

[PUBLIC CORRUPTION]

Honest Services Fraud

A modern tool for dealing with federal public corruption cases

**BY INSPECTOR GENERAL
EARL DEVANEY AND JAMES
P. O'SULLIVAN**

The versatile “honest services” fraud statute makes it a crime to devise a “scheme or artifice to deprive another of the intangible right of honest services.”¹ A recent series of high-profile convictions illustrates the effectiveness of this statute as a modern tool for dealing with federal public corruption cases. For example, on September 29, 2008, former Central Intelligence Agency Executive Director Kyle “Dusty” Foggo pleaded guilty to honest services fraud for having fraudulently deprived the U.S. of its right to his honest services as a public official. The basis for the charge was that Mr. Foggo had abused his high-ranking position by devising and executing a scheme to induce the CIA into hiring “companies and individuals with whom he had concealed his personal relationships.”²

Another high-profile example of the use of the honest services fraud statute is that of former federal lobbyist Jack Abramoff. Mr. Abramoff pled guilty to



honest services fraud³ and conspiracy to commit honest services fraud, stemming from his extensive efforts to induce public officials to take improper action on behalf of his clients.⁴ As a result of the Abramoff investigation – and illustrating the substantial reach of the statute – a U.S. Congressman⁵ and four former senior Congressional staff members⁶

subsequently pled guilty to conspiracy to commit this crime.

The honest services fraud statute has been useful not only in prosecuting public corruption cases of national significance, but also in dealing with more common corruption cases such as government procurement fraud. For example, in March 2007, a government contractor pleaded guilty to honest services fraud in connection with a scheme to steer government contracts at Walter Reed Army Medical

1 The Honorable Earl E. Devaney is the Inspector General of the Department of the Interior. James P. O'Sullivan is a former Associate General Counsel of the Office of Inspector General, Department of the Interior. The authors thank Chris Martinez, Attorney Advisor, Office of Inspector General, Department of the Interior, for his assistance in preparing this article. “The views of co-author James P. O'Sullivan reflect his personal views and do not necessarily reflect the views of the Department of Justice.”

2 DOJ press release, “Former CIA Executive Director Kyle ‘Dusty’ Foggo Pleads Guilty to Defrauding the United States” (Sept. 29, 2008) available at <http://sandiego.fbi.gov/dojpressrel/pressrel08/sd092908.htm>.

3 In January 2006, Jack A. Abramoff pleaded guilty to a number of charges including honest services fraud and conspiracy to commit honest services fraud.

4 Richard B. Schmitt, “Jack Abramoff Sentenced to 48 Months,” L.A. Times (Sept. 5, 2008), available at <http://articles.latimes.com/2008/sep/05/nation/na-abramoff5>.

5 In September 2006, Congressman Robert W. Ney, pleaded guilty to, among other things, conspiracy to commit honest services fraud.

6 Tony C. Rudy, a former member of the staff of Congressman Tom DeLay, pleaded guilty in March 2006 to conspiracy to defraud the citizens of the United States and the United States House of Representatives of the right to his honest ser-

vices. Neil G. Volz, a former member of the staff of Congressman Robert W. Ney, pleaded guilty in May 2006 to conspiracy to commit honest services fraud. William J. Heaton, a former member of the staff of Congressman Robert W. Ney, pleaded guilty in February 2007 to conspiracy to commit honest services fraud. Mark D. Zachares, a former senior staffer to the House Transportation and Infrastructure Committee, pleaded guilty in April 2007 to conspiracy to commit honest services fraud.

Center.⁷ Moreover, the ongoing National Procurement Fraud Initiative, announced by the DoJ in October 2006,⁸ has yielded convictions and indictments under the honest services fraud statute. In December 2006, a federal jury in U.S. District Court Western District of Virginia convicted a U.S. Army procurement official and the chief executive officer of a Defense contractor of two counts each of honest services wire fraud, and one count each of bribery.⁹ In June 2007, DoJ announced the guilty plea of a former DoD civilian employee that included one count of honest services wire fraud related to a scheme to obtain unauthorized pay and entitlements.¹⁰

While these cases show that the honest services fraud statute is indeed an effective 21st century tool for dealing with public corruption, the statute's ancestry goes back to the 19th century when the original mail fraud statute was enacted to protect the federal mails. Over the course of the next 100 years, the theory of honest services fraud developed in case law interpreting the mail and wire fraud statutes and emerged as a powerful doctrine in the 1970s, supporting public corruption prosecutions of state, local and federal officials.¹¹

