

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	No. 08 CR 888-6
)	
ROBERT BLAGOJEVICH,)	The Honorable
)	James B. Zagel,
Defendant.)	Judge Presiding.

**DEFENDANT ROBERT BLAGOJEVICH'S
MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS THE INDICTMENT**

INTRODUCTION

On April 2, 2009, a 19-count superceding indictment was returned.¹ Count One of the indictment alleges the existence of a conspiracy to engage in racketeering beginning in 2002 and ending December 9, 2008. The “enterprise,” was Rod Blagojevich, the Office of the Governor of Illinois, and Friends of Blagojevich. (Count One ¶ 2) The indictment alleges that Friends of Blagojevich was established in or about June 2000 and was a private entity existing under the laws of Illinois as a campaign committee for the purpose of supporting the election of Rod Blagojevich as Governor of Illinois, and was the principal campaign fundraising vehicle for Rod Blagojevich. Friends of Blagojevich maintained offices at 4147 North Ravenswood, Chicago, Illinois. Although various individuals, including, at times, defendant Christopher Kelly, Alonzo Monk and Robert Blagojevich, held the office of chairman of Friends of Blagojevich, at all times the activities and financial affairs of Friends of Blagojevich were controlled and directed by Rod Blagojevich, for

¹ Hereafter, references to the “indictment” refers to the 19-count superceding indictment returned April 2, 2009.

whose benefit Friends of Blagojevich was operated. (Count One ¶ 1.b.)

Robert Blagojevich is the brother of defendant Rod Blagojevich. The indictment alleges that in August 2008, Robert Blagojevich served as the chairman of Friends of Blagojevich. (Count One ¶ 1.f.)

Count One of the indictment alleges a racketeering conspiracy and that Robert Blagojevich was “employed by and associated with an enterprise, namely the Blagojevich Enterprise,” (Count One ¶ 4) The indictment charges Robert Blagojevich, and others, with engaging “in a scheme to deprive the people of the State of Illinois and the beneficiaries of TRS of their intangible right to the honest services of” Rod Blagojevich and others. (Count One ¶ 6) It is further alleged that Robert Blagojevich, and others, “used and attempted to use the powers of the Office of the Governor, to take and cause governmental actions ... in exchange for financial benefits for themselves and others, including campaign contributions for ROD BLAGOJEVICH, money for themselves, and employment for ROD BLAGOJEVICH and his wife.” (Count One ¶ 7)

Count Two of the indictment alleges that Robert Blagojevich, Alonzo Monk, John Harris, Rod Blagojevich, together with Christopher Kelly, William Cellini, Antoin Rezko, Stuart Levine, and others, “devised and participated in a scheme (from 2002 to December 9, 2008) to deprive the people of the State of Illinois and the beneficiaries of TRS (the Teachers’ Retirement System of the State of Illinois) of their intangible right to honest services” of Rod Blagojevich, John Harris, Alonzo Monk, and Stuart Levine. (Count Two ¶ 2)

According to the indictment, Rod Blagojevich, Alonzo Monk, John Harris, Robert Blagojevich, Christopher Kelly, William Cellini, Antoin Rezko, Stuart Levine, and others, “used and attempted to use the powers of the Office of the Governor, and of certain state boards and commissions subject to influence by the Office of the Governor, to take and cause governmental

actions, including: appointments to boards and commissions; the awarding of state business, grants, and investment fund allocations; the enactment of legislation and executive orders; and the appointment of a United States Senator; in exchange for financial benefits for themselves and others, including campaign contributions for Rod Blagojevich, money for themselves, and employment for Rod Blagojevich and his wife.” (Count Two ¶ 3)

