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WHO’S THE BOSS? PROSECUTORIAL INVOLVEMENT IN CORPORATE AMERICA

“We thought, because we had power, we had wisdom.” - Stephen Vincent Benét

“'Tis skill, not strength, that governs a ship.” - Thomas Fuller

P.J. Meitl*

In June 2005, the board of directors at Bristol-Myers Squibb1 signed a deferred prosecution agreement with federal prosecutors, resolving allegations of a fraudulent scheme to inflate earnings.2 The accord between the two parties laid out extensively Bristol-Myers’ responsibilities and duties that were compulsory in order for the company to avoid further criminal sanctions. Among other things, federal prosecutors required the company to replace the chief financial officer, the former controller, and the former president of one of the major businesses of the Company, establish two new executive positions relating to compliance, and split the roles of chairman of the board and chief executive between two people.3 The Company was required to change the budget process, devote additional resources and money to controls, retain an outside independent monitor approved by the U.S. Attorney, endow a chair at Seton Hall University dedicated to business ethics, and make payments of over $300 million to aggrieved shareholders.4

These changes went to the very heart of corporate governance and the traditional role of the board of directors and the decisions traditionally made by it and the company’s shareholders. Prosecutors stated that one of their goals was to achieve improved corporate governance and renewed market confidence.

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2. The Bristol-Myers deferred prosecution agreement requires that the agreement be posted prominently on the Bristol-Myers website. The agreement is posted on the Bristol-Myers.com homepage and is available in .pdf format at http://www.Bristol-Myers.com/static/pdf/dpa.pdf [hereinafter Bristol-Myers Agreement].

3. Id. at 1-3.

4. Id. at 2-6. (The $300 million sum, when combined with other penalties, amounted to approximately $839 million in total restitution payments.).
without destroying a corporation and losing American jobs in the process. U.S. Attorney Chris Christie, the lead prosecutor in the case, went even further in stating the prosecutor’s role in managing the company by arguing: “[t]his company is now a partner of mine.” What makes the agreement all the more remarkable is that the U.S. Attorney’s Office for New Jersey, the prosecuting agency who wrote the terms of the agreement, had never before executed a deferred prosecution agreement.

Prosecutors have always possessed unique and substantial power. In recent years, however, this power has expanded in regard to corporate governance. Prosecutors are not only increasingly investigating and indicting corporations; they are also mandating changes in business practices, governance, and compliance. Most notably, this power is inherent in the deferred prosecution agreements and non-prosecution agreements, which are growing in popularity and prevalence. As prosecutors decide what charges to bring and what punishment to seek in a corporate criminal case, they now believe the chips on the bargaining table have grown in variety. Prosecutors can look at long-held business practices, specific personnel, management, spending, distributions, and compliance programs as tools to use in seeking a just conclusion to a corporate criminal wrongdoing. Because these agreements often last several years, prosecutors have ongoing and direct involvement with the corporation.

In conjunction with the expanded power, are new questions, which up until this point, have not been discussed in the literature. Most directly, we must question the legitimacy of prosecutive discretion in corporate governance matters. Corporate governance by its nature is a forward-looking endeavor designed to safeguard and manage the corporation. Prosecutions, on the other hand, are backward-looking as they assign liability or blame for past events and thus, there is some question whether this expanded power is proper in light of the heritage of both prosecutors and corporate America. At the same time, considering the embedded nature prosecutors seem to now have in the business


7. Christie & Hanna, supra note 5, at 1049.


9. For example, the Bristol-Myers deferred prosecution agreement will be effective for two years, see Bristol-Myers Agreement, supra note 2, at 1; the KPMG deferred prosecution agreement had an effective period of one year with the possibility of extension for eighteen months, KPMG Deferred Prosecution Agreement at 13-14, available at http://www.usdoj.gov/usao/nys/pressreleases/August05/kpmgdpagmt.pdf [hereinafter KPMG Agreement].
affairs of corporate America, we should question whether prosecutors possess enough business savvy, education, and experience to properly influence corporate governance in such a direct way.

This Article explores the role and proficiency of prosecutors in corporate governance matters in greater depth. It starts, in Part I, by providing background on the traditional role of prosecutors. It focuses on the powers prosecutors have and how those powers have expanded over the years. Part I discusses the conventional corporate governance actors and their responsibilities and how prosecutors play into this mix. Part II discusses some of the recent developments in the corporate criminal context and how they have affected prosecutorial power. The recent scandals and government response have given prosecutors greater power and new tools in fighting corporate crime, while also allowing for greater involvement in corporate governance affairs. In particular, this section focuses on deferred prosecution agreements and non-prosecution agreements as the primary mechanisms, in regards to corporate governance matters, at a prosecutor’s disposal. Lastly, in Part III, the Article analyzes the validity of prosecutorial involvement both on the theoretical level and in regard to their skill and competence relating to corporate governance matters. It concludes by arguing that not only do prosecutors possess the requisite education and experience but they have properly filled a void left by regulating agencies, boards of directors, and the courts.

I. BACKGROUND ON PROSECUTORS AND CORPORATE GOVERNANCE

A. Traditional Role of the Prosecutor

Prosecutors have historically held significant control and influence within the criminal justice system.10 As one author has stated, “the individual prosecutor has broad powers and discretion, and operates as a free agent, making myriad daily judgments and decisions, hopefully in a lawful, ethical, and honorable fashion.”11 Although there has been significant academic analysis of the various functions that prosecutors play in the criminal justice system,12 the U.S. Supreme Court may have put it best when suggesting that a prosecutor

10. Young, 481 U.S. at 813.
is the representative . . . of a sovereign whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.13

Among all of the powers that a prosecutor possesses, the charging decision and ability to negotiate sentences are the most far-reaching and influential tools in their arsenal.14 Prosecutors are given the power to decide whether and how to charge a defendant. A prosecutor can decide whether to offer a plea to a lesser charge and then has the ability to set the terms of the plea, and she can judge whether the conditions set forth in the plea have been met by the defendant.15 In many jurisdictions, sentencing guidelines pre-determine the power and influence that a judge can have on a sentence and thus, the prosecutor’s influence is increased.16 A defendant clearly has the option to take his case to trial and attempt to get a more favorable verdict or sentence (as compared to what the prosecutor is offering), but for a variety of reasons, most defendants choose to take the deal.17 In fact, the percentage of those who agree to a plea bargain hovers at around 90% of all criminal cases.18 Given their unique positioning, prosecutors essentially control much of the criminal justice process.19

Although there have been a number of critics of prosecutorial control,20 the Supreme Court has consistently upheld the broad exercise of prosecutorial

16. This impact has been mollified by the Supreme Court’s January 2005 ruling in United States v. Booker, which found that the federal sentencing guidelines were advisory rather than mandatory. 543 U.S. 220 (2005). Many federal judges, however, have continued to treat the guidelines as essentially mandatory. See Paul G. Cassell, Statement Before the United States Sentencing Commission Concerning the Effect of United States v. Booker on the Federal Sentencing Guidelines at 15 (February 15, 2005), available at http://www.uscc.gov/hearings/02_15_05/cassell_testimony.pdf. (Judge Cassell stated that the Guidelines create consistent sentencing as they “are the only standard available to guide all the judges around the country today.”).
19. This power is strengthened in the corporate criminal context. For further discussion see Part IB of this Article.
“Armed with expansive powers and wide-ranging discretion,” a prosecutor will have the ability use a variety of means and methods to achieve their ultimate goal – to “seek justice.” This power is nowhere more apparent than in the context of corporate criminal investigations and prosecutions.

B. Prosecutors in the Corporate Criminal Context

By common practice and by statute in most states, management of the regular business affairs of the corporation is vested in the board of directors, the members of which are elected by the shareholders. The officers, who are selected by the board, carry out the management of the company. Yet in recent years, prosecutors for a number of reasons, as discussed further in Part II, have become increasingly interested in corporate governance matters and have inserted themselves as active participants in the decision-making process. The framework that a prosecutor brings to this junction is crucial to understanding their effectiveness in promoting goals of justice and good corporate governance.

In the corporate criminal context, a prosecutor retains many of the goals and objectives that he or she might use when prosecuting a street crime. Prosecutors are instructed to continue to weigh all relevant factors, including “federal law enforcement priorities,” the “nature and seriousness of the offense,” the “deterrent effect of prosecution,” the “person's culpability in connection with the offense,” and the “probable sentence or other consequences.” As discussed below, this list has been supplemented by the Holder and Thompson Memos which list a set of specific criteria that prosecutors should consider when deciding whether or not to charge a corporation.

Corporate criminal cases are different, however, in that they tend to be higher profile matters, whose crimes affect a larger number of individuals and...
receive more press coverage as a result.\textsuperscript{27} Given the increased attention, prosecutors often view corporate crimes as a stronger vehicle for signaling prosecutorial priorities and action. This tends to drive the prosecutor to increase the weight he or she would normally place on the deterrent factor in charging and seeking sentences for corporate crimes.\textsuperscript{28} Such an aspect should not be lost as one examines a prosecutor’s mindset as he or she seeks a final result. For example, manuals on prosecuting in the limelight have suggested that in a high-profile case, “the added media attention can visit incredible pressure upon the prosecutor. At the outset, the prosecutor should be tough in making the charging decision – certainly a safe and generally popular move.”\textsuperscript{29} Tough charging mindsets often lead to more aggressive and stubborn approaches at the negotiating table.

Additionally, the Department of Justice, the employer and ultimate authority for all federal prosecutors, has set forth requirements that all prosecutors must follow in charging a crime and in seeking a given sentence. In September 2003, Attorney General John Ashcroft issued a policy directive to all DOJ attorneys that required federal prosecutors, except in limited, narrow circumstances to bring charges for “the most serious, readily provable offense that can be supported by the facts of the case.”\textsuperscript{30} The directive also requires prosecutors to seek the most severe sentence allowed by the law unless there are overriding considerations.\textsuperscript{31}

C. Education and Training of Prosecutors in Corporate Governance Matters

Given the unique personality traits and inherent societal and institutional pressures that prosecutors bring to the negotiating table in the corporate criminal context, it is all the more important that they have received the proper education and training before bargaining for and demanding prosecutorial oversight of

\begin{footnotesize}
\begin{enumerate}
\item[28.] Jennifer S. Recine, Note, Examination of the White Collar Crime Penalty Enhancements in the Sarbanes-Oxley Act, 39 AM. CRIM. L. REV. 1535, 1563 (2002) (stating “[p]lainly, the more white-collar criminals who are convicted and sentenced for the crimes they commit, the greater the deterrent effect produced by the legislation”).
\end{enumerate}
\end{footnotesize}
corporate governance functions. As Thomas Carlyle once said “nothing is more terrible than activity without insight.”

Training of prosecutors varies between offices and jurisdictions. Assistant United States Attorneys (AUSAs) typically receive a more formalized and rigorous training regimen, under the direction of more seasoned attorneys and law enforcement officials. For example, new AUSAs in the District of Columbia office participate in a three week basic training program that covers a variety of topics, from “advocacy skills to seminars on administrative and ethical duties.” The training program also provides new AUSAs with a trial manual that “covers issues involving both substantive law and administrative procedures.”

In addition, those prosecutors assigned to work on complex cases often receive additional training from the Justice Department which provides monthly “‘advanced white collar’ training for senior AUSAs and DOJ trial attorneys.” Prosecutors are also encouraged to take advantage of courses that are offered “at the Justice Department’s training facility – the National Advocacy Center – located on the grounds of the University of South Carolina.”

Although state and local prosecutors don’t have the wealth of resources available to them to which federal prosecutors are privy, the National College of District Attorneys was developed to train new and continuing prosecutors in fields applicable to their practice. Created in 1970, the college provides courses it offers or coordinates designed to introduce “prosecutors to innovations and developments in the classroom so that they are not confronted with them for the first time in the courtroom.” The College conducts approximately twenty to twenty-five national courses a year at various locations around the United States. Typically lasting four to five days, they focus on a variety of topics such as trial advocacy, forensic evidence, and white collar crime.

II. CORPORATE TURMOIL RESULTS IN INCREASED PROSECUTORIAL POWER

Starting in the fall of 2001 with the scandal and debacle at Enron, increased focus by law enforcement, politicians, and the news media have put a heavy spotlight on corporate criminal matters. In the words of one expert, “white-collar
crime is in vogue.”40 As a consequence, new government entities have been created, designed solely to root out corporate crime; prosecutors have been given a revised set of guidelines to better direct their efforts in the corporate crime arena; and new tools have been introduced and sanctioned by the Department of Justice to aid corporate criminal prosecutions. These changes have not only allowed but have pushed prosecutors to take a more active role in corporate governance matters.

A. A Wave of Scandals Causes Significant Government Reaction

In early January of 2000, the Dow Jones Industrial Average peaked at 11,723.41 By October of 2002, only twenty-two months later, the Dow bottomed out at 7,286, a 38% percent decline in value. Likewise, the National Association of Securities Dealers Automated Quotations (NASDAQ) went from a peak of over 5000 in March of 2000 to 1335 in January 2003, an astronomical 74% drop in value.42 Although a number of factors played a role in the “bursting of the bubble,” including the horrific events of September 11, 2001, a slew of high-profile corporate frauds and business failures were a significant factor in the slide. Four of the six largest bankruptcies in U.S. history occurred in 2001 and 2002.43 The collapses of Enron,44 WorldCom,45 Adelphia,46 and Global-
Crossing\textsuperscript{47} sent shockwaves through the global financial markets, and as will be discussed infra, led to a revolution in corporate governance regulation and interest by law enforcement officials. Each bankruptcy was the result of accounting frauds and arguably lax oversight by the board of directors, as evidence emerged that “top executives were not merely pushing the envelope on generally-accepted accounting practices, but instead engaged in numerous fraudulent practices. Those practices often were enabled by the corporate accounting firms and attorneys and blessed by internal audit committees.”\textsuperscript{48}

In 2002 and 2003, lawmakers and regulators were largely in scramble mode as they attempted to react to the wave of corporate scandals that had rocked the markets. Over a million people had lost their jobs at once thriving companies,\textsuperscript{49} millions had seen their pensions or retirement funds depleted or wiped out, and even more fled the investment markets altogether as they had either lost too much money or lost confidence in the markets themselves.

Because of these horrific effects, lawmakers acted muscularly, passing legislation and regulatory action that gave the government significantly increased access and control over corporate action. Although a more detailed discussion of these actions can be found elsewhere in the literature,\textsuperscript{50} the changes can be organized into three main categories. First, new agencies and government entities, such as the Corporate Fraud Task Force,\textsuperscript{51} were created in an effort to more closely monitor compliance and provide resources for greater investigation and accountability. Second, new laws, most notably, the Sarbanes-Oxley Act of

\footnotesize
\textsuperscript{47} Global-Crossing executives executed risky and questionable accounting methods and business practices in order to inflate its corporate earnings and trick analysts and investors. The company filed for bankruptcy on January 28, 2002, sending its stock tumbling from a high of over $64 to below $1 a share. Timothy L. O’Brien, \textit{A New Legal Chapter for a 90’s Flameout}, N.Y. TIMES, Aug. 15, 2004, at 1.

\textsuperscript{48} Recine, \textit{supra} note 28, at 1538.

\textsuperscript{49} Almost 1.5 million jobs were lost in 2001 and the first half of 2002. Bureau of Labor Statistics, Employment Situation Summary: Seasonally Adjusted Employment Level, Civilian Labor Force (September 2002).


\textsuperscript{51} In July 2002, the Corporate Fraud Task Force was created through an Executive Order and was charged with “cleaning up corruption in the board room, restoring investor confidence in our financial markets, and sending a loud and clear message that corporate wrongdoing will not be tolerated.” Second Year Report to the President Corporate Fraud Task Force (July 20, 2004), \textit{available at} http://www.usdoj.gov/dag/cftf/2nd_yr_fraud_report.pdf. In the Task Force’s first year report to the President, it reported that it had been involved “in well over 320 criminal investigations” and that “criminal charges were pending against 354 defendants,” and “250 individuals have been convicted or pled guilty to corporate fraud charges.” \textit{Id}. 


2002,\textsuperscript{52} provided a wide array of strengthened standards for corporations to follow.\textsuperscript{53} Third, prosecutors were given new guidelines\textsuperscript{54} for how to best pursue corporate criminal liability, including tools that would allow prosecutors to play crucial roles in the ongoing corporate governance scheme of legal entities. Perhaps most important for this Article’s focus was a Justice Department directive that explicitly encouraged and allowed federal prosecutors to begin settling corporate crime cases with pretrial diversions often in the form of deferred prosecutions and non-prosecution agreements, as discussed in II.B. infra.\textsuperscript{55} In effect, these changes codified and articulated a new form of prosecutorial power by creating an atmosphere that demanded greater government oversight of corporate governance and conduct and allowed prosecutors to assert greater influence over the everyday affairs of corporate America.

B. New Tools Emerge for Prosecutors While Old Ones Gain Power

Prosecutors have a broad array of apparatus at their disposal in seeking how to best adjudicate a corporate criminal case. They can either choose not to prosecute, seek an indictment, go after key individuals, seek a settlement, or use pretrial diversions tactics such as deferred prosecution agreements and non-prosecution agreements. All of these carry considerable consequences, not only for the company but for a variety of other actors involved or tangentially related to the company.

Justice Department guidelines issued in 2004\textsuperscript{56} gave explicit authority to prosecutors to pursue other avenues of punishment in an effort to seek justice where a corporate crime has occurred. These guidelines pointed prosecutors in a new direction in which they would be given the ability to more directly engage


\textsuperscript{53} For example, in Sarbanes-Oxley, Congress quadrupled the statutory maximum penalties for wire and mail fraud from five to twenty years. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 903, 116 Stat. 805.

\textsuperscript{54} Known as the Holder and Thompson Memos, these guidelines came in the form of policy memoranda from the Deputy Attorney General (Eric Holder in 1999 and Larry Thompson in 2004). The memos laid out a set of criteria to be used when deciding how to best prosecute corporate crimes. For an excellent discussion of the Memo and its effects, see Christopher Wray & Robert Hur, Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice, 43 AM. CRIM L. REV. 1095 (2006).

\textsuperscript{55} As the Thompson Memo stated “granting a corporation immunity, or amnesty or pretrial diversion may be considered in the course of the government’s investigation.” Memorandum from Larry D. Thompson, Deputy Attorney General, on Principles of Federal Prosecution of Business Organizations 1 (Jan. 20, 2003), http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm [hereinafter Thompson Memo].

\textsuperscript{56} See Thompson Memo, supra notes 54-55 and corresponding text.
in corporate governance matters. The alternatives, such as pretrial diversions, were designed to be the gray area between the severe black and white of indictments and no prosecutorial involvement.

1. Deferred Prosecutions

A deferred prosecution agreement (DPA) is a signed agreement between the government and a company under investigation that formally sets forth terms that the corporation must abide by for a set period of time or face formal indictment and prosecution. Such an agreement permits a corporation to civilly resolve a criminal investigation by agreeing to terms such as restitution, fines, additional auditing measures, termination of responsible individuals, and probation. Akin to corporate probation, the agreements usually require corporations to cooperate completely with the government in its ongoing investigation, including investigations of the employees of the company. A DPA often also requires the creation of or modification of internal compliance programs which may include the use of independent monitors. Restitution, fines, or penalties often accompany a DPA, almost always requiring the company to forfeit any ill-gotten gains to those aggrieved or to a special fund. If the corporation breaches the agreement in any way, prosecutors have the ability to proceed with a full prosecution. Such an event would likely spell doom for the corporation, as the government would now have all of the company’s previous admissions, cooperation, and other evidence that was procured during the term of the DPA.

A deferred prosecution agreement is a rather new exercise of adjudication in the context of corporate criminal wrongdoing. Although they have long been used in juvenile cases or in drug offenses, it seems unlikely that, at least from the outset, they were ever intended for major corporate crime cases. As the U.S. Attorney’s Manual makes clear – a major objective of pretrial diversions is to “save prosecutive and judicial resources for concentration on major cases.” Most corporate criminal cases would qualify as “major cases” and yet deferred prosecution agreements seem to be in vogue with the Justice Department and prosecutors.

57. This might indicate that the Justice Department realized how draconian a prosecution of a corporation can be. In fact, the Justice Department’s experience with Arthur Andersen and its eventual demise and the surrounding collateral consequences may have been the motivating factor behind the change. On June 15, 2002, Andersen was convicted of obstruction of justice. The firm was out of business by August 2002. The Thompson Memo, which embodied the change, was issued in January 2003. See Elizabeth Ainslie, Indicting Corporations Revisited: Lessons of the Arthur Anderson Prosecution, 43 AM. CRIM. L. REV. 107, 107-09 (2006).


59. See note 25, at § 9-22.010.
The earliest corporate criminal deferred prosecution agreement seems to have taken place in 1994 with Prudential Securities. Accused of fraud in connection with the sale of oil and gas interests, the government and the company agreed to a deferred prosecution for a term of three years in which Prudential would cough up over $330 million in restitution and seat an independent director on the board that was agreeable to prosecutors. The government would have oversight responsibility of the company’s operations during this time. The prosecutors were largely acting in uncharted waters, as no guidelines existed at the time to guide their decisions. They were “left to their own discretion, with few if any applicable standards upon which to rely.”

After the Thompson Memo – which contained new guidelines for prosecuting corporations – was released, thereby giving Main Justice’s approval of deferred prosecution agreements and explicit instructions on how to approach such an agreement, prosecutors started using pretrial diversions in significant numbers. Between 2003 and 2005, the government engaged in fourteen deferred prosecution agreements with major corporations while it had only entered into three in the preceding ten years (including the Prudential Securities Case described supra). Prosecutors recognized the incredible power of this new tool, stating “these agreements, with their broad range of reform tools, permit remedies beyond the scope of what a court could achieve after a criminal conviction.”

Prosecutors believe that DPAs are appropriate mechanisms for sentencing in that they provide “general and specific deterrence, full disclosure to the investing public, carefully targeted reform of a corrupted corporate culture, and restitution to victim shareholders, while minimizing collateral consequences.” As most DPAs require continued monitoring and changes in business practice, they go to the heart of corporate governance matters, normally reserved for the Board of Directors. This might best be expressed in terms of a number of examples. In a

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62. Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements, in CORPORATE CRIME REPORTER, December 28, 2005, available at http://www.corporatecrimereporter.com/deferreddreport.htm [hereinafter Crime Without Conviction]. The fourteen corporations that entered into DPAs in the post-Thompson Memo era were (in chronological order): Banco Popular De Puerto Rico (January 2003); PNC Financial (January 2003); BDO Seidman (2003); Canadian Imperial Bank of Commerce (December 2003); New York Racing Association (December 2003); MCI (March 2004); Computer Associates (September 2004); Amsouth Bancorp (October 2004); American International Group (November 2004); America On-Line (December 2004); InVision Technologies (December 2004); Monsanto (January 2005); Bristol Myers Squibb (June 2005); KPMG (August 2005). The three that entered into DPAs prior to the Thompson Memo were (in chronological order): Prudential Securities (October 1994); Sears (April 2001); Arthur Andersen (April 1996). Id.

63. Christie & Hanna, supra note 5, at 1043.

64. Id. at 1043-44.
DPA with Computer Associates International, a software producer, prosecutors required the company to add an independent board member, agree to a set of corporate governance reforms, and hire a monitor to assess the company’s compliance.  

Similarly, in a DPA with AOL in December 2004, the internet giant agreed to install a set of internal controls, work with an independent monitor, and pay $210 million in fines and penalties. More recently, KPMG, one of the largest accounting firms in the world, agreed to “establish a compliance and ethics program to help prevent . . . wrongdoing in the future” and to cease its private client compensation and benefits practices in connection with its deferred prosecution agreement. The Bristol-Myers DPA, discussed supra, might be one of the most obvious examples of prosecutorial willingness to get involved in the internal affairs of a corporation. It gave prosecutors the ability to change the management of the corporation, require new seats on the board, and gave it the leeway to change basic internal workings of the corporation. DPAs then can be seen as an invitation for prosecutors to become an active participant in the corporate governance of a corporation.

How then does a federal prosecutor, a U.S. Attorney’s office, or the Department of Justice decide when to use a DPA and if they do, how do they decide what measures to require in order to forestall further prosecution? Little research or documentation has taken place on this topic but a recent article by Christopher Christie, the U.S. Attorney of New Jersey, who had authority over the Bristol-Myers investigation and prosecution sheds light on the decision-making process. In the midst of the investigation, his office engaged in “significant internal debate and disagreement” over the proper punishment for Bristol-Myers even to the point where meetings were “loud and emotional.” Eventually, the deferred prosecution agreement was believed to be the best course of action despite the acknowledgement that “federal prosecutors must tread warily in the area of corporate governance.” The corporate governance changes that Christie required were informed by meetings with the board and the CEO which at times proved contentious. Christie and his staff continued to travel to regularly scheduled board meetings and held quarterly meetings with the independent monitor, Bristol-Myers’ CEO, its non-executive chairman, and

68. KPMG Agreement, supra note 9, at 5-6.
69. Christie & Hanna, supra note 5, at 1049.
70. Id. at 1049.
71. Id. at 1051.
72. Id. at 1053-54.
general counsel.\textsuperscript{73} In addition, prosecutors were provided with quarterly progress reports, ranging between 400-500 pages prepared by the independent monitor.\textsuperscript{74}

2. Non-Prosecutions

Non-prosecution agreements are very similar in scope and terms to a deferred prosecution agreement. The difference lies in the decision of the government to not formally file charges against the corporation, as is the case with a deferred prosecution agreement. Non-prosecution agreements do allow prosecutors to later charge a corporation with wrongdoing if the corporation fails to live up to its responsibilities, as is the case with DPAs. Restitution, the requirement for full cooperation, and the implementation of corporate governance measures and remedial mechanisms are all used in non-prosecution agreements, making the effects and ramifications in terms of prosecutorial power almost identical to that in DPAs.

As with deferred prosecution agreements, there has been a bevy of non-prosecution agreements in recent years. Since the issuance of the Thompson Memo in 2003 and up until the end of 2005, there were nine different non-prosecution agreements entered into by the government and major corporations.\textsuperscript{75} Seven of those were in 2005 itself.\textsuperscript{76} In the entire eleven years preceding the Thompson Memo, there were only eight non-prosecution agreements with major corporations.\textsuperscript{77}

Non-prosecution agreements also allow prosecutors to become active participants in corporate governance matters. For example, in June 2004, prosecutors entered into a non-prosecution agreement with Symbol Technologies, a producer of bar code scanning technology with over 5000 employees.\textsuperscript{78} The investigation by law enforcement authority uncovered massive fraud where reported revenue was overstated by $230 million.\textsuperscript{79} The Agreement required the company to replace the president and chief executive officer, and install a “new Chief Financial Officer, new Senior Vice Presidents of Finance, Sales, Operations, Global Products and Customer Service, a new General

\textsuperscript{73} Id. at 1054.
\textsuperscript{74} Id. at 1055.
\textsuperscript{75} Crime Without Conviction, supra note 61. They were (in chronological order): Merrill Lynch (September 2003); Symbol Technologies (June 2004); American Electric Power (January 2005); Micrus Corporation (March 2005); Adelphia Communications (May 2005); Shell Oil (June 2005); Hilfiger (August 2005); MCI (September 2005); Bank of New York (November 2005). \textit{Id.}
\textsuperscript{76} Id.
\textsuperscript{77} Id. They were (in chronological order): Salomon Brothers (May 1992); Sequa (June 1993); Aetna (August 1993); John Hancock Mutual Life (March 1994); Lazard Freres (October 1995); Merrill Lynch (October 1995); Coopers & Lybrand (September 1996); Aurora Foods (January 2001). \textit{Id.}
\textsuperscript{79} Id.
Counsel and Secretary and a new Chief Information Officer. Symbol was also required to dismiss its old auditing firm, restructure its board, divide the positions of CEO and Chairman of the board between two different individuals, appoint an independent examiner, and establish an ongoing training and education program for its directors, officers and employees. The agreement has a duration of three years, ending in June 2007.

Many observers have lauded deferred prosecution agreements and non-prosecution agreements as effective criminal law enforcement tools. Advantages have included greater cooperation by corporations, resulting in declined use of valuable prosecutorial resources, voluntary self-reporting by companies, even before investigations begin, and the avoidance of the significant collateral consequences that result from an indictment or successful prosecution of a major corporation. On the other hand, little attention has been paid to the consequences of allowing prosecutors to play such a substantial role in the corporate governance matters.

3. Other Prosecutorial Powers

Beyond the rather new mechanisms, such as DPAs and non-prosecution agreements, some of the more traditional tools in a prosecutor’s arsenal have amplified power in the corporate criminal context and added increased ability to directly engage in corporate governance matters. The most notable example is the simplest form of prosecutorial decision-making – the choice of whether or not to indict. For many public companies, particularly those in regulated industries, an indictment often serves as a death knell. Many regulating agencies refuse to work with or award contracts to companies under an indictment. As well, the sheer reputational harm associated with an indictment will often drive customers, vendors, and shareholders away from the company. In effect, the tipping point does not occur at trial by the judge or by the jury but when the prosecutor chooses whether or not to file charges against the entity. For example, after the indictment of Arthur Andersen, one of the five largest and most highly regarded accounting firms in the country on obstruction of justice charges, the firm essentially had to shut down, putting 28,000 people out of work. Although the corporation was ultimately convicted, a unanimous United States Supreme Court reversed and remanded the conviction, finding fatal flaws.
in the jury instructions on which the conviction was based.\footnote{Arthur Andersen LLP v. United States, 544 U.S. 696, 708 (2005).} This reversal came as little consolation to the firm, as it was largely non-existent, highlighting the essential nature of the indictment decision and prosecutorial power in the system. Prosecutors realize that this power lies solely in their hands. As top DOJ officials have noted, a corporate prosecution provides the government an “opportunity for deterrence on a massive scale.”\footnote{Thompson Memo, supra note 50, at I.B.} Although the decision of whether to indict does not insert the prosecutor into the ongoing affairs of the corporation, it certainly has a clear impact on the business, industry, and in many cases, global markets. Thus, the question of a prosecutor’s skill and competence in business affairs is again in question as an unchecked decision-maker wielding incredible power over the marketplace.

In conjunction with the choice of whether or not to indict is the corollary question of who to indict. Many prosecutors have chosen to prosecute high ranking individuals in firms under investigation rather than seek an indictment of the whole corporation. Notable examples include Bernie Ebbers,\footnote{Ebbers was eventually sentenced to 25 years. Dionne Searcy et. al, Ebbers Is Sentenced to 25 Years for $11 Billion WorldCom Fraud, WALL ST. J., July 14, 2005, at A1.} the former CEO of WorldCom and Ken Lay, the founder of Enron.\footnote{Lay and former Enron CEO Jeffrey Skilling were convicted of fraud and conspiracy. Alexei Barrionuevo et al., The Enron Verdict: The Overview; 2 Enron Chiefs are Convicted in Fraud and Conspiracy Trial, N.Y. TIMES, May 26, 2006, at A1.} This tactic can avoid some of the collateral consequences of a full corporate indictment, although as Enron has shown, when the fraud and criminal activity is rampant throughout the company, the indictment of individuals does not guarantee the continued vitality of the corporation. The crux of the decision will depend on many factors but certainly one crucial concern is how the choice of prosecution will affect shareholders, employees, and the market. If prosecutors lack the proper education or fail to possess enough business savvy to make such a decision, then we may question the suitability of their power in this arena.

Certain prosecutors have also sought to use their power to affect not just one company’s corporate governance but to change an entire industry. Eliot Spitzer, the former attorney general for New York and now that State’s governor, is the most striking and famous example of a prosecutor wielding his power in the markets to effect significant industry change. In fact, he was so involved in corporate matters that the San Francisco Chronicle named Spitzer their 2003 “Businessperson of the Year.”\footnote{Pia Sarkar, Businessperson of the Year- Eliot Spitzer N.Y.Attorney General Ferrets Out Funds’ Abuses, SAN FRANCISCO CHRONICLE, December 31, 2003, at B-1.} Spitzer has forced significant change in the mutual fund industry, the banking industry, the insurance and re-insurance industries, and in the securities industry. Spitzer’s modus operandi typically involves initiating an investigation of fraudulent practices, requesting extensive discovery while using the media to rail against what he sees as corrupt business
policies. Typically, his investigations result in settlements with those under investigation which produce enormous pay-outs to aggrieved parties. For the most part, Spitzer has avoided formal indictments in a similar manner to prosecutors who use DPAs and non-prosecution agreements. The difference lies in Spitzer’s veiled threats to go after other similarly situated or managed companies who refuse to alter their business practices or policies in a way that the previous settlement envisioned. Most corporations are unwilling to take the chance of incurring Spitzer’s wrath and thus reform their policies to appease the State Attorney General. Again, this enormous power involves a legally educated attorney inserting himself and his office into the corporate affairs of a company and in this case, in the whole structuring of an industry.

III. ANALYSIS

Given the scandals, enhanced tools, and institutional pressures of the past decade, the role of the federal prosecutor has evolved, particularly in regard to corporate crimes. The increased involvement in business affairs and governance matters raises two essential questions. First, should a prosecutor be involved in these matters at all, regardless of whether their power allows them to be so? Second, if we find that it is appropriate for prosecutors to be involved, are they adequately trained and prepared for such a task given their education, experience, and resources?

Although the weight of this article has pointed out what problems may arise from prosecutorial involvement in corporate governance matters, it seems that a closer analysis reveals that their increased involvement, although new and unique, is quite appropriate. Prosecutors are often the last line of defense against offensive corporate governance. Once boards fail to fulfill their roles and other regulatory agencies fall short in their oversight responsibilities, prosecutors are left in the unenviable position of wading into business matters and the corporate governance of American companies. Although such involvement represents a significant departure from the ideals of proper business management, prosecutors have been forced to take on this burden, and for the most part, they have taken the most minimal measures needed to satisfy their goals. As well, an examination of prosecutorial involvement reveals that prosecutors are in fact very qualified to make the judgments and decisions typically involved in DPAs and non-prosecution agreements. The combination of their education and experience make them very suitable for such decisions. They are not alone in this endeavor and are advised to utilize outside experts as they make their decisions.

Finally, most of the corporate governance decisions they are required to make do not require extensive business savvy.

A. The Appropriateness of Prosecutorial Involvement

One of the essential foundations of American corporate law states that “the business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors.”91 These directors, elected by the shareholders, are given the duty to act in the best interest of the corporation. Thus, corporate governance matters are placed squarely and explicitly, through legislation, in the hands of those who direct the corporation. Prosecutorial involvement in such matters then seems suspect and at odds with more than 200 years of American statutory and common law. Prosecutors have the authority, under the same statutory and common law, to investigate and prosecute corporate criminal activity.92 But is it appropriate for the prosecutor to displace the board of directors through the use of DPAs and non-prosecution agreements? Three main arguments emerge for the legitimacy of prosecutorial involvement in corporate affairs. First, their interest and participation only takes place after a total failure by the board. Prosecutors, therefore, are not displacing the power of the board, merely filling in a void. Second, prosecutorial oversight tends to be limited and less involved than we might otherwise think. Lastly, prosecutorial involvement is not only appropriate but preferable to the alternative of full criminal prosecution. It’s an effective tool for cases that require action while minimizing collateral consequences.

1. Filling a Void

Prosecutorial involvement in the affairs of a corporation only takes place in the most severe circumstances and after the board has failed to take reasonable actions to prevent criminal wrongdoing. As previously discussed, although the uses of pretrial alternatives are on the rise, their use is still rather infrequent, considering the number of business entities in the United States. Up until the start of 2006, there have only been thirty-four pre-trial diversions with major U.S. corporations.93 Prosecutorial involvement in corporate governance matters, while significant, is not by any means an epidemic. The vast majority of U.S. corporations and business entities, totaling more than twenty-two million94 rarely interact with prosecutors and even fewer must deal with prosecutorial

91. 8 Del. C. § 141.
92. See Ainslie, supra note 57, at 124-142 (identifying and explaining the law regarding corporate criminal liability in all fifty states and U.S. territories).
93. See Part II. B. of this Article.
94. Dep’t of State, Small Business and the Corporation, http://usinfo.state.gov/products/pubs/oecon/chap4.htm (last visited Apr. 23, 2006) (noting in 1995, there were 16.4 million non-farm, sole proprietorships, 1.6 million partnerships, and 4.5 million corporations in the United States -- a total of 22.5 million independent enterprises).
involvement in the affairs of their company. Those that do, however, must only face such a reality, after severe criminal wrongdoing and a total failure by the board of directors to fulfill their duties. For example, prosecutors only sought to enter into a DPA with Banco Popular de Puerto Rico, a large international bank, after the bank admitted to a failure to disclose suspicious deposit patterns that had allowed a drug dealer to launder over $20 million. The failure of the board to institute and maintain a proper compliance program was a driving factor in the decision of prosecutors to become more involved. Likewise, prosecutors investigated and sought the use of a pre-trial diversion with PNC Financial Services group after discovering that “the financial company engaged in a scheme to use accounting vehicles known as ‘special-purpose entities’ to offload more than $750 million in problem loans and investments from PNC’s books.”

This strategy was either tacitly approved, or ignored by the board, raising prosecutors’ distrust and belief that there was a significant void in corporate leadership at PNC. For the majority of companies, corporate governance matters will be left solely to the discretion of the board of directors, in adherence to the tradition and history of American corporate law. Only when criminal violations are severe and the board has failed to act, will a prosecutor step into the void and flex his new-found power.

A significant criticism of prosecutorial involvement in corporate governance matters is based on the trepidation that prosecutors will not only fill the void but will abuse the power, requiring wholesale changes to corporate boards or needlessly forcing process changes that were not implicated in the criminal wrongdoing. In effect, critics fear that prosecutors will become rogue, all-powerful super board members without any checks on their authority. These worries, however, seem largely unfounded. As described earlier, pre-trial diversions are only entered into on occasional situations. Their implementation typically requires approval by the United States Attorney, thus ensuring that the decision has been vetted through several layers of experienced prosecutors. As two prosecutors have described, corporations who feel mistreated by prosecutors can appeal their decision to higher ups:

96. Id.
97. Id.
98. In the Bristol-Myers DPA, U.S. Attorney Chris Christie was intimately involved with the negotiations and final deal. He has stated that “if any resolution of the investigation includes a significant commitment by the board of directors to the requirements of the deferred prosecution agreement, the U.S. Attorney may want to meet personally with the board to gauge their resolve to implement the proposed remedies.” Christie & Hanna, supra note 5, at 1044.
Defense counsel who believe that they are not getting a fair . . . offer in a particular case [can] request a meeting with the line AUSAs supervisor, typically a section chief . . . . Defense counsel also have the option of seeking to appeal a plea agreement issue further up the chain of command – to the chief of the Criminal Division, the U.S. Attorney, and even to Main Justice (typically to the Deputy Attorney General’s Office). 99

Informal mechanisms also play a role in tempering prosecutorial overzealousness. 100 Furthermore, as discussed below, prosecutors have little incentive to require changes that will mandate continual oversight of their valuable resources and time. Lastly, the negotiations between defense counsel and prosecutors often start by using other pre-trial diversions as a basis for their negotiations. Assuming these agreements were reasonable, it becomes more difficult for a prosecutor to demand requirements that are abusive or overbearing to the corporation.

2. The Limited Nature of the Oversight

Prosecutorial involvement, through pre-trial diversions, while it can seem severe and heavy-handed at the outset, is rather minimal in terms of its involvement when looked at through a long term lens. Their engagement in the corporate governance of the company simply fills a short-term void of responsible leadership and then recedes as new and better corporate governance measures are brought on board. In the Bristol-Myers DPA, Christie and his team clearly required significant changes in the corporate governance of the corporation, but for the most part, these changes were one-time fixes to perceived structural evils. Although the U.S. Attorney’s Office for New Jersey will continue to remain apprised of Bristol-Myer’s ongoing corporate governance decisions, it is unlikely that they will require further changes in board or management positions or force significant process alterations. Prosecutorial involvement tends to be a one shot prescription of corporate policy and governance rather than continual care. Prosecutors are more than familiar

99. Brown & Bunnell, supra note 18, at 1082. Although the authors were referring to basic plea agreements in typical criminal cases, the analogy is easily made to pre-trial diversion agreements which share most characteristics with more typical plea negotiations.

100. Id. at 1080-81 (noting that

In our experience, most of the AUSAs we work with view being a prosecutor as more of a calling than a job. It is part of their personal identity. They care passionately about their reputation for fairness and integrity. They especially seek the respect and trust of the judges before whom they regularly appear, and are wary of doing anything that would jeopardize their standing in the eyes of the bench. And on a more practical level, they want the defense bar to be willing to deal with them and to have their clients cooperate in criminal investigations. Defendants will be much more likely to cooperate if their attorneys can assure them that the prosecutor is as good as her word.).
with such determinations, as resolutions of typical criminal cases often include a sentence or plea deal that requires behavior modification, *i.e.* restraining orders, a commitment to attend rehabilitation therapy such as Alcoholics Anonymous, or community service.

Additionally, where significant monitoring or process changes and compliance are required in the corporate criminal context, prosecutors tend to step away from such minute matters and often appoint an independent monitor to fill such a role. These monitors are akin to probation officers in a more typical criminal context. Both probation officers and independent monitors tend to bring significant experience and become far more intimately involved and knowledgeable in the day-to-day affairs of those whom they oversee. For example, in the Bristol-Myers case, Judge Frederick Lacey was appointed to serve as the independent monitor. He was given “wide authority to oversee Bristol-Myer’s compliance with the deferred prosecution agreement and strengthen its ongoing remediation efforts.”\(^\text{101}\) He had previously served the company as an independent advisor, being given a “broad mandate to review the company’s internal controls, financial reporting, disclosure, compliance, and budget processes.”\(^\text{102}\) This significant company-specific experience provides considerable familiarity and internal knowledge of the company, that a prosecutor would simply not have the ability to attain. Although the independent monitor serves at the discretion of the prosecutor, their service typically reflects its moniker – independent – as prosecuting authorities give great weight to the abilities and experience they provide.

3. The Preferable Alternative

Although some might be wary of prosecutorial involvement in corporate governance matters, most would agree that they serve as a significantly preferable alternative to a prosecutor’s other choice –indictment. Although some corporations might be able to stave off prosecutorial action by taking immediate and responsible action, most cases that are resolved through pretrial diversion agreements (our basis for comparison) are a result of board inaction or consistent failures. In these cases, prosecutorial action is often not a question, given Justice Department policy, the likely enormity of the wrongdoing, and public pressure. Prosecutors usually must act, so they must only resolve on how best to proceed.

As discussed earlier, an indictment can often serve as a death knell for a corporation.\(^\text{103}\) The extensive collateral consequences of formal indictment and prosecution of a corporation can include the loss of: billions of dollars in corporate value, thousands of jobs to American employees, investor confidence in the markets, and the ultimate destruction of corporate entities – as was the

\(^{101}\) Christie & Hanna, *supra* note 5, at 1054.

\(^{102}\) *Id.*

\(^{103}\) See Part II. B. III. of this Article.
case in the Andersen prosecution. Pretrial diversions then provide an alternative means for achieving prosecutorial ends including deterrence, restraint, and restoration without the imposition of severe collateral consequences on innocent victims. Corporations who agree to a pretrial diversion can continue to do business, can keep on its employees, and can carry on work that requires institutional knowledge. This point cannot be understated. For example, in the Bristol-Myers case, the company has produced pharmaceutical drugs for the past 100 years, including the design and manufacture of medicines that successfully treated HIV, cancer, heart attacks, and diabetes.104 The destruction of the company through an indictment would have significantly set back the deployment, perhaps fatally, of many of these drugs and the research that had accumulated at the company.

One commentator summarized the value of pretrial diversions: “[t]he government’s willingness to resolve criminal investigations of corporations with deferred prosecution or non-prosecution agreements makes sense for the government, for corporate entities, and for the public at large.”105

B. Prosecutorial Proficiency in Corporate Governance

As one of the leading authors of the Thompson Memo and an expert in the field, Christopher Wray, the former head of the DOJ Criminal Division has suggested, “prosecutors know their way around a courtroom and a grand jury investigation but are unlikely to have developed meaningfully expertise in the reform of highly regulated industries.”106 Thus, we must question whether or not the tools a prosecutor uses, in particular the use of pre-trial diversions, are in fact the proper tools for prosecutors to be wielding. Is the lack of business savvy or education detrimental to the effective usage of DPAs and non-prosecution agreements? Are there alternative means of using such tools that ensure a higher level of competence and effectiveness? If not, what are the ramifications?

1. Education and Experience

The education and experience that prosecutors bring to the bargaining table in the context of corporate criminal crimes provides a sufficient framework for corporate governance decisions. Although most prosecutors do not have formal business training, undergraduate, law school, and the on the job education amply

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106. Wray & Hur, supra note 54, at 1144-45 n. 235.
prepares them to make a myriad of decisions. Although it may be glib to suggest that attorneys know little about business or corporate policy, their educational backgrounds provide little evidence for such an assertion. First, many prosecutors pursue undergraduate degrees in business or business related fields. As evidence, in 1998, over 15% of all law school applicants had business related majors.107 Second, most legal educational programs focus heavily on analytical skills and logic,108 tools that are applicable in a variety of contexts, particularly in the arena of corporate governance. Law schools typically require or suggest that students take courses that focus on corporate law, corporate governance, and taxation. Most law schools also provide courses in white-collar crime, securities, business planning, mergers and acquisitions, antitrust, and other business related courses.109 Those on a prosecutorial career track may focus their efforts more on trial practice and litigation related courses but are likely to still be exposed to a variety of business concepts.

More importantly, the experience that most prosecutors, particularly those involved in the corporate criminal context, receive provides a sound background to their decision-making when it comes to corporate governance. Most prosecutors work for several years, typically in private practice at major law firms where the majority of their clients were large corporations, prior to their appointments as attorneys for the government.110 Once they begin as prosecutors, there are a number of opportunities for further training111 and those attorneys appointed to positions that involve corporate and business investigations are often required to attain these additional educational opportunities. Attorneys in fraud and white-collar sections of prosecuting agencies are often some of the more experienced attorneys in the office, adding to their ability to have a more mature grasp of business concepts and issues. Beyond the education and training,
those federal prosecutors assigned to handle corporate crimes tend to be the most experienced:

Of the twenty attorneys in the USAO-DC’s Fraud and Public Corruption Section (which handles the USAO-DC’s more sophisticated white collar cases), five have at least twenty years of experience as federal prosecutors, five have fifteen years of experience, three have ten years of experience, and the remaining seven have between six and seven years of federal prosecutorial experience. In short, those who prosecute the more complex cases are seasoned prosecutors . . . .

