potential for partisan politics to influence and interfere with public corruption prosecutions distinctly from other types of prosecutions.\textsuperscript{182}

2. What to Charge? Inventive and Technical Frauds

Honest services fraud’s malleable nature is also susceptible to abuse because prosecutors improperly influenced by politics may try to push honest services fraud to its outer limits by charging defendants based on behavior that may not even be criminal. Because activities charged under the statute are often allegations of misuse of political power or improper payments disguised as campaign contributions, federal judges, who are supposed to be removed and isolated from the political process, are forced to make difficult and constrained distinctions between legitimate campaign contributions to elected officials and behavior that crosses the line and is corrupt. Three in 10 view the parties as equally financially corrupt.”

\textsuperscript{180} Joint Hearing on Selective Prosecution, supra note 176 (statement of Donald C. Shields, Ph.D., professor at University of Missouri–St. Louis).

\textsuperscript{181} For example, the study lacks historical data on the investigations and prosecutions of political figures from past administrations. But demonstration that selective prosecution occurred in previous administrations as well would only further indicate that the problem was a longstanding institutional one, rather than a political problem of the Bush administration as the study claims. Id. (“Given the strength of the evidence of these numbers, the only remaining question . . . has been whether or not the bias is institutional . . . or policy driven. Political profiling as selective investigation—like racial profiling—can be either institutional or policy driven. Information . . . concerning the firing of [the] U.S. Attorneys . . . and especially information indicating that the reason for replacing them related directly to their refusal to prosecute Democrats with sufficient enthusiasm or their decisions to prosecute Republicans—supports the conclusion that the demonstrated political profiling bias is policy driven.”). But see Savage, supra note 132 (discussing historical data).

\textsuperscript{182} Press Release, U.S. Dep’t of Justice, Former Alabama Governor Don Siegelman, Former HealthSouth CEO Richard Scrushy Convicted of Bribery, Conspiracy and Fraud (June 29, 2006), available at http://www.usdoj.gov/opa/pr/2006/June/06_cr_409.html. But see Scott Horton, Career Prosecutors Opposed Siegelman Case, HARPER’S, Oct. 29, 2007, available at http://www.harpers.org/archive/2007/10/hbc-90001540 (reporting that “a number of the most experienced and senior career prosecutors involved in the case strongly opposed continuing the prosecution against Siegelman” and that “[t]he case was pushed through . . . ‘with blunt political force’ over their opposition”).
illegal. Courts, however, are reluctant to limit prosecutors in the types of cases brought under the honest services fraud statute. Thus, Congress's enactment of an expansive, somewhat amorphous offense, coupled with courts' tendencies to construe the offense broadly, make the honest services fraud statute's vague nature particularly vulnerable to exploitation by partisan political forces.

The ambiguous nature of honest services fraud may also encourage politically motivated charges against an individual based on minor technical breaches or on behavior that, standing alone, may not be criminal. Dan Kahan's favorite instance of political motives improperly influencing a U.S. Attorney exemplifies such behavior. Kahan cites the "notorious insider trading prosecutions" during Rudolph Giuliani's "reign of terror" as U.S. Attorney for the Southern District of New York. The story goes that Giuliani, as part of a self-conscious and calculated attempt to win approval and future campaign support from established Wall Street firms, engaged in a high-visibility crackdown on "insider trading" and used the RICO and mail fraud statutes to prosecute technical tax violations as more serious offenses. In an effort to rein in Giuliani, the Department of Justice issued regulations on RICO and mail fraud prosecutions prohibiting this practice. But, Kahan argues, "by that point, Giuliani's crusade had

183. Stuart P. Green, Moral Ambiguity in White Collar Criminal Law, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 501, 508-10 (2004) (discussing how it is not always easy to tell whether the behavior charged as violating the honest services fraud statute is actually illegal). As Judge Easterbrook pointed out when the Seventh Circuit reversed a problematic honest services fraud conviction in 2007, "The idea that it is a federal crime for any official in state or local government to take account of political considerations when deciding how to spend public money is preposterous." United States v. Thompson, 484 F.3d 877, 883 (7th Cir. 2007).

184. The only time the Supreme Court actually did limit "scheme to defraud" to keep it from embracing the "intangible right to honest services," Congress responded swiftly, demanding its inclusion. See supra Part II.C.4.

185. Beale, supra note 85, at 712-13. See also United States v. Martin, 195 F.3d 961, 967 (7th Cir. 1999) ("[A] century of interpretation of the [mail fraud] statute has failed to still the doubts of those who think it dangerously vague.").