Count Two of the indictment goes on to allege several schemes, including: Rod Blagojevich and Alonzo Monk sharing financial benefits from State action (Count Two ¶ 4); the Illinois Pension Obligation Bond deal between Rod Blagojevich and Alonzo Monk (Count Two ¶ 5); maintaining control over TRS (Count Two ¶ 6); the solicitation of Ali Ata (Count Two ¶ 7); the solicitation of Joseph Cari (Count Two ¶¶ 8-11); campaign contributions solicited for TRS investments (Count Two ¶ 12); the attempted extortion of Capri Capital (Count Two ¶¶ 13-18); benefits given to Rod Blagojevich and Alonzo (Count Two ¶ 19); the search for employment for Rod Blagojevich’s wife (Count Two ¶ 20); and the attempted extortion of United States Congressman A (Count Two ¶ 22). There are absolutely no allegations Robert Blagojevich had knowledge of or involvement in any of the schemes set forth in paragraphs 4-25 of Count Two.

With respect to Robert Blagojevich, Count Two alleges that Robert Blagojevich was involved in four schemes: (1) the attempted extortion of Children’s Memorial Hospital; (2) the attempted extortion of a racetrack executive; (3) the attempted extortion of a highway contractor; and (4) efforts to obtain personal financial benefits for Rod Blagojevich in return for Rod Blagojevich’s appointment of a United States Senator. (Count Two ¶¶ 26-40)

1. The Attempted Extortion of Children’s Memorial Hospital

Count Two of the indictment alleges that Rod Blagojevich wanted “\$50,000 in **campaign contributions** from the Chief Executive Officer of Children’s Memorial Hospital (‘the Children’s

CEO’).” (Count Two ¶ 26) (Emphasis added.) Count Two alleges that on or about October 22, 2008, Robert Blagojevich “spoke with the Children’s CEO and **asked** him to raise \$25,000 for ROD BLAGOJEVICH prior to January 1, 2009.” (Count Two ¶ 28) According to the indictment, “[i]t was further part of the scheme that on or about November 12, 2008, after the Children’s CEO had not returned additional phone calls from defendant ROBERT BLAGOJEVICH, and no **political contributions** from the Children’s CEO or other persons associated with Children’s Memorial Hospital had been received, defendant ROD BLAGOJEVICH spoke to Deputy Governor A about the increase in the Medicaid reimbursement rates for specialty-care pediatric physicians, asking whether ‘we could pull it back if we needed to’” (Count Two ¶ 29) (Emphasis added.)

2. The Attempted Extortion of Racetrack Executive

Count Two of the indictment alleges that “on or about November 13, 2008, defendant ROD BLAGOJEVICH told defendant ROBERT BLAGOJEVICH that “he wanted **campaign contributions** to be made by the end of the year by Racetrack Executive” (Count Two ¶ 30) (Emphasis added.)

3. The Attempted Extortion of Highway Contractor

Count Two of the indictment alleges that “on or about September 18, 2008, defendants ROD BLAGOJEVICH, MONK and ROBERT BLAGOJEVICH met with Construction Executive, who was both an executive with a company that manufactured and distributed road building materials and a representative of a trade group involved with the construction of roads. In that meeting, ROD BLAGOJEVICH said that he was planning on announcing a \$1.5 billion road building program that would be administered through the Illinois Toll Highway Authority (the ‘Tollway’) and that he might authorize an additional \$6 billion road building program later on. Shortly thereafter in the conversation, ROD BLAGOJEVICH asked for Construction Executive’s help in raising

contributions for ROD BLAGOJEVICH's **campaign** by the end of the year. After Construction Executive left the meeting, ROD BLAGOJEVICH instructed MONK to try to get Construction Executive to raise \$500,000 in **contributions**." (Count Two ¶ 35) (Emphasis added.)

4. Efforts to Obtain Personal Financial Benefits for Rod Blagojevich in Return for his Appointment of a United States Senator

Count Two of the indictment alleges that:

38. It was further part of the scheme that beginning in or about October 2008, and continuing until on or about December 9, 2008, defendant ROD BLAGOJEVICH, with the assistance of defendants HARRIS and ROBERT BLAGOJEVICH, and others, sought to obtain financial benefits for himself and his wife, in return for the exercise of his duty under Illinois law to appoint a United States Senator to fill the vacancy created by the election of Barack Obama as President of the United States.

