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Recommended Citation
Michael C. Bennett, Borre v. United States: An Improper Interpretation of Property Rights, 42 DePaul L. Rev. 1499 (1993)
Available at: https://via.library.depaul.edu/law-review/vol42/iss4/15
NOTE

BORRE v. UNITED STATES: AN IMPROPER INTERPRETATION OF PROPERTY RIGHTS

INTRODUCTION

In its first 115 years of development, the Federal Mail Fraud Act grew into a powerful tool for punishing crime and corruption. The Mail Fraud Act was described by one commentator as the government's "Stradivarius ... Colt .45 ... Louisville Slugger ... Cuisinart ..." because of the law's ubiquitous effectiveness. The broad scope of the law allowed the federal government to prosecute crimes involving corruption in state and local government. However, a look at the history of the Mail Fraud Act shows that it has been marred by confusion from its outset in 1872. The law was initially subject to interpretation by both broad and strict constructions until the Supreme Court gave support to the broad interpretation in United States v. Young. Over time, the government further broadened the statute's application, crystallizing with the recognition of the intangible rights theory in 1973. Under the intangible rights theory, mail fraud convictions were obtained based on the defendants depriving citizens of their right to honest dealings, usually with the government.

This theory was recognized in all circuits until 1987, when the Supreme Court overturned it in McNally v. United States. The Court held that the Mail Fraud Act (Act) only applies to schemes

2. Id. at 771.
6. Id. at 766.
that result in a loss of money or property. Violations of intangible rights were no longer recognized as a cause of action. This decision severely weakened the effectiveness of the statute. That same year, the Supreme Court diminished the effect of *McNally* in *Carpenter v. United States*. There, the Court ruled that the Mail Fraud Act does cover the deprivation of intangible property rights, specifically, a business's right to confidential information.

With the intangible rights theory having been struck down — although intangible property rights were upheld — defendants convicted under the Act attempted to have their convictions overturned through either a writ of coram nobis or a writ of habeas corpus. In these post-conviction proceedings, the courts look at the indictment and jury instructions to see if the defendant was convicted under a theory that charged a deprivation of money or property. If the defendant was convicted solely on the basis of an intangible rights theory, the conviction must be overturned. Many of these cases involved bribery, kickbacks, security interests, confidential business information, or licenses in which courts have overturned many convictions. However, in 1988, Congress amended the Mail Fraud Act once again, re-establishing the intangible rights theory and returning the law to its pre-*McNally* status.

In 1991, the Seventh Circuit, in *Borre v. United States*, seemed to revive the intangible rights theory despite *McNally*. In *Borre*, the Seventh Circuit held that a cable television franchise was property under the Mail Fraud Act. The district court found that Borre was convicted under the intangible rights theory and therefore vacated his convictions based on *McNally*; however, the Seventh Circuit reversed the determination of the district court by a 2-1 vote and reinstated Borre's conviction.

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8. *Id.* at 359.
10. *Id.* at 25.
13. *See* Magnuson v. United States, 861 F.2d 166, 168 (7th Cir. 1988) (finding an indictment insufficient under *McNally*).
15. 940 F.2d 215 (7th Cir. 1991).
16. *Id.* at 220.
17. *Id.* at 217.
18. *Id.* at 224.
Borre exemplifies the current state of the law. McNally significantly narrowed the reach of the Mail Fraud Act. The Borre court’s ruling that a cable television franchise is property for the purposes of the statute is a sign that the scope of the law is expanding once again.

This Note examines the early development of the Mail Fraud Act. It shows how the law changed during its early years and how courts interpreted the statute. The Note then looks at the intangible rights theory and details the McNally and Carpenter decisions, which caused an upheaval in the interpretation of the Mail Fraud Act. The Note discusses retroactive application of McNally and the procedures used by defendants to overturn convictions. Then it shows how the courts look to the indictment and jury instructions to determine if a conviction should stand. The Note also discusses some of the relevant case law, showing what the courts have found to be property under McNally. It specifically examines the case of Borre v. United States and argues that the defendant there did not deprive the government of a property interest as defined by McNally. Finally, the Note assesses how the Borre court’s interpretation of the Mail Fraud Act undermines McNally and possibly reintroduces the intangible rights concepts that McNally temporarily eliminated.

I. Background

A. Development of the Mail Fraud Act Prior to McNally

1. Introduction

The original Mail Fraud Act did not specify what crimes it covered. This led to varied interpretations of the law by the federal courts; some viewed mail fraud as only dealing with crimes dependent on the use of the mails, while others applied the statute to any crime which incidentally used the mails. It took over forty years before the courts and Congress approved the latter, broader construction of the statute. By 1941, this broad construction of the law led to the development of the intangible rights theory — mail fraud convictions based on schemes that deprived citizens of the right to an honest government.

2. Early Development of the Mail Fraud Act

In 1872, Congress passed a series of laws concerning the postal
service, which included the first statute to make mail fraud a federal crime.\textsuperscript{19} There was no legislative history or congressional debate for the Act (which contains 327 sections),\textsuperscript{20} other than the comment of a representative who said the laws attempted to prevent "thieves, forgers, and rapscallions generally" from "deceiving and fleecing the innocent people in the country."\textsuperscript{21}

Commentators viewed the statute as a congressional response to the ineffectiveness of state and local laws in combatting fraudulent "get-rich-quick" swindles.\textsuperscript{22} Looking at the language of the statute, however, Congress seemed to be more concerned with the degree of mail abuse than with the degree of fraud.\textsuperscript{23}

In its infancy, the statutory package survived two constitutional attacks.\textsuperscript{24} In \textit{Ex parte Jackson},\textsuperscript{25} decided in 1877, the defendant claimed that the postal law prohibiting the mailing of circulars for

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\textsuperscript{19} Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323 (current version at 18 U.S.C. § 1346 (1988)). The statute provides:

That if any person having devised or intending to devise any scheme or artifice to defraud, or be effected by either opening or intending to open correspondence or communication with any other person (whether resident within or outside of the United States), by means of the post-office establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice (or attempting so to do), place any letter or packet in any post-office of the United States, or take or receive any therefrom, such person, so misusing the post-office establishment, shall be guilty of a misdemeanor, and shall be punished with a fine of not more than five hundred dollars, with or without such imprisonment, as the court shall direct, not exceeding eighteen calendar months. The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device.

\textit{Id.}; see also Rakoff, \textit{supra} note 1, at 777-78 (noting that the odd design of the statute has led to several unusual practical consequences (i.e., it results in each separate use of the mails constituting a crime)).

\textsuperscript{20} Rakoff, \textit{supra} note 1, at 779.


\textsuperscript{22} Rakoff, \textit{supra} note 1, at 780 (citing William A. Dunning, \textit{Reconstruction, Political and Economic} 224-37 (1962); Harold U. Faulkner, \textit{American Economic History} 483-86, 516-17 (1960); John H. Franklin, \textit{Reconstruction After the Civil War} 8-9, 146-49, 174-77 (1961)).

\textsuperscript{23} See id. at 784 (noting that the apparent function of the statute was to "deter the actual and intentional misuse of the mails in furtherance of a truly mail fraud scheme"); see also Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323 (current version at 18 U.S.C. § 1346 (1988)) (telling the sentencing court in a mail fraud prosecution to "proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device").

\textsuperscript{24} See \textit{Ex parte} Rapier, 143 U.S. 110 (1892); \textit{Ex parte} Jackson, 96 U.S. 727 (1877).

\textsuperscript{25} 96 U.S. 727 (1877).
illegal lotteries was outside the scope of Congress's regulatory pow-
er. 26 A unanimous Court held that the Constitution gave Congress the power to regulate the entire postal system of the United States. 27 Accordingly, the Court found that Congress had the power to determine what was a misuse of the mails. 28 The Supreme Court's ruling bolstered the constitutionality of all the postal laws, including the Mail Fraud Act. 29

In 1892, the Court provided further support for Congress's au-
thority over the mails in Ex parte Rapier. 30 There, the defendants were involved in a lottery scheme which used the mails, and they argued that only the states could regulate illegal lotteries. 31 Once again, a unanimous Court upheld Congress's power to police the mails, stating that it was "not necessary that Congress should have the power to deal with crime or immorality within the States in or-
der to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality." 32 Because the statute was declared constitutional, the lower courts did not have to adopt a narrow construction of the Mail Fraud Act to avoid constitutional challenges. 33

However, the lower courts had few guidelines to interpret the law. 34 Accordingly, the courts subsequently split in their interpreta-
tion of the new statute, generally falling into two camps: strict con-
structionists and broad constructionists. 35 Strict constructionist
looked at the mail-emphasizing language in the statute as limiting its application to frauds that could only be perpetrated by using the mails.\textsuperscript{36} This interpretation of the mail fraud statute was convenient because a simple "but for the use of the mails" test could be applied.\textsuperscript{37} The strict constructionist approach resulted in courts refusing to apply the statute to schemes of a "local and trivial nature."\textsuperscript{38} Moreover, strict constructionists never defined what the Act meant by a scheme to defraud, and since very few schemes were so reliant on the mails to fall within the strict constructionist approach, such a definition was unnecessary.\textsuperscript{39}

The broad constructionists did not let the mail-emphasizing language limit their definition of a scheme to defraud.\textsuperscript{40} The courts using this approach found that any scheme where the defendants intentionally used the mails to defraud came within the statute.\textsuperscript{41} Furthermore, the broad constructionists applied the Mail Fraud Act to all schemes to defraud, not just to fraud recognized under the common law or state law.\textsuperscript{42}

For seventeen years, the two schemes co-existed and "seemed to inhibit the development of strong precedent."\textsuperscript{43} Due to the two di-

the judges, and the judges' "degree of moral concern" as related to the substantiality of the fraud were what guided judges in their construction of the mail fraud statute. Rakoff, supra note 1, at 800.

\textsuperscript{36} Rakoff, supra note 1, at 791, 793; see, e.g., United States v. Clark, 121 F. 190 (M.D. Pa. 1903) (finding that fraudulent advertising circulars sent through the mail could have been sent by other means); see also United States v. Mitchell, 36 F. 492 (W.D. Pa. 1888) (ruling that a scheme to defraud an insurance company was not within the scope of the mail fraud statute); United States v. Owens, 17 F. 72 (E.D. Mo. 1883) (stating that mail fraud laws are not intended to cover all commercial correspondence).

\textsuperscript{37} Rakoff, supra note 1, at 793; see also Clark, 121 F. at 191 (holding that the use of the mails is not enough, but rather it must be such use to successfully perpetrate the fraud).

\textsuperscript{38} Rakoff, supra note 1, at 792; see Owens, 17 F. at 74 (giving a narrow definition of what types of cases constitute mail fraud).

\textsuperscript{39} Rakoff, supra note 1, at 794; cf. Owens, 17 F. at 74 (failing to define "schemes of fraud").

\textsuperscript{40} Rakoff, supra note 1, at 796.

\textsuperscript{41} See United States v. Horman, 118 F. 780 (S.D. Ohio 1901) (finding that blackmail falls within the mail fraud statute), aff'd, 116 F. 350 (6th Cir.), cert. denied, 187 U.S. 641 (1902); Weeber v. United States, 62 F. 740 (C.C.D. Colo. 1894) (holding that posing as a U.S. attorney to blackmail a victim is a scheme to defraud); United States v. Jones, 10 F. 469, 470 (C.C.S.D.N.Y. 1882) (stating that "the gist of the offence consists in the abuse of the mail"); see also Rakoff, supra note 1, at 798-99 (noting that broad constructionists found no limitations on the language of the statute).

\textsuperscript{42} See, e.g., United States v. Loring, 91 F. 881, 887 (N.D. Ill. 1884) (finding that any scheme to defraud which uses the mail, whether or not it is covered by other statutes, is mail fraud).

\textsuperscript{43} Jeffrey J. Dean & Doye E. Green, McNally v. United States and Its Effect on the Federal Mail Fraud Statute: Will White Collar Criminals Get a Break?, 39 MERCER L. REV. 697, 701 (1988). During this seventeen-year period, the Supreme Court did not side with either construc-
vergent interpretations of the law, Congress attempted to clarify interpretation by enacting the 1889 Amendment to the Mail Fraud Act. The law now enumerated specific crimes that were mail fraud. These additional schemes were connected to the original schemes to defraud by the use of the disjunctive "or." However, confusion still reigned. Strict constructionists thought the additions to the statute limited the law to only those crimes. On the other

ition. See United States v. Hess, 124 U.S. 483 (1888) (addressing whether the indictment should fit within the language of the statute or specifically detail the scheme used); Ex parte Henry, 123 U.S. 372 (1887) (addressing the penalty provisions in the statute).


If any person having devised or intending to devise any scheme or artifice to defraud, or to sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlawful use any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intended to be or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "sawdust swindle," or "counterfeit money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "bills," "paper goods," "spurious Treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the Post-Office Establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, packet, writing, circular, pamphlet, or advertisement in any post-office, branch post-office, or street or hotel letter-box of the United States, to be sent or delivered by the said post-office establishment, or shall take or receive any such therefrom, such person so misusing the post-office establishment shall, upon conviction, be punishable by a fine of not more than five hundred dollars and by imprisonment for not more than eighteen months, or by both such punishments, at the discretion of the court. The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device.

Id.

45. Dean & Green, supra note 43, at 701; see Rakoff, supra note 1, at 809 (noting that when Congress amended the statute it expressly included certain specific schemes within its scope).


47. Rakoff, supra note 1, at 809; see United States v. Beach, 71 F. 160, 161 (D. Colo. 1895) (stating that "[t]he statute is not limited to the particular deceits mentioned in it, . . . for the first clause embraces 'any scheme or artifice to defraud'; but these words must be taken to mean any scheme or artifice of the general character of those specified in the act," but not including schemes
side, broad constructionists thought the amendment endorsed their interpretation, as many of the schemes specified in the amendment were the same schemes they had found illegal under the old law.\(^{48}\)

In 1895, the Supreme Court came close to endorsing the broad constructionist view of the Mail Fraud Act in *Durland v. United States*.\(^{49}\) The *Durland* defendants claimed that the Mail Fraud Act applied only to common law fraud and the concept of false pretenses.\(^{50}\) The Court rejected this argument. The Court stated that the mail fraud "statute is broader than is claimed" and held that promises and misrepresentations as to the future fit within the scope of the statute.\(^{51}\)

Subsequently, Congress further amended the Mail Fraud Act in 1909.\(^{52}\) This amendment incorporated the *Durland* holding,\(^{53}\) and it eliminated the mail-emphasizing language.\(^{54}\) Accordingly, since Congress eliminated the language referring to "misusing the post-office establishment,"\(^{55}\) federal courts ruled that prosecutors no

of a different character); cf. Milby v. United States, 120 F. 1 (6th Cir. 1903) (holding that specific crimes were just additions to the statute); Culp v. United States, 82 F. 990 (3d Cir. 1897) (noting that the amendment did not narrow the scope of the statute to specific schemes). Congress, once again, left no legislative history to guide the lower courts. Dean & Green, supra note 43, at 701 n.40.

