

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

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 05 CR 00644 – 1 & 4
)	Judge David H. Coar
ROBERT SORICH, <i>et al</i>)	
)	
Defendants.)	

**DEFENDANTS SORICH AND SLATTERY’S MEMORANDUM OF LAW
IN SUPPORT OF THEIR JOINT MOTION TO DISMISS THE INDICTMENT**

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INTRODUCTION

The U.S. Attorney's Office reaches a new plateau with the filing of this indictment. Not satisfied with indicting over thirty (30) people for bribery, kickbacks and other classic Chicago forms of corruption in what has become known as the "Hired Truck" scandal,¹ the government has now decided to criminalize, through a stretch of the mail fraud statute of unprecedented proportions, the supposed violation of the everyday hiring and promotion practices of the City of Chicago ostensibly covered by two consent judgments in the infamous Shakman litigation.

The prosecution pursues these charges with its customary great fanfare in the press, notwithstanding being forced to concede, as they must, that unlike the "Hired Truck" defendants, the individuals charged in this so-called "scheme" lined their pockets with not one red cent; received not one other benefit, financial or otherwise; and, had absolutely nothing whatsoever to do with establishing the departments, practices or procedures which the federal government now frowns upon.²

The ramifications of this indictment to traditional concepts of federalism – to say nothing about fundamental criminal concepts like notice and the opportunity to conform one's conduct to the law – are draconian, at best. If this indictment is permitted to proceed, the federal government will have succeeded in getting its nose under the tent, through the artifice of a federal civil consent decree, so as to dictate how the City of Chicago should be run on a daily

¹ See, e.g., Steve Warmbir and Tim Novak, *How Far Will It Go?*, CHGO. SUN TIMES, Nov. 6, 2005, at 1; Gary Wasburn, *Daley Faces His Biggest Test*, CHGO. TRIB., Aug. 28, 2005, at sec. 1, p. 1.

² Not one of the Defendants, save Katalinic, was even employed by the City at the time of either of the Shakman Decrees; or, for that matter, in 1989 when the Office of Intergovernmental Affairs was originated. Sorich, for example, was not employed by the City until 1993 – the date not coincidentally the indictment alleges this scheme began. See, Indictment ¶¶ 2-6, and p. 3, *infra*. Suggesting Sorich was the originator or provocateur of a grand scheme to violate Shakman is like suggesting the groundskeeper was responsible for the White Sox World Series victory.

basis, and subject literally thousands of city employees to criminal liability for everyday mundane decisions that, ironically, would arguably not even subject them to civil contempt penalties.³ Such an absurd result should not be permitted; and this indictment should be seen for exactly what it is; *i.e.*, a misguided and wrongheaded attempt by the government to find a theory that allow it to continue to insert itself into the everyday running of the affairs of the City.

The indictment, as best as counsel can determine, alleges that the five named defendants engaged in a mail fraud scheme to violate the City's personnel process – specifically, the process contemplated by and developed as a result of the 1983 Shakman Decree⁴ – in an supposed effort to reward certain persons based on “political” considerations – whatever that might mean.

The crux of the allegations seem to be that the defendants, as City employees, breached duties they owed to the City and its residents by violating provisions of the 1983 Shakman decree.⁵ The indictment also claims that defendants violated City personnel rules embodied in

³ See *Association for Retarded Citizens of Connecticut v. Thorne*, 30 F.3d 367, 370 (2nd Cir. 1994)(finding that where terms of a consent decree are voluntarily assumed, rather than legally imposed, there is no basis for extending the negotiated outcome to a non-party).

⁴ “Shakman decrees” refer, collectively, to the civil consent judgments entered by the United States District Court for the Northern District of Illinois, Eastern Division, in the case of *Shakman, et al. v. The Democratic Organization of Cook County, et al.*, 69 C 2145, on May 5, 1972 (“1972 Consent Decree”) and June 20, 1983 (“1983 Consent Decree”). The City of Chicago is a party to both of these consent decrees which prohibit the consideration of political factors in making certain employment decisions for non-policy making positions. A concise history of the Shakman decrees, as well a history of three decades worth of protracted and contentious Shakman proceedings, is found in the Seventh Circuit’s most recent Shakman opinion. See *Shakman v. City of Chicago*, 426 F.3d 925, 927-929(7th Cir. 2005).

⁵ While the indictment appears to allege that the duties owed by defendants arise out of both the 1972 and 1983 Consent Decrees entered in the *Shakman* litigation, (Ind. ¶10), Counts 1 thru 3 are fundamentally based on the hiring and promotion practices required under the 1983 Decree. See *Shakman v. Democratic Org. of Cook Cty.*, 569 F.Supp. 177, 187 (N.D. Ill. 1983). The 1972 Consent Decree did not specifically address, and made no provisions for, hiring and promotion practices. Such practices were addressed only in the 1983 Consent Decree. Under the terms of the 1983 Consent Decree, the City issued its “Principles for Plan of Compliance” (PPC) as well as its “Detailed Hiring Provisions” (“DHP”), as it was required, to implement the terms of the Decree. See *O’Sullivan v. City of Chicago*, 396 F.3d 843, 849 (7th Cir. 2005). The PPC applied to “hiring for all non-Exempt positions covered by the Judgment; whereas the DHP applied to all “hiring decisions concerning individuals who currently are not employed with the City *as well as to transfer, demotion, promotion or reclassification decisions involving*

two obscure ordinances, as well as two provision of the Illinois Criminal Code pertaining to official misconduct and the making of false entries by public employees.⁶ (Ind. ¶¶ 8-10). The indictment also cryptically references a provision of the Constitution of the State of Illinois regarding the use of public funds and property.⁷ (Ind. ¶ 11).