In 1987, however, the U.S. Supreme Court's *McNally* decision held that the mail and wire fraud statutes applied only

to the defrauding of a property interest, and did not apply to defrauding the government and citizens of their intangible right to the honest services of public officials.¹² Congress responded swiftly to this decision, and in 1988 enacted 18 U.S.C. § 1346, a definitional provision of the mail and wire fraud statutes that expressly covers a scheme or artifice "to deprive another of the intangible right of honest services".¹³ Since 1988, the honest services fraud statute has been applied in a wide variety of factual circumstances and has proven to be a flexible tool in dealing with public corruption.

THEORY AND ELEMENTS OF HONEST SERVICES FRAUD

Although section 1346 is subtle in its application and can raise nuances of legal interpretation, the basic theory behind it is straightforward and intuitive, especially in cases involving federal government officials.¹⁴ A federal government employee takes an oath to support and defend the Constitution and to faithfully discharge the duties of public office. The federal government, the employing agency and citizens in general have a right to the honest services of every federal employee who undertakes that public trust. The right to honest services includes the right to the conscientious,

12 *McNally v. U.S.*, 483 U.S. 350 (1987).

13 The full text of 18 U.S.C. § 1346 states: "For the 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." A scheme or artifice to defraud using the mail is proscribed by 18 U.S.C. § 1341. Wire fraud is proscribed by 18 U.S.C. § 1343.

14 The statute has a somewhat more controversial history when applied in an exclusively private sector scheme. Some cases involving only private parties have encountered resistance from courts and criticism from commentators who have expressed concerns that the statute may be criminalizing conduct that amounts to no more than a civil fraud or perhaps only a breach of contract. The statute has also generated criticism on federalism grounds when applied to corruption of state or local officials. Commentators have generally taken a more favorable view of the statute when a federal interest is at stake or the conduct involves a federal official, although some have nevertheless criticized the statute as inherently vague.

loyal, faithful, disinterested and impartial service of federal employees.¹⁵

Whenever a federal employee engages in deceit, fraud, bias, undue influence, conflict of interest, self-enrichment, self-dealing and concealment, he or she commits a serious breach of public trust and, depending on the facts, may become criminally liable under the honest services fraud statute. The statute also applies to other persons who are not federal employees who deprive the government and its citizens of the honest services of federal officials.

Four elements must be established in order to prove honest services fraud in a federal government context: the defendant must knowingly devise or participate in a scheme to defraud the government or the public of its right to honest services; the falsehood at the heart of the scheme must be material; there must be a specific intent to defraud; and there must be use of the mails or a transmission by wire, radio or television in interstate commerce.

As regards the first element, the government generally must prove that the scheme would likely compromise governmental objectivity and fairness.¹⁶ This often means that the scheme centered on a particular, discretionary decision or set of decisions.¹⁷ The courts, however, courts have held that there is no requirement that an official actually ren-

15 The statute does not define the term "honest services." A bill, S. 2559, introduced by Senator Leahy in the 109th Congress contained the following definition of the term: "The term 'honest services' includes the right to the conscientious, loyal, faithful, disinterested, and unbiased service, to be performed free of deceit, undue influence, conflict of interest, self-enrichment, self-dealing, concealment, bribery, fraud, and corruption."

16 E.g., *U.S. v. Hasner*, 340 F.3d 1261, 1271 (11th Cir. 2003) (discussing public officials' fiduciary duty to the public to be open and act in their best interests, and how the public's right to honest services is harmed when those duties are breached).

17 E.g., *id.* at 1265-68 (Chairman of county housing agency convicted of committing honest services mail fraud by voting on a government contract in order to directly benefit a private party with whom he had an agreement to share the resulting commission).

der any biased or impartial decisions; it is enough that an official failed to disclose information material to his or her duties, such as a conflict of interest.¹⁸

The second honest services fraud element is that the fraudulent scheme must involve a material deception by the accused official. Even though the word “materiality” appears nowhere in 18 U.S.C. §§ 1341, 1343, or 1346, the Supreme Court established that these and similar statutes inherently adopted the common law meaning of fraud, which had always “required a misrepresentation or concealment of material fact.”¹⁹ In a nutshell, a material misrepresentation or concealment is one that has “a natural tendency to influence . . . the decision of the decision making body to which it was addressed.”²⁰

The third element requires that the defendant have specific intent to defraud. This means not only that the official was aware of the scheme, but that he or she willfully intended for it to harm governmental honesty and fairness. Such intent may be proven by circumstantial evidence. No direct admission is required, but the facts must be such that could lead a reasonable jury to conclude that the defendant did not act in good faith, but specifically intended to harm governmental objectivity and honesty.