The best evidence that attorneys serving as prosecutors are qualified to make corporate governance and business decisions is revealed by looking at the composition of various boards of directors in corporate America. For example, in 1997, five years before the enactment of Sarbanes-Oxley, 78 of the 250 largest industrial corporations in the country, and 99 out of 250 of the country’s largest financial institutions have attorneys on their boards of directors. The scandals and increasing regulation, oversight, and liability that is tied to board membership has forced boards increasingly to look at attorneys in an effort to fill vacant seats. Corporations want legally educated individuals on their boards for more than just legal or political cover, they also seem to value the analytical reasoning, education, and familiarity with the law that attorneys possess – evidenced by multiple attorneys sitting on one board. For example, four of the five largest public companies in the United States each have two or more attorneys on their board of directors. As a board member’s primary responsibility is to oversee management and the corporate governance of the company, attorneys are trusted repeatedly to make the same decisions that prosecutors make occasionally through the use of a deferred prosecution or non-prosecution agreement.

2. Outside Advice and Help

Prosecutors are not alone in making corporate governance decisions. Although the power to require change ultimately rests with the government attorney in deferred prosecution and non-prosecution agreements, substantial assistance is not only provided but is suggested to prosecutors as they make their final decisions.

114. Citibank: Robert Rubin & Richard Parsons; Walmart: Jose H. Villarreal & S. Robson Walton; General Electric: Bob Wright and Sam Nunn; Bank of America: John T. Collins & Meredith Spangler.
As discussed supra, the Thompson Memo, the guide for prosecutors considering a corporate prosecution provides extensive directions and policy concerns for prosecutors to consider when deciding whether or not to prosecute a corporation. While these edicts do not give direction on what to do once a pretrial diversion has been initiated, the Memo does urge prosecutors to be conscious of their experience in certain fields and to “be aware of the specific policy goals and incentive programs established by the respective Divisions [of the Justice Department] and regulatory agencies.”

Other government agencies, such as the SEC, PCAOB, and the Corporate Fraud Task Force are available for prosecutors to consult with before proffering corporate governance changes. In addition, most white-collar or fraud sections in prosecuting agencies employ forensic accountants or other experts to aid in investigations and prosecutions. These individuals can also provide substantial assistance in formulating suggestions and corporate governance packages. Moreover, prosecutors have the ability and power to bring in outside experts to help with these difficult questions.

Prosecutors may also rely on a valuable ally, whom they have significant power in selecting – independent monitors. Independent monitors are used in almost every DPA and non-prosecution agreement and they traditionally carry significant business and legal experience that will aid prosecutors as continued monitoring takes place. For example, in the KPMG DPA, Richard Breeden was appointed as the independent monitor. Breeden previously served as the Chairman of the United States Securities and Exchange Commission and has served as a director of several publicly traded and privately held companies, a stock exchange, and various advisory groups. Independent monitors may also bring experience in dealing with monitoring and restructuring. For example, Richard Breeden had previously been appointed to act as Corporate Monitor of WorldCom, Inc.

In addition, prosecutors can rely on past experiences with pretrial diversions or on the experiences of their peers. In effect, prosecutors don’t need to reinvent the wheel with every new pretrial diversion. Many of the sound corporate governance measures can be used again and again. For example, although U.S. Attorney Christie admitted that the deferred prosecution agreement that his office reached with Bristol-Myers was the office’s first use of a DPA, it contained many of the same elements that prosecutors in the Eastern District of New York had used in the non-prosecution agreement with Symbol.

115. Thompson Memo, supra note 50, at Section III.B.
116. Leon Lazaroff & Andrew Zajac, KPMG Admits to $2.5 Billion Tax Fraud, CHI. TRIB., August 30, 2005, at C-1.
117. Id.
118. Id.
119. See n.7 of this Article and accompanying text.
Technologies only one year before. In addition, technological advances have made peer-to-peer sharing of information more accessible, helping to create more uniform prosecutorial responses. AUSAs can access electronically the “vast amount of information available from the Justice Department on all manner of topics associated . . . .” AUSAs from the various U.S. Attorneys’ Office also “routinely consult one another by email to compare notes” on problematic cases or issues.

These varying forms of advice and assistance ameliorate any inexperience a prosecutor may possess. “Such consultation is essential to fashion effective requirements that are compatible with the relevant regulatory environment and that do not inadvertently skew the economics of the industry.”

3. Most Pretrial Diversion Decisions Don’t Require Extensive Business Savvy

Although it seems clear that prosecutors have the education, experience, and agency/third party support necessary to make the types of corporate governance decisions used in pretrial diversions, it may be the case that the decisions themselves are not all that complicated and are not particularly sophisticated business decisions at all. Perhaps many of the decisions that boards of directors make (and thus prosecutors make) in the corporate criminal context are far more based on personnel and structuring issues. Additionally, it seems that more and more of corporate governance is consumed by compliance and legal issues - topics prosecutors are more than adept at handling.

Of the DPAs and non-prosecution agreements we have looked at, most of the changes required by prosecutors have been related to the structure of senior management, the selection of an independent monitor, and the addition of independent board members. Prosecutors, particularly high ranking ones – who are typically heavily involved in any pretrial diversion – are likely to have extensive experience in recruiting, selecting, and retaining key personnel. For example, the U.S. Attorney for the District of Columbia employs over 350 attorneys and 350 support personnel. Although hiring attorneys is different than selecting a CFO, some of the same talents and abilities cross over. As well, prosecutors in DPAs and non-prosecution agreements don’t necessarily select senior management themselves; they simply require new slates of management to be chosen because the previous crew was found to be in violation of the law.

120. See notes 72-76 of this Article and accompanying text (both required the positions of chairman and CEO to be split, both required independent monitors, and both required the overhaul of senior management).
121. Brown & Bunnell, supra note 18, at 1081.
122. Id.
123. Wray & Hur, supra note 54, at 1186.
Viewed in the light, prosecutors are doing little more than what they have traditionally done by prosecuting individuals and leaving the bulk of decisions to the company. Certainly prosecutors enjoy veto power in most pretrial diversions over selection of new directors and management, but this is rarely an issue as the corporation is aware of the reputational harm it has already suffered and seeks to restore shareholder confidence by selecting steady, proven leadership.

Almost all pretrial diversion agreements require the installation or modification of compliance programs.\textsuperscript{125} Again, prosecutors do not start from scratch and draw up their own compliance programs for corporations to follow. Instead, outside compliance experts are often brought in or best practices are utilized. Prosecutorial monitoring does take place, but as with hiring decisions, prosecutors often have cross-over experience that is valuable. Dealing with criminals on probation, repeat offenders, and criminal organizations, prosecutors are knowledgeable and privy to the characteristics and warning signals that arise in corporate criminal contexts.

Very few deferred prosecutions or non-prosecutions go beyond what has been outlined in this article. Prosecutors are wary of becoming too involved both because of the belief that it is not in the best interest of the company, shareholder, and society, as well as for selfish reasons – prosecutors have other cases to try and other crimes to investigate. Continual monitoring involvement frustrates the ultimate goals of prosecutors.

\textbf{IV. CONCLUSION}

The rise of corporate criminal wrongdoing over the past five years has pushed prosecutors into action. Seeking to find the best solutions and punishments for corporations, many prosecutors are starting to use pretrial diversions, particularly deferred prosecution agreements and non-prosecution agreements. These agreements provide the prosecutor the ability to avoid many of the collateral consequences that are associated with an indictment. At the same time, pretrial diversions give prosecutors increasing power in the field of corporate governance as the agreements often require changes in management, compliance, business practices, and board composition. Some question the competency of prosecutors to engage in such a foreign field but as this Article has shown, they are in fact qualified to make such decisions. The combination of the education, experience, support staff, and ability to use outside advisors creates a solid framework for the decision-making. As well, the decisions that confront prosecutors are not as foreign as one might guess after closer analysis. In the end, without prosecutorial involvement, there may be a dearth of oversight and enforcement that seems to be increasingly needed.

\textsuperscript{125} For a thorough analysis of many pretrial diversions and the requirement that the company implement or improve a compliance program, see generally Wray & Har, supra note 54.
AN IN-DEPTH ANALYSIS OF THE EVOLUTION OF SELF-DETERMINATION UNDER INTERNATIONAL LAW AND THE ENSUING IMPACT ON THE KASHMIRI FREEDOM STRUGGLE, PAST AND PRESENT

by Sikander Shah∗

I. INTRODUCTION

This article discusses in intricate detail how the law of both "internal" and "external" forms of self-determination has evolved and the increasingly significant status it presently enjoys under international law. It further undertakes an extensive analysis of all the relevant Declarations and Conventions. Finally, the paper delves into the Kashmiri imbroglio by examining not only how the Kashmiri right of self-determination was initially suppressed, but also how, due to the expanding scope of self-determination, the legality and necessity of the exercise of such right is imperative and therefore immediately warranted.

II. DISCUSSION

The practical application of the right of self-determination can be traced back to the American Declaration of Independence in 1776 and the French Revolution in 1789.1 The birth of self-determination came as a reaction to Monarchy, under which the monarch considered both a territory and its inhabitants his property, on whom he enjoyed power unrestrained by law.2 If desired, the monarch could transfer or alienate the territory and its inhabitants during the course of a variety of transactions including “sale, exchange, marriage, contract inheritance, etc.”3

The French Revolution laid down the basic founding principle of self-determination, which is the will of peoples to determine the state of which such peoples desire to be associated.4 This determination was to be ascertained only through plebiscites.5 In practice, only pro-French plebiscites were valid in areas annexed subsequent to the French Revolution and colonial peoples, ethnic and

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2. See CASSESE, supra note 1, at 11.
3. SHUKRI, supra note 1, at 18.
4. See generally CASSESE, supra note 1, at 12-13.
5. Id.
cultural groups were all held not to possess this right of self-determination. The peoples’ right to "internal self-determination," a concept that is inclusive of the right to choose the form of government and the political leaders by the peoples, was completely ignored.

It was not until just after the First World War, after the demise of the Austro-Hungarian and Ottoman Empires, that the concept of self-determination was brought into the international limelight by the Soviet Union’s ruler, Vladimir Lenin, and U.S. President Woodrow Wilson. Lenin’s notion of self-determination, primarily influenced by socialism, awarded the right of self-determination to all nations and peoples of a state. The right of secession was to be achieved by peaceful means through a plebiscite or referendum. The right of self-determination was also available in the colonial liberation context, where the colonial people could exercise their right even through an armed struggle if the circumstances so warranted. Though Lenin recognized the right of self-determination, he explicitly advocated that such freed nations should eventually strive to join a socialist federation, as he saw the advantages of such undertakings to be immense for all states involved.

In practice, however, Lenin’s position on self-determination was largely political rhetoric. The annexation of Latvia, Estonia and Lithuania by the Soviet Union and the denial of self-determination to the people of such nations presented prima facie evidence of this fact. Supporting such acts, Lenin had explicitly stated in his writings that the socialist cause enjoyed higher priority than the right of self-determination and if ever a conflict between these two concepts arose, socialism was to pre-empt the right of self-determination. Furthermore, Lenin was primarily interested in the right of self-determination for only the working class population of states.

Wilson’s position on self-determination was influenced by democratic principles of governance. Self-determination, in Wilson’s eyes, centered largely on "internal self-determination," a concept under which people have the right to choose, with freedom, their form of government, state authority, and

6. See Cassee, supra note 1, at 12.
7. Id.
10. Id. at 17.
11. Id.
12. Id. at 16-18.
13. Id. at 18.
14. See Cassee, supra note 1, at 18.
15. Id.
16. Id.
political leaders.\textsuperscript{18} Though Wilson, referencing Eastern Europe, stated that nations previously under the rule of the Ottoman and Austro-Hungarian Empires had an unstinted right to self-determination, he opined that such a right was subject to qualifications in relation to the subjugated people who inhabited various European colonies.\textsuperscript{19} According to Wilson, the interests of the colonial powers were of prime importance and therefore were to be accorded due consideration.\textsuperscript{20}

Like Lenin, Wilson’s view on self-determination was mere political rhetoric.\textsuperscript{21} The Allies denied the right of self-determination when such a right was contrary to their “geopolitical, economic and strategic interests.”\textsuperscript{22} For example, the South Tyrol/Alto Adige territory belonging to Austria was awarded to Italy without holding a plebiscite of its inhabitants,\textsuperscript{23} and Austria was not allowed to join Germany.\textsuperscript{24}

To sum up the state of international law on self-determination in this relevant time frame, the case of the Aaland Island warrants discussion. In 1920, the Council of the League of Nations appointed a three-jurist commission to decide the issue of whether the Aaland Islands could, through a plebiscite, secede from Finland and join Sweden.\textsuperscript{25} The commission held that the Aaland Islands could not secede from Finland and stated that self-determination was neither an international legal norm nor a positive law of the law of nations.\textsuperscript{26} Therefore, the legality of deciding to hold such a plebiscite was solely under the jurisdiction of the domestic legal system.\textsuperscript{27}

\textbf{A. Self Determination under the U.N. Charter and Resolution 1514 (XI)}

When the leaders of the United Kingdom (U.K) and the United States (U.S.) drafted the Atlantic Charter in 1941, the U.K. was quick to voice that the proclamation of self-determination in the Charter was applicable

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\textsuperscript{18} See Cassese, supra note 1, at 19.

\textsuperscript{19} See Hannum, supra note 8, at 28.

\textsuperscript{20} See Cassese, supra note 1, at 21.

\textsuperscript{21} Id. at 16.

\textsuperscript{22} See id. at 25; Shukri, supra note 1, at 30.


\textsuperscript{24} Id. See also Sarah Wambaugh, Plebiscites Since the World War 24-25 (1933).

\textsuperscript{25} Cassese, supra note 1, at 27. Until 1809, the Aaland Islands were a part of Sweden, but they were subsequently made a part of Russia as the result of a conquest. At that same time, Finland was also made part of Russia. The international community took the stance that the Aaland Islands were part of Finland after that time. After the outbreak of the Russian Revolution, Finland separated from Russia, and the Aaland Islands expressed their desire to break away from both Russia and Finland to rejoin Sweden. See Diane F. Orentlicher, Separation Anxiety: International Responses to Ethno-Separatist Claims, 23 Yale J. Int’l L. 1, 36 (1998).

\textsuperscript{26} Cassese, supra note 1, at 28.

\textsuperscript{27} Id. at 29.
only in the context of Nazi aggression.\textsuperscript{28} Subsequently, when the U.N. Charter was drafted, the colonial powers were against interjecting the language "peoples’ right of self determination" in the Charter.\textsuperscript{29} However, mounting pressure from third-world countries and the Soviets resulted in the appearance of the aforementioned phrase at two junctures in the U.N. Charter.\textsuperscript{30} Article 1, paragraph 2, states that the purpose of the organization was "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self determination of peoples . . .".\textsuperscript{31} Additionally, Article 55 states that the organization was to act through the "creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . .".\textsuperscript{32}

The language of such Articles was no more than a moral precept;\textsuperscript{33} in practice, such text did not afford any legal right of self-determination or secession.\textsuperscript{34} This is apparent when the loose and vague language of these Articles is viewed in conjunction with other clear and explicit Articles of the Charter. For example, Article 2, paragraph 4,\textsuperscript{35} pertaining to the threat or use of force, and Article 2, paragraph 7,\textsuperscript{36} pertaining to the prohibition against internal intervention in state affairs, clearly impose direct and immediate legal duties relating to state sovereignty. In addition, the purpose of both Article 1, paragraph 2 and Article 55, was to maintain friendly relations between states.\textsuperscript{37} This language functionally suggests that the right of self-determination was

\textsuperscript{28} 74 \textsc{parl. deb., h.c.} (5th ser.) (1940) 68-69; \textit{see also} \textsc{edward r. stettinius, jr., roosevelt and the russians; the yalta conference} 244-45 (1949) (quoting churchill speaking to the house of commons, stating, "[a]t the atlantic meeting, we had in mind, primarily, the restoration of the sovereignty, self-government and national life of the states and nations of europe now under the nazi yoke, and the principles governing any alterations in the territorial boundaries which may have to be made. so that is quite a separate problem from the progressive evolution of self-governing institutions in the regions and peoples which owe allegiance to the british crown.").

\textsuperscript{29} \textit{see cassese, supra} note 1, at 39. the belgian representative was especially critical of the reference to self-determination. he raised several concerns regarding including such language, including, that a focus on peoples’ rights was too great a shift from the usual focus on states’ rights in international agreements and that the inclusion of self-determination principles would put too much pressure on the international community to intervene should a national minority declare the right of self-determination.

\textsuperscript{30} \textit{see hannum, supra} note 8, at 32-34. recall that lenin strongly advocated self-determination, but likely saw the principle as a political tool, encouraging newly freed nations to strive to join socialist federations.

\textsuperscript{31} \textsc{u.n. charter} art. 1, para. 2.

\textsuperscript{32} \textsc{u.n. charter} art 55.

\textsuperscript{33} \textit{see generally} orenlichter, \textit{supra} note 25, at 35-39.

\textsuperscript{34} \textit{see id.} at 35-36 (discussing the impact of the aaland islands decision on the practical application of self-determination and its effect on the traditional notion of states’ sovereignty.).

\textsuperscript{35} \textsc{u.n. charter} art. 2, para. 4.

\textsuperscript{36} \textsc{u.n. charter} art. 2, para. 7.

\textsuperscript{37} \textit{see hannum, supra} note 8, at 33-34.
merely a means to accomplish an end, namely to achieve the goal of friendly relations. Consequently, the policy became that when self-determination resulted in conflict between states, it was not to be afforded any credence.

In succeeding years, as a result of continued pressure from Socialist states and third-world countries, the somewhat amorphous right of external self-determination started to take shape. To an extremely minimal extent, it was regarded by a few states as a norm of customary international law. In 1960, the U.N. General Assembly adopted Resolution 1514 (XV), also known as the “Declaration on Granting Independence to Colonial Countries and People” (“the Declaration”), and Resolution 1541 (XV). Resolution 1514 stated that "the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter [and that] … all people had a right to self-determination.” It was apparent from the ongoing negotiations among U.N. member states at that time that this "alien subjugation, domination and exploitation" language utilized in the Declaration was only meant to be applicable in the context of colonies; to be more specific European colonies. The right of self-determination was not available to people living in a state not classified as a colony. In other words, the "self" was understood not to be inclusive of minorities, such as those based on ethnic or linguistic classifications. Such groups were not understood to be living under alien rule.

This view that ethnic groups or nations within a state were not at liberty to determine their external status can be further substantiated by the language of the Declaration. Article 6 explicitly and clearly stated that “[a]ny attempt at the partial or total disruption of the national unity and the territorial integrity of a
country”50 were inconsistent with the Charter.51 The implicit colonial context of
the Declaration and the explicit language utilized by Article 6 were the result of
the principle of "Uti Possidetis.”52
"Uti Possidetis" is a general international law principle under which the
sanctity of states’ boundaries and territorial integrity are respected, when such
state boundaries have been determined and delineated by former colonial
rulers.53 Such a rule became incorporated in international law to prevent civil
unrest, ethnic strife and disintegration of the newly independent states.54 These
new states in the postcolonial era emphatically supported and advocated the
principle of “Uti Possidetis.”
In the contemporaneous historical context, the international community’s
hesitation to undermine this principle in even the most warranted circumstances
was apparent by its initial apprehension in not recognizing Bangladesh (formerly
known as East Pakistan) as a sovereign state in 1971.55 The international
community was reluctant to recognize Bangladesh even though its secession
from Pakistan was partly a result of the massive human rights abuses of genocide
and crimes against humanity committed by the Pakistani armed forces.56 Another
international situation where the sanctity of "Uti Possidetis" was held paramount
occurred when the international community condemned and criticized the Island
of Mayotte’s association with France, rather than with the independent Comoros
Islands.57 The international community viewed the Mayotte situation as a
violation of Comoros Islands’ territorial integrity, even though it was France that
had previously integrated the Mayotte Island with the Comoros Islands for what
it termed as purely administrative purposes.58
However, there have also been a few situations where the international
community has ignored the “Uti Possidetis” principle.59 Such was the case when
the United Nations dealt with the Rwanda –Urundi dispute in 1962.60 In this
case, the U.N. eventually administered plebiscite elections, after which one state

50. G.A. Res. 1514(XV), supra note 42.
52. See generally Gregory H. Fox, Self-Determination in the Post-Cold War Era: A New
International Monitoring of Plebiscites, Referenda and National Elections: Self
Determination and Transition to Democracy (1994)).
53. Id.
54. Id.
55. See Gregory J. Ewald, The Kurds’ Right to Secede Under International Law: Self-
determination Prevails Over Political Manipulation, 22 Den. J. Int’l L. & Pol’y 375, 384
(1994). The U.N. did not discuss the matter of East Pakistan’s secession from Pakistan until a
full-scale war erupted between Pakistan and India, who had intervened on behalf of the East
Pakistanis.
56. Id.
57. See generally Pomerance, supra note 17, at 30-31.
58. Id.
59. See Hannum, supra note 8, at 36.
60. Id.
was allowed to separate into two.\textsuperscript{61} This occurred because there was a consensus among the U.N. members that two entirely separate peoples were involved.\textsuperscript{62} Another example where “Uti Possidetis” was disregarded transpired when, through a U.N. supervised plebiscite, the British Cameroons divided.\textsuperscript{63} As a result, the Northern Cameroons integrated into Nigeria and the Southern Cameroons voted to integrate with Cameroon.\textsuperscript{64} Here it is pertinent to mention that the preemption of the "Uti Possidetis" principle by the international community is definitely the exception rather than the norm.\textsuperscript{65}

Additional evidence of the fact that the "alien subjugation" language utilized in the Declaration was only meant to apply with respect to European colonies becomes obvious when analyzing the circumstances under which India annexed Goa, a Portuguese colony.\textsuperscript{66} In 1960, the international community acquiesced in India’s occupation and assimilation of Goa in the Indian Union, even when India undertook such occupation and integration without determining the wishes of the local population.\textsuperscript{67} In 1969, a similar situation was witnessed when Indonesia annexed West Irian and as a result, the peoples’ right of self-determination was ignored because of the absence of a European colonial subjugator.\textsuperscript{68}

B. The International Human Rights Covenants of 1966

The evolving nature of customary international law with respect to self-determination in subsequent years consequentially resulted in further advancements and modifications of the related treaty law. This phenomenon is evidenced by the United Nation’s adoption of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.\textsuperscript{69} Article 1(1) of both the Covenants stated “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”\textsuperscript{70}

The use of two extremely pertinent terms in these Articles was perceived by the international community as a tremendous breakthrough in the law of self-determination. First was the use of the phrase “all people,” which when read in conjunction with Article 3(1) of the Covenants, provided that people having the right of self-determination included

\begin{itemize}
  \item \textsuperscript{61} See POMERANCE, supra note 17, at 19.
  \item \textsuperscript{62} Id.
  \item \textsuperscript{63} Id.
  \item \textsuperscript{64} Fox, supra note 52, at 748 n 74.
  \item \textsuperscript{65} See id. at 748.
  \item \textsuperscript{66} See SHUKRI, supra note 1, at 215-19.
  \item \textsuperscript{67} Id.
  \item \textsuperscript{68} See CASSESE, supra note 1, at 82-84.
  \item \textsuperscript{70} Id. at 49, 53.
\end{itemize}
people belonging to non-self governing and trust territories (dependant territories).\(^{71}\) Thereafter, this new expansive and emerging definition of external self-determination was viewed by the majority of the international actors such as France, Germany and the Netherlands, as according all peoples, not just those living under foreign occupation, the right of self-determination.\(^{72}\) The minority view, that only foreign colonial domination triggered self-determination, was held by India.\(^{73}\) India made a reservation to Article 1 upon the ratification of the Covenants by stating concerns that such a broad right would jeopardize the “national integrity” of states.\(^{74}\) It is important to point out at this juncture that the overwhelming majority of states unanimously agreed upon the definition of “peoples,” as not including the various minority groups present in any state.\(^{75}\) This was in concurrence with the reason forwarded by India in the previously mentioned colonial context, that of “national integrity.”\(^{76}\)

The second important term to appear in the Covenants was “freely” and was seen by the international community as expanding the right of internal self-determination.\(^{77}\) Under such a right, all individuals residing in a state had an unstinted entitlement to take part in the decision-making processes of the state in a completely democratic fashion.\(^{78}\) The creation of such a right was further evidenced by analyzing the other related provisions of the International Covenant on Civil and Political Rights, such as Article 19 (freedom of statement),\(^{79}\) Article 25(b) (the right to vote),\(^{80}\) and Article 25(a) (“the right to take part in public affairs, directly or through freely chosen representatives”).\(^{81}\) However, it should be pointed out that some of these related provisions, for example Article 25(a) (engaging in public affairs), are so ambiguous, vague and consisting of loose language, that the genuine exercise of the right of internal self-determination could easily be surpassed without actually breaching such Articles on paper.\(^{82}\)

One danger of interpreting the fundamental democratic attributes associated with internal self-determination absolutely is that the right of external self-determination becomes vulnerable to compromise. This right becomes
vulnerable because under Article 4(1) of the Covenant on Civil and Political Rights, states can derogate from their obligations owed to individuals in instances of grave national emergencies. A state could thereafter easily argue that instances of external self-determinations are exigencies warranting derogation of its obligation to the related people. It is interesting to note that as time has passed, the U.N. Human Rights Committee has increasingly taken a more expansive view on what the parameters of the right of internal self-determination includes compared to the position it took at the inception of the Covenant.

C. The 1970 Declaration on Friendly Relations and Internal Self-Determination

The General Assembly adopted the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States as Resolution 2625. This Declaration was primarily a result of a compromise between the western states, who wanted the right of internal self-determination to be applicable to all peoples of sovereign states, and the socialist and third world states, who wanted to restrict the application of this right of self-determination as narrowly as possible. Many international law scholars hypothesize that the reason for the position advocated by the western industrialized states was that after the demise of European colonialism the mostly democratic western states had no vested interest in restricting the right of internal self-determination. As such, these core rights were already provided for under their own political framework. Some scholars have taken a more extreme view with regards to this issue. They opine that the western states’ position on the issue was totally a pretext, and the guise of internal self-determination was being used as a weapon with the purpose of halting, retarding or meddling in the affairs of socialist and authoritarian regimes.

The principle of equal rights and self-determination of peoples in the Declaration is proof of the aforementioned compromise. The seventh paragraph started out by strongly reaffirming the principle of territorial integrity and sovereignty of independent states and further stated that nothing in the foregoing paragraphs should be construed as proof of a contrary view.

83. G.A. Res. 2200 (XXI), supra note 69, at 53.
84. Id.
85. CASSESE, supra note 1, at 64.
88. Id. at 109.
89. See generally Miller, supra note 87, at 612-17 (describing the views of the western states).
90. Id.
91. G.A. Res. 2625 (XXV), supra note 86, at 123.
92. Id. at 124.
However, this affirmation was followed by the qualification that the territorial integrity of the states being discussed pertained to those states that were conducting themselves in “compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.” The latter clause implied that if states did not offer specific groups, based on race, creed and color (and not all people generally), access to government, then such groups could justifiably claim a right of self-determination. The use of race and color as selected groups in the Declaration was a result of such distinctions made under Article 2(1) of the Universal Declaration of Human Rights in 1948, and because of the events and circumstances of the Holocaust.

Some fundamental questions arise at this juncture. What is meant by creed? What level and degree of the denial of particular rights is sufficient so that the selected groups are entitled to raise a claim of self-determination? Once the right of self-determination is triggered, does it include the right for specific groups to secede?

The international community understands creed to be inclusive of groups who have particular religious beliefs, but not political beliefs. Such an understanding between the international actors developed because of pressure exerted by third world and socialist states who believed that awarding political groups who were denied representation such a right of self-determination would open the flood gates for thousands of frivolous claims of self-determination. This would eventually result in massive civil unrest and threaten the sovereignty of their states. Resistance shown by such states as to the inclusion of religious groups in the definition of creed was much muted as these states perceived religious groups to be fewer in number, harder to create, and not a viable threat to political unity.

It is interesting to note, upon analyzing the relative text of this Article, that only a right of access to government is granted to the selected groups, rather than equal rights themselves. The rationale probably was that once a group has a right of access, they will automatically be able to secure equal rights; a goal that in practice is not always achieved.

93. Id.
94. Cassese, supra note 1, at 112.
96. Cassese, supra note 1, at 112-14.
97. Id. at 112-18.
98. Id. at 114.
99. Id. at 112-18.
100. Id. at 114-15.
101. Id.
In practice, however, the development of customary international law has been such that the international community has acknowledged a right of internal self-determination and has thereafter taken concrete steps and condemned the related state government only in the most extreme of situations – as where not only governmental access has been denied, but where the selected group has exhausted primarily all available venues to obtain their right of representation. An additional situation occurs when extremely grave human rights violations and unwarranted persecution against the selected groups have been committed. In reality, such standards have been harder to satisfy when religious groups, rather than racial groups, are involved. South Africa and South Rhodesia are examples of a handful of the above-mentioned situations where the international community has accordingly acted.

The query then is whether selected groups, having in all respects failed to obtain their right of internal self-determination after utmost efforts, can then go ahead and rightfully proclaim the right of external self-determination. Though such a right might be implicit in the Declaration, the majority of states have refused to accept any such interpretation. However, some states voiced support for advocating such a right when “Jus Cogens” are indiscriminately violated or other serious human rights violations, such as genocide, are being perpetuated.

D. The Current State of Law on External Self-Determination through Secession

In order to adequately comprehend where international law presently stands with regard to external self-determination through secession, it is imperative that two recent instances where such a right was invoked be elaborated upon. The first instance involves the break up of Yugoslavia. An analysis of this case will elaborate upon how the international community viewed the dissolution. The second situation will involve a discussion on how the domestic courts of Canada viewed the legality of one of its provinces demanding secession.

The Republics of the former Yugoslav Federation’s right to secede was accepted by the majority of the world community. Such a result was achieved through the slow recognition of the status of those Republics as independent states. However, the specific facts pertaining to the situation on ground in Yugoslavia must be kept in mind, as such facts were responsible for the eventual acquiescence of the world community on the issue of secession. Fundamental

102. Cassese, supra note 1, at 119-20.
103. Id.
104. Id. at 120-21.
105. Id. at 118-20.
106. Id. at 119-20.
107. See generally Miller, supra note 87, at 625.
108. Id.
minority rights in the Federation had been persistently and gravely violated.\footnote{109} The minorities possessed no participatory rights related to government affairs.\footnote{110} The central authority was despotic and unimaginably oppressive and grave human rights violations, such as genocide and crimes against humanity, were routinely committed against the minority population.\footnote{111} A pragmatic and peaceful solution to the imbroglio without secession was just not possible. In addition, the recognition of the seceding Republics as independent state actors was contingent upon the maintenance of certain stringent standards, such as the new states’ explicit agreement to maintain high standards for the protection of fundamental human rights, specifically minority rights and a commitment to respect all international obligations.\footnote{112}

Even so, the Arbitral Committee created by the EC to deal with the break up of Yugoslavia held that the Federation had experienced dissolution and not secession.\footnote{113} The Committee held that because the Federation lacked a “government,” as the Federation no longer exercised control over substantial areas in the state; it no longer satisfied all the elements of statehood under international law as laid out in the 1933 Montevideo Convention.\footnote{114} In reality, the Committee was trying to avoid deciding upon the contentious issue of secession, because at the time the world community was hesitant to view such a right as inherent.\footnote{115} One reason why the holding forwarded by the Committee raises eyebrows is because the newly established state of Bosnia-Herzegovina had itself lacked a government before being awarded state recognition.\footnote{116} Its relevant authorities had minimal or no control in comparison to the control enjoyed by the Yugoslav army over its subjects.\footnote{117}

Another interesting development regarding self-determination has been how the highest domestic court of Canada, the Supreme Court of Canada, decided upon the legality of the unilateral secession of one of its provinces, Quebec.\footnote{118} With regard to international law, the court noted that the Quebec population was not under any foreign, alien, or colonial occupation.\footnote{119} It then affirmed the legality of the principle of the right of internal self-determination, but held that

\footnote{110. Id.}
\footnote{111. Id.}
\footnote{112. Cassese, supra note 1, at 273.}
\footnote{113. Id. at 272.}
\footnote{114. Id. at 272-73; see David J. Bederman, International Law Frameworks 51 (Foundation Press 2001) (explaining the elements of statehood).}
\footnote{115. Id. at 272-73.}
\footnote{116. Id.}
\footnote{117. Cassese, supra note 1, at 272-73.}
\footnote{118. See generally William J. Dodge, Succeeding in Seceding?: Internationalizing the Quebec Secession Reference Under NAFTA, 34 Tex. Int’l L. J. 287 (1999).}
\footnote{119. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 222.}
the Quebecois had not been stripped of such a right.\footnote{120} This holding was substantiated on the basis that such population was neither oppressed, nor did it systematically experience civil rights violations.\footnote{121} In fact, many Quebecois held or had held high federal positions, including Prime Minister which is the highest executive position in the country.\footnote{122} In addition, the court confronted the issue that Quebec might effectively achieve de facto secession by securing control over its territory and obtaining international recognition.\footnote{123} According to the court, this was possible without infringing upon the lawfulness of the undertaking.\footnote{124}

With respect to domestic law, on the issue of the legality of Quebec’s right of secession the court held that if a clear majority of Quebecois voted for secession when presented with a clear referendum question, then the federal government and other provincial governments were under a constitutional duty to negotiate secession in good faith with the relevant Quebec authorities.\footnote{125} However, the federal government was not required to reach a secession agreement.\footnote{126} In addition, the Quebec authority itself was under an obligation to respect its minorities and to negotiate with the minorities, the provincial, and the federal government in good faith.\footnote{127}

With the break up of U.S.S.R., the bipolar nature of the world which had lingered until the late 1980’s no longer existed. Thereafter the western industrialized states, after exerting pressure on other states, managed to gain increased acceptance and recognition for the right of internal self-determination, a concept that has many qualities that are inherent in western notions of democracy.\footnote{128}

The expansion of the right of internal self-determination has in turn resulted in the recognition of a multitude of groups, such as those based on linguistic and ethnic foundations and not just those groups based on race, creed and color, as eligible possessors of rights inherent to internal self-determination.\footnote{129} In other circumstances all individuals are eligible for fundamental human rights.\footnote{130} Some scholars argue that all forms of self-determination have now transformed into international norms, which are non-derogable.\footnote{131} Others argue that self-determination has attained the

\footnotesize
\begin{itemize}
\item \footnote{120}{Id.}
\item \footnote{121}{Id.}
\item \footnote{122}{Id. at 286.}
\item \footnote{123}{Id. at 288-89.}
\item \footnote{124}{Dodge, supra note 118, at 301-02.}
\item \footnote{125}{Reference re Secession of Quebec, [1998] 2 S.C.R 217, 264-65.}
\item \footnote{126}{Id. at 267.}
\item \footnote{127}{Id. at 271-72, 294.}
\item \footnote{128}{Miller, supra note 87, at 624-25.}
\item \footnote{129}{Hannum, supra note 23, at 35.}
\item \footnote{130}{Id. at 31.}
\item \footnote{131}{Cassese, supra note 1, at 169-70.}
\end{itemize}
status of “Jus Cogens.” These are extreme views, though the importance and scope of the right of internal self-determination under international law is definitely on the rise, the world community has continued to be apprehensible and hesitant to recognize secession under external self-determination as an inherent right.

III. THE RIGHT OF SELF-DETERMINATION OF THE KASHMIRIS

A. A Brief Historical Perspective

When the Indian subcontinent was divided into Pakistan and India in 1947, there were around 560 Princely States, which were free to decide to join Pakistan, India, or remain independent. The Maharaja (Ruler) of Kashmir had initially decided to remain independent. However, when ethnic violence and civil unrest faced the state and local tribes from Pakistan’s frontier province advanced into the State for the purpose of helping their co-religionists in jeopardy, the Maharaja was forced to flee. Upon India’s insistence that it would only provide military assistance to the Maharaja if he acceded, the Maharaja acceded to India, but with the understanding that only defense, foreign affairs, and communications would fall under the jurisdiction of the Government of India. This accession was accepted by the then-incumbent Indian Governor General, Lord Mountbatten, on the condition that this acceptance was provisional and the eventual question of accession was to be decided based upon the will of the people, once peace was restored. A somewhat similar stance was taken by the Indian Prime Minister Nehru, who stated that a plebiscite under the auspices of the United Nations was the only way that the Kashmir situation could be resolved.

India eventually took the matter of Kashmir to the United Nations on January 1, 1948, when different areas of the state were under the military control of both Pakistan and India. The Security Council eventually decided that the status of Kashmir was to be decided through a plebiscite. Subsequent resolutions adopted by the newly created UN Commission for India and Pakistan on August 13, 1948, and January 5, 1949, reiterated this position. To date

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132. *Id.* (arguing that “Jus Cogens” is an international norm that is non derogable and therefore makes no distinction between the two concepts).
137. *See Shukri, supra* note 1, at 208.
such a plebiscite has not been held. In 1989, the Kashmiri population, frustrated by puppet governments, fixed elections and massive human rights abuses, which were committed by Indian security officials, commenced an extensive guerilla movement to liberate Kashmir from the Indian yoke. The movement still continues.

B. The Kashmiri Right of External Self-Determination.

In pre-partitioned India, Kashmir, like other Princely States, was autonomous under the British rule, with the British authorities having legal jurisdiction solely over defense and foreign affair matters. Under an arrangement, internal intervention by the British was only warranted when the State was adjudged to be in a state of gross mismanagement. In 1946, the British Cabinet Mission in India issued a statement, which stated that, “…paramountcy can neither be retained by the British Crown nor transferred to the new Government.”140 Later Article 7 of the Indian Independence Act of 1947 stated that, “…the suzerainty of His Majesty over the Indian States Lapses.”141 It is apparent from viewing these two provisions together that all Princely States, at the time of India’s independence and partition, were sovereign states themselves, a fact that both Pakistan and India had then accepted.

However, shortly after independence, India annexed the sovereign princely states of Junagarh and Hyderabad after the Muslim Ruler of Junagarh opted for union with Pakistan,142 and the Muslim Ruler of Hyderabad (Nizam) chose independence for his state.143 India’s justification for its actions was premised on the fact that as the majority of citizens of these states were Hindus, only the will of the people, through consensus, could determine the legal status of such states.144 Subsequently, a referendum was held in Junagarh and, as predicted, the majority involved opted for union with India.145 Hyderabad, on the other hand, was dismembered and its territories were split among adjoining provinces without a referendum.146 Therefore, in order for India to remain consistent with the position it took in the case of Junagarh and Hyderabad after its annexation of the Kashmir Valley, it initially reiterated that only the will of the people (seventy-eight percent of whom were Muslim) could determine the status of the State.147

140. See Hussain, supra note 45, at 4.
141. See Noorani, supra note 133, at 21.
143. Id. at 37.
144. Id.
145. Id. at 36.
146. Id. at 37.
147. Id.
As discussed earlier, at the time of India’s partition in 1947, the right of self-determination was not considered an inherent right under the U.N. Charter. Democratic rights affiliated with the concept of internal self-determination were mere moral precepts and underdeveloped. The principle that India had rightly raised at that point in time, that the consensus of a people relative to their political existence should be the relevant determining factor, had not yet been seen as an established right under international law. Under governing international law, whoever possessed authority and control over a state (regardless of the nature of his status, i.e., that being of a ruler, monarch or dictator), was seen by other international actors as the relevant state government, eligible and qualified to make decisions regarding the States’ future status.

An important question that arises at this juncture is whether the Maharaja had any authority to accede to India under the prevailing circumstances at the time. The evidence points to the contrary. The Maharaja, at the time of accession, did not possess any government or exercise any real control over his territories. In fact, he had to flee the state for protection. The state was substantially under the control of the tribes that had ascended from Pakistan and the local militia groups that had revolted against the Ruler. The accession was therefore void, as the requirement of a government was not met.

Following the United Nations directive of holding a plebiscite, which India had fervently accepted, India “arranged” local elections in Kashmir in 1951, which were widely accused of being fixed. As a result of these elections, the Constituent Assembly was instituted, which thereafter declared union with India. Subsequently, India publicly stated that such a declaration by the Constituent Assembly was equivalent to a plebiscite. This rationale was outright rejected by the Security Council and thereafter the Council passed a resolution on January 24, 1957, declaring India’s actions as illegal. Even if the fact that the elections were partial is ignored, the rationale of the Security Council was.
Council’s decision can be ascertained by the fact that they took into account that elections were held and representatives elected for purpose of governing State institutions, and not with the mandate of accession.


_Uti Possidetis_ as discussed previously is an established principle of international law. In recent years, its application in particular circumstances has been somewhat retarded and hampered, because of the acceptance of the right of both internal and external self-determination. However, _Uti Possidetis_ is, in most circumstances, still regarded as a more established and controlling norm of international law than the right of self-determination. _Uti Possidetis_ is a useful principle and has been generally acceptable to the world community as it prevents the break up of new states, specifically former colonies, which is a phenomenon that can potentially be threatening to international peace and security. Utilizing _Uti Possidetis_, India made reservations to the International Covenants of 1966 and Resolution 2625, citing a threat to its national integrity as a justification. Basically, India acted on this premise because it was aware that the Kashmiris could potentially bring a new form of a self-determination claim, one based on a religious, distinct creed, as they had been denied access to governmental institutions.

Even if one accepts India’s argument that _Uti Possidetis_ could not be compromised, especially in the context of self-determination, its position regarding Kashmir would actually be in conflict with _Uti Possidetis_. The purpose of _Uti Possidetis_ is to prevent and provide a disincentive to particular groups, formed on the basis of some general criterion in states, from unilaterally declaring the right to exercise self-determination.

When the British demarcated India’s boundaries, Kashmir was never legally a part of India. In fact, Kashmir’s sovereign status was explicitly accepted by

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156. See Fox, supra note 52, at 747.
157. Id.
158. See id. at 748. In the colonial context, _Uti Possidetis_ served to protect new states from incessant boundary disputes and endless armed conflicts, once the colonial powers had left. It did so by excluding claims of overlapping historical title or ethnic kinship from determinations of territorial sovereignty. The doctrine freezes title to territory at the time of independence, a moment sometimes referred to as the “critical date.” Disputes over territory are thus focused solely on what the boundaries were (or were intended to be if no actual delimitation had occurred) at that moment.
160. WIRLING, supra note 142, at 14 (explaining that the Punjab Boundary Commission’s final boundary awards excluded Kashmir and Jammu, leaving these and other princely states the theoretical right to choose to accede to either India or Pakistan).
If India’s new position that Kashmir is an integral part of India is accepted, then one could more forcefully argue that Pakistan is even more pertinent to India’s national integrity, as pre-partition Pakistan, unlike Kashmir, was not an independent princely state but was part of British India. Therefore, India’s position on the issue must be rejected.

Another interesting and relevant situation was when the international community actually tolerated the violation of the territorial integrity of Goa, a Portuguese colony, after India annexed the territory without determining the will of the local people. However, the reason for such international acquiescence over this annexation was because the other party to the dispute was Portugal, a colonial power. India’s actions were, in some sense, seen as a fight against colonialism, a phenomenon which enjoyed international condemnation. In the case of Kashmir, however, no colonial power was involved and Pakistan enjoyed the same status as India, a state that had overcome colonial forces.

Some scholars are of the opinion that partitioning the State of Kashmir is one of the only viable options to the dispute. They propose the partitioning of the Muslim majority areas from the Hindu and Buddhist majority areas of Jammu and Ladakh, respectively, after holding a plebiscite in such respective areas. Scholars cite examples of situations where the principle of Uti Possidetis was set aside, as in the case of Rwanda-Urundi and Cameroon, where the United Nations had organized such types of plebiscites. These positions must be rejected. In the aforementioned circumstances, the United Nations allowed such plebiscites because it was clearly of the opinion that the people involved were comprised of more than one distinct group. Such an opinion was formed because there were massive disparities relative to custom, culture and the level of integration among the communities involved. Additionally, the level of hostility among the peoples was awarded due consideration.

161. *Id.* at 12-13 (noting that the British viceroy Lord Louis Mountbatten had secured promises from political leaders before the announcement of the boundary award).


163. Cf. M. Shafi Khan, *Kashmir: Analysis and Recommendations*, in *KASHMIR PROBLEM: CHALLENGE AND RESPONSE* 29, 29 (Tariq Jan & Ghulam Sarwar eds., 2d ed. 1991) (indicating that Pakistan’s share of the assets of the defunct British India, of which it had been a part, had been denied); see also HANNUM, supra note 8, at 151.

164. *See POMERANCE, supra* note 17, at 20.

165. *Id.* (explaining that the majority of the General Assembly of the United Nations appeared to adopt the *Indian* view of the annexation, that “[India is] not prepared to tolerate the presence of the Portuguese in Goa even if the Goans want them to be there.”)

166. *See generally SHUKRI, supra* note 1, at 215-16.

167. *Id.*


169. *Id.* at 220.

170. *See supra* pp. 9-10 and notes 60-65.

171. *Id.*

172. *Id.*
Historically, the people of Kashmir have lived in relative harmony and peace among themselves. Apart from religious differences, the people are culturally the same. Even religious distinctions have become somewhat murky, as the different religions in the region have, in some respect, amalgamated. When major hostilities broke out in Kashmir, they were between the Kashmiri Muslims, Rashtriya Swayamsevak Sangh (RSS, a Hindu nationalist group) and the Indian armed forces in 1947; Indian security forces and Kashmiri militants clashed in 1989. The hostilities were not among the local inhabitants. Aggression between local Hindus, Sikhs, Buddhists and the Kashmiri Muslims has been witnessed extremely seldom. Therefore, the people of Kashmir, under the extremely broad international law standard of what constitutes a people, are one people.

D. Kashmir and Internal Self-Determination

The Kashmiri population has consistently been deprived of its right of internal self-determination. Kashmiris have routinely been denied equal representation and access to the government. Rigged elections, political imprisonments and the killing of prominent Kashmiri leaders undertaken by India have disrupted life in the State. Even pro-Indian Kashmiri leaders, such as Sheikh Abdullah, who was a member of the Constituent Assembly on Kashmir that illegally declared Kashmir’s integration with India, were later imprisoned when their agendas started to stray from India’s ambitions pertaining to Kashmir. Apart from the 1977 election, there have been accusations that all elections in the state have been completely rigged, and that the puppet-leaders in power have pursued aggressive Indian policies that have further degraded the fundamental rights of the Kashmiri people.