Despite the government's attempt to make out a cognizable mail fraud case under either §§ 1341 or 1346, the indictment fails miserably for several reasons. First, the charges brought under §1346's "honest services" prong of the mail fraud statute cannot withstand scrutiny because they improperly rely on the 1983 Shakman Decree – a civil consent decree the Seventh Circuit has, in effect, pronounced void and which was never ratified by the Chicago City Council as required by Section 2-60-080 of the Chicago Municipal Code. Second, the charges do not comply with the requirements the Seventh Circuit has announced in its leading "honest services" mail fraud opinions – *Bloom* and *Hausmann* – by failing to allege that Sorich or Slattery misused their respective positions with the City for private gain at the expense of the City or its citizenry.⁸ Moreover, the §1346 charges also suffer from constitutional deficiencies explained

current City employees." *Id.* (emphasis added). The indictment incorporates the language that comes directly from the PPC and DHP in its allegations regarding the process by which hiring and promotions were to be conducted. *See*, Ind. ¶¶ C (i) -(iv). In that the PPC and DHP derive solely from the 1983 Consent Decree, and the charges in the indictment concern only promotions, the 1983 Consent Decree is the only relevant Consent Decree in this case.

⁶ Specifically, the indictment alleges that Defendants' alleged activity violated Section 2-74-050 ("Personnel rules") and Section 2-74-090 ("Unlawful practices relating to employee and employment – Penalty") of the Chicago Municipal Code; as well as 720 ILCS § 5/33E-15 ("False entries") and 720 ILCS § 5/33-3(b) ("Official Misconduct") of the Illinois Code.

⁷ The indictment makes a general reference to Article VIII, Sec. 1(a) of the Illinois Constitution, which provides that "public funds, property or credit shall be used only for public purposes."

⁸ Nor is this a defect the government can cure by being given another chance to re-indict. As mentioned, the government must concede that it has no evidence whatsoever that the Defendants took one red cent or otherwise personally benefitted from this purported scheme. Tellingly, the only persons the government has evidence with respect to being on the take are its "Hired Truck" cooperators – Katalinic and Tomczak. To date, these two are the only people who have chosen to agree with the government that these facts constitute a crime. Compared with the

herein. Likewise, the §1341 charges fail because the indictment is missing the key to any §1341 prosecution – that is, any allegation that the City, or its citizens, have been deprived of money or property. These defects necessitate dismissal of the indictment against Sorich and Slattery.

ARGUMENT

I. LEGAL STANDARDS

The Federal Rules of Criminal Procedure permit a defendant to “raise by pre-trial motion any defense, objection, or request that the court can determine without a trial of the general issues.” Fed.R. Crim. P.12(b)(2). And, a defendant may challenge the sufficiency of an indictment on pre-trial motion. “In order to be valid, an indictment must allege that the defendant preformed acts, which, if proven, constituted a violation of the law that he or she is charged with violating.” *United States v. Gimbel*, 830 F.2d 621, 624 (7th Cir. 1987); *see also*, *United States v. Risk*, 843 F.2d 1059, 1061 (7th Cir. 1988). This Court may dismiss an indictment before trial “if the government’s inability to produce sufficient evidence ‘so convincingly appears on the face of the indictment that as a matter of law there need be no necessity for such delay.’” *United States v. Segal*, 299 F.Supp.2d 840, 844 (N.D.Ill. 2004)(quoting *United States v. Castor*, 558 F.2d 379, 384 (7th Cir. 1977), *cert. denied*, 434 U.S. 1010, 98 S.Ct. 720 (1978)). Further, it is clear that “pre-trial motions to dismiss are not limited to challenging the technical sufficiency of the indictment.” *United States v. Myr Group, Inc.* 274 F.Supp.2d. 945, 947 (N.D. Ill. 2003). “Regardless of the sufficiency of the indictment in setting out the elements of a statutory violation, if the government’s own facts establish that there is no

gravity of the “Hired Truck” corruption which both admit to, however, it is hardly a wonder they would now be more than happy to jump on the government’s “patronage corruption” bandwagon.

violation, the indictment may be dismissed.” *Id.* (quoting *Risk*, 843 F.2d at 1061).

II. The “Honest Services” Mail Fraud Charges Must be Dismissed.

As set forth below, the charges brought under the §1346 “honest services” prong of the mail fraud statute fail because they impermissibly rely on the breach of a consent decree.

Moreover, the consent decree which the indictment attempts to rely upon is effectively void.

Furthermore, the indictment’s “honest services” claims are non-starters in that they do not meet the criteria that there was any personal gain by the Defendants at the expense of either the people of the City or the City itself. Lastly, the §1346 charges are constitutionally infirm and must be dismissed.

A. The Shakman Decree Does Not Provide a Sufficient Basis for an Honest Services Mail Fraud Charge

The mail fraud allegations contained in the indictment are based primarily on alleged violations of the Shakman Decrees – principally the 1983 Consent Decree. However, those allegations fail as a matter of law and must be dismissed.

1. The Violation of a Civil Consent Decree Is an Improper Basis for An Honest Services Mail Fraud Violation

This indictment breaks dramatic new ground in that, to counsel’s knowledge, there is no case that predicates an honest services mail fraud violation on a civil consent decree. The absence of any such case is not surprising, as it is unquestioned that consent judgments are construed as contracts for enforcement purposes. *See United States v. ITT*, 420 U.S. 223 (1975); *see also*, 47 Am. Jur. 2d Judgments § 1085 (since consent decrees are contractual in nature, they should be construed as a written contract). And, courts have consistently refused to expand honest services mail fraud to breaches of contract, wisely recognizing that do so “could make a criminal

out of anyone who breaches any contractual representation.” See *United States v. Warner*, 292 F.Supp. 2d 1051,1059 (N.D. Ill. 2003)(citing *United States v. Handakas*, 286 F.3d 92, 108 (2nd Cir. 2002), *rev’d on other grounds by United States v. Rybicki*, 354 F.3d 124 (2nd Cir. 2003)); see also, *United States v. Lee*, 65 F.3d 169 (6th Cir. 1995) (emphasizing that breach of contract cannot form the basis of a mail fraud prosecution); see also, *United States v. D’Amato*, 39 F.3d 1249, n. 8 (2nd Cir. 1994)(“a breach of contract does not amount to mail fraud”).