48. Rakoff, supra note 1, at 809.
49. 161 U.S. 306 (1896); see Dean & Green, supra note 43, at 701; Rakoff, supra note 1, at 811-12. The *Durland* defendants sold bonds to people, never intending to pay them back on the date of maturity. *Durland*, 161 U.S. at 312.
50. *Durland*, 161 U.S. at 312. Under the principles of common law fraud and false pretenses, "there must be a misrepresentation as to some existing fact and not a mere promise of the future." *Id.*
51. *Id.* at 313.

> 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 . . . shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post-office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States . . . shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.

*Id.*
53. Dean & Green, supra note 43, at 702.
54. Rakoff, supra note 1, at 816.
longer had to show a criminal intent to misuse the mails. The misuse of mails thus became incidental to the fraud itself. This amendment destroyed all support for the strict constructionists.

Five years later, in 1914, the Supreme Court, in United States v. Young interpreted section 215 of the Criminal Code and set up the two elements needed for a successful prosecution under the Mail Fraud Act. First, the scheme must be devised to defraud, or to obtain money or property by false pretenses. Second, the mails must have been used to effectuate the scheme, with merely one letter being enough to qualify. By reiterating the language in the statute, the Court made the law easier to apply. Thus, by 1914, the federal government had jurisdiction over "any and all schemes to defraud that involved an act of mailing."

Just two years later, the Supreme Court further clarified the Mail Fraud Act in Badders v. United States. The Court held that Congress could find the act of using the mail to perpetrate a fraud illegal, even if it could not regulate the scheme itself. This decision appeared to remove all limitations courts had previously placed on the Mail Fraud Act.

After Badders, "it was only a matter of time before federal prose-

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56. Rakoff, supra note 1, at 816; see United States v. Young, 232 U.S. 155 (1914) (comparing § 5480 of the Revised Statutes from 1889 with the new 1909 amendment and finding that intent to misuse the mails is unnecessary).

57. Rakoff, supra note 1, at 816; see Dean & Green, supra note 43, at 702 ("The removal of these key phrases leaves the statute so bare that it can only be seen as a tool to fight corruption and not as a means of protecting the integrity of the mails.").

58. Rakoff, supra note 1, at 817 (stating that "[t]he minimal use of the mails that would trigger the statute could, within broad limits, be an incidental or even accidental accompaniment of the defendant's fraudulent scheme"); see, e.g., United States v. Young, 232 U.S. 155, 161 (1914) (defining the scope of the statute).

59. 232 U.S. 155 (1914).

60. Id. at 161.

61. Id.

62. Id. The Supreme Court said this was all that was needed and that "[t]he District Court apparently overlooked the distinction between the sections [of the statute] and was of the opinion that something more was necessary to an offense under § 215, than the averment of the scheme and its attempted execution in the manner stated." Id.

63. Dean & Green, supra note 43, at 703.

64. Rakoff, supra note 1, at 817.

65. 240 U.S. 391 (1916). The defendant argued, inter alia, that Congress could not regulate a scheme fraudulent in itself. Id. at 393.

66. Id. The Court found such acts contrary to public policy. Id. Congress could now regulate acts that were not criminal, as long as the acts furthered a fraudulent scheme which used the mails. Id.

67. Rakoff, supra note 1, at 818.
cutors realized the potential of what is now section 1341. Subsequently, Congress amended the Mail Fraud Act three more times, each time making minor alterations in the wording of the statute.

3. Intangible Rights

The courts continued to find new applications for the Mail Fraud Act. By 1941, the statute was being applied to cases that resulted in no monetary loss to the victims of the scheme to defraud. Previously, to successfully prosecute a mail fraud conviction, the victim had to lose money. This new intangible rights theory expanded the scope of mail fraud prosecutions. Rather than losing money, the victims of these schemes, which usually involved employment or governmental relationships, lost intangible rights. However, it took three decades before prosecutors began pursuing intangible rights convictions in earnest.

In 1973, the little-used intangible rights theory was applied in United States v. States. The Eighth Circuit responded with enthusiastic support for the theory. In States, the defendants argued that the Mail Fraud Act did not apply to their scheme, as the law only covered deprivations of money or property. This argument re-
quired a conjunctive reading of the portion of the act making illegal "any scheme or artifice to defraud, or for obtaining money or property . . . ." The court disregarded this analysis and said it was more natural to read the two phrases independently. The court thus held that a "scheme or artifice to defraud" did not require a loss of money or property. In so concluding, the court looked at past cases that supported a broad construction of the Mail Fraud Act. The court held that the defendants were guilty of mail fraud, even though the victims did not lose money or property.

Subsequently, the government used the intangible rights theory to reach public officials who failed to disclose material information while concealing corrupt activities. As long as the failure to disclose was combined with the use of mails to carry out a fraud, the

74. 18 U.S.C. § 1341 (emphasis added).
75. States, 488 F.2d at 764.
76. Id.
77. Id.; Durland v. United States, 161 U.S. 306, 313 (1896); Shushan v. United States, 117 F.2d 110 (5th Cir.), cert. denied, 313 U.S. 574 (1941); see also Gouled v. United States, 273 F. 506, 508 (2d Cir. 1921) (finding that kickbacks to an officer authorized to make contracts on behalf of the government constituted mail fraud). But cf. United States v. Regent Office Supply Co., 421 F.2d 1174, 1179 (2d Cir. 1970) (holding that false representations that did not affect a customer's understanding of the bargain were not mail fraud).

The States court also looked at mail fraud cases involving bribery which indicated that a deprivation of political rights was a type of offense under the statute. States, 488 F.2d at 765-66. It placed great weight on the ruling in United States v. Faser, 303 F. Supp. 380, 385 (E.D. La. 1969), where the district court stated that "it is a violation of the statute in question if a person defrauds the State out of the 'loyal and faithful services of an employee.'" Id.

78. Id.
79. See United States v. Holzer, 816 F.2d 304 (7th Cir.) (holding that a judge who obtained assistance from lawyers to get bank loans committed fraud within the meaning of the mail fraud statute), cert. denied, 484 U.S. 891 (1987); United States v. Bush, 522 F.2d 641 (7th Cir. 1975) (holding that a city employee who defrauded citizens of the city and used mails in furtherance of his scheme was guilty of mail fraud), cert. denied, 424 U.S. 977 (1976). In Bush, the press secretary hid his contractual relationship with a company seeking the airline advertising contract for O'Hare Airport. Id. at 643.
Mail Fraud Act applied. This application of the Act applied whether or not the victim or the public at large lost any money or property.

This broad application was welcomed by most judges and jurists. Chief Justice Burger's oft-quoted dissenting opinion in United States v. Maze endorsed the broad reach of the statute. Burger called the statute the federal government's "first line of defense" (i.e., a catch-all law which the government used to deal with new crimes until Congress could get around to passing a specific law). This catch-all nature did not please everyone. Certainly, the broad reach of the law made it an effective tool to prosecute crimes otherwise not illegal under federal law. This is the framework which existed until the Supreme Court's opinion in McNally v. United States.

B. The McNally Decision

In 1987, the Supreme Court ruled that the Mail Fraud Act did
not cover schemes to defraud persons of their intangible rights. McNally v. United States involved a scheme to get commissions from the insurance agency that handled the state of Kentucky’s workers’ compensation policy. The chairman of the Kentucky Democratic Party, Howard P. Hunt, approached the Wombwell Insurance Company with the plan. Hunt asked for a cut of the company’s commissions in exchange for guaranteeing that Wombwell would continue to be the agent for the policy. The commissions were then distributed to other insurance agencies designated by Hunt. The defendants were convicted, and their convictions were affirmed by the Sixth Circuit based upon the intangible rights theory of mail fraud prosecutions.

The Supreme Court reversed the convictions. The Court stated that the Mail Fraud Act did not cover the loss of the intangible right of citizens to an honest government. In making its decision, the Court engaged in a lengthy historical analysis. It concluded that despite the lack of a solid historical record, it appeared that the legislature intended for the Mail Fraud Act to protect people from frauds which caused a deprivation of money or property. Looking to Durland v. United States and the subsequent 1909 amendment to the Mail Fraud Act, the Court set out to interpret the wording of the amendment.

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88. Id. at 360-61.
89. Id. at 352-53.
90. Id. at 352. Wombwell had held the workers’ compensation policy of the state since 1971.
91. Id.
92. Id. at 353. One of those agencies was controlled by Hunt and co-defendant James E. Gray. Id. Co-defendant Charles J. McNally passed himself off as the owner of the company, Seton Investments, Inc. Id.
94. McNally, 483 U.S. at 356.
95. Id.
96. Id. The Court began the analysis by looking at the comments of Representative Farnsworth back in 1870. Id.; see also CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870) (declaring that laws were necessary “to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rascallions generally, for the purpose of deceiving and fleecing the innocent people in the country”).
97. McNally, 483 U.S. at 356.
The Court said the phrases "schemes or artifices to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representation, or promises..." could be read conjunctively or disjunctively. Reaching back to its decision in *Hammerschmidt v. United States*, the Court sought to define what was meant by the term "defraud." The *Hammerschmidt* Court said that the term "defraud" referred to "wronging one in his property rights by dishonest methods or schemes" and "usually signif[ied] the deprivation of something of value by trick, deceit, chicane or overreaching." The Court in *McNally* felt that Congress, in drafting the 1909 amendment was acting consistently with this definition.

Faced with two interpretations of the Mail Fraud Act, the Court said it would adopt the harsher interpretation only if Congress had spoken in definite language. Applying this so-called rule of lenity, the Court held for the more lenient definition because it found the statute ambiguous as to whether it included the intangible rights doctrine. The Court left it to Congress to amend the law if it so chose.

The Court then applied this narrow construction of the statute to the jury instructions. In invalidating the intangible rights theory, the Court held that the only benefit the government received from the Mail Fraud Act was limited "to the Government's interests as property holder." The Court found that the government failed to show how this interest as a property holder was violated. It said that the jury instructions "[did] not [require the jury] to find that the

102. 265 U.S. 182 (1924).
104. *Hammerschmidt*, 265 U.S. at 188.
107. The rule of lenity holds that if the Court has to choose between two meanings of a statute, it will choose the meaning that results in the least harsh result or application. See *Bell v. United States*, 349 U.S. 81, 83 (1955) ("When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.").
109. *Id.*
110. *Id.* at 358 n.8.
111. *Id.* at 360.
Commonwealth itself was defrauded of any money or property” and was based solely an intangible rights theory. The Court then said that even if the defendants were properly charged, the government could not, and did not, show how the state of Kentucky lost money or property. The state was only deprived of the information that the defendants held an interest in one of the insurance agencies involved. Accordingly, the Mail Fraud Act did not apply because the government only proved a loss of intangible rights, and the convictions were overturned.

Justice Stevens replied with a critical dissent. Stevens concluded that under the Court’s reasoning, many schemes would no longer fall under the Mail Fraud Act. In the fourth part of his dissent, however, Stevens suggested two ways the government could circumvent the Court’s decision to prosecute some corrupt official whose use of the mails would result in some loss of money or property. First, the government could establish a loss of money when a government official violates his fiduciary duty because “the employer” (i.e., the people) pays the government official to act faithfully. An official who does not act in the public’s behalf is taking the public’s money. Second, the government could claim that an official was liable under agency theory, meaning the official would owe the government the proceeds of his scheme.

Comment and opinion on the decision was split, as the Court overturned the law of all twelve circuits. Some commentators suggested that the Supreme Court rejected the theory because it was concerned with federalism and how the federal government enforced

112. Id.
113. Id.
114. Id. at 361 n.9.
115. Id. at 361.
116. Id. at 362 (Stevens, J., dissenting). The dissent engaged in its own review of the history of the mail fraud statute, including cases such as Badders, which supported a broad construction of the law. Id. at 366; see Badders v. United States, 240 U.S. 391 (1916). The dissent firmly aligned itself with the reasoning in Shushan, States, and their progeny, fully supporting the continued existence of the intangible rights theory. McNally, 483 U.S. at 362 n.1 (Stevens, J., dissenting).
117. McNally, 483 U.S. at 377 (Stevens, J., dissenting).
118. Id.
119. Id. at 377 n.10.
120. Id.
121. Id.
122. See Ward v. United States, 845 F.2d 1459, 1460 (7th Cir. 1988) (describing McNally as “a stunning setback for the [Justice] Department”).
the Mail Fraud Act. Other commentators posited that the Court wanted to force government prosecutors "to clearly identify the victim, and to define, in economic terms, what he or she stood to lose and what the defendant stood to gain." Opponents felt the Court was incorrect in ignoring the long-standing doctrine of intangible rights. Supporters, on the other hand, did not see McNally as being harmful, as most frauds involved a deprivation of money or property.

Throughout the statute's history, courts continually expanded the scope of the Mail Fraud Act. Under the intangible rights theory, federal prosecutors were able to clamp down on corruption in state and local government. The McNally decision, however, diminished the ability of prosecutors to maintain such prosecutions and served to invalidate prior convictions under the intangible rights theory.

C. The Carpenter Decision

Whether or not due to this public comment, the Supreme Court, during the same term, subsequently re-expanded the reach of the Mail Fraud Act with its decision in Carpenter v. United States. The Court in Carpenter held that the Mail Fraud Act applied to intangible property rights as well as to tangible property rights. The Court's decision in the case, however, did not alter the prior decision in McNally, which removed intangible nonproperty rights from the reach of the statute.

123. Ellen Berkowitz, Note, The Rise and Fall of the Right to Honest Government: Prosecuting Public Corruption After McNally v. United States, 22 Loy. L.A. L. Rev. 325, 371-76 (1988). The commentators' concern was that the mail fraud statute was infringing on areas traditionally left to the states and that the mail fraud statute was being used to do more than police the mails. Id.
127. See Hearing, supra note 86.
128. Id. at 109. In 1988, the Justice Department estimated that 186 convictions would be overturned.
130. Id. at 25. While intangible rights involve a person's right to honest dealings, usually with the government, property rights are not intangible rights. However, property itself may be tangible or intangible. Id.
The defendants in *Carpenter* were a reporter for the *Wall Street Journal*, the reporter's roommate, who was a stockbroker, and one of his roommate's clients. The reporter, R. Foster Winans, wrote for the *Wall Street Journal*'s "Heard on the Street" column. The newspaper regarded the information procured for the column as confidential until publication. The column was known to affect the price of stocks which it featured. The defendants sought to take advantage of this effect. Winans provided his co-conspirators with information disclosing which stocks the *Wall Street Journal* would feature in upcoming editions.