Finally, following the rigged election of 1987, when the son of Sheikh Abdullah, Farooq Abdullah, was sworn in as the Chief Minister of the State, the oppressed and frustrated Kashmiris launched a full-scale
uprising demanding independence. In response, the Indian government imposed direct presidential rule on Kashmir. Subsequently, the Indian army started to commit massive human rights abuses on the local population to quell the liberation movement. Since then the violence has continued unabated. In September 1996, India again “stage-managed” State Assembly elections in Kashmir which resulted in Farooq Abdullah reassuming power.

The human rights violations committed by the Indian army in Kashmir, specifically in the 1990’s, have not been much different than other grave violations committed around the world. For example, the Kashmiri situation resembles the Yugoslav army’s human rights abuses against the Federation’s ethnic minorities. The Indian troops-to-Kashmiri people ratio in Kashmir is the largest ever soldiers-to-civilians ratio in the world. Human rights violations in Kashmir include indiscriminate killings, rape, mass murders, torture, molestation, extra-judicial executions, and the destruction of business and residential properties. Such adventurism has been corroborated and documented in detail by global institutions such as Amnesty International, US Human Rights Watch-Asia, International Commission of Jurists (Geneva) and Physicians for Human Rights. According to separatists, the aggregate number of people killed in the Kashmiri uprising is estimated to be more than 80,000, despite the Indian government’s claim that only 35,000 have been killed.

184. Khan, supra note 163, at 35.
185. See generally Bose, supra note 135, at 46.
186. Id.
187. HUSSAIN, supra note 45, at 31.
188. Id.
189. See ContactPakistan.com: Fact Sheet on Kashmir, available at http://www.contactpakistan.com/kashmir/facts-kashmir.htm. “There are approximately 600,000 Indian military forces—including regular army, para-military troops, border security force and police—currently deployed in the occupied Kashmir. This is in addition to thousands of “counter-militants”--the civilians hired by the Indian forces to crush the uprising.”
190. WIRSING, supra note 142, at 157-58.
193. See India – Attacks on Justice 2002 (2002), http://www.icj.org/news.php3?id_article=26844&lang=en (stating “Serious human rights violations have persisted in India. These violations are particularly virulent in the states of Jammu and Kashmir . . . Security forces, government-supported military forces and armed opposition groups all commit serious abuses, including torture, extra-judicial killings, rape and disappearances in the regions where conflict continues.”).
In addition, Indian laws regarding Kashmir, including the Special Powers Act of 1990, have provided a legal pretext for the grave persecution experienced by the Kashmiris. This specific Act grants special powers to the Indian armed forces in Kashmir to kill with impunity. Under the Act, any soldier can, without a warrant, arrest anyone, enter and search any premise at any time, and fire upon or otherwise use force, even deadly force, against any person. The Act provides immunity to soldiers against prosecution, suits or legal proceedings for actions undertaken or purported to have been undertaken through powers conferred upon them under the Act.

All the facts presented provide adequate proof that India has grossly violated both the Human Rights Covenants of 1966 and Declaration 2625. There is no doubt that the right of internal self-determination of the Kashmiri people has been compromised.

IV. CONCLUSION

In the preceding decades, the view that the right of self-determination is part of international law has gained increased acceptance. With the collapse of the U.S.S.R., globalization and the growing strength of various international NGO’s related to human rights in the international sphere, the status of the right of internal self-determination has more or less been qualified as an inherent right under international law.

197. See generally Institute of Policy Studies, supra note 177, at 5.
198. Id.
199. See Special Powers Act, 1990, supra note 196, at § 4. Subpart (a) of this section of the Act states that any member of the armed forces may, “if he is of the opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances.”

Subpart (c) of this section of the Act states that any member of the armed forces may, “arrest, without warrant, any person who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and may use such force as may be necessary to effect the arrest.”

Subpart (d) of this section of the Act states that any member of the armed forces may, “enter and search, without warrant, any premises to make any such arrest as aforesaid or to recover any person believed to be wrongfully restrained or confined or any property reasonably suspected to be stolen property or any arms, ammunition or explosive substances believed to be unlawfully kept in such premises, and may for that purpose use such force as may be necessary, and seize any such property, arms, ammunition or explosive substances.”

200. Id. at § 7. Section 7 of the Act states, “No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act.”
Such positive developments relative to the right of external self-determination have been less forthcoming because external self-determination threatens and impinges upon state sovereignty and territorial integrity in a much more direct and adverse fashion than does the right of internal self-determination. In Yugoslavia, there was a denial of internal self-determination and extremely horrendous human rights violations committed against the people.\footnote{CASSESE, supra note 1, at 268-69.} Consequently, such people were granted the right of external self-determination.\footnote{Id. at 269-70.} However, the Arbitral Committee on Yugoslavia chose to classify the confronting situation as involving a break up or dissolution of Yugoslavia, rather than terming it secession.\footnote{Id. at 272.} If the episode had been termed secession, then that would have implied that the right of external self-determination was being granted.

Though the Kashmiri suppression is not much different from that seen in Yugoslavia, it is highly unlikely that the international community will unilaterally allow Kashmir to secede without India’s consent any time in the near future. India’s geo-political status, economic strength and size are such that the world community cannot afford to directly confront it. India would view any such confrontation by the international community as a severe infringement upon its sovereignty or territorial integrity.
NEWDOW V. UNITED STATES CONGRESS: IS THERE ANY ROOM FOR GOD?

by James Adam Browning*

I. INTRODUCTION

Imagine the scene within millions of American households as families prepare to send their children off to public school for the day: the parents wake up their children and make them take showers; the children get dressed, eat breakfast, gather their belongings, and rush to catch the school bus. The drill continues at school1 as children rush through hallways, socialize with friends and hasten to attend their first class of the day. Once inside the classroom, often “homeroom”, the children participate in a pre-planned routine that involves a variety of tasks, often performed unconsciously, with little thought or deliberate intention. The teacher or school principal2 often leads the students through this routine, usually involving taking attendance, discussing daily agendas and news, reading the lunch menu, reciting the Pledge of Allegiance (“Pledge”), and organizing school materials. None of these activities has become more controversial than the recitation of the Pledge.3

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1. Interview with Amy Razor, Principal at Grants Lick Elementary School, in Grants Lick, Kentucky. This hypothetical illustration is based loosely on school district procedures at Grants Lick Elementary as of January 5, 2007.

2. An interesting variation on this scenario, which will not be examined within this casenote, is one in which an older student individually and voluntary assumes the normal responsibilities of the teacher for such tasks as reading daily menus and reciting the Pledge, thereby possibly eliminating any argument that these activities constitute a state action.

The 1954 Pledge\(^4\) was instituted as a means of fostering patriotism within the United States and as a way of recognizing the nation’s historical attachment to God.\(^5\) Many parents argue, however, that the Pledge is a blatant governmental endorsement and establishment of religion contravening their right to oversee the religious upbringing of their children.\(^6\) The First Amendment to the United States Constitution states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”\(^7\) This Amendment, including the phrase, “establishment of religion” (the Establishment Clause), was made applicable with full force to the states through the Fourteenth Amendment.\(^8\)

This casenote explores the interplay between the First Amendment, the Pledge, their underlying purposes and the use of the Pledge in public classrooms. The issue will be framed by a decision made by the Ninth Circuit Court of Appeals\(^9\) ("Newdow I") which held that the statute adding the words “under God” to the Pledge and a school district’s policy of reciting the Pledge violated the First Amendment’s Establishment Clause.\(^10\)

Section II of this note introduces the facts of and surveys the background of the law concerning Newdow I, including the Lemon test, the Endorsement test, and the Coercion test. Section III provides the holding and the rationale of Newdow I. Section IV analyzes the Newdow I decision and explains why the Pledge does not violate the Establishment Clause. Section V discusses the possible ramifications of the Newdow I decision.

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6. See, e.g., Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789, 795 (9th Cir. 1999) (en banc) (holding that parents have a right to direct the religious upbringing of their children and, on that basis, have standing).

7. U.S. Const. amend. I.

8. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (stating that the Fourteenth Amendment made state legislatures “as incompetent as Congress” to enact laws contrary to the First Amendment’s prohibition on the government establishing or prohibiting the free exercise of religion); Lee v. Weisman, 505 U.S. 577, 580 (1992) (stating that because the First Amendment is made applicable to the states it is also applicable to their school districts).

9. Newdow, 292 F.3d at 597. This case is commonly referred to as Newdow I.

10. Id. at 612.
Although the Newdow I decision has been amended by the Ninth Circuit Court,\(^{11}\) and was overturned by the United States Supreme Court on standing grounds,\(^{12}\) the legacy of the decision cannot be denied. As recognized by the Eastern District of California in 2005, “[B]ecause a court may reach the merits despite a lack of prudential standing, it follows that where an opinion is reversed on prudential standing grounds, the remaining portion of the circuit court’s decision binds the district courts below. . . [therefore] this court remains bound by the Ninth Circuit’s holding. . .”\(^{13}\) This is an important issue because, depending upon how federal courts rule in the future, it could ultimately determine what is constitutionally permitted when including references to God in other public settings or government activities.\(^{14}\)

This casenote proposes in Sections IV and V that the Newdow I Court reached the incorrect decision for multiple reasons and that the decision could have been reversed on its substantive merits. First, a definitional analysis of the First Amendment shows that the conduct at issue falls outside of the plain meaning of the Establishment Clause. Second, the language of the school policy is outside of constitutional infirmity in light of Supreme Court precedent. Third, peer-pressure exacted upon dissenting students cannot be equated with governmental coercion. Fourth, understanding the framers’ intent when drafting the First Amendment and of the Supreme Court’s interpretation of that intent disprove the assertion that the conduct violates the Constitution. Finally, because the phrase “under God” in the Pledge has lost all religious meaning, the state compelling its recitation does not constitute “an establishment of religion.”

Section V concludes that had the Ninth Circuit properly followed Supreme Court precedent and employed common sense, Newdow I would have been but a drop in the bucket of First Amendment jurisprudence, rather than an historic watershed.

II. BACKGROUND

A. Three Establishment Clause Tests

Over the last thirty-five years, the Supreme Court has used three tests to decide cases involving alleged violations of the Establishment Clause: the

\(^{11}\) Newdow v. United States Cong., 328 F.3d 466 (9th Cir. 2003).
\(^{13}\) Newdow v. The Cong. of the United States, 383 F.Supp.2d 1229, 1241 (E.D. Cal. 2005).
\(^{14}\) See, e.g., Epstein, supra note 6, at 2104-22 (exploring the significance of ceremonial activities with references to God in several scenarios, including legislative prayers and prayer rooms; prayers at presidential inaugurations; presidential addresses invoking the name of God; the invocation, “God save the United States and this Court” prior to judicial proceedings; the use of the Bible to administer oaths of public officers, court witnesses, and jurors; the use of, “in the year of our Lord,” to date public documents; the Thanksgiving and Christmas holidays; the national day of prayer; and the national motto, “In God We Trust”).
The Lemon test,\textsuperscript{15} the ‘Endorsement’ test\textsuperscript{16} and the ‘Coercion’ test.\textsuperscript{17} A condensed summation of these three tests provides the legal framework for the \textit{Newdow I} decision.

1. The Lemon Test

In \textit{Lemon v. Kurtzman},\textsuperscript{18} the Supreme Court dealt with the issue of unconstitutional state aid to nonpublic schools and set forth a three-pronged test for evaluating alleged Establishment Clause violations.\textsuperscript{19} In order to survive the Lemon test, the government conduct in question first must have a secular purpose.\textsuperscript{20} Second, the conduct must have a principal or primary effect that neither advances nor inhibits religion.\textsuperscript{21} Finally, the conduct cannot foster an excessive government entanglement with religion.\textsuperscript{22}

2. The Endorsement Test

The Supreme Court uniformly applied the Lemon test to nearly all of the Establishment Clause cases that it decided between 1971 and 1984,\textsuperscript{23} but in the 1984 \textit{Lynch v. Donnelly}\textsuperscript{24} decision, Justice O’Connor sought clarification within this field of jurisprudence by developing, within her concurring opinion, the ‘Endorsement’ test\textsuperscript{25} by essentially collapsing the first two prongs of the Lemon test:

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions . . . The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political

\begin{thebibliography}{99}
\bibitem{15} Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
\bibitem{17} Lee, 505 U.S. at 592.
\bibitem{18} Lemon, 403 U.S. at 602.
\bibitem{19} \textit{Id.} at 612-13.
\bibitem{20} \textit{Id.}
\bibitem{21} \textit{Id.}
\bibitem{22} \textit{Id.}
\bibitem{23} \textit{But see}, Marsh v. Chambers, 463 U.S. 783, 792 (1983) (declining to apply the Lemon test, the Supreme Court held that the Nebraska Legislature’s tradition of beginning each day’s legislative session with a prayer that was led by a state-paid chaplain, did not violate the Establishment Clause because it was a historically accepted practice that had become “part of the fabric of our society.”).
\bibitem{25} \textit{Id.} at 687-94.
\end{thebibliography}
community, and an accompanying message to adherents that they are insiders, favored members of the political community.  

3. The Coercion Test

The Supreme Court framed the ‘Coercion’ test\(^{27}\) in 1992. In Lee, the Court held the practice of allowing all-inclusive prayers at public school graduation ceremonies to be unconstitutional.\(^{28}\) The Court neither considered, nor applied the Lemon test.\(^{29}\) They instead developed the ‘Coercion’ test which is based upon the theory that “at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise to act in a way which establishes a state religion or religious faith, or tends to do so.”\(^{30}\)

The Supreme Court looked first to the extent to which the school was involved in the prayer and determined that “the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position.”\(^{31}\) The Court borrowed from its prior holdings\(^{32}\) in recognizing that the concerns of the judiciary must be increased when protecting freedom of conscience from “subtle coercive pressure” faced in public schools.\(^{33}\) Because of this especially sensitive dilemma, the Court held that the school district’s supervision and control of the ceremony pressured students to participate in or show respect during the prayer, thus impermissibly putting students in the untenable position of either participating in a religious ceremony or protesting.\(^{34}\)

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26. Id. at 687-88.
27. Lee, 505 U.S. at 592. But see Newdow, 292 F.3d at 607 n.5 (noting that coercion is not a necessary factor for violating the Establishment Clause). See, e.g., Lee, 505 U.S. at 618-19 (Souter, J., concurring) (explaining that many state laws and practices that, while conveying religious messages, yet were noncoercive, have been invalidated as violations of the Establishment Clause); Engel v. Vitale, 370 U.S. 421, 430 (1962) (stating that direct governmental compulsion is not necessary to violate the Establishment Clause); County of Allegheny, 492 U.S. at 628 (noting that coercion alone has never been the “touchstone of Establishment Clause analysis” and that, if it were a necessary element, it would make the Free Exercise Clause redundant).
28. Lee, 505 U.S. at 599 (in deciding whether religious conduct may take place at a graduation ceremony, “where… young graduates who object are induced to conform”, the Court held that a school compelling or persuading students to participate in these religious exercises violates the Establishment Clause).
29. Id. at 587.
30. Id. (quoting from Lynch, 465 U.S. at 678, “[r]ather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith . . . the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so.”).
31. Id. at 590.
33. Lee, 505 U.S. at 592.
34. Id. at 593.
4. Application of All Three Tests

In a case involving school prayer, the Supreme Court applied the *Lemon* test, the ‘Endorsement’ test and the ‘Coercion’ test and held that a school district’s policy of allowing student-initiated and student-led prayers before high school football games was unconstitutional. The Court cited to *Lee* in deciding that “the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship.” In its application of the *Lemon* test, the Court concluded that the policy was facially unconstitutional because it did not have a secular purpose. Additionally, and in using language associated with the ‘Endorsement’ test, the Court stated that, “[t]his policy was implemented with the purpose of endorsing school prayer,” and that “[g]overnment efforts to endorse religion cannot evade constitutional reproach based solely on the remote possibility that those attempts may fail.”

B. Facts and Legal Framework of Newdow v. United States Congress

Michael Newdow’s daughter attended an elementary school in California’s Elk Grove Unified School District (“EGUSD”). Pursuant to state law and an EGUSD rule, the teachers at the daughter’s school led their students in reciting the Pledge at the beginning of each school day. Under the California Education Code, public schools were required to begin each school day with “appropriate patriotic exercises” and that reciting the Pledge would satisfy that mandate. As a means of implementing the California Code, the EGUSD implemented a policy requiring each elementary classroom to recite the Pledge daily.

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36. *Lemon*, 403 U.S. at 612-13. In order to survive the *Lemon* test, the government conduct in question first must have a secular purpose. Second, the conduct must have a principal or primary effect that neither advances nor inhibits religion. Finally, the conduct cannot foster an excessive government entanglement with religion.
37. *County of Allegheny*, 492 U.S at 593-94 (adopting Justice O’Connor’s concurring opinion in *Lynch* as the ‘Endorsement’ test and stating that the Establishment Clause, “at the very least, prohibits government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person’s standing in the political community”).
38. *Lee*, 505 U.S. at 587 (holding that the “[...government may not coerce anyone to support or participate in religion or its exercise, or otherwise to act in a way which establishes a state religion or religious faith, or tends to do so”).
40. *Id.* at 312.
41. *Id.* at 314-16.
42. *Id.* at 315-16.
43. *Newdow*, 292 F.3d at 597.
44. *Id.* at 600.
45. *Id.* *See also* supra note 5.
47. *Newdow*, 292 F.3d at 600.
but Newdow, who is an atheist, alleged that his daughter was injured by being compelled to “watch and listen as her state-employed teacher in her state-run school led her classmates in a ritual proclaiming that there is a God, and that our’s [sic] is ‘one nation under God.’”

Newdow filed a complaint in the district court wherein he challenged the constitutionality of the 1954 Congressional Act codifying the modern Pledge, the California statute, and EGUSD’s policy requiring teachers to lead students in the recitation of the Pledge. These laws were challenged using a First Amendment analysis. Newdow did not seek damages, but rather requested declaratory and injunctive relief. The district court dismissed Newdow’s complaint for failure to state a claim upon which relief could be granted. On appeal, the Ninth Circuit, after dispensing with issues of jurisdiction, standing, and the naming of appropriate defendants, ruled in favor of Newdow on his constitutionality argument.

### III. HOLDING AND RATIONALE OF NEWDOW V. UNITED STATES CONGRESS

#### A. Majority Opinion

The court began its opinion by recognizing its authority to apply any of the three Establishment Clause tests. In *Santa Fe Independent School District v. Doe*, the Supreme Court noted that a violation of any one of the three tests provided grounds for invalidating a challenged statute. For instance, in *Lee v. Weisman*, the court invalidated the challenged policy based solely on a ‘Coercion’ test analysis. Stated differently, the court has the prerogative to apply any single Establishment Clause test or all three tests, and to invalidate any challenged policy that fails to satisfy any one of these requirements.

48. *Id.* at 601. Compelling students to recite the Pledge violated the First Amendment’s Establishment Clause in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (stating that local authorities go beyond the constitutional limits to their power by compelling students to salute and pledge to the flag and that this compulsion “invades the sphere of intellect and spirit” the First Amendment protects from the control of the government).

49. *Newdow*, 292 F.3d at 601.

50. *Id.*

51. *Id.*

52. *Id.*


54. *Newdow*, 292 F.3d at 601-05.

55. *Id.* at 597.

56. *Id.* at 607 (applying the *Lemon* test, the ‘Endorsement’ test and the ‘Coercion’ test).


58. *Id.* at 301 (applying the *Lemon* test, the ‘Endorsement’ test and the ‘Coercion’ test).


60. *Id.* at 587.

61. *Newdow*, 292 F.3d at 607.
Nevertheless, the Newdow Court, possibly for purpose of being comprehensive, tested the school district policy and the 1954 Act against all three tests.62 The court first considered the ‘Endorsement’ test. 63 The court concluded that a statement or pledge proclaiming that the United States is a nation under God is indeed a religious endorsement. 64 Specifically, it is a profession of a religious belief, that of monotheism. 65 The court rejected the claim that a simple recitation of America being a nation “under God” is only an acknowledgement that many Americans believe in a deity. 66 Similarly, they rejected the view that the Pledge simply memorializes the irrefutable historical impact of religion in America. 67 Rather, the phraseology of the Pledge is normative. 68 Reciting the Pledge is not to describe the United States, but instead it is to swear allegiance to the values for which the Pledge and flag stand. 69 Per the language of the Pledge itself, these values include unity, indivisibility, liberty, justice, and monotheism. 70

According to the court’s interpretation of Establishment Clause precedent, the government must pursue a course of total neutrality toward religion. 71 The court asserts, however, that the text of the Pledge, codified into federal law, is not neutral, but rather takes a position with respect to a purely religious question: the existence or nonexistence of God. 72 Drawing parallels to other religious issues, the court opined that proclaiming America to be a nation “under God,” is the same as professing America to be a nation “under Jesus,” “under Zeus,” “under Vishnu,” or “under no god,” because none of these statements are religiously neutral. 73 The court also held that, because a teacher leads the recitation, the Pledge itself devolves into nothing more than an attempt to indoctrinate in students a respect for the very ideals set forth in the Pledge. 74 This, they held, amounted to a state endorsement of those same ideals. 75 The Court pointed out that while EGUSD students were not required to participate in the recitation of the Pledge, the policy of having school teachers lead the recitation, in and of itself, conveyed a message of state endorsement of a religious belief. 76

62. Id.
63. Id.
64. Id.
65. Id.
66. Id.
67. Newdow, 292 F.3d at 607.
68. Id.
69. Id.
70. Id.
71. Id. at 608 (quoting Wallace v. Jaffree, 472 U.S. 38, 60 (1985)).
72. Id. at 607.
73. Newdow, 292 F.3d. at 607-08.
74. Id. at 608.
75. Id.
76. Id.
The court reemphasized its holding by comparing it to the Supreme Court decision in \textit{West Virginia State Board of Education v. Barnette}.\footnote{Barnette, 319 U.S. at 624 (discussing political ideals contained in the Pledge).} There, the Supreme Court voided as unconstitutional a school district’s policy of punishing students who rebuffed a compelled reciting of the Pledge and saluting of the flag.\footnote{Id. at 642.} The \textit{Barnette} Court found that students were compelled to declare a belief\footnote{Id. at 631.} and accept the political ideas inherent in the symbolic flag\footnote{Id. at 633.} because a compulsory act, in and of itself, requires an affirming attitude of mind.\footnote{Id.} The \textit{Barnette} Court stressed that the ideas articulated in the Pledge were aspirational and idealistic, not merely historically descriptive.\footnote{See id. at 631-33.} Stated differently, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.”\footnote{Barnette, 319 U.S. at 642.}

The \textit{Newdow I} Court concluded that the current Pledge impermissibly endorses religion because it makes nonbelievers feel as though they do not belong, or are otherwise second-class citizens in the American political community.\footnote{Newdow, 292 F.3d at 608 (citing Justice O’Connor’s concurring opinion in \textit{Lynch}, 465 U.S. at 668).} The court stated that, “it borders of sophistry to suggest that the reasonable atheist would not feel less than a full member of the political community every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false.”\footnote{Id. (quoting Justice Kennedy’s dissent in \textit{County of Allegheny}, 492 U.S. at 672).}

The \textit{Newdow I} Court also concluded that the EGUSD policy and the 1954 Act failed the ‘Coercion’ test.\footnote{Id. at 609.} The court analogized the present case to \textit{Lee}, surmising that the policy and Act at issue placed students in the same untenable position of either participating in an exercise with religious content or openly protesting.\footnote{Id. at 609.} The \textit{Lee} Court stated that, with regards to graduation prayers, most believers would think of it as a reasonable request to respect their collective religious practice, but conversely, and when placed in the context of a public school ceremony, it would appear to a nonbeliever or dissenter as an attempt by the State itself to compel religious belief.\footnote{Lee, 505 U.S. at 592.} The \textit{Newdow I} Defendants argued that any possible religious import inferred from the phrase “one nation under God” is minimal,\footnote{Newdow, 292 F.3d at 609.} but the court disagreed and found that to either an atheist or
someone who believes in non-Judeo-Christian philosophies, such a phrase could reasonably appear as a governmental attempt to enforce a religious orthodoxy of monotheism. The court said that the coerciveness of the policy and Act were particularly egregious in the school setting due to the participants’ young ages and their impressionability, and the tacit understanding that they must adhere to the standards set by their school, their teacher, and their peers.91

The Newdow Court, under Lee, refused to distinguish Barnette because, even though student participation was not required, the daily exposure to the statement “one nation under God” has a coercive effect.92 This effect was most clearly shown when examining the practice in context and by reviewing its legislative history; both of which indicate that the Act was designed for the purpose of causing the specific words “under God” to be spoken daily in school classrooms.93 For instance, President Eisenhower stated during the signing ceremony, “[f]rom this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to the Almighty.”94

Finally, the Newdow Court applied the Lemon test.95 Under the Lemon test, a court first examines whether the challenged policy has a secular purpose.96 The defendants in Newdow I argued that the Pledge, when viewed as a whole, had the secular purpose of “solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.”97 The court, however, viewed the historical, primary purpose of the 1954 Act as a way of combating atheistic communism by advancing religion with the recognition a Supreme Being.98 Furthermore, the defendant’s approach was problematic in light of the Supreme Court’s analysis in Wallace v. Jaffree.99 In Wallace, an Alabama statute requiring a moment of silence for either meditation or voluntary prayer was ruled to be unconstitutional, not because it lacked a primary secular purpose, but because the state legislature purposefully amended the statute to include the words, “or voluntary prayer.”100

The Newdow I Court similarly applied the Secular Purpose prong of the Lemon test to only the portion of the 1954 Act that added the words “under

90. Id.
91. Id. (recognizing the “subtle and indirect” social pressures found in the classroom as first stated in Lee, 505 U.S. at 592-93).
92. Id.
93. Id.
94. Id. (citing 100 Cong. Rec. 8618 (1954) in which a statement from Senator Ferguson incorporated the signing statement of President Eisenhower).
95. Newdow, 292 F.3d at 609.
98. Id. at 609.
99. Wallace, 472 at 60.
100. Id. at 59-60.
God", not to the entire Pledge.  

The court concluded that the sole purpose of that particular clause was to separate the United States from nations under communist rule and that this was accomplished by advancing religion.  

The court confidently stated that the language of the amendment to the 1954 Act revealed that the actual underlying purpose of the 1954 Act was to take the position that the United States was theistic and that the country opposed contrary positions.  

The court stated that such motives were contrary to the Establishment Clause by expanding the traditional view that the government cannot endorse one particular religion over another, but that religion generally cannot be advanced against atheism.  

Although the 1954 Act expressly disclaimed a religious purpose, the court drew no constitutional distinction between the Establishment Clause’s restriction of endorsing religion as an institution or merely endorsing any religious ideology.  

Because the 1954 Act failed the Secular Purpose prong, the court did not consider the other prongs of the Lemon test, and held that the Act did not pass constitutional muster.  

The court concluded that the school district policy also failed the Lemon test.  

The court, and Newdow, conceded that the policy survived the first prong of the Lemon test because of the colorable argument that the school district had a legitimate secular purpose of fostering patriotism.  

However, it was determined that the policy failed the Lemon test’s Effects prong.  

This failure was further explained by examining the Supreme Court decision in School District of the City of Grand Rapids v. Ball.  

The second prong, as stated in Ball, asks, “whether the symbolic union of church and state effected by..."
the challenged government action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval of their individual religious choices.” 114  The Newdow Court noted that given the ages of the schoolchildren and their impressionability, especially in the classroom environment, such policies likely convey a message of endorsement to some students and disapproval to others regarding the existence of a single God. 115  As a result, the court held that the policy was unconstitutional by failing the Effects prong of the Lemon test. 116

Thus, both the policy and the Act failed the Lemon test, the ‘Endorsement’ test and the ‘Coercion’ test. 117

B. Dissenting Opinion

The dissenting opinion began by stating that the purpose of the Establishment Clause was not to drive religious expression out of public thought, but rather to avoid discrimination. 118  Judge Ferdinand F. Fernandez noted that a “litany of tests and concepts” have floated to the surface and been applied to Establishment Clause questions, but stated that the one correct notion of First Amendment jurisprudence is that of government neutrality. 119  He stated that the First Amendment is, in effect, an early kind of equal protection provision assuring that the government will discriminate neither for nor against a religion or religions. 120  After admittedly sweeping aside legal world abstractions, Judge Fernandez stated that, realistically, the danger of “under God” in the Pledge bringing about a theocracy or suppressing individual beliefs was so minuscule as to be de minimis. 121  Judges and Supreme Court Justices, have recognized the lack of danger in that and similar expressions for decades, if not for centuries, as have Presidents and members of Congress. 122  In Allegheny, the Supreme Court

114. Id. at 390.
115. Newdow, 292 F.3d at 611.
116. Id.
117. Id.
118. Id. at 613 (Fernandez, J., dissenting).
119. Id.
120. Id.
121. Newdow, 292 F.3d at 613 (Fernandez, J., dissenting). Judge Fernandez sarcastically notes that some judges “choke” on the notion of de minimis and have, therefore, resorted to the euphemism “ceremonial deism.” Id. at 614 (Fernandez, J., dissenting) (referring to Lynch, 465 U.S. at 716 (Brennan, J., dissenting) as an example).
122. Id. at 613; see also, e.g., County of Allegheny, 492 U.S. at 602-03 (1989) (indicating that the national motto, “In God We Trust”, and the Pledge are consistent with the First Amendment); Wallace, 472 U.S. at 78 n. 5 (1985) (O’Connor, J., concurring) (dismissing the suggestion that the Pledge is an unconstitutional endorsement of religion); Lynch, 465 U.S. at 676, 693, 716 (1984) (upholding the inclusion of a nativity scene in a city’s Christmas display); Sch. Dist. of Abington, 374 U.S. at 306-08 (1963) (Goldberg, J., concurring) (stating that neither the government nor the Court can or should ignore the significance of the fact that a vast portion of Americans believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings); Separation of Church & State Comm. v. City of Eugene, 93 F.3d 617, 621
stated, “[o]ur previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief.”123 The Seventh Circuit, reacting in part to that statement, expressed the following thought through Judge Frank H. Easterbrook:

Plaintiffs observe that the Court sometimes changes its tune when it confronts a subject directly. True enough, but an inferior court had best respect what the majority says rather than read between the lines. If the Court proclaims that a practice is consistent with the Establishment Clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so.124

In sum, Judge Fernandez argued that “such phrases as ‘In God We Trust’ or ‘Under God’ have no tendency to establish a religion in this country or to suppress anyone’s exercise, or non-exercise, of religion, except in the fevered eye of persons who most ardently would like to drive all tincture of religion out of the public life of our polity.”125 He added, “[t]hese expressions have not caused any real harm of that sort over the years since 1791, and are not likely to do so in the future, not because they are drained of meaning[,] [r]ather [...] it is because their tendency to establish religion (or affect its exercise) is exiguous.”126 Conceding that some people may not feel good about hearing the phrases recited in their presence, Judge Fernandez countered that other might not feel good if they are omitted.127 He noted that, in fact, the Barnette Court did not say that the Pledge could not be recited in the presence of Jehovah’s Witness children, but merely that they did not have to recite it.128 Therefore, dissenters’

(9th Cir. 1996) (O'Scannlain, J., concurring) (noting that the accommodation of religion, as intended by the Framers, was not only permitted but encouraged); Gaylor v. United States, 74 F.3d 214, 217-18 (10th Cir. 1996) (holding that a reasonable observer, aware of the purpose, context, and history of the phrase, “In God we trust,” would not consider its use or its reproduction on U.S. currency to be an endorsement of religion); Sherman v. Cnty. Consol. Sch. Dist. 21, 980 F.2d 437, 445-48 (7th Cir. 1992) (stating that the Pledge is a secular rather than a sectarian vow); O’Hair v. Blumenthal, 462 F. Supp. 19, 19-20 (W.D. Tex. 1978) (holding that the national motto is excluded from First Amendment significance because the motto has no theological or ritualistic impact); Aronow v. United States, 432 F.2d 242, 243-44 (9th Cir. 1970) (“[s]chool children and others are officially encouraged to express love for our country by reciting officially espoused anthems which include the composer's professions of faith in a Supreme Being”); Marsh, 463 U.S. at 792 (holding that legislative prayer is not an “establishment” of religion or a step toward establishment, but simply a tolerable acknowledgment of beliefs widely held among the people of this country).

123. See Allegheny, 492 U.S. at 602-03.
124. See Sherman, 980 F.2d at 448.
125. Newdow, 292 F.3d at 614 (Fernandez, J., dissenting).
126. Id.
127. Id.
128. Id. (citing Barnette, 319 U.S. at 630 which discussed political ideas and not the specific phraseology, “under God”).
constitutional rights are protected by precluding the government from trenching upon, “the sphere of intellect and spirit.”

Judge Fernandez continued, “the Constitution is a practical and balanced charter for the just governance of a free people in a vast territory” and “[t]hus, although we do feel good when we contemplate the effects of its inspiring phrasing and majestic promises, it is not primarily a feel-good prescription.”

Furthermore, Judge Fernandez noted that, “[a]s the [Barnette] Court pointed out, a dissenter’s religiously based refusal, ‘to participate in the ceremony [would] not interfere with or deny rights of others to do so.’” According to Judge Fernandez, the Ninth Circuit should not permit Newdow’s feel-good concept to change that balance. The ultimate legacy of the majority’s ruling would lead to disturbing results, such as a prohibition from using our albums of patriotic songs in many public settings. “God Bless America” and “America the Beautiful” would be gone for sure, and “while use of the first three stanzas of ‘The Star Spangled Banner’ will still be permissible, we would be precluded from straying into the fourth.” In conclusion, Judges could only accept the majority result if they limited themselves to elements and tests, while failing to look at the good sense and principles that animated those tests in the first place.

IV. ANALYSIS

A. Introduction and Definitional Background

[W]e have simply interwoven the motto [In God We Trust] so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits.

This general principle might also serve to insulate the various patriotic exercises and activities used in the public schools and elsewhere which, whatever may have been their origins, no longer have a religious purpose or meaning. The reference to divinity in the revised pledge of allegiance, for example, may merely recognize the historical fact that our Nation was believed to have been founded “under God.” Thus reciting the pledge may be no more of a religious exercise than the

129. Id. (quoting Barnette, 319 U.S. at 642).
130. Id.
131. Newdow, 292 F.3d at 614 (Fernandez, J., dissenting) (quoting Barnette, 319 U.S. at 630 (brackets in the internal quotes in the original)).
132. Id.
133. Id.
134. Id. (pointing out that the fourth stanza of “My Country ‘Tis of Thee” would also be off-limits).
135. Id.
reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact.\textsuperscript{136}

Black’s law dictionary defines religion as “[a] system of faith and worship, usually involving belief in a supreme being and usually containing a moral or ethical code; especially such a system recognized and practiced by a particular church, sect, or denomination.”\textsuperscript{137} In construing the protections under the Establishment Clause and the Free Exercise Clause, courts have interpreted the term religion quite broadly to include a wide variety of theistic and non-theistic beliefs.\textsuperscript{138} The plain language of the First Amendment clearly states that the government must \textit{establish} a religion in order to infringe constitutional rights, as opposed to recognizing, observing or aiding religion in some capacity.\textsuperscript{139} The verb “establish” is defined as that action which settles, makes or fixes firmly or enacts permanently.\textsuperscript{140} Further, “establish” is defined as making, forming or bringing something into existence; and to prove or to convince.\textsuperscript{141}

Unfortunately for patriotic (and religious) Americans, the Ninth Circuit has taken perfectly workable Establishment Clause tests and misapplied them to simple factual scenarios, thereby deviating from simple plain term meanings and Supreme Court jurisprudence. Granted that, “[n]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”\textsuperscript{142} In other words, \textit{Barnette} established that individuals could not be required to recite the pledge.\textsuperscript{143} However, it does not follow that a pupil who objects to the content of the Pledge may prevent teachers and other students from reciting it in his or her presence.\textsuperscript{144}

B. Language of School Policy

The California Education Code, as stated above, requires each public school to begin every day with an appropriate patriotic exercise and the Pledge of Allegiance satisfies this requirement.\textsuperscript{145} To carry out this mandate, EGUSD has a policy stating that each elementary class shall recite the pledge once each day.\textsuperscript{146} The language of the school policy clearly contemplates that each class

\begin{itemize}
  \item \textsuperscript{136} \textit{Sch. Dist. of Abington}, 374 U.S. at 303-04 (1963) (Brennan, J., concurring).
  \item \textsuperscript{137} \textit{BLACK’S LAW DICTIONARY} 1317 (8th ed. 2004).
  \item \textsuperscript{138} See, e.g., \textit{Ansonia Bd. of Educ. v. Philbrook}, 479 U.S. 60, 76 (1986) (Stevens, J., concurring in part) (stating statutory definition of religion as that including all aspects of religious observance and practice, as well as belief).
  \item \textsuperscript{139} U.S. CONST. amend. I.
  \item \textsuperscript{140} \textit{BLACK’S LAW DICTIONARY, supra} note 138, at 586.
  \item \textsuperscript{141} \textit{Id}.
  \item \textsuperscript{142} \textit{Barnette}, 319 U.S. at 642 (1943).
  \item \textsuperscript{143} See \textit{id}.
  \item \textsuperscript{144} \textit{Sherman}, 980 F.2d at 445 (7th Cir. 1992).
  \item \textsuperscript{145} \textit{CAL. EDUC. CODE} § 52720 (West 1989).
  \item \textsuperscript{146} \textit{Newdow}, 292 F.3d at 600 (9th Cir. 2002).
\end{itemize}
shall recite the Pledge, but does not specifically state who shall participate.\textsuperscript{147} Thus, the policy permits participation by some pupils, while allowing others to remain silent.\textsuperscript{148} Even if the statute is not expressly voluntary, it should be interpreted as such.\textsuperscript{149} As stated by the United States Supreme Court, statutes will be interpreted to avoid unconstitutional difficulty.\textsuperscript{150} California courts also resolve ambiguous statutes in a manner that most reasonably carries out the objectives of the statute and avoids absurd consequences.\textsuperscript{151} This interpretation is guided “by the precept ‘that a court, when faced with a statute that raises serious constitutional questions, should endeavor to construe the statute in a manner that avoids any doubt concerning its validity.’”\textsuperscript{152} By interpreting the school policy as voluntary, the act of reciting the Pledge in class is consistent with \textit{Barnette}, the most on-point pledge case handed down by the Supreme Court.\textsuperscript{153}

\section*{C. Peer-Pressure is Not Government Coercion}

The coercion test was formulated in the midst of an increasingly unpopular \textit{Lemon} test.\textsuperscript{154} In \textit{Lee}, a middle school had included the uniquely religious practice of praying during their graduation ceremony.\textsuperscript{155} The prayer was led by a clergyman.\textsuperscript{156} The Court felt that this practice impermissibly bore the imprint of the state and that it placed students in the awkward (i.e., coerced) position of either participating or protesting.\textsuperscript{157} The Ninth Circuit in \textit{Newdow I} has mistakenly drawn an incorrect analogy with \textit{Lee}. First, “under God” in the Pledge does not make it a religious exercise,\textsuperscript{158} as was the prayer in \textit{Lee}.\textsuperscript{159} Secondly, social pressure (also considered peer pressure) cannot be equated with governmental coercion or pressure and the presence, if any, of the previous does not justify silencing willing students who want to recite the Pledge.\textsuperscript{160} If this type of ‘coercion’ were the cornerstone of Establishment Clause jurisprudence, following the Ninth Circuits reasoning, then courts could not stop by merely

\begin{footnotesize}
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  \item \textsuperscript{147} \textit{Id}. at 600-601.
  \item \textsuperscript{148} \textit{See id}.
  \item \textsuperscript{149} \textit{See Sherman}, 980 F.2d at 442 (construing an Illinois statute requiring daily recitation of the pledge by schoolchildren to only include willing students rather than all students).
  \item \textsuperscript{150} Frisby v. Schultz, 487 U.S. 474, 483 (1988).
  \item \textsuperscript{152} \textit{Id}. (quoting Young v. Haines, 718 P.2d 909, 917 (Cal. 1986) (emphasis in the original)).
  \item \textsuperscript{153} \textit{See generally Barnette}, 319 U.S. at 624 (discussing the constitutionality of the Pledge).
  \item \textsuperscript{154} \textit{See generally Lee}, 505 U.S. at 577 (\textit{Lemon}, 403 U.S. at 602 not relied on or endorsed by majority with four justices proposing to not retain \textit{Lemon} as an Establishment Clause test).
  \item \textsuperscript{155} \textit{Lee}, 505 U.S. at 581.
  \item \textsuperscript{156} \textit{Id}. at 580.
  \item \textsuperscript{157} \textit{Id}. at 587-91.
  \item \textsuperscript{158} \textit{Sherman}, 980 F.2d at 447.
  \item \textsuperscript{159} \textit{Lee}, 505 U.S. at 581.
  \item \textsuperscript{160} \textit{Sherman}, 980 F.2d at 444.
\end{itemize}
\end{footnotesize}
invalidating the Pledge, but would have to continually hold unconstitutional a myriad of school activities termed disagreeable with students. For instance, public schools present a variety of viewpoints within their books, tests, essays and discussions. The diversity of religious views in the United States ensures that anything a school teaches will offend the conscience and contradict the principles of some if not many persons. The absurdity of such a line of reasoning is evident and not required by Supreme Court precedent because “under God” in the pledge is not “religion” and even if it were, whatever pressure dissenting students feel is not government coercion as envisioned in the First Amendment. The type of state action Newdow complains of simply does not amount to an establishment of religion. If legislative prayer based upon the Judeo-Christian tradition is permissible under Marsh and a Christmas nativity scene erected by a city government is permissible under Lynch, then the less specific reference to God in the Pledge likewise cannot amount to an establishment of religion.

D. Original Intent and The Supreme Court

One must straightforwardly ask the question whether the framers of our Constitution understood their handiwork? Unless we answer no, or think the founding fathers to be hypocrites, we must believe that certain ceremomial invocations of God did not amount to a governmental establishment of religion. For example, James Madison, author of the First Amendment, issued presidential proclamations of religious fasting and thanksgiving. Thomas Jefferson signed treaties sending ministers to the Indians. The Declaration of Independence contains multiple references to God. This uniquely American tradition has endured. Presidents still issue proclamations of thanksgiving, political speeches are read citing God, mottos on coinage continue to include God, the Bible is used to administer oaths, there is a national day of prayer and

161. Id.
162. Id.
163. Id.
164. See id. at 445.
167. Sherman, 980 F.2d at 448.
168. See County of Allegheny, 492 U.S. at 671-73 (Kennedy, J., dissenting in part) (stating that those present at creation of First Amendment did not deem ceremomial invocations as establishments of religion).
169. Sherman, 980 F.2d at 446.
170. Id.
171. See The Declaration of Independence para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.”).
172. See Sherman, 980 F.2d at 446.
we use phraseology such as ‘in the year of our Lord’ to date public documents. Individuals, both young and old, are in some manner required to participate in or observe these traditions. The Supreme Court in *Engel v. Vitale*, the first school prayer case, recognized the distinction between ceremonial references to God and a governmental establishment of religion by stating:

There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer’s professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.

To the same effect, *Abington School District v. Schempp* and *Lynch* include the Pledge in a list of civic exercises with religious connotations that the court implies as permissible. For example, Justice O’Connor stated that Thanksgiving, ‘In God We Trust’ and similar “government acknowledgments of religion serve . . . the legitimate secular purposes of solemnizing public occasions . . . and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, [these] practices are not understood as conveying approval of particular religious beliefs.”

**E. Justice Brennan and the Loss of Religious Purpose**

As stated earlier, Justice Brennan, who has been described by the Seventh Circuit as a stalwart separationist, has acknowledged the possibility that phrases such as ‘under God’ have lost their religious significance through rote repetition, despite what their origins were. In other words, this tradition, which has been woven into our civic polity, has changed the nature of these ceremonial references into a mere recognition of our country’s history. By the time *Marsh* was decided Justice Brennan was still uncertain:

173. Id.
175. Id. at 435 n. 21.
178. Id. at 676. See also *Schempp*, 374 U.S. at 306-08 (Golberg, J., concurring).
182. Id.
I frankly do not know what should be the proper disposition of features of our public life such as ‘God save the United States and this Honorable Court,’ ‘In God We Trust,’ ‘One Nation Under God,’ and the like. I might well adhere to the view expressed in Schempp that such mottoes are consistent with the Establishment Clause, not because their import is de minimis, but because they have lost any true religious significance.  

Finally, in Lynch, Justice Brennan concluded that the reference to God in the Pledge of Allegiance can best be understood as a form of ‘ceremonial deism’ protected by the Establishment Clause chiefly because it has lost any significant religious content. In fact, the Seventh Circuit has adopted this line of reasoning. Therefore, a plaintiff could not be injured by the Pledge because the it is not a religious exercise but merely a recognition of historical attachment. Whatever religious idea it once had contained would now be replaced with a sort of detached novelty. This conclusion follows neatly from, on the one hand, a purely definitional connection with “religion,” and a common sense approach to defining religious practice combined with a straightforward interpretation of Supreme Court discussion.

V. CONCLUSION

The decision of the Ninth Circuit Court of Appeals in Newdow I sets a dangerous precedent. If this case serves as the new standard in First Amendment jurisprudence, the government and private citizens will have to reevaluate references to God and religion in all public settings and in any activity, which may have only the most attenuated connection with the government. Such a result, when taken to its logical conclusion, is not mandated by the First Amendment for multiple independent reasons. These answers are most easily understood when considering what the average American family, as shown in the hypothetical, would consider a First Amendment violation. Such an answer may be reached by applying little more than common sense and Supreme Court precedent.