Moreover, and quite pertinent to the nature of the allegations at hand, in order to draw a distinction between mere breach of contract and criminal fraud, courts have also required that there be evidence that a party entered into an agreement *knowing* that it did not intend to perform under the agreement in order for the mail fraud statute to apply. *United States v. Lee*, 65 F.3d 169, *3 (6th Cir. 1995)(citing *United States v. Paccione*, 949 F.2d 1183, 1196 (2nd Cir. 1991), *cert. denied*, 112 S.Ct. 3029 (1992)). To apply mail fraud to non-performance, without evidence of fraudulent intent, would make the difference between breach of contract and fraud one without distinction. See, *Lee*, 65 F.3d at *3; see also, *D’Amato*, 39 F.3d at 1261, n.8 (failure to comply with contractual obligation is only fraudulent when promisor never intended to honor the contract . . . [t]o infer fraudulent intent from mere nonperformance . . . would eviscerate the distinction between breach of contract and fraud.”); *cf.*, *Paccione*, 949 F.2d at 1196 (holding that scheme to offer services in exchange for fee, with the intent not to perform the contracted services, is within the reach of the mail fraud statute).

Here, no such allegation can be made in that these Defendants, all *mere employees* of the City of Chicago, were never parties to the Shakman Consent Decrees to begin with. Certainly, even the government cannot suggest with a straight face that the City through any of its

employees, much less its public officials, entered into either Shakman consent decree with the intent not to perform under the agreement.⁹ Nor can there be any serious question that somehow upon Sorich's arrival to the Office of Intergovernmental Affairs in 1993 the City all of a sudden decided not to perform under the Consent Decrees. It is a mystery, therefore, how Sorich and a much lower-level employee like Slattery could be accountable under any such contractual theory in the first place, even if a contractual theory were a permissible basis for mail fraud.

2. The 1983 Shakman Decree Is Void and Can Only Be Enforced by a Contempt Petition.

Even if an honest services mail fraud charge could be based on a civil consent decree, it certainly cannot be based on one that is void. The fundamental premise of the indictment is that the defendants violated a duty of honest services that was based on the Shakman decrees, specifically the 1983 Consent Decree. However, if that decree is void, then it cannot be used to define a duty of honest services.

The Seventh Circuit has now on two occasions made clear, that the 1983 Consent Decree should be vacated. *See Shakman v. City of Chicago*, 426 F.3d 925, 936 (7th Cir. 2005); *see also O'Sullivan v. City of Chicago*, 396 F.3d 843, 867-68 (7th Cir. 2005).¹⁰ The most recent pronouncement by the appellate court came after years of contentious litigation over the application of the 1983 Consent Decree, and after the City filed a motion before Judge Anderson

⁹ Interestingly enough, the 1983 Consent Decree was entered into by the Harold Washington Administration as part of its campaign "reform" pledges to rid the City of the supposed corrupt patronage practices of the late Mayor Richard J. Daley, father to the current Mayor. A Washington pledge to "dance on the grave of patronage" was a keystone of his mayoral campaign from its inception. *See Thom Shanker, City Seeks More Patronage Leeway*, CHGO. TRIB., Fed. 8, 1985, at sec. 1, p. 3. However, every mayoral administration – including the Washington Administration – had difficulty working with the decree and often sought more leeway.

¹⁰ As noted, an excellent source on the history of the Shakman litigation and the resulting consent decrees is found in the Seventh Circuit's most recent Shakman opinion holding that the district court had abused its discretion in denying the City's efforts to vacate the 1983 Consent Decree. *See Shakman*, 426 F.3d at 927-929.

to have it vacated. *See, Shakman v. Democratic Org.*, No. 69 C 2145, 2004 WL 691782 (N.D. Ill., March 30, 2004). Judge Anderson denied the City's motion, but the Seventh Circuit reversed on appeal, finding that Judge Anderson had abused his discretion. *Shakman*, 426 F.3d at 933 (7th Cir. 2005).

The Seventh Circuit acknowledged the need of the federal courts to avoid, when possible, interfering in local decision-making processes by extending, unnecessarily, the life of a consent decree whose objectives have been met or become unjust or unattainable. *Id.* The panel also concluded that the City's efforts to vacate the consent decree eleven years after it was first entered, was not untimely and that the district court abused its discretion by not taking into account the nature of the litigation as well as the resulting prejudice, if any, to the present elected officials, who were not in office at the time of the 1983 Consent Decree was drafted. *Id.* at 934. Moreover, the Seventh Circuit reiterated the importance of the need for flexibility with respect to consent decrees in place in long term institutional litigation and found that Judge Anderson's failure to adopt a "flexible" approach was an abuse of discretion. *Id.* at 934-935.

After rejecting each basis Judge Anderson relied on in denying the City's motion to vacate, the Seventh Circuit remanded the case for reconsideration of the City's motion in light of "concerns of federalism," and "the significant change in the law of voter standing since the entry of the 1983 Consent Decree." *Id.* at 936; *See also O'Sullivan*, 396 F.3d at 868 (stating that the district court must address federalism concerns and apply the substantial changes in the law of voter standing in determining whether the 1983 Consent Decree should be vacated).