186. This authority is expressly sanctioned in CRIMINAL RESOURCE MANUAL § 920 (Dep't of Justice 1997).


188. Giuliani's plan appears to have worked; when he later ran for mayor of New York, these firms supplied valuable support to Giuliani's campaigns. Kahan, supra note 20, at 487-92; Kahan, Reallocating, supra note 187, at 52-53, 55; Kahan, Three Conceptions, supra note 187, at 16-17, 19-20.

189. U.S. ATTORNEYS' MANUAL § 6-4.210 (Dep't of Justice 1997) (stating that a U.S. Attorney
already succeeded in gaining judicial acceptance of a variety of ill-
considered legal doctrines and in creating a climate of career-destroying,
life-ruining public hysteria."^{190}

3. One Count or Eighty-Four? Inapposite Charging Decisions

Honest services fraud is also particularly vulnerable to abuse in
deciding how many counts to charge a defendant with. The *U.S. Attorneys’
Criminal Resource Manual* instructs federal prosecutors to charge “as few
separate counts as are reasonably necessary to prosecute fully and
successfully and to provide for a fair sentence on conviction.”^{191} But what
constitutes a “fair sentence”? The *Manual* does not say, instead reiterating
that the “sentence [be] appropriate to the nature and extent of the offenses
involved.”^{192} Thus, the choice to charge single or multiple counts is subject
to the federal prosecutor’s broad discretionary power and is therefore
susceptible to improper political influence.

While this decision is susceptible to improper political influence apart
from the statute,^{193} the potential for politics to influence charging counts is
especially prevalent in honest services fraud prosecutions because each
mailing or wire transmission in connection with a single scheme constitutes
a separate offense which the prosecutor may allege as one count in the
indictment.^{194} The decision whether to charge multiple offenses gives
prosecutors discretion over what penalties will be invoked, and depending
on how seriously the prosecutor views the conduct, a prosecutor can
prevent or dole out the full sanctions of the law simply by filing only one or
several mailings as charges.^{195} Because “scheme to defraud” and
“intangible right to honest services” are undefined, the danger is that

^{190} Kahan, supra note 20, at 487.
^{191} CRIMINAL RES. MANUAL § 215 (number of counts in indictments).
^{192} Id.
^{193} Davis, supra note 19, at 408–09. Of course, the counterargument is that because sentencing for
mail, wire, and honest services fraud is based on loss, prosecutors must charge more counts to ensure that
truly egregious behavior is punished. Also, conduct that falls under honest services fraud is typically
difficult to prove, which means prosecutors may need to charge more counts because a jury may not
convict the defendant of all the charges.
^{194} Schwartz, supra note 30, at 79–80.
^{195} James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1526
for Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 473, 481 (1976)).
partisan politics may influence a prosecutor to charge several separate mailings, all as part of the same "scheme," simply because the mailing element is liberally construed by the courts. 196

A simple example comes from the indictment of former Allegheny County coroner Cyril H. Wecht, which originally charged him with seventy-nine counts of mail fraud, wire fraud, and theft of honest services. 197 A survey of the counts in the indictment shows that twenty-four of the wire fraud charges are for use of the coroner’s fax machine for personal business four times in 2002, eleven times in 2003, eight times in 2004, and once in 2005. 198 The next thirteen counts, alleging honest services mail fraud, consist of using the office mail to send eight histological slides, mostly to attorneys in black lung cases who had consulted with Wecht seeking justice for their clients. 199 Assuming the cost of a fax is one dollar and postage costs thirty-nine cents, Wecht was charged with thirty-two federal felonies for “scheme[s] to deprive” the public of $27.12. 200

Wecht’s attorney testified before Congress that Wecht was “a prominent and highly visible Democrat in [a] predominantly Democratic region.” 201 If the decision to bring Wecht’s case was politically motivated, as his attorney and commentators argued, 202 improper political considerations may have influenced the number of counts that were charged. They also could have influenced the decision to bring allegations of fraud from 2001, 2002, 2003, 2004, and 2005, all as part of the same “scheme.” The indictment indicated that, for the most part, each fax was to a different person or entity. Nevertheless, by broadly defining “scheme,” a prosecutor is


198. Id. ¶ 35.

199. Id. ¶ 40.

200. Though his math is wrong, the logic of this argument comes from Thornburgh’s testimony before Congress. Joint Hearing on Selective Prosecution, supra note 176, at 4 (statement of Richard Thornburgh, former Attorney General of the United States).

201. Id. at 6. The next forty-seven felony charges were for alleged private mail fraud in connection with expense billings to Wecht’s private clients. The final five counts of the Indictment alleged that, in each year from 2001 to 2005, Wecht stole “property valued at $5,000 or more” in violation of 18 U.S.C. § 666(a)(1)(A) (2006), the federal bribery statute. Id. at 4–5.