39. It was further part of the scheme that defendant ROD BLAGOJEVICH engaged in numerous conversations with others, at times including defendants HARRIS and ROBERT BLAGOJEVICH, certain high-ranking employees of the Office of Governor, and certain political consultants, to devise and set in motion plans by which ROD BLAGOJEVICH could use his power to appoint a United States Senator to obtain financial benefits for himself and his wife. At times ROD BLAGOJEVICH directed others, including state employees, to assist in these endeavors, including by performing research and conveying messages to third parties.

* * * * *

42. It was further part of the scheme that on or about December 4, 2008, defendant ROD BLAGOJEVICH instructed defendant ROBERT BLAGOJEVICH to contact a representative of Senate Candidate A, and advise the representative that if Senate Candidate A was going to be chosen to fill the Senate seat, some of the promised **fundraising** had to occur before the appointment. ROD BLAGOJEVICH instructed ROBERT BLAGOJEVICH to communicate the urgency of the message, and to do it in person, rather than over the phone. ROBERT BLAGOJEVICH agreed to do so, and thereafter arranged a meeting with an associate of Senate Candidate A.

43. It was further part of the scheme that on or about December 5,

2008, following the publication that day of a newspaper article reporting that ROD BLAGOJEVICH had been surreptitiously recorded in connection with an ongoing federal investigation, ROD BLAGOJEVICH instructed ROBERT BLAGOJEVICH to cancel his meeting with the associate of Senate Candidate A, and ROBERT BLAGOJEVICH agreed to do so. (Emphasis added.)

Counts Three of the indictment charges that Robert Blagojevich committed honest services wire fraud, in violation of 18 U.S.C. §§ 1343 and 1346, by alleging, in pertinent part:

On or about November 1, 2008, ... ROBERT BLAGOJEVICH gave ROD BLAGOJEVICH an update on the **solicitation of campaign contributions** from Construction Executive and racetrack Executive, and they discussed potential **contributions** from Senate Candidate C and Senate Candidate A. (Emphasis added.)

Count Twelve of the indictment charges that Robert Blagojevich committed honest services wire fraud, in violation of 18 U.S.C. §§ 1343 and 1346, by alleging, in pertinent part:

On or about December 4, 2008, ... ROD BLAGOJEVICH and ROBERT BLAGOJEVICH, defendants herein, for the purposes of executing the above-described scheme, did knowingly cause to be transmitted by means of wire and radio communication ... a phone call between ROD BLAGOJEVICH and Deputy Governor A in Chicago, Illinois, and Advisor A in Washington, D.C., in which ROD BLAGOJEVICH said that if he gave the Senate seat to senate Candidate A, there would be “tangible political support ... specif amounts and everything ... some of it up front.”

STATUTORY FRAMEWORK

The indictment charges Robert Blagojevich with two counts of honest services wire fraud pursuant to 18 U.S.C. §§ 1343 and 1346.

The federal wire fraud statute provides, in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses ... 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.

18 U.S.C. § 1343.

Pursuant to 18 U.S.C. § 1346, a “scheme or artifice to defraud” under the mail or wire fraud statutes “includes a scheme or artifice to deprive another of the intangible right of honest services.”

ARGUMENT

I. Legal Standards

The Federal Rules of Criminal Procedure permit a defendant to “raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issues.” Fed.R.Crim.Proc. 12(b)(2). When considering a motion to dismiss under Rule 12(b)(2), a court assumes all facts in the indictment are true and must “view all facts in the light most favorable to the government.” *United States v. Yashar*, 166 F.3d 873, 880 (7th Cir. 1999).

II. Pending Cases Before The Supreme Court Of The United States

The mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, prohibit a “scheme or artifice to defraud” by use of the mails or wires. In 1987, the Supreme Court made clear that the deprivation of the intangible right to honest services does not fall within the “scheme or artifice to defraud” language of the mail and wire fraud statutes. *McNally v. United States*, 483 U.S. 350, 358-59, 107 S.Ct. 2875 (1987). The *McNally* Court read § 1341 as limited to the protection of property rights, and observed that “[i]f Congress desires to go further, it must speak more clearly than it has.” *Id.* at 360.