The Seventh Circuit's ruling was nothing short of a direction to Judge Anderson to vacate the 1983 Consent Decree. On the issue of standing, the Seventh Circuit has made it abundantly

clear that a voter does not have standing to challenge alleged patronage practices. *Shakman v. City of Chicago*, 426 F.3d at 933 (7th Cir. 2005); *see also, Rutan v. Republican Party*, 868 F.2d 943, 958 (7th Cir. 1989)(en banc), *aff'd in part and rev'd in part*, 497 U.S. 62 (1990)(concluding that the causal link between any loss in the plaintiffs' votes' impact and the challenged action too tenuous to support plaintiffs' standing); *Shakman v. Dunne*, 829 F.2d 1387, 1398 (7th Cir. 1987). Moreover, the Seventh Circuit's decision – which was issued months after these criminal proceedings were initiated – made it a point to restate the longstanding constitutional principle that “concerns of federalism” require deference to local administrators to solve institutional problems for local public entities. *Shakman*, 426 F.3d at 932.

Without *Shakman*, the remaining so-called legal duties that the indictment attempts to rely upon fail as well. All of those purported duties merely create purported duties under *Shakman*, and none of the alleged duties survive outside of the realm of *Shakman*. Moreover, the remaining duties consist of a handful of state and local provisions the enforcement of which must be said to be far outside any legitimate interest of the federal government. This point, with respect to the legitimate interests of the federal government, has not been lost on the Seventh Circuit which, in the past, has posed a poignant rhetorical question appropriate in this instance as well: “[w]hy the United States should be so interested in enforcing ‘the laws of the City of Chicago’ is something of a mystery.” *Toulabi v. United States*, 875 F.2d 122, 123 (7th Cir.1989)(questioning the wisdom of a federal prosecution of violations of a City of Chicago ordinance regarding taxi driver's permits). Counsel would suggest, if history can be any guide, that such a mystery is usually no more complicated than whether the federal interest involves bagging a big scalp for the prosecutor.

Even putting the issue of the 1983 Consent Decree's continued validity aside, the indictment ignores the fact that the only method by which the Consent Decree's provisions are enforceable is through a contempt petition. In fact, over the years, in the suits brought to enforce Shakman, the courts have uniformly held that, if a person wants to assert a Shakman violation, the *sole judicial remedy* is to file a contempt petition or complaint for a rule to show cause. *See, e.g., Alliance to End Repression v. City of Chicago*, 356 F.3d 767, 771-772 (7th Cir. 2004) ("persons complaining of violations of the Shakman decree. . . litigate the violations as contempts of court."); *see also, Auriemma v. City of Chicago*, 601 F.Supp.1080, 1086 (N.D.Ill. 1984) ("if [plaintiffs] believe that the City has violated the terms of the Shakman Consent Decree . . . they *must* present that claim in the form of a contempt petition in *that* proceeding.") (emphasis added); *Webb v. Local 73 Service Employees International Union*, No. 02 C 3279, 2002 WL 31049841, *5 (N.D. Ill. Sept. 13, 2002) ("a plaintiff whose claim falls within the scope of the consent decree cannot seek equitable relief outside of the consent decree."); *Hudson v. O'Grady*, No. 87 C 2291, 1989 WL 31010, *1 (N.D. Ill. Mar. 28, 1989) (claims of violations of Shakman Consent Decree must be brought as contempt petition); *Quinn v. City of Chicago*, 646 F.Supp. 549, 552 (N. D. Ill. 1986) (dismissing plaintiff's Shakman claim for failure to present claim in the form of a contempt petition).

Moreover, and not surprisingly, in the twenty-three year history of the Shakman litigation, there appears not to be one instance where a criminal contempt charge has been brought for a supposed violation of either Shakman Decree. Not only is there no basis for criminal contempt liability, but the most recent filing in the Shakman civil litigation is telling with respect to the absurd situation these City employees find themselves. In a desperate attempt

by the Shakman plaintiffs to keep the protracted litigation under the 1983 Consent Decree alive – despite the Seventh Circuit’s clear warning that it should be vacated – Shakman, *et al*, filed “Plaintiff’s Motion to File Second Supplement to First Amended Complaint and Second Supplement to First Amended Complaint,” copies of which were attached as Exhibit A-1 and A-2 to Defendants’ previously filed motion for an extension of time to file this memorandum, and are incorporated herein by reference.

The new Shakman complaint or “supplement” also obviously attempts to keep in play Plaintiffs’ widely publicized civil – not criminal – contempt charges filed on July 26, 2005, against the City and Mayor Daley upon the heels of the filing of the Criminal Complaint in this matter on July 17, 2005. The new complaint also boldly asserts that Mayor Daley “knew or recklessly disregarded” what it describes as “a widespread political patronage system,” and goes so far as to accuse the Mayor and his brother of conspiring with Sorich to commit the very acts charged in this case. Remarkably, the new complaint also goes on to accuse the Mayor of subliminally sending messages through his public statements about this criminal case and of “creat[ing] at least the appearance that loyalty to Daley and the 11th Ward Democratic organization was more important than the harm done to the City by Slattery and Sorich’s criminal conduct.”

Significantly, none of the defendants in this criminal case are named as civil defendants in the new Shakman complaint or “supplement.” Instead, the Shakman plaintiffs hammer away at the Mayor with the criminal allegations. This absurd circularity virtually proves the point that bringing criminal charges based on a civil enforcement issue is a dangerous path down which to permit the government to proceed.

B. The Indictment Fails to Make Sufficient Allegations for “Honest Services” Mail Fraud.

Even if the Shakman decrees or any other consent decree could support an honest mail fraud violation, the indictment is still deficient because it fails to allege the legal requirements to establish an honest services mail fraud violation—namely, private gain by the defendants at the expense of the City of Chicago and the people of the City.

1. Because the Indictment Fails to Allege that the Charged Scheme to Defraud Involved the Misuse of Office for Private Gain at the Expense of the City or Its Residents, and Because there is no Evidence to Support Such a Conclusion, the “Honest Services” Mail Fraud Charges Must be Dismissed.