202. Thomas J. Faman, It’s Not a Federal Case, PITTSBURGH POST-GAZETTE, Jan. 28, 2008, available at http://www.post-gazette.com/pg/08028/852287-109.stm ("There is a very real danger, given the sheer number of charges, that the . . . prosecutor will make something stick. And we will suffer the distasteful prospect of having to put a dedicated public servant in jail. This case should never have been brought.").
able to bring all the charges in one indictment, thereby permitting a prosecutor to charge a defendant with a "scheme" based on several mailings that are completely unrelated in order to further partisan goals.\textsuperscript{203}

Another example of potential abuse of this type comes from the trial of former Illinois governor George Ryan. Ryan was charged with nine counts of mail fraud—all of them mailings allegedly in furtherance of one fraudulent scheme that continued from the time Ryan was elected secretary of state of Illinois until he left the governor's office twelve years later.\textsuperscript{204} The indictment offered 128 numbered paragraphs (about forty-pages worth) that began with the words "it was a part of the scheme" or "it was a further part of the scheme."\textsuperscript{205} Albert Alschuler argues that for "anyone who uses the word 'scheme' in the ordinary way, the allegations spread over 40 pages of the Ryan indictment do not appear to constitute a unitary scheme or plot."\textsuperscript{206} Nevertheless, the trial judge ruled that the indictment appropriately alleged one scheme, writing "Ryan and Warner are charged with misusing State of Illinois resources for their personal gain, a scheme they carried out in a variety of ways... The mere fact that these activities involved different individuals and entities does not render the charges duplicitous."\textsuperscript{207}

Whether Wecht's indictment or Ryan's prosecution were politically motivated remains to be seen. What is important for present purposes is that, as it now stands, the federal prosecutor's broad discretionary authority, coupled with the vagueness of honest services fraud, makes these types of scenarios possible.\textsuperscript{208} Thus, regardless of whether Wecht's\textsuperscript{203} Of course, the counterargument is that sentencing is based on loss, so prosecutors must charge more counts to ensure that truly egregious behavior is punished. Also, because conduct that falls under honest services fraud is typically difficult to prove, the prosecutor needs to charge more counts because a jury may not convict a defendant of all the charges. For example, when former Alabama governor Don Siegelman was charged with trading government favors for campaign donations, his indictment included at least twenty-one counts of honest services mail and wire fraud. A jury acquitted him of all but four of those charges. Press Release, supra note 182. \textit{But see} Horton, supra note 182 (reporting that "a number of the most experienced and senior career prosecutors involved on the case strongly opposed continuing the prosecution against Siegelman" and that "[t]he case was pushed through... 'with blunt political force' over their opposition").

204. Alschuler, supra note 196, at 113–16.
205. Id. at 115–16.
206. Id. at 116.
208. Cf. Kahan, supra note 20, at 487 ("[D]epiction of Giuliani [as a U.S. Attorney on a 'reign of terror'] is contentious, but the strength of my argument doesn't depend on whether [t]his story is right.
indictment or Ryan’s prosecution were politically motivated as some have claimed, prosecutors who allow improper political considerations to influence the number of counts they list in the indictment could end up charging one defendant with a greater number of counts than another. Moreover, because the number of counts within the indictment affects the length of sentence, improper political considerations may lead defendants convicted of honest services fraud to receive different sentences for very similar behavior. The potential for such a disparity demonstrates the need for a solution both to limit the potential for political influence on prosecutorial decisionmaking and to provide additional guidance in bringing charges under honest services fraud.

IV. LESSENING THE RISK OF PROSECUTORIAL ABUSE OF HONEST SERVICES FRAUD FOR POLITICAL PURPOSE: UNIFORMITY, ACCOUNTABILITY, AND TRANSPARENCY

The perception that U.S. Attorneys’ Offices are improperly exercising their prosecutorial powers in a partisan manner has already led to an increase of motions in court by defense counsel. These defense attorneys allege that prosecutors consider a target’s political affiliations when deciding whether to issue an indictment. Attorneys who believe their clients are being prosecuted for improper political motives can and should raise this claim, but these motions are extremely hard to prove because of a high evidentiary standard and general skepticism that someone in the United States would be singled out for prosecution for political reasons.

All that matters is that existing institutional structures make the kind of behavior . . . attribute[d] to Giuliani both plausible and predictable.”).  

209. See, e.g., Horton, supra note 182. 

210. Richard B. Schmitt, Attorney Firings Echo in Courts, L.A. TIMES, June 18, 2007, at Al (reporting that several defense attorneys were citing the allegations of selective prosecution as evidence that federal prosecutors were bringing criminal charges based upon improper political motives). 