The reasonable parent understands that reciting “under God” in the Pledge is not an establishment of or practice of religion. Rather, the Pledge is viewed as a patriotic exercise, which, at most, merely recognizes America’s historical

183. Marsh, 463 U.S. at 818 (Brennan, J. dissenting).
185. See ACLU v. St. Charles, 794 F.2d 265, 271 (7th Cir. 1985) (stating that ‘In God We Trust’ and the Christmas tree are secular having lost their original religious significance).
186. See generally Lynch, 465 U.S. at 676.
187. See, e.g., Zorach v. Clauson, 343 U.S. 306, 313-15 (1952) (stating that the constitution does not require, “callous indifference,” to religion, but only that there is an, adequate separation between church and state).
188. Compare U.S. CONST. amend. I., with BLACK’S LAW DICTIONARY, supra note 138, at 1317 (defining establishment).
founding.\textsuperscript{189} The child, once in school, does not have to participate in reciting the Pledge and therefore falls outside \textit{Barnette}.\textsuperscript{190} While the dissenting student may feel pressure because of his non-participation, it is incorrect to assume that he is a victim of government coercion.\textsuperscript{191} The founding fathers recognized this distinction by themselves participating in multiple ceremonial references to God.\textsuperscript{192} Furthermore, the Supreme Court has implicitly acknowledged the constitutionality of such practices.\textsuperscript{193} Even if the 1954 Pledge was intended to be an endorsement of religion, in all practicality, the reference to God has lost any religious significance and is nothing more than a secular, historical reference and an appreciation of our collective past.\textsuperscript{194} After studying \textit{Newdow}, it should not be surprising to learn that from 1996-2000, the Supreme Court has reversed the Ninth Circuit sixty-three out of seventy-three times.\textsuperscript{195}

\begin{thebibliography}{9}
\bibitem{189} \textit{Schempp}, 374 U.S. at 303-04 (Brennan, J., concurring).
\bibitem{190} See generally \textit{Barnette}, 319 U.S. at 624.
\bibitem{191} \textit{Sherman}, 980 F.2d at 445.
\bibitem{192} See id. at 446.
\bibitem{193} \textit{Lynch}, 465 U.S. at 676. See also \textit{Schempp}, 374 U.S. at 306-08 (Goldberg, J., concurring).
\bibitem{194} See \textit{Lynch}, 465 U.S. at 676-78.
\bibitem{195} Orin Hatch, \textit{A Circuitsus Cour; Pledge Decision is Judicial Activism}, \textit{WASH. TIMES}, July 2, 2002, at A17.
\end{thebibliography}
HAS THE FAT LADY SUNG ON SENTENCING GUIDELINES? THE IMPACT OF BOOKER, BLAKELY, APPRENDI AND FOSTER ON OHIO’S SENTENCING PROTOCOL

"Just as opera stars often go on singing after being shot, stabbed, or poisoned, so judicial opinions often survive what could be fatal blows."

by Ann Marie Tracey

I. INTRODUCTION

In State v. Foster, by its own report, the Ohio Supreme Court “severely wounded” Ohio’s felony sentencing guidelines system. Following the lead of the nation’s highest Court, Ohio justices unanimously agreed in the court’s judgment that certain of Ohio’s guidelines were unconstitutional, and enthusiastically amputated key provisions. After two decades of guideline parameters, are Ohio judges now at liberty to use discretion in sentencing, unfettered by legislative direction?

In Foster, the court held unconstitutional the Ohio felony sentencing guidelines provisions mandating that a judge engage in fact-finding before imposing a sentence in four categories: one that is greater than the sentence range for an offense, a consecutive sentence, a sentence more than the minimum, or a sentence enhanced by a major drug or violent offender specification. The court purportedly based its decision primarily on recent United States Supreme Court cases addressing guidelines sentencing issues as implicated by the Sixth Amendment right to a jury trial: Apprendi v. New Jersey, Blakely v. Washington, and United States v. Booker. In spite of the distinctions between

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2. Id. at ¶ 99, 845 N.E.2d at 498, 109 Ohio St. 3d at 29 (Justice Lanzinger authored the opinion; Chief Justice Moyer and Justices Pfeifer, Lundberg Stratton, O’Connor and O’Donnell concurred; Justice Resnick concurred in the judgment and paragraph seven of the syllabus only).
3. Id. at ¶ 100, 845 N.E.2d at 498, 109 Ohio St. 3d at 30.
6. United States v. Booker, 543 U.S. 220 (2005). Post Booker and Foster, the United States Supreme Court addressed California’s determinate sentencing laws in Cunningham v. California,
the Ohio system on one hand, and the federal and Washington State systems, which the Supreme Court previously found had flunked the constitutionality test on the other,\(^7\) the Ohio Supreme Court determined that key Ohio provisions requiring judicial fact finding were unconstitutional, and severed the offending provisions from the Ohio guidelines scheme.\(^8\)

The Foster opinion opened by explaining a defendant’s Sixth Amendment right to have a jury determine facts underlying a sentence;\(^9\) it terminated with defendants losing the right to have a court articulate and support the basis for punishment more severe than the legislature had outlined for the offense level.\(^10\) As a result, defendants have fewer safeguards and are exposed to greater sentences, judges have broader discretion, and prosecutors won the lottery.

This article will explore the inter-relatedness and distinguishing features of the federal and Ohio guidelines systems through their evolution, stormy journey through the courts, and the aftermath of the Booker and Foster cases. Part II examines the federal and Ohio legislation at the heart of the respective guidelines debates, highlighting important distinctions between the federal and Ohio protocols. It then provides a brief background of the United States Supreme Court cases that provide the context for the Foster decision, focusing on the court’s reasoning and remedies. In Part III the author analyzes the applicability of these cases to the constitutional questions the Ohio Supreme Court faced in Foster, as well as the Foster holding and opinion. Finally, in Part IV, the article discusses the implications of the Foster decision on sentencing in Ohio, from both theoretical and applied perspectives. It examines whether and to what extent the Ohio guidelines system maintains its vitality. It also explores the likelihood of the Ohio General Assembly considering options in an attempt to revitalize the guidelines for the purposes it originally intended.

**II. BACKGROUND**

**A. Comparing and Contrasting the Federal and Ohio Guidelines Systems**

The 1970’s saw a rise in criticism of “unfettered judicial discretion,” and “capricious” sentencing, meaning judges could select a particular sentence

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\(^{127}\) S. Ct. 856 (2007). The Court held that California’s statutory scheme, which imposed a heavier sentence based on judicial fact-finding by a preponderance of the evidence standard, and not “inherent in the jury’s verdict nor embraced by the defendant’s plea,” violated a defendant’s right to a jury trial as protected by the Sixth and Fourteenth Amendments. *Id.* at 860.

\(^{7}\) *Blakely*, 542 U.S. at 313-14; see also *Booker*, 543 U.S. at 226.

\(^{8}\) *Foster*, 2006-Ohio-856 at ¶ 99, 845 N.E.2d at 498, 109 Ohio St. 3d at 3.

\(^{9}\) *Id.* at ¶ 2, 845 N.E.2d at 477, 109 Ohio St. 3d at 3.

\(^{10}\) *Id.* at ¶ 100, 845 N.E.2d at 498, 109 Ohio St. 3d at 30 (in the court’s words, “trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than minimum sentences.”).
without stating a reason.\textsuperscript{11} The latitude afforded to judges contributed to concerns about perceived disparities in sentencing,\textsuperscript{12} not to mention an uproar over crime rates.\textsuperscript{13} As a consequence, the federal court system saw Congress enact the Sentencing Reform Act of 1984,\textsuperscript{14} which limited judicial discretion and tilted sentences toward greater severity.\textsuperscript{15}

Under the Federal Sentencing Reform Act of 1984, the sentencing focus was redirected away from a strong rehabilitation component toward the goals of retribution, education, deterrence, and incapacitation.\textsuperscript{16} The Act created the United States Sentencing Commission, and charged it with developing and implementing guidelines that federal judges were mandated to use in sentencing.\textsuperscript{17} Judicial reaction was chilly and contemptuous;\textsuperscript{18} after all, their “judgment [was] questioned and their discretion reduced.”\textsuperscript{19}

Under the Federal Sentencing Guidelines, Congress had provided a range of sentences.\textsuperscript{20} Punishment was based on facts determined by plea, trial, or by the judge by a preponderance of the evidence at a post-trial sentencing hearing.\textsuperscript{21} These facts could include a defendant’s prominence in an organization,\textsuperscript{22} the organization’s size,\textsuperscript{23} the loss to the victims,\textsuperscript{24} and similar considerations.\textsuperscript{25} No jury was involved in this post-trial fact finding process.\textsuperscript{26} As Congress mandated

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\item \textsuperscript{11} Kristina Walter, Note, Booker and Our Brave New World: The Tension Among the Federal Sentencing Guidelines, Judicial Discretion, and a Defendant’s Constitutional Right to Trial by Jury, 53 CLEV. ST. L. REV. 657, 660 (2005/2006).
\item \textsuperscript{12} Id. It is noteworthy that sentences under advisory, as opposed to presumed guidelines sentencing systems, are not wildly discrepant. See id. at 685 (citing Kim Hunt & Michael Connelly, \textit{Advisory Guidelines in the Post-Blakely Era}, 17 FED. SENT. R. 233 (2005)).
\item \textsuperscript{13} See Joy Ann Boyd, Power, Policy, and Practice: The Department of Justice’s Plea Bargain Policy as Applied to the Federal Prosecutor’s Power under the United States Sentencing Guidelines, 56 ALA. L. REV. 591, 591 (2004). Presumably, since the overall objective of the Sentencing Reform Act of 1984 was to effectively combat crime, there was actually concern over the crime rate.
\item \textsuperscript{15} See Ann Marie Tracey & Paul Fiorelli, Throwing the Book\[er\] at Congress: The Constitutionality and Prognosis of the Federal Sentencing Guidelines and Congressional Control in Light of United States v. Booker, 2005 MICH. ST. L. REV. 1199, 1201 (2005) (discussing how Congress, by limiting judicial discretion, also decreased the ability of the judiciary to utilize rehabilitation in sentencing).
\item \textsuperscript{17} U.S. Sentencing Guidelines Manual \textsection 1A1.1, cmt. 1 (2004).
\item \textsuperscript{18} Heller, \textit{supra} note 16, at 772.
\item \textsuperscript{19} Id.
\item \textsuperscript{20} Tracey & Fiorelli, \textit{supra} note 15, at 1202.
\item \textsuperscript{21} Id.
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Id. at 1211.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} See Tracey & Fiorelli, \textit{supra} note 15, at 1202.
\end{itemize}
that judges impose the sentence calculated based on fact finding, the trial, or the plea, little discretion was left to judges.\textsuperscript{27} Instead of a rather subjective, wide-latitude endeavor, under the Federal Sentencing Guidelines, sentencing became an exercise that incorporated:

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a step by step process that is designed to include individualized adjustments. Beginning with a base level offense of conviction, judges are directed to make upward and downward adjustments to the applicable sentencing range depending on certain factors such as the defendant's role, acceptance of responsibility and criminal history.\textsuperscript{28}
\end{quote}
\end{quote}

A judge could only depart from the Guidelines by articulating a factor the Sentencing Commission had not considered sufficiently.\textsuperscript{29}

Similar containment forces were at work in Ohio to address its “predominantly indeterminate felony-sentencing structure in which a sentence was expressed in the form of a minimum and maximum prison term with the release decision in the hands of a parole board.”\textsuperscript{30} Ohio’s legislature, the Ohio General Assembly, sought “to introduce certainty and proportionality to felony sentencing.”\textsuperscript{31} With Ohio prisons bursting at the seams, it also sought to coax judges into using community alternatives, such as drug and alcohol programs, for lower level felonies.\textsuperscript{32} However, the Ohio legislature adopted an approach quite dissimilar to the federal tax return or federal grid approach\textsuperscript{33} of the federal guidelines. Effective July 1, 1996, “Senate Bill 2” (here, “S.B. 2”)\textsuperscript{34} “provided a sentencing scheme of ‘guided discretion’ for judges, intending that the required findings guide trial courts to select sentences within a range rather than to mandate specific sentences within that range. When mandatory sentences are intended, they are expressed.”\textsuperscript{35} Unlike the federal guidelines, which required a judge to apply “a complex point and grid system,”\textsuperscript{36} basically,\textsuperscript{37} the Ohio structure reflects a system of standard range sentences, with judges having the

\begin{thebibliography}{37}
\bibitem{27} Id. at 1201-02.
\bibitem{29} Heller, \textit{supra} note 16, at 760.
\bibitem{30} Foster, 2006-Ohio-856 at ¶ 34, 845 N.E.2d at 484, 109 Ohio St. 3d at 12.
\bibitem{31} Id. at ¶ 34, 845 N.E.2d at 484, 109 Ohio St. 3d at 12.
\bibitem{32} See OHIO REV. CODE ANN. § 2929.14, § 2929.13(B)(2)(b) (LexisNexis 2006).
\bibitem{33} Heller, \textit{supra} note 16, at 760.
\bibitem{34} 1996 Ohio Laws 7136.
\bibitem{35} Foster, 2006-Ohio-856 at ¶ 89, 845 N.E.2d at 495, 109 Ohio St. 3d at 27 (citing OHIO REV. CODE. ANN. § 2929.14 (D)(1)(a), (c), (d), and (f) (LexisNexis 2006)).
\bibitem{36} Heller, \textit{supra} note 16, at 760. See id. at 760-61 for a more complete explanation of the process.
\bibitem{37} The author does not attempt here to describe all the sentencing variations possible considering specific drug and other offenses.
\end{thebibliography}
“discretion to determine the most effective way to comply with the purposes and principles of sentencing” set forth in R.C. 2929.11, with departures allowed in certain circumstances. Consequently, where the federal guidelines required findings, the Ohio protocol only guided judges toward a sentence range, but did not mandate one.

The General Assembly further directed that with respect to a felony, the judge should impose a sentence that was “reasonably calculated to achieve the two overriding purposes of felony sentencing,” that is, deterrence and punishment, and which was “commensurate with and not demeaning to the seriousness of the offender’s conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.” This necessitated that the judge evaluate several issues according to certain factors. Two primary considerations were whether the conduct at issue was “more” or “less” serious, and whether the offender was likely to re-offend. For example, causing the victim serious harm increased the gravity of the crime, while harm being unanticipated could indicate an offense that was less serious. Similarly, committing the offense as a probationer or while in prison did not inspire confidence in the offender’s ability to stay out of trouble, while a lack of a criminal record did.

S.B. 2 then offered general guidelines according to the offense level, as well as certain requirements in specific instances. For each of the five felony offense levels, S.B. 2 provides a sentence range. Higher level felonies carried a presumption in favor of prison, with there being a preference for probation (renamed “community control”) for lower level (fourth- and fifth-degree) felonies. For more serious offenses, if the judge made certain findings, S.B. 2

38. S.B. 2 defined the purposes of sentencing as “to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.” OHIO REV. CODE ANN. § 2929.11(A) (LexisNexis 2006).
39. § 2929.12(A).
40. § 2929.12.
41. § 2929.11(B).
42. § 2929.11(A).
43. § 2929.11(B)
44. OHIO REV. CODE ANN. § 2929.12(B)(1)-(8) (LexisNexis 2006).
45. See § 2929.12(B)(1)-(2) (for factors increasing the seriousness of the offense).
46. § 2929.13(C)(3). See § 2929.12(C)(1)-C(4) (for factors indicating an offense that was less serious).
47. § 2929.12(D)(1).
48. See § 2929.12(D)(2) (for factors suggesting recidivism is likely); § 2929.12(E) (for factors suggesting future criminal behavior is unlikely).
49. § 2929.14.
51. See § 2929.13(D).
52. See § 2929.13(B).
required the judge to impose a prison sentence.\footnote{For a first or second degree felony, the judge was required to impose a prison term unless all of the following applied: a non-prison term would not demean the seriousness of the offense, and would adequately punish the offender and protect the public; the decreasing seriousness factors outweigh the increasing ones, and there was less likelihood of recidivism. § 2929.13(D).} For fourth- and fifth-degree felonies, if the judge failed to make specific findings, in combination with other considerations, the judge was required to impose community control.\footnote{See \textit{State v. Edmonson}, 715 N.E.2d 131, 133, 86 Ohio St. 3d 324, 325 (1999).}

Primarily because the legislature had already provided a sentencing scheme, a judge wishing to stray from the prescribed punishment range first was required to make certain findings.\footnote{See \textit{Ohio Rev. Code Ann.} § 2929.14(B)(1) and (2) (LexisNexis 2006) (regarding exceeding a minimum sentence).} Certain of these requirements were at issue in \textit{Foster}. For example, S.B. 2 required judges to impose the minimum prison term on a person unless the judge found that the offender was in prison when he committed the crime, the offender had previously served a prison term, that a minimum sentence would demean the seriousness of the offender's conduct, or that it would not adequately protect the public.\footnote{\textit{Id.} at 135, 86 Ohio St. 3d at 328.} However, in \textit{State v. Edmonson} the court held that R.C. 2929.14(B), which dealt with imposing a minimum sentence for a first time imprisonment, did not require that the trial court give its reasons for its finding that the seriousness of the offender's conduct will be demeaned or that the public will not be adequately protected from future crimes before it can lawfully impose more than the minimum authorized sentence.\footnote{\textit{Id.} at 135, 86 Ohio St. 3d at 328.}

Similarly, R.C. 2929.14(C) provided that a judge “may” impose a maximum sentence “only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes,” and in certain other narrow areas, including certain major drug offenders and
certain repeat violent offenders. S.B. 2 also required a judge to make findings for other statutory sentencing provisions at issue in Foster, including consecutive sentences and special sentences for major drug and repeat violent offenders. In other words, findings were required only if a judge wanted to buck the legislature’s direction for prison on more serious offenses, and community control on lower level felonies.

Importantly, a judge had great latitude in making such somewhat subjective findings. With respect to third-degree felonies, the judge was merely obliged to “comply with the purposes and principles of sentencing,” such as deterrence and incapacitation, as well as to use discretion in considering the seriousness of the offense and the likelihood of recidivism.

In order to impose a maximum sentence, the court needed to find an existing aggravating factor, for example, the crime was the worst form of the offense. Unlike the federal sentencing guidelines, then, a judge finding certain factors could impose a heavier sentence even if factors prompting a community control sentence were present. On the other hand, the judge was still at liberty to impose a sentence less than the maximum that was within the range.

Although findings were unnecessary at the trial court level except for certain circumstances, an appellate court could require a trial judge to make findings. If a judge ignored the presumption of prison and gave community control on a more serious offense, imposed a prison sentence on a lower level felony, imposed consecutive sentences, or granted judicial release without having made the necessary findings, a 2000 amendment to S.B. 2 permitted the appellate court to remand the case in order for the trial court to make the findings. The court of appeals could also modify the sentence or vacate it and remand it for resentencing if the findings were not supported by the record or the sentence was otherwise unlawful.

59. Ohio Rev. Code Ann. § 2929.14(C) (LexisNexis 2006). In Edmonson, the Court held that the other statute at issue, § 2929.19(B)(2)(d), sets the procedure that a trial court must follow when imposing the maximum sentence on an offender for a single offense. Edmonson, 715 N.E.2d at 135, 86 Ohio St. 3d at 328. It requires a trial court to “make a finding that gives its reasons for selecting the sentence imposed . . . [i]f the sentence is for one offense and . . . is the maximum prison term allowed for that offense.” Ohio Rev. Code Ann. § 2929.19(B)(2) (LexisNexis 2006).

60. Foster, 845 N.E.2d at 486.


62. § 2929.13(C) (citing Ohio Rev. Code Ann. § 2929.11).


64. Foster, 2006-Ohio-856 at ¶ 62, 845 N.E.2d at 490, 109 Ohio St. 3d at 20 (citing Ohio Rev. Code Ann. § 2929.14(C)).

65. See id. at ¶ 63, 845 N.E.2d at 490, 109 Ohio St. 3d at 20.

66. Id. at ¶¶ 48, 485 N.E.2d at 487, 109 Ohio St. 3d at 16.

67. Id., 845 N.E.2d at 487, 109 Ohio St. 3d at 16 (citing Ohio Rev. Code Ann. § 2953.08(G)(1) (LexisNexis 2006)).

68. Id., 845 N.E.2d at 487, 109 Ohio St. 3d at 16-17 (citing Ohio Rev. Code Ann. § 2953.08(G)(2)(a) & (b) (LexisNexis 2006)).
Unlike the federal sentencing structure at issue in Booker, but somewhat similar to the Washington State scheme which the United States Supreme Court addressed in Blakely, S.B. 2 incorporated “no mandate for judicial fact-finding in the general guidance statutes.” 69 S.B. 2 required judges to hold a sentencing hearing, at which the parties and any victims provided information relevant to punishment. 70 However, in imposing a sentence, judges needed only “consider” the purposes of sentencing, namely, protecting the public from the defendant committing future crimes, and punishing the offender. 71 The judge had discretion to determine how best to comply with sentencing purposes, and was directed to consider relevant factors such as the seriousness of the offense and the likelihood of recidivism. 72

B. The Apprendi, Blakely, and Booker Cases, Reinforcing the Right to a Jury

In Foster, the Ohio Supreme Court examined the constitutionality of key S.B. 2 provisions in light of a series of cases in which the United States Supreme Court had confronted a defendant’s right to a jury to determine facts underpinning a sentence, as well as the mandatory nature of some sentencing guidelines. Three key cases have had a dramatic impact on state and federal sentencing protocols: Apprendi v. New Jersey, and two critical “guidelines” cases, Blakely v. Washington, and United States v. Booker. In spite of the differences between the Ohio system, and the federal and Washington state systems in Booker and Blakely, respectively, the Ohio court would deem those cases dispositive of the issues in Foster. 73

Apprendi implicated the New Jersey state process by which a defendant could receive incarceration beyond that provided for an offense if an offense was a “hate crime.” 74 In that case, the judge, as part of a post-plea sentencing process, found by a preponderance of the evidence that Charles Apprendi had an underlying racial bias when he fired a weapon into the home of an African-American family. 75 Finding that the defendant had a “purpose to intimidate” 76 in committing the act, the trial judge determined that the hate-crime enhancement applied; this resulted in Apprendi’s receiving two additional years in prison on the gun possession offense to which he pleaded guilty. 77 The United States Supreme Court concluded that the Constitution required that a jury find beyond a reasonable doubt any fact, other than a prior conviction, that would enhance a

69. Id. at ¶ 42, 845 N.E.2d at 485, 109 Ohio St. 3d at 14.
72. § 2929.12.
73. See Foster, 2006-Ohio-856 at ¶ 82-83, 845 N.E.2d at 494, 109 Ohio St. 3d at 25.
74. Apprendi, 530 U.S. at 469.
75. Id. at 468-69.
76. Id.
77. Id. at 471.
sentence beyond the statutory maximum penalty range. While in Apprendi, the “hate crime” enhancement under New Jersey law was at issue, drug and violence “enhancements” would likewise be subject to similar constitutional constraints. Soon after, in Blakely v. Washington and United States v. Booker, the United States Supreme Court would address the sentencing protocols themselves in the federal and Washington state systems respectively.

In 2004, in Blakely, the Court examined the Washington State sentencing guidelines. As with S.B. 2, the Washington State sentencing structure provided a minimum and maximum sentence for an offense, within which range a judge could select the specific sentence, absent additional findings. However, unlike Ohio’s guidelines, the scheme provided specific ranges of sentences within the minimum and maximum terms, and a process by which judges selected an appropriate sentence based on findings. Mr. Blakely’s own case was demonstrative of the process, and was important to the Supreme Court’s considerations.

Mr. Blakely was charged with the first-degree kidnapping of his estranged wife at knifepoint. With a plea agreement, the charge was reduced to second-degree kidnapping, a class B felony. State law provided that "[n]o person convicted of a [class B] felony shall be punished by confinement . . . exceeding . . . a term of ten years," However, other provisions of the Washington Sentencing Reform Act specified that the standard range was 49 to 53 months for such a kidnapping offense involving a firearm. This took into account Blakely’s “offender score” and included a 36 month firearm enhancement. Under Washington law, only if the judge made findings of fact and conclusions of law supporting "substantial and compelling reasons justifying an exceptional sentence" could the judge “impose a sentence above the standard range” for the offense. Through these provisions, the judge could increase a sentence beyond the statutory maximum penalty range.

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78. Id. at 490.
79. Id. at 469.
80. See Tracey & Fiorelli, supra note 15, at 1213-21 (discussing the Apprendi, Blakely, and Booker cases).
81. Blakely, 542 U.S. at 298-301.
82. Id. at 303.
83. Id. at 299.
84. See id. at 296.
85. Id. at 298.
86. See id. at 298-99.
87. Blakely, 542 U.S. at 299 (citing WASH. REV. CODE ANN. § 9A.20.021(1)(b) (LexisNexis 2006)).
88. Id. (citing WASH. REV. CODE ANN. § 9.94A.320 (1981), recodified at § 9.94A.515 (LexisNexis 2006)).
89. Id. (citing WASH. REV. CODE ANN. § 9.94A.360 (1981), recodified at § 9.94A.525 (LexisNexis 2006)).
90. Id. (citing WASH. REV. CODE ANN. § 9.94A.120(2) (1981), recodified at § 9.94A.505 (LexisNexis 2006)).
91. Id.
beyond that range for which a defendant would be exposed based on the trial or facts the defendant admitted. 92

State law listed several factors the judge could consider; however, "][a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense." 93 The sentence would fail on appellate review if, "under a clearly erroneous standard, there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence." 94

After Mr. Blakely pleaded guilty, the judge imposed a 90 month sentence based on a finding of several aggravating factors. The court specifically found that Mr. Blakely was deliberately cruel, a statutorily enumerated aggravating factor, in the manner in which he committed domestic violence in kidnapping his estranged wife. 95 This finding would withstand state court appeals. As a result, the sentence stretched 37 months beyond the standard range of 49 to 53 months. 96 Blakely challenged this extended sentence based upon his Sixth Amendment right to a jury trial and Apprendi. 97

Because of the similarity between the Washington guidelines and the U.S. Sentencing Guidelines, 98 the Blakely appeal aroused great interest by the time it had reached the United States Supreme Court. Invoking its decision in Apprendi, the High Court determined that the Washington State sentencing protocol violated Mr. Blakely’s Sixth Amendment right to a jury. 99 It held that imposing a sentence greater than one within the standard range of the offense violated the Sixth Amendment because the sentence was based on facts a judge determined by a preponderance of evidence. 100 Instead, a jury must decide such facts beyond a reasonable doubt before a judge could impose the enhanced sentence. 101

The Court also redefined the critical term “statutory maximum.” 102 Rather than meaning the maximum penalty possible for a statutorily-defined offense, it became, “the maximum sentence a judge may impose solely on the basis of the

92. Id. at 303 (citing Ring v. Arizona, 536 U.S. 584, 602 (2002)); see also Apprendi, 530 U.S. at 488.
94. Id. at 300 (citing Gore, 21 P.3d at 277 (citing WASH. REV. CODE ANN. § 9.94A.210(4), recodified at § 9.94A.585 (LexisNexis 2006))).
95. Id.
96. Id. (citing WASH. REV. CODE ANN. § 9.94A.390(2)(h)(iii), recodified as § 9.94A.535 (LexisNexis 2006) which permitted such a departure).
97. Id. (citing WASH. REV. CODE ANN. § 9.94A.390(2)(h)(iii), which permitted this enhancement in domestic violence cases).
98. Id. at 296.
99. Booker, 543 U.S. at 233 (concluding that there were no constitutionally significant differences between the Washington State and Federal Sentencing Guidelines sentencing procedures).
100. Blakely, 542 U.S. at 305.
101. Id.
102. Id. at 313-14.
103. Id. at 303.
facts reflected in the jury verdict or admitted by the defendant." To the extent that the Washington State scheme did not provide for a jury determination of facts supporting the sentence, it was unconstitutional. In spite of its concerns, the Court imposed no remedy beyond that specific case. Any reprieve for such guidelines systems would be short-lived, as the Court would save its sword for the federal guidelines contest in Booker.

The Blakely decision did not appear to have immediate repercussions for Ohio’s procedures. In fact, courts as well as Ohio’s Sentencing Commission “speculated that Apprendi and Blakely did not materially affect the Ohio sentencing scheme,” because of the differences between the Washington and Ohio sentencing protocols. Unlike the sentencing guidelines in the state of Washington and the federal criminal system, Ohio’s scheme does not permit a sentencing court to deviate from a prescribed range of sentences for any felony. As long as a judge sentenced within the range of years prescribed for an offense, including the maximum sentence, “the consensus then was that the Sixth Amendment was not implicated by Ohio’s sentencing statutes.” Booker would dramatically change the landscape from which these views emanated.

In Booker, the Court applied its reasoning in Blakely to the mandatory federal sentencing guidelines. Freddie Booker, and the companion case defendant, Duncan Fanfan, were convicted of drug offenses. The issue raised in each case was whether sentences could, consistently with the Sixth Amendment, be increased based on the quantity of drugs involved when the findings were made by a judge rather than a jury.

Mr. Booker and Mr. Fanfan each arrived at the Supreme Court in the enviable posture as “respondent.” In both cases, the United States was appealing a court ruling that “binding rules set forth in the Guidelines limited the severity of the sentence the judge could lawfully impose on the defendant based on the facts found by the jury at his trial.” In each case, the lower courts had found that the Supreme Court’s ruling in Blakely applied to the federal sentencing guidelines and that the Sixth Amendment precluded a judge, by a

104. Id. (italics in opinion).
105. Id. at 305.
106. Blakely, 542 U.S. at 305.
108. Id.
109. Id.
110. Booker, 543 U.S. at 235 (citing Blakely, 542 U.S. at 305).
111. Id. at 227-28.
112. Id. at 226.
113. See id. at 227-28.
114. Id. at 226 (emphasis added).
preponderance of evidence, from making findings that would trigger longer sentences.115

The Court found no constitutionally significant differences between the Washington State and Federal Sentencing Guidelines sentencing procedures.116 In a 5-4 decision, in which Justices Stevens, Scalia, Souter, Thomas and Ginsburg agreed, the Court held that such an approach violated the defendants’ Sixth Amendment right to a jury trial.117 Describing them as “basic precepts . . . [and] procedures,” the opinion reiterated the development of the Sixth Amendment right to a jury.118 This included the right to have a jury determine “‘every fact necessary to constitute the crime with which he is charged.’”119 This evolved into “the right to demand a jury find him guilty of all elements of the crime with which he is charged,”120 as articulated in United States v. Gaudin.121

While the Court in Blakely had not reached for a remedy beyond that case, it now demonstrated no such recalcitrance. Rather, in a separate opinion Justice Breyer authored, the Court severed the two offending provisions of the Sentencing Reform Act which had effectively mandated judges to apply the guidelines in determining a sentence.122 First, it extracted from the guidelines 18 U.S.C.A. §3553(b)(1)123 which had required judges to impose a sentence within the guidelines-prescribed range after such fact-finding, unless there were circumstances justifying a “downward departure.”124 The Court also severed a second, related provision pertaining to appellate review of departures from mandatory guidelines sentences.125 With the Blakely and Booker beacons, the prognosis for state guidelines systems that were similar to the federal and Washington State systems was bleak.

115. Id. at 227-28. In the case of Mr. Booker, the trial judge adhered strictly to the Guidelines and imposed a sentence of 30 years. Id. at 227. This sentence was reversed by the Seventh Circuit, where the court found that strict adherence to the Guidelines violated Mr. Booker’s Sixth Amendment right to a jury trial. Id. at 227-28. As for Mr. Fanfan, the trial judge in the first instance refused to apply the Guidelines strictly and imposed a sentence based solely upon the findings of the jury. Id. at 228. In each case, petitions were filed directly with the Supreme Court, and the petitions were consolidated. Id.

116. Booker, 543 U.S. at 233 (citing Blakely, 542 U.S. at 325 (O’Connor, J., dissenting)).
117. Id. at 226.
118. Id. at 230.
119. Id. (citing In re Winship, 397 U.S. 358, 364 (1970)).
120. Id.
122. See Booker, 543 U.S. at 259.
125. Id. at 259 (citing 18 U.S.C. § 3742(e) (2000 & Supp. 2004)).
III. THE *FOSTER* CONSOLIDATED CASES: UNCONSTITUTIONAL FACT-FINDING

The resulting challenge to the Ohio state guidelines system was quick to follow. By the time the *Foster* case reached the Ohio Supreme Court, most of Ohio’s appellate courts had found Ohio’s sentencing structure sound. They had determined that the guidelines did not fall within *Blakely’s* reach, only required a traditional, constitutional sentencing approach, or that *Apprendi* did not apply because the United States Supreme Court had already excepted a “prior conviction” from a jury requirement. After all, unlike the Washington State protocol at issue in *Blakely*, findings under R.C. 2929.14(A) regarding exceeding a minimum sentence and (B) regarding imposing a maximum sentence would still result in imposing a sentence within the “standard range” for the offense.

In *Foster*, the Ohio Supreme Court consolidated four separate cases in which defendants had challenged the Ohio felony sentencing guidelines after receiving heftier sentences than jury verdicts or admitted facts warranted. This joinder allowed Ohio’s justices to tackle comprehensively the constitutional issues pertaining to several sentencing provisions.

Andrew Foster pleaded guilty to and was sentenced beyond the minimum penalty for assorted theft offenses. After the Licking County Court of Appeals upheld his sentence, Foster appealed to the Ohio Supreme Court, claiming that under R.C. 2929.14(B) and (C), a jury beyond a reasonable doubt, not a judge, must make those findings which could trigger a longer sentence. R.C. 2929.14 names several factors that trigger longer prison sentences including prior prison time and the idea that imposing the minimum term would demean the seriousness of the conduct or not adequately protect the public future crimes.

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126. *Foster*, 2006-Ohio-856 at ¶ 50, 845 N.E.2d at 488, 109 Ohio St. 3d at 17.
127. *Id.*, at ¶ 50, 845 N.E.2d at 488, 109 Ohio St. 3d at 17; see *Apprendi*, 530 U.S. at 476 (where the Court held that a fact, except a prior conviction, that increases a penalty beyond the maximum penalty for an offense must be charged and proven to a jury beyond a reasonable doubt).
129. *Id.* at ¶ 12-28, 845 N.E.2d at 479-83, 109 Ohio St. 3d at 6-11.
130. *Id.*, 845 N.E.2d at 479-83, 109 Ohio St. 3d at 6-11.
131. *Id.* at ¶ 12-17, 845 N.E.2d at 479-80, 109 Ohio St. 3d at 6-7.
133. *Id.* at ¶ 17, 845 N.E.2d at 480, 109 Ohio St. 3d at 7.
Both Jason Quinones and Robert Adams brought similar Sixth Amendment challenges regarding their maximum, consecutive sentences. They asserted in essence that their maximum sentences violated *Blakely* in that no jury had determined the statutory prerequisites of R.C. 2929.14(C) for a maximum sentence, *i.e.*, committing the worst form of the offense or posing the greatest likelihood or recidivism. While the Cuyahoga Court of Appeals agreed with Quinones, the Lake County Court of Appeals upheld Adams’ maximum, consecutive 26-year prison sentence, including a violent offender specification, as well as related offenses. The Lake County Court of Appeals found *Blakely* and *Apprendi* inapplicable to consecutive sentences.

Jeannett Horn’s case raised the issue of whether *Blakely* applied to major drug offender sentences after a judicial finding prompted her 10-year sentence for conspiracy and drug offenses. The court of appeals upheld this sentence, leaving the question next before the Ohio Supreme Court.

Without distinguishing between the Washington State and Ohio protocols, the court found that the Sixth Amendment principles *Blakely* articulated squarely addressed the statutes at issue. It rejected the state’s argument that the Ohio protocol reflected traditional sentencing factors within a judge’s prerogative to consider, or involved simple sentence “enhancements.” It compared the *Blakely* scenario of imposing a sentence beyond a standard range for an offense to the Quinones and Adams challenges to maximum sentences under R.C. 2929.14(C). However, this statute, instead of permitting additional penalties, precluded judges from imposing a maximum sentence by authorizing them “only upon offenders who committed the worst forms of the offense, upon offenders who had the greatest likelihood of committing future crimes, upon certain drug offenders . . . and upon certain repeat violent offenders.” Consequently, while *Blakely* precluded a judicially-found fact from increasing a defendant’s statutory maximum, the *Foster* court took a different tack, finding that the Sixth Amendment challenges were not applicable.

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135. *Id.* at ¶ 19-24, 845 N.E.2d at 481-82, 109 Ohio St. 3d at 8-10; *see also* Ohio Rev. Code Ann. § 2929.14 (D)(2) (LexisNexis 2006).
136. *Id.* at ¶ 62, 845 N.E.2d at 490, 109 Ohio St. 3d at 20.
137. *Id.* at ¶ 24, 845 N.E.2d at 482, 109 Ohio St. 3d at 9-10.
139. *Foster*, 2006-Ohio-856 at ¶ 26-27, 845 N.E.2d at 482, 109 Ohio St. 3d at 10.
140. *Id.* at ¶ 27, 845 N.E.2d at 482, 109 Ohio St. 3d at 10 (citing State v. Horn, No. OT-03-016, 2005-Ohio-5257, 2005 WL 2416033 (Ohio Ct. App. Sept. 30, 2005)).
141. *Id.* at ¶ 83, 845 N.E.2d at 494, 109 Ohio St. 3d at 25.
142. *Id.* at ¶ 53, 845 N.E.2d at 489, 109 Ohio St. 3d at 18-19.
143. *Id.* at ¶ 62-64, 845 N.E.2d at 490, 109 Ohio St. 3d at 20 (citing Ohio Rev. Code Ann. § 2929.14 (LexisNexis 2006)).
144. *Id.* at ¶ 62, 845 N.E.2d at 490, 109 Ohio St. 3d at 20.
Amendment blocked S.B. 2’s requirement that a judge limit a sentence without additional findings. 146

Perhaps in a curious twist unanticipated by all parties, or even the Blakely and Booker decisions, the court’s focus was S.B. 2’s restraints on judicial discretion with respect to the upper limits of sentencing. 147 This certainly had not been a complaint of the Foster defendants. Seeking support, the court focused on those S.B. 2 mandates, reflected in statutory presumptions and “the ‘use of the word ‘shall’ at crucial points in the legislative scheme.’” 148 It found that such directives overrode any rationale that the sentence may fall within the statutory range permitted. 149 Without an ability to impose the heftiest of penalties, “Unlimited judicial discretion to sentence within a range is not currently authorized by statute. If required judicial facts are not found, certain sentences may not be imposed. These limitations create presumed statutory maximums that implicate Sixth Amendment protection.” 150 However, the statutory maximum of which the court spoke was the two-year limit Foster claimed applied absent jury findings; that is, a standard sentence. 151 In other words, the court found that the General Assembly’s preclusion of a judge from imposing a maximum sentence, unless the judge made certain findings, violated the Sixth Amendment. 152

The United States Supreme Court had explicitly rejected such an approach in Apprendi. 153 There, Justice Stevens emphasized the distinction “between facts in aggravation of punishment and facts in mitigation.” 154

If facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute. If the defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the Judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone. Core concerns animating the jury and burden-of-proof requirements are thus absent from such a scheme. 155

146. Foster, 2006-Ohio-856 at ¶ 61, 845 N.E.2d at 490, 109 Ohio St. 3d at 20.
147. See id. at ¶ 51, 845 N.E.2d at 488, 109 Ohio St. 3d at 18.
148. Id., 845 N.E.2d at 488, 109 Ohio St. 3d at 18.
149. Id., 845 N.E.2d at 488, 109 Ohio St. 3d at 18.
150. Id., 845 N.E.2d at 488, 109 Ohio St. 3d at 18.
151. Id., 845 N.E.2d at 488, 109 Ohio St. 3d at 18.
152. Foster, 2006-Ohio-856 at ¶ 53, 845 N.E.2d at 489, 109 Ohio St. 3d at 19.
153. See Apprendi, 530 U.S. at 490-92.
154. Id. at 490 n.16 (citing Martin v. Ohio, 480 U.S. 228 (1987)).
155. Id.
Although “Apprendi only applied to facts increasing the statutory maximum,”156 the Foster court applied its scalpel to the S.B. 2 provisions that in effect could require a lesser sentence, albeit only as to those operative sections directly implicated on the appeals.157 The court remedied perceived constitutional defects by eliminating only those provisions requiring mandatory judicial fact finding with respect to maximum prison terms,158 consecutive prison terms,159 repeat violent offenders;160 and major drug offenders.161 The court also severed the provisions creating “presumptive minimum or concurrent terms or [that] require judicial fact-finding to overcome the presumption,” as having “no meaning now that judicial findings are unconstitutional.”162 The court further found “inapplicable” the related appellate review provision of statutory findings for consecutive sentences.163

Unlike the broad brush of the Booker remedy, sweeping aside all of the federal guidelines for purposes of mandatory consideration, the Ohio court was restrained. It addressed only the select S.B. 2 provisions at issue, and then only with respect to fact-finding requirements.164 The result of its approach was to “remove only the presumptive and judicial findings that relate to ‘upward departures,’ that is, the findings necessary to increase the potential prison penalty.”165 This left the “vast majority” of S.B. 2 intact.166

The Foster court viewed its approach as contained and having limited impact on S.B. 2. According to the Foster court, with sentences continuing to be imposed for a specific prison term, “the severance remedy preserves ‘truth in sentencing,’ a fundamental element of S.B. 2.”167 It also offered as solace the fact that other S.B. 2 initiative reforms, such as re-categorizing felonies, community control options, enhancements, and life without parole, largely had

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156. See Walter, supra note 11, at 665.
158. Foster, 2006-Ohio-856 at ¶ 64, 845 N.E.2d at 490, 497-98, 109 Ohio St. 3d at 20, 29 (citing OHIO REV. CODE ANN. § 2929.14(C) (LexisNexis 2006)).
159. Id. at ¶ 67, 845 N.E.2d at 491, 109 Ohio St. 3d at 21-22 (citing OHIO REV. CODE ANN. § 2929.14(E)(4) (LexisNexis 2006)).
160. Id. at ¶ 76-78, 845 N.E.2d at 493, 109 Ohio St. 3d at 24 (citing OHIO REV. CODE ANN. § 2929.24(D)(2)(b) (LexisNexis 2006)).
161. Id. at ¶ 80, 845 N.E.2d at 493-94, 109 Ohio St. 3d at 24 (citing OHIO REV. CODE ANN. § 2929.24(D)(3)(b) (LexisNexis 2006)).
162. Id. at ¶ 97, 845 N.E.2d at 497, 109 Ohio St. 3d at 29 (citing to OHIO REV. CODE ANN. §§ 2929.14(B), 2929.19(B)(2), and 2929.41 (LexisNexis 2006)).
163. Id., 845 N.E.2d at 497, 109 Ohio St. 3d at 29 (citing to OHIO REV. CODE ANN. § 2953.08(G) (LexisNexis 2006)).
165. Id. at ¶ 98, 845 N.E.2d at 498, 109 Ohio St. 3d at 29.
166. Id., 845 N.E.2d at 498, 109 Ohio St. 3d at 29.
167. Id. at ¶ 101, 845 N.E.2d at 498, 109 Ohio St. 3d at 30 (punctuation omitted).
survived. All justices agreed that because of the majority’s conclusions, “Trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences.”

While this seems to leave unresolved the Booker and Blakely concerns regarding imposing additional time for circumstances not determined by a jury, the court acknowledged a caveat: The sentence must be within the codified standard range, and also be “based upon a jury verdict or admission of the defendant.” In so doing, the court opened a Pandora’s box from which escaped more questions than the Foster decision resolves.

It is difficult to reconcile the Foster rationale and remedy in light of Booker and Blakely, given the distinctions between the S.B. 2 guidelines and those at issue in Booker and Blakely, as well as the remedy the Booker court applied. While in Booker, the United States Supreme Court addressed guidelines that required judges to impose penalties based on findings made, S.B. 2 required the judges to make findings when imposing a sentence generally beyond the statutory range, i.e., the maximum sentence. Arguably, such a maximum sentence therefore was not beyond the range the Ohio General Assembly provided in S.B. 2. In this respect, the remedy the court adopted may have been appropriate: excising the requirement that findings be made. However, unlike the Booker and Blakely statutory scenarios, the Ohio statute precluded imposing the maximum sentence without findings; it did not require the judge to impose a sentence based on findings not admitted nor found by a jury upon evidence proved beyond a reasonable doubt. Further, S.B. 2, as addressed in Foster, did not mandate the sentence outcome based on the facts, as did the federal or Washington State guidelines. Rather, under S.B. 2, judges could choose to reject legislative presumptions or suggestions if they first made certain findings. Otherwise, judges were only required to make findings ab initio if an appellate court so directed.

If the S.B. 2 guidelines’ flaw was that any findings that could trigger the heftier maximum did not pass Sixth Amendment muster, the court could have exercised another remedy more consistent with the legislative push to use the maximum sentence only in extraordinary circumstances, i.e., on offenders who had committed the worse form of the crime or who possessed the greatest likelihood of recidivism. That solution would have been to eliminate the provision allowing a sentence beyond the standard range, i.e., the maximum, to

168. Id., 845 N.E.2d at 498, 109 Ohio St. 3d at 30.
169. Id. at ¶ 100, 845 N.E.2d at 498, 109 Ohio St. 3d at 30.
170. Foster, 2006-Ohio-856 at ¶ 99, 845 N.E.2d at 498, 109 Ohio St. 3d at 30 (italics added).
171. See Booker, 543 U.S. at 229.
172. Foster, 2006-Ohio-856 at ¶ 63, 845 N.E.2d at 490, 109 Ohio St. 3d at 20.
173. See Bruce, 2005-Ohio-373 at ¶ 7, 824 N.E.2d at 611, 159 Ohio App. 3d at 565.
174. See Foster, 2006-Ohio-856 at ¶ 51, 845 N.E.2d at 488, 109 Ohio St. 3d at 18.
be imposed. This would leave it up to the General Assembly to address whether it wanted to increase the range for the offense, while leaving the S.B. 2 scheme intact in the interim.

IV. THE FOSTER AFTERMATH AND IMPACT

The Foster ruling immediately caught Ohio’s lower courts in its crossfire. The decision directed that all cases pending on direct review be remanded for new sentencing hearings. While the court acknowledged the disruption Foster would cause and the resources it would require, it provided little practical assistance to judges. In In re Ohio Criminal Sentencing Statutes Cases, the court first specifically addressed those pending cases. In one swoop, it reversed 190 appellate decisions and remanded the felony cases to trial courts for resentencing, with another three cases reversed in part and remanded for resentencing. The court addressed numerous additional cases in subsequent decisions. Some judges must have bristled under the task of resentencing defendants. After all, the Ohio Supreme Court in State v. Comer had just required them to make findings for consecutive and non-minimum terms; suddenly, this approach now violated a defendant’s right to a jury trial. Were judges wondering whether the third round of sentences would stick?