As this Court is no doubt aware, since the Seventh Circuit’s opinion in *United States v. Bloom*, 149 F.3d 649 (7th Cir. 1998), it has been the law in this circuit that when the government charges an “intangible rights” or “honest services” fraud in violation of 18 U.S.C. §1346, as it has done here, the government must both plead and prove that the defendant “misused his position (or the information he obtained in it) for private gain.” *Bloom*, 149 F.3d at 656-57. In *United States v. Hausmann*, 345 F.3d 952, 956 (7th Cir. 2003), the Seventh Circuit further explained that the *Bloom* “private gain” must also be at the expense of the party to whom the fiduciary duty was owed. *Hausmann*, 345 F.3d at 956. Both points seem to have escaped the attention of the drafters of this indictment.

This indictment not only fails to make the necessary allegations as outlined above; but, even assuming the government could prove everything it has charged, there is also no evidence whatsoever to support the proposition that anything was done here for the “private gain” of any of the defendants or anyone else, nor is there any evidence that such gain was at the expense of or contrary to the interests of the City of Chicago or its citizens.

a. *Bloom* requires the allegation and proof of misuse of office for private gain.

Concerned that an overly expansive view of §1346 would create a common-law federal crime, and fail to account for the rule of lenity which requires that doubts be resolved against criminalizing conduct, the Seventh Circuit in *Bloom* sought a reasoned basis to limit the scope of Congress' specific authorization of "honest services" mail fraud. *Bloom*, 149 F.3d. at 655. Judge Easterbrook, writing the majority opinion for the Court, was likewise concerned with differentiating "run of the mill violations of state-law fiduciary duty . . . from federal crime." *Id.* The Court noted several serious constitutional implications with §1346, that resonate loudly here but seem to have fallen on deaf ears in the U.S. Attorney's Office:

No one can be sure how far the intangible rights theory of criminal prosecution really extends because it is a judicial gloss on §1341. Congress told the courts in §1346 to go right on glossing the mail fraud and wire fraud statutes along these lines. Given the tradition (which verges on constitutional status) against common-law federal crimes, and the rule of lenity that requires doubts to be resolved against criminalizing conduct, it is best to limit the intangible rights approach to the scope it held when the Court decided (and Congress undid) *McNally*. *Id.*, 149 F.3d at 656.

The Court went so far as to assume that Bloom operated under a clear conflict of interest and that he violated a state-law-imposed fiduciary duty. Nevertheless, the Court reserved the position that such infractions, without the necessary misuse of office for private gain, amounted to a federal fraud violation. In fact, as Judge Easterbrook specifically warned: "it is frightening to contemplate the prospect that the federal mail fraud statute makes it a crime punishable by five years' imprisonment to misunderstand how a state court in future years will delineate the extent of impermissible conflicts. Then we would have a federal common-law crime, a beastie

that many decisions say cannot exist.”¹¹ *Id.* at 655 (citing, *United States v. Bass*, 404 U.S. 336, 248 (1971)); *United States v. Hudson*, 11 U.S. 32 (1812); *United States v. Reynolds*, 919 F.2d 435, 438 (7th Cir. 1990), *cert. denied*, 499 U.S. 942, 111 S.Ct. 1402 (1991); *McNally v. United States*, 483 U.S. 350 (1987). In a further effort to prevent the “honest services” theory from creating a federal common-law crime, the *Bloom* majority also determined that “violations of state-law fiduciary duties do not turn into mail fraud just because the mails are used in the process.” *Bloom*, 149 F.3d at 655. In sum, the court concluded that because the idea that “all deceits are criminal fraud” has been consistently rejected, there must be a “line drawn” to differentiate the breach of fiduciary or other duties from the imposition of federal criminal fraud liability.¹² *Id.*

As noted, the *Bloom* majority drew its line at the point of the *misuse of office for private gain*. And, lest there be any doubt that *Bloom*’s line created a requirement of *pleading* as well as *proof*,¹³ the Seventh Circuit explicitly held that “Count I does not allege that Bloom did this [misused his position (or the information he obtained in it) for personal gain] and therefore does not allege an offense under the intangible rights theory.” *Id.* at 656-57. Indeed numerous

¹¹ One could easily substitute “how a federal civil court will delineate the definition of ‘political’ hiring and promotions” to see the same problem in this context. As well, Judge Easterbrook would likely be more frightened by such a prospect today, as the statutory maximum sentence for mail fraud has been increased from five to twenty years. *See*, 18 U.S.C. §1341.

¹² Despite the fact that the court ultimately drew such a line, the court also specifically noted that the line’s “location cannot be found by parsing § 1341 or 1346 [which is] a profound difficulty in a criminal case.” The difficulty in drawing this line should invalidate §1346 for the reasons argued on pp. 17-20 herein.

¹³ At the preliminary hearing of one of the defendants, the government argued that *Bloom* does not require the government to plead or prove private gain. *See*, Slattery Prelim. Tr. 7/26/05 p. 107 (“So to answer your question: Does the government have to plead? First of all, plead personal gain? The answer is no. Does the government have to prove personal gain as a matter of law in a mail fraud statute, the government also believes the answer to that is no. Bloom does talk about, at least arguably, and in a more narrow context, that for a particular fact pattern you may need to plead and prove, at least prove breach of fiduciary duty plus personal gain.”)

circuits have adopted *Bloom*'s pleading requirement. *See, United States v. Devegter*, 198 F.3d 1324, (11th Cir. 2000); *see also, United States v. Sawyer*, 85 F.3d 713 (1st Cir. 1996); *but see, United States v. Welch*, 327 F.3d 1081, 1107 (10th Cir. 2003) (declining to adopt *Bloom*'s pleading requirement of personal gain).

As such, in every "honest services" or "intangible-rights" prosecution under §1346 in this Circuit since *Bloom*, the government must allege, and then prove, that the scheme to defraud involved the misuse of office for private gain.¹⁴

b. *Hausmann* requires the allegation and proof that the "gain" be at the expense of the party to whom the duty was owed.

