

Honest Services Fraud and the Christie Bridge Scandal

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In my last piece, I asked whether being delayed in traffic for a police escort of collegiate athletes is [unconstitutional under the Fourth Amendment](#). Many dismissed such a theory by accepting the position that government has the power to hold you up in traffic for nearly any reason. The emerging GW bridge scandal in New Jersey, though—where motorists and emergency vehicles were caused serious, extended delays because government officials were playing games—demonstrates that there are limits on government power to unreasonably detain you as you travel the nation’s highways.

The Christie administration, up to and including Governor Christie himself, now face a variety of legal troubles. Six residents of Fort Lee have filed a federal lawsuit against the governor “[on the grounds that the roadblocks violated their constitutional rights to due process and freedom of movement](#).” Potential criminal charges include official misconduct, obstruction of justice, conspiracy to violate voting rights, and [possibly even homicide](#). Serious consequences arose from the unnecessary traffic jams including [delays in EMS response times](#). Was this merely a case of bullying?

“I repeat. I am not a bully.”

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var _giphy = _giphy || []; _giphy.push({id: 'JgGBtIKSZSHio',w: 498, h: 250});var g = document.createElement('script'); g.type = 'text/javascript'; g.async = true;g.src = ('https:' == document.location.protocol ? 'https://' : 'http://') + 'giphy.com/static/js/widgets/embed.js';var s = document.getElementsByTagName('script')[0]; s.parentNode.insertBefore(g, s);
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One legal theory that [is already being dismissed](#) (by critics) is violation of the honest services fraud statute, 18 U.S.C. § 1346. Honest services fraud is a rather confusing concept, but I will try to outline it briefly here and make the argument that the lane closures could successfully be prosecuted under § 1346.

Timeline:

1872: Congress enacts the mail fraud statute, 18 U.S.C. § 1341. You cannot use the mail in any way to commit fraud.

1952: Congress enacts the wire fraud statute, 18 U.S.C. § 1343. Same idea as mail fraud, but involving any use of wire, radio, or television to commit fraud. For modern

purposes, this includes phone and internet communication.

1970s–80s: Prosecutors use the statute to incarcerate numerous public officials and white collar criminals. Numerous courts accept that the mail and wire fraud statutes include schemes designed to defraud citizens of their “intangible rights to honest and impartial government.”¹ [1. [United States v. Silvano](#), 812 F.2d 754, 759 (1st Cir. 1987) (quoting [United States v. Gray](#), 790 F.2d 1290, 1294 (6th Cir. 1986)).]

1987: In *McNally v. United States*,² [2. [483 U.S. 350](#) (1987).] the Supreme Court limits the mail and wire fraud statutes to the protection of property rights. The Supremes throw down the gauntlet to the legislature, stating, “If Congress desires to go further, it must speak more clearly than it has.”³ [3. *Id.* at 360.]

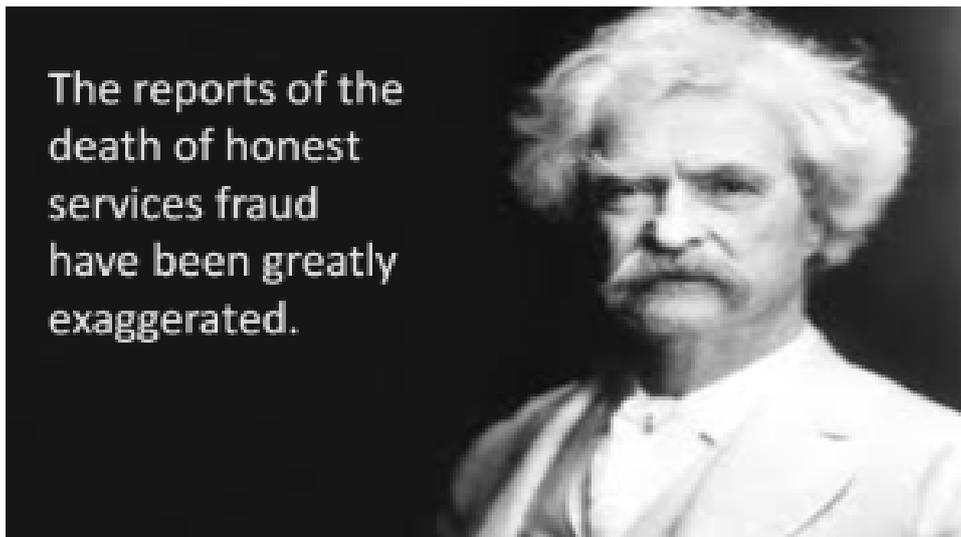
1988: Congress speaks more clearly.⁴ [4. Sort of.] Congress passes the Anti-Drug Abuse Act and Ronald Reagan signs it into law. Within that Act are twenty-eight words that will become known as the honest services fraud statute:

For the purposes of [mail and wire fraud], the term “scheme or artifice to defraud” includes a scheme or artifice to deprive another of the **intangible right of honest services**.⁵ [5. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181 (1988) (codified at 18 U.S.C. § 1346 (1988)) (emphasis added).]

1988–2010: Courts everywhere try to figure out what that phrase means. No coherent definition forms. Prosecutors are accused of abusing the ambiguous language to criminalize the normal, everyday grafts that form the backbone of American business and politics.

2010: The Supreme Court redefines honest services fraud in the case of former Enron CEO Jeff Skilling.⁶ [6. [Skilling v. United States](#), 130 S.Ct. 2896 (2010).] The Court limits the reach of the HSF statute to criminalize “only the bribe-and-kickback core of the pre-*McNally* case law.”⁷ [7. *Id.* at 2931.]