The fourth and final element in an honest services mail fraud case is, of course, that the mails be used or caused

to be used in furtherance of the fraud. The mailing, however, does not have to be essential to the scheme, and the defendant need not be the one responsible for it. Also, the definition of “the mails” has been extended by statute beyond the U.S. Postal Service to include private and commercial carriers involved in interstate commerce, such as FedEx.

For honest services wire fraud charges, the fourth element requires that the defendant, in furthering his or her scheme to defraud, transmitted or caused the transmission of any writing, signal, or sound by means of a wire, radio, or television communication in interstate commerce. Typically, this includes email, fax, and telephone/cell phone communications, although the statutory terms invite further definition as technology continues to change and evolve. Moreover, as is also the case with mail fraud, the communication itself need not contain a fraudulent representation; it merely needs to “further” the scheme in some way, such as by arranging a meeting place or providing other information helpful to executing the scheme.

Within the broad parameters of these elements lies a vast spectrum of misconduct that can be covered by the honest services fraud statute. A scheme or artifice to defraud citizens and the government of the right to the honest services of public officials can take many forms. Some of the most common types of honest services fraud cases involving public officials include bribery schemes, undisclosed financial interest schemes, and schemes involving misappropriation of confidential information. It is important to keep in mind; however, that the honest services fraud statute is flexible enough to embrace any scheme to defraud that comes within its limits.

In many cases, the honest services fraud statute is used in conjunction with other criminal statutes, such as those proscribing bribery, illegal gratuities or other conflicts of interest. Consequently, the facts that would support those violations will often also support an honest services fraud case. On the other hand, there

may be cases where the facts would not establish all the required elements of a conflict of interest crime but would be sufficient to establish an honest services fraud violation.

BRIBERY SCHEMES

Many honest services fraud cases strongly resemble bribery or illegal gratuity cases. For example, in a number of the honest services fraud cases arising out of the Abramoff investigation, there was a scheme or artifice to defraud that consisted of the defendant accepting (as a public official) or providing (as a lobbyist) a “stream of things of value” (e.g., domestic and overseas trips, golf, entertainment, meals and drinks, employment opportunities, etc.) to influence or reward official action. In the case of the government officials, they agreed “to take a stream of favorable official action” (e.g., making certain contacts with executive branch officials, inserting legislative amendments, etc.).

Such cases, even when they do not include a bribery count, nevertheless have a strong bribery-like quality to them.²¹ Unlike the bribery statute, however which requires an explicit quid pro quo or a showing that the giving of things of value was intended to induce a pattern of official actions (e.g., either “this for that” or “these for those”),²² an honest services fraud case has no such requirement.

21 The Information and Plea Agreement in the case of Congressman Robert W. Ney did not contain a bribery or illegal gratuity count.

22 Section 201(b)(2) of Title 18, U.S. Code, states that whoever “being a public official . . . corruptly demands, seeks, receives, accepts . . . anything of value . . . in return for being influenced in the performance of any official act” shall be fined or imprisoned under the statute. (Emphasis added.) See also *U.S. v. Ganim*, 510 F.3d 134, 148-49 (2d Cir. 2007) (noting that “bribery can be accomplished through an ongoing course of conduct” if the gifts are being given in exchange for a course of official action); *U.S. v. Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998) (noting that “[t]he quid pro quo requirement is satisfied so long as the evidence shows a ‘course of conduct of favors and gifts flowing to a public official in exchange for a pattern of official actions favorable to the donor’”) (quoting *U.S. v. Arthur*, 544 F.2d 730, 734 (4th Cir. 1976)).