In *Hausmann*, the Seventh Circuit once again addressed, but to a lesser extent than in *Bloom*, the scope of the "intangible-rights" theory under §1346. The Court, in an opinion authored by Judge Bauer, reiterated the doubts it expressed in *Bloom* as to the applicability of "intangible-rights theory" prosecutions to mere breaches of fiduciary duty. *Hausmann*, 345 F.3d at 956. The Court nonetheless upheld the theory as it related to *Hausmann*, a personal injury lawyer receiving kickbacks from a chiropractor to whom he referred clients. *Id.* at 959. In doing so, the Court specifically noted that it had previously held that "an employee's undisclosed derivation of profits from business that he transacted on his employer's behalf amounted to a deprivation of the employer's intangible right to honest services in violation of 18 U.S.C. §§

¹⁴ The *Bloom* majority specifically rejected the idea that the line could be drawn by limiting prosecutions to "cases in which a defendant's acts not only violated a fiduciary duty but also transgressed some other rule of law." *Bloom*, 149 F.3d at 655. The court rejected this proposed limitation as extending the definition of "fraud" beyond all reasonable bounds and because it would create a common-law crime. *Id.* Such a rule would also impermissibly allow federal fraud liability where the intent proven was merely to violate a local statute or rule. *See, e.g., Sawyer*, 85 F.3d at 731-32; *United States v. McNeive*, 536 F.2d 1245, 1246 (8th Cir. 1976); *United States v. Rabbitt*, 583 F.2d 1014, 1026 (8th Cir. 1978).

1341 and 1346.”¹⁵ *Id.*, (citing, *United States v. Montani*, 204 F.3d 761, 768-69 (7th Cir. 2000)).

In announcing what must be charged and proven in an intangible-rights case, the *Hausmann* court re-stated the *Bloom* standard, but emphasized another:

Accordingly, under the intangible-rights theory of federal mail or wire fraud liability, a *valid indictment* need only allege, and a finder of fact need only believe, that a defendant used the interstate mails or wire communications system in furtherance of a scheme to misuse his fiduciary relationship for gain *at the expense of the party to whom the fiduciary duty was owed*. *Id.* (Emphasis added)

c. The government’s indictment and its own evidence reveal a failure to allege and an inability to prove the elements of intangible-rights fraud as established by *Bloom* and *Hausmann*.

Unlike almost every other intangible-rights theory prosecution brought in this circuit, or anywhere else for that matter, the government has not alleged here that the defendants were taking bribes, kickbacks, pay-offs, or any other payments whatsoever in order to misuse their office. In fact, the government has not asserted, nor does it have any evidence, that the defendants demanded, took, or received a single penny as part of the charged scheme to defraud. Rather, and in what appears to be an entirely novel theory for a fraud prosecution, intangible-right or otherwise, the government is simply alleging that the defendants’ supposed scheme to defraud involved hiring or promoting workers for the City of Chicago because those workers had also engaged in political activities, such as handing out leaflets, knocking on doors, and etc. Notably, the government has not alleged, nor is there any proof, that the political work in question was done on the employees’ “city time” or in any way conflicted or interfered with their ordinary city employment. In short, the government has failed to allege the “private gain”

¹⁵ The defendants in *Hausmann* were, therefore, on notice that their conduct violated §1346. *Hausmann*, 345 F.3d at 959. No such argument could be made here; and, in fact the opposite is true, as the issue of patronage hiring has been only a civil matter for more than thirty years.

required by *Bloom* and that such gain was at the expense of the City of Chicago or the people of the City of Chicago as required by *Hausmann*. As such, the portions of the indictment charging “intangible-rights” fraud in violation of 18 U.S.C. §1346 must be dismissed.

C. 18 U.S.C. §1346 is Void for Vagueness, as the Phrase “Intangible Right of Honest Services” is Facially Vague and Vague as Applied Here.

While 18 U.S.C. §1346 has been frequently attacked as unconstitutional,¹⁶ this case provides what counsel believe is the most illuminating example that the term “intangible right of honest services” is so vague as to allow crimes without notice, and to permit prosecutors to criminalize at their whim virtually any conduct they may come to perceive as “bad government.” For example, despite neither Congress nor the State of Illinois having ever proclaimed that political hiring is a crime, and despite the fact that the issue of political hiring has been a civil matter in the City of Chicago for more than thirty years,¹⁷ the Chicago Office of U.S. Attorney has now proclaimed, for the very first time, that political hiring in Chicago is the federal crime of mail fraud.¹⁸ This is apparently so, and can only be so, because these prosecutors have now determined that patronage hiring is a “dishonest service.” Criminal offenses require notice,

¹⁶ Counsel acknowledge that §1346 has survived vagueness challenges in the past. See, e.g., *United States v. Rybicki*, 354 F.3d 124 (2nd Cir. 2003) (en banc), *cert. denied*, 125 S.Ct. 32 (2004); *United States v. Brumley*, 116 F.3d 728 (5th Cir.), *cert denied*, 522 U.S. 1028 (1997); *United States v. Welch*, 327 F.3d 1081 (10th Cir. 2003); *United States v. Gray*, 96 F.3d 769 (5th Cir. 1996), *cert denied*, 520 U.S. 1129 (1997); *United States v. Hausmann*, 345 F.3d 952 (7th Cir. 2003).

¹⁷ There is also considerable philosophical debate in academic circles over the entire issue of patronage, although in Chicago it has become such a dirty word that the mere mention of it sends most politicians scurrying for cover these days – or, as at least one writer has suggested, “expulsion from the good government club.” See, *In Defense of City Hall Patronage*; by Mike Lawrence, head of the Paul Simon Public Policy Institute at Southern Illinois University; *Chicago Tribune*, August 14, 2005.

¹⁸ Perhaps the prosecution will explain whether patronage hiring is a federal mail fraud violation for governmental entities outside of the City of Chicago and its *Shakman* decree, or whether other cities, states, local governments and the federal government itself are free to make hiring decisions without fear of being charged with fraud.

however, and also must not permit or promote arbitrary enforcement. As this case perfectly illustrates, §1346 utterly fails in both regards, and it is at the very least unconstitutionally vague as applied here.