Since the *Skilling* decision, courts and scholars have tried to determine the reach of the honest services fraud statute.⁸ [8. See, e.g., Anita Cava & Brian M. Stewart, *Quid Pro Quo Corruption is “So Yesterday”: Restoring Honest Services Fraud After Skilling and Black*, 12 U.C. DAVIS BUS. L.J. 1 (2011).] Some sources have even declared the statute prematurely dead.⁹ [9. [Newsweek](#) claims the Supreme Court “threw out the ‘honest services’ concept as too vague and problematic.” This is incorrect. Rather, the Court placed a limiting instruction on the statute. The [Huffington Post](#) similarly misstates the honest services law, stating that it was “struck down” and “deemed unconstitutional.” Neither are true.] However disappointing it may be to opponents of the honest services statute, honest services fraud is still alive and still capable of being used as a powerful prosecutorial tool.



Justice Scalia concurred in the *Skilling* decision, but did not think that the majority went far enough. Scalia would have held the entire statute void for vagueness. Construing the statute to only encompass bribery and kickback schemes was nothing less than “wielding a power [the Court] long ago abjured: the power to define new federal crimes.”¹⁰ [10. *Skilling*, 130 S.Ct. at 2935 (Scalia, J., concurring in part and concurring in the judgment).]

The black hole of the *Skilling* decision, as discussed by Scalia, is that the opinion speaks to the nature of the scheme to defraud, but not the nature of the deprivation. Section 1346 states that “the term ‘scheme or artifice to defraud’ includes a scheme or artifice **to deprive another of the intangible right of honest services.**” Although now limited to instances where money changes hands among the fraudsters, there is no reason to believe that those defrauded must have been defrauded out of money or tangible property. As long as anyone caught up in a bribery or kickback scheme has been **deprived of their intangible right of honest services**, a potential federal prosecution could still arise.

How does this apply to the GW Bridge? The true motivations behind the shutdown have yet to be revealed and there has been no evidence thus far of any scheme involving a bribe or kickback. Nor has there been any link to sketchy political contributions as motivation.¹¹ [11. There appears to be no easy way to [distinguish a political contribution from a bribe.](#)] For the sake of argument, however, let us assume that there was a sufficient quid pro quo somewhere along the line to trigger *Skilling*’s bribery and kickback clause.

The looming question then, is, “Is this fraud?” Certainly this is not fraud within the sense that the people of Fort Lee were defrauded of money or any other tangible property rights.¹² [12. It is arguable that loss of wages and gasoline expended could be quantified, though.] They were, however, most definitely deprived of the intangible right of honest services. That is, government officials cannot intentionally make the lives of citizens worse under the guise of a traffic study, or for that matter, under the guise of good governance. The citizens need not have lost any money; the deprivation of honest services constitutes a federal crime even if the public is better off with the underhanded deal that was made.¹³ [13. See [United States v. Dixon](#), 536 F.2d 1388,

1400 (2d Cir. 1976) (“Such actions may not deplete the fisc; indeed, . . . they may have enriched it, but they are nonetheless frauds since the public official has been paid to act in breach of his duties.”).]



The majority in *Skilling* set forth to salvage the honest services statute and honor Congress’ intention to “reinstate the body of pre-*McNally* honest-services law.”¹⁴ [14. *Skilling*, 130 S.Ct. at 2929.] Justice Scalia called this

a step out of the frying pan into the fire. The pre-*McNally* cases provide no clear indication of what constitutes a denial of the right of honest services. The possibilities range from any action that is contrary to public policy or otherwise immoral, to only the disloyalty of a public official or employee to his principal, to only the secret use of a perpetrator’s position of trust in order to harm whomever he is beholden to.¹⁵ [15. *Skilling*, 130 S.Ct. at 2938 (Scalia, J., concurring in part and concurring in the judgment).]

McNally limited schemes to defraud to include only deprivations of money or property.¹⁶ [16. *McNally v. United States*, 483 U.S. 350, 358 (1987).] Prior to *McNally*, the honest services doctrine was used in numerous instances to convict public sector workers “of defrauding citizens of their right to the honest services of their government officials.”¹⁷ [17. *Id.* at 362–63 (Stevens, J., dissenting).] *McNally* held that the mail fraud statute “clearly protects property rights, but does not refer to the intangible right of the citizenry to good government.”¹⁸ [18. *Id.* at 356 (majority opinion).] But Congress enacted Section 1346 to override *McNally* and the

Supreme Court subsequently set forth to reinstate the interpretation of honest services fraud to the pre-*McNally* standard.¹⁹ [19. *Skilling*, 130 S.Ct. at 2931 (“Congress’ reversal of *McNally* and reinstatement of the honest-services doctrine, we conclude, can and should be salvaged by confining its scope to the core pre-*McNally* applications.”).]

It is therefore clear that in any case involving bribery or a kickback, the honest services fraud statute can and does reach “officials [that] have secretly made governmental decisions with the objective of benefiting themselves or promoting their own interests, instead of fulfilling their legal commitment to provide the citizens of the State or local government with their loyal service and honest government.”²⁰ [20. *McNally*, 483 U.S. 350, 363 (Stevens, J., dissenting).]

In the current situation, it is not at all difficult to find New Jersey government officials providing disloyal service and dishonest governance. If the U.S. Attorney’s Office can find evidence of a bribe or kickback at the heart of the bridge scandal, anyone tied to the scheme could successfully be prosecuted under the mail and wire fraud statutes merely for the breach of the public trust.