18 See, e.g., *U.S. v. deVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999) (noting that “[a] public official’s undisclosed conflict of interest . . . does by itself harm the constituents’ interest in the end for which the official serves—honest government in the public’s best interest”) (emphasis added); *U.S. v. Holzer*, 816 F.2d 304, 308 (7th Cir.) (holding that a judge’s receipt of bribes and “loans” to influence official actions constituted mail fraud irrespective of whether he ruled differently on any cases), vacated, 484 U.S. 807 (1987) (ordering reconsideration in light of *McNally*); *U.S. v. Sawyer*, 85 F.3d 713, 724 (1st Cir. 1996) (noting that “the public is deprived of its right . . . to disinterested decision making” when “an official fails to disclose a personal interest in a matter over which she has decision-making power”).

19 *Neder v. U.S.*, 527 U.S. 1, 22 (1999).

20 *Id.*

Nor, as is required under the illegal gratuity statute, is it necessary to show that a thing of value was given “for or because of an official act.”²³ Thus, instead of showing a specific link between a bribe or gratuity and some official action, in an honest services fraud case there is a showing of a “stream of things of value” and a corresponding “series of official acts.”

For this reason, it is useful to consider honest services fraud counts in cases that may initially be evaluated as a bribery or illegal gratuities case. Especially since the Supreme Court’s *Sun-Diamond*²⁴ decision which required a strong link to some official action in gratuities cases, the honest services fraud theory may provide a useful alternative to a bribery or illegal gratuity charge.

For example, in the Woodward case involving a Massachusetts state legislator, the Court held that an honest services violation may be established where there is a showing of a “generalized pattern of gratuities to coax favorable official action.”²⁵ As the Court further explained, “[a] person might not, however, give an unlawful gratuity with the intent to effect a specific quid pro quo. Rather, as the government contends here, a person with continuing and long-term interests before an official might engage in a pattern of repeated, intentional gratuity offenses in order to coax ongoing favorable official action in derogation of the pub-

lic’s right to impartial official services.”²⁶

Kickback schemes, close relatives of bribery schemes, have also been prosecuted under the honest services fraud statute. One example of a kickback scheme is the arrangement engineered between Jack Abramoff and Michael Scanlon. Abramoff recommended to his Native American tribal clients that they use the grassroots and public relations services provided by Scanlon’s firm. Abramoff did not disclose to his clients that he had an arrangement with Scanlon to receive fifty percent of the net profits of the fees paid to Scanlon’s firm. In the words of the plea agreement, this scheme violated Abramoff’s “duty to disclose all relevant facts to his lobbying clients, including conflicts of interest and any financial interest in fees paid to others.”²⁷

UNDISCLOSED FINANCIAL INTEREST SCHEMES

A second type of honest services fraud case involves schemes in which a public official has an undisclosed financial interest and takes some official action or uses public office to benefit a secret financial interest. Section 1346 has been regularly used to successfully prosecute state and local public officials in this type of case.²⁸

Although the honest services fraud statute has been less frequently used to prosecute federal officials for undisclosed, conflicting financial interests, one notable federal case involved a scheme by two U.S. Department of the Treasury officials to use their access to the govern-

ment procurement process to channel money to themselves and their companies.²⁹ The scheme involved the use of no-bid contracts to a third-party contractor who provided financial benefits to the Treasury officials. The two officials were convicted of honest services wire fraud violations. They also were convicted of violations of 18 U.S.C. § 208 which bars an executive branch employee from taking action on a matter that could affect the employee’s financial interest.

Another federal case of this type involved an Assistant U.S. Attorney who engaged in a scheme to make favorable recommendations to the court and others on behalf of cooperating witnesses and defendants in exchange for money.³⁰ In one instance, the AUSA accepted \$98,000 from a cooperator. In return, the AUSA argued for leniency at a sentencing hearing. The AUSA pled guilty to two counts of honest services wire fraud and one felony conflict of interest count under 18 U.S.C. § 208.

There may be a number of reasons why the honest services fraud statute is not used more frequently in federal prosecutions involving conflicting financial interests on the part of federal officials. In some cases, there may not be any element of concealment and hence no “scheme or artifice” as required under the mail and wire fraud statutes. For example, in cases where federal employees have acted on matters that would affect a company with which they were negotiating for employment or had an arrangement for future employment, the employee may have made no attempt at concealment. In some cases of an inadvertent section 208 violation, the conflicting financial interest may even have been reported on a financial disclosure report. A more likely explanation for the paucity of federal cases of this type, however, is that

23 For example, 18 U.S.C. § 201(c)(1)(B) states that whoever “being a public official . . . demands, seeks, receives, accepts . . . anything of value . . . for or because of any official act performed or to be performed by such official or person” shall be fined or imprisoned under the statute.