A criminal statute may be invalidated on vagueness grounds because (1) it fails to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits, or because (2) it authorizes and even encourages arbitrary and discriminatory enforcement.” *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999), *citing*, *Kolender v. Lawson* 461 U.S. 352, 357 (1983).

1. Section 1346 Fails to Provide Adequate Notice.

A statute fails to provide adequate notice when people “of common intelligence must necessarily guess at its meaning and differ as to its application.” *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). And, because of their impact on liberty, criminal statutes are examined more stringently than civil statutes. *Winters v. New York*, 333 U.S. 507, 515 (1948) (explaining that the level of certainty for criminal statutes is higher than for those statutes imposing civil sanctions). *See, also, Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (“[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.”). Likewise, the rule of lenity mandates that ambiguities be resolved in favor of narrowing rather than expanding the questioned language. *See, e.g., Cleveland v. United States*, 531 U.S. 12, 25 (2000) (“Moreover, to the extent the word “property” is ambiguous . . . we have instructed that ‘ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.’”) *quoting, Rewis v. United States*, 401 U.S. 808, 812 (1971).

Section 1346 fails to provide adequate notice of what it prohibits even to trained

lawyers, let alone laymen who may endeavor to understand what is prohibited. As noted by a well-reasoned dissenting opinion from the Fifth Circuit, the term “intangible right of honest services” utterly lacks and actually defies definition. Honest services “is not defined anywhere in the United States Code, is not defined in Black’s Law Dictionary, and has never been used in the United States Code Prior to its use in §1346.” *United States v. Brumley*, 116 F.3d 728, 742 (5th Cir. 1997) (Jolly, DeMoss & Smith, JJ., dissenting), *cert. denied*, 522 U.S. 1028, 118 S.Ct. 625 (1997). As is obvious, the term “intangible right” lacks definition by its very nature. *Id.* Numerous other courts have expressed a similar displeasure with the statute’s ambiguity. *See, e.g., Sawyer*, 85 F.3d at 724 (the concept of honest services eludes easy definition); *Rybicki*, 354 F.3d at 135 (court would have to “labor long and with difficulty in seeking a clear and properly limited meaning” of an honest services fraud); *United States v. Martin*, 195 F.3d 961, 967 (7th Cir. 1999), *cert denied*, 541 U.S. 1072 (2004) (taking note of “persistent concerns about the breadth and vagueness” of §1346).

In addition to the statute failing to provide adequate notice on its face, it should be more than clear that §1346 fails in that regard as applied here. Counsel submit that no one could have guessed, either from a reading of the statute, or even from a review of appellate opinions discussing honest services mail fraud, that the statute would be extended to encompass political hiring as it has been here. *See, Hausmann*, 345 F.3d at 959 (suggesting that adequate notice can be gleaned from prior appellate court opinions). In fact, because such matters have been handled civilly for over thirty years, just the opposite is true.

2. Section 1346 permits and encourages arbitrary enforcement.

Exacerbating its vague language, §1346 provides no limitations, instructions, or other

explanation as to how it is to be enforced, what the standards are, and what elements must be charged. As at least one court has noted, there is wide disagreement among appellate courts as to such basic questions as: whether the defendants scheme must cause actual harm; what *mens rea* must be proved; what duty must be breached; whether the source of the duty must be state or federal law, and whether §1346 revived the law as it existed prior to the Supreme Court's decision in *McNally*. See, *Rybicki*, 354 F.3d at 162-63. All of these unresolved issues, and the doubts surrounding them, permit prosecutors to simply pick and choose when an honest services fraud charge is appropriate. As noted herein, for example, despite the unequivocal requirements of *Bloom* and *Hausmann*, the government has simply chosen to ignore them in the indictment. And, at one of the preliminary hearings for this matter, and despite the fact that a §1346 violation was alleged in the criminal complaint, the government went so far as to claim that the *Bloom* requirements do not exist.¹⁹ A statute that allows its essential elements to be debated by courts and ignored by prosecutors is the very essence of a statute that permits and encourages arbitrary enforcement.

As the Eleventh Circuit noted when reversing a mail fraud conviction in *United States v. Brown*, 79 F.3d 1550, 1562 (11th Cir. 1996), “[t]he exercise of federal government power to criminalize conduct and thereby to coerce and to deprive persons, by government action, of their liberty, reputation and property must be watched carefully in a country that values the liberties of its private citizens. Never can we allow federal prosecutors to make up the law as they go along.”

¹⁹ See, Slattery Prelim. Tr. 7/26/05 p. 107.

D. Section 1346 Creates an Impermissible Common Law Crime.

As courts have long explained, there is simply no such animal as a common law crime. *See, e.g., United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812); *Rogers v. Tennessee*, 532 U.S. 451, 476 (2001) (Scalia, J., dissenting). The language chosen by Congress in enacting §1346 effectively creates one, however. As the Court is no doubt well aware, prior to the Supreme Court’s 1987 decision in *McNally*, *supra*, “honest services” fraud was simply a judicial creation grafted onto §1341 over the years. When *McNally* ended this practice, Congress merely codified the judicial creation by enacting §1346 and its “intangible right to honest services” language. The problem with Congress’ choice of language, however, is that it has caused courts to revert to the practice of creating or countenancing “honest services” fraud as they go. In discussing this very issue, the Seventh Circuit has commented that:

“[n]o one can be sure how far the intangible rights theory of criminal responsibility really extends, because it is a judicial gloss on § 1346. Congress told the courts in §1346 to go right on glossing the mail fraud and wire fraud statutes along these lines. Given the tradition (which verges on constitutional status) against common-law federal crimes, and the rule of lenity that requires doubts to be resolved against criminalizing conduct, it is best to limit the intangible rights approach to the scope it held when the Court decided (and Congress undid) *McNally*.”