Meanwhile, the stockbroker's employer noticed a pattern in that broker's trading which coincided with the appearance of stocks in the column, and this led to an investigation by the Securities and Exchange Commission (SEC). The SEC's inquiries led to squabbling among the conspirators, and Winans and his roommate, Carpenter, confessed to the SEC. The defendants were charged with mail fraud based upon their use of the confidential information. The district court convicted the defendants, and the appellate court upheld the convictions.

On appeal to the Supreme Court, the defendants argued that the use of the *Wall Street Journal*'s confidential information deprived the victim only of an intangible right and was therefore not subject to the Mail Fraud Act. The Court rejected this argument.

The Court held that because confidential business information was found to be a long-recognized intangible property right, the entity which procured such information had an exclusive right to benefit from it. The defendants' use of the information thus deprived the *Wall Street Journal* of both the right to control that in-


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131. *Id.* at 22.
132. *Id.*
133. *Id.* at 23.
134. *Id.* at 22.
135. *Id.* at 23.
136. *Id.*
137. *Id.*
138. *Id.* at 24.
139. *Id.*
140. *Id.* at 25.
141. *Id.*
142. *Id.* at 26 (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001-04 (1984)). According to the *Carpenter* Court, the Court in *Ruckelshaus* looked to common law sources "such as state law" to determine what constitutes property. *Id.*
143. *Id.*
formation and the right to decide how it would be used. The Court said this deprivation went beyond the loss of the honest and faithful service of an employee, which would have been a mere intangible rights charge. The Court held that no loss of money needed to be shown to constitute the loss or deprivation of an intangible property right, and that it was enough that the Wall Street Journal lost exclusive use of the information.

The Carpenter holding served to clarify the earlier McNally decision. After McNally, and until Congress acted to amend the statute, the intangible rights theory was no longer in the arsenal of federal prosecutors. Prosecutors were required to show a loss of property by the victim to obtain a mail fraud conviction. After Carpenter, however, the property no longer had to be in a tangible form because the Court recognized that intangible items, such as information, can be classified as property.

D. The Aftermath: Overturning Convictions

1. Retroactivity

McNally v. United States gave new hope to defendants convicted of mail fraud under the intangible rights theory. The Supreme Court's ruling meant that those defendants did not commit a crime under the Mail Fraud Act. Accordingly, allowing convictions returned under the now invalid intangible rights theory to stand would be a "miscarriage of justice." The lower courts have applied Mc-

144. Id.
145. Id. at 27.
146. Id. The Court compared the defendants' crime to embezzlement, which is included in the concept of fraud, and affirmed the convictions. Id. at 27-28; see Grin v. Shine, 187 U.S. 181, 189 (1902) (defining embezzlement as "[t]he fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another").
147. Carpenter has been applied in a nonmail fraud context. See United States v. Fowler, 932 F.2d 306, 310 (4th Cir. 1991). In Fowler, government information was found to be intangible property for the purpose of a federal theft and embezzlement statute. Id. at 309; see 18 U.S.C. § 641 (1988). Section 641 makes it a felony for anyone who embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof . . . . [providing the value of the property exceeds $100].
149. United States v. Keane, 852 F.2d 199, 205 (7th Cir. 1988), cert. denied, 490 U.S. 1084 (1989); e.g., Davis v. United States, 417 U.S. 333, 346 (1974) (holding that the petitioner's con-
Nally retroactively to avoid such miscarriages of justice.150 The retroactive application of McNally was necessary since defendants convicted under the intangible rights theory had no opportunity to object to its use at either the trial or appellate levels because the theory was so entrenched in the courts.151

Defendants convicted under the Mail Fraud Act before McNally have used one of two methods to have their convictions overturned: 1) a writ of coram nobis152 or 2) a writ of habeas corpus pursuant to 28 U.S.C. § 2255.153 Both procedures allow defendants to challenge conviction for violating a subsequently invalidated Selective Service induction order resulted in a "miscarriage of justice").

150. United States v. Shelton, 848 F.2d 1485, 1489 (10th Cir. 1988). The Tenth Circuit said that allowing a conviction under the intangible rights theory to stand would be improper because "the defendant [convicted under the intangible rights theory was] . . . not subject to trial on the charge [of mail fraud]." Id.

151. Inger, 841 F.2d at 453. The courts have unanimously found that the McNally decision was fully retroactive. See, e.g., United States v. Osser, 864 F.2d 1056 (3d Cir. 1988) (ruling that a trial court lacked power to convict a defendant, for the proven activity must necessarily be retroactive); Magnuson v. United States, 861 F.2d 166 (7th Cir. 1988) (holding that McNally is to be applied retroactively); United States v. Keane, 852 F.2d 199 (7th Cir. 1988) (ruling that a failure to state an offense may be raised anytime to avoid a miscarriage of justice), cert. denied, 490 U.S. 1084 (1989); United States v. Shelton, 848 F.2d 1485 (10th Cir. 1988) (finding that a nonconstitutional decision concerning the reach of a federal statute is retroactive); United States v. Ochs, 842 F.2d 515 (1st Cir. 1988) (ruling that courts must consider any supervening change in law after a judgment was entered); Inger, 841 F.2d 450 (stating that McNally must be applied retroactively because the trial court lacked the authority to convict or punish); United States v. Mandel, 672 F. Supp. 864 (D. Md. 1987) (holding that a conviction can be attacked on a § 2255 motion if the law had been changed since trial and appeal), aff'd, 862 F.2d 1067 (4th Cir.), cert. denied, 491 U.S. 906 (1989). Postconviction proceedings are possible due to McNally, but they take into account intangible property due to the Carpenter decision. The McNally decision also applies retroactively to defendants convicted under the federal wire fraud statute. United States v. Gimbel, 830 F.2d 621, 627 (7th Cir. 1987); see 18 U.S.C. § 1343 (1986).

152. The function of a writ of coram nobis is to bring attention of court to, and obtain relief from, errors of fact, such as a valid defense existing in facts of case, but which, without negligence on defendant's part, was not made, either through duress or fraud or excusable mistake, where facts did not appear on face of record, and were such as, if known in season, would have prevented rendition of the judgment questioned.


153. This statute reads in pertinent part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. . . .

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and
their convictions in the court where they were sentenced.\textsuperscript{154} The two procedures differ, however, for a writ of habeas corpus requires that the petitioner be in custody, while a writ of coram nobis is only available after the defendant has served his sentence.\textsuperscript{155} Otherwise, a writ of coram nobis provides the same general relief as a writ of habeas corpus.\textsuperscript{156}

2. Coram Nobis

A writ of coram nobis allows a defendant who has served his sentence to have his conviction expunged because of a fundamental error which led to his being found guilty.\textsuperscript{157} The improper interpretation of a statute is a fundamental error.\textsuperscript{158} This fundamental error in interpreting the scope of the Mail Fraud Act had the effect of allowing defendants convicted before \textit{McNally} under the improper intangible rights theory to petition the court to reverse their convictions.\textsuperscript{159}

Generally, to obtain a reversal under coram nobis, a defendant must show: "(1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case
or controversy requirement of Article III; and (4) the error is of the most fundamental character."

United States v. Walgren shows how this test applies to a mail fraud conviction which was based on the intangible rights theory. The defendant in Walgren was a Washington state legislator who mailed a falsified campaign disclosure form. He was convicted and served his sentence. Subsequently, he filed a petition for a writ of coram nobis, claiming the government's only ground for charging him with mail fraud was under the now invalid theory of intangible rights.

The court looked at the four factors for granting a writ of coram nobis: 1) because the conviction was handed down prior to McNally, the court found that the defendant had no reason to attack the conviction at trial or on appeal; 2) the defendant was subject to the adverse consequence of larger potential sentences for convictions in the future; 3) the conviction was based on a fundamental error, the improper interpretation of a statute; and 4) the defendant had no other relief available. The court vacated the conviction. The test to satisfy a writ of coram nobis is not difficult to meet, and, once met, the previous conviction is overturned.

3. Habeas Corpus Under Section 2255

A pre-McNally mail or wire fraud conviction can also be challenged by a writ of habeas corpus. The habeas corpus statute, 28 U.S.C. § 2255, applies to defendants whether they were found guilty by a jury or entered a plea of guilty. A defendant must be

160. Hirabayashi v. United States, 828 F.2d 591, 604 (9th Cir. 1987). The adverse consequences must be more than the effect of having to spend time in prison. Osser, 864 F.2d at 1061. For example, the loss of the right to vote or the possibility of more severe sentences for future convictions are consequences that will support a writ of coram nobis. United States v. Keane, 852 F.2d 199, 203 (7th Cir. 1988), cert. denied, 490 U.S. 1084 (1989).
161. 885 F.2d 1417 (9th Cir. 1989).
162. Id. at 1419. The defendant did not report that he had purchased a news clipping service. He did not know he bought the service from a government agent. Id.
163. Id.
164. Id. at 1420.
165. Id. at 1421.
166. Id. at 1422.
167. Id. at 1423-24; see supra notes 157-59 and accompanying text (discussing misinterpretation as a fundamental error).
169. Id. at 1424.
170. Williams v. United States, 805 F.2d 1301, 1306 (7th Cir. 1986), cert. denied, 481 U.S.
in custody, however, to get a mail fraud conviction overturned through a writ of habeas corpus.\textsuperscript{171}

Relief under section 2255 does not take the place of a timely appeal.\textsuperscript{172} Under \textit{McNally}, this rule does not present a problem; petitioners did not have a chance to challenge the use of the intangible rights theory because at the time it was acceptable grounds for a mail fraud conviction.\textsuperscript{173}

4. \textit{How the Court Analyzes Petitions Under Coram Nobis and Habeas Corpus}

In a postconviction proceeding, the fundamental question is whether the defendant was convicted for a crime under the Mail Fraud Act as interpreted by \textit{McNally}.\textsuperscript{174} During these proceedings, the court will look at the indictment and the jury instructions.\textsuperscript{176} First, the indictment must charge an act that constitutes a crime under the relevant statute.\textsuperscript{176} Next, the government must present

\textsuperscript{1039} (1987). The petition for habeas corpus must be directed to the sentencing court. \textit{Yackle, supra} note 11, at 153-54. Habeas corpus can be used to attack convictions not based on criminal conduct. \textit{Id.} at 162; see, e.g., \textit{Davis v. United States}, 417 U.S. 333 (1974). A court will grant the writ if upholding the conviction would result in a miscarriage of justice. \textit{Id.} at 346.


\textsuperscript{172}. \textit{Johnson v. United States}, 838 F.2d 201, 202 (7th Cir. 1988).

\textsuperscript{173}. \textit{But see United States v. Osser}, 864 F.2d 1056 (3d Cir. 1988) (holding that a defendant prosecuted in 1972, before intangible rights was an established theory in the jurisdiction, could not invoke \textit{McNally} to have his conviction overturned). If a pre-\textit{McNally} mail fraud defendant is seeking habeas corpus relief, but never made a direct appeal, he must satisfy the cause and prejudice standard. \textit{See, e.g., United States v. Frady}, 456 U.S. 152 (1982) (finding that cause and actual prejudice is the proper standard in § 2255 cases); \textit{Theodorou v. United States}, 887 F.2d 1336, 1339 (7th Cir. 1989) (stating that § 2255 does not take the place of a direct appeal); \textit{Williams}, 805 F.2d at 1306 (ruling that a defendant who pled guilty can use the cause and prejudice standard). To satisfy the standard, the defendant "must show both (1) good cause for his failure to pursue an issue on direct appeal and (2) actual prejudice stemming from the alleged constitutional violation"; \textit{see Theodorou}, 887 F.2d at 1340; \textit{see also Messinger v. United States}, 872 F.2d 217 (7th Cir. 1989) (finding that the defendant was not prejudiced by use of the intangible rights theory, as the indictment and jury instructions also alleged a deprivation of a property right); \textit{United States v. Griffin}, 765 F.2d 677, 682 (7th Cir. 1985) (holding that both elements of the cause and prejudice standard must be satisfied).

\textsuperscript{174}. \textit{See Yackle, supra} note 11, at 166 (concluding that the function of coram nobis is the same as that of § 2255).

\textsuperscript{175}. \textit{See, e.g., United States v. Gimbel}, 830 F.2d 621, 627 (7th Cir. 1987) (demonstrating a court's review of the indictment and the jury's required findings); \textit{see United States v. Walgren}, 885 F.2d 1417 (9th Cir. 1989); \textit{United States v. Osser}, 864 F.2d 1056 (3d Cir. 1988); \textit{United States v. Mandel}, 862 F.2d 1067 (4th Cir.), \textit{cert. denied}, 491 U.S. 906 (1989); \textit{Ingber v. Enzor}, 841 F.2d 450 (2d Cir. 1988).

\textsuperscript{176}. \textit{Gimbel}, 830 F.2d at 624 ("In order to be valid, an indictment must allege that the defendant performed acts which, if proven, constituted a violation of the law that he or she is charged with violating.").
facts that show that the charge was based upon the deprivation of money or a property right. These general principles also apply to the jury instructions. Instructions which state only an intangible rights theory are improper under McNally. Furthermore, the government cannot seek to uphold the conviction on a theory different than that alleged in the indictment or given in jury instructions.

In postconviction proceedings, the courts do not look only at the literal language of the instructions or the indictment. Instead, the courts will look to the substantive allegations to "determine whether the conduct alleged and necessarily found to have occurred by the jury constituted an offense." If the indictment has multiple allegations, there is the risk that it will be impossible for the court to determine what theory the jury followed. In this situation, the court must decide whether the jury convicted the defendant on all the facts necessary to be proved under the proper theory.

Because many indictments and jury instructions contain multiple allegations, the courts developed the "easily separable" theory. In such a case, the government must show there was a single scheme

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177. Ward v. United States, 845 F.2d 1459, 1462 (7th Cir. 1988).
178. United States v. Wellman, 830 F.2d 1453, 1463 (7th Cir. 1987) (stating that McNally prescribes more than a rule of pleading).
179. United States v. Italiano (Italiano I), 837 F.2d 1480, 1486 (11th Cir. 1988). The government is not allowed to argue a different theory on appeal because the indictment must give a defendant warning of what he is being charged with, or else he will not be able to put on a proper defense. United States v. Zauber, 857 F.2d 137, 143 (3d Cir. 1988), cert. denied, 489 U.S. 1066 (1989), and cert. denied. Scotto v. United States, 489 U.S. 1066 (1989); see United States v. Baldinger, 838 F.2d 176, 181 (6th Cir. 1988) (holding that a defect in an indictment charging the defendant polygraph examiner with mail fraud and alleging invalid intangible rights theory was fundamental and required reversal of a mail fraud conviction).
180. Wellman, 830 F.2d at 1462.
181. Id. In the Wellman case, the indictment and jury instructions alleged both a deprivation of property rights and a deprivation of intangible rights. Id. at 1463. The court found that both allegations involved the same conduct, and one scheme could not be proved without proving the other. Id. Because the government proved facts that showed a deprivation of property consistent with the jury instructions, the court upheld the conviction. Id. at 1463, 1465. However, if there is no allegation in the indictment or jury instructions charging a deprivation of property rights, the court will vacate the conviction. United States v. Covino, 837 F.2d 65, 70 (2d Cir. 1988).
183. Id.
184. United States v. Eckhardt, 843 F.2d 989, 997 (7th Cir.) (ruling that allegations which are insufficient to state an offense are mere surplusage (citing United States v. Cooke, 833 F.2d 109 (7th Cir. 1987)))
, cert. denied, 488 U.S. 839 (1988); United States v. Cooke, 833 F.2d 109 (7th Cir. 1987) (finding that the charges in an indictment were easily separable and did not prejudice the jury). Under the theory, if the fraud scheme has multiple objectives and only some objectives invoke the intangible rights theory, the remaining charges will be sufficient to sustain a conviction if they are "easily separable" from the intangible rights charges, which are considered "mere surplusage." Eckhardt, 843 F.2d at 997.
that had the dual effect of depriving a victim of property rights and intangible rights. As long as only one scheme is charged, the insufficient charges do not infect the remainder of the indictment or jury instructions that dealt with the deprivation of monetary or property rights. The easily separable analysis is also applied to the charges when the defendant enters a guilty plea.