Congress accepted the Supreme Court’s invitation and enacted 18 U.S.C. § 1346, which is a single 28-word sentence which expanded the definition of “a scheme or artifice to defraud” to

include a “scheme or artifice to deprive another of the intangible right of honest services.” However, § 1346 does not define the term “honest services” – a term unknown both at common law and elsewhere in the United States criminal code. *See United States v. Brumley*, 116 F.3d 728, 742 (5th Cir. 1997) (en banc) (Jolly, DeMoss and Smith, JJ. Dissenting). Consequently, instead of speaking more clearly, Congress left it to prosecutors and the courts to divine meaning for the vague term. As a result, prosecutions based upon the “intangible right to honest services” has become a prosecutor’s favorite tool.

In the Supreme Court’s last Term, Justice Scalia questioned whether the “terse amendment qualifies as speaking ‘more clearly’ or in any way lessens the vagueness and federalism concerns.” *United States v. Sorich*, ___ U.S. ___, 129 S.Ct. 1308, 1309 (2009) (Scalia, J., dissenting from denial of certiorari). Not surprisingly, this lack of clarity has created confusion in the courts. As Justice Scalia observed in *Sorich*, “[t]he Courts of Appeals have spent two decades attempting to cabin the breadth of § 1346 through a variety of limiting principles. No consensus has emerged.” *Sorich*, 129 S.Ct. at 1309.

Justice Scalia suggested that the statute provides no way to determine “what principle it is that separates the criminal breaches, conflicts and misstatements from the obnoxious but lawful ones.” *Sorich*, 129 S.Ct. at 1310. Justice Scalia went on to observe:

It is one thing to enact and enforce clear rules against certain types of corrupt behavior, e.g., 18 U.S.C. § 666(a) (bribes and gratuities to public officials), but quite another to mandate a freestanding, open-ended duty to provide “honest services”-with the details to be worked out case-by-case. (Cite omitted.)

Second and relatedly, this Court has long recognized the “basic principle that a criminal statute must give fair warning of the conduct that it makes a crime.” *Bouie v. City of Columbia*, 378 U.S. 247, 350, 84 S.Ct. 1697 (1964). There is a serious argument that § 1346 is nothing more than an invitation for federal courts to develop a

common-law crime of unethical conduct. But “the notion of a common-law crime is utterly anathema today.” *Rogers v. Tennessee*, 532 U.S. 451, 476, 121 S.Ct. 1693 (2001) (Scalia, J., dissenting), and for good reason. It is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail. “How can the public be expected to know what the statute means when the judges and prosecutors themselves do not know, or must make it up as they go along?” *Rybicki*, 354 F.3d 124, 160 (Jacobs, J., dissenting).
Sorich, 129 S.Ct. at 1310.

* * * * *

Finally, in addition to presenting two of the principle devices the Courts of Appeals have used in an effort to limit § 1346, the case also squarely presents the issue of its constitutionality.
Sorich, 129 S.Ct. at 1311.

The constitutional deficiencies of § 1346 can no longer stand. In the wake of Justice Scalia’s dissenting opinion in *Sorich*, the Supreme Court has decided to weigh in on these issues when it granted certiorari in three cases involving prosecutions based upon alleged violations of the honest services provisions codified in § 1346. *See Black v. United States*, No. 08-876; *Weyhrauch v. United States*, No. 08-1196; and *Skilling v. United States*, No. 08-1394. Oral arguments have been held in *Black* and *Weyhrauch*, and the parties in *Skilling* have filed their briefs.

III. Section 1346 Is Unconstitutionally Vague On Its Face

As noted above, § 1346 is a statute so vague and expansive that only the prosecution can define what conduct it prohibits. The United State Supreme Court has long recognized the “basic principle that a criminal statute must give fair warning of the conduct that it makes a crime.” *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964); *United States v. Reese*, 92 U.S. 214, 220 (1926) (“Every man should be able to know with certainty when he is committing a crime.”) Moreover, a statute is void for vagueness if the statute either fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously

discriminatory enforcement.” *United States v. Williams*, 128 S.Ct. 1830, 1845 (2008).