24 In *U.S. v. Sun-Diamond Growers*, 526 U.S. 398 (1999), the Supreme Court ruled that in an illegal gratuity case it was necessary to show that the gratuity was linked to some specific official act taken by the public official. One current legislative proposal seeks to expand the scope of the illegal gratuity statute by amending the statutory definition of “official act” to include “any decision or action within the range of official duty of a public official.” See H.R. 2438, “Clean Up Government Act of 2007,” 110th Cong., 1st Sess. (introduced May 22, 2007).

25 See *U.S. v. Woodward*, 149 F.3d 46, 55 (1st Cir. 1998), cert. denied, 525 U.S. 1138 (1999).

26 *Id.*

27 See Factual Basis for the Plea of Jack A. Abramoff at p. 3.

28 See *U.S. v. Mittelstaedt*, 31 F.3d 1208 (2d Cir. 1994), cert. denied, 513 U.S. 1084 (1995) (consultant employed by two towns to advise on zoning and planning matters had undisclosed interest in certain real estate projects); *U.S. v. Bissell*, 954 F. Supp. 841 (D.N.J. 1996), judgment aff’d. without opinion, 142 F.3d 429 (3d Cir. 1998) (local prosecutor shared a partnership interest in gasoline stations with attorney who represented adversaries of the prosecutor’s office); *U.S. v. Grandmaison*, 77 F.3d 555 (1st Cir. 1996) (part-time city alderman secretly influenced the award of a contract to a construction company that was his employer).

29 *U.S. v. Quinn*, 359 F.3d 666 (4th Cir. 2004). For additional facts in this case, see Case 1 in the 2002 Conflict of Interest Prosecution Survey, issued by the Office of Government Ethics on October 31, 2003.

30 See Case 3 in the 1997 Conflict of Interest Prosecution Survey, issued by the Office of Government Ethics on March 13, 1998.

section 208 is itself an adequate tool for dealing with employees who act on matters that benefit their own financial interest, whether or not that interest is concealed.³¹

There are some situations, however, not covered by section 208, that may justify use of the honest services fraud statute. Section 208 covers the financial interests personally owned by the federal official; it also covers certain other so-called “imputed interests” that constitute a conflict for an official, such as the financial interests held by a spouse or a minor child. But section 208 does not cover the financial interests of other close relatives such as a sibling, a parent, or an uncle or aunt.³² It also does not cover the financial interests of a “significant other” or “live-in partner.”

So, for example, if instead of a steering a contract to a company owned by a spouse (which would violate section 208), the official directed the contract to a company owned by a brother or a member of the official’s immediate household, section 208 would not apply. In these situations, the honest services fraud statute may be a useful alternative to a section 208 prosecution. The honest services fraud statute could apply if there was a scheme to steer the contract to a brother, an in-law or some other family member whose financial interests are not covered by section 208.

MISAPPROPRIATION OF CONFIDENTIAL INFORMATION SCHEMES

A third type of honest services fraud case is one where the dominant facts involve a misappropriation of confidential information. It is well established that the misappropriation of confidential infor-

mation, whether it be government information or business information, can constitute a violation of the mail and wire fraud statutes. Even prior to the enactment of the honest services fraud statute, the Supreme Court in *Carpenter* upheld the conviction of a Wall Street Journal reporter who used nonpublic business information to make money trading in the stock market.³³

Many honest services fraud cases involving public officials engaged in bribery or undisclosed financial interest schemes have elements that involve the misuse of nonpublic government information. One honest services fraud case in which misappropriation of government information was at the heart of the case was *United States v. Czubinski*.³⁴

Richard Czubinski was employed by the Internal Revenue Service in the Boston office of the Taxpayers Services Division. In order to carry out his official duties, which included answering taxpayer questions regarding their returns, Czubinski was authorized to have access to the IRS’s Integrated Data Retrieval System. His authorization was limited to answering taxpayer inquiries, but Czubinski browsed the database and conducted searches that were outside the scope of his official duties.