E. Postconviction Proceedings Generally

Through these postconviction proceedings, courts have busily defined the boundaries of the McNally decision beyond the requirement that the government must prove a deprivation of money or property rights. All courts hold that the government is not required to show that the defendants benefited from the scheme. Courts also have not required that the victim actually lose money as long as the scheme was aimed at defrauding the victim of money or property. Thus, to determine if an alleged scheme involved only intangible rights, the courts look to see if there was any "concrete economic harm," that is, if the victim was in danger of losing money or property.

186. Cooke, 833 F.2d at 110 (viewing the allegations of other objectives as surplusage); see United States v. Folak, 865 F.2d 110, 113 (7th Cir. 1988) ("The presence of some language referring to an intangible rights theory is not always fatal to the indictment."). Accordingly, to avoid the possibility that the jury convicted the defendant solely on the intangible rights theory, it is important that the charges all stem from the same scheme. Messinger v. United States, 872 F.2d 217, 222 (7th Cir. 1989); see also United States v. Bonansinga, 855 F.2d 476 (7th Cir. 1988) (stating that the scheme had a dual effect of depriving the public of both a property right and an intangible right and the government could not prove one theory without proving the other).
187. Eckhardt, 843 F.2d at 997-98. In Eckhardt, the defendant pled guilty to four charges stated in his indictment. Id. at 991. The first three alleged deprivation of intangible rights, while the fourth alleged a deprivation of money and property. Id. at 996-97. The defendant pled guilty to all charges, and the court found the charges easily separable, upholding the defendant's conviction. Id. at 997-98.
188. See, e.g., Lombardo v. United States, 865 F.2d 155, 159 (7th Cir.) ("McNally did not posit the further requirement that the scheme to obtain money or property by fraudulent means result in a benefit to the schemers."); cert. denied, 491 U.S. 905 (1989); see also United States v. Barber, 881 F.2d 345, 349 (7th Cir. 1989) (holding that the government does not have to show that the victim was actually defrauded of property), cert. denied, 495 U.S. 922 (1990).
189. See, e.g., United States v. Cosentino, 869 F.2d 301, 307 (7th Cir.) (finding that it is not necessary that a plea actually result in financial loss or that the victim profit from the scheme as long as the defendant intended to defraud him of some of that money), cert. denied, 492 U.S. 908 (1989); see United States v. Dial, 757 F.2d 163 (7th Cir.) (stating that the plan was aimed at the fraudulent deprivation of money or property), cert. denied, 474 U.S. 838 (1985).
190. See United States v. Asher, 854 F.2d 1483, 1494 (3d Cir. 1988) (ruling that the bottom line of the scheme must cause the victim monetary or property losses), cert. denied, 488 U.S. 1029 (1989); United States v. Wellman, 830 F.2d 1453, 1462 (7th Cir. 1987) (concluding that the
Cases have arisen, however, in which the property analysis is difficult to apply to the facts. The government must show that the indictment alleged an actual deprivation of property. There are three areas in particular that have undergone judicial scrutiny: 1) schemes to deprive a victim of material information; 2) schemes
where the defendant receives a bribe or kickback; and 3) schemes to obtain a license or franchise.

1. Disclosure of Material Information

Many intangible rights cases involve a defendant depriving the government or private citizens of material information. While courts may find that the indictment implied a loss of property, they will look at the whole indictment before making such a determination. In particular, after Carpenter v. United States, the government has had an easier time sustaining convictions in cases where the defendants revealed confidential business information. When a defendant misuses confidential business information, the government does not have to show quantifiable monetary harm to the business. The harm to a business's reputation is enough for a court to uphold a conviction.

Another way to assess confidential business information is to determine whether it constitutes part of the victim's stock-in-trade.

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193. See, e.g., United States v. Matt, 838 F.2d 1356 (5th Cir.) (involving the defrauding of an employer by filing false sales reports and selling promotional items for personal gain), cert. denied, 486 U.S. 1035 (1988); see also United States v. Fagan, 821 F.2d 1002, 1009 (5th Cir. 1987) (finding that where a defendant created a phony corporation to hide kickbacks from his employer, a mail fraud violation occurred), cert. denied, 484 U.S. 1005 (1988).

194. Matt, 838 F.2d at 1358-59. Here, the defendant sold his employer's promotional cigarettes for his own economic gain, covering up his fraud by mailing in false sales reports. Id. at 1357. The court found this to be "economically material information" and said the government proved that the employer did lose money. Id. at 1357-58.

195. See United States v. Huls, 841 F.2d 109 (5th Cir. 1988). In Huls, the court found the indictment alleged a deprivation of "material information," but prefaced this with a quote of the lower court stating that "[a] scheme to defraud need not contemplate loss of money or property to the victims." Id. at 112. The court said that the term "material" did not refer to economic loss, and that the jury could, and in fact did, apply the term to nonproperty rights. Id.

196. 484 U.S. 19 (1987). The actual postconviction proceedings still stem from the McNally decision, limiting mail fraud convictions to those schemes leading to a deprivation of property.

197. See United States v. Diwan, 864 F.2d 715 (11th Cir.) (finding a violation where the defendant used a talent agency's client list to further a child pornography scheme), cert. denied, 492 U.S. 921 (1989); United States v. Grossman, 843 F.2d 78 (2d Cir. 1988) (ruling that a defendant who disseminated confidential information and shared profits with partners was guilty of mail fraud), cert. denied, 488 U.S. 1040 (1989).

198. In Diwan, the defendants used a talent agency to obtain the names of young girls. 864 F.2d at 717. The defendants posed as filmmakers and convinced some of the girls' parents that they needed to take nude photographs of their children. Id. While the court found no specific economic harm to the agency, it found that the victim was deprived of intangible property along with modeling services, photographs, and likenesses, and upheld the mail fraud conviction. Id. at 719.

199. Grossman, 843 F.2d at 86. The Grossman court reasoned that reputation had commercial value, as a firm can gain or lose clients based upon it. Id.
This approach was developed in *United States v. Cherif*. The defendant in *Cherif* worked at the First National Bank of Chicago. After being informed of his termination, Cherif had his secretary falsify a document which allowed him to retain his key card. This allowed him access to the bank’s data entry department after business hours. The defendant subsequently used the keycard to break into files relating to business transactions, which included information on the finances and performances of the bank’s client companies. The bank required its employees, including Cherif, to sign an “integrity policy” in which employees agreed not to disclose this information. Cherif used this information to buy and sell stock. Eventually, the SEC and the FBI discovered the defendant’s actions and arrested him.

The defendant argued that he did not deprive the bank of property, and that, therefore, under *McNally* and *Carpenter*, he did not violate the Mail Fraud Act. The Seventh Circuit interpreted *Carpenter* as extending the statute’s reach to all forms of property — intangible as well as tangible — while foreclosing conviction for a deprivation of intangible rights. The question was whether the information the defendant obtained fit within the parameters of property as defined by *McNally* and *Carpenter*. The court found that the indictment did not allege a deprivation of intangible rights but, rather, of intangible property.

According to the defendant, the bank dealt in lending money and providing financial services, whereas the victim in *Carpenter* was in the business of publishing news and information. In this respect, the information in *Carpenter* was part of its stock-in-trade. Here, however, Cherif claimed that the information was not part of the

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201. *Id.* at 694.
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.* at 694-95. He also shared this information with his former fellow employees and his friends. *Id.* at 695.
207. *Id.* Apparently, Cherif’s former fellow employee figured “that a clear conscience, self preservation, or both were more important than friendship.” *Id.*
208. *Id.* at 697.
209. *Id.*
210. *Id.* at 698 (“[T]he evidence was sufficient to show Cherif schemed to obtain confidential information (that is, property).”).
211. *Id.* at 697.
bank's stock-in-trade and, thus, not the bank's property.\textsuperscript{212}

The court did not recognize this distinction.\textsuperscript{213} The Seventh Circuit ruled that the information was background used in developing the bank's stock-in-trade.\textsuperscript{214} The information was valuable to the bank because it was the equivalent of raw materials needed by the bank to provide financial services.\textsuperscript{215} The court thus held that the information was the bank's property and upheld Cherif's conviction.\textsuperscript{216}

2. Bribes and Kickbacks

Some mail fraud defendants have been convicted for schemes involving bribes or kickbacks. The government has had less success sustaining the convictions for bribery schemes than those involving kickbacks.

In a typical bribery case, such as United States v. Holzer,\textsuperscript{217} the defendant was a government official who took money in exchange for ignoring a public duty. In these cases, the government has argued that the victim — the public who expects such duties to be performed — was entitled to the bribe money under the theory of constructive trust.\textsuperscript{218}

The First Circuit has criticized this theory, saying it is unfair to the defendant, as the constructive trust theory was never put to the jury.\textsuperscript{219} Furthermore, the Seventh Circuit has commented that the theory is particularly inapplicable when government officials were taking bribes, unless it can be shown that the government wanted

\textsuperscript{212} Id.
\textsuperscript{213} Id.
\textsuperscript{214} Id. ("It was a unique product and Cherif stole it.").
\textsuperscript{215} Id. at 698 (stating that financial services were the bank's product).
\textsuperscript{216} Id. at 698-99.
\textsuperscript{217} 840 F.2d 1343 (7th Cir.), cert. denied, 486 U.S. 1035 (1988). There, a judge accepted bribes from lawyers who had cases before him and from persons who sought appointment as receivers. \textit{Id.} at 1345.
\textsuperscript{218} See United States v. Runnels, 833 F.2d 1183, 1188 (6th Cir. 1987) (holding that the victim was deprived of property, and that the bribe proceeds were held in constructive trust), vacated, 877 F.2d 481 (6th Cir. 1989). A constructive trust is a 
\textsuperscript{219} See United States v. Ochs, 842 F.2d 515, 525-26 (1st Cir. 1988); see also United States v. Shelton, 848 F.2d 1485, 1491-92 (10th Cir. 1988) (overturning defendant's conviction because the defendant was not given the opportunity to defend against the constructive trust theory in court).
the official to take bribes so it could capture the proceeds under the constructive trust theory.\textsuperscript{220} Accordingly, the public/government has no property interest in bribes taken by public officials. Thus, the convictions would be overturned.

Unlike bribery cases, the government does not need to rely on the constructive trust theory when deciding mail fraud cases involving employees taking kickbacks.\textsuperscript{221} In kickback cases, it is uniformly held that if prices were raised for an employer to get the funds to pay the kickback, there has been a deprivation of property. In Ranke v. United States, the defendant maintained that prices were not raised because he received kickbacks.\textsuperscript{222} The defendant, who procured subcontractors for his employer, a contractor, submitted extra work orders and raised a subcontractor’s bid in order to get a kickback.\textsuperscript{223} The Seventh Circuit held that if the extra work was not actually performed, then the contractor was obviously deprived of a property interest.\textsuperscript{224} Furthermore, if the extra work was performed, the defendant was still liable under McNally because he deprived the contractor of the right to control how its money was spent.\textsuperscript{225} Since the government was able to show a deprivation of property, the defendant’s conviction was upheld.\textsuperscript{226}

\textsuperscript{220} See Holzer, 840 F.2d at 1348. The Seventh Circuit noted the difference between an employee taking money intended for his employer and taking a bribe, where the money is never intended for the employer. \textit{Id.} at 1347. The court disagreed with the Sixth Circuit in Runnels “on the question whether such principles can be used to save cases that had been brought and tried under the now-discredited ‘intangible rights’ theory.” \textit{Id.} The Seventh Circuit said the only situation in which a mail fraud/bribery conviction could be sustained is where the government had tried to recover the bribes and the defendant tried to conceal the payments, thereby depriving the government of a property interest. \textit{Id.} at 1348.

\textsuperscript{221} See United States v. Shyres, 898 F.2d 647 (8th Cir.), \textit{cert. denied}, 498 U.S. 821 (1990); Ranke v. United States, 873 F.2d 1033 (7th Cir. 1989).

\textsuperscript{222} Ranke, 873 F.2d at 1038-39.

\textsuperscript{223} \textit{Id.} at 1039.

\textsuperscript{224} \textit{Id.}

\textsuperscript{225} \textit{Id.} In Ranke, the contractor only thought it was paying for the work performed and did not realize that the defendant was taking a percentage of the payments. \textit{Id.; see Shyres, 898 F.2d at 652 (upholding a conviction for a scheme involving false invoices designed to get Anheuser-Busch to pay for work that had not been done); United States v. Kerkman, 866 F.2d 877 (6th Cir.) (sustaining a mail fraud conviction for a kickback scheme to obtain a government contract), \textit{cert. denied}, 493 U.S. 828 (1989).}

\textsuperscript{226} Ranke, 873 F.2d at 1040.
3. Licenses and Franchises

a. Licenses

Many defendants with convictions based on schemes involving licenses and franchises have also challenged these convictions under McNally. The courts, however, do not agree as to whether a license constitutes a government property interest under McNally.227 The Seventh Circuit, for example, in Frank v. United States, found that a license constituted a property right.228 In Frank, the defendant attorney tried to prevent a drunk driving charge from appearing on his client's record.228 Upon a drunk driving conviction, police normally forward the driver's license to the Department of Motor Vehicles.230 To hinder this action, the defendant bribed the court bailiff to take his client's driver's license so it would not go to the Department of Motor Vehicles.231 The court said that because the license was part of the record the judge sends to the department, the department had a property interest in the license.232 The court reasoned that because the record was the state's property and the license was part of the record, the license was state property.233

The Third Circuit, in United States v. Martinez,234 also found a license to be state property. In Martinez, the defendant sent fraudulent documents to the state of Pennsylvania in applying for a medical license.235 The court acknowledged that the medical license was

227. See United States v. Granberry, 908 F.2d 278 (8th Cir. 1990) (holding that a license to drive a school bus is not government property), cert. denied, 111 S. Ct. 2024 (1991); United States v. Kato, 878 F.2d 267 (9th Cir. 1989) (ruling that the government has no property interest in pilot licenses); Toulabi v. United States, 875 F.2d 122 (7th Cir. 1989) (finding that a license to drive a taxi was not city property); United States v. Murphy, 836 F.2d 248 (6th Cir.) (stating that bingo permits are not property of the government), cert. denied, 488 U.S. 924 (1988). Contra Frank v. United States, 914 F.2d 828 (7th Cir. 1990) (concluding that the government has a property interest in a driver's license); United States v. Martinez, 905 F.2d 709 (3d Cir.) (holding that a state medical license is government property), cert. denied, 498 U.S. 1017 (1990).