The prospect of the additional burden of resentencing defendants did not daunt the enthusiasm of many in the judiciary for the Foster decision. Heralded as a “grand slam home run for law and order,” Ohio prosecutors as well as

176. Foster, 2006-Ohio-856 at ¶ 104, 845 N.E.2d at 499, 109 Ohio St. 3d at 31; see also Mathis, 2006-Ohio-855 at ¶ 3, 846 N.E.2d at 3, 109 Ohio St. 3d at 55 (2006).
177. Foster, 2006-Ohio-856 at ¶ 104, 845 N.E.2d at 499, 109 Ohio St. 3d at 31.
179. Id. at ¶ 2-148, 207-52, 847 N.E.2d at 1174-80, 1182-84, 109 Ohio St. 3d at 313-21, 325-28.
180. Id. at ¶ 166-68, 845 N.E.2d at 1180-81, 109 Ohio St. 3d at 322.
183. See, e.g., Mathis, 2006-Ohio-855 at ¶ 26, 846 N.E.2d at 6, 109 Ohio St. 3d at 59. In Mathis, a trial court that had supplemented findings on remand from the Court of Appeals was reversed for failing to conduct a resentencing hearing de novo because the Foster decision “severed the statutes on which Comer relied.” Id. at ¶ 26 n.7, 846 N.E.2d at 6 n.7, 109 Ohio St. 3d at 60 n.7.
The hoopla may have been premature. In spite of their narrower applicability, it is clear from the opinion that the guidelines retain significant vitality with respect to the sentencing process. Importantly, traditional sentencing factors and the purposes and principles the General Assembly articulated remain intact.\(^\text{186}\) Nowhere in *Blakely* or *Booker* did the Court say it was constitutional to impose sentences without a factual basis. To the contrary, and as the Ohio court acknowledged in *Foster*, any sentence imposed must reflect the facts percolating from the “jury verdict or admission of the defendant without the mandated judicial findings that *Blakely* prohibits.”\(^\text{187}\) The question then becomes whether sizeable sentences outside the range contemplated in S.B. 2, which remains intact except for the redacted provisions, will survive appellate scrutiny.

Especially when taking into account appellate review, the vigor of the guidelines after *Foster* is heartier than initial reactions would suggest. The court made it clear in the *Foster* decision, and subsequently,\(^\text{188}\) that in *Foster* it had only eliminated a findings requirements for maximum, consecutive, more than the minimum, and special offender sentences.\(^\text{189}\) Courts remained mandated to “consider those portions of the sentencing code that are unaffected by today’s decision and impose any sentence within the appropriate felony range.”\(^\text{190}\) With respect to the balance of findings requirements for sentencing, judges must still consider and apply S.B. 2 sentencing guidelines.\(^\text{191}\) The court may just be beginning to articulate the extent of these persistent requirements. Post-*Foster*,


\(^{186}\) See *Foster*, 2006-Ohio-856 at ¶ 98, 845 N.E.2d at 497-98, 109 Ohio St. 3d at 29 (noting that by “[e]xercising the unconstitutional provisions,” the court’s holding in *Foster* would “not detract from the overriding objectives of the General Assembly, including the goals of protecting the public and punishing the offender.”)

\(^{187}\) Id. at ¶ 102, 845 N.E.2d at 499, 109 Ohio St. 3d at 30. Prior convictions remain excepted even after *Booker*. See id. at ¶ 106, 845 N.E.2d at 499, 109 Ohio St. 3d at 31.

\(^{188}\) See *Mathis*, 2006-Ohio-855 at ¶ 26, 846 N.E.2d at 6, Ohio St. 3d at 59-60.

\(^{189}\) *Foster*, 2006-Ohio-856 at ¶ 56-81, 845 N.E.2d at 489-494, 109 Ohio St. 3d at 20-25.

\(^{190}\) Id. at ¶ 105, 845 N.E.2d at 499, 109 Ohio St. 3d at 31.

\(^{191}\) Id. at ¶ 98, 845 N.E.2d at 498, 109 Ohio St. 3d at 29 (noting that “the vast majority of S.B. 2, which is capable of being read and of standing alone, is left in place.”).
in *State v. Mathis*, the court underscored that “[j]udicial findings must be provided only for *downward* departures, such as when a court refuses to impose the presumptive prison term under R.C. 2929.13(D) or when a court grants a judicial release.”

With respect to those provisions that still require findings, R.C. 2953.08(G)(2)(a) allows an appellate court to “increase, reduce, or otherwise modify or vacate a sentence and remand the matter to the trial court for resentencing if the court finds by clear and convincing evidence . . . [t]hat the record does not support the sentencing court's findings.” Clearly, compliance with these guidelines is required and crucial to appellate scrutiny.

Even in those instances when no findings are required, as is now the case with respect to those provisions the court excised in *Foster*, consulting the guidelines could otherwise buttress the validity of a sentence in the eyes of a reviewing court. R.C. 2953.08(G)(2)(b) also provides for an appellate court to increase, reduce, or remand a sentence that “is otherwise contrary to law.” In eliminating the S.B. 2 findings requirements as the starting point for evaluation, the much broader abuse of discretion standard will once again dominate the review. In assessing whether this occurred, the appellate court is bound to rely in the first instance on the trial court’s observations. “An appellate court should not, however, simply substitute its judgment for that of the trial court, as the trial court is ‘clearly in the better position to judge the defendant’s dangerousness and to ascertain the effect of the crimes on the victims.’” These ideas are best captured by findings a judge makes and places on the record. Consequently, even though the *Foster* court declined to adopt the *Booker* endorsement of the guidelines’ continued relevancy, a judge’s articulating in the record factual findings consistent with those in S.B. 2, albeit no longer required, seems prudent and suggests that the judge exercised thoughtful and appropriate discretion.

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192. *Mathis*, 2006-Ohio-855 at ¶ 27, 846 N.E.2d at 7, 109 Ohio St. 3d at 60 (emphasis added).


194. See id. at ¶ 53.


196. Id. at ¶ 58 (citing *State v. Jones*, 754 N.E.2d 1252, 1261, 93 Ohio St. 3d 391 (2001)).

197. See *Booker*, 543 U.S. at 264. The Supreme Court underscored the continued import of the Federal Sentencing Guidelines, advising that in sentencing, federal judges, “while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.” *Id.; see also Tracey & Fiorelli, supra note 15, at 1231-32 (discussing the relevance of the Federal Sentencing Guidelines with respect to appellate considerations); United States v. Crosby, 397 F.3d 103, 115 (2d Cir. 2005) (reiterating the need to consult the Guidelines).*
In this regard, the Court in *Booker* underscored the vestigial import of the guidelines with respect to federal appellate considerations. The Court suggested that in determining whether a departure from the applicable guidelines range was appropriate, appellate courts would evaluate a sentence according to the appellate review standard pre-existing that, evoking mandatory guidelines, it now deemed unconstitutional. This earlier standard asked whether a sentence was “unreasonable, having regard for . . . the factors to be considered in imposing a sentence . . . .” Although no longer mandatory, the Court concluded that those criteria articulated in the Federal Sentencing Guidelines remained the appropriate factors against which an appellate court would review the sentence. These included the seriousness of the offense, adequate deterrence, protecting the public from further crime, and promoting respect for the law. An Ohio judge similarly could reinforce the validity of a sentence through its consistency with S.B. 2 guidelines.

Whether *Foster* will affect the actual length of sentences imposed is another open question. As a result of *Foster*, and as clarified in *Mathis*, Ohio judges may only disregard the S.B. 2 provisions at issue in *Foster* (maximum, consecutive, and drug and violent offender enhancements), and, only with respect to upward departures. While some viewed *Booker*’s impact on the federal system as giving judges “the discretion to deal with individual cases without being unnecessarily harsh,” after *Foster*, Ohio sentences can now be longer or more punitive than S.B. 2 permitted originally. Only the abuse of discretion standard would restrain judges from imposing maximum or consecutive sentences. However, this does not necessarily mean that Ohio sentences will jump in severity.

In spite of their non-mandatory status, Ohio judges may follow the lead of the many federal courts that are still taking the Federal Sentencing Guidelines seriously. While the trial judge must have “consider[ed]” the federal

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198. *See Booker*, 543 U.S. at 262-63.
199. *Id.*
201. *Booker*, 543 U.S. at 261. On the other hand, as the Court noted, “Justice Scalia believes that only in ‘Wonderland’ is it possible to infer a standard of review after excising § 3742(e).” *Id.* 18 U.S.C. § 3742(e) cross-referenced and was excised together with 18 U.S.C.§ 3553(b)(1), which had mandated imposing a sentence within the Guidelines, “thereby requiring courts to consider facts not found by a jury . . . .” Anello & Peikin, *supra* note 200, at III.C.2.
202. *Id.*
204. *Foster*, 2006-Ohio-856 at ¶ 97-98, 845 N.E.2d at 497-98, 109 Ohio St. 3d at 29.
205. Anello & Peikin, *supra* note 200, at V.
sentencing guidelines, a judge otherwise is unfettered by them. Nevertheless, so far, many federal district courts have concluded that the guidelines generally maintain the same force and effect as they did pre-Booker. The Sixth Circuit is one appellate bench taking a narrow view of the Booker decision: “We read Booker to require that when district courts consult the Guidelines, they are to continue to consider the sentence, sentencing range, and pertinent policy statements contained in those Guidelines, as required by § 3553(a)(4) and (5).”

Similarly, Ohio judges are familiar and comfortable with applying the guidelines in light of over two decades of use, and may likely continue to resort to them as a frame of reference. Unlike the mandatory drill Congress instituted with the Federal Sentencing Guidelines, the Ohio General Assembly accorded judges great latitude in S.B. 2 sentencing laws. As a result, the most significant impact on the length of sentences is likely to involve imposing more than the minimum sentences for offenders previously benefiting from a S.B. 2 requirement that a judge find aggravating factors before imposing such a sentence.

Not addressed to date by the Ohio or United States Supreme Courts is whether a defendant has a right to a jury trial regarding factors triggering downward departures from the guidelines. A defendant may be inclined to argue an extension of Booker to include the Sixth Amendment right to have a jury determine the availability of a non-prison sentence under R.C. 2929.13(d), although that tactic ignores the fact that a non-prison sentence is less than the presumptive prison term that constituted the “standard range” for the offense.

Another result of Foster is its dramatic alteration of the dynamics between the prosecutor and defendant. This is quite unlike the shift of power occurring as a result of Booker and Blakely, vividly underscoring the differences between the federal and Ohio guidelines protocols. While Booker effectively reallocated

207. Id.
210. Bowman, supra note 145, at 188. Professor Bowman speculates that there is less disparity in sentencing in state courts, as opposed to Federal venues, but does not offer statistical information regarding this. Id. Professor Bowman also suggests that because state advisory guidelines may correspond more closely to a judge’s sense of what constitutes an appropriate outcome than may be true in the Federal system. Id. at 188-89. If this is true in Ohio, then sentences should remain relatively constant even with the removal of findings requirements in Foster. However, this author submits that the latitude already accorded judges in Ohio may be a more critical factor in post-Foster sentences remaining relatively consistent with those under an unabridged S.B. 2.
211. See OHIO REV. CODE ANN. § 2929.14(B)(1) and (2) (regarding findings necessary before imposing a sentence in excess of the minimum sentence).
power in determining penalty from prosecutors back to judges and gave defendants a reprieve from harsh guidelines sentences, Foster will have little impact on the balance of power between judges and prosecutors. S.B. 2 had already accorded broad discretion to judges in sentencing.

It is also unlikely that Foster will evoke another concern Booker prompted: reluctance to cooperate with the government. In testimony before the House Subcommittee on Crime, Terrorism and Homeland Security, Former Assistant Attorney General Christopher Wray, with respect to the Booker impact, “expressed concern that there would be decreased incentive for cooperating defendants to assume the risks of cooperation if they can seek the benefits regardless.” As findings requirements regarding downward departures remain intact in Ohio, and without similar findings requirements in place for hammers such as maximum and consecutive sentences, prosecutors are well-positioned to elicit pleas and cooperation.

The Ohio legislature’s reaction to the Ohio judiciary’s partial respite from its controls remains to be seen. The Ohio Supreme Court acknowledged that the Ohio Criminal Sentencing Commission could recommend changes to the General Assembly in order to address concerns of disparity in sentencing and other S.B. 2 goals, yet remain compliant with Blakely. Members of the General Assembly acknowledge there is work to be done. “What we started with is pretty much gone,” remarked State Representative Tyrone Yates, a Cincinnati Democrat, referencing the sweeping S.B. 2 reforms. He concluded, “Now we’re in this mess.” “We’ve got to get back to fixing sentencing reform,” offered Bill Seitz, a Green Township Republican State Representative, “but it’s not something you start on Monday and finish on Tuesday.”

212. Anello & Peikin, supra note 200, at II.D.2. Pre-Booker, the Federal Sentencing Guidelines reigned judges in while affording prosecutors great discretion:

The most significant and problematic result, according to Guideline detractors, was a shift of discretion from judges to prosecutors that occurred for a number of reasons under the Guidelines system: first, prosecutors exercised discretion in choosing the crime to charge; second, by using the Guidelines as a negotiating tool, prosecutors compelled defendants to cooperate in exchange for a “substantial assistance” downward departure—the only exception to a Guidelines sentence that had potentially unlimited effect; and third, prosecutors controlled the facts presented to the court at the time of sentence by forcing defendants to forgo certain legal arguments in order to strike a deal with the government.


214. Mathis, 2006-Ohio-855 at ¶ 27, 846 N.E.2d at 7, 109 Ohio St. 3d at 60.


217. Id.

218. Id. at A6 (punctuation omitted).
At this juncture, the affected provisions relate to the legislature’s attempt to limit the harshest of sentences (maximum, consecutive, special offender) and to reserve more than the minimum sentences for select first time prison occupants. Any remedial action would be directed toward these circumstances; it seems unlikely in a “tough on crimes” environment that elected officials would move to reduce sentences, and thereby limit the length of a prison term a judge could impose. At the time of this writing, there has been no legislative groundswell to take any steps to address any of the issues the Foster decision raised. The court in the Foster opinion therefore may have served a winning volley for the Ohio judiciary and prosecutors, yet again withstanding legislative attempts to limit judicial discretion.

V. CONCLUSION

The court in Foster did not limit its analysis to those scenarios in which a defendant faced a greater sentence, as was the factual predicate for the Apprendi, Blakely, and Booker cases. Rather, the Ohio Supreme Court deftly adapted the language in these cases to attack the S.B. 2 provisions limiting judicial discretion with respect to imposing longer sentences than the legislature had prescribed. It delivered a fatal blow to many of the sentencing reforms the General Assembly set out to accomplish with S.B. 2.

Time will tell whether a return to loosely-fettered judicial discretion with respect to maximum, consecutive, and special sentences will result in significantly harsher penalties. After all, the S.B. 2 requirements already had afforded judges significant breathing space in which to justify a sentence by articulating often very subjective findings. Absent lengthier sentences that stretch an overburdened penal system and budget even further, the General Assembly may attempt little remedial action, if any.

While the Foster opinion began by explaining a defendant’s Sixth Amendment right to have a jury determine beyond a reasonable doubt facts underlying a sentence, it ended with defendants losing the opportunity to have a judge articulate and support the basis for imposing punishment more severe than the legislature had outlined for the offense level. It is unlikely that this was what the drafters of the Sixth Amendment had in mind.
I. INTRODUCTION

In November of 2005, the National Football League (NFL) instituted a policy which required that all ticket holders undergo pat-downs before being allowed to enter NFL stadiums. Although the pat-downs were supposedly intended to protect against a terrorist attack, the more immediate effect was to ignite a firestorm of controversy in NFL towns across the country. Johnston v. Tampa Bay Sports Authority was the first case to decide whether this policy violated the Fourth Amendment, and consequently the court found that the pat-downs did violate the Fourth Amendment.

This Note argues that Johnston was correctly decided because the mass suspicionless pat-downs were unreasonable, and therefore violative of the Fourth Amendment. Section II explores the United States Supreme Court’s Fourth Amendment precedent and its application of the same to cases factually similar to Johnston. Section III then recites Johnston’s relevant facts. Section IV analyzes whether the pat-downs violate the Fourth Amendment. Specifically, this section considers whether the state action doctrine or the doctrine of implied
consent renders the Fourth Amendment a nullity, as well as whether the pat-downs were reasonable based on the “special need” of preventing a terrorist attack on stadiums. Finally, Section V concludes the Note.

II. BACKGROUND

The Fourth Amendment to the United States Constitution prevents the federal government or the states from conducting “unreasonable searches and seizures.” This prohibition is meant “to safeguard the privacy and security of individuals against arbitrary invasions by government officials,” and it reflects the Framers’ belief that “searches conducted in the absence of reasonable and particular suspicion were intolerable in a democratic society.”

Because the Fourth Amendment is only meant to be a check upon government searches, these safeguards do not apply unless the search can be fairly attributed to the State. Although there are no hard and fast rules for determining state action, attribution is fair when an individual is deprived of a constitutionally protected right by the exercise of a state created right, privilege or rule of conduct, or when the depriving individual is himself a state actor. Thus, if the plaintiff is unable to prove the presence of state action, then the Fourth Amendment’s protections are inapplicable.

5. See Duncan v. Louisiana, 391 U.S. 145, 148 (1968) (incorporating the Fourth Amendment against the States via the Due Process Clause of the Fourteenth Amendment (citing Mapp v. Ohio, 367 U.S. 643 (1961))). Although it is the Fourteenth Amendment’s incorporation of the Fourth Amendment’s limitations through the Due Process Clause which binds the states, for simplicity’s sake, this Note will refer to those limitations as merely the Fourth Amendment.

6. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).


8. Id. at 852 (citing Henry v. United States, 361 U.S. 98, 100 (1959)).

9. See Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 156 (1978) (recognizing that “most rights secured by the Constitution are protected only against infringement by governments.”). See also Lugar v. Edmondson Oil Co., 457 U.S. 922, 924 (1982) (“Because the [Fourteenth] Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as ‘state action.’”) and Civil Rights Cases, 109 U.S. 3, 23 (1883) (recognizing that the Fourteenth Amendment only “affords[s] relief against state regulations or proceedings.”).

10. See, e.g., Johnston, 442 F.Supp. 2d at 1262 (“A variety of tests have been employed to determine whether conduct constitutes state action.”).

11. Lugar, 457 U.S. at 937 (“[T]he deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible.”).

12. It is the plaintiff that bears the burden of proving state action. See Johnston, 442 F.Supp. 2d at 1262 (citing Lugar, 457 U.S. at 937).

13. See Flagg Bros., Inc. 436 U.S. at 156.
At its core, the Fourth Amendment requires that all government searches be reasonably conducted. 14 Although a search typically must be conducted pursuant to a warrant supported by probable cause in order to be reasonable, 15 the U.S. Supreme Court has recognized that in limited circumstances a search will be reasonable based on its nature and surrounding circumstances, 16 despite the absence of a warrant or probable cause. 17 Of course, these cases are the exception rather than the rule, but courts have been willing to depart from the usual rule if there are “special needs.” 18

A “special need” arises when the government alleges that some unique condition makes compliance with the warrant and probable cause requirements impracticable. 19 For instance, the Supreme Court has upheld the following suspicionless searches based on a “special need”: the suspicionless drug testing of railroad personnel involved in train accidents; 20 a random drug testing regime for federal customs officers involved in drug interdiction; 21 and certain highway

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15. See Katz v. United States, 389 U.S. 347, 357 (1967) (“[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions.”). See also Chandler v. Miller, 520 U.S. 305, 313 (1997) (“To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing.”).

16. See United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985) (“The Fourth Amendment commands that searches and seizures be reasonable. What is reasonable depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.”).

17. See Michigan v. Tyler, 436 U.S. 499, 509 (1978) (permitting law enforcement officers to make a warrantless entry onto private property in order to fight a fire and investigate its causes); Ker v. California, 374 U.S. 23, 40-41 (1963) (authorizing warrantless entry onto private property in order to prevent the imminent destruction of evidence); and United States v. Santana, 427 U.S. 38, 42-43 (1976) (allowing warrantless entry onto private property in order to engage in “hot pursuit” of fleeing suspect).

18. Chandler, 520 U.S. at 313 (“[P]articularized exceptions to the main rule are sometimes warranted based on ‘special needs. . . .’. ”).

19. The normal needs of law enforcement are insufficient grounds upon which to base a special need. See New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J. concurring) (“Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.”), accord Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (citations omitted) (“Although we usually require that a search be undertaken only pursuant to a warrant (and thus supported by probable cause, as the Constitution says warrants must be), we have permitted exceptions when ‘special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.’”).

20. Skinner v. Railway Labor Executives’ Ass’n, 489 U.S. 602, 612-13 (1989) (reversing the Ninth Circuit, the Court held that the regulation mandating drug tests did not violate the Fourth Amendment).

automobile checkpoints looking for illegal immigrants\textsuperscript{22} or drunk drivers.\textsuperscript{23} In all of these cases, there was some special need beyond the basic concern for crime detection which made the requirement of a warrant impractical.\textsuperscript{24}

Contrast the cases recited above with City of Indianapolis v. Edmond,\textsuperscript{25} where the Court invalidated a highway checkpoint because its primary purpose was interdicting illegal narcotics.\textsuperscript{26} In Edmond, there was no unique condition, but in fact, the search was a part of typical law enforcement needs.\textsuperscript{27} Because the City was unable to show that some unique condition rendered the warrant requirement impractical, the Court refused to recognize a special needs exception.\textsuperscript{28}

In order to be accepted by the court, the government’s purported “special need” must be both substantial\textsuperscript{29} and concrete.\textsuperscript{30} It is not enough that the potential harm to the government is severe, yet remote.\textsuperscript{31} For example, in

\textsuperscript{22}United States v. Martinez-Fuerte, 428 U.S. 543, 562-63 (1976).
\textsuperscript{24}See T.L.O., 469 U.S. at 340 (noting that “[t]he warrant requirement . . . is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.”); Von Raab, 489 U.S. at 667 (“The Customs Service has been entrusted with pressing responsibilities, and its mission would be compromised if it were required to seek search warrants in connection with routine, yet sensitive, employment decisions.”); Skinner, 489 U.S. at 623-24 (“The Government’s need to rely on private railroads to set the testing process in motion also indicates that insistence on a warrant requirement would impede the achievement of the Government’s objective. Railroad supervisors . . . are not in the business of investigating violations of the criminal laws or enforcing administrative codes, and otherwise have little occasion to become familiar with the intricacies of this Court’s Fourth Amendment jurisprudence. ‘Imposing unwieldy warrant procedures . . . upon supervisors, who would otherwise have no reason to be familiar with such procedures, is simply unreasonable.’” (quoting O’Connor v. Ortega, 480 U.S. 709, 722 (1987))); Martinez-Fuerte, 428 U.S. at 565 (recognizing that “the strong Fourth Amendment interests that justify the warrant requirement in that context [search of a residence] are absent here.”); and Sitz, 496 U.S. at 453 (“The intrusion resulting from the brief stop at the sobriety checkpoint is for constitutional purposes indistinguishable from the checkpoint stops we upheld in Martinez-Fuerte.”).
\textsuperscript{25}City of Indianapolis v. Edmond, 531 U.S. 32 (2000).
\textsuperscript{26}Id. at 41-42 (“Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment.”).
\textsuperscript{27}Id. at 42.
\textsuperscript{28}Id. (“Without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life.”) The Court proceeded to reject, among other things, the claims that the city’s drug problem constituted a “special need.” Id. at 42-43.
\textsuperscript{29}Chandler, 520 U.S. at 318 (“Our precedents establish that the proffered special need for drug testing must be substantial--important enough to override the individual’s acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion.”).
\textsuperscript{30}Id. at 319 (finding that evidence of a concrete drug problem “would shore up an assertion of special need for a suspicionless general search program.”).
\textsuperscript{31}Edmond, 531 U.S. at 42 (“[T]he gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose.”).
Chandler v. Miller, the U.S. Supreme Court struck down a Georgia statute requiring that all candidates for public office certify that they passed a drug test because, while a drug epidemic amongst its politicians posed a severe threat to the state, there was no evidence to prove that such a threat actually existed in Georgia.32 The lack of evidence here contrasts significantly with those cases where courts have granted “special needs” exceptions.33 Because Georgia had no concrete need to conduct these suspicionless searches, a special needs exception was denied.34

Once the government has proven the existence of a substantial and concrete “special need,” it must next show that its “special need” is so important as to outweigh the intrusion upon the individual’s privacy rights.35 If the government’s “special need” in circumventing the warrant process outweighs the individual’s privacy interest, then the court will allow the suspicionless search based on a “special needs” exception.36 However, if the converse is true, and the individual’s privacy interest is greater than the government’s interest in conducting the search, then the court will not recognize a “special needs” exception.37 In Vernonia School Dist. 47j v. Acton,38 the U.S. Supreme Court sustained a random drug testing regime for high school athletes by balancing the importance of deterring drug use and the risk that a student athlete on drugs

32. Chandler, 520 U.S. at 321-22 (“But Georgia asserts no evidence of a drug problem among the State's elected officials, those officials typically do not perform high-risk, safety-sensitive tasks, and the required certification immediately aids no interdiction effort.”).
33. See Board of Educ. v. Earls, 536 U.S. 822, 834-36 (upholding suspicionless drug testing program for students involved in extracurricular activities based on the School District’s presentation of specific evidence of drug use at a particular school, including teachers’ testimony of witnessing students under the influence and where police found drugs or drug paraphernalia in a vehicle driven by an extracurricular club member); Sitz, 496 U.S. at 447, 451 (upholding sobriety checkpoint where court found “[d]runk drivers cause an annual death toll of over 25,000 and in the same span cause nearly one million personal injuries and more than five billion dollars in property damage.”); Skinner, 489 U.S. at 607-08 (upholding Federal Railroad Administration’s adoption of a rule requiring the drug testing of employees involved in train accidents or who committed certain safety violations, where testing was adopted in response to evidence of drug and alcohol abuse by some railroad employees, “the obvious safety hazard” posed by such abuse, and the documented link between drug and alcohol impaired employees and the incidence of train accidents); Von Raab, 489 U.S. at 669 (upholding drug testing for Customs employees seeking promotion even though government did not demonstrate an existing problem of drug abuse but where it was demonstrated that Customs’ officers “ha[d] been the targets of bribery by drug smugglers on numerous occasions,” and several succumbed to the temptation).
34. Chandler, 520 U.S. at 322 (“The need revealed, in short, is symbolic, not ‘special,’ as that term draws meaning from our case law.”).
35. Von Raab, 489 U.S. at 665-66 (“[W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectations against the Government’s interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.”).
36. Id.
37. Id.
might injure him or herself or others while on the playing field against the student’s privacy interest, which the Court found to be diminished because the students were “within the school environment.”39 In all, a mass suspicionless search will be reasonable based on “special need,” and therefore permitted by the Fourth Amendment when the court finds that the purported special need is substantial and concrete, and that the public’s interest in allowing the search outweighs the individual’s privacy interest.40

III. FACTS

In August of 2005, the National Football League (“NFL”) adopted a mandate which required that all persons attending NFL games be physically searched41 before entering the stadium or else be denied admission.42 This policy was intended to reduce the likelihood that an improvised explosive device (“IED”) could be smuggled into and detonated during a game.43

In Johnston, a Tampa Bay Buccaneers’ season ticket holder, Gordon Johnston, filed suit in the Circuit Court of Hillsborough County, Florida alleging that the Tampa Sports Authority (“TSA”), which is a public entity created by the Florida legislature to operate the publicly owned stadium where the Buccaneers play,44 and its Executive Director, Henry G. Saavedra, violated his constitutional

39. Id. at 649. The Court found that in public schools administrators and teachers had sufficient special needs to effectively institute disciplinary procedures absent a warrant requirement, and that students, especially athletes, have lessened privacy expectations. Id. at 653-57. Weighing these against each other, the Court found the drug testing to be reasonable, but cautioned that the case should be construed in light of the government’s duty in public schools to act as a “guardian and tutor of children . . . .” Id. at 664-65.

40. See Von Raab, 489 U.S. at 665 (“[W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectations against the Government’s interests . . . .”).

41. A pat-down goes as follows:

Generally, the pat-down is performed above the patron’s waist. If the security personnel observe suspicious bulges, the screener may pat the pockets and instruct the patron to empty them. The screener “conducts a visual inspection of the person by asking the person to extend his arms sideward and upward, parallel to the ground, with palms facing up, and then visually inspects the person’s wrists and arms for switches, wires, or push-button devices.” The screener then conducts a “physical inspection by touching, patting, or lightly rubbing the person’s torso, around his waist, along the belt line” and “touches, pats, or lightly rubs the person’s back along the spine from the belt line to the collar line.” Anyone found to be carrying contraband is detained while the police are summoned.

Johnston, 442 F.Supp. 2d at 1260 (citations omitted).

42. Johnston, 914 So. 2d at 1078 (“In August 2005 the NFL declared that all persons attending league games must be physically searched before entering any of the venues where the games are played, the aim being to prevent terrorists from carrying explosives into the stadiums.”).

43. Id. (“[T]he policy’s aim being to prevent terrorists from carrying explosives into the stadiums.”).

44. Id. (“The TSA was created by law to, among other things, maintain sports facilities for the benefit of the citizens of Tampa and Hillsborough County.”).
rights when they implemented mass suspicionless pat-downs.\textsuperscript{45} After an evidentiary hearing, the court granted Johnston’s preliminary injunction,\textsuperscript{46} but the injunction was stayed once the TSA filed their appeal.\textsuperscript{47} Subsequently, Johnston’s request to vacate the stay was denied by the Circuit Court.\textsuperscript{48} However, on November 4, 2005 the Second District Court of Appeals of Florida granted Johnston’s request to vacate the stay.\textsuperscript{49}

Soon thereafter, the defendants removed the case to federal court, citing federal question jurisdiction,\textsuperscript{50} and filed a Motion to Reconsider, Vacate, and Dissolve the Preliminary Injunction.\textsuperscript{51} On July 28, 2006, their motion was denied; the court held that the TSA’s implementation of the NFL’s pat-down policy was an unreasonable search, and thus violated both the Florida and the U.S. Constitution.\textsuperscript{52}

In its Opinion, the court began by conducting a state action analysis.\textsuperscript{53} The court was unpersuaded by the TSA’s argument that it was not “acting in a governmental capacity” nor “performing a governmental function,” but merely acting as a “managing agent” pursuant to the Stadium Agreement it entered with the Buccaneers.\textsuperscript{54} Neither did the court find that the TSA’s use of private screeners insulated them from state action status.\textsuperscript{55} Instead, the court held that the TSA was a state actor when conducting pat-downs because they hired, paid

\begin{itemize}
  \item \textsuperscript{45} Id. at 1077 (“Gordon Johnston has sued the Tampa Sports Authority and its executive director, Henry G. Saavedra (we will refer to them collectively as ‘the TSA’), seeking to enjoin them from conducting suspicionless patdown searches of every person who attends a Tampa Bay Buccaneers home football game.”).
  \item \textsuperscript{46} Id. at 1078 (“After an evidentiary hearing, the circuit court determined that Johnston had established the four factors necessary to obtain a preliminary injunction.”).
  \item \textsuperscript{47} Id. at 1077.
  \item \textsuperscript{48} Johnston, 914 So. 2d at 1077 (The “circuit court denied Johnston’s request to vacate the stay.”).
  \item \textsuperscript{49} Id.
  \item \textsuperscript{50} Johnston, 442 F.Supp. 2d at 1261. Federal question jurisdiction grants U.S. District Courts original jurisdiction over all civil matters arising under the Constitution, laws, or treaties of the United States. See 28 U.S.C §1331 (2000) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).
  \item \textsuperscript{51} Johnston, 442 F.Supp. 2d. at 1258 (“Before the Court is Defendants’ Motion to Reconsider, Vacate, and Dissolve the Preliminary Injunction . . . .”)
  \item \textsuperscript{52} Id. at 1258-59 (“The mass suspicionless pat-downs implemented by the Tampa Sports Authority (‘TSA’) for NFL games at Raymond James Stadium (‘Stadium’) constitute unreasonable searches under the Florida Constitution and the Fourth Amendment to the United States Constitution.”).
  \item \textsuperscript{53} Id. at 1262 (“Implicit in [the Fourth Amendment] is the requirement that an agent of the government perform those searches and seizures.” (quoting State v. Iaccarino, So.2d 470, 475 (Fla. 2d Dist. Ct. App. 2000)).
  \item \textsuperscript{54} Id. at 1262-63.
  \item \textsuperscript{55} Id. at 1263 (“[T]hat the pat-downs are conducted by a private security company does not insulate the searches from state action status.”).
\end{itemize}
and supervised those conducting the searches, and because the TSA was fulfilling its public purpose when it implemented the pat-downs.\footnote{Id. at 1264 (“[T]he pat-down searches constitute state action because the TSA, acting as a public entity fulfilling its public purpose, implemented the pat-down policy, hired and supervised the security personnel and paid for the searches with public funds. Under such circumstances, the pat-down searches constitute state action for purposes of a Fourth Amendment search and seizure analysis.”).}

The court then proceeded to determine whether a “special needs” exception existed, which would render the NFL’s pat-down policy reasonable, despite the absence of individualized suspicion.\footnote{Johnston, 442 F.Supp. 2d at 1265-71.} The TSA argued that the “special need” was justified in this case because “of the need to protect patrons against potential terrorist attacks.”\footnote{Id. at 1266.} While the court recognized that this threat was substantial,\footnote{Id. (“One cannot seriously dispute the magnitude of the threat of terrorism to this country or the Government’s interest in eradicating it . . . Likewise, any reasonable person appreciates the potential harm that would result from a terrorist attack at the Stadium.”).} it was not convinced that the threat was concrete.\footnote{Id. (The court noted that prior to the TSA’s vote to implement the policy, “there was no testimony or evidence of a particularized threat to NFL games or to the Stadium.”).}

The TSA attempted to prove that the threat to stadiums was concrete by offering into evidence a July 2002 CBS news report claiming that suspected terrorists were downloading pictures of NFL stadiums.\footnote{Id. at 1267 (footnote omitted) (Robert Hast, the NFL’s Director of Event Security “identified only two specific reports of terrorists threats. The first and most troubling report was a CBS news report from July 2002 that persons associated with terrorist groups had downloaded images from the internet of NFL stadiums in Indianapolis and St. Louis.”).} In addition, the TSA relied upon a copy of the State Department’s “Country Report on Terrorism 2004,” which indicated that the terrorists responsible for the 2004 bombing of commuter trains in Madrid, Spain also planned to bomb that city’s largest soccer stadium.\footnote{Id. (citations omitted) (“The second report relied on by the NFL was issued in April 2005 by the U.S. Department of State in its ‘Country Reports on Terrorism 2004.’ The Report included a summary of terrorist threats in Spain, which included an incident in March 2004 when a bomb was detonated on a commuter train and the arrest in November 2004 of individuals linked to a radical Islamic organization. The arrest reportedly disrupted ‘apparent plans’ to bomb Spain’s High court, Madrid’s largest soccer stadium, office buildings and other public landmarks.”).} Neither report proved sufficient to establish a concrete threat.\footnote{Id. at 1268 (“[T]he evidence the TSA presented in support of a ‘special needs’ exception is not sufficient to demonstrate the requisite ‘real’ and ‘concrete danger’. . . .”).} The court discounted the CBS report because “the FBI investigated that incident and determined that it presented no threat”\footnote{Id. at 1267.} and the State Department report was undermined by a Joint Information Bulletin issued by the Department of Homeland Security (“DHS”), which found no reason to believe that terrorist intended to attack stadiums inside the United States.\footnote{Id. at 1267.} Further, mass
suspicionless searches were not among the DHS’s recommended protective measures. Based on this evidence, the court found the NFL policy to be “a broad prophylactic measure in response to a general threat that terrorists might attack any venue where a large number of Americans gather.” Thus, the court was unpersuaded that a real and concrete threat to stadiums existed, and therefore refused to recognize a “special needs” exception.

Despite its conclusion that the TSA failed to sufficiently justify the need for a “special needs” exception, the court continued its analysis to consider whether the TSA’s purported interest in protecting patrons against terrorist attacks outweighed the intrusion upon the individual’s privacy interest. The TSA alleged that Johnston’s privacy interest was diminished when attending NFL games. This allegation was quickly resolved, as the court found “no persuasive authority establishing that Plaintiff had a minimal expectation of privacy simply because he attends NFL games.” The court also considered whether the pat-downs were “a mere petty indignity,” so minimally intrusive such that individualized suspicion was not required at all. The court quickly rejected this hypothetical argument by citing Terry v. Ohio, where the U.S. Supreme Court rejected the idea that a stop and frisk was a “mere petty indignity.” The Terry Court held that “the Fourth Amendment governs all intrusions by agents of the public upon personal security.”

Finally, the court considered whether Johnston implicitly consented to the pat-downs by attending games with notice that he would be subjected to the searches. After finding that Johnston had a “property interest in his season tickets and his right to attend the games . . . constitute[d] benefits or privileges,” the court found these benefits could not be conditioned on his “relinquishment of his Fourth Amendment rights.” Such would be an unconstitutional condition.

66. Id.
67. Id.
68. Id. ("[T]he evidence the TSA presented in support of a ‘special needs’ exception is not sufficient to demonstrate the requisite ‘real’ and ‘concrete danger’ to public safety at the Stadium.").
70. Id. at 1269.
71. Id. at 1270.
72. Id. at 1265-66 (discussing the general reasonableness of pat-down searches).
73. The argument was a hypothetical one because it was never actually raised by the TSA. See Id. (recognizing that Terry rejected an argument which could also be made in this case, that a frisk was a mere petty indignity).
75. Id. at 17 (stating that a frisk “is a serious intrusion upon the sanctity of the person . . .”); see also Jensen v. City of Pontiac, 317 N.W.2d 619, 624 (Mich. Ct. App. 1981) (recognizing that “[a] physical pat-down search by a guard is more intrusive than a limited visual search.”); and United States v. Cintron-Segarra, Crim. No. 92-306(JAF), 1993 WL 150307, at *3 (D.P.R. 1993) (recognizing that “hand held magnetometer . . . is much less intrusive than a pat-down or frisk.”).
76. Terry, 392 U.S. at 18 n.15 (emphasis added).
78. Id. at 1271.
Further, Johnston did not implicitly consent to the searches because any consent given was not voluntary. Based on these reasons the TSA’s Motion to Reconsider, Vacate, and Dissolve the Preliminary Injunction was denied.

IV. ANALYSIS

The TSA violated the Fourth Amendment’s prohibition on unreasonable searches when it conducted mass suspicionless searches of patrons attending NFL games at Raymond James Stadium. The TSA was subject to the Fourth Amendment’s restraints because it was a publicly created entity performing a public function, and its operation of Raymond James Stadium entwined it with the state. The pat-downs were unreasonable because they were conducted without individualized suspicion, and the TSA was unable to prove that a concrete threat to stadiums justified a “special needs” exception. Neither was the TSA able to prove that patrons had a reduced expectation of privacy while attending NFL games or that they implicitly consented to the pat-downs by attending games with notice of the pat-down policy.

A. State Action Doctrine

The TSA was a state actor because it was a public agency created by an act of the Florida Legislature to operate a publicly owned stadium for the community’s use and enjoyment. In Burton v. Wilmington Parking Authority, the U.S. Supreme Court found state action where the Wilmington Parking Authority, which was also a public agency created by the state

79. Id. The “unconstitutional condition doctrine” prohibits the government from denying a benefit to a person on a basis that infringes a constitutionally protected right. See United States v. America Library Ass’n, 539 U.S. 194, 210 (2003) (quoting Board of Comm’rs v. Umbehr, 518 U.S. 668, 674 (1996)) (holding that “the government ‘may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech’ . . . .”). See also Bourgeois v. Peters, 387 F.3d 1303, 1325 (11th Cir. 2004) (“[T]he City’s decision to require protestors to waive their Fourth Amendment rights and submit to searches in order to exercise their First Amendment rights was an unconstitutional condition that violated the First Amendment.”).

80. Johnston, 442 F.Supp. 2d at 1272 (“Plaintiff’s conduct does not constitute implied consent because it was not voluntarily given, free from constraint.”).

81. Id. at 1258 (“After careful consideration of the parties’ briefs and the record before the state court, Defendants’ Motion to Reconsider, Vacate and Dissolve the Preliminary Injunction is DENIED.”).

82. See infra Part IV.a. State Action Doctrine.

83. See infra Part IV.b. The Reasonableness of Pat-downs.

84. See infra Part IV.c. Implicit Consent.

85. State v. Tampa Sports Auth., 188 So. 2d 795, 796 (Fla. 1966) (“The Tampa Sports Authority was created as a public agency by Chapter 65-2307, Laws of Florida, Acts of 1965, ‘for the purpose of planning, developing, and maintaining a comprehensive complex of sports and recreation facilities for the use and enjoyment of the citizens of Tampa and Hillsborough County,’ as a public purpose.”).

legislature\textsuperscript{87} to manage public property\textsuperscript{88} in order to achieve a public purpose,\textsuperscript{89} allowed one of its private tenants to exclude customers on the basis of race.\textsuperscript{90} Specifically, the Court held that “when a State leases public property in the manner and for the purpose shown here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself.”\textsuperscript{91} Thus, just as the private tenants in \textit{Burton} where bound by the limits of the Fourteenth Amendment, so too are the TSA’s private screeners bound.

The TSA mistakenly attempts to refute the notion that it is a state actor with the argument that it is not performing acts which have been “traditionally the exclusive prerogative of the state.”\textsuperscript{92} Regardless of whether this contention is true, the TSA wrongly supposes this is enough to except it from state actor status, when in reality the U.S. Supreme Court has never adopted one test as entirely dispositive of the state action question.\textsuperscript{93} Instead, the Court has chosen to speak in more general terms, instructing the lower courts to sift facts and weigh circumstances\textsuperscript{94} in search of acts that may be attributed to the state.\textsuperscript{95} Therefore, the Johnston court was correct to reject the TSA’s single minded approach to state action, and instead inquire into whether the conduct in question could be attributable to the TSA.\textsuperscript{96} Given that the TSA is a public agency created by an act of the Florida Legislature to operate a publicly owned stadium

\textsuperscript{87} Id. at 717 (“The authority was created by the City of Wilmington pursuant to 22 Del. Code, §§ 501—515.”).

\textsuperscript{88} Id. at 723 (“The land and building were publicly owned.”).

\textsuperscript{89} Id. at 717 (“Its statutory purpose is to provide adequate parking facilities for the convenience of the public . . . .”).

\textsuperscript{90} Id. (“On the merits we have concluded that the exclusion of appellant under the circumstances shown to be present here was discriminatory state action in violation of the Equal Protection Clause of the Fourteenth Amendment.”).

\textsuperscript{91} Id. at 726.

\textsuperscript{92} See \textit{Jackson v. Metropolitan Edison Co.}, 419 U.S. 345, 352 (1974) (“We have, of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State.”).

\textsuperscript{93} See \textit{Johnston}, 442 F.Supp. 2d at 1262 (“A variety of tests have been employed to determine whether conduct constitutes state action.”). \textit{See also} \textit{Ludtke v. Kuhn}, 461 F.Supp. 86, 93 (S.D.N.Y. 1978) (“There is, however, no rigid yardstick against which the relationship may be measured to determine the presence of state action. As the Supreme Court has explained: ‘Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.’” (quoting \textit{Burton}, 365 U.S. at 722)).

\textsuperscript{94} See \textit{Evans v. Newton}, 382 U.S. 296, 299 (1966) (“‘Only by sifting facts and weighing circumstances’ can we determine whether the reach of the Fourteenth Amendment extends to a particular case.” (quoting \textit{Burton}, 365 U.S. at 722)).

\textsuperscript{95} \textit{Lugar}, 457 U.S. at 937. (“Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State.”).

\textsuperscript{96} See \textit{Johnston}, 442 F.Supp. 2d. at 1263 (considering the question of whether there is “a sufficiently close nexus between the TSA and the challenged conduct such that the conduct may be fairly treated as that of the TSA itself.”); \textit{See also} \textit{Gallagher v. Neil Young Freedom Concert}, 49 F.3d 1442, 1450 (10th Cir. 1995) (recognizing that a nexus would exist if “the appellants could demonstrate that the pat-down searches directly resulted from the University's policies . . . .”).
for the community’s use and enjoyment,\(^7\) the TSA’s use of private screeners to conduct pat-downs is conduct which can be attributable to the state.\(^8\)

Although the state action analysis was somewhat simplified by the public nature of both the TSA and Raymond James Stadium, private stadiums should also be aware that they too could be considered state actors when implementing the NFL’s pat-down policy.\(^9\) In *Evans v. Newton*, the U.S. Supreme Court recognized that purely private parties could become state actors when entwined with the state.\(^10\) If this were not the case, a state could simply sidestep its constitutional obligations by allowing private parties to wield the state’s power in discriminatory ways. Therefore, just as the *Evans* Court found that the public character of a privately owned park justified its treatment as a public institution,\(^11\) so too the public character of privately owned sports stadiums could justify their treatment as public institutions. In fact, courts have already found private stadiums to be state actors in certain instances.\(^12\)

In *Ludtke v. Kuhn*, the U.S. District Court for the Southern District of New York found that the New York Yankees enforcement of Major League Baseball’s policy excluding women from the locker rooms constituted state action.\(^13\) The court found this result to be dictated by *Burton*.\(^14\) In both *Ludtke* and *Burton* the discriminatory acts occurred on public lands leased to private parties,\(^15\) the facilities were supported with public funds,\(^16\) and there was a relationship of interdependence between the private party and the state.\(^17\) These

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\(^7\) See Johnston, 914 So. 2d at 1078 (“The TSA was created by law to, among other things, maintain sports facilities for the benefit of the citizens of Tampa and Hillsborough County.”).

\(^8\) Johnston, 442 F.Supp. 2d at 1263 (“[T]hat the pat-downs are conducted by a private security company does not insulate the searches from state action status.”).

\(^9\) See Lawrence A. Israeloff, *The Sports Fan v. The Sports Team Owner: Does a Franchise’s Prohibition of Spectators’ Banners Violate the First Amendment?*, 24 COLUM. J.L. & SOC. PROBS. 419, 436-44 (1991) (discussing the possibility that a privately owned sports franchise could be held to state actor status under either the “public function approach” or the “nexus approach.”).

\(^10\) *Evans*, 382 U.S. at 299 (“When private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.”).

\(^11\) Id. at 302 (“Under the circumstances of this case, we cannot but conclude that the public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law.”).

\(^12\) See Ludtke, 461 F.Supp.at 95-96 (employing state action analysis to private operators of Yankee Stadium in a sex discrimination case).

\(^13\) Id. at 96 (“[T]his court holds that the Kuhn determination is state action within the contemplation of the Fourteenth Amendment.”).

\(^14\) Id. at 93 (“The facts of the case at hand so nearly resemble those of Burton that there can be little doubt that state action exists here . . . .”)

\(^15\) Id. (“Here, as in *Burton*, the place where the discriminatory acts occurred is owned by the state (the City of New York) and leased pursuant to special legislative provisions to the Yankees.”).