The government indicted Czubinski on nine counts of honest services wire fraud and four counts of computer fraud. A jury convicted Czubinski on all counts. On appeal, the First Circuit reversed Czubinski’s conviction on all counts. With respect to the honest ser-

vices fraud counts, the Court held that the unauthorized browsing of confidential taxpayer information did not, standing alone, deprive the government of his honest services as a federal employee.

The Czubinski decision provides useful guidance as to what would be needed to successfully establish an honest services fraud case involving a scheme to misappropriate confidential government information. The First Circuit acknowledged that the government had established that the defendant engaged in unauthorized searches of taxpayer information using interstate wire transmissions (the database was in Martinsburg, West Virginia). The court, however found that the government did not establish that the defendant had received any tangible benefit from his misuse of his position. The court thus determined that the case “falls outside of the core of honest services fraud precedents”³⁵ in that it did not involve bribery, embezzlement of some other serious breach of public trust. In this regard, the First Circuit took special note of the fact that the defendant’s duties were ministerial (responding to taxpayer requests for information about their own returns) and did not involve a discretionary, decision-making role. Finally, the court said that the government failed to prove the intent to deprive the public of the defendant’s honest services, since it did not establish that Czubinski intended to use the files he browsed for some private purpose.

Thus, to be successful, an honest service fraud prosecution involving a misappropriation of confidential information should show that: there was a disclosure of the confidential information to some private party for private gain; if there was no such outside disclosure, that the government employee used the information for his or her own private purposes; the employee served in a position that involved a discretionary, decision-making role; the breach of public trust was sufficiently serious; and there was a failure to carry out official duties (such as granting exclusive, preferential treatment) that

³⁵ *Id.* at 1077.

³¹ For those employees who are required to file either a public or confidential financial disclosure report, the failure to report a financial interest could violate both civil and criminal statutes.

³² The Standards of Conduct attempt to address this problem on an administrative level by requiring officials to consider recusal from matters that would affect the financial interest of other close relatives or members of their household. See 5 C.F.R. § 2635.502.

³³ See *Carpenter v. U.S.*, 484 U.S. 19 (1987). R. Foster Winans was a reporter for the Wall Street Journal who wrote a daily column called “Heard on the Street” which evaluated stock based on business information that he gathered in the course of his work for the newspaper. The column had an impact, although hard to calculate, on the stocks that it discussed. Winans conspired with Carpenter and others in a scheme to provide advance information that would later appear in the columns and to trade in stock on the basis of this advance information. In addition to various securities laws violations, Winans was convicted of honest services fraud.

³⁴ See *U.S. v. Czubinski*, 106 F.3d 1069 (1st Cir. 1997).

amounted to an intent to deprive the public of the official's honest services.

The misuse of the confidential information would not necessarily have to result in a financial gain to the official or to some private party. It could, for example, be the unauthorized release of sensitive nonpublic government information that significantly benefits the goals of some private organization, particularly where there is some demonstrable harm to the government or the public resulting from the release.

MISUSE OF OFFICIAL POSITION SCHEMES

In one of the cases arising out of the Abramoff investigation, it was established that Abramoff had attempted to secure an appointment for Mark Zachares in the Department of the Interior Office of Insular Affairs.³⁶ The Office of Insular Affairs was responsible for U.S. island territories; Abramoff had lobbying interests in the Commonwealth of the Northern Mariana Islands. Abramoff was unsuccessful in this effort. Ultimately, Mark Zachares found a position on a Congressional staff.

Abramoff and Zachares had a so-called "two-year plan" in which Zachares would work on the Hill advancing Abramoff's interests and gain valuable contacts that would enhance his value as a future lobbyist working for Abramoff. The factual statement in the plea agreement set forth a bribery-like scheme in which Abramoff provided a "stream of things of value" in exchange for a "stream of official action." Zachares pleaded guilty to conspiracy to commit honest services fraud.

This case suggests the outlines of an innovative application of the honest services fraud statute to deal with a scheme that might be described as placing a "mole" in a government position. Such a case could be established even in the absence of a bribery-like exchange of favors for official action if the following elements were established: there was an express or implicit understanding of future private

sector employment between the official and an outside party; and an official engaged in a pattern of exclusive preferential treatment of the outside party, such as providing nonpublic information, arranging for special access, and speaking on behalf of the outside party's interests. This pattern of preferential treatment must be serious enough to amount to a deprivation of the public's right to the official's honest services.