211. Id. 

212. Generally, where others who are similarly situated to the defendant are not prosecuted for conduct similar to the defendant’s, the defense claim is that the defendant has been intentionally singled out for prosecution on the basis of an arbitrary or invidious criterion. Though the elements of the defense of discriminatory prosecution are relatively straightforward, the difficulty arises in the proof or establishment of each of the elements. See, e.g., United States v. Peskin, 527 F.2d 71 (7th Cir. 1975) (affirming the defendant’s conviction for violating the Federal Travel Act and holding that the decision to prosecute the defendant, made in part on consideration of his political prominence, was not made on an impermissible basis). 

213. Editorial, Selective Prosecution, N.Y. TIMES, Aug. 6, 2007 (“Putting political opponents in jail is the sort of thing that happens in third-world dictatorships. In the United States, prosecutions are supposed to be scrupulously nonpartisan.”). See also Richman & Stuntz, supra note 173, at 616 (noting that even for judges, “favorable facts—the whiff of corruption that attracted the prosecutor’s attention
Additionally, the media is usually very eager to report on a federal public corruption investigation. Thus, even if a defense of political retaliation succeeds, the damage to the individual’s life and reputation may be beyond repair.\textsuperscript{214}

Others have argued that the solution lies with Congress providing limiting language in the honest services statute,\textsuperscript{215} or in the judiciary’s reliance on enumerated factors or use of a specific test.\textsuperscript{216} But given that none of the other Justices joined Justice Scalia in his recent opinion calling upon the Court to interpret the statute and provide “some coherent limiting principle to define what ‘the intangible right of honest services’ is, whence it derives, and how it is violated,” it seems unlikely the Supreme Court will resolve any of these issues anytime soon.\textsuperscript{217} Moreover, even if the Supreme Court or Congress were to act, both of these prescriptions are undesirable because they ignore the historical development of honest services fraud as a tool for prosecuting inventive frauds that are not proscribed by other measures.\textsuperscript{218} Furthermore, because the majority of literature focuses on providing adequate notice to potential defendants,\textsuperscript{219} they do not solve the
problem of abuse of prosecutorial discretion that occurs when the U.S. Attorneys’ Office is politicized. Additional legislation or judicially interpreted elements will not curb some of the most damaging forms of misconduct, including inapposite charging decisions and selective prosecutions, all occurring behind closed doors. Thus, an effective solution must find a way to limit improper political influence on prosecutorial decisionmaking while still retaining honest services fraud’s flexibility to go after corruption.

This Note advocates a two-part proposal: First, centralize the administration of honest services fraud prosecutions within the Department of Justice’s PIN. Second, create a federal public corruption registry and expand the Attorney General’s annual reports to Congress on the Justice Department’s PIN. A centralized administration of honest services fraud prosecutions within the PIN achieves the desired uniformity in the application of honest services fraud, while the courts’ power to decide whether to give the PIN’s interpretations deference provides an additional check both on individual prosecutorial overreaching and on the PIN as a whole. Simultaneously, the federal public corruption registry and expansion of the Attorney General’s annual reports to Congress on the operations and activities of the Justice Department’s PIN will make the Department of Justice’s and U.S. Attorneys’ actions more transparent. Together, these solutions will help prevent partisan politics from influencing the broad discretion currently afforded federal prosecutors due to the ambiguity inherent in the honest services fraud statute. These two proposals are addressed in Sections A and B, respectively.

A. STEP ONE: A UNIFORM SYSTEM FOR HONEST SERVICES FRAUD PROSECUTIONS

Kahan uses the account of Giuliani’s abuse of mail fraud for political purposes to show that “existing institutional structures make the kind of behavior . . . attribute[d] to Giuliani both plausible and predictable. Individual U.S. Attorneys internalize the political benefits and externalize the practical and human costs of adventurous readings of federal criminal fraud.

220. Davis, supra note 19, at 414 (noting that “[t]he courts have shielded many of these behaviors from scrutiny by establishing nearly impossible standards for obtaining the necessary discovery to seek judicial review”); Moohr, supra note 29, at 176–77 (“Further, the secrecy and informality with which prosecutors decide to press charges shield them from both outside scrutiny and internal examination.”).

221. See, e.g., 2006 DOJ PINs REPORT, supra note 7, at i.
law."

He argues that neither the Department of Justice nor the federal court system as they currently exist is able to combat this form of overreaching. "As a result, federal criminal law is broader and looser than it would be were it aligned with the interests of the national electorate."

To counter the problem that legislators refuse to regulate prosecutors and judges are unable to effectively do so, Kahan proposes shifting federal criminal lawmaking powers to the executive branch by forming a centralized "law revision commission" within the Department of Justice that would engage in "reasonable, pre-litigation interpretations of vaguely worded criminal statutes." Currently, the U.S. Attorneys' Manual "provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal." Though the Manual is supposed to guide and inform the prosecutor, not only is it unhelpful because it fails to define "scheme to defraud," "honest services," or other key terms, but also for many U.S. Attorneys, disregard of the Manual is "a source of pride."