A. Section 1346 Does Not Provide Notice That Permits A Person Of Ordinary Intelligence To Understand What Conduct Violates The Law.

Section 1346 speaks of “the intangible right of honest services,” but offers no suggestion as to who confers this right, the source of this right, who enjoys this right as against whom, or what the parameters of this right are. Rather, it merely states that a breach of this shapeless right is criminal conduct. *United States v. Handakas*, 286 F.3d 92, 104 (2nd Cir. 2002) (“[T]he text of § 1346 simply provides no clue to the public or the courts as to what conduct is prohibited under the statute.”), *overruled in part by United States v. Rybicki*, 354 F.3d 124, 144 (2nd Cir. 2003) (en banc); *United States v. Sorich*, 523 F.3d 702, 707 (7th Cir. 2008) (“§ 1346 is “amorphous and open-ended”); *United States v. Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008) (§ 1346 “is vague and undefined”); *United States v. Brown*, 459 F.3d 509, 520 (5th Cir. 2006) (§ 1346 is a “facially vague criminal statute”); and *United States v. Murphy*, 323 F.3d 102, 116 (3rd Cir. 2003) (“the plain language of § 1346 provides little guidance as to the conduct it prohibits”).

Section 1346's reference to “*the* intangible right of honest services” and its legislative history indicate that Congress believed that it was codifying some specific, preexisting right whose meaning could be easily discerned from pre-*McNally* lower court decisions. *See Cleveland v. United States*, 531 U.S. 12, 19-20 (2000). Congress was wrong. Certain principles in the pre-*McNally* caselaw approach coherence, but only to the most discriminating lawyer or judge, and overall the pre-*McNally* caselaw is a hodgepodge of oft-conflicting holdings, statements, and dicta. Reading those cases into § 1346 by the common-law method does nothing more than substitute a multitude of vague and inconsistent standards for the facially meaningless phrase that Congress plucked out of

the caselaw.²

Neither “intangible right” or “honest services” is “defined anywhere in the United States Code, [or] Black’s Law Dictionary, and had never been used in the United States Code prior to its use in § 1346.” *Brumley*, 116 F.3d at 742 (Jolly, DeMoss and Smith, JJ., dissenting); *United States v. Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008). In fact, the ordinary definition of the term “intangible” recognizes that the term refers to something vague or elusive. Webster’s Third New International Dictionary 1173 (1986) (defining “intangible” as “incapable of being defined or determined with certainty or precision: vague, elusive.”).

The Government’s history of § 1346 prosecutions proves that the statute has no single, clear, coherent meaning, and prosecutors have proffered whatever meaning is necessary to prosecute whatever defendant happens to be in the Government’s sights. This is made clear by the Government’s arguments advanced before the Supreme Court in *Black*, *Weyhrauch* and *Skilling* in:

- In *Black*, the Government argued that § 1346 requires the existence of a fiduciary duty, (Gov. Brief 11-12), while it recently argued the opposite. *United States v. McGeehan*, 584 F.3d 560, 574 (3rd Cir. 2009).
- In *Weyhrauch*, the Government argued that public officials who act for political motives do not commit honest-services fraud, (Gov. Brief 45), but recently argued the opposite. *United States v. Thompson*, 484 F.3d 877, 878 (7th Cir. 2007).
- In *Black*, the Government argued that a person can commit honest-services fraud only for “official action,” (Gov. Brief 36-37), but

² *United States v. Kwiat*, 817 F.2d 440, 443 (7th Cir. 1987) (“honest and diligent services”); *United States v. Connor*, 752 F.2d 566, 572 (11th Cir. 1985) (“fraud which is perpetrated through a breach of the fiduciary duty”); *United States v. Boffa*, 688 F.2d 919, 931 (3rd Cir. 1982) (“loyal, faithful, and honest services”); *United States v. Bohonus*, 628 F.2d 1167, 1172 (9th Cir. 1980) (“honest services” and “right to have ... business conducted honestly”); *United States v. Bryza*, 522 F.2d 414, 422 (7th Cir. 1975) (“loyal services”); and *United States v. Mandel*, 591 F.2d 1347, 1362 (4th Cir. 1979) (“honest and faithful Government”).

previously argued the opposite, and that *any* workplace misconduct would suffice. *United States v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997).