\(^16\) Id. (“In this case, as in *Burton*, the facility involved is maintained and improved with the use of public funds.”).

\(^17\) Id. at 93-94 (“The Court noted in *Burton* that the relationship of the public and private entities in that case placed them in a relationship of interdependence. The same observation can be made on these facts, where the annual rentals to be paid to the City for use of the stadium depend
factors were enough to turn a private party into a state actor, and it suggests that stadiums implementing the NFL’s pat-down policy could also be held to state actor status, regardless of whether the stadiums are publicly or privately owned.

B. The Reasonableness of Pat-downs

The TSA’s pat-downs were unreasonable because they were conducted without individualized suspicion, and could not be justified based on a “special needs” exception. There was no “special need” to conduct the pat-downs because there was no concrete threat posed to Raymond James Stadium, and even if there was such a threat, the pat-downs were overly intrusive.

1. Special Needs

The TSA could not rely upon the “special needs” exception to render its pat-downs reasonable. While the threat of a terrorist attack on U.S. stadiums was substantial, there was no evidence to prove that a concrete threat existed. Because the threat was not concrete, the court would not grant a “special needs” exception, which meant the pat-downs were unreasonable absent individualized suspicion.

i. A Substantial Threat

The TSA had little difficulty convincing the court that the threat of terrorism was substantial. Even prior to the events of September 11, 2001, it was apparent that terrorists might target large concentrations of people at sporting events. This reality has only been exacerbated since September 11, 2001. Since that time, the Department of Homeland Security (DHS) has continued to conduct directly on the drawing power of Yankee games, and the City has in turn invested substantial sums of public money to enhance that drawing power by modernizing and improving the stadium itself.

108. See Johnston, 442 F.Supp. 2d at 1259 (“The TSA has not established that its concern for public safety is based on a substantial and real risk which would justify a “special needs” exception to the well-established rule that suspicionless searches of one’s person are per se unreasonable.”) (emphasis original).

109. Id. at 1269 (“[T]he TSA has not presented evidence that the threat of a terrorist attack on an NFL stadium is ‘concrete’ or ‘real.’”).

110. Id. at 1271 (“Simply put, the intrusiveness of the pat-downs cannot be constitutionally justified under these circumstances.”).

111. Id. at 1269.

112. Id. at 1259.

113. See Barry L. Rothberg, Averting Armageddon: Preventing Nuclear Terrorism in the United States, 8 DUKE J. COMP. & INT’L L. 79, 110 (1997) (“Radiological terrorists could go after office buildings . . . densely populated urban areas, or concentrations of people at sporting events or similar venues.”).

114. See Bourgeois, 387 F.3d at 1311 n.8 (recognizing the lower court’s acknowledgement that law enforcement’s ability to combat terrorism post-September 11 as “difficult, often impossible”).
terrorism training exercises for first responders at sports venues, and has even recommended that the public avoid gathering at sports arenas entirely when the Homeland Security Advisory System is elevated to Red.

State and local authorities have also recognized the considerable danger that would follow a terrorist attack on a sports stadium. For instance, on September 30, 2006, the DHS and the Southwestern Ohio, Southeastern Indiana, and Northern Kentucky (SOSINK) Regional Collaborative conducted a mock disaster exercise simulating a terrorist attack at Great American Ball Park in Cincinnati, Ohio. Together, all of this evidence suggests that the court was correct to find that the TSA’s interest in preventing a terrorist attack at Raymond James Stadium was substantial. Yet, the TSA could not easily prove that the threat to the stadium was concrete.

ii. A Concrete Threat

The TSA was unable to present sufficient evidence that a concrete threat was directed against NFL stadiums. The TSA’s evidence of a concrete threat was out-dated, of little probative value, had subsequently been contradicted, and made no mention of any specific threat to Raymond James Stadium. Further, it became clear at trial that the TSA used its evidence as nothing more than a pretext for carrying out the NFL’s mandate. Given the U.S. Supreme Court’s prior rulings on the evidentiary showing required in “special needs” cases, the

116. Id.
118. Johnston, 442 F. Supp. 2d at 1266 (finding that the “special need” to prevent terrorist attacks [was] “substantial” . . . .”).
119. Id. at 1268 (describing the TSA’s evidence as “relatively dated”).
120. Id. (describing the TSA’s evidence as “non-specific”).
121. Id. (“The TSA adopted that policy because it was ‘mandated’ by the NFL and the Buccaneers . . . .”)
122. See Earls, 536 U.S. at 834-35 (citations omitted) (“Teachers testified that they had seen students who appeared to be under the influence of drugs and that they had heard students speaking openly about using drugs. A drug dog found marijuana cigarettes near the school parking lot. Police officers once found drugs or drug paraphernalia in a car driven by a Future Farmers of America member.”). See also Skinner, 489 U.S. at 607 (footnote omitted) (“The [Federal Railroad Administration] pointed to evidence indicating that on-the-job intoxication was a significant problem in the railroad industry. The FRA also found, after a review of accident investigation reports, that from 1972 to 1983 the nation's railroads experienced at least 21 significant train accidents involving alcohol or drug use as a probable cause or contributing factor,” and that these accidents ‘resulted in 25 fatalities, 61 non-fatal injuries, and property damage estimated at $19 million (approximately $27 million in 1982 dollars).”))
TSA’s evidence was simply insufficient to prove that terrorists posed a concrete threat to Raymond James Stadium.123

The TSA was unable to prove a concrete threat because it relied on out-dated evidence.124 The U.S. Supreme Court has recognized a “special needs” exception only where fresh evidence can prove the present existence of a concrete threat.125 For example, in Vernonia School District 47J, the Court found the evidence of drug use among current “particular students”126 to suggest an “immediate crisis.”127 In Skinner, a Federal Railway Administration (FRA) study reviewing accident reports from 1972 to 1983 was less than a year old when the FRA’s drug testing policy was finally adopted.128 More recently, the Eleventh Circuit recognized the importance of fresh evidence when it held that a mass suspicionless search could not be justified based on elevation of DHS’s threat advisory level since the threat level was initially elevated over two years ago.129

By the time the TSA decided to implement its pat-down policy, the CBS report was more than three years old.130 The passage of time had dissipated the evidence’s ability to prove a concrete threat. For instance, given that three years had passed since the CBS Report was released and not a single U.S. stadium had

123. See Johnston, 442 F.Supp. 2d at 1268 (“[T]he evidence the TSA presented in support of a ‘special needs’ exception is not sufficient to demonstrate the requisite ‘real’ and ‘concrete danger’ to public safety at the Stadium.”).
124. See Id. (describing the TSA’s evidence as “relatively dated”).
125. See Earls, 536 U.S. at 834-36 (noting the specific evidence of a drug problem among the students presented by the school district as a reason for upholding suspicionless searches); Skinner, 489 U.S. at 607-08 (citing specific statistics of drug or alcohol abuse and “the documented link between . . . impaired employees and the incidence of train accidents” in upholding suspicionless drug testing regulation); Sitz, 496 U.S. at 447 (noting mortality and property damage statistics in upholding suspicionless sobriety checkpoints); and Von Raab, 489 U.S. at 669 (noting evidence that customs agents were previously the successful targets of bribery attempts by drug smugglers when upholding suspicionless drug testing for Customs’ employees).
126. Vernonia Sch. Dist. 47 J, 515 U.S. at 679 (O’Connor, J., dissenting) (noting that “the evidence of drug use [was] by particular students” and not the entire student body.) In her dissent, Justice O’Connor’s was troubled by the fact that all students who participated in athletics were subject to the random testing, even though the School District’s evidence was only observations of a few students. Id. In her view, those observations would lead to individualized suspicion. Id. The majority opinion, however, took a broader approach by agreeing with the lower court’s finding that those “particular students” constituted “a large segment of the student body.” Id. at 662.
127. Id. at 663 (“That is an immediate crisis . . . .”)
128. Skinner, 489 U.S. at 607-08 (noting that the “[i]n July 1983, the FRA expressed concern” about the findings in its study, while it “announced in June 1984 its intention to promulgate federal regulations on the subject.”). During the time between when the report was released and the policy was adopted, the FRA considered possible methods of redressing the problem. See Id. at 607 (“In light of these problems, the FRA solicited comments from interested parties on various regulatory approaches to the problems of alcohol and drug abuse throughout the Nation’s railroad system.”).
129. Bourgeois, 387 F.3d at 1312 (“Given that we have been on ‘yellow alert’ for over two and a half years now, we cannot consider this a particularly exceptional condition that warrants curtailment of constitutional rights.”).
130. Johnston, 442 F.Supp. 2d at 1266-67 (note the TSA considered and decided on the pat-down policy in September 2005, while the CBS report was aired in July 2002).
been attacked, it seems that the threat had either been neutralized or never existed in the first place. Either way, the CBS report does not provide any evidence of a current specific threat against stadiums inside the U.S.

By the same token, whatever probative value the State Department Report once held had since been lost. If the TSA cited the State Department Report to draw the inference that those individuals arrested for plotting to bomb Madrid’s largest soccer stadium were also plotting similar attacks inside the U.S., then the plotters’ arrests seem to indicate that the threat has been neutralized. 131 That is, unless the TSA can show how those same individuals can attack U.S. stadiums from within a Spanish prison, they pose no concrete threat. If on the other hand, the TSA is citing the same report for the proposition that similar attacks could be attempted inside the U.S., then, even if true, this is not enough to prove a concrete threat. After all, a generalized threat is not enough. 132 Thus, the TSA can point to no source which proves that there is a current and concrete threat against stadiums.

Another problem with the TSA’s evidence was that subsequent reports found that no such threat existed. An FBI investigation into the CBS report found no threat to stadiums whatsoever, 133 and a subsequent DHS Joint Information Bulletin found “no credible or specific intelligence” regarding a possible attack on stadiums inside the United States. 134 This means that however fresh or relevant the information in the two reports may have been at one time, they are now nonetheless insufficient to evidence a concrete threat. It does not matter whether the reports were wrong from the beginning, or whether subsequent events have caused the once-real threat to dissolve. Because the DHS report was released after the CBS and State Department reports, 135 it is the most up-to-date information considered. The DHS report makes clear that even if a credible threat existed previously, the threat has since dissipated, and therefore, there is currently no reason to conduct pat-downs.

However, even if the CBS and State Department reports were fresh and relevant, the TSA’s evidence would still be insufficient because neither report indicated that terrorists were specifically targeting Raymond James Stadium. In Bourgeois v. Peters, a case factually similar to Johnston, the Eleventh Circuit Court of Appeals held that requiring protestors to pass through a magnetometer

131. Id. at 1267 (noting the State Department report dealt with the Madrid train bombing in March 2004 and the conspirators’ subsequent arrest in November 2004). The court specifically stated that “the arrest . . . disrupted ‘apparent plans’” of the group to carry out more bombings. Id. 132. See Id. at 1266 (“A generalized threat of a terrorist attack will not suffice.”). 133. Id. at 1267 (“[T]he FBI investigated that incident and determined that it presented no threat, ‘not even a perceived or implied threat.’”). In addition, the FBI found that there was no reason to alter NFL attendance policies. See Id. 134. Id. at 1268 (“[T]he DHS expressly stated that ‘there is currently no credible or specific intelligence regarding the possibility of such attack in the United States.’”). 135. Id. at 1267 (“[T]he Bulletin was issued after the TSA voted to implement the pat-down policy.”).
was an unreasonable search because there was no reason to believe that terrorists would target this protest.\footnote{Bourgeois, 387 F.3d. at 1311 (“In the absence of some reason to believe that international terrorists would target or infiltrate this protest, there is no basis for using September 11 as an excuse for searching the protestors.”).} Although the court recognized that the threat of terrorism was “omnipresent,” an individualized and specific threat to the particular protest was needed in order to render the search reasonable.\footnote{Id. (“While the threat of terrorism is omnipresent, we cannot use it as the basis for restricting the scope of the Fourth Amendment’s protections in any large gathering of people.”).} Therefore, the TSA would have to prove the existence of a concrete threat against Raymond James Stadium in particular. It would not be enough to prove that terrorists were targeting other NFL stadiums. Because the TSA has no information showing a concrete threat to Raymond James Stadium, they would be denied a “special needs” exception.

Finally, it appears that not even the TSA itself thought these reports evidenced a concrete threat to Raymond James Stadium. During the three years between when the CBS report aired and the NFL policy was adopted, the TSA twice rejected proposals to implement a pat-down policy.\footnote{Johnston, 442 F.Supp. 2d at 1266 (“[T]he TSA rejected pat-downs on two separate occasions, finding them unnecessary.”).} This begs the question: If the CBS report revealed a concrete threat to Raymond James Stadium, why did it take the TSA three years to appreciate the threat? If the threat was concrete, why did the TSA refuse to implement pat-downs on the two prior occasions when it considered the issue, but instead only implemented the policy after the NFL took the lead? Both the TSA’s members and minutes have answered these questions.\footnote{Id. at 1266-67 (“According to Manteiga, the ‘biggest difference’ between the two votes against the pat-downs and the third vote to implement the pat-downs was that the NFL ‘mandated’ implementation of the pat-downs prior to the third vote.”).}

TSA board member, Roland Manteiga, testified that the pat-down policy was adopted during the third vote, not because the TSA suddenly appreciated the gravity of the three year old report, but because the NFL had already mandated the pat-downs.\footnote{Id. (“According to Manteiga, the ‘biggest difference’ between the two votes against the pat-downs and the third vote to implement the pat-downs was that the NFL ‘mandated’ implementation of the pat-downs prior to the third vote.”).} This is confirmed by the minutes of the TSA board meeting which note “that the TSA adopted the pat-down policy solely because of the NFL’s mandate.”\footnote{Id. at 1267 (“The minutes of the September 13, 2005 board meeting confirm that the TSA adopted the pat-down policy solely because of the NFL’s mandate.”).} All of this evidence makes clear that not even the TSA itself found the 2002 CBS report or the State Department’s 2004 report to indicate that stadiums were being specifically targeted by terrorists, but only relied upon these reports as a pretext. The truth is that neither report showed a concrete threat when it was released, and it certainly does not do so today.

\footnote{Bourgeois, 387 F.3d. at 1311 (“In the absence of some reason to believe that international terrorists would target or infiltrate this protest, there is no basis for using September 11 as an excuse for searching the protestors.”).}

\footnote{Id. (“While the threat of terrorism is omnipresent, we cannot use it as the basis for restricting the scope of the Fourth Amendment’s protections in any large gathering of people.”).}

\footnote{Johnston, 442 F.Supp. 2d at 1266 (“[T]he TSA rejected pat-downs on two separate occasions, finding them unnecessary.”).}

\footnote{Id.}

\footnote{Id. at 1266-67 (“According to Manteiga, the ‘biggest difference’ between the two votes against the pat-downs and the third vote to implement the pat-downs was that the NFL ‘mandated’ implementation of the pat-downs prior to the third vote.”).}

\footnote{Id. at 1267 (“The minutes of the September 13, 2005 board meeting confirm that the TSA adopted the pat-down policy solely because of the NFL’s mandate.”).}
iii. Government Interest Versus Privacy Interest

Assuming arguendo that the TSA was able to prove the existence of a substantial and concrete threat against Raymond James Stadium, it would still not have been entitled to a “special needs” exception because the highly intrusive nature of the pat-downs was not outweighed by the TSA’s interest in conducting the searches. The TSA makes the unsupported proposition that Johnston enjoyed such a reduced expectation of privacy while attending games so that the pat-downs were a mere de minimis intrusion.\textsuperscript{142} Supreme Court precedent clearly refutes this argument.\textsuperscript{143} First, Johnston’s Fourth Amendment protections were not diminished by attending NFL games because it is well-established that Fourth Amendment protections are not determined by an individual’s locale.\textsuperscript{144} That is, an individual does not lose her Fourth Amendment protections when she trades the sanctity of the home for the openness of the public square.\textsuperscript{145} Instead, the Constitution continues to protect those things that an individual intends to keep private, even while in public.\textsuperscript{146}

Second, the pat-downs were not a de minimis invasion, but were in fact “a gross invasion” of privacy.\textsuperscript{147} The Supreme Court has held that chief among the rights protected by the Fourth Amendment is the individual’s right “to the possession and control of his own person, free from all restraint or interference of others . . . .”\textsuperscript{148} A pat-down is an invasion upon this right in a way that can be an annoying, fright-filled and embarrassing experience.\textsuperscript{149} Indeed, a pat-down poses a greater intrusion upon this right than do either visual searches or

\textsuperscript{142} Id. at 1270 (“Defendants’ assertion that Plaintiff enjoyed a diminished or minimal expectation of privacy because he attended a Buccaneers game is contrary to Eleventh Circuit precedent and otherwise unpersuasive.”).

\textsuperscript{143} See, e.g., Terry, 392 U.S. at 19 (characterizing a pat-down or frisk as “a serious intrusion upon the sanctity of the person . . . .”).

\textsuperscript{144} See Katz, 389 U.S. at 351 (“For the Fourth Amendment protects people, not places.”); see also Terry, 392 U.S. at 9 (citation omitted) (“Wherever an individual may harbor a reasonable ‘expectation of privacy’ he is entitled to be free from unreasonable government intrusion.”).

\textsuperscript{145} Terry, 392 U.S. at 8-9 (“This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.”). See also Bourgeois, 387 F.3d at 1315 (quoting Delaware v. Prouse, 440 U.S. 648, 662-62 (1979) (“[I]ndividuals ‘are not shorn of all Fourth Amendment protection when they step from their home onto the public sidewalks.’”).

\textsuperscript{146} Katz, 389 U.S. at 351-52 (recognizing that what an individual “seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”).

\textsuperscript{147} United States v. Albarado, 495 F.2d 799, 807 (2nd Cir. 1974) (“Normally a frisk is considered a gross invasion of one’s privacy.”).

\textsuperscript{148} Terry, 392 U.S. at 9 (quoting Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891)).

\textsuperscript{149} See Id. at 24-25 (“Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.”); See also Albarado, 495 F.2d at 806 (“The passing through a magnetometer has none of the indignities involved in . . . a frisk. The use of the device does not annoy, frighten or humiliate those who pass through it.”), accord Wilkinson v. Frost, 832 F.2d 1330, 1340 (2nd Cir. 1987).
magnetometer searches. Because pat-downs are more intrusive upon privacy rights, the TSA’s interest must be even more compelling in order to overcome this grave intrusion.

This is something the TSA is unable to prove. In fact, even airports and courtrooms, which have historically been targeted more than stadiums, have only been permitted to conduct the less intrusive magnetometer search. Thus, even if the TSA could establish a substantial and concrete threat against Raymond James Stadium, its pat-downs would still be unconstitutional because of the pat-downs’ highly intrusive nature.

3. Implicit consent

The TSA’s argument that Johnston consented to the search when he attended NFL games with notice of the pat-down policy is also without merit. This is true for two reasons. First, the same argument was made and rejected in Bourgeois. There, the Eleventh Circuit Court of Appeals rejected the City’s argument that magnetometer searches were voluntary because the protestors only had to submit to the searches if they wanted to participate in the protest. The court found this arrangement to be “a classic ‘unconstitutional condition.’” In Johnston, the unconstitutional condition was the TSA’s conditioning of a patron’s right to enter the stadium on the relinquishment of their Fourth Amendment rights.

150. See Jacobsen v. City of Seattle, 658 P.2d 653, 656 (Wash. 1983) (“[I]n contrast to the high degree of intrusion in the pat-down frisk employed by Seattle police, both airport searches which are conducted with a magnetometer and courtroom searches which employ a brief stop and a visual examination of packages, pocketbooks, and briefcases are far less intrusive.”). See also Jensen 317 N.W.2d at 624 (“A physical pat-down search by a guard is more intrusive than a limited visual search.”) and Wilkinson, 832 F.2d at 1337-40 (finding mass suspicionless weapons pat-downs of those attending Klu Klux Klan rallies unconstitutional but upholding magnetometer searches because they are less intrusive).

151. Wilkinson, 832 F.2d at 1339 (recognizing that airport and courtroom searches were not conducted “until the onset of airplane hijackings and courtroom violence presented a perceived need for preventive measures to be taken”).

152. Id. (“[T]he airport and courtroom cases have sanctioned only magnetometer searches . . .”).

153. Bourgeois, 387 F.3d at 1325 (“[T]he City’s decision to require protestors to waive their Fourth Amendment rights and submit to searches in order to exercise their First Amendment rights was an unconstitutional condition that violated the First Amendment.”).

154. Id. at 1324. See also American Library Ass’n, 539 U.S. at 210 (noting the government may not deny a benefit to a person on basis that that infringes upon their other constitutional rights).

155. Johnston, 442 F.Supp. 2d at 1271 (“Plaintiff’s property interest in his season tickets and his right to attend the games and assemble with other Buccaneers fans constitute benefits or privileges that cannot be conditioned on relinquishment of his Fourth Amendment rights.”). See also Bossier Parish School Board v. Lemon, 370 F.2d 847, 851 (5th Cir. 1967) (finding that admission into a public school cannot be conditioned on the waiver of a right to a desegregated public education); and Nakamoto v. Fasi, 635 P.2d 946, 951-52 (Haw. 1981) (holding that the privilege of attending a rock concert cannot be conditioned on the relinquishment of Fourth Amendment protections).
Second, it is undisputed that Johnston did not consent to the search, but in fact, made his objections clear. This is important because a waiver is not valid unless it is voluntarily given. In order to be voluntary, the consent must be uncoerced and the result of a “free and unconstrained choice.” Because Johnston’s decision to undergo the search was not the result of free choice, but was instead the result of coercion, his actions were not voluntarily given, and therefore insufficient to constitute a valid waiver.

In its dicta, the court intimates that Johnston might have implicitly consented to the pat-down if he had notice prior to purchasing his season tickets. That is, if Johnston had notice of the search before buying his tickets, and thus before he had a right to attend Buccaneer games, then he was not forced to submit to the search or lose the value of his tickets. Instead, Johnston simply could have refused to buy tickets. However, because there is a waiting list for season tickets, the court might consider Johnston’s place in line to be a property interest, and therefore find that he was forced to submit to the search or else forfeit his place in line. This would mean that there was no implicit consent.

V. CONCLUSION

Johnston was correctly decided because the TSA was subject to the restraints of the Fourth Amendment, and it violated those restraints when it unnecessarily conducted mass suspicionless pat-downs. If a “special need” had been recognized in Johnston, the door would have been opened to allowing mass suspicionless searches anytime large numbers of people gather together, and this reality would fly directly in the face of the Fourth Amendment’s core

156. Johnston, 442 F.Supp. 2d. at 1272 (“It is undisputed that at each game he attended, Plaintiff clearly expressed his objection to submitting to the pat-down.”).
157. See, e.g., United States v. Kapperman, 764 F.2d 786, 793 (11th Cir. 1985) (“Searches conducted by means of consent are valid so long as the consent is voluntary.”).
158. Nakamoto, 635 P.2d at 951 (“Consent to be valid must be uncoerced . . . .”).
159. See United States v. Garcia, 890 F.2d 355, 360 (11th Cir. 1989).
161. Id. at 1261.
162. Id. at 1269 (“A finding of ‘special needs’ based on evidence that supports only a general fear of terrorist attacks would essentially condone mass suspicionless searches of every person attending any large event, including, for example, virtually all professional sporting events, high school graduations, indoor and outdoor concerts, and parades.”).
principles. Instead, Johnston suggests that in the future, it is unlikely that the NFL will be allowed to conduct pat-downs of fans, although less intrusive means such as magnetometer searches might be permitted if the TSA can produce better evidence of a concrete threat posed to specific stadiums.

163. See Bourgeois, 387 F.3d at 1312 ("[T]he Fourth Amendment embodies a value judgment by the Framers that prevents us from gradually trading ever-increasing amounts of freedom and privacy for additional security.").
ONCE AGAIN, IT IS TIME TO “SPEAK MORE CLEARLY” ABOUT § 1346 AND THE INTANGIBLE RIGHTS OF HONEST SERVICES DOCTRINE IN MAIL AND WIRE FRAUD

Daniel C. Cleveland*

I. INTRODUCTION

Since the first mail fraud statute found its way into the United States criminal code, the “honest services” doctrine slowly crept into the realm of criminal fraud. Courts and prosecutors quickly used the existing mail fraud statutes to attack new schemes by public officials which had no specific victim(s) and specific statute prohibiting them.1 As a development of federal common law, however, the formless doctrine found varied interpretations from federal court to federal court.2 Recognizing the difficulty of judicially shaping the boundaries of the doctrine and finding little statutory support, the Supreme Court called on Congress to “speak more clearly” if our lawmakers wished to include the honest services doctrine within the criminal ambit of the mail and wire fraud statutes.3

Congress responded by enacting vague and ambiguous legislation that simply states that “the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.”4 Unfortunately, the new statute did not include a definition of what “honest services” actually are.5 Broadly speaking, intangible rights to honest services could be defined as one’s legal right to have duties owed by others (employees, elected officials, etc.) performed in a manner which furthers the owee’s best interests.6 Since the enactment of the statute, however, courts have continued to struggle to define the boundaries of the honest services doctrine, leaving application of the statute far from uniform.7 It has been suggested that the lack

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2. Id.
5. Id.
6. This broad definition is this commentator’s general understanding of what honest services were before §1346 was enacted and are since that time. This comment will attempt to narrow the definition.
of uniformity underscores the point that “courts do not and cannot know” Congress’ intent in passing the statute.8

The broad language of the statute and the relative lack of legislative history indicates that Congress, either intentionally or unintentionally, left to the courts the task of defining the exact scope of honest services mail and wire fraud. Considering the fact that United States v. McNally (the case which prompted §1346) dealt with public corruption, it is safe to say Congress intended the scope of the statute to reach corrupt acts of state and federal public officials.9 In the private sector, however, courts have consistently failed to reach a national consensus as to what constitutes honest services mail and wire fraud.10 Since application of the honest services doctrine varied from circuit to circuit when the Supreme Court decided McNally,11 it is not surprising the doctrine remains varied today.12

By enacting §1346, Congress attempted to establish a federal crime of honest services mail and wire fraud. We should assume, then, Congress did not intend for the elements of this federal crime to vary from region to region without specifically stating that purpose. While the Supreme Court or Congress could quickly bring the needed national uniformity in honest service fraud cases, they have thus far declined to do so. In light of the Supreme Court’s and Congress’ silence, this comment will review three recent private sector cases to determine the current status of honest services mail and wire fraud and will suggest a national approach that encompasses elements from the various circuits.

Part II of this comment discusses the elements of mail and wire fraud and the history of the honest services doctrine codified in §1346. Part III reviews and analyzes the current approaches to honest services mail fraud cases by looking at three recent private sector honest services decisions.13 Next, it discusses how the variations in the circuits could produce differing results in reviewing the same facts. Part IV briefly discusses the need for a national consensus and sets out factors courts should look at in determining honest services fraud cases. Part V

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8. See id.
10. See United States v. Rybicki, 354 F.3d 124, 162-163 (2d Cir. 2003) (Jacobs, J. dissenting) (noting the number of circuit splits and the breadth of unanswered questions surrounding the statute).
11. See United States v. Brumley, 116 F.3d 728, 733 (5th Cir. 1997) (“It bears emphasis that before McNally the doctrine of honest services was not a unified set rules. And Congress could not have intended to bless each and every pre-McNally lower court ‘honest services’ opinion. Many of these opinions have expressions far broader than their holdings.”).
12. See Rybicki, 354 F.3d at 162-163 (Jacobs, J. dissenting) (discussing the various current circuit splits on §1346). See generally J. KELLY STRADER, UNDERSTANDING WHITE COLLAR CRIME, §4.05(B) (Mathew Bender & Company, Inc., 2002) (discussing the courts’ struggle to define the meaning and reach of “honest services” and positing four approaches to public sector cases and three approaches to private sector cases).
13. See United States v. Vinyard, 266 F.3d 320 (4th Cir. 2001); Rybicki, 354 F.3d 124; and United States v. Brown, 459 F.3d 509 (5th Cir. 2006).
concludes that regardless of what is the best test or application for §1346, it is time for the Supreme Court or Congress to further clarify the intended scope of honest services mail and wire fraud.

II. HISTORICAL BACKGROUND LEADING UP TO THE ENACTMENT OF §1346

A. Elements of a Mail and Wire Fraud Offense

Section 1341 of Title 18 of the United States Code criminalizes the use of the mails to perpetrate a fraud. The operative language of the statute states:

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 . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier . . . shall be fined under this title or imprisoned not more than five years or both.

Wire Fraud is criminalized under Section 1343 of the same title. The statutes receive similar analysis since they share the same operative language and only differ in the means by which a fraud is perpetrated. Whereas mail fraud requires the use of the postal system or its private carrier equivalent, wire fraud requires the transmission of an electronic communication across state lines. This difference exists not only to address different modus operandi of the crime, but to also set forth jurisdiction requirements.

Government prosecutors must prove three elements to support a conviction in mail or wire fraud cases. There must be 1) a scheme to defraud, 2) specific intent to defraud, and 3) use of the mails or interstate wires in furtherance of that scheme. Despite its absence in the statutory language, in *Neder v. United*
States the Supreme Court held that Congress intended to “incorporate the well-settled meaning of the common-law terms” fraud and defraud.23 Thus, the Neder Court recognized that the common law requirement of “materiality of falsehood” relating to the omission or misrepresentation is an additional element of the crimes of federal mail and wire fraud.24

B. “A Scheme or Artifice to Defraud”

The vital element of a mail or wire fraud conviction is the scheme to defraud.25 Proof of the scheme not only addresses the intent element, but also helps define the boundaries of the private sector application of the mail and wire fraud statutes.26 Since the enactment of §1346, the scope of the statutes’ reach encompasses two forms of schemes to defraud: traditional frauds and frauds involving intangible rights of honest services.27

Traditional schemes deal with planned efforts to mislead or deceive third parties in order to get the victims to “give up some tangible interest.”28 Traditional frauds encompass historically recognized cons such as check kiting schemes, false advertising, or insurance fraud.29 However, not every questionable or sharp act in either the public or private sectors, is reached by the mail and wire fraud statute.30

Section 1346 of the criminal code supplements the definition of “any scheme or artifice to defraud” by including schemes intended to deprive others of intangible rights of honest services.31 While the intangible rights doctrine was never limited to the public sector, prior to 1987, it was most commonly used in

scheme as proof of intent. (United States v. Fernandez, 282 F.3d 500, 507 (7th Cir. 2002)). See also Alex Hortis, Note, Valuing Honest Services: The Common Law Evolution of Section 1346, 74 N.Y.U.L.REV. 1099, 1107 (October, 1999) (noting that only the scheme to defraud and use of mails or wires in furtherance are the only settled elements, and that intent to defraud is not necessarily a uniform requirement). 23. Neder v. United States, 527 U.S. 1, 23 (1999). 24. Id. at 25. 25. See United States v. McNeive, 536 F.2d 1245, 1252 (8th Cir. 1976) (“[T]here must be, at a minimum, a cognizable scheme to defraud.”). Accord United States v. Jain, 93 F.3d 436, 442 (8th Cir. 1996). 26. Jain, 93 F.3d at 441-42 (noting intent is “[e]ssential to a scheme to defraud” and that “[w]hen there is no tangible harm to the victim of a private scheme, it is hard to discern what intangible ‘rights’ have been violated”). 27. Hewens, supra note 20, at 871-75. 28. Id. at 871 (quoting Porcelli v. United States, 303 F.3d 452, 457 (2d Cir. 2002)). 29. Id. at 872. 30. See United States v. Rafsky, 803 F.2d 105, 107 (3d Cir. 1986) (noting a single instance of check kiting without proof of an accompanying scheme is not enough to establish mail fraud); see also United States v. Mandel, 415 F.Supp. 997, 1008 (D.Md. 1976) (openly accepting bribes does not trigger mail fraud liability because there is no intent to deceive); but see United States v. Fischl, 797 F.2d 306, 311 (6th Cir. 1986) (public official accepting bribes is a deprivation of public’s right to honest services despite lack of pecuniary injury to the state). 31. 18 U.S.C. § 1346.
cases involving frauds committed by public officials in their public capacity.\(^{32}\)

Courts have had trouble applying honest services fraud to the private sector outside the presence of a breach of clear fiduciary duties, which is characteristically found in the employer-employee context.\(^{33}\) Further, a breach of a fiduciary duty standing alone may not be sufficient to establish mail fraud in the private sector.\(^{34}\) Some recent examples of upheld convictions based on the intangible rights doctrine include a scheme to defraud a university of the honest employment of its professors;\(^{35}\) an employee engaging in a self-dealing scheme to obtain illegal commissions from sales;\(^{36}\) and lawyers giving kickbacks to insurance adjusters in order to decrease the time it takes to process clients’ claims.\(^{37}\)

The broad and sweeping nature and language of the statutes place them among the favorite tools in prosecutors’ toolboxes.\(^{38}\) Indeed, the mail and wire fraud statutes have been referred to as “stopgap” measures to combat the numerous new and ever-changing methods by which unscrupulous people swindle others.\(^{39}\) Thus, the statutes serve an important function by aiding prosecutors in protecting citizens from clever, new scams.

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32. See Hewens, supra note 20, at 874 n.73 (“Although the paradigm case of honest services fraud is the bribery of a public official, §1346 . . . extends to the defrauding of some private sector duties of loyalty.”) (quoting United States v. DeVegter, 98 F.3d 1324, 1327-28 (11th Cir. 1999)).

33. United States v. Frost, 125 F.3d 346, 365 (6th Cir. 1997) (noting that enforcement of the doctrine of honest services is problematic because of the nature of private sector relationships).

34. See Jain, 93 F.3d at 442 (Defendant doctor who failed to disclose his conflict of interest when referring patients to psychology clinic was not guilty of honest services mail fraud “because the breach did not affect the services rendered” to the patients. “[A] fiduciary’s nondisclosure must be material to constitute a criminal scheme to defraud.”). See also United States v. Bronston, 658 F.2d 920, 927 (2d Cir. 1981) (finding the government must show that the scheme was devised with the specific intent to defraud).

35. See Frost, 125 F.3d at 369, 392 (noting that the professor defendants were acting in their private capacity as employees, the court upheld the defendants’ mail fraud convictions where they breached a fiduciary duty to the university employer by awarding graduate degrees in exchange for help in securing government contracts for privately held company).

36. United States v. Vinyard, 266 F.3d 320, 330 (4th Cir. 2001) (Defendant was guilty of mail fraud for aiding his brother in breaching the duty of loyalty owed to the brother’s employer in order to acquire commissions from the brother’s employer.).

37. Rybicki, 354 F.3d at 146-47 (2d Cir. 2003) (Defendants were found guilty of depriving insurance companies of the honest services of insurance adjusters by bribing adjusters to expedite the processing of insurance claims.).

38. See Ellen Podgor, Mail Fraud: Redefining the Boundaries, 10 ST. THOMAS L. REV. 557, 558 (Spring, 1998) ( likening the mail fraud statute to a “prosecutor’s ‘Stradivarius’ . . . ‘Colt 45’ . . . ‘Uzi’ . . . hydrogen bombs on stealth aircraft’”).

39. See id. (“Prosecutors have used the mail [and wire] fraud statute . . . as ‘a stopgap device to deal on a temporary basis with the new phenomenon, until particularized legislation can be developed.’” (quoting United States v. Maze 414 U.S. 395, 405-06 (1974) (Burger, C.J. dissenting). Professor Podgor also noted that prosecutors have used the general mail and wire fraud statutes “despite the existence of particularized legislation.”).
C. Early Developments of the Honest Services Doctrine up to the Enactment of §1346

“As first enacted in 1872 . . . the [mail fraud] statute contained a general proscription against using the mails to initiate correspondence in furtherance of ‘any scheme or artifice to defraud.’”40 The sponsor of the bill intended it as a means to prevent various unremunerated frauds used to “deceiv[e] and fleec[e] the innocent people in the country.”41 In *Durland v. United States*, the Supreme Court indicated a somewhat limited approach to interpretation of the early statute by construing “any scheme or artifice to defraud” broadly as applied to property rights, but rejecting an argument to expand the meaning to the common law definition of “false pretences.”42 In 1909, Congress codified the language of *Durland*, amending the language of the statute to “any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses.”43 As Justice White noted, the introduction of the word “or” into the statutory language created independent phrases, which allowed later courts to construe the statute as prohibiting “schemes ‘to defraud’ or ‘for obtaining money or property by false or fraudulent pretenses.’”44 Perhaps unknowingly, Congress had expanded the breadth and scope of the mail fraud statute to unforeseen limits.45

Following the 1909 amendment, the federal courts began interpreting the first clause, “any scheme or artifice to defraud,” to include intangible rights not traditionally connected with property.46 Such “intangible rights” include the right of the people or government to have “public officials perform their duties honestly.”47 One commentator has suggested that dicta in early case law shows the theory of “intangible rights” arose as a means to combat fraud when there was no showing of a concrete pecuniary loss to the victims.48 The first applications of the theory in mail fraud cases, however, typically involved some form of financial gain to the accused at the victims’ expense.49 In 1941, the Fifth Circuit held that a scheme to achieve private gain by bribing a public official was actionable as a scheme to defraud the public of that official’s services.50

41. Id.
42. Id. at 356-57.
43. Id. at 358.
44. Id.
47. Id.
48. See Kobrin, *supra* note 45, at 790 (“The theory maintained that even when victims did not experience a pecuniary or property shortfall, those who defrauded them were unlawfully depriving the victims of a right.”).
49. Id.
50. Id. at 790-91 (citing United States v. Shushan, 117 F.2d 110, 114-15 (5th Cir. 1941)).
Effectively, this holding paved the way for use of the doctrine of intangible right to honest services against all public officials.\textsuperscript{51}

The 1970s saw a major thrust in the use of the intangible rights doctrine as a means to prosecute government officials for corruption.\textsuperscript{52} It was difficult to show actual pecuniary loss to the public in official corruption cases so prosecutors combined the twin doctrines of intangible rights and honest services.\textsuperscript{53} While most early cases involved public officials accepting bribes or failing to disclose conflicts of interests, the broad language of the mail fraud statute allowed prosecutors ample leeway to combat new schemes not yet specifically regulated.\textsuperscript{54} Throughout the 1970s and early 80s, the intangible rights doctrine expanded its reach further into public corruption and private fraud\textsuperscript{55} until it came to an abrupt, albeit temporary, stop in 1987 in \textit{United States v. McNally}.\textsuperscript{56}

In \textit{McNally}, the Supreme Court held there was no intangible right of the citizens to the honest and faithful services of their government in a case involving a kickback scheme facilitated by the head of the Kentucky Democratic Party.\textsuperscript{57} The \textit{McNally} Court rejected previous interpretations regarding the reach of the statute, stating that the amendment merely “made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property.”\textsuperscript{58} To come to this decision, the majority drew on case law which stated that defrauding the Government “means primarily to cheat the Government out of property or money.”\textsuperscript{59} The selective reliance was not lost on Justice Stevens who quickly pointed out in his dissent that \textit{Hammerschmidt v. United States} specifically recognized honest services fraud in connection with public corruption.\textsuperscript{60} Justice Stevens quoted from \textit{Hammerschmidt} for the proposition that “[i]t is not necessary that the

\begin{itemize}
\item \textsuperscript{51} See id. at 791 (noting that later judges would cite the language of \textit{Shushan} as support for the idea that one who defrauds another of an intangible right is just as culpable as one whose schemes cause monetary damage).
\item \textsuperscript{52} Id. at 791-92
\item \textsuperscript{53} See Kobrin, supra note 45, at 792-93.
\item \textsuperscript{54} See Carrie A. Tendler, Note, \textit{An Indictment of Bright Line Tests for Honest Services Mail Fraud}, 72 FORDHAM L. REV. 2729, 2733-34 (2004) (discussing the development of the intangible rights doctrine in the 1970s in the public sector and how it carried over into the private sector, and noting that one commentator analogized the expansion of the doctrine as “‘kudzu vine’” that “‘quickly overgrew the legal landscape . . .’”).
\item \textsuperscript{55} See id. at 2734 (“As prosecutors shifted their attention from protecting the integrity of the mails to white collar crime, the mail fraud statute became a ‘strategic tool in fighting political corruption and increasingly sophisticated economic misconduct.’”).
\item \textsuperscript{56} See, e.g., Loya, Jr., supra note 7, at 141 (noting that the expansion of the doctrine in the 1970s came to an abrupt end at the hands of the \textit{McNally} decision, but Congress was prompted by Justice Stevens’s dissent to enact §1346).
\item \textsuperscript{57} McNally, 483 U.S. at 359.
\item \textsuperscript{58} Id.
\item \textsuperscript{59} Id. at 358-59, n.8 (citing Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)).
\item \textsuperscript{60} Id. at 368 (Stevens, J., dissenting).
\end{itemize}
Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by the misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention.61

Within six months, the court clarified that McNally did not affect the use of the mail and wire fraud statutes to prosecute a scheme which deprived someone of intangible property rights.62 In Carpenter v. United States, a Wall Street Journal employee was convicted of mail and wire fraud for revealing confidential information to his co-conspirators (two stock brokers) before the information was published.63 Subsequently, the parties traded securities on the confidential information before it became public.64 In upholding the conspirators’ convictions, the Court unanimously found that the confidential pre-publication information was intangible property, and that the Wall Street Journal’s employee had breached a fiduciary duty by misappropriating company property.65 The Carpenter decision was an attempt to clarify what is and what is not a property right, and thus, what falls within the ambit of the mail and wire fraud statutes.66

However, the Supreme Court’s recognition of criminal sanction based on defrauding someone of intangible property did not squash Congress’ desire to overturn McNally completely. Congress soon attached 18 U.S.C. §1346 as an amendment to a sweeping anti-drug bill.67 The language of the amendment simply states that “the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.”68 In his floor remarks regarding the passage of the amendment, Rep. Conyers specifically noted that:

Prior to the McNally decision, every Federal appellate court that had considered the scope of the mail and wire fraud provisions held that those provisions protect the right of the public to the honest services of public officials and others responsible for the conduct of public or public affairs; the right of a member of an organization to the honest services of the leaders of that organization; and the right of employers to the honest service of their employees.69

61. Id. at 368, n.6 (Stevens, J., dissenting) (quoting Hammerschmidt, 265 U.S. at 188).
62. Carpenter v. U.S., 484 U.S. 19 (1987). The basic holding in Carpenter was that the mail and wire fraud statute can be used to prosecute schemes that deprive people of intangible property rights or interests, but honest services are not an intangible property right.
63. Id. at 23-24.
64. Id.
65. Id. at 25-27.
66. Id.
Representative Conyers claimed that the amendment would merely restore the mail and wire fraud statutes to where they “were before the McNally decision.”

Unfortunately, the new statute failed to define exactly what services or rights were covered under the honest services doctrine prior to McNally. Pre-McNally case law clearly indicates that honest services fraud encompassed the acts and omissions of public officials; however, it was still unclear how the doctrine applied to private acts. Most of the cases falling within the ambit of private sector honest services fraud dealt with fiduciary duties owed by employees to employers. Other case law leading up to the monumental 1987 McNally decision is inconclusive as to whether private breaches of fiduciary duties fell within the scope of the honest services doctrine, especially in the absence of proven pecuniary gains by the defendant. Without a statutory definition of honest services to guide our courts, Congress’ effort to restore the law to its pre-McNally position effectively destroyed the first glimpse of uniformity in the fraud statutes since the 1896 Durland decision.

III. HONEST SERVICES DOCTRINE SINCE THE ENACTMENT OF §1346

Congress’ attempt to restore order ostensibly muddied the waters further. Since the enactment of §1346, courts have struggled to define the nature of the frauds regulated and set limits to the statute’s application. The question of where the honest services doctrine currently stands has been recently considered by courts and commentators alike. Central to the debate is a number of circuit

70. Id.

71. See, e.g., United States v. Margiotta, 688 F.2d 108, 121-22 (2d Cir. 1982); United States v. Mandel, 591 F.2d 1347, 1358-64 (4th Cir. 1979).

72. See Loya, Jr., supra note 7, at 138, n.2 (suggesting that the circuits are currently “lost in an ‘honest services’ morass that resembles that which preceded the Court’s ruling in McNally”).

73. See, e.g., United States v. Von Barta, 635 F.2d 999, 1006-07 (2d Cir. 1980) (Broker convicted for mail and wire fraud for causing his employer to extend credit to an undercapitalized investment fund in which the employee owned half interest because broker did not first disclose his ownership interest in the fund and the fact it was undercapitalized); United States v. Lemire, 720 F.2d 1327, 1332-34 (D.C. Cir. 1983) (employee convicted for taking bribes from contractor who overcharged employer); United States v. Siegel, 717 F.2d 9, 14 (2d Cir. 1983) (breach of fiduciary duty when employees used proceeds from the sale of corporate goods for non-corporate purposes); United States v. McCracken, 581 F.2d 719 (8th Cir. 1978) (employee breached a fiduciary duty owed to the employer by using his position in employer’s business to create gain for his own company).

74. Compare United States v. Dixon, 536 F.2d 1388, 1399 (2d Cir. 1976) (“There is abundant authority that a scheme to use a private fiduciary position to obtain direct pecuniary gain is within the mail fraud statute.”) with United States v. Rabbitt, 583 F.2d 1014, 1024 (8th Cir.1978) (finding a public official breaching a private fiduciary duty while acting in a private capacity did not fall within the honest services doctrine).

75. See generally Podgor, supra note 38; Hortis, supra note 22; Tendler, supra note 54; Kessimian, supra note 1; Andrew B. Matheson, A Critique of United States v. Rybicki: Why Foreseeable Harm Should Be An Aspect of the Mens Rea of Honest Services Fraud, 28 AM. J. TRIAL ADVOC. 355 (2004).
splits on a variety of issues surrounding §1346’s application. Among these splits are whether private sector honest services fraud requires a fiduciary duty; what are the appropriate test(s) and elements to find a violation; and whether state law or federal law should be used to define the offense or the existence of duties in private contexts. Additionally, commentators have written about the statute’s effects on federalism; the over criminalization of private matters; and the appropriateness of regulating matters of trust and betrayal. Another commentator recently suggested courts should abandon all attempts to find a uniform test to approach honest services cases, and rather consider a list of non-exclusive factors to determine liability in each individual case. Such a system would be of little precedental guidance to courts and would subject defendants to the whims of overzealous prosecutors and juries who lack sophisticated legal understanding of the subtlety of the law.

Despite the vast amount of commentary and judicial pronouncements, the complex and divergent issues are only slightly more lucid eighteen years following §1346’s enactment. Making sense of where the law stands nationally is tenuous at best, but there remains “a broad consensus among courts and commentators that there must be a limiting element for honest services fraud, lest every ethical lapse be treated as a crime.”