228. Frank, 914 F.2d at 833.

229. Id.

230. Id. at 832-33.

231. Id. at 832.

232. Id. at 833. In determining that the license was part of the record, the court looked to state law. Id. The court contrasted this with the Murphy decision, where the licenses in that case, bingo permits, were not classified as property by state law. Id. at 833-34; see United States v. Murphy, 836 F.2d 248 (6th Cir.), cert. denied, 488 U.S. 924 (1988).

233. Frank, 914 F.2d at 833.


235. Id. at 710-11. The defendant was accepted into a residence program at a Pennsylvania hospital, passed the relevant examinations, and received the license. Id. He was subsequently charged with and convicted of a mail fraud scheme to defraud the state and its citizens by fraudu-
certainly property to the licensee.\textsuperscript{236} Then, looking at \textit{United States v. Carpenter},\textsuperscript{237} the court said that the Supreme Court "found it significant that traditional property law recognizes the right of a corporation to enjoin the use of confidential information."\textsuperscript{238} By analogy, the court reasoned that since Pennsylvania could enjoin Martinez's medical license, the license must be state property.\textsuperscript{239} The court further noted that it did not matter that this property interest had no value to the issuer of the license.\textsuperscript{240} Concluding that the state lost its right to keep the medical licenses for itself and to issue them to persons who were properly qualified, the court held that the state involvement was not merely as a regulator, but also as a dispenser of a property interest which it was free to enjoin.\textsuperscript{241} Finding that the state was deprived of property, the court upheld the defendant's conviction.\textsuperscript{242}

Other courts do not view a state's interest as property.\textsuperscript{243} These courts generally adhere to the theory that a license is property of the recipient when issued, but it never constitutes property to the government.\textsuperscript{244} What the license represents to the government is a regulatory interest.\textsuperscript{245} According to one court, "[f]rom the government's perspective, . . . the license is a promise not to interfere rather than a sliver of property."\textsuperscript{246}

\textsuperscript{236} Id. at 713.
\textsuperscript{237} 484 U.S. 19 (1987).
\textsuperscript{238} Martinez, 905 F.2d at 713.
\textsuperscript{239} Id.
\textsuperscript{240} Id. "We see nothing in the Supreme Court's jurisprudence on the mail fraud statute that requires or supports this theory of incipient or embryonic property." \textit{Id.}
\textsuperscript{241} Id. at 714. The court then looked at the latest amendment to the mail fraud law and said this was a sign that the mail fraud law was to be interpreted broadly. \textit{Id.} at 715; see 18 U.S.C. § 1346 (1988) (codifying the amendment which reincorporates the intangible rights theory in mail fraud cases); \textit{infra} notes 294-97 and accompanying text (discussing this latest amendment).
\textsuperscript{242} Martinez, 940 F.2d at 716.
\textsuperscript{243} See, e.g., \textit{United States v. Kato}, 878 F.2d 267, 269 (9th Cir. 1989) (holding that a pilot license issued by the FAA is not government property).
\textsuperscript{244} See \textit{id.}; see also \textit{United States v. Murphy}, 836 F.2d 248, 253-54 (6th Cir.) (ruling that a license is merely a piece of property), \textit{cert. denied}, 488 U.S. 924 (1988).
\textsuperscript{245} See \textit{Toulabi} v. \textit{United States}, 875 F.2d 122, 125 (7th Cir. 1989); \textit{see also} \textit{United States v. Schwartz}, 924 F.2d 410 (2d Cir. 1991) (holding that export licenses were not government property but merely embodiments of government regulation); \textit{United States v. Evans}, 844 F.2d 36 (2d Cir. 1988) (holding that the government regulatory interest in arms sales did not constitute a property right).
\textsuperscript{246} \textit{Toulabi}, 875 F.2d at 125.
The Seventh Circuit, for instance, did not find a state property interest in a license in *Toulabi v. United States.* In *Toulabi,* the defendant sold the answers to the test that Chicago cab drivers were required to pass to get a taxi-cab license. The court said that the city did not have a property interest in the information on the tests, because this information was not confidential. The court distinguished *Carpenter* by pointing out that, unlike the victim in that case (the *Wall Street Journal*), the city of Chicago did not make money from selling tests. The license, in essence, only represented a legal entitlement to the government, not a property interest.

Similarly, cases involving other types of regulatory interests illustrate that such interests do not constitute property rights. For instance, both *United States v. Evans* and *United States v. Schwartz* involved defendants who gave false information to the government in order to facilitate military sales. Both courts found that the government’s right to control future arms sales was a regulatory right, not a property right.

In *Evans,* the court addressed “whether the right of the United States to veto sales of U.S.-made or licensed weapons by one foreign government to another is a property right for mail fraud purposes.” The defendants in *Evans* filed false end-user certificates to conceal the fact that they were selling arms to Iran. The government claimed deprivation of a property right due to its interest as a nonpossessor in the sale of the arms. The court said that unlike most nonpossessory interests, such as fee simple determinable and reversionary rights, the government, as a nonpossessor in this

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247. 875 F.2d 122 (7th Cir. 1989).
248. Id. at 123.
249. Id. at 125. The court pointed out that all the information on the test could be found on a map and that the city did not have a property interest “in the fact that Cornell Avenue is east of Drexel Street . . . .” Id.
250. Id.
251. Id.; see *United States v. Granberry,* 908 F.2d 278, 279 (8th Cir. 1990) (finding that “licensing authorities have no property interest in licenses or permits”), *cert. denied,* 111 S. Ct. 2024 (1991).
252. 844 F.2d 36 (2d Cir. 1988).
253. 924 F.2d 410 (2d Cir. 1991).
254. Id. at 413; *Evans,* 844 F.2d at 37.
255. *Schwartz,* 924 F.2d at 417; *Evans,* 844 F.2d at 42.
256. *Evans,* 844 F.2d at 37.
257. End-user forms tell the government that the seller is shipping the arms. Id.
258. Id.
259. Id. at 41.
circumstance, never had such possessory interests in the arms.\textsuperscript{260}

The court ruled that the government's interest in the arms sales was in its capacity as a regulator, not as a property holder.\textsuperscript{261} If regulations did create a property interest, the court reasoned that taken to an extreme, the government would have a property interest in all other items it regulates, such as heroin and toxic waste.\textsuperscript{262} Since there was no property deprivation under \textit{McNally}, the court overturned the convictions.\textsuperscript{263}

Similarly, in \textit{United States v. Schwartz},\textsuperscript{264} the defendant lied to the government about who was buying the arms and where the arms were going.\textsuperscript{265} The \textit{Schwartz} court followed the reasoning in \textit{Evans}. The Second Circuit concluded that the fact that the government enforces its interest through the issuance of licenses does not turn its regulatory interest into a property interest.\textsuperscript{266} The court said that the government can regulate trade without the use of a license and that the license merely stands for the legally required government approval.\textsuperscript{267} The court further stated that any such approval will take the form of a writing and that it would be "incongruous" to determine what a property right is based on whether the piece of paper at issue is a license or merely a letter.\textsuperscript{268}

\subsection*{b. Franchises}

A franchise resembles a license in that it is "a special privilege conferred by the government on an individual or individuals."\textsuperscript{269} Courts do not agree whether a franchise constitutes a property right under \textit{McNally}. In \textit{United States v. Italiano (Italiano II)},\textsuperscript{270} the Eleventh Circuit found that a cable television franchise is a property right.

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\textsuperscript{260} \textit{Id.}.
\textsuperscript{261} \textit{Id.} at 42.
\textsuperscript{262} \textit{Id.}
\textsuperscript{263} \textit{Id.}
\textsuperscript{264} 924 F.2d 410 (2d Cir. 1991).
\textsuperscript{265} \textit{Id.} at 414-16.
\textsuperscript{266} \textit{Id.} at 417.
\textsuperscript{267} \textit{Id.}
\textsuperscript{268} \textit{Id.}
\textsuperscript{270} 894 F.2d 1280 (11th Cir.), \textit{cert. denied}, 498 U.S. 896 (1990).
right to the government. It relied on the reasoning provided by the dissent in *United States v. Italiano (Italiano I).* The dissent in that case looked to the fact that local franchising was an acceptable means to regulate cable television. It considered the franchise a grant by the state of a privilege with respect to property. The dissent showed that Florida state law considered the franchise property, even though the law did not say whether the franchise was property in the state’s hands. Based upon these propositions, the Eleventh Circuit eventually found that a cable television franchise constituted property for the purpose of the Mail Fraud Act.

However, other courts do not universally embrace this reasoning. For example, in *United States v. Slay,* the court found the government’s interest in granting franchises to be purely regulatory. The court said:

[A] franchise, once granted by the government for valuable consideration and accepted by the individual or corporation, becomes property in the form of a binding contract between the government and the franchisee. . . . However, “until an ordinance granting a franchise is accepted, the franchise lacks the essential elements of a contract . . . [and] is a mere proposition.”

Thus, the mere contemplation of a franchise contract did not amount to a property right according to the *Slay* court. Furthermore, the city did not have to give any money to the defendant, so that aspect of the franchise agreement did not result in the depriva-

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271. *Id.* at 1285.
272. *Id.* at 1285 n.6; see *Italiano I,* 837 F.2d 1480 (11th Cir. 1988) (Owens, C.J., dissenting). The defendant’s indictment was dismissed in the first Eleventh Circuit case because of *McNally.* *Id.* The second Eleventh Circuit case dealt with the defendant’s indictment on new charges. *Italiano II,* 894 F.2d 1280.
273. *Italiano I,* 837 F.2d at 1492 (Owens, J., dissenting).
274. *Id.* (“[L]ocal franchising processes are an acceptable means of regulating the cable television industry.”); see 37 C.J.S. Franchises § 8 (1943) (stating that a franchise is “a grant by the state”).
275. *Italiano I,* 837 F.2d 1480 (Owens, J., dissenting); see also *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1001 (1984) (“In answering the question now, we are mindful of the basic axiom that ‘[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.’”).
276. *Italiano II,* 894 F.2d at 1285.
278. *Id.* at 692.
279. *Id.* at 693 (citing 12 EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS § 34.06, at 23 (3d ed. 1986)); see also 12 EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS § 34.03, at 11 (3d ed. 1986) (defining a franchise).
tion of a property right. Therefore, the court determined that no property right existed until the franchise was awarded.

4. Summary

After McNally v. United States, many defendants convicted of mail fraud challenged their convictions claiming that they were convicted under the no longer valid intangible rights theory. In all of these cases, the courts determined whether the victim of the scheme suffered concrete economic harm. In cases involving a deprivation of material information, courts have been willing to find such economic harm as a deprivation of an intangible property right under Carpenter v. United States. As long as the government can show that the victim used this material information for financial gain, the court will sustain the conviction.

Defendants have more success in challenging convictions involving bribery schemes. The government will usually be unable to prove that the victim has an interest in bribes received by the defendant, because the defendant has not taken property from the victim. Therefore, bribes involve the deprivation of intangible rights rather than property rights.

However, with schemes involving kickbacks, the government can more easily sustain a conviction. Since the victim often ends up, in reality, paying the kickback, the victim suffers real economic harm. For example, if an employee takes a kickback for steering contracts a vendor's way, the vendor may raise the contract price that the employer will end up paying. The employer becomes the victim, having to pay more for the contract than necessary. Thus, the victim loses property from the scheme, and McNally does not

281. Id. at 694.
282. Id. at 694-95; see also 37 C.J.S. Franchise § 8 ("An applicant for a franchise . . . has no property right until the application has been granted, and the denial of an application does not constitute an invasion of a property right.").
284. 484 U.S. 19 (1987); see supra notes 129-47 and accompanying text (explaining the Carpenter decision).
285. See supra notes 196-216 and accompanying text (illustrating cases which rely on Carpenter's intangible property rights theory).
286. See supra notes 217-20 and accompanying text (discussing the postconviction challenge of bribery schemes).
287. See, e.g., United States v. Holzer, 840 F.2d 1343, 1348 (7th Cir.) ("[T]he state's financial situation is the same whether he takes bribes or doesn't take bribes. . . . This is an intangible rights case and only an intangible rights case."); cert. denied, 486 U.S. 1035 (1988).
288. See supra notes 221-26 and accompanying text (discussing kickback cases).
Finally, defendants convicted of schemes involving licenses and franchises have challenged those convictions under *McNally.* Some courts have held that the issuance of a license or franchise is similar to a business dealing in confidential information. Therefore, the state’s ability to give and subsequently revoke a license gives the state a property right. However, other courts disagree with this approach. These courts contend that the government suffers no economic harm from these schemes. Furthermore, these courts point out that even in situations involving intangible property, there must be a showing of concrete economic harm. In light of the courts’ disagreement on these issues, this area of *McNally* interpretation has not been fully resolved.

5. *Subsequent Change in the Statute*

The *McNally* era was a short one, for Congress responded to the Supreme Court’s ruling with the passage of 18 U.S.C. § 1346. It reads: “For purposes of this chapter, the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.” This statute, however, “cannot be applied retroactively to acts committed before its enactment regardless of whether such conduct occurred prior to *McNally.*” Therefore, the new law cannot be applied to the backlog of intangible rights cases.

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289. See *supra* notes 228-82 and accompanying text (summarizing license and franchise post-conviction challenges).
290. See *supra* notes 228-42, 270-76, and accompanying text (summarizing cases finding a property right in licenses and franchises).
291. See *supra* notes 243-68, 277-82, and accompanying text (providing examples where courts found no property right).
292. See United States v. Schwartz, 924 F.2d 410 (2d Cir. 1991) (holding that the government did not have a property interest in export licenses, but merely a regulatory interest); Toulabi v. United States, 875 F.2d 122 (7th Cir. 1989) (holding that Chicago did not have a property interest in its taxi-cab licenses); United States v. Evans, 844 F.2d 36 (2d Cir. 1988) (holding that a government’s regulatory interest in arms sales does not constitute a property right); United States v. Slay, 717 F. Supp. 689 (E.D. Mo. 1989) (finding a government’s interest in granting franchises to be purely regulatory).
295. See *Hearing, supra* note 86, at 110 (testimony of Scott Wallace) (“We are saying [intangible rights] cases cannot be saved no matter what you do. These people were convicted under
II. Subject Opinion

As indicated in the Background section of this Note, the circuit courts have applied the McNally doctrine inconsistently.\(^{296}\) McNally required that the victim suffer concrete economic harm in order to have a property right for the purposes of the Mail Fraud Act. However, the concept of concrete economic harm is sometimes overshadowed by the determination of whether the victim had a property interest.