By contrast, for its interpretations to be binding on courts, the Department of Justice would have to comply with standard administrative law requirements. For example, to prevent "post hoc rationalizations" or explanations offered in support of agency actions after the decisions have been made, the Department of Justice would need to issue and formally

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223. Id. at 488. Kahan also argues that the current system suffers because federal judges have "limited and sporadic" experience with criminal law. Id. at 485. When asked to interpret vague statutes that mark the boundary line between socially desirable and socially undesirable behavior—that is, honest services fraud—the judiciary's limited expertise has resulted in "a body of formless doctrines that create unacceptably high risks of overdeterrence and unfair surprise when applied generally." Id. By contrast, the Department of Justice has close contact with all types of crimes and cases at all stages of development throughout the justice system. Id. at 489. Because the Department has more experience with criminal law enforcement than any court, it is more likely to appreciate the policy implications of a disputed statutory issue. Accordingly, the combination of practical experience and a deeper understanding of policy issues means that the Department of Justice is better situated than courts are to exercise criminal lawmaking power. Id. at 495.
225. U.S. ATTORNEYS' MANUAL § 1-1.100 (Dep't of Justice 1997) (purpose).
226. Kahan, supra note 20, at 487. See also Moohr, supra note 29, at 176 ("Due in part to the decentralized organization of the Department of Justice, federal prosecutors often operate independently, with minimal direction or supervision from their superiors in Washington.").
defend their interpretations of ambiguous statutes before defending them in
court, thus avoiding the potential for unfair surprise.\textsuperscript{229} Kahan argues that
such a commission would best solve the current problems of lack of
uniformity and curtail the risk of abuse of prosecutorial discretion by
"concentrat[ing] the lawmaking powers... in a politically accountable
entity that has [the] relevant expertise."\textsuperscript{230}

Kahan advocates for sweeping supervision by the Department of
Justice, implemented on a global basis. Realistically, such a dramatic,
formal substitution of an administrative law regime would "vastly increase
the complexity and expense of the prosecutorial agency."\textsuperscript{231} More
importantly, however, such a formal change has the potential to both
underprotect defendants and overregulate prosecutors.\textsuperscript{232} Consequently,
rather than advocate for a dramatic change from a structure that has been
with us for more than two hundred years, this Note proposes centralizing
public corruption prosecutions in the PIN and letting the PIN issue
interpretive rules for honest services fraud and the other statutes used in
those cases.

Part of the Department of Justice Criminal Division, the PIN
"oversees the federal effort to combat corruption through the prosecution of
elected and appointed public officials at all levels of government."\textsuperscript{233} Created in 1976, the PIN was intended to "consolidate into one unit of the
Criminal Division the Department's oversight responsibilities for the
prosecution of criminal abuses of the public trust by government
officials."\textsuperscript{234} The PIN has exclusive jurisdiction over allegations of criminal
misconduct on the part of federal judges and also monitors the investigation
and prosecution of election and conflict of interest
crimes.\textsuperscript{235} The PIN's
attorneys prosecute selected public corruption cases against federal, state,
and local officials.\textsuperscript{236} They are also available as a source of advice and
expertise to other prosecutors and investigators, including all ninety-three

\textsuperscript{229}. Kahan, \textit{Three Conceptions}, supra note 187, at 17-18.
\textsuperscript{230}. Kahan, \textit{Reallocating}, supra note 187, at 54.
2117, 2145 (1998).
\textsuperscript{232}. \textit{Id.} at 2144.
\textsuperscript{233}. U.S. Dep't of Justice, Public Integrity Section, http://www.usdoj.gov/criminal/pin (last
\textsuperscript{234}. 2006 DOJ PINS REPORT, supra note 7, at I.
\textsuperscript{235}. Public Integrity Section, supra note 233.
\textsuperscript{236}. \textit{Id.}
Approval from the PIN should be required for any indictments charging honest services fraud to issue. Though preapproval from the PIN is required under the current system, the PIN has a general policy of automatically approving public corruption prosecutions against low-level government officials. This current policy would need to change to a more meaningful review and a co-sharing of cases among the various districts and the PIN. In addition to removing the current policy, the PIN should be consulted for all prosecutions or plea bargains resulting from an indictment. Though the issuing office would remain the lead prosecutor, the PIN should be consulted on a bimonthly basis or as the case develops, whichever the PIN judges is reasonable from the circumstances of the case. Requiring prior approval rather than expanding the PIN’s exclusive jurisdiction prevents a significant increase in complexity and expenses and ensures the PIN remains focused. It also allows the PIN to monitor individual U.S. Attorneys’ Offices to catch and screen any potential inappropriate agenda-setting or a potential pattern of selective prosecution. Consultations with the PIN throughout the trial process will also encourage uniformity in application of honest services fraud and other statutes used to fight public corruption.