- In *Weyhrauch*, the Government argued that the honest-services statute itself, and not state law, is the source of any fiduciary duty, (Gov. Brief 11-12), while it previously argued that a violation of a state law ethical duty is relevant and sufficient evidence of honest-services fraud. *United States v. Sawyer*, 85 F.3d 713, 726-27 (1st Cir. 1996).

- In *Weyhrauch*, the Government argued that a defendant's lack of knowledge of his disclosure obligation is relevant in assessing whether he had an intent to deceive, (Gov. Brief 48), but recently argued the opposite. *United States v. Carbo*, 572 F.3d 112, 116 (3rd Cir. 2009).

- In *Weyhrauch*, the Government argued that the defendant must act to further his personal financial interest, and that the statute essentially reduces to bribes, kickbacks, and self-dealing, (Gov. Brief 41, 45-46), and then argued *against* these limitations in the Court of Appeals in *Skilling*.

The last example, dealing with personal financial interest, has been the subject of conflicting jurisprudence by the Seventh Circuit. Prior to *Sorich*, the Seventh Circuit had required the showing of a misuse of office for “personal gain” to sustain a conviction for honest-services fraud. *Bloom*, 149 F.3d at 655-57 (requiring “private” or “personal gain”); *Hausmann*, 345 F.3d at 956 (requiring “personal gain”). In *Sorich*, the Seventh Circuit explained that the “personal gain” phrase it had been using for ten years may have been “misleading” and that it simply “mean[t] illegitimate gain.” *Sorich*, 523 F.3d at 709. The Seventh Circuit effectively removed any meaningful limit it had previously imposed on § 1346 to include allegations of any gain by anyone as a result of the scheme. This recent change in the law makes it all the more clear that the “make it up as they go along” approach can no longer stand. *Rybicki*, 354 F.3d at 160 (Jacobs, Walker, Cabranes and Parker, JJ., dissenting).

The foregoing history shows that § 1346 not only fails to provide clear notice of criminalized conduct, but also facilitates opportunistic and arbitrary prosecutions, which implicates the other principal element of the vagueness doctrine. The point is not whether the Government “applied its discretion wisely or poorly in a particular case,” but that § 1346 “is unconstitutional ... because the [Government] enjoys too much discretion in *every* case.” *Chicago v. Morales*, 527 U.S. 41, 71 (1999) (Breyer, J., concurring).

IV. Section 1346 Creates An Impermissible Common Law Crime

A corollary of § 1346's vagueness is that courts are impermissibly left to create new and ever changing common-law crimes. Because courts are forced to derive the elements of the crime from the factual circumstances presented in the indictment, as here, new facts in new indictments invite the creation of new crimes. As Justice Scalia stated in *Sorich*, “[t]here is a serious argument that § 1346 is nothing more than an invitation for federal courts to develop a common-law crime of unethical conduct. But ‘the notion of a common-law crime is utterly anathema today.’” *Sorich*, 129 at 1310, quoting *Rogers v. Tennessee*, 532 U.S. 451, 476, 121 S.Ct. 1693 (2001).

Legislatures and not the courts should define criminal activity. Therefore, Congress’ failure to define “honest services,” coupled with the absence of any commonly understood meaning, leaves too much to the courts to make up as they go along.

CONCLUSION

For the reasons set forth above, Robert Blagojevich respectfully requests that this Court dismiss Counts Three and Twelve of the indictment, as they pertain to Robert Blagojevich.

Respectfully submitted,

/s/ Michael D. Ettinger

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