Such a theory of an honest services fraud case would enable law enforcement to address serious misconduct that might not be covered by the conflict of interest law which deals with representation of private parties in matters in which the United States has an interest. That statute, 18 U.S.C. § 205, bars an employee of the executive branch from acting as an agent or attorney in a matter in which the U.S. is a party or has a direct and substantial interest. The statute serves two policy goals.

First, it protects government processes from the improper influence and advantage that a private party might obtain by being represented by a government employee. Second, it preserves the value of loyalty that an employee should have to his or her employer, the government. The statute, however, requires that a person act as an "agent or attorney." Thus it would not apply in a situation where a private party had not engaged the government employee as a representative. For extreme conduct in which the official acted as a "person on the inside" and bestowed preferential treatment that compromised the duty to provide honest services, the honest services fraud statute could apply instead.

FEDERAL PROGRAM FRAUD SCHEMES

Finally, the honest services fraud statute can be used in cases involving federal program fraud. The federal program fraud statute proscribes bribery related to programs that receive federal funds when there is no bribery of a federal public official.³⁷ In a case involving a local gov-

ernment official, the mayor of Calumet City, Illinois, was convicted under both 18 U.S.C. § 666 (federal program fraud) and under the honest services fraud statute.³⁸ The honest services fraud conviction involved a kickback scheme in which a law firm that received "the lion's share" of the city's legal business kicked back thirty percent of the payments it received from the city to the mayor. The concurrent program fraud scheme involved the payment of comp time to city employees who had taken leave time to engage in political activity. In this case, the two counts involved different sets of facts. As required by the program fraud statute, Calumet City received more than \$10,000 annually in federal funds.

THE FUTURE OF HONEST SERVICES FRAUD

The honest services fraud statute continues to be an effective tool for dealing with public corruption and is often viewed as a first-line defense for combating new and unusual fraud schemes until Congress provides a particular legislative response. The statute should be considered as an alternative charge where the facts might not support all the elements of a conflict of interest crime – for instance, bribery or illegal gratuity cases where there is no specific link between benefits and particular official acts, financial conflict cases where the concealed financial interest is that of a family member or other relationship not covered by the conflicts laws, and cases involving extreme disloyalty and violation of the duty of a public official to serve the public interest.✱

36 See Factual Basis for the Plea of Mark Dennis Zachares at 1 (Mar. 14, 2007).

37 See 18 U.S.C. § 666.

38 U.S. v. Genova, 333 F.3d 750 (7th Cir. 2003).



Earl E. Devaney

Earl E. Devaney was nominated by President Clinton on July 1, 1999 to be the seventh Inspector General for the Department of the Interior. Mr. Devaney was confirmed by the full Senate on August 3, 1999. As head of the Office of Inspector General, he is responsible for overseeing the administration of a nation wide, independent program of audits, evaluations, and investigations involving the Department of the Interiors programs and operations.

Since assuming his responsibilities, Mr. Devaney has transformed the Office of Inspector General into an innovative organization dedicated not only to detecting fraud, waste, and mismanagement, but also to assist the Department in identifying and implementing new and better ways of conducting business. Mr. Devaney and his team of senior managers have worked diligently toward developing strong working relationships with senior departmental managers, congressional staff and key congressmen and senators. Armed with a philosophy that blends cooperation with strong oversight and enforcement, the Office of Inspector General for the Department of the Interior has made significant advances under the leadership and vision of Mr. Devaney.

Having graduated from Georgetown University's prestigious Leadership Coaching Program, Mr. Devaney's vision for the Human Resources Committee is to cultivate and advance leadership development for the entire Inspector General community.

James P. O'Sullivan is a senior attorney in the Departmental Ethics Office of the U.S. Department of Justice. From 2005 to 2008, he served as an Associate General Counsel in the Office of Inspector General of the U.S. Department of the Interior where he worked on public integrity investigations.

He was a member of the joint audit team of the Department of Defense and Department of the Interior that received an Award for Excellence from the former PCIE in 2008. Prior to his service at the Department of the Interior, he was the Special Assistant to the Director of the Office of Government Ethics from 2002 to 2005 and was an Associate General Counsel at the Office of Government Ethics from 1992 to 2002.

He is a member of the adjunct faculty of the Washington College of Law of the American University and a graduate of Georgetown University Law Center. Mr. O'Sullivan is admitted to practice in Maryland, the District of Columbia, and New York.

James P. O'Sullivan