A centralized system for honest services fraud and other public corruption statutes should also include additional guidance in the Criminal Resource Manual and censure for federal prosecutors who deviate from the guidelines without approval. The PIN should issue interpretations of honest services fraud and other public corruption statutes, which should be added to the Manual and consulted by federal prosecutors on a regular basis. Because the PIN’s interpretations and the U.S. Attorneys’ Manual are not statutorily authorized, these would not be binding on the courts. Nevertheless, the courts can use the Skidmore doctrine to examine the guidelines and interpretations issued by the PIN and give them deference “depend[ing] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.”

PIN supervisors are uniquely suited to interpret the public corruption

238. See Williams, supra note 150, at 145.
240. Id. at 140.
statutes and issue policy statements for guidance. The career attorneys working in the PIN have the necessary experience and depth of knowledge regarding honest services fraud to engage in thorough analysis and reasoning. Because the types of crimes the PIN handles expose its prosecutors to a myriad of sensitive issues, they are more likely to appreciate the policy implications of a disputed statutory issue than the courts would be.\footnote{Kahan, supra note 20, at 495.}

Furthermore, one of the PIN’s most oft-cited attributes is “a penchant for consistency,”\footnote{Roberto Suro, Looking Inward at Justice, WASH. POST, Mar. 17, 1999, at A25.} which acts as a “powerful safeguard against partisanship.” In fact, the PIN’s reputation for nonpartisanship is so great that when the independent counsel statute was set to expire on July 1, 1999, Attorney General Janet Reno and others—including Common Cause, a nonprofit advocacy group committed to honest, open, and accountable government—advocated giving the PIN most of the duties previously performed by independent counsel.\footnote{Id.} Thus, regardless of an official’s party, requiring approval and consultations with the PIN would add one more layer toward ensuring that investigations are conducted according to the same procedures and that the law is interpreted the same way.

One way in which this proposal is desirable, as opposed to Kahan’s, for instance, is that implementation has the potential to reap all the benefits of the administrative law system with substantially fewer complications. After United States v. Mead Corp. held that deference to an agency’s interpretation of its governing statutes was only appropriate when those interpretations are reasonable, authorized by Congress, and have “the force of law,”\footnote{United States v. Mead Corp., 533 U.S. 218, 218–19 (2001).} implementation of Kahan’s proposal requires either the courts reversing themselves or Congress enacting a statute directing the courts to treat the Department of Justice’s interpretations of criminal law as binding exercises of delegated lawmaking power.\footnote{See Kahan, supra note 20, at 507–11 (explaining how deference to the Justice Department’s criminal law readings can be achieved through use of another doctrine that supports judicial acquiescence to executive branch interpretations by agencies “that lack delegated lawmaking powers but that nonetheless possess important enforcement responsibilities” (citing Skidmore, 323 U.S. 134)).} This proposal, by contrast, focuses only on issuing better guidelines in the Manual to achieve equal and uniform administration of justice.

The PIN has the appropriate experience and depth of knowledge regarding honest services fraud to appreciate the policy implications of a
disputed statutory issue and engage in reasoned decisionmaking.\textsuperscript{246} Together, the vagueness of the honest services fraud statute, the experienced and knowledgeable career attorneys working in the Department of Justice's PIN, and the relatively nonpartisan nature of the PIN, thus justify centralizing public corruption prosecutions and issuing more detailed guidelines as interpretive rules.

The most appealing justification for centralizing public corruption prosecutions under the PIN is that it would ensure uniform interpretation and application of federal criminal laws.\textsuperscript{247} Comprising approximately twenty-nine attorneys in 2006, the PIN is discrete and insular, its jurisdiction is well defined and narrow in scope, and the PIN is relatively nonpartisan in nature.\textsuperscript{248} The uniformity achieved by centralizing all public corruption prosecutions in the PIN has another benefit as well; it also helps rein in individual U.S. Attorneys like Giuliani who advance imaginative readings of vague criminal offenses in order to further a personal political agenda and please influential local interests. Accordingly, by ensuring uniformity in the application of honest services fraud and other federal laws and reducing the potential for uncoordinated actions from individual U.S. Attorneys with political agendas, this proposal solves many of the problems identified in this Note.

Justice Scalia criticizes the \textit{Skidmore} test as too unpredictable: a test that "'var[ies] with the circumstances,' including 'the degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position,'"\textsuperscript{249} has the potential to be applied with varying degrees of strictness. Though a potential for varied and inconsistent outcomes exists, it is doubtful that the results could be more diverse and unpredictable than the law's current status. What is more likely, however, is that by issuing interpretive rules and promulgating their policies, even if the courts do not give deference to those policies, the activities charged under the statute will become more consistent over time.