76. Rybicki, 354 F.3d at 162-63 (Jacobs, J., dissenting) (noting various issues which the Federal Circuits have resolved differently).
77. Compare United States v. Ervasti, 201 F.3d 1029, 1036 (8th Cir. 2000) (holding that while a breach of a fiduciary duty is indication of a deprivation of one’s right to honest services, it is not an element of §1346) and United States v. Sancho, 157 F.3d 918, 920 (2d Cir. 1998) (proof of fiduciary duty is not an element of wire fraud) with Frost, 125 F.3d at 365 (noting application of honest services doctrine in private sector cases can be problematic without a breach of fiduciary duty and defining honest services as a breach of a specific duty owed).
78. Compare Rybicki, 354 F.3d at 145-47 (discussing the materiality and foreseeable harm tests, ultimately adopting the materiality test) with Vinyard, 266 F.2d at 327-29 (noting the circuit split on reasonably foreseeable harm test or materiality test and ultimately adopting foreseeable harm test).
79. Compare Bramley, 116 F.3d at 733-34 (noting that before McNally, there was not a unified body set of rules and looking to state law to define the meaning of honest services) with Rybicki, 354 F.3d at 136-37, 145 (“we must therefore look to the case law from the various circuits that McNally overruled in order to determine” if the meaning of honest services was “sufficiently clear” prior to the enactment of §1346, but then noting “[t]he pre-McNally case law is ‘pertinent,’ even though we are not bound by it in a stare decisis [emphasis added] sense.”).
80. Compare Bramley, 116 F.3d at 735 (using state law to define whether there is a violation), with Frost, 125 F.3d at 366 (“Federal law governs the existence of fiduciary duty under the mail fraud statute.”).
82. See id.
83. See Kobrin, supra note 45, at 821 (“[T]he law is essentially a criminalization of betrayal. As a result, it comes with numerous ramifications that occur whenever a relationship of trust is subject to regulation.”).
84. See Tendler, supra note 54, at 2731.
85. See Matheson, supra note 75, at 372.
Three recently decided cases help to illustrate the variance in views on how the circuit courts approach and decide private sector honest services mail and wire fraud cases. In 2001, the Fourth Circuit proceeded under the foreseeable harm test in order to uphold an honest services mail fraud conviction of an individual who aided in effectuating a self dealing scheme to obtain commissions from his brother’s employer. The year later, the Second Circuit sitting en banc decided United States v. Rybicki, which applied the materiality test in upholding the honest services mail and wire convictions of two lawyers who provided kickbacks to insurance adjustors in order to secure faster settlements for their clients. Lastly, in August of 2006, in United States v. Brown, the Fifth Circuit applied its own brand of the materiality test as it reversed the honest services wire fraud convictions of several high ranking employees at Enron and Merrill Lynch. Each of these cases provides insight as to where the continued judicial development of honest services currently is, where the doctrine is heading, and the significant differences between the circuits in applying the doctrine.

A. The Reasonably Foreseeable Harm Test—United States v. Vinyard

United States v. Vinyard provides a good example of the foreseeability of harm test for determining liability under §1346. The Fourth Circuit’s analysis and reasoning relied largely on the Sixth Circuit’s decision in United States v. Frost and can be seen as a fair representation of the approach taken in multiple circuits. Additionally, the court’s succinct appraisal of the state of the law and analysis of the tests provides a good starting place for review.

Brothers, Michael and James Vinyard, were convicted of 14 counts of mail fraud and money laundering after they facilitated a scheme to receive illegal commissions while defrauding James’ employer. James Vinyard was tasked by his employer, Sonoco, with finding an independent broker to locate and purchase recycled plastics on Sonoco’s behalf. Using a third party’s name as incorporator and president, James and Michael secretly set up CSE, a plastic brokerage of their own in another state. Misrepresenting his connections with

86. Vinyard, 266 F.3d at 328-30 (After reviewing the appropriate tests and evidentiary requirements for honest services fraud, the court affirmed the denial of defendant’s motion for summary judgment.).
87. Rybicki, 354 F.3d at 146-47.
88. United States v. Brown, 459 F.3d 509 (5th Cir. 2006).
89. Vinyard, 266 F.3d at 320.
90. Frost, 125 F.3d at 346.
91. Vinyard, 266 F.3d at 327-28.
92. Id. at 322.
93. See id. (Also noting that Sonoco wanted to use an independent broker to negotiate and purchase the goods in order to protect its identity.).
94. Id. at 323.
CSE, James presented the company as an independent broker to Sonoco.95 Falsely believing CSE was an independent broker that provided the lowest prices for recycled plastics, Sonoco began purchasing the goods through CSE, allowing CSE to collect a commission on each sale.96 Additionally, the brothers caused CSE to enter into an enterprise facilitating sales of used Sonoco grocery bags to recyclers for yet more commissions.97 During the six year period it operated, CSE netted nearly $3 million in profit, which the brothers filtered through another entity and pocketed.98 In 1997, one of CSE’s vendors blew the whistle.99 The indictment that followed alleged, among other things, that the brothers entered into a scheme to defraud Sonoco of its rights to the honest services of James Vinyard.100

Michael Vinyard appealed his conviction stating that he neither intended to nor caused actual economic harm Sonoco.101 The court noted that other courts have “consistently utilized certain principles to limit [§1346’s] scope in the private sector employment.”102 Although “[t]he plain language of the ‘honest services’ doctrine codified in §1346 suggests that ‘dishonesty by an employee, standing alone, is a crime,’”103 such an interpretation potentially extends the scope of the honest services doctrine too far.104

Reviewing other courts’ decisions applying §1346, the Fourth Circuit found that the circuits had “split over the approach” to take in private sector honest services cases between the “reasonably foreseeable harm test,” and the “materiality test.”105 Although neither party briefed nor argued to the court which test should be adopted, the court sought to address the scope of the honest services doctrine after Michael Vinyard raised the issue at trial and on appeal.106 The court said the reasonably foreseeable harm test requires the Government to “prove that the employee intended to breach a fiduciary duty, and that the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach.”107 On the other hand, the court summarized the materiality test as only requiring the government to show

95. Id.
96. Id.
97. Vinyard, 266 F.3d at 323.
98. Id.
99. Id.
100. Id.
101. Id. at 324.
102. Vinyard, 266 F.3d at 326-27.
103. Id. at 326-27 (quoting Frost, 125 F. 3d at 368).
104. Id. at 327 (recognizing that extending §1346 to the limits of its plain meaning “would expose employees to mail fraud prosecution for ‘every breach of contract or every misstatement made in the course of dealing’”) (quoting United States v. Cochran, 109 F.3d 660, 667 (10th Cir. 1997)).
105. Vinyard, 266 F.3d at 327.
106. Id. at 328. n.6 (Review of the conviction required the court to address the “proper construction of the honest services doctrine in the private employment context.”).
107. Id. at 327 (quoting Frost, 125 F.3d at 368).
that an employee had fraudulent intent and that the alleged misrepresentation was material.\textsuperscript{108} A misrepresentation is material if it “has the natural tendency to influence or is capable of influencing the employer to change his behavior.”\textsuperscript{109}

The court held that although the application of the two tests will usually yield similar outcomes,\textsuperscript{110} the reasonably foreseeable harm test was the better approach to deciding honest services fraud cases.\textsuperscript{111} The court felt the foreseeable harm test was superior because 1) it focuses the analysis on the employee’s intent rather than the employer’s response and 2) because it limits §1346’s scope to serious harms.\textsuperscript{112} The Fourth Circuit found that courts restrict the application of the honest services doctrine to instances where there is a significant breach of a duty owed.\textsuperscript{113} Further, the court determined an employer’s response is not the proper barometer to measure the significance of the breach as “an employer may overreact to an insignificant fraud or under react to a significant one.”\textsuperscript{114} Additionally, the reasonably foreseeable harm test does not extend liability to “trivial frauds” which provoke an employer to change business practices in order to avoid the appearance of impropriety.\textsuperscript{115}

The court further held that the reasonably foreseeable harm test requires neither that the employer actually suffer a loss nor the employee intend to harm the employer.\textsuperscript{116} Instead, all the reasonably foreseeable harm test requires is that an employee foresee that the fiduciary breach could “create ‘an identifiable economic risk’ for the employer,” and as the court stated, “‘economic risk’ embraces the idea of risk to future opportunities for savings or profit; the focus on the employer’s well-being encompasses both the long-term and short-term of

\textsuperscript{108.} Id.
\textsuperscript{109.} Id. at 328 (quoting Cochran, 109 F.3d at 668, n.3.) It should be noted that the definition used for a material misrepresentation does not necessarily explain why an omission is material. Borrowing from securities law, the definition of a material omission of fact is the omission of a fact necessary to make a statement not misleading. There are two ways for an omission to become material. First, the omission is material if there is some affirmative duty to disclose the information in the first place. In mail and wire fraud cases dealing with circumstances of self-dealing, that affirmative duty to disclose generally arises from the duty of loyalty. Absent an affirmative duty to disclose, an omission becomes material if the omitted information is necessary to make an affirmative representation not misleading. Thus, in some instances, omitting even large and seemingly important facts may not rise to the level of materiality, unless those facts are needed to make another representation not misleading. \textit{See, e.g.}, Oxford Asset Mgmt, Ltd. v. Jaharis, 297 F.3d 1182, 1188 (11th Cir. 2002) (“Section 11(a) of the 1933 Act … provides a cause of action to purchasers of securities where: ‘any part of the registration statement … contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading …’”).
\textsuperscript{110.} Vinyard, 266 F.3d at 328, n.7.
\textsuperscript{111.} Id. at 328.
\textsuperscript{112.} Id. at 328-29.
\textsuperscript{113.} Id. at 328.
\textsuperscript{114.} Id.
\textsuperscript{115.} Vinyard, 266 F.3d at 328.
\textsuperscript{116.} Id. at 329.
the business.”

Thus, according to the Vinyard Court, to be convicted under the foreseeable risk of harm test, a defendant must 1) engage in a scheme in which someone intends to breach a fiduciary duty owed to an employer; and 2) that the defendant foresaw, or reasonably should have foreseen, such a breach could create an identifiable economic risk to the employer, regardless of whether the risk ever materialized.

Using this analysis, the Fourth Circuit determined that the defendant participated in a scheme in which James breached a fiduciary duty to Sonoco of which Michael was aware. Lastly, the court found the evidence suggested that the scheme exposed Sonoco to foreseeable economic risk, regardless if the underlying transactions of the scheme were “objectively fair.”

B. The Materiality Test – Rybicki II and Brown

1. United States v. Rybicki – Bribes or Kickback Schemes

Setting aside for a moment the constitutional issues that were litigated and decided in the case, United States v. Rybicki (Rybicki II) presents a scholarly look at both the foreseeable risk of harm test and the materiality test in honest services fraud cases. After the en banc panel of the Second Circuit first ruled that §1346 is not unconstitutionally vague, thereby overruling its previous decision in United States v. Handakas, the court explored the two tests in depth before choosing the materiality test to uphold the convictions of two

117. Id. (noting that this requirement is met if, at the time of the scheme, the employee foresees or should foresee his conduct might be economically detrimental to his employer. Thus, there is no need to allege or prove actual pecuniary harm to the victim, only that the harm was or should have been within the reasonable contemplation of the defendant).

118. Id.

119. Id. (“Thus, in analyzing the propriety of the district court’s denial of Michael’s motion for judgment of acquittal, we must assess whether there was sufficient evidence for the jury to find that Michael willingly aided and participated in the breach of a fiduciary duty by James, and that he could reasonably foresee that the breach would create an identifiable economic risk to Sonoco.”).

120. Vinyard, 266 F.3d at 329-30.

121. Id. at 330 (The court found the risk to Sonoco was their last chance to consider a variety of brokers and search for the best price.).

122. See United States v. Rybicki, 287 F.3d 257 (2d Cir. 2002) (holding that §1346 was not unconstitutionally vague as applied to this case and that it was precluded from considering a facial challenge because the assertion was not based on the statute’s impact on First Amendment rights).

123. Rybicki, 354 F.3d at 144 (The en banc panel concluded that the Handakas court should not have reached the constitutional question and overruled it without reviewing its merits). That ruling was based on existing Second Circuit case law that prohibits facial review of a statute outside of the First Amendment context because reviewing courts are supposed to decide cases on the narrowest possible grounds, see id.
attorneys who paid kickbacks to insurance adjustors in order to hasten their clients claims. In the case, two personal injury attorneys, Thomas Rybicki and Fredric Grae, arranged for payments to be made to insurance claims adjustors who were employed by the companies that insured the defendants’ clients. The purpose of the payments was to hasten the speed at which the defendant’s claims were processed, and the payments were typically determined as a percentage of the total settlement amount. Eventually, the defendants were caught and indicted for mail and wire fraud by entering into a scheme to defraud the insurance companies of the honest services of the adjustors. During the trial, the Government did not attempt to show that any of the settlements from the implicated claims were “inflated above what would have been a reasonable range for that settlement.” Effectively, that meant the prosecution was either unwilling or incapable of showing any actual economic harm had occurred to the insurance companies as a result of the kickback scheme. Even so, the jury convicted each defendant on over twenty-two counts of either mail or wire fraud.

The court first determined that §1346 was not unconstitutional as it applied in this case because a “specific meaning” of the phrase “the intangible right of honest services” could be found in pre-McNally case law. Next, the court reviewed case law from the several circuits to determine the pre-McNally meaning of honest services. Following this exhaustive review, the panel concluded that “private-sector honest services cases fall into two general groups, cases involving bribes or kickbacks, and cases involving self-dealing.” The court then concluded that, under the honest services doctrine, the existence of a bribe or kickback is enough to sustain a conviction, but in self-dealing cases

124. Id. at 146-47.
125. Id. at 127.
126. Id. (Adjusters were expressly forbidden by the insurance companies’ written policies from accepting gifts or fees from the insured, and were required to report the offer). None of the adjusters in this case reported accepting or being offered the payments. In total, the payments at issue exceeded $3 million dollars, see id.
127. Id. at 127-28.
128. Rybicki, 354 F.3d at 128.
129. See id.
130. Id.
131. Id. at 137-38 (emphasis original) (The language Congress used when enacting the statute contained “[the definite article ‘the,’ which caused the court to reason §1346 did not criminalize all intangible rights of honest services, just those that had been criminal before McNally. Based on this observation, the court concluded that “there was no reason to think that Congress sought to grant carte blanche to federal prosecutors, judges and juries to define ‘honest services’ from case to case for themselves.””).
132. Id. at 138-39, n.13.
133. Rybicki, 354 F.3d. at 139.
there needs to be something more than just a conflict of interest. After the courts’ exhaustive review of private sector honest services cases from several different circuits, it concluded:

[T]hat the term ‘scheme or artifice to deprive another of the intangible right to [sic] honest services’ in section 1346 . . . means a scheme or artifice to use the mails or wires to enable an officer or employee of a private entity . . . purporting to act for and in the interests of his or her employer . . . secretly to act in his or her or the defendant’s own interests instead, accompanied by a material misrepresentation made or omission of information disclosed to the employer or other person.

The panel also made it clear that honest services fraud did not have to arise in an employer-employee context, but could occur whenever there is a relationship which gives rise to a duty comparable to the duty of loyalty.

Next, the en banc panel decided the *Rybicki* I court erred when it upheld the convictions using a modified version of the foreseeable risk of harm test. Citing the *Vinyard* court’s definition of “material,” the *Rybicki* II panel “prefer[ed] the ‘materiality’ test because it has the virtue of arising out of fundamental principles of the law of fraud.” In this vein, however, the court refused to rule on whether the fraud needed to be the cause a change in business conduct. Further, the application of the “materiality” test would encompass the cases in which there was a foreseeable risk of economic harm, because the company’s knowledge of misrepresented fact would cause them to change their conduct. Finally, the court noted, without going into much detail, that by eliminating the pecuniary or economic harm portion of the foreseeable risk of harm test, the materiality test “may capture some cases of non-economic, yet serious, harm in the private sphere.”

134. *Id.* at 141. The court stated in the self dealing cases, the defendant’s conflict of interest needed to “at least be capable of causing . . . perhaps some economic or pecuniary detriment -- to the employer.” This language could be read as suggesting foreseeable risk of harm needs to be present in self dealing cases even in circuits that use the “materiality test.” But see *id.* at 1-41, n.16 (The court noted that its own pre- McNally case law suggests the existence of a conflict of interest was enough to uphold on honest services conviction.).

135. *Id.* at 141-42.

136. *Id.*

137. *Id.* at 145 (noting that *Rybicki* I modified the foreseeable risk of harm test by requiring the economic harm be more than de minimis).

138. *Rybicki*, 354 F.3d at 145 (A misrepresentation or omission is material if it “would naturally tend to lead or is capable of leading a reasonable employer to change its conduct.”). See also *id.* at 146 (finding the de minimis foreseeable harm test to be designed simply to limit the scope of §1346).

139. *Id.* at 146. Seemingly, this allows the court to avoid the problem of an employer changing its conduct to avoid the appearance of impropriety envisioned by the *Vinyard and Frost* courts. However, absent further elaboration by the panel, such an assessment is only speculation.

140. *Id.* (noting the de minimis function was satisfied because such small frauds would not be material).

141. *Id.* at 146.
According to *Rybicki II*, in jurisdictions applying the “materiality test,” a defendant who meets the other mail or wire fraud elements, is guilty of honest services mail or wire fraud when 1) the defendant makes a material misrepresentation or omission, 2) in breach of a duty rising to the level of the duty of loyalty, and 3) the misrepresentation or omission is capable of leading a reasonable employer to change his conduct. Thus, under this theory there is no need to show that the conduct could actually harm the victim; it is only necessary to show that knowledge of the conduct would cause the victim to take a different course of action. Under this logic, the fact a fiduciary accepts a bribe or kickback in itself is sufficient evidence to show they are depriving the party to whom the duty is owed of the fiduciary’s honest services.


In *United States v. Brown*, the Fifth Circuit once again added its own unique twist to interpreting §1346. In this case, the court reversed the mail and wire fraud convictions of several high ranking Enron and Merrill Lynch employees, despite the existence of the elements needed for a conviction under the Circuit’s version of the “materiality test.”

Feeling pressure to meet end-of-year forecasted earnings targets, Enron caused one of its divisions to sell that division’s primary assets. After several unsuccessful attempts to sell the assets to an industry buyer, Enron executives began seeking an “emergency alternative.” The defendants agreed that before the end of the fiscal year, Enron would sell the assets to Merrill Lynch for six months or less. While some Merrill employees were uncertain about entering

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143. *Rybicki*, 354 F.3d at 145-46. Note, however, the case was dealing specifically with a bribery or kickback scheme and not a self-dealing scheme. The court had previously stated that in self dealing situations, some detriment to the victim needs to be present. *Id.*
144. *Id.* at 142.
145. *Id.* at 141.
146. *See Brunley*, 116 F.3d at 734 (holding that the definition of “honest services” is found by looking at the duties owed under state law).
147. *Brown*, 459 F.3d at 520-523 (discussing both the Government’s allegations and then the defense and ultimately concluding that honest services fraud did not apply because the interests of the parties were not sufficiently divergent).
148. *Id.* at 514 (By causing the division to sell power-generating barges, its primary assets, the division would show a gain for the year, thereby allowing its parent company to meet its forecasted earnings.).
149. *Id.* (The executives referred to Merrill Lynch as a “friend of Enron” who may be willing to “help Enron out.”).
150. *Id.* at 514-16 (discussing the terms of the deal and the communications leading up to its execution). The deal was for Merrill to buy equity in the assets for $7 million dollars in a “special purpose vehicle” which allowed Enron to book over $12 million in earnings on the end of the year income statement. Merrill was assured it would receive a specified markup and that it would not hold onto the barges for more than six months. *See id.*
into the transaction,\textsuperscript{151} the Merrill defendants executed the deal after the Enron defendants gave guarantees that Enron would either find a third party buyer; repurchase the assets itself; or cause a subsidiary to repurchase the asset within six months at a set mark up.\textsuperscript{152} The government alleged that, by temporarily selling assets and guaranteeing to repurchase those same assets, the defendants schemed to defraud Enron and its shareholders of the honest services of its employees.\textsuperscript{153} The Government charged high ranking employees of Enron and Merrill Lynch with “honest services” wire fraud under §§1343 and 1346, and various counts of falsifying books and records.\textsuperscript{154} At trial, the government presented facts which tended to show that the Enron and Merrill defendants continued to engage in questionable practices that substantiated the allegations of accounting fraud.\textsuperscript{155} On appeal, the Fifth Circuit concluded that the theory of honest services wire fraud did not extend to the specific situation and vacated the judgment.\textsuperscript{156}

After first reviewing the history of honest services wire fraud and §1346, the court then explained the Fifth Circuit approach in deciding the case.\textsuperscript{157} First, the court stated that state law defined “honest services,” and these services included fiduciary duties.\textsuperscript{158} Next, the court set out the limiting principle that, in private

\textsuperscript{151} Brown, 459 F.3d at 514, n.1 (discussing Katherine Zrike’s, chief counsel to Merrill’s Global Investment Banking, concerns and an internal memo warning of “problematic end-of-year transactions by clients seeking to show gains or losses prior to the end of the year”). Some Merrill employees questioned whether the deal would come to fruition due to the concerns regarding the lack of due diligence and the risk to Merrill’s reputation stemming from aiding and abetting Enron in “income statement manipulation.” See id. at 514.

\textsuperscript{152} Id. at 515. Enron also guaranteed a rate of return on the investment of over 20%, but the assurances could not be made in writing because it would “prevent Enron from receiving the accounting treatment it sought.” See id. According to the Government, “[t]hese oral but material [repurchase] terms . . . required that the deal be booked as a loan rather than as a sale.” This shows the intent of the parties was to use the deal as a way for Enron to defraud the market and its shareholders by allowing Enron to manipulate its earnings for the year. See id. at 516.

\textsuperscript{153} Brown, 459 F.3d at 516 (Because the transaction should have been recorded into the accounting books as a loan, but schemers recorded the deal as a sale, they defrauded Enron of the honest services of their employees.).

\textsuperscript{154} Id.

\textsuperscript{155} Id. at 516, nn.2, 3 (noting that the dates and amounts of Merrill’s sale of the assets to an entity not wholly independent to Enron comport with the proposed rate of return and time exposure promised to Merrill during negotiations).

\textsuperscript{156} Id. at 517.

\textsuperscript{157} Id. at 517-19 (discussing the general history and elements of the honest services doctrine and statute).

\textsuperscript{158} Id. at 519 (citing Brumley, 116 F.3d at 733). This statement seems somewhat contradictory as the court had just previously stated that the parameters of the honest services doctrine was found in the pre-McNally case law. This almost uniquely Fifth Circuit approach comes from Brumley, a post-McNally Fifth Circuit case, which says honest services are services owed under state law. The en banc Brumley panel reached its state law conclusion after performing its own lengthy review of the honest services cases, and spoke about its federalism concerns with the statute in its holding. “The tension inherent in the federal criminalization of conduct by state officials innocent under state law is here.” These concerns were more readily apparent in Brumley, as the case dealt with
sector cases the government must show some detriment to the person to whom
the services or duty is owed. However, a breach of a duty to disclose material
information is a sufficient detriment because of the victim’s lost opportunity
to change its business conduct based on the omission or misrepresentation.
Having set out its approach to honest services fraud, the court then
acknowledged the prosecution set out a “plausible, even strong” honest services
wire fraud case, as the prosecution alleged actual pecuniary harm (not just the
uncertain detriment that Enron lost the chance to change its conduct) as a result
of the breach of the duty to “disclose the full truth about the . . . transaction.”

Turning to the defendants’ appeals, however, the court seemingly added yet
another requirement to proving honest services wire fraud. The court first
restated the generally held axiom that “not every breach of a fiduciary duty
works a criminal fraud.” Next, citing Rybicki II, the en banc panel concluded
that the Fifth Circuit’s development of the doctrine was similar to the Second
Circuit’s analysis. The Brown court, however, pointed out that while the
Rybicki II rule dealt with a “secret conflict” of interest, the Fifth Circuit read the
cases “more broadly” to reach a “divergence” of interest instead. Using this
broader understanding of the rule, the panel then stated that while the actions of
the employees may not have been in their employer’s long term best interests,
the employees’ interests were not sufficiently divergent to those of their
employer to uphold the convictions. The court implied that all of the
defendants acted on the premise that the scheme was itself in Enron’s best
interests.

The court then explained that the fact the individual defendants’ bonuses
increased as a result of the fraud would not change the outcome because the
compensation plan had been created by the victim. Enron created an incentive
structure based upon the attainment of corporate goals, thereby creating an

the conduct of a state official in his official capacity, and not in a private sector setting. See
Bramley, 116 F.3d at 733-35.
159. Brown, 459 F.3d at 519-20. The court did not specifically say that the detriment must be
pecuniary or economic; however, it did note that a similar rule in the Seventh Circuit requires the
breaching employee to garner some personal benefit.
160. Id. at 519.
161. Id. at 519-20. The Government alleged both the “harm inherent in a failure to disclose
material information” and also that the transaction involved the defendants receiving bonus
increases for meeting end of the year targets and transaction fees paid to Merrill.).
162. See id. at 521 (quoting United States v. George, 477 F.2d 508, 512 (7th Cir. 1973)).
163. Id.
164. Brown, 459 F.3d at 521 (The panel agreed that there were similarities between the majority
of cases involving self dealing or bribery and the development of the Rybicki II rule.).
165. Id.
166. Id. at 521-22. The premise was that meeting the year end income target was in the
immediate interest of both the defendants and their employer, and thus there was no violation of the
statute.
167. Id. at 522.
168. Id.
understanding among its employees of the corporation’s interests (attaining earnings targets) and the employees’ interest (increasing their bonus) were linked.  Consequently, Enron’s corporate interests and its employees’ personal interests were indistinguishable, so that the defendants were unlikely to recognize their breach in furtherance of the corporate interest was a criminal act.

Because its new divergence of interest requirement was not met, the defendants’ honest services wire fraud convictions were vacated despite the court’s understanding that a fraudulent transaction had actually occurred and that the defendants personally gained as a result. The court, however, immediately sought to limit its holding by stating the alleged conduct was “not a federal crime under the honest services fraud theory specifically.” Explaining this outcome as a product of the application of the rule of lenity, the court chose to narrow the scope of its materiality application by adding the new divergence of interest requirement.

Much of the majority’s reasoning in Brown can actually be traced back to its constitutional concerns around the doctrine itself. From the outset of the majority opinion, the court cautioned against the over expansion of the honest services doctrine. Similarly, it is reasonable to believe that the court sought to limit its holding as much as it could in order to prevent over-reliance on the case going forward. Further, the opinion criticized the prosecution for arguing for an expansive interpretation of the honest services doctrine. Considering the court’s repeated acknowledgement of wrong doing on part of the defendants, perhaps the most compelling reason underlying the outcome in Brown was the Fifth Circuit’s resistance to “the incremental expansion of a statute that is vague

169. Brown, 459 F.3d at 522.
170. Id.
171. Id. at 522-23 (“We do not presume that it is in a corporation’s legitimate interests ever to misstate earnings – it is not. However . . . where the employee’s conduct is consistent with that perception of the mutual [corporate and personal] interest . . . the Government must turn to other statutes, or even the wire fraud statute absent the component of honest services, to punish this character of wrongdoing.”).
172. Id. at 523.
173. Id. (citing McNally, 483 U.S. at 360) (choosing to apply the narrower of the two reasonable theories presented thereby excluding the defendants’ conduct from conviction in order to “resist the incremental expansion” of §1346).
174. See Brown, 459 F.3d at 523.
175. Id. at 520 (“If we are not to lapse into defining a common law crime, the outer boundary of this facially vague criminal statute must be determined from the factual circumstances supporting affirmed convictions, not by negative implication from the few constraints mentioned in disparate cases.”).
176. Id. at 523 (“Given our repeated exhortation against the expanding federal criminal jurisdiction beyond specific federal statutes to the defining of common-law crimes . . .”).
177. Id. at 520 (“We begin by noting that the Government urges the broadest reading by relying on the barest reiteration of the few constraints we have previously acknowledged.”).
and amorphous on its face and depends for its constitutionality on the clarity divined from a jumble of disparate cases."

C. Comparing the Approaches

Given the different tests used by the circuits to decide honest services mail and wire fraud cases, as well as the different applications of the same test from circuit to circuit, it is not only possible that the facts of one case will yield different results in different localities, but likely. This section will take the basic facts decided upon in United States v. Brown, discussed above, and will briefly apply the Rybicki II and Vinyard approaches to show how the cases would have been different. In doing so, this section will briefly compare and discuss the appropriateness of the different approaches.

1. Brown decided Under the Foreseeable Risk of Harm Test

As it was stated earlier, the foreseeable risk of harm test requires a scheme in which someone intends to breach a fiduciary duty owed to an employer; and that the defendant foresaw, or reasonably should have foreseen such a breach could create an identifiable economic risk to the employer, regardless whether the risk ever materialized. In Brown, the defendants breached a duty to disclose information regarding the sale of millions of dollars worth of assets. As Judge Reavley pointed out in his dissent, that duty was owed both to Enron and to its shareholders. The parties intended to breach the duty in order to manipulate the corporate books, thereby manipulating the share price by falsely meeting earnings targets for 1999. Since there is never a legitimate interest of the corporation to misstate earnings, and because such action can lead to serious and expensive legal actions against companies who get caught engaging in accounting fraud, then it was, or reasonably should have been, foreseeable to the Enron and Merrill defendants their actions exposed Enron to economic or pecuniary risk.

The key to the analysis is the foreseeability of economic risk. Ignoring the potential risks associated with getting caught, it could be argued that the economic risk to Enron from the transaction was not reasonably foreseeable. Enron had planned on selling the asset anyway, and while the transaction violated accounting laws by creating a false sale date to enter the anticipated proceeds, it did not change Enron’s overall plans. Indeed, through continuing

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178. Id. at 523.
179. Vinyard, 266 F.3d at 329.
180. Brown, 459 F.3d at 515-16.
181. Id. at 533 (Reavely, J., concurring in part and dissenting in part).
182. Id.
183. Id. at 522.
184. Id. at 516, n.3. (discussing the final disposition of the assets after the Merrill and Enron deal).
efforts, Enron eventually sold the assets for a substantially similar amount to a third party. The argument, then, would basically be that so long as the sale to a third party was effectuated the long term exposure to the company was minimal, and thus the scheme actually furthered the short term goals without causing a foreseeable risk to the long term goals.

However, this is an exceedingly narrow view of the risk Enron faced. As Judge Reavley pointed out, stock prices are likely not the proper measure of economic harm or of a company’s interests. It is unlikely the foreseeable risk of harm test would consider the short term stock prices as dispositive when determining the foreseeable risk created by the breach, especially since the test is specifically designed to consider and protect long term interests as well. More likely, a court applying the foreseeability test would look at the risk in its totality. It is foreseeable that Enron would not have found a buyer for the assets or that an auditor reviewing the corporate books would locate and expose the fraud. It follows then, that a court applying the foreseeable risk of harm test could have upheld the convictions.

2. Brown decided differently under the Materiality Test

As the panel of the Second Circuit recognized, the “fundamental principles of the law of fraud” giving rise to the “materiality” test create somewhat of an overlap with the existing elements needed in mail and wire fraud cases. This overlap is due in large part to the holding in United States v. Neder, which held that “materiality of falsehood” is always an element of the federal fraud statutes. Thus, under Neder, every court must consider the “materiality” of the

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185. Brown, 459 F.3d at 516. (noting that the asset was first sold to a company which may not have been entirely independent of Enron, and eventually sold to an industry competitor). However, the sale to the industry competitor tended to show the fraudulent nature of the transaction as a whole. See id. at n.3 (noting that the final purchaser negotiated with the Enron division rather than the official asset holder in intermediary).

186. Id. at 533 (Reavley, J., concurring in part and dissenting in part) (“[F]alsifying Enron’s books does not serve a legitimate corporate purpose, even if it temporarily made Enron’s finances appear more attractive to the investing public in the short term.”).

187. Vinyard, 266 F.3d at 329 (“‘[E]conomic risk’ embraces the idea of risk to future opportunities for savings or profit; the focus on the employer’s well-being encompasses both the long-term and short-term of the business.”).

188. Rybicki, 354 F.3d at 146, n.20 (noting that the Supreme Court previously determined in Neder that “materiality of falsehood” is an element of mail and wire fraud).

It is hard to determine whether the courts applying the “materiality test” use the Neder requirement of “materiality of falsehood” as the basis of the test, or if they treat it as a separate element to be used when reviewing mail and wire fraud cases which do not rest on the §1346 honest services theory. For the purposes of this comment, this commentator is treating the Neder materiality requirement as the foundation of the “materiality test” rather than a second materiality element. Thus, since “materiality of falsehood” must always be an element in mail and wire fraud, it is an understood, but unspoken element in honest services fraud jurisdictions which apply the foreseeable risk of harm test. This analysis fits with the Rybicki panel’s assessment that the materiality test is broader. See Id.

misrepresentation as part of the underlying offense, regardless of which test is applied. Because the overlap exists, it is not difficult to imagine how Brown could be decided differently using the same “materiality test.”

During its endorsement of the “materiality test,” the Rybicki II panel stated that the test was a “somewhat broader test.”¹⁹⁰ The court seemed to be concerned with catching “non-economic, yet serious, harm” in cases arising from the private sector.¹⁹¹ While the Rybicki II panel considered the necessity for a detriment in self dealing cases,¹⁹² this concern about preventing non-economic harm leads one to believe that finding someone falsifying corporate records is necessary to satisfy this requirement. It is extremely likely that knowledge of “cooking” Enron’s books would cause the shareholders to change their conduct.¹⁹³ The key difference is changing perception on who has the right to honest services. Viewing the duty as being owed to the shareholders could change the analysis completely because it was the shareholders, not the company, whose rights to honest services were deprived.¹⁹⁴

IV. FINDING A NATIONAL CONSENSUS IN DECIDING §1346 CASES

A. Need for a National Consensus – Due Process Notice Concerns

The purpose of the above analysis is not to criticize the courts in their application of this difficult doctrine, but rather to show the latitude §1346 gives prosecutors and courts. By demonstrating different possible outcomes for a uniform set of facts, this comment suggests that a defendant’s guilt or innocence may not be dependent on his or her conduct, but rather on his or her location. It seems unfathomable that Congress would intentionally create a federal criminal statute that has different – albeit similar – elements to the offense based on where the criminal conduct occurred. But the ad hoc approaches the circuit courts have used to define the elements of honest services fraud has created more questions about the validity of the statute than answers.

The constitutional breadth of §1346 has been challenged before, and, at least a few times, those challenges succeeded.¹⁹⁵ Due Process requires that a statute

¹⁹⁰. Rybicki, 354 F.3d at 146.
¹⁹¹. Id.
¹⁹². Id. at 141-42.
¹⁹³. Brown, 459 F.3d at 533 (Reavley, J., dissenting) (noting that the duty was owed to the shareholders and implying the knowledge Enron was falsifying its records would cause them to change their position). In the current atmosphere of corporate scandal, and in the wake of the Enron collapse, it is not difficult to assume that shareholder knowledge of corporate accounting scandals would cause investors to unload the stock.
¹⁹⁴. Id. (“Enron executives are not Enron itself and, in any event, they owed a fiduciary duty to Enron and its shareholders.”).
¹⁹⁵. See United States v. Handakas, 286 F.3d 92, 101-12 (2d Cir. 2002), overruled by Rybicki, 354 F.3d at 137-38 (en banc), (finding §1346 unconstitutionally vague as it applied to defendant because it failed to provide notice of criminal violation and failed to provide sufficient standards
provide fair notice that to a potential defendant the he or she is engaging in conduct that could lead to criminal liability. Wondering whether §1346 provides notice that a person is about to engage in a criminal act, Judge Jacobs noted that the Second Circuit’s experience trying to define the statute “is . . . telling evidence that most lawyers and judges, not to speak of ordinary laymen or prospective defendants, cannot be expected to understand the statute.” While some judges and commentators have questioned the validity of the statute, courts are slow to find ordinary criminal statutes unconstitutional due to vagueness. Judges recognize the “practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.” Thus, statutes do not fail constitutional challenges just because they require citizens to conform to inexact normative standards. With this milieu of statutory interpretation, the circuit courts have struggled to find common ground on the parameters of §1346 honest services wire and mail fraud. While the approaches of the circuit courts may vary, however, the statute has been repeatedly upheld as constitutional.

Essentially, the only thing many of the circuit courts agree on is that Congress intended to overturn the Supreme Court decision in McNally. By attempting to codify an “amorphous” doctrine developed without statutory guidance by federal courts, Congress created a standardless and broadly written statute which generated as much, if not more, confusion among the courts as existed prior to McNally. Most of this confusion stems from the circuit courts’ continued attempts to define the scope of honest services fraud.


197. Rybicki, 354 F.3d at 158 (Jacobs, J., dissenting).

198. See Dressler, supra note 196, §5.02.

199. Id. (quoting Colten v. Kentucky, 407 U.S. 104, 110 (1972)).

200. Id.

201. Rybicki, 354 F.3d at 143.

202. See Frost, 125 F.3d at 364 (stating that “[e]very court to address the effect of §1346 has held that it has overruled the holding in McNally” and citing several other circuit decisions reaching that conclusion).

203. McNally, 483 U.S. at 356, 359-60. Essential to the Court’s holding was that previous to the adoption of §1346 there was no statutory support for the honest services doctrine because the mail and wire statutes only protected property rights.

204. See Loya, Jr., supra note 7, at 138, n.2 (suggesting that the circuits are currently “lost in an ‘honest services’ morass that resembles that which preceded the Court’s ruling in McNally”).

205. See id. at 142 (After discussing various cases interpreting the statute, the commentator notes that “circuit courts have engaged in a veritable free-for-all in which each circuit offers its own spin on ‘honest services.’”).
It seems possible that the illegality of particular conduct may vary from circuit to circuit. One Circuit even appears to take a “we’ll know it when we see it,” attitude in evaluating the conduct at question. What has emerged since §1346’s enactment is a regional patchwork of tests, standards, and sources of law to determine one’s culpability.

It seems self evident that a federal criminal law which is national in scope should have a homogeneous definition and application. As the Fifth Circuit recently said, “[i]f we are not to lapse into defining a common law crime, the outer boundary of this facially vague criminal statute must be determined from the factual circumstances supporting affirmed convictions, not by negative implication from the few constraints mentioned in disparate cases.” While it is the job of Congress or the Supreme Court to make the final determination, finding a clear standard or test within the current fractured framework of cases upholding convictions is not only possible, but is also needed in order to stave off many future vagueness attacks.

B. Sculpting National Review

1. Duty or Relationship Defendant Has With Victims

Assuming there is a scheme, the first element in finding honest services fraud is defining the nature and scope of the duty owed to the victim. The language of §1346 suggests that one must have a right to those services in order to be deprived of them. In this sense, the plain language of the statute suggests that one cannot be guilty of entering into a scheme to defraud another of services to which that person does not have a right to receive. But who has the “right”

206. See id. at 138 (stating “courts have issued conflicting -- indeed contradictory -- opinions as to the precise elements of honest services mail fraud”).
207. See Brumley, 116 F.3d at 733 (“[T]he boundaries of ‘intangible rights’ may be difficult to discern, but that does not mean that it is difficult to determine whether [the defendant] in particular violated them.”).
208. This type of discretion sounds eerily similar to another forgone standard. See Jacobellis v. State of Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“[U]nder the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material . . . to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it.”).
209. This is especially true when the criminal penalties could carry up to $1 million fines and thirty years in prison. See 18 U.S.C. §1341 (2002).
211. A person can still be guilty of regular mail or wire fraud, just not under the honest services theory.
to honest services? Although the legislative history of the honest services statute is sparse, Representative Conyers specifically provided his constitutional basis for regulating state and local corruption.\footnote{See 134 Cong.Rec. H11108-01 (“Some questions were raised during the Criminal Justice Subcommittee’s hearing on the McNally decision regarding the Federal Government’s constitutional role in prosecuting State and local corruption. I believe that the guarantee clause of the U.S. Constitution, article IV, section 4 can be used as a constitutional basis for Congress to pass criminal legislation relating to corruption in local government.”).} Given the specific reference to public corruption and the fact the statute was intended to overturn McNally\footnote{Id.}, it is easy to recognize Congress intended the §1346 to protect the public’s right to the honest services of their public officials or employees. This is because Congress recognized the public’s interest in having disinterested people making decisions on behalf of the public at large.\footnote{See United States v. Sawyer, 85 F.3d 713, 724 (1st Cir. 1996) (While discussing the affirmative duty of a public official to disclose material information, the court noted that a public official’s failure to remain disinterested in an official decision which the public official can influence, or their failure to disclose an existing interest, deprives the public of its right to honest services.).} What is less clear is how Congress intended the statute to affect people’s rights to honest services in the private context. Since its enactment, courts have disputed what type of duty must be owed to the victim and from what source of law the duty arises.\footnote{See Rybicki, 354 F.3d at 162-63 (Jacobs J., dissenting) (noting the various circuit splits).} Thus, an important first step in analyzing private sector honest services cases is determining what type of duty has been breached.

Without doing a circuit by circuit recitation, it has generally been held that the relationship between the defendant and victim includes duties which are fiduciary in nature.\footnote{See, e.g., Frost, 125 F.3d at 366 (“[A] private person may violate the mail fraud act by defrauding private parties of the right to his honest services if he owes them a fiduciary duty.”).} Although the Vinyard court declined to answer whether there had to be an actual breach of a fiduciary duty to sustain a conviction for honest services fraud,\footnote{Vinyard, 266 F.3d at 327-28, n.5 (The court mentioned other circuits have held there is no such requirement, but recognized that James’s breach of his duty of loyalty to Sunoco mooted the point as it pertained to the case it was deciding.).} other circuits have been less circumspect in making the pronouncement. The Sixth Circuit held in Frost that the duty owed needed to rise to the level of a fiduciary duty.\footnote{Frost, 125 F.3d at 366.} It appears to be unclear from the Fifth Circuit’s decision in Brown whether it requires the duty to rise to the level of a fiduciary; but seemingly, the court acknowledged that in private sector employment situations, the duties are fiduciary in nature.\footnote{Brown, 459 F.3d at 519 (“Honest services’ are services owed to an employer under state law, including fiduciary duties defined by the employer-employee relationship.”) (quoting Brumley, 116 F.3d at 734).} Similarly, while the Second Circuit’s holding in Rybicki II did not expressly define what that duty was, the court did expressly overrule its decision in United States v. Sancho.\footnote{Rybicki, 354 F.3d at 144.} In Sancho, the Second Circuit flatly denied the need for any fiduciary duty to...
exist to uphold a conviction under §1346 honest services fraud.\textsuperscript{222} Given the constitutional question first presented the \textit{Rybicki II} court, however, it naturally follows that the court concluded the validity of the statute required the historical limits on the right to honest services.\textsuperscript{223} The Second Circuit endorsed the idea that the Government must show a breach of a duty rising to the level of “a duty of loyalty.”\textsuperscript{224} However, rejecting the argument that there must be a fiduciary duty in honest services fraud case, the Eighth Circuit stated that “while we do not doubt that a . . . breach of a fiduciary duty in proper circumstances may be a powerful indication . . . the breach of a fiduciary duty is not a necessary element of §1346.”\textsuperscript{225}

One should be reticent, however, in concluding there is a firm requirement that the Government show a breach of a fiduciary duty. Fiduciary duties typically arise from state common law and are expansive and vague and vary from state to state.\textsuperscript{226} Requiring a breach of a fiduciary duty for honest services fraud liability potentially invites unnecessary federal interpretation of state law.\textsuperscript{227} This in turn, could lead to more inconsistency in federal criminal law.\textsuperscript{228} As one commentator noted, the goal of “furtherance of uniformity in federal criminal law is well settled.”\textsuperscript{229} Further, trying to limit the definition of honest services to the state laws, or the case law of a particular circuit ignores the effect of the ruling in \textit{McNally} all together. By stating the mail fraud statute did not protect a right to honest services, the \textit{McNally} majority held there was no basis for the doctrine and rendered it moot.\textsuperscript{230} No one had an intangible right to honest

\textsuperscript{222} Sancho, 157 F.3d at 918.
\textsuperscript{223} Rybicki, 354 F.3d at 130-31, 144 (indicating that to succeed in a facial vagueness challenge to a statute not predicated on First Amendment protections, the defendant would have to show there are no set of circumstances in which the statute would be valid and then concluding that the statute was not facially invalid). The court reviewed the history and development of the honest services doctrine and determined that given the historical and understood meaning, the statute was not vague. \textit{Id.} at 134-44.
\textsuperscript{224} Id. at 142.
\textsuperscript{225} Ervasti, 201 F.3d at 1036.
\textsuperscript{226} See Kessimian, \textit{supra} note 1, at 211 (stating while the threat of over-criminalization may be overblown because of the relationships which traditionally give rise to fiduciary obligations are fairly uniform, the variance and ambiguity across jurisdictions is a pronounced problem).
\textsuperscript{227} See Daniel W. Hurson, Comment, \textit{Mail Fraud, the Intangible Rights Doctrine, and the Infusion of State Law: A Bermuda Triangle of Sorts}, 38 Hous. L. Rev. 297, 319 (2001) (discussing the Fifth Circuit’s decision in \textit{Brumley}, which required honest services to be defined as services owed under state law, the author notes that basing prosecution on fiduciary obligations as defined by state law “leads to the de facto criminalization of state law”). Because most fiduciary obligations are rooted in state law, defining the “intangible right of honest services” as a fiduciary obligation invites prosecutorial and judicial interpretation of the state law, even if the interpretation is not required.
\textsuperscript{228} See \textit{id.} at 320.
\textsuperscript{229} \textit{Id.} (noting the problems with requiring a state law definition for an essential element of a federal crime).
\textsuperscript{230} \textit{McNally}, 483 U.S. at 356, 359-60 (noting that “[t]he mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government,” and then discussing the lack of statutory basis for the intangible right to honest services).
services until the enactment of §1346. Regardless of what some think Congress’ intent was when it enacted the honest services statute, \(^{231}\) by not using more specific language, Congress included the laws and theories of the several circuits into one single federal crime. \(^{232}\) Claiming that the plain meaning of the statute is only to resurrect a particular circuit’s case law seems disingenuous.