The Seventh Circuit faced this issue in *Borre v. United States*\(^{297}\) in sustaining a conviction brought under the intangible rights theory. In *Borre*, the defendant, Kurtis Borre, sought habeas corpus relief under 28 U.S.C. § 2255 on the grounds that his conviction was improper in light of McNally.\(^{298}\) Borre acted as the decoy in a scheme to guarantee the United States Cable Company (U.S. Cable) the cable television franchise in the Village of Fox Lake, Illinois.\(^{299}\) Borre did not reveal that some Fox Lake officials had an interest in U.S. Cable.\(^{300}\) The mayor of Fox Lake owned a five percent ownership interest in U.S. Cable, although it appeared that Borre owned the shares.\(^{301}\) The mayor gave part of his interest to a member of the board of trustees and a one percent interest to Borre.\(^{302}\) Borre then went before the village’s board of trustees and nominated U.S. Cable as the cable provider for Fox Lake.\(^{303}\)

U.S. Cable was awarded the franchise without having to resort to competitive bidding.\(^{304}\) It did not receive money from the village, nor did it pay for the franchise.\(^{305}\) The scheme was discovered, and Borre was charged with conspiracy to commit an offense against the United States and with mail fraud.\(^{306}\) He pled guilty to both charges.
and was sentenced to two concurrent five-year sentences.\footnote{307}

Subsequently, the Supreme Court decided \textit{McNally}, and one of Borre's co-defendants, a Fox Lake government official, had his conviction vacated.\footnote{308} Borre then filed a habeas corpus petition for relief.\footnote{309} The district court vacated his conviction.\footnote{310}

On appeal, the Seventh Circuit looked at the indictment to see if any of the charges, in light of \textit{McNally}, were sufficient to state an offense.\footnote{311} It applied the cause and prejudice standard in analyzing this habeas corpus petition.\footnote{312} It found sufficient cause because Borre's conviction was prior to \textit{McNally}; he thus could not have previously contested his indictment on a deprivation of intangible rights theory.\footnote{313} The court found prejudice because Borre could show that he was convicted under an intangible rights theory and that his conviction should be overturned.\footnote{314} Since Borre pled guilty to the charges, the court looked at the charges and his plea agreement to determine whether he pled guilty to an offense punishable under the Mail Fraud Act.\footnote{315}

The government conceded that the first two charges were insufficient.\footnote{316} It maintained, however, that the third theory stated that Borre committed mail fraud based upon the deprivation of the right to award the cable television franchise with full disclosure of ownership interests.\footnote{317} The court agreed, although on different grounds,

\begin{quote}
307. \textit{Borre}, 940 F.2d at 217.
308. \textit{Id.}
311. \textit{Borre}, 940 F.2d at 217.
312. \textit{See supra} notes 170-73 (explaining habeas corpus petitions).
313. \textit{Borre}, 940 F.2d at 218.
314. \textit{Id.}
315. \textit{Id.} at 219.
316. \textit{Id.} The insufficient indictments read:
\begin{quote}
([the defendants]) [d]evised and intended to devise and participate in a scheme to defraud:
(a) the Village of Fox Lake and its citizens of their right to the legal, faithful and honest services of Richard Hamm in the performance of acts related to his public employment;
(b) the Village of Fox Lake and its citizens, its public officials and its public employees of the right to have the business of the Village of Fox Lake conducted honestly, fairly and impartially, free from collusion, partiality, dishonesty, conflicts of interest, and fraud . . . .
\end{quote}
\textit{Id.}
317. \textit{Id.} The third portion in count five of the indictment read:
\begin{quote}
[T]he Village of Fox Lake and its citizens, its public officials and its public employees
\end{quote}
saying that Borre deprived Fox Lake of the cable television franchise, which it held to be a property right.\textsuperscript{318} The court looked to \textit{McNally} and \textit{Carpenter} and said that in order to determine whether something is property, it must examine applicable state law.\textsuperscript{319} The court said that a franchise represents the delegation of a government function under Illinois state law.\textsuperscript{320}

The court then looked to the Eleventh Circuit’s decision in \textit{Italiano II},\textsuperscript{321} which used the state law approach. In that case, the Eleventh Circuit noted that a cable television franchise was property for mail fraud purposes.\textsuperscript{322} The \textit{Borre} court further found it relevant that the federal government allows municipalities to assert control over and run their own cable television operations.\textsuperscript{323} It also considered the fact that cable television involves the creation and use of easements.\textsuperscript{324} The court said that granting a franchise is not just a regulatory act, but a governmental power derived from the legisla-

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\textsuperscript{318} Id. at 220.  
\textsuperscript{319} Id.; see \textit{California v. Central Pac. R.R.}, 127 U.S. 1 (1888) (stating that it is within “the powers and rights of sovereign States to classify the property within the State for purposes of taxation”); \textit{Withers v. Granite City}, 177 N.E.2d 181, 183 (Ill. 1961) (ruling that a city cannot allow use of land beneath a municipality’s easements that interferes with the city’s right to use the land); \textit{People v. Commonwealth Edison Co.}, 32 N.E.2d 902, 904 (Ill. 1941) (stating that a franchise given to a utility is an exercise of a city’s police power); \textit{People ex rel. Better Broadcasting Council, Inc. v. Keane}, 309 N.E.2d 362, 367 (Ill. App. Ct. 1973) (finding that a city that grants a franchise is using its legislative authority); see also \textit{Ruckelshaus v. Monsanto Co.}, 467 U.S. 986, 1001 (1984) (“[Property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.”); \textit{Contra 47 U.S.C. § 521 (1988)} (indicating that franchises are a means for a locality to regulate cable television).

\textsuperscript{320} \textit{Borre}, 940 F.2d at 220; see \textit{Lasher v. People}, 55 N.E. 663, 665 (Ill. 1899) (stating that a franchise is a “right which belongs to the government when conferred upon the citizen”); \textit{Charles D. Ferris et al., Cable Television Law} § 13.13, at 13-68.11 (1990) (“The modern tendency is . . . to regard a [cable television] franchise as a delegation of a governmental function to private entities to be performed in the furtherance of the public welfare.”); see also \textit{William Blackstone, Commentaries} *37 (describing a franchise as “a royal privilege, or branch of the king’s prerogative, subsisting in the hands of a subject”).

\textsuperscript{321} 894 F.2d 1280 (11th Cir.), \textit{cert. denied}, 498 U.S. 896 (1990).

\textsuperscript{322} Id. at 1285 n.6.

\textsuperscript{323} \textit{Borre}, 940 F.2d at 220-21; see also \textit{Warner Cable Communications, Inc. v. City of Niceville}, 911 F.2d 634 (11th Cir. 1990) (upholding a municipality’s right to run a cable franchise), \textit{cert. denied}, 111 S. Ct. 2839 (1991).

\textsuperscript{324} \textit{Borre}, 940 F.2d at 221; see also \textit{47 U.S.C. § 541 (a)(2) (1988)} (allowing the automatic granting of easements over public right-of-way to cable franchises); 65 ILCS 5/11-42-11(c) (1992) (same).
In light of all of these factors, it held that the franchise was a property right because it was derived from legislative power, and because cable television requires the use of property to be implemented.\textsuperscript{326} The court, having determined the franchise was property, said that the defendant deprived Fox Lake of this interest.\textsuperscript{327} Referring to \textit{Ranke v. United States},\textsuperscript{328} the court said the village was denied the right to control its property.\textsuperscript{329} Since Fox Lake lost a property right and Borre pled guilty to conduct consistent with the Mail Fraud Act, the court denied his habeas corpus petition.\textsuperscript{330}

Judge Easterbrook wrote a strong dissent based on his belief that the franchise was not property.\textsuperscript{331} He said that a franchise is similar to a contract or a license and that \textit{McNally} involved an analogous scheme.\textsuperscript{332} He noted that the key to property rights in the context of \textit{McNally} is whether the victim lost something of value.\textsuperscript{333} Easterbrook compared this franchise case to cases where a license was held not to be property.\textsuperscript{334} In particular, the judge said the court ignored the prior Seventh Circuit decision in \textit{Toulabi v. United States},\textsuperscript{335} which held that the government did not have a property interest in a license.\textsuperscript{336} Judge Easterbrook asserted: “Anyway . . . a ‘license’ is just a public announcement of permission to act. It indicates that the government will leave you alone if you do something.”\textsuperscript{337}

The dissent then disputed the majority’s contention that to convict under the Mail Fraud Act the government only has to show the victim lost control of the property.\textsuperscript{338} Easterbrook said that \textit{Ranke}\textsuperscript{339}

\begin{thebibliography}{99}
\bibitem{Borre} Borre, 940 F.2d at 221.
\bibitem{Id} Id.
\bibitem{Id} Id. at 222.
\bibitem{873} 873 F.2d 1033 (7th Cir. 1989); see supra notes 222-26 and accompanying text (discussing \textit{Ranke}).
\bibitem{Borre} Borre, 940 F.2d at 222.
\bibitem{Id} Id. at 223.
\bibitem{Id} Id. at 224 (Easterbrook, J., dissenting).
\bibitem{Id} Id.
\bibitem{Id} Id. at 225.
\bibitem{875} 875 F.2d 122 (7th Cir. 1989).
\bibitem{Borre} Borre, 940 F.2d at 225 (Easterbrook, J., dissenting).
\bibitem{Id} Id. at 223.
\bibitem{Id} Id.
\bibitem{873} Ranke v. United States, 873 F.2d 1033 (7th Cir. 1989); see supra notes 222-26 and accompanying text (discussing the \textit{Ranke} decision).
\end{thebibliography}
did not stand for this loss of control theory because, in Ranke, there was an actual out-of-pocket loss.\textsuperscript{340} He also disagreed with the application of state law to define property, arguing that \textit{McNally} adequately defined what the court should look at — concrete economic harm — which could not be shown in this case.\textsuperscript{341}

Alternatively, even if state law was to be applied, Judge Easterbrook felt it was improperly applied in this case.\textsuperscript{342} He said that cable television is a form of speech which can never be classified as government property.\textsuperscript{343} The judge characterized a franchise as part of the government's regulatory interest where the franchisee merely asks the government's permission to perform a service.\textsuperscript{344} The difference between a license and a franchise is that franchises are exclusive.\textsuperscript{345} Overall, Judge Easterbrook noted that the fact that cable television systems often use easements to run cables is not important since there are other ways to put together a system without using the citizens' property.\textsuperscript{346} Finally, Judge Easterbrook criticized the majority's decision as an attempt to avoid the \textit{McNally} and \textit{Toulabi} decisions to sustain a conviction.\textsuperscript{347}

\section*{III. Analysis}

Judge Easterbrook's dissent in \textit{Borre} was correct. The majority decision resulted from faulty analogies, improper application of relevant case law, and a mistaken understanding of the governmental interests involved in a franchise.

The majority ignored the factual similarities between the case at

\begin{itemize}
\item \textsuperscript{340} \textit{Borre}, 940 F.2d at 225 (Easterbrook, J., dissenting).
\item \textsuperscript{341} Id. at 226.
\item \textsuperscript{342} Id.
\item \textsuperscript{343} Id.; see also \textit{Leathers v. Medlock}, 111 S. Ct. 1438 (1991) (finding that cable television is speech under the First Amendment); \textit{City of Los Angeles v. Preferred Communications}, Inc., 476 U.S. 488, 494 (1986) (find that cable television "plainly implicate[s] First Amendment interests"). In \textit{Preferred Communications}, the Court said that the First Amendment interests for cable television are protectable to a greater extent than newspapers, but to a lesser extent than radio and television broadcasters. 476 U.S. at 494-95. The Court never referred to the cable franchise as property. The case was remanded to determine if the denial of a franchise to a second operator was a First Amendment violation. \textit{Id.} at 495.
\item \textsuperscript{344} \textit{Borre}, 940 F.2d at 225 (Easterbrook, J., dissenting).
\item \textsuperscript{345} Id.
\item \textsuperscript{346} Id. at 226; see also \textit{FCC v. Florida Power Corp.}, 480 U.S. 245, 247 (1987) (stating that cable franchisees can use utility poles instead of underground lines under the Pole Attachments Act).
\item \textsuperscript{347} \textit{Borre}, 940 F.2d at 226 (Easterbrook, J., dissenting) ("It is understandable that this institution sees \textit{McNally} as a problem to be overcome rather than a rule to be implemented.").
\end{itemize}
bar and *McNally v. United States*.\(^{348}\) Furthermore, it failed to notice the differences between *Carpenter v. United States*\(^{349}\) and *Borre* and improperly applied the *Carpenter* holding. As a result, the majority improperly ruled that Fox Lake was deprived of a property interest because it determined the franchise to be property. This is contrary to the authorities which show that a franchise, by itself, merely represents a regulatory interest, rather than a property interest. Accordingly, the Village of Fox Lake did not suffer concrete economic harm, and, therefore, Borre did not commit the crime of mail fraud.

### A. United States v. Borre Was Decided Incorrectly

Both *McNally* and *Borre* dealt with government corruption. In *McNally*, the Supreme Court concluded that the Mail Fraud Act only covered schemes that affected the government as a property holder.\(^{350}\) In reaching this conclusion, the Court relied on the definition of "defraud" found in *Hammerschmidt v. United States*.\(^{351}\) The *Hammerschmidt* Court said that "to defraud," within the context of the Mail Fraud Act, usually means the victim was "[deprived] of something of value"\(^{352}\) as a result of the scheme.\(^{353}\)

*McNally*’s analysis of *Hammerschmidt* is relevant to *Borre* because Fox Lake never showed that it was deprived of something of value. In fact, the district court, when it overturned Borre’s conviction, specifically found that the scheme caused no loss of money to the village or to its citizens.\(^{354}\) The village did not pay money to U.S. Cable, and U.S. Cable did not have to pay a fee for the cable franchise.\(^{355}\) On appeal, however, the majority on the Seventh Circuit panel failed to address this point. The finding of the district court should have foreclosed the argument that Borre and his co-conspirators defrauded Fox Lake of money.