B. \textbf{STEP TWO: ACCOUNTABILITY THROUGH INCREASED TRANSPARENCY AND ENHANCED CONGRESSIONAL OVERSIGHT}

Though affixed with this reputation of nonpartisanship, testimony

\begin{itemize}
\item[\textsuperscript{246}] Id. at 495.
\item[\textsuperscript{247}] Id. at 489.
\item[\textsuperscript{248}] 2006 DOJ PINS REPORT, supra note 7, at i.
\item[\textsuperscript{249}] \textit{Mead}, 533 U.S. at 241 (Scalia, J., dissenting) (calling \textit{Skidmore} "that test most beloved by a court unwilling to be held to rules . . . : th'ol' 'totality of the circumstances' test").
\end{itemize}
before Congress last year made it painfully clear that even the PIN is not immune from the potential for partisan politics infiltrating prosecutorial decisionmaking. Jill Simpson, a lawyer and member of the Alabama Republican party, testified before the House Judiciary Committee that Karl Rove, while still serving as President Bush's political advisor, approached the head of the PIN and asked him to assign resources to the Department of Justice's prosecution of former Alabama governor Don Siegelman by case.\(^{250}\)

Evidence that the partisan political influences on prosecutorial decisionmaking has the potential to penetrate the depths of the Department of Justice is troubling, but it also underscores the tension inherent in the federal prosecutor's twin roles of serving the president and upholding the rule of law.\(^{251}\) To be sure that a Department of Justice necessarily embedded in politics does not use its power to promote partisan causes, it seems as though accountability for federal prosecutors and the Department of Justice must come from outside the executive branch. Given the ineffectiveness of courts in this arena thus far, and the unlikelyhood of their intervention in the future, the best checks on prosecutorial overreaching seem to be Congress and the people of the United States.

Current checks, however, have proven to be inadequate. Given the general current frustration with the politicization of the Department of Justice by the White House and the lack of confidence in the integrity of public officials,\(^{252}\) increased transparency is necessary to restore legitimacy to the criminal justice system and the electoral process. Additional checks narrowly tailored to a problem help prevent increased bureaucracy and promote swift responsive action.

The Department of Justice should be required to maintain a national registry of the federal investigations of both candidates and elected officials

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251. See Perry, supra note 21, at 134 ("The question is not whether one can solve the politics-versus-law point. The normative debate will and should continue, but as with the judiciary, it will not be resolved. Indeed, I have argued elsewhere that it should not be resolved."). See also Louis D. Bilionis, Process, the Constitution, and Substantive Criminal Law, 96 MICH. L. REV. 1269 (1998) (arguing that if criminal law is inescapably political, both in the sense that it rests on contestable value judgments and in the sense that it embodies tradeoffs between different values, it seems natural to assign responsibility for it to the most politically accountable actors).

252. See CBS News Poll, supra note 179.
by the U.S. Attorneys' or other offices in the Department of Justice. 253 This federal public corruption registry would list the elected officials and candidates running for public office that are indicted, prosecuted, and convicted of public corruption crimes and report the candidates' or elected officials' party affiliation and the jurisdiction in which the federal action occurred. The registry should also publish when and why a case is dropped, 254 whether the indicted individual entered into a plea bargain, or whether the trial resulted in an acquittal. The Department of Justice already maintains records of filing, prosecution, and conviction for a variety of crimes. 255 Because indictments, convictions, and party affiliation are all part of the public record, 256 information published in the registry would not interfere with ongoing investigations.

Section 603 of the Ethics in Government Act of 1978, which requires the Attorney General to report annually to Congress on the operations and activities of the Justice Department's PIN, 257 should be expanded to include substantive reports on any cases where the government charged more than fifteen counts. The Criminal Resource Manual instructs, "To the extent reasonable, indictments and informations should be limited to fifteen counts or less, so long as such a limitation does not jeopardize successful prosecution or preclude a sentence appropriate to the nature and extent of the offenses involved." 258 But as discussed above, prosecutors frequently

253. The Honest Leadership and Open Government Act of 2007 ("HLOGA") has a similar provision but differs enough that either it does not preempt this proposal or HLOGA should be amended to include this proposal. 2 U.S.C. § 1605 (2006). First, HLOGA does not create a specific national registry as is called for here, but it does create a searchable database. Second, the provision makes "publicly available, on a semiannual basis, the aggregate number of registrants referred to the United States Attorney for the District of Columbia for noncompliance," but it does not provide data on individuals who are charged for potential violations of the Act. Id. § 1605(a)(11) (emphasis added). Third, the registry should include a searchable link to a PDF of an individual's indictment, as well as a citation and link to the specific statute charged.