Bloom, 149 F.3d at 656.

Counsel submit that while the *Bloom* court recognized the problem, it failed to go far enough. The language “intangible right of honest services” allows for far more than mere judicial gloss. The language effectively delegates to the judicial branch the “task of defining the key terms and coverage” of the statute. *Brumley*, 116 F.3d at 733. Such task, unless properly left solely to Congress, results in an impermissible common law crime.

E. Section 1346 Violates Separation of Powers

In a similar manner, §1346 permits prosecutors to usurp legislative powers to which Congress has sole right and possession under Article I, §1 of the United States Constitution. As is clear from this case, prosecutors are easily able to employ and manipulate the term “intangible rights of honest services” to create as yet unheard of crimes and to attempt to enforce their perception of “good government.”

The Supreme Court has made abundantly clear that law-makers may not “abdicate their responsibilities for setting the standards of the criminal law,” by enacting statutes with language so broad that it allows prosecutors to pursue “personal predilections.” *Smith v. Goguen*, 415 U.S. 566, 575 (1974). A statute violates separation of powers when its language, as well as the manner in which its is construed by courts, allows prosecutors to assign their own subjective meaning to an element of the offense. *See Kolender*, 461 U.S. at 355–61. Such is the case here, as the prosecution, with its indictment, is attempting to squeeze political hiring into a violation of “honest services.”

III. The Indictment Fails to Allege the Deprivation of Money or Property Required for a Mail Fraud Prosecution under Section 1341.

While the indictment seems to primarily focus on honest services mail fraud, it also contains a bare assertion that the alleged scheme violated the traditional concept of mail fraud as contained in §1341. Nevertheless, these allegations fail for at least two reasons.

First, the indictment avers that Sorich and Slattery deprived the City and its citizens of money and property. However, the indictment is silent as to what cognizable property right of the City or its citizens was the subject of the scheme to defraud. In fact, the indictment does not

allege that Sorich or Slattery took any money or property at all.²⁰ The indictment, therefore, fails to even meet the fundamental requirement that the U.S. Supreme Court has set for a mail fraud prosecution.

In the landmark case of *McNally*, 83 U.S. at 360, 107 S.Ct. 2875, the Supreme Court held that the federal mail fraud statute is “limited in scope to the protection of property rights.” The *McNally* Court reviewed the history of §1341, and concluded that “the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property.” *Id.* at 356. With *McNally*, the Supreme Court made clear that all things other than money or property were beyond the mail fraud proscriptions. Significantly, the Court also held that the money-or-property limitation applies with equal force when the government is the alleged target of a scheme to defraud. *Id.* at 359 (“any benefit which the Government derives from the [mail fraud] statute must be limited to the Government’s interest as a property holder”).

Since *McNally*, courts have recognized and applied the “*McNally* limitation,” and dismissed counts of mail fraud that do not involve the deprivation of money or property. *See, e.g., United States v. Murphy*, 836 F.2d 248, 254 (6th Cir. 1988)(finding that the unissued bingo licenses did not meet the “*McNally* limitations” since the unissued license is not property in the hand of the issuing state); *see also, United States v. Santa-Manzano*, 842 F.2d 1, 2 (1st Cir. 1988)(reversing wire fraud convictions where indictment silent, if not misleading, with respect to what money or property was obtained by the alleged scheme to defraud). This is just such a

²⁰ Defendants have filed simultaneously herewith “Defendants’ Motion for Bill of Particulars,” which specifically requests that this Court direct the government, if it can, to identify the money or property it alleges was the object of the scheme to defraud. Defendants would like to reserve the right to reply to the Government’s Response and identification of the “money” or “property.” Defendants contend that the government will be unable to allege a property right in the hands of the City of Chicago or the citizen’s of the City that is cognizable under §1341.

case as the indictment does not allege any property or money that the people of the City or the City itself was deprived of by the alleged scheme to defraud. Therefore, the §1341 allegations must be dismissed.

Second, and equally as important, the indictment fails to allege that Sorich or Slattery ever received any money or property. In *United States v. Walters*, 997 F.2d 1219 (7th Cir. 1993), the Seventh Circuit held that §1341 requires proof of a transfer of money or property from the victim to the defendant or that such a transfer was intended by the scheme in order to sustain a mail fraud charge. *Id.* at 1227. The fact that there may be some form of deprivation of money or property is not sufficient. *Id.* (“[L]osses that occur as byproducts of a deceitful scheme do not satisfy the statutory requirement.”). In *Walters*, the court rejected the government’s contention that an actual transfer of property was not required – that it was enough that the victim lose something. *Id.* at 1224. Instead, Judge Easterbrook, writing for the panel, restated the Supreme Court’s assurances in *McNally* that §1341 “does not cover the waterfront of deceit.” *Id.*

Not unlike the *Walters* case, the government in this case does not allege that Sorich and Slattery received any money or property or intended to do so. Nor is there any evidence to support such an allegation. Thus, even if the government could articulate some form of property which the City or its citizens have been deprived of – an assertion they have not made and will be unable to maintain – there is no evidence that there was any property obtained or intended to be obtained by Sorich or Slattery as part of the alleged scheme to defraud.

Therefore, because the government fails to allege, and will be unable to prove, that Sorich or Slattery schemed to defraud the City and its citizens of money or property, and that there was a transfer of some kind from those alleged victims, the §1341 charges (i.e., those

alleging deprivation of “money” or “property”) contained in Counts I, II, and III must be stricken or those Counts dismissed.

CONCLUSION

Wherefore, Defendants request that the Court enter an order consistent herewith and dismiss the indictment against Defendants Sorich and Slattery.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that foregoing Defendants Sorich & Slattery's Memorandum of Law in Support of Defendants' Joint Motion to Dismiss the Indictment was served on December 9, 2005, in accordance with Fed.R.Crim.P.49, Fed.R.Civ.P.5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court's system as to ECF filers.

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