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350. *McNally*, 483 U.S. at 359 n.8 ("[A]ny benefit which the Government derives from the statute must be limited to the Government’s interests as property holder.").
351. *Id.* at 358. *See* *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924) (holding that incitement to disobey the Selective Service Act did not violate the Mail Fraud Act).
352. *Hammerschmidt*, 265 U.S. at 188.
355. *Id.*
1. The Seventh Circuit Improperly Interpreted McNally and Carpenter

a. McNally is factually similar to Borre

The Borre majority briefly reviewed McNally but focused its attention on Carpenter v. United States, disregarding the fact that Borre's situation more strongly resembled McNally. Both McNally and Borre involved government officials who failed to disclose a financial interest in companies that had dealings with the government. In McNally, the government officials used their influence to obtain commissions from an insurance agent who needed the approval of the same officials to renew his relationship with the state. In Borre, the mayor and a fellow official failed to disclose an interest in U.S. Cable. In both cases, the government did not lose money. The citizens of Kentucky, in McNally, were deprived of the right to give the state's workers' compensation contract to an honest dealer. In Borre, the citizens of Fox Lake were deprived of their right to issue the franchise to an honest company. Neither governmental entity lost property; each merely lost the ability to make a fully informed and impartial decision. This right to make an impartial decision is an intangible right, a right denied coverage under the Mail Fraud Act, according to McNally.

b. The Seventh Circuit improperly utilized the holding in Carpenter

Despite the similarities to McNally, the Borre court relied on Carpenter. It looked to Carpenter's clarification of the scope of what constitutes property under the Mail Fraud Act. In Carpenter, the Supreme Court ruled that because the common law recognized confidential business information as property, such "intangible property" would be recognized for the purposes of the Mail Fraud Act.

357. Borre, 940 F.2d at 225 (Easterbrook, J., dissenting) ("Indeed, with the change of a few details, Borre's case is a replay of McNally's.").
358. McNally, 483 U.S. at 352.
359. Borre, 940 F.2d at 217.
360. McNally, 483 U.S. at 355-60.
361. Borre, 940 F.2d at 219.
362. See supra notes 88-128 and accompanying text (discussing McNally).
363. Borre, 940 F.2d at 219-20.
as modified by *McNally*.\(^{364}\) The *Carpenter* Court, however, did not further define what qualified as intangible property.

The *Borre* court looked to *Carpenter* as a guide even though there is little factual similarity between *Borre* and *Carpenter*. In *Carpenter*, the defendant, an employee for the *Wall Street Journal*, conspired to use confidential information reserved for a *Journal* column.\(^{365}\) The defendant and his co-conspirators used the information for profit.\(^{366}\) The Court found that the information, though intangible, was property for the purposes of the Mail Fraud Act.\(^{367}\) It relied on the fact that the *Wall Street Journal* derived a benefit, in fact profits, from its ability to control and disseminate the information.\(^{368}\) On one hand, this appeared to be an intangible right and therefore not property under *McNally*, in that the newspaper only lost its ability to decide when to disclose the information. On the other hand, this right to disclose information was essential to the economic success of the *Wall Street Journal*, which sells information, just as a furniture store sells tables and chairs. In this respect, the *Carpenter* decision appears justified, but, nonetheless, inapplicable to *Borre*.

The franchise in *Borre* bears little relation to the information disclosed in *Carpenter*. Unlike the *Wall Street Journal*, Fox Lake was not in the business of handing out franchises for profit. In *Carpenter*, the Court said that the scope of *McNally* reached intangible property rights.\(^{369}\) *McNally* requires a loss of value of some sort by the victim, so intangible property must have some value to the holder to be covered by the Mail Fraud Act.\(^{370}\) Even if the franchise is deemed intangible property in *Borre*, it should not be covered under the Mail Fraud Act because Fox Lake took no value for it. Therefore, the *Borre* court incorrectly relied on *Carpenter*; although Fox Lake was defrauded of a legitimate franchise, it did not suffer an economic loss and thus did not fall under *McNally*'s definition of property.

\[\text{\(^{364}\) Carpenter v. United States, 484 U.S. 19, 26 (1987).}\]
\[\text{\(^{365}\) Id. at 23.}\]
\[\text{\(^{366}\) Id.}\]
\[\text{\(^{367}\) Id. at 26.}\]
\[\text{\(^{368}\) Id.}\]
\[\text{\(^{369}\) Id.}\]
\[\text{\(^{370}\) McNally v. United States, 483 U.S. 350, 358 (1987).}\]
c. United States v. Cherif and stock-in-trade

To understand the Seventh Circuit's analysis of Carpenter, it is useful to look at the court's decision in United States v. Cherif. The Seventh Circuit conducted a more thorough analysis of Carpenter in Cherif than in Borre. Cherif was factually similar to Carpenter in that the defendant misused the bank's confidential business information. The defendant gained access to the bank's investment files through an illicitly obtained pass and then made profitable stock purchases.

The Cherif court pointed out that Carpenter stood for the existence of intangible property and did not revive the doctrine of intangible rights. It further stated that confidential business information was clearly not the same thing as the intangible right to an honest government. In this respect, Seventh Circuit precedent interpreting Carpenter and McNally found that one purpose of McNally was to prevent a vague statute from being used to prosecute government corruption at the state and local level. Thus the application of Carpenter to the franchise in Borre is problematic because the conduct of the defendant in Borre certainly touched upon citizens' right to honest government.

Cherif's factual differences, like those of Carpenter, make it inapplicable to Borre. The defendant in Cherif argued that the information he obtained from the bank was not the institution's stock-in-trade, and therefore did not qualify as confidential business information as defined by Carpenter. The defendant claimed that the bank was in the business of storing people's money, not of gathering information. The Seventh Circuit disagreed. It reasoned that while the bank was not in the business of publishing the information, the information was still part of the bank's stock-in-trade because the information was essential to investments the bank made...

371. 943 F.2d 692 (7th Cir. 1991).
372. Id. at 694.
373. Id.
374. Id. at 697.
375. Id. at 697-98.
376. Id.
378. Cherif, 943 F.2d at 697.
and to the development of its stock-in-trade. The court ruled, therefore, that the information was property of the bank and the defendant's conduct fell under the Mail Fraud Act.

Unlike the information stolen in Cherif, a franchise is not part of the government's stock-in-trade. The Cherif court compared the bank's confidential information to the raw materials needed to produce a product. However, the franchise at issue in Borre was not part of any product being made by the government of Fox Lake.

Fox Lake did not charge for the franchise. Had it done so, the stock-in-trade argument would have more viability because the franchise would be seen as a product of the village. But even this argument may not hold much weight. In Cherif, the defendant took information from the bank and used it to buy stock, in essence becoming a competitor of the bank. These actions diminished the bank's potential to buy the same stock, and by reducing the number of available sellers, it cut into the bank's profits. This does not hold true in Borre's case. Regardless of how Borre obtained the franchise, Fox Lake (if it was charging for the franchise) still was paid and suffered no financial loss.

2. The Franchise Represented Only a Regulatory Interest

The Borre court improperly relied on state law to support its holding. State common law, moreover, fails to classify Fox Lake's interest as property. The Borre court drew upon Carpenter's application of state common law to show that a franchise is property. The majority used state law to refute the contention that a franchise is merely a grant of permission to perform a service from the government. It continued by referring to the granting of a cable television franchise as a legislative, rather than a regulatory, function. It did not, however, explain how the term "legislative" differed from "regulatory" or how this transformed it into a property interest. Thus the court's explanation failed to justify its conclusion.

The franchise represented a regulatory interest — not a property

379. Id.
380. Id. at 698.
381. Id.
383. Id. at 221.
384. Id.
interest, as pointed out in the Borre dissent. It is important to remember that under McNally, the government only has an interest in property it holds. This implies that a plaintiff must be deprived of some sort of possessory interest in order to use the Mail Fraud Act. The Second Circuit in United States v. Evans pointed out that the government often has a regulatory interest in things in which it has absolutely no property or possessory interest. As with the weapons at issue in Evans, Fox Lake did not have the right to possess the cable television franchise operated by U.S. Cable. Four reasons exist for this position: 1) the franchise is not government property; 2) the court improperly applied state law; 3) the court ignored the previous cases on licenses; and 4) a cable television franchise represents a recognized First Amendment interest.

a. A franchise is not property to the government

To reach its conclusion, the court in Borre had to establish that a franchise is property. Standing alone, the phrase “a franchise is property” is essentially true. The question is: To whom does the franchise belong — to the issuer or to the holder? The Borre majority looked to the Italiano II court for guidance because the court in Italiano II found that, in the mail fraud context, a cable television franchise is property. Neither the Eleventh Circuit opinion in Italiano II, nor the prior district court decision, however, offers any substantive reasoning as to why the cable franchise is property.

It is quite possible the two Italiano courts relied on the more thorough analysis of cable franchises made in an earlier Eleventh Circuit opinion relating to the Italiano case, Italiano I. In his dissent from Italiano I, Judge Owens looked to Corpus Juris

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385. Id. at 226 (Easterbrook, J., dissenting) (“Public promises not to interfere with private conduct . . . are not ‘property’ for purposes of the mail fraud statute.”).
386. 844 F.2d 36 (2d Cir. 1988).
387. Id. at 42.
388. 844 F.2d 36 (2d Cir. 1988); see supra notes 256-62 and accompanying text (summarizing the Evans case).
390. Borre, 940 F.2d at 220.
392. Italiano I, 837 F.2d 1480 (11th Cir. 1988). In this case, the defendant had his conviction overturned. Id. He was subsequently re-indicted. See Italiano, 701 F. Supp. at 206 (explaining the history of the case).
Secundum to define the character of a franchise. This source states: "Franchises are property and are frequently invested with the attributes of property generally." Judge Owens took this quote completely out of context. The same source states that a franchise "is merely a right or privilege" that is "distinct from, and does not embrace, property used or acquired in connection with the exercise of the franchise ... ." In the context of cable television, this reflects the difference between the right to run a system, the franchise, and the property which is necessary to run the franchise.

More importantly, the property right derived from a franchise does not vest until the franchise is granted. This property right is intangible and is separate from the property used to carry out the franchise. Until the government grants the franchise, all it is doing is contemplating contracting with an individual, not holding property. Furthermore, what the Borre court, and accordingly the Italiano II court, failed to consider is when the franchise becomes property. Franchises are not property to the government; rather, they "resemble direct regulation in execution." Clearly, the authorities do not support the contention that the state has a property interest in the franchise. Consequently, the Seventh Circuit's reliance on Italiano II is misplaced. Borre and his co-conspirators deceived Fox Lake to obtain the cable television franchise. Government officials acted dishonestly. This seems to be more in line with the invalid intangible rights theory than with the Italiano II court's holding that a franchise is property.

b. State law does not prove that the franchise is property

Illinois law did not justify the Seventh Circuit's holding either. The Seventh Circuit applied state common law to determine whether a franchise is considered property. The sources relied on

393. 837 F.2d at 1492 (Owens, J., dissenting).
394. 37 C.J.S. Franchises § 8 (1943).
395. 37 Id. § 5.
396. United States v. Slay, 717 F. Supp. 689, 693 (E.D. Mo. 1989) ("The government fails to explain how mere contemplation of an ongoing contractual relationship rises to a property right protected by the mail and wire fraud statutes."); see 12 MCQUILLIN, supra note 279, § 34.03, at 11.
397. 12 MCQUILLIN, supra note 279, § 34.03, at 11.
by the majority do confirm that a government can grant a franchise.\textsuperscript{401} None of the sources go so far, however, as to declare that a franchise is property of the government.

The court also found significance in the fact that municipalities can run their own cable systems, rather than awarding franchises to private companies.\textsuperscript{402} This fact fails to establish whether a franchise is property. Rather, it only stands for the proposition that the government does not have to grant a franchise to an independent entity.

The majority then looked at cases which characterize "the granting of a franchise as a legislative, not a regulatory act."\textsuperscript{403} None of these cases provide support for the contention that a franchise is property to the government, but rather they recognize the regulatory function of a franchise.\textsuperscript{404} The cases deal with the propriety of granting franchises, not with their character as property.\textsuperscript{405} Thus, these cases do not refute the regulatory purpose of a franchise or support its classification as property.

While looking at state law, the Seventh Circuit ignored the federal statute that deals with the franchising of cable systems. The Cable Communications Policy Act of 1984 stated that Congress's purpose in passing the legislation was to "establish guidelines for the exercise of Federal, State and local authority with respect to regulation of cable systems."\textsuperscript{406} The purpose of the franchise, as seen in

\textsuperscript{401} See 2 William Blackstone, Commentaries *37 (defining a franchise as "a royal privilege, or branch of the kings prerogative, subsisting in the hands of a subject"); see also Lasher v. People, 55 N.E. 663, 665 (Ill. 1899) (stating that a franchise is "[a] right which belongs to the government when conferred upon the citizen").

\textsuperscript{402} Borre, 940 F.2d at 220-21.

\textsuperscript{403} Id. at 221.

\textsuperscript{404} See California v. Central Pac. R.R., 127 U.S. 1, 40-41 (1888) (noting that a franchise is a privilege granted for the public interest which is subject to public control and is not taxable); Withers v. City of Granite City, 177 N.E.2d 181, 183 (Ill. 1961) (holding that a grant to a company to use city streets was not invalid if it did not divest public use or interests); People v. Commonwealth Edison Co., 32 N.E.2d 902, 904 (Ill. 1941) (finding that a city ordinance granting a public utility use of the streets was an exercise of legislative authority not taxable as tangible personal property); People ex rel. Better Broadcasting Council, Inc. v. Keane, 309 N.E.2d 362, 367 (Ill. App. Ct. 1973) (holding that a grant to a cable television franchise was an exercise of legislative authority not subject to mandamus).

\textsuperscript{405} Withers v. Granite City held that a city could not permit a use that infringes on the right of the municipality to use land beneath the municipality's easements. 177 N.E.2d at 182. People v. Commonwealth Edison Co. stated that "[a]n ordinance which grants the use of public streets to a utility . . . is in the exercise of the police power . . . ." 32 N.E.2d at 904. People ex rel. Better Broadcasting Council ruled that "the granting of franchises by municipalities to utility companies or private persons to use the streets in the public interest constitutes an exercise of the city's legislative authority." 309 N.E.2d at 367.

light of the statute, is to give the franchising authority (i.e., the local government) the means to regulate the system. Nothing in the statute implies that the franchise is the government’s property.

Therefore, state law as applied by the Seventh Circuit is, at best, inconclusive and does nothing to show that a franchise is property to a local government. However, federal law seems to imply that the purpose of the cable television franchise is to provide a consistent regulatory scheme for cable providers. The federal law does not suggest that the franchise is property for the individual municipality.

c. The court ignored the precedent of the license cases

In addition to its misplaced reliance on state law, the Seventh Circuit, in *Borre*, ignored prior decisions regarding licenses. Generally, franchises and licenses are similar. The difference is that a franchise is exclusive. The majority distinguished precedent dealing with licenses, *Toulabi v. United States*, by stating that the granting of a franchise is a legislative, not a regulatory, act. This apparently separates a franchise from a license. Yet the license and franchise both grant the holder permission to perform an act. In Borre’s case, that act was the operation of a cable television franchise. The majority supported its distinction by stating that a franchise must be property because cable television, by necessity, runs cables through the property of citizens. As Judge Easter-

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407. The text of 47 U.S.C. § 521 reads in pertinent part:

   The purposes of this subchapter are to —
   (1) establish a national policy concerning cable communications;
   (2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;
   (3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;
   (4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;
   (5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator’s past performance and proposal for future performance meet the standards established by this subchapter; and
   (6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.