254. Presently, the Department of Justice requires federal prosecutors to indicate why they have chosen to forgo a prosecution. The Department provides prosecutors with a standardized form of thirty-four declination reasons. See U.S. ATTORNEYS' MANUAL § 9-2.020 (Dep't of Justice 1997) ("Whenever a case is closed without prosecution, the United States Attorney's files should reflect the action taken and the reason for it."). See generally Phillip B. Heyman, Assistant Attorney Gen., Criminal Div., U.S. Dep't of Justice, Declinations and the Prosecutor's Task, Statement Before the Comm. on the Judiciary, U.S. Senate, excerpted in 6 FED. SENT. R. 330 (1994) (explaining common reasons for declinations).


256. The first two are accessible through docket and court records; party affiliation is accessible through the Department of Motor Vehicles in most jurisdictions.


258. CRIMINAL RES. MANUAL § 215 (Dep't of Justice 1997) (number of counts in indictments).
charge more and greater offenses than they can prove under the reasonable
doubt standard.\textsuperscript{259} Currently, the PIN’s annual report to Congress describes
the activities of the PIN during the year and provides statistics (not names)
on the nationwide federal effort against public corruption during the year
and over the previous two decades.\textsuperscript{260} By requiring publication and explanation of resolved cases where the
government charged more than fifteen counts, not only will the legal and
prosecutorial decisionmaking process become more transparent, but it
could also have the derivative effect of educating the lawyers, public
officials, lobbyists, and others involved in public corruption charges.
Though not intended to be binding authority, these reports would still
provide a defense attorney or public official with the opportunity to see
how and what types of behaviors \textit{tend} to be charged. The report could thus
offer lawyers insight into charging patterns or public officials guidance into
what types of behavior “mark the boundary line between socially desirable
and socially undesirable behavior”\textsuperscript{261} for purposes of the statute.

V. CONCLUSION

As Coffee and Whitebread observed, “Federal prosecutors have long
followed the maxim, ‘When in doubt, charge mail fraud.’”\textsuperscript{262} When
conduct that prosecutors found objectionable could not readily be charged
under other statutes, mail fraud or wire fraud charges were brought
instead.\textsuperscript{263} The cost of creating offenses that are broad enough to reach
such a full range of deceptive activity, however, is that the federal
prosecutors’ power to charge individuals with federal honest services fraud
is particularly susceptible to abuse of discretion when partisan politics
improperly influence prosecutorial decisionmaking. In other words, the
ambiguity of the honest services fraud statute “has for decades been an
open invitation to federal prosecutors to expand their sway over the
political process in harmful and even corrupt ways, all in the name of
fighting corruption.”\textsuperscript{264}

Without administrative checks on ambitious or politically motivated

\begin{footnotes}
\item[259] Davis, \textit{supra} note 19, at 413.
\item[260] \textit{See}, \textit{e.g.}, 2006 DOJ PINS REPORT, \textit{supra} note 7, at i.
\item[261] Kahan, \textit{supra} note 20, at 485.
\item[262] Coffee & Whitebread, \textit{supra} note 12, § 9.01, at 9-2.
\item[263] \textit{See supra} Part II.
\end{footnotes}
prosecutors,265 the honest services fraud statute continues to present a dangerous loophole for improper political considerations to exploit prosecutors’ broad discretionary authority. As it now stands, the limitless expansion of honest services fraud “vests federal prosecutors with largely unchecked power to harass political opponents.”266 Accordingly, a uniform system of accountability is necessary to guide prosecutors in their investigations and limit improper political influence on prosecutorial decisionmaking, all while retaining honest services fraud’s flexibility to go after corruption.

A centralized administration of honest services fraud prosecutions within the PIN achieves the desired uniformity in the application of honest services fraud while the courts’ power to decide whether to give the PIN’s interpretations deference provides an additional check on individual prosecutorial overreaching and on the PIN as a whole. The vagueness of the honest services fraud statute, the experienced and knowledgeable career attorneys working in the PIN, and the relatively nonpartisan nature of the PIN indicate that it is well suited to issue these interpretations. Simultaneously, the federal public corruption registry and expansion of the Attorney General’s annual reports to Congress on the operations and activities of the Justice Department’s PIN will make the Department of Justice’s and U.S. Attorneys’ actions more transparent. Together, these solutions will help prevent partisan politics from influencing the broad discretion currently afforded federal prosecutors due to the ambiguity inherent in the honest services fraud statute.

265. See Beale, supra note 85.

266. United States v. Margiotta, 688 F.2d 108, 143 n.5 (2d Cir. 1982) (Winter, J., dissenting) (“It may be that we should expect only ‘enlightened statesmen’ to hold such office, but, with Madison, I would prefer not to take such a risk.”).