409. 875 F.2d 122 (7th Cir. 1989); see supra notes 247-51 and accompanying text (discussing *Toulabi*).

410. *Borre*, 940 F.2d at 221.

411. *Id.*
brook pointed out, however, there are other ways of putting together a cable system that do not require easements over residential property.\textsuperscript{412} For instance, this may be accomplished by installing cable on the poles used by utility companies.\textsuperscript{413} Thus, the majority failed to show how the legislature granted the government property. Fox Lake was only giving U.S. Cable permission to run a cable system in their town. Even if Fox Lake required easements, they would be required only as an effect of the franchise, not as the franchise itself. Therefore, the use of easements should not be considered in the determination of whether a franchise is property.

Because the franchise/license distinction fails, Borre is clearly out of line with Toulabi.\textsuperscript{414} In Toulabi, the city had no property interest in the answers to a taxi driver’s license examination.\textsuperscript{415} Likewise, Fox Lake had no property interest in the franchise. Upon discovery of the deceit, the village could have withdrawn the franchise, but this would not be the same as gaining possession of the property.\textsuperscript{416} It would only mean that U.S. Cable no longer had permission to run a cable television system in Fox Lake. The government could then decide to run the system on its own, but it would not gain a property interest until it held a vested right to run the system. Because all Fox Lake was doing was giving U.S. Cable permission, and not giving up a property right, the court should have followed the reasoning in the Toulabi decision.

Frank v. United States\textsuperscript{417} is likewise inapposite. In Frank, the government was found to have a property interest in a driver’s license.\textsuperscript{418} Under the law of Indiana, a surrendered license in a drunk driving case is part of the court record and property of the government upon possession.\textsuperscript{419} The license was retained to indicate to the Indiana Bureau of Motor Vehicles that the defendant’s license was

\textsuperscript{412} Id. at 226 (Easterbrook, J., dissenting) (citing FCC v. Florida Power Corp., 480 U.S. 245 (1987)).
\textsuperscript{413} See 47 U.S.C. § 224 (1988). This statute is commonly known as the Pole Attachments Act.
\textsuperscript{414} Toulabi v. United States, 875 F.2d 122 (7th Cir. 1989).
\textsuperscript{415} Id. at 125.
\textsuperscript{416} But see United States v. Martinez, 905 F.2d 709 (3d Cir.), cert. denied, 498 U.S. 1017 (1990). In Martinez, the Third Circuit held that the government of Pennsylvania had a property interest in a fraudulently obtained medical license. The court implied that because the state had a right to revoke the license, it was property under the mail fraud statute. Id. at 715.
\textsuperscript{417} 914 F.2d 828 (7th Cir. 1990).
\textsuperscript{418} Id. at 834.
\textsuperscript{419} Id. at 833.
The license was used like a cash bail bond, as a type of security interest, to insure that the convicted driver would be unable to operate his vehicle legally.

In *Borre*, the government could not show a similar possessory interest in the franchise. In *Frank*, the property right did not stem from the issuance of the license, but from its retention in the court record. However, there was no such security interest endowed in the cable television franchise, because there was no retention of the franchise. *Frank* dealt with the physical license as property, whereas Fox Lake possessed no physical manifestation of the franchise. So while Seventh Circuit precedent holds that the government has a property right in a license, it does not apply to the *Borre* case because *Frank* dealt with actual physical possession of the license. Therefore, the court should have looked to *Toulabi*, under which it would have found that the village of Fox Lake was not deprived of property.

d. A cable television franchise is speech

The *Borre* majority relied on the fact that a municipality can run its own cable franchise in deciding that the U.S. Cable franchise was the property of Fox Lake. As the dissent pointed out, however, a cable television company engages in speech.

Judge Easterbrook relied on the Supreme Court opinion in *City of Los Angeles v. Preferred Communications, Inc.* to argue that the right to speech was not government property to be delegated to franchisees. In *Preferred Communications*, the Supreme Court, in dicta, said that the First Amendment interests in cable television fall somewhere between those of newspapers, which are subject to little government regulation, and broadcasters, who are watched more closely due to the limited availability of broadcast frequencies. The Court remanded the case to have the district court determine if denying a franchise to a second operator in a large city is

420. Id.
421. See Messinger v. United States, 872 F.2d 217, 220 (7th Cir. 1989) (noting that a cash bail bond is a security interest and thus an intangible property right).
423. Id. at 226 (Easterbrook, J., dissenting).
425. Borre, 940 F.2d at 226 (Easterbrook, J., dissenting).
426. Preferred Communications, 476 U.S. at 494-95.
a First Amendment violation. The Court never referred to the franchise as government property but referred to it only as a means to regulate the system, particularly where cable lines are laid. The opinion indicates that a cable system is also subject to some degree of regulation based upon its programming content.

Having established that cable television has some degree of First Amendment protection, Judge Easterbrook said that the government cannot grant the right to speak, as it is a right that already exists through the First Amendment. This argument does not mean that the cable system has no value; it obviously does. Rather, it shows that what the government is granting is not the system itself, but the right to operate a system to provide communications (and speech) to its citizens. While the government, through statutory authority, allows a city to run a system on its own, the government is not giving the private entity the system. This was particularly true in the Borre case, where U.S. Cable did not pay for the franchise. Fox Lake was delegating its right, through the granting of a franchise, to operate such a system. Rather than operate it themselves, Fox Lake chose to regulate a private company.

B. The Loss of Control Theory

The Seventh Circuit also erred in applying the loss of control theory. The majority in Borre, after determining that a cable television franchise was property, went on to show that Fox Lake was deprived of that property because it lost control over the disposition of property. Both the defendant and the dissent, however, argued that the victim had to show an actual out-of-pocket loss. On this point, the dissent was correct.

The majority based its conclusion on Ranke v. United States.
In *Ranke*, the defendant adjusted a subcontractor's bid to his employer and received kickback payments from the subcontractor.\(^{437}\) The defendant claimed that his employer did not actually lose money because he accepted the altered bid and was awarded the job.\(^{438}\) The court felt that this was irrelevant because Ranke's employer may have accepted another bid if he knew that part of the money going to the subcontractor was being paid to Ranke.\(^{439}\) This, therefore, represented a loss of control over the victim's property.

The dissent's argument was more accurate. In the *Borre* dissent, Judge Easterbrook disagreed with how the majority interpreted *Ranke* and said that the *Ranke* court required an actual loss of money.\(^{440}\) Ranke, by adjusting the bid, deprived his employer of what would have been a lower bid, absent the bribe/kickback.\(^{441}\) This argument is sound because in *Ranke*, the victim lost control of his property interest; he could have awarded the contract to someone else. More importantly, Ranke asserted control over part of that money. Perhaps if the facts were changed, the *Borre* majority's theory would be more justifiable. If Ranke, for instance, was a friend of the subcontractor and received no kickbacks, there would be a case where the employer lost control without suffering an out-of-pocket loss. But *Ranke* does not reflect such facts. Even if the theory is termed "loss of control," there must also be an out-of-pocket loss.

Furthermore, even assuming the franchise is property, this loss of control theory still does not meet the *Carpenter* standard. Fox Lake did not sell the franchise to U.S. Cable and, thus, could show no monetary loss. Although Fox Lake could have awarded the franchise to another company, this would have had no economic effect on the village. It is possible that the premise for which *Ranke* stands is correct, but as it stands, the case is not factually similar to *Borre*. In *Ranke*, the victim suffered an economic loss. In *Borre*, Fox Lake did not suffer any such loss.

**IV. Impact**

The impact of *Borre* can be assessed from two perspectives. To the defendant, the consequences are obvious. It remains uncertain

\(^{437}\) *Id.* at 1039.

\(^{438}\) *Id.*

\(^{439}\) *Id.* at 1040.

\(^{440}\) *Borre* v. United States, 940 F.2d 215, 225 (7th Cir. 1991) (Easterbrook, J., dissenting).

\(^{441}\) *Id.*
how the decision will affect future coram nobis and habeas corpus petitioners.

A. Effect on Borre

Kurtis Borre's mail fraud conviction was sustained.\textsuperscript{442} Unfortunately for him, his future legal avenues are limited. While he may apply to the Supreme Court for a writ of certiorari, this probably will not bring a favorable result. The Supreme Court has not heard any cases regarding the \textit{McNally v. United States}\textsuperscript{443} interpretation of mail fraud since it decided \textit{Carpenter v. United States}\textsuperscript{444} It appears that with the enactment of the newest amendment to the Mail Fraud Act, which revives the intangible rights theory, the Court has little interest in further interpretation of \textit{McNally}.\textsuperscript{446}

B. Effect on Future Petitioners

The Seventh Circuit has "a copious backlog of intangible rights cases."\textsuperscript{448} There remain defendants petitioning the courts for relief, and if Judge Easterbrook is correct, the courts are tired of overturning convictions.\textsuperscript{447} \textit{Borre} represents a broader interpretation of the property rights defined by \textit{McNally} and could signal a new direction in the analysis of postconviction mail fraud proceedings.

1. State Law

The \textit{Borre} court used state law to justify its conclusion that the cable television franchise was a property interest of Fox Lake.\textsuperscript{448} The two state law premises the court emphasized were: that a franchise is a privilege a state grants that does not commonly belong to its citizens; and, more importantly, that a municipality may run its own cable system.\textsuperscript{449}

The \textit{Borre} court's interpretation of state law may affect cases involving a license or a franchise which seem to be intangible rights.

\textsuperscript{442} 910 F.2d at 224.
\textsuperscript{443} 483 U.S. 350 (1987).
\textsuperscript{444} 484 U.S. 19 (1987).
\textsuperscript{445} See 18 U.S.C. § 1346 (1988) (codifying the new amendment to the statute); see also \textit{Borre}, 940 F.2d at 226 (Easterbrook, J., dissenting) (noting that with the reinstatement of intangible rights theory in § 1346 there is "no way to avoid \textit{McNally} and \textit{Toulabi}").
\textsuperscript{446} \textit{Borre}, 940 F.2d at 226 (Easterbrook, J., dissenting).
\textsuperscript{447} \textit{Id}.
\textsuperscript{448} 940 F.2d at 220.
\textsuperscript{449} \textit{Id.} at 220-21.
If a court can show that the government delegated a function that the government could have done on its own, it appears that under *Borre*, this franchise or license is a property right.

This interpretation of property rights is not limited to cable television. Assume that a government-run institution decided, under statutory authority, to give a franchise to provide the institution's food services, rather than the government running its own cafeteria. Subsequently, the winner of the franchise is found to be a company secretly owned by a government official instrumental in awarding the franchise. Under *Borre*, since the government could have run the food service itself, it has a property right, in spite of the fact that the government would not have lost any money. *Borre* thus used state law to create property rights under *McNally* where none previously existed.

2. Loss of Control

If the *Borre* interpretation stands, the *Ranke* loss of control theory is broadened. The *Borre* court explicitly contradicted *McNally* by stating that no out-of-pocket loss needs to be shown by the victim. In essence, to have a deprivation of property rights under *Borre*, the government has to show: 1) that the victim relinquished control of something to the defendant and 2) that the defendant would not have controlled the property without defrauding the victim, regardless of whether the victim suffered a monetary loss. Thus, the *Borre* court justified its conclusion by using a loss of control argument. This sounds not like a deprivation of property rights, but rather like a deprivation of intangible rights. Ultimately, *Borre* finds a new way to bring back the intangible rights theory in pre-*McNally* convictions.

C. Application to Federal Theft Laws

The *McNally* line of cases has engendered a unique area of law defining property interests. For the most part, the holdings have not been useful in other contexts.

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450. See supra notes 221-26 and accompanying text (discussing the loss of control theory).
451. *Borre*, 940 F.2d at 222; *see* 483 U.S. 350, 361 (1981) (requiring a deprivation of a property right). The *Ranke* court got around this problem by distinguishing *McNally* on the grounds that the state was not paying a portion of its premium to the defendants. In *Ranke*, unlike *McNally*, the state paid fixed premiums. *Ranke* v. United States, 873 F.2d 1033, 1040 (7th Cir. 1989).
This changed with the case of United States v. Fowler. The defendant in Fowler was charged with a violation of 18 U.S.C. § 641. Fowler, a civilian, utilized a Defense Department security clearance to pass along classified information to government defense contractors. He argued that he did not steal property, because he merely copied documents or recorded information from them.

The Fourth Circuit said the documents themselves were tangible property. Citing Carpenter, the court further held that the information contained within the documents was property. This information thus had the requisite value, and the court upheld Fowler's conviction.

Borre v. United States may further expand the application of 18 U.S.C. § 641. The franchise, if Borre is correct, is a form of intangible property. Schemes to illegally obtain a franchise or license from the federal government may now be within the reach of the statute. Unlike Fowler, where the value of the information was implicit, the value of a license or franchise could be set at an arbitrary level, by charging a one-hundred dollar fee, thereby automatically invoking the statute. If Borre represents a new trend in the treatment of franchises, then its application in the context of the theft of government property is the next logical step.

**CONCLUSION**

"After McNally, the courts of appeals have discussed property deprivation in a variety of factual settings, resulting in a somewhat confusing web of caselaw." The history of mail fraud law is that of a law the scope of which was expanded until McNally came along and burst the balloon. Whether it was decided correctly is dependent upon one's interpretation of that history. That past history and Congress's subsequent action have created a channel of law that will be drying up soon. There are still people seeking to vacate

452. 932 F.2d 306 (4th Cir. 1991).
453. Id. at 308-09. The court stated that "[s]ection 641 provides whoever 'knowingly converts to his own use or the use of another, or without authority . . . conveys . . . any record . . . or thing of value of the United States' is guilty of a felony if the value of the property exceeds $100." Id. at 309 (citing 19 U.S.C. § 641 (1988)).
454. Id. at 308-09.
455. Id. at 309.
456. Id. at 310.
457. Id.
458. Id. at 310, 318. The court did not expressly declare the information's value.
their convictions, so all cases subsequent to McNally have in one way or another sought to clarify the points made by that decision. The courts have carved out ways to deal with a failure to disclose information, with confidential business information, with licenses, and with bribes. Very often these interpretations blur together. Making the situation even more difficult is the fact that the interpretations may be unnecessary if the indictment or jury instructions only deal with intangible rights. In Borre, two counts of the indictment clearly stated an intangible rights theory. The court’s analysis rested on whether the third count was proper under McNally. The Borre majority improperly characterized a regulatory interest as a property interest, and yet failed to show how the village lost money, property, or control thereof. The case was wrongly decided under McNally and appears to have brought some intangible rights concepts back into the pre-18 U.S.C. § 1346 law.

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