Labeling of the duty owed as a fiduciary duty is not important to interpreting the statute. \(^{233}\) “What matters is whether [the duty] comes within the statute’s requirement of an ‘intangible right of honest services.’” \(^{234}\) In *Frost*, the Sixth Circuit firmly stated that “[f]ederal law governs the existence of fiduciary duty under the mail fraud statute.” \(^{235}\) Although the *Frost* court called the duties it reviewed “fiduciary,” by limiting its review to federal cases which already existed under the mail fraud statute, the Fifth Circuit correctly treated §1346’s enactment in 1988 as the legal creation of the “intangible rights to honest services” doctrine. By reviewing federal case law only, the Sixth Circuit avoided further inclusion of state law into federal honest services fraud and recognized that the duties covered under the doctrine were uniquely federal. Thus, by keeping the review of the duty confined to existing federal law, courts can stop trying to define the scope of fiduciary duties and can properly determine whether a the victim’s right is protected by the federal honest services statute.

2. Specific Intent of the Actor

Much of the debate on the proper application of the honest services doctrine focuses on elements which deal with the harm suffered by the victim or the materiality of the defendant’s misrepresentation or omission. While courts have outwardly struggled in crafting elements of the conduct and knowledge of the actor into a single test, they apparently have forgotten that the purpose of the test is to find the essential element of intent. \(^{236}\) The specific intent of the actor to harm or deprive the victim of honest services owed as a matter of right is the

\(^{231}\) *Brumley*, 116 F.3d at 733 (noting the wide array of different honest services provisions and concluding “Congress could not have intended to bless” them all).

\(^{232}\) It should be noted that despite the relative sparseness of the legislative history, Rep. Conyers cited cases from three different circuits as support for enacting the statute. *See* 134 Cong. Rec. H11108-01 (Oct. 21, 1988).

\(^{233}\) *Sancho*, 157 F.3d at 922.

\(^{234}\) Id. at 921.

\(^{235}\) *Frost*, 125 F.3d at 366.

\(^{236}\) *See* Moohr, *supra* note 210, at 21 (“[M]ail fraud is a facially inchoate offense, culpability, referred to as ‘intent’ in the case law, is the essential element in all forms of mail fraud. . . The culpability required in an inchoate crime is a specific intent to effect the harm that is proscribed by an object crime. Thus, specific intent is the intention to commit a particular target crime; it is a special mental element in addition to the intent to commit the act element of the inchoate offense.”). Professor Moohr indicated that much of the problem is that the courts confuse definitions of deceive and defraud, the former being a general intent crime while the latter requires specific intent.
cornerstone of honest services fraud. As the First Circuit noted in Sawyer, the Government must actually prove that a defendant intended to deprive the victim of his or her right to honest services. Additionally, the court observed that “[i]f the ‘scheme’ does not, as its necessary outcome, deprive the public of honest services, then independent evidence of the intent to deprive another of those services must be present.” The court further explained that neither a violation of a state statute nor a fiduciary breach necessarily shows the requisite intent to deprive someone of their right to honest services, but is merely just evidence of such intent. The court’s focus on intent rather than conduct or harm suggests that the defendant’s specific intent and not the risk of harm or the materiality of a misrepresentation should be the determining factor in honest services cases.

While the materiality and foreseeable risk of harm tests may both play a vital role in finding intent, they should not be treated as the final stop in a rigid elemental approach to finding fraud. As the Vinyard court noted “[t]he two tests . . . are similar in many respects.” Noting this similarity, the Second Circuit

237. See id. at 24-25 (discussing the combination of intent and conduct, and while relating intent to harm, the professor noted “[i]n honest services fraud, the harm suffered by the victim of the deceit is the loss of honest services”).
238. See Sawyer, 85 F.3d at 725 (discussing a scheme to deprive the public of its right to the honest services of a government official the court noted “the conviction of that official for honest services fraud cannot stand where the conduct does not actually deprive the public of its right to her honest services, and it is not shown to intend that result. Similarly, if a non-public-official is prosecuted . . . the government must prove that the target of the scheme is the deprivation of the official’s honest services”). The court drew this observation from reviewing two pre-McNally Eighth Circuit cases. Although no actual pecuniary harm could be attributed to the conduct in either case, the actors were convicted of depriving the public of its right to the honest services of public officials. The court overturned the honest services convictions in both cases, despite the failure of the public actors to disclose information relating to their official conduct or potential conflict of interests. The Government in both cases failed to establish the defendants’ specific intent necessary to actors schemed to deprive the public of honest services. While the Sawyer court did not explicitly discuss the materiality of the non-disclosure or the foreseeable risk of harm to the public in those cases, it did focus on the Government’s inability to prove any intent to defraud. See id.
239. Id.
240. See Id. at 726, 729-30 (noting that “[i]n general, proof of a state law violation is not required for conviction of honest services fraud,” and that every violation of a state gift or gratuity statute shows intent to deprive the public of an official’s honest services). See also, Loya, Jr., supra note 7, at 148.
241. It is noteworthy that Sawyer is a public corruption case, but seems to take a narrower view of what constitutes honest services mail and wire fraud than most cases discussed in this comment. As mentioned above, Congress’ expressed intent in enacting §1346 was to provide a mechanism to combat public corruption. See 134 Cong. Rec. H11108-01 (Oct. 21, 1988). It stands to reason that the Government’s interest in prosecuting official public corruption is greater than in private fraud cases. This is probably because in private fraud cases, the victims are often small in number relative to public fraud cases and the relationship between the victim and defendant “generally rest upon concerns and expectations less ethereal and more economic.” Frost, 125 F.3d at 365. Thus, one would naturally expect the standard in a public fraud case to be lessened, not heightened.
242. Vinyard, 266 F.3d at 328. See also Frost, 125 F.3d at 369 ("For the most part, application of the materiality approach will be identical to the reasonable foreseeable harm test).
found that the “fundamental principles of the law of fraud” giving rise to the materiality test create somewhat of an overlap with the existing elements needed in mail and wire fraud cases.\textsuperscript{243} The Supreme Court’s holding that “materiality of falsehood is always an element of the federal fraud statutes in United States v. Neder\textsuperscript{244} further entwined the tests.\textsuperscript{245} The question to ask is: Which test is better for finding specific intent?

Because every court must consider the “materiality” of the misrepresentation as part of the underlying offense, courts applying the materiality test use its outcome to explain the existence of specific intent in much the same manner that courts use the foreseeable risk of harm.\textsuperscript{246} The primary disagreement among the courts is on which party to focus its review.\textsuperscript{247} Courts applying the foreseeable harm test repeatedly recite fears that trivial frauds could lead to prosecutions because they could cause the alleged victim to change its practices to avoid the appearance of impropriety.\textsuperscript{248} On the other hand, courts applying the materiality test prefer it because it may capture instances of serious fraud which are non-economic in nature.\textsuperscript{249} The initial applications of the foreseeable harm test tried to limit the scope of review to economic harm only;\textsuperscript{250} but considering the broad brush\textsuperscript{251} Vinyard used to define economic risk, it is possible to classify nearly any risk as economic.

\textsuperscript{243} \textit{Rybicki}, 354 F.3d at 146, n.20 (noting that the Supreme Court previously determined in \textit{Neder} that “materiality of falsehood” is an element of mail and wire fraud).

\textsuperscript{244} \textit{See Neder}, 527 U.S. at 25.

\textsuperscript{245} It is hard to determine whether the courts applying the “materiality test” use the \textit{Neder} requirement of “materiality of falsehood” as the basis of the test, or if they treat it as a separate element to be used when reviewing mail and wire fraud cases which do not rest on the §1346 honest services theory. Since “materiality of falsehood” must always be an element in mail and wire fraud, this commentator is treating the \textit{Neder} materiality requirement as a second materiality element going to the actus reus of the crime, and the materiality test as a search for intent. This approach gives the \textit{Neder} requirement equal weight in jurisdictions applying both the foreseeable risk of harm test and the materiality test.

\textsuperscript{246} \textit{See Vinyard}, 266 F.3d at 328, n.7 (“For the most part, application of the materiality approach will be identical to the reasonably foreseeable harm test, because an employer would almost certainly alter his business practices if disclosure of a fraud scheme revealed either foregone business opportunities or an economic threat.”).

\textsuperscript{247} \textit{See, e.g.}, id. at 328 (“First, the reasonably foreseeable harm test keeps the focus of the analysis on employee intent rather than employer response.”).

\textsuperscript{248} \textit{See id}.

\textsuperscript{249} \textit{See Rybicki}, 354 F.3d at 146. The \textit{Rybicki} panel did not divulge what these non-economic harms may be, but it did recognize the test was “somewhat broader.” \textit{Id}.

\textsuperscript{250} \textit{See Vinyard}, 266 F.3d at 328 (noting that the materiality test may lead to convictions where no economic harm would result).

\textsuperscript{251} \textit{Id} at 329 (“[E]conomic risk’ embraces the idea of risk to future opportunities for savings or profit.”).
Both the Fifth\textsuperscript{252} and Second\textsuperscript{253} Circuits indicate that honest services fraud is a specific intent crime, but then apply a test which looks to the actions of the victim to determine the specific intent of the defendant. The foreseeability test properly focuses its specific intent search on the employee, but the courts applying it look only for the intent to breach a duty and risk of harm.\textsuperscript{254} As the decision in Brown indicates, the intent to breach a duty owed is not the same as intent to deprive another of honest services.\textsuperscript{255} Combining the circuits’ approaches, we see that the foreseeable harm test, by focusing on the actions of the defendant, is the better test for finding the specific intent so long as the court recognizes it is looking for specific intent to deprive a right to honest services and not merely intent to breach a duty.

Keeping the review of honest services doctrine to those cases in which it is clearly shown the defendant’s specific intent was to “deprive another of honest services,” limits the range and application of §1346. Perhaps unknowingly, the Fifth Circuit in Brown undertook the search for the specific intent to deprive honest services.\textsuperscript{256} In each instance, the conduct of the charged parties met several of the elements of honest services fraud, but in each case, the defendants’ specific intent was not to deprive others of honest services. The outcomes in Rybicki and Vinyard can be similarly explained. The bribes in Rybicki were made to expedite the defendants’ claims by having the insurance adjustors ignore standard commercial practices used by the insurance companies in processing claims.\textsuperscript{257} Thus, the bribe was specifically intended to deprive the insurance companies of the honest services of the adjustors.\textsuperscript{258} Likewise, in Vinyard, after

\textsuperscript{252} Brown, 459 F.3d at 519 (noting honest services fraud is a specific intent crime even though specific intent does not need to be alleged in the indictment).

\textsuperscript{253} Rybicki, 354 F.3d at 145 (noting that the intent necessary to be shown is the “intent to deprive another of the intangible right of honest services”).

\textsuperscript{254} See Frost, 125 F.3d at 368-69, and Vinyard, 266 F.3d at 327-28.

\textsuperscript{255} Brown, 459 F.3d at 522-23 (“[T]he Government must turn to other statutes, or even the wire fraud statutes absent the component of honest services, to punish this character of wrong doing.”). Again, this comment treats the courts reasoning as an inability to find specific intent to deprive Enron of its right to honest services because the actors’ intent was to further Enron’s financial interest. See also Moohr, supra note 210, at 40 (discussing recent cases, stating “the requirement of independent evidence rejects the argument that the breach of fiduciary duty is sufficient proof of specific intent and returns the factfinder to evidence of an intended result”).

\textsuperscript{256} See Brown, 459 F.3d at 522-23 (discussing the need for divergent interests to find deprivation of honest services). While the decision in Brown seems to be more about the court’s desire to not expand federal criminal law, it seems very likely that requirement of divergent interests is nothing more than the court failing to find any intent to deprive Enron or its shareholders of honest services. The analysis would be, because the defendants’ and victims’ interests were not divergent, the government failed to show the defendants intended to deprive the victim of honest services.

\textsuperscript{257} Rybicki, 354 F.3d at 127.

\textsuperscript{258} See Rybicki, 354 F.3d at 141 (The Rybicki panel found that in bribery or kickback cases, the existence of the bribe was generally sufficient to prove that an employer was deprived of its employees’ honest services without having to show a loss.). While this finding may be true, it ignores the reason why the acceptance of a bribe or kickback potentially harms the victim. Basically, the court held that the best evidence that someone is
being tasked with finding an independent broker for Sonoco to contract with, the Sonoco employee purposefully did not conduct a meaningful search, but rather he caused Sonoco to enter into contracts with himself that resulted in undisclosed payments to the Sonoco employee. Even though it was debatable whether Sonoco suffered any actual financial harm, it was the Sonoco employee’s specific intent to deprive his employer of his honest services. Ergo, case law suggests that regardless of which test a court applies, the court makes its ruling on the finding of specific intent to deprive honest services.

V. Conclusion

The evolution of the honest services doctrine in mail and wire fraud cases has been remarkable. As the case law demonstrates, and this comment explains, many genuine issues regarding §1346’s application have yet to be resolved, leading to persistent constitutional questions of due process. This comment has tried to show that, in the honest services doctrine’s current form, queries of guilt or innocence have as much to do with geographic location as they do the alleged fraudulent conduct. This comment suggests that courts may be able to rein the doctrine in by focusing on whether the victim possessed a right to honest services under federal law and whether the defendant had the requisite specific intent to deprive the victim of those services.

Without a national mandate, circuit analysis will likely continue to diverge in content and character leaving the law in a perplexing state. As Judge Jacobs noted in his Rybicki II dissent, “the vagueness of the statute has induced court

depoothing another of their honest services is a bribe, and thus the existence of a bribe shows that someone has been deprived of their intangible right to honest services. This form of circular conclusion, however, fails to explain why the existence of a bribe is the best evidence to support the conviction in an honest services case. Such logic cuts the analysis one step short of the natural conclusion, which gets to the underlying reason a bribe or kickback is paid. A bribe is “a price, reward, gift, or favor bestowed . . . with a view to pervert the judgment of or influence the action of a position in trust.” BLACK’S LAW DICTIONARY, 78 (2d pocket ed. 2001). Kickbacks are the return of money received to another schemer “especially as a result of corruption.” Id. at 392. By contrast, a gratuity is a payment like a bribe or kickback, but without any expectation of, or as a result of favorable treatment. Id. at 310. By definition, a bribe or kickback implies a betrayal of the best interests by a person in a position of trust. Thus, a bribe or a kickback is strong evidence that a schemer took some action opposed to the best interest of a person to whom some duty was owed. It follows then, that a bribe is paid in order to cause someone to create a foreseeable risk of harm to a person to whom a duty is owed, like an employer, by taking an action not in the person’s (the employer’s) best interest. Thus, the fact that the Rybicki II Court generally found there was no requirement to prove some detriment to the victim(s) in the bribery kickback cases, does not mean there was no foreseeable risk of harm. 259. Vinyard, 266 F.3d at 322. 260. Id. at 329 (rejecting the argument that there was no deprivation of honest services because there was no evidence the contracts and commissions were not commercially reasonable). The defendant argued that there was no basis for an honest services claim because there was no actual intent to harm Sonoco and no actual pecuniary harm as a result of the self dealing. The requirement is intent to defraud, not intent to cause harm. Id. (quoting United States v. Sun-Diamond Growers of California, 138 F.3d 961, 974 (D.C.Cir. 1998)).
after court to undertake a rescue operation by fashioning something that (if enacted) would withstand a vagueness challenge.”

In response to *Rybicki II* dissenters, Judge Sack wrote:

The dissent may thus be making a valid argument that the Supreme Court, a large part of whose work consists of resolving just such “perplexity,” should in an appropriate case seek to resolve inconsistencies in circuit analysis of section 1346. But it proves too much to argue from such circuit divisions that a statute is unconstitutionally vague. If so, there are a frightful number of fatally vague statutes lurking about.

Rather than asking the Supreme Court to fashion a test for proper review of the statute, however, courts should be asking Congress for guidance. That “[l]egislatures and not courts should define criminal activity,” caused the Supreme Court to invalidate the honest services doctrine once. Chief among the reasons for the Court’s unease in *McNally* were expressed concerns about the lack of a statutory basis on which the honest services doctrine stood. The Court’s concern led to the majority to call on Congress to “speak more clearly” as to whether the mail and wire fraud statutes protected the rights honest services. It is time for our lawmakers to again “speak more clearly” in defining honest services in order to provide the judiciary with the needed guidance in applying §1346 to mail and wire fraud cases.

262. *Id.* at 143.
263. *Id.* at 164 (quoting United States v. Bass, 404 U.S. 336, 348 (1971)).
265. *Id.* (noting that when a statute has two possible constructions, the court only chooses the harsher when there is a clear and definite mandate in the statute).
266. *Id.* at 360.
I. INTRODUCTION

The “final judgment rule” generally forbids appeal of certain issues until a final judgment has been rendered. Federal courts have always prohibited piecemeal disposal of litigation and permitted appeals only from final judgments except in those special instances covered by statute. As such, the purpose of the final judgment rule is to extinguish lingering issues at the trial level before appellate review is given.

Both statutes and the common law recognize a handful of exceptions to the final judgment rule. One such exception is for class actions, and is located in

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   The full text of this statute states: “The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.”

2. See Hohorst v. Hamburg-American Packet Co., 148 U.S. 262, 264 (1893) (“We are of the opinion, therefore, that this appeal cannot be maintained because the decree rendered in favor of the company was not a final decree.”); See also, Cobbledick v. United States, 309 U.S. 323, 324-25 (1940) (describing finality as “an historic characteristic of federal appellate procedure,” and noting that the final judgment rule “has been departed from only when observance of it would practically defeat the right to any review at all.”).

3. Cohen v. Beneficial Loan Corp., 337 U.S. 541, 546 (1948) (“The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results.”).

4. See, e.g., Fed. R. Civ. P. 23(i) (“A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying a class certification under this rule if application is made to it within ten days after entry of the order.”); Cohen, 337 U.S. at 546 (“This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent to the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.”); and 28 U.S.C. § 1651(a) (2000) (“The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”).
the Federal Rules of Civil Procedure. Specifically, Rule 23 permits a court of appeals to grant an appeal from a district court order granting or denying class action certification. Another exception to the final judgment rule is the *Cohen* collateral-order doctrine. The *Cohen* collateral-order doctrine allows interlocutory appeals for issues that meet its three prong test. A further exception is codified at 28 U.S.C. § 1651 and is known as the all-writs act. This statute allows for an aggrieved party to petition an appellate court for a writ of mandamus which, if granted, forces appellate review on the issue before final judgment is rendered. The policy justification behind a writ of mandamus is compliance with Congress’s Judiciary Act of 1789, which states that as a general rule “appellate review should be postponed until after final judgment has been rendered by the trial court.” Thus, a writ of mandamus provides an alternative route to appellate review without upsetting the final judgment rule.

Currently, the federal circuits are split as to whether attorney-client privilege rulings can be immediately appealed. One group of circuits forbid appellate review for any issue before a final judgment is rendered. The group adopting

6. Id. (“A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying a class certification under this rule if application is made to it within ten days after entry of the order.”).
7. *Cohen*, 337 U.S. at 546-47 (While recognizing the absence of a final judgment, nonetheless finding the “order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.”).
8. Id. The three prong test will be discussed infra.
10. Id.
11. Kerr v. U.S. Dist. Court, 426 U.S. 394, 403 (1976) (“A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by that judgment of Congress [in the Judiciary Act of 1789].”).
12. Id. (quoting Will v. United States, 396 U.S. 90, 96 (1967)) (“It has been Congress’s determination since the Judiciary Act of 1789 that as a general rule ‘appellate review should be postponed . . . until after final judgment has been rendered by the trial court.’”).
14. See Ogden Corp., 202 F.3d at 458 (“Nevertheless, some orders that do not themselves end litigation are deemed final (and thus immediately appealable) under the collateral order doctrine.”); *Chase Manhattan Bank*, 964 F.2d at 163-66 (exercising mandamus review of a discovery order relating to attorney-client privilege); *Texaco*, 995 F.2d at 43-44 (quoting Honig v. E. I. duPont de Nemours & Co., 404 F.2d 410, 410 (5th Cir. 1968)) (recognizing a possible exception to the
this “forbidden” approach comprises a majority of the circuits, including the First, Second, Fifth, Seventh and Tenth Circuits. Under this approach, attorneys must seek review by means of civil disobedience or writs of mandamus. Unfortunately for an aggrieved party, each of the methods listed is both inconsistent and has little chance of success.

A second group of circuits adopt a “permissible” approach, allowing appellate review for interlocutory issues such as attorney-client privilege rulings. These circuits believe attorney-client privilege orders pass the Cohen collateral-order doctrine and the importance related to this privilege justifies such review. These circuits accept review to clear up potential issues the final judgment rule was created to stop because once privileged documents are disclosed, one cannot “un-ring the bell.” In other words, once potentially privileged documents are disclosed to the other side, almost nothing can make the aggrieved party whole again.

This article argues that a permissible approach should be adopted across the circuits in order to make attorney-client privilege rulings immediately appealable. Part II describes the various methods a litigant may use to obtain review in federal appellate courts. Part II also includes a brief background on final judgments and then addresses the Cohen collateral-order doctrine, civil
general rule that “a discovery order incident to a pending action is not subject to appeal.”); Reise 957 F.2d at 295 (“Discovery orders, including orders to submit to an examination, are readily reviewable after final decision. A party aggrieved by the order assures eventual review by refusing to comply. The district judge then imposes sanctions . . . .”); and Boughton, 10 F.3d at 749 (recognizing the collateral order doctrine).

15. See cases cited supra note 14.

16. Chase Manhattan Bank, 964 F.2d at 166 (holding that discovery orders can be reviewed under a petition for a writ of mandamus); See also Reise, 957 F.2d at 295 (holding that the petitioner could simply refuse to comply, be sanctioned, and appeal from the sanction).

17. See Ford Motor Co., 110 F.3d at 958 (recognizing that the collateral order doctrine is “a narrow exception to the general rule permitting appellate review only of final orders.”); Philip Morris, 314 F.3d at 617 (citing Quackenbush v. Alaska Ins. Co., 517 U.S. 706, 712 (1996)) (“The collateral order doctrine is a narrow exception to the general rule that appellate review is only available for final orders.”).

18. See Ford Motor Co., 110 F.3d at 964 (“Accordingly, the strictures of the collateral order doctrine have been met in this case . . . .”); Phillip Morris, 314 F.3d at 621 (“[W]e hold that BATCo has demonstrated jurisdiction under the collateral order doctrine.”).

19. See Ford Motor Co., 110 F.3d at 961 (“[T]he interests protected by the privilege are significant relative to the interests advanced by adherence to the final judgment rule.”); Phillip Morris, 314 F.3d at 618 (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)(alteration original)) (“The attorney-client privilege rests at the center of our adversary system and promotes ‘broader public interests in the observance of the law and administration of justice’ and ‘encourage[s] full and frank discussion between attorneys and their clients.’”)

20. Ford Motor Co., 110 F.3d at 963 (citing Bogosian v. Gulf Oil Corp., 738 F.2d 587, 591 (3d Cir. 1984)) (“[O]nce putatively protected material is disclosed, the very ‘right sought to be protected’ has been destroyed.”); Phillip Morris, 314 F.3d at 618 (“Only by ensuring that privileged information is never disclosed will these important interests [promoted by the attorney-client privilege] be advanced.”)

21 See cases cited supra note 20.
disobedience, and writs of mandamus. Part III highlights major cases in each of these circuits, demonstrating which side of the split each circuit lies. Part IV analyzes and discusses why the permissible approach is the better of the two options and why such an approach should be adopted across the circuits. Part V concludes this analysis.

II. VARIOUS METHODS OF SEEKING REVIEW

Part II discusses four distinct methods of review available to aggrieved parties. In turn, each of these methods will prominently appear throughout the rest of this article. Starting with the easiest of the four, the final judgment rule creates the standard for appellate review. Stated another way, the majority of cases require a final judgment before an appeal can be sought. The subsequent three sections of Part II discuss either exceptions to, or ways around, the final judgment rule.


The final judgment rule provides, with limited exceptions, only final orders of a federal district court may be appealed. Specifically, 28 U.S.C. § 1291 states in part that “the court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States.” Section 1291 requires a district court to issue a final judgment order before a court of appeals will consider jurisdiction of the issue brought on appeal. When determining whether a final decision has occurred for jurisdiction under 28 U.S.C. § 1291, courts “depend[] on the existence of a decision by the District Court that ‘ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.’” The normal application of this definition bars discovery orders from warranting interlocutory appellate review.

Under the collateral-order doctrine, however, a limited number of interlocutory trial court orders may be appealed without a final disposition in the

22. Id.
23. Id.
24. Hahnemann Univ. Hosp. v. Edgar, 74 F.3d 456, 461 (3d Cir. 1996) (holding that mandamus review is the appropriate remedy because discovery orders are not final appealable orders); see also, Haines v. Liggett Group Inc., 975 F.2d 81, 83 (3d Cir.1992) (citing Borden Co. v. Sylk, 410 F.2d 843, 845 (3d Cir.1969)) (“This is not an appeal from final judgment. Rather, it involves a very sensitive issue of discovery that is part of an ongoing personal-injuries action brought under diversity jurisdiction. Because this is a discovery matter, the district court’s order is not immediately appealable.”).
25. Boughton, 10 F.3d at 748 (10th Cir. 1993) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978)).
26. This view is shared by a majority of circuits including the Second, Fifth, Seventh and Tenth. See Chase Manhattan Bank, 964 F.2d at 162; Boughton, 10 F.3d at 748-49; Texaco, 995 F.2d at 43-44; and Reise, 957 F.2d at 295. The Third and D.C. Circuits have taken the opposite view. See Ford Motor Co., 110 F.3d at 964; and Philip Morris, 314 F.3d at 621.
case. The question then becomes whether attorney-client privilege orders can ever fall under this doctrine.

B. Cohen’s Collateral-Order Doctrine

The Cohen collateral-order doctrine carves out an exception to the previously mentioned final judgment rule. In Cohen v. Beneficial Industrial Loan Corp., the United States Supreme Court created a test to determine whether the issue of consequence falls under the created exception. Justice Jackson, writing for the Court, created a test which is often cited whenever a party seeks appellate review of a discovery order while the case is still pending. Although Justice Jackson never spelled out the test numerically, the Supreme Court subsequently used another case to lay out Jackson’s test into three specific requirements.

To meet the exception under Cohen, first, the order “must conclusively determine the disputed question.” Second, the order “must resolve an important issue completely separate from the merits of the action.” Finally, the order must “be effectively unreviewable on appeal from a final judgment.” Many courts, including the Third Circuit, have used this language when discussing the issue of final orders.

27. See Aaron M. Streett, Can Privilege Rulings Be Immediately Appealed? 28 Nat’l L. J. 25 (2006). This article combined with an ongoing case in the courtroom where I clerk provided the inspiration for this article.

28. Cohen, 337 U.S. at 547 (holding that because “it is the right to security that presents a serious and unsettled question” which makes appellate review is appropriate).

29. Id. at 546 (recognizing a small class of cases which “finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require appellate consideration to be deferred until the whole case is adjudicated.”).

30. Id.

31. See Coopers & Lybrand, 437 U.S. at 468 (“To come within the ‘small class’ of decisions excepted from the final-judgment rule by Cohen, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.”). This summarized Justice Jackson’s opinion into three specific requirements all of which must be met.

32. Id.

33. Id.

34. Id.

35. See Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851, 860 (3d Cir. 1994) (quoting Smith v. BIC Corp., 869 F.2d 194, 198 (3d Cir. 1989)) (“First, the order must conclusively determine the disputed question. Second, the order must resolve an important issue completely separate from the merits of the action. Third, and finally, the order must be effectively unreviewable on appeal from final judgment.”). Although the district court in Rhone-Poulenc granted mandamus review and dismissed the appeal, the Third Circuit did not grant appellate review until 1997. See Ford Motor Co., 110 F.3d at 958 (“An appeal of a nonfinal order will lie if (1) the order from which the appellant appeals conclusively determines the disputed question; (2) the order resolves an important issue that is completely separate from the merits of the dispute; and (3) the order is effectively unreviewable on appeal from final judgment.”).
The issue in *Cohen* involved a stockholder’s derivative action and was brought into federal court by way of diversity jurisdiction. This case centered around whether or not a New Jersey statute was applicable to the plaintiffs. The statute required the plaintiffs to pay the reasonable expenses and attorneys fees of the defendant if the suit was unsuccessful. The court of original jurisdiction found the New Jersey statute did not apply to the plaintiffs and thus, the defendants appealed. The Court of Appeals overturned the lower court’s ruling and the Supreme Court subsequently granted certiorari. Before deciding the issue of the statute, the Supreme Court was required to determine whether or not it had jurisdiction over the case, which in turn created the collateral-order doctrine. Squaring its holding with 28 U.S.C. § 1291, the Court felt this order was appealable “because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.” The Court granted appellate review, but stated that not every order will be subject to such review. Specifically in *Cohen*, Justice Jackson believed the right to security presented a “serious and unsettled question” necessary to trigger appellate review. By spelling out the reason why appellate review was granted in *Cohen*, the Court clearly delineated that orders meeting this standard will be small in number.

One positive aspect of this approach is that it gives aggrieved parties an avenue to argue attorney-client privilege rulings. Under the *Cohen* collateral-order doctrine, aggrieved parties may persuade an appellate court the challenged order properly falls within the doctrine. Without the *Cohen* collateral-order

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36. *Cohen* 337 U.S. at 543-44 (“This stockholder, therefore, sought to assert the right of the corporation.”).
37. *Id.* at 543 (“[T]he parties are of diverse citizenship . . . .”).
38. *Id.* (“The ultimate question here is whether a federal court, having jurisdiction of a stockholder’s derivative action only because the parties are of diverse citizenship, must apply a statute of the forum state which makes the plaintiff, if unsuccessful, liable for the reasonable expenses, including attorney’s fees, of the defense and entitles the corporation to require security for their payment.”).
39. *Id.*
40. *Id.* at 545 (citation omitted) (“The District Court was of the opinion that the state enactment is not applicable to such an action when pending in a federal court.”).
41. Beneficial Industrial Loan Corp. v. Smith, 170 F.2d 44, 48 (3d Cir. 1948) (“Beneficial has appealed.”).
42. *Cohen*, 337 U.S. at 545 (citations omitted) (“The Court of Appeals was of a contrary opinion and reversed, and we granted certiorari.”).
43. *Id.* (“At the threshold we are met with the question whether the District Court’s order refusing to apply the statute was an appealable one.”).
44. *Id.* at 546-47.
45. *Id.* at 547 (“But we do not mean that every order fixing security is subject to appeal.”).
46. *Id.* (“Here it is the right to security that presents a serious and unsettled question.”).
47. See, e.g., *Ford Motor Co.*, 110 F.3d at 956 (“We conclude that, because the district court’s order finally resolved an important issue separate from the merits that would be effectively unreviewable after final judgment, we have appellate jurisdiction under the collateral order doctrine.”).
doctrine, attorneys would be forced to use either a writ of mandamus or civil disobedience approach exclusively. Comparably, the negative aspect related to the Cohen collateral-order doctrine is that appellate review of attorney-client privilege depends solely on the discretion of the individual circuit in which the action is brought.

C. The Cobbleidick Rule

Parties resisting discovery orders may successfully maneuver around appellate or mandamus review by simple disobedience. This course of action involves a party refusing the trial court’s discovery order, being held in contempt until final judgment is rendered, then appealing from the contempt order, which acts as a final judgment. The rule itself comes from the case of Cobbleidick v. United States. In Cobbleidick, the issue presented arose out of the Northern California District Court refusing to quash a subpoena ducem tecum. Subsequently, the Court of Appeals denied jurisdiction because refusing to quash a subpoena does not act as a final judgment. In its’ ruling, the Supreme Court recognized that this allowed the adverse party to refuse to comply with the discovery order, be held in contempt, and appeal from that order. While this means of review is primarily drawn from cases dealing with grand jury subpoenas, attorneys in civil cases can refuse to produce documents until the trial court is forced to enter a final judgment against the party.

The positive aspect of this approach is that it gives an appellate court a clean order from which the appeal will arise. However, this approach prejudices those parties who are not willing to risk an adverse judgment for the sole purpose of appealing a discovery order. Furthermore, as will be discussed in the analysis

48. Ogden Corp., 202 F.3d at 459 (quoting Corporation Insular de Seguros v. Garcia, 876 F.2d 254, 257 (1st Cir. 1989)) (alteration original) ("[T]he party resisting the discovery order ‘can gain the right of appeal by defying it, being held in contempt, and then appealing from the contempt order, which would be a final judgment as to [him].’").
49. Id.
50. Cobbleidick, 309 U.S. at 323.
51. Id. at 324 ("The District Court for the Northern District of California denied motions to quash subpoenas ducem tecum addressed to the petitioners and directing them to appear and produce documents before a United States grand jury at the July, 1939 term of that court.").
52. Id. (The Ninth Circuit Court of Appeals “found itself to be without jurisdiction and dismissed the appeals.”).
53. Id. at 330 ("After the court has ordered a recusant witness to testify before the Commission, there remains nothing for it to do . . . . So far as the court is concerned, it is complete in itself.”).
54. See 15B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3914.23 at 154. (2d ed. 1992) ("Courts that have sought to explain the procedure in these terms have suggested that it works in part because it encourages reconsideration both by the party resisting discovery and by the party seeking discovery, and in part because it tends to limit appeals to issues that are both important and reasonably likely to lead to reversal."). The authors of this manual believe the rule exists to serve efficiency interests because it encourages reflection both by the party seeking discovery and by the party resisting it.
section, at least one circuit does not interpret a civil contempt citation as a final appealable order.55

D. Writ of Mandamus

Parties who have lost an important discovery order may also take one last extraordinary measure to obtain relief from an appellate court; they may file a writ of mandamus with the appellate court asking for review of the issue in dispute.56 Since the advent of the collateral-order doctrine, adverse parties have routinely filed both appeals and a writ of mandamus simultaneously seeking to vacate the order.57 Section 1651 of Title 28 grants the ability to review a case under a writ of mandamus.58 While this section gives hope to adverse parties seeking review, courts rarely use this power to overturn discovery orders involving privilege claims.59

Two main themes arise when courts look to exercise mandamus review of discovery orders. First, most courts agree the power is extraordinary and should only be used in extreme and drastic situations.60 Second, there is a difference between the standard of review used for appellate jurisdiction and mandamus jurisdiction.61 Some courts, particularly the Second Circuit, have created a test to deal with mandamus review of discovery orders.62 The test created by the

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55. See Byrd v. Reno, 180 F.3d 298,300 (D.C. Cir. 1999) (finding a civil contempt order “is not appealable by a party”); and compare with Ogden, 202 F.3d at 459 (finding that a contempt order would be a final judgment).

56. 52 AM. JUR. 2D Mandamus § 16 (2000) (“In its discretion, but only under extraordinary circumstances, a federal Court of Appeals may grant the ‘drastic’ remedy of mandamus, which is considered an extraordinary exercise of the court’s jurisdiction. This power derives from 28 U.S.C.A. §1651 (the All Writs Act), and does not apply to coequal courts”).

57. See, e.g., Chase Manhattan Bank, 964 F.2d at 160 (“Turner & Newall (T&N) appeals from Judge Broderick’s interlocutory discovery order . . . . Alternatively, T&N petitions for a writ of mandamus vacating the order.”); and Ford Motor Co. 110 F.3d at 956 (noting that the appeal also contains a “companion petition for a writ of mandamus”).

58. Specifically, 28 U.S.C. § 1651 states:
   (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
   (b) An alternative writ or rule of nisi may be issued by a justice or judge of a court which has jurisdiction.

59. See Chase Manhattan Bank, 964 F.2d at 163 (“[W]e have rarely used the extraordinary writ of mandamus to overturn a discovery order involving a claim of privilege.”); and 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER., FEDERAL PRACTICE AND PROCEDURE § 3935.3, at 606 n.6 (2d ed. 1992 & Supp. 2006).

60. See, e.g., Ford Motor Co., 110 F.3d at 957 (“A writ of mandamus is an extraordinary exercise of our jurisdiction; moreover, such a writ is not a substitute for appeal.”). Here, the court was announcing the difference in standards for the Third Circuit specifically. The standard for mandamus review differs greatly across the circuits as will be discussed infra.

61. Id. at 964 (“The practical difference between appellate jurisdiction and mandamus jurisdiction is the standard of review.”).

62. Chase Manhattan Bank, 964 F.2d at 163 (“In sum, we will exercise mandamus review of discovery orders relating to claims of privilege where: (i) an issue of importance and of first
Second Circuit is similar to the Cohen collateral-order doctrine with some slight variations. The slight variations are broken down into three parts. First, “the issue must be one of importance and of first impression.” The second part states, “the privilege will be lost in the particular case if review must await a final judgment.” The final part of the test requires that “immediate resolution will avoid the development of discovery practices or doctrines undermining the privilege.” Because the standard illustrated by the Second Circuit so closely follows the Cohen collateral-order doctrine standard, courts will be just as reluctant to afford an adverse party mandamus review. Therefore, whether or not a circuit will exercise mandamus review of an attorney-client ruling remains, at best, a long shot for the adverse party.

III. BACKGROUND CASE LAW, THE PERMISSIBLE VS. FORBIDDEN APPROACH

A circuit split exists regarding the application of the collateral-order doctrine to attorney client privilege orders. The United States Court of Appeals for the Third and D.C. Circuits have adopted a permissible approach, allowing review of attorney-client privilege orders under the Cohen collateral-order doctrine. Circuits adopting this approach have done so in part by analyzing the attorney-client privilege order under the three prongs of the Cohen doctrine. However, the majority of United States Court of Appeals Circuits have taken a forbidden approach. The Second, Fifth, Seventh, and Tenth Circuits have an established history of refusing to allow attorney-client privilege orders immediate appellate review. These circuits are reluctant to allow any new members into the Cohen impression is raised; (ii) the privilege will be lost in the particular case if review must await a final judgment; and (iii) immediate resolution will avoid the development of discovery practices or doctrine undermining the privilege.”).

63. Compare Cohen, 337 U.S. at 546 (“This decision appears to fall into that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.”), with Chase Manhattan Bank, 964 F.2d at 163 (“In sum, we will exercise mandamus review of discovery orders relating to claims of privilege where: (i) an issue of importance and of first impression is raised; (ii) the privilege will be lost in the particular case if review must await a final judgment; and (iii) immediate resolution will avoid the development of discovery practices or doctrine undermining the privilege.”).

66 Chase Manhattan Bank, 964 F.2d at 163.

64. Id.
65. Id.
66. Id.

67. See cases cited supra note 63.
68. See cases cited supra note 13.
69. See cases cited supra note 17.
70. See cases cited supra note 17.
71. See cases cited supra note 14.
72. See, e.g., Chase Manhattan Bank, 964 F.2d at 162; Boughton, 10 F.3d at 748-49; Texaco, 995 F.2d at 43-44; and Reise, 957 F.2d at 295.
doctrine “club” because, in their analysis, attorney-client privilege orders are not final appealable orders. Furthermore, these circuits point to the various doctrines already mentioned as legitimate means of establishing review before a final judgment.

A. The Permissible Approach

Two circuits have pioneered the permissible approach allowing immediate appellate review of attorney-client privilege orders. The predominant case advocating this approach is In Re Ford Motor Co., decided by the Third Circuit in 1997. Following closely the rationale of Ford Motor Co., the D.C. Circuit also adopted the permissible approach with its decision in United States v. Philip Morris.

In Ford Motor Co., the defendant was sued for defectively designing a four wheel drive vehicle called the “Bronco II.” The plaintiff, Susan Kelly, alleged the vehicle had a relatively high center of gravity making it susceptible to rollover. Furthermore, Susan Kelly believed this defective design caused the death of her husband, Gerald Kelly, because the Bronco II rolled over during his operation of the vehicle. Shortly after the suit was filed, Kelly sought discovery of Ford documents “related to the development, marketing, and safety of the Bronco II.” Responding to this request, Ford asserted that the attorney-client privilege and work product doctrine “shielded certain documents from discovery” and sought a protective order from the district court covering those documents. The court found only two sets of documents discoverable and ruled that the vast majority of documents requested of Ford fell under the attorney-client privilege and/or work product doctrine.

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73. See Byrd, 180 F.3d at 300 (finding a civil contempt order “is not appealable by a party”).
74. See, e.g., Boughton, 10 F.3d at 750 (stating the circuit has issued review of attorney-client privilege orders under a writ of mandamus); Chase Manhattan Bank, 964 F.2d at 166 (holding that mandamus review was appropriate because of the “significant and important” issues raised relating to attorney-client privilege); Ogden, 202 F.3d at 459 (quoting Corporacion Insular de Seguros, 876 F.2d at 257) (finding that parties “can gain the right of appeal by . . . defying [the order] . . . and then appealing from the contempt order . . . “); and Reise, 957 F.2d at 295, (holding that an aggrieved party can refuse to comply until the court imposes sanctions under Fed.R.Civ.P. 37(b)(2) that would act as a final judgment); But see also, Philip Morris, 314 F.3d at 620 (stating that civil contempt citations are not final appealable orders in the D.C. Circuit).
75. Ford Motor Co., 110 F.3d at 954.
76. Philip Morris, 314 F.3d at 621 (“Therefore, we hold that BATCo has demonstrated jurisdiction under the collateral order doctrine.”) Both cases found that all three prongs of the Cohen test were satisfied.
77. Ford Motor Co., 110 F.3d at 957.
78. Id.
79. Id.
80. Id.
81. Id.
82. Id.
The documents found discoverable included a final draft of the minutes from
da November 18, 1982 Policy and Strategy Committee meeting and a series of
agendas, one with handwritten notations. Having ruled against Ford in its
initial decision, the district court also denied Ford’s request for
reconsideration. Subsequently, the district court judge ordered production of
the documents. In response, Ford filed a petition for mandamus and notice of
appeal with the Third Circuit Court of Appeals who consolidated the actions and
issued a stay on the production order.

The first issue confronting the Third Circuit was whether Ford could appeal
district court’s ruling because the court of appeals would not issue a writ of
mandamus if relief were possible through an ordinary appeal. Opening its
analysis by stating “discovery orders normally may not be appealed until after
final judgment,” the Third Circuit reasoned that a narrow exception to this rule
existed under Cohen.

The Third Circuit then analyzed the disputed documents
under the three prongs of the Cohen doctrine. Here, the first prong requiring
the disputed documents be conclusively determined was easily met because the
district court’s order requiring production left no room for further consideration
that the documents were protected.

Under the second prong of the Cohen doctrine, the disputed documents must
resolve an important issue and be separable from the merits of the case. Before
analyzing the issue of separability from the merits, the Third Circuit first
observed that “most courts have paid little attention to the ‘importance’
requirement.” In Ford Motor Co., the issue to resolve was whether or not a
determination of the disputed documents would implicate the merits of the
dispute. As the Third Circuit understood it, the plaintiff sought to show what
Ford knew about the rollover possibility of the Bronco II, when Ford knew about
the problem, and what Ford did to correct the design flaw. While the Third
Circuit believed documents involving these details would be useful in answering
the plaintiff’s questions, the court understood the question before it was one of

83. Ford Motor Co., 110 F.3d at 957.
84. Id.
85. Id.
86. Id.
87. Id.
88. Ford Motor Co., 110 F.3d at 958.
89. Id. at 958-64.
90. Id. at 958 (“It is beyond cavil that the first element is satisfied here.”).
91. Id.
92. Rhone-Poulenc Rorer Inc., 32 F.3d at 860 (quoting BIC Corp., 869 F.2d at 198) (“Second,
the order must solve an important issue completely separate from the merits of the action.”).
93. Ford Motor Co., 110 F.3d at 959 (quoting John C. Nagel, Replacing the Crazy Quilt of
Interlocutory Appeals Jurisprudence with Discretionary Review, 44 Duke L.J. 200, 207 (1994)).
94. Id. at 958 (“Kelly submits that a determination of the issues of privilege and work product
will in fact implicate the merits of the underlying dispute.”).
95. Id.
context; that is, who prepared the documents and whether they contained legal advice or legal strategies.\(^{96}\) The Third Circuit believed it could “resolve the privilege and work product issues without delving into the disputed facts about Ford’s knowledge and actions.”\(^{97}\) In other words, because the Third Circuit did not need to address any issue central to the facts alleged in the complaint, the attorney-client privilege ruling was entirely separate from the merits of the case.\(^{98}\) Therefore, the separability issue under the second prong was resolved in favor of Ford.\(^{99}\)

While the Third Circuit pointed out that the importance issue under the second prong is rarely scrutinized, a thorough analysis was necessary in Ford Motor Co. for proper application of the Cohen doctrine.\(^{100}\) For the purposes of the Cohen doctrine, the Third Circuit understood an issue to be important if “the interests that would potentially go unprotected without immediate review of that issue are significant relative to the efficiency sought to be advanced by adherence to the final judgment rule.”\(^{101}\) Believing the importance determination should be resolved by a balancing process,\(^{102}\) the Third Circuit found one such balancing factor requires the issue present a “serious and unsettled question.”\(^{103}\) As to why a serious and unsettled question needed interlocutory appeal, the Third Circuit stated, “it not only ensures the proper adjudication of the case before the court, but may also prevent erroneous adjudications in other cases and head off unnecessary appeals.”\(^{104}\) Because the attorney-client privilege is “deeply embedded in our legal culture,” the Third Circuit believed the privilege qualified as “important” under Cohen.\(^{105}\)

After determining the attorney-client privilege issue met the first and second prongs of the Cohen doctrine, the court, using the third prong of Cohen, analyzed

\(^{96}\) Id.
\(^{97}\) Id.
\(^{98}\) Id.
\(^{99}\) Ford Motor Co., 110 F.3d at 958.
\(^{100}\) Id. at 959.
\(^{101}\) Id.
\(^{103}\) Ford Motor Co., 110 F.3d at 961 (citations omitted) (“And, in examining whether the relevant issue was important, we have from time to time (though not consistently) raised the question whether the issue presents ‘a serious and unsettled question.’”).
\(^{104}\) Id.
\(^{105}\) Id. at 962 (“Yet, every jurisdiction in this nation recognizes the attorney-client privilege. For the reasons set forth supra, the attorney-client privilege is thus important in the Cohen sense; the status or relationship, deeply embedded in our legal culture.”).
whether or not Ford could seek effective review of the attorney-client privilege after final judgment.\textsuperscript{106} Relying on colorful analogies from other circuits, the Third Circuit reasoned, “there is no way to unscramble the egg scrambled by disclosure” and “the baby has been thrown out with the bath water.”\textsuperscript{107} Put another way, “bells cannot be un-rung. Tolstoy could not stand in the corner and forget the white bear -- even though it was imaginary.”\textsuperscript{108} Because the Third Circuit believed that an attorney cannot “unlearn” certain documents, there was no effective means of review after final judgment to properly protect the party forced to disclose documents.\textsuperscript{109}

A second major issue decided by the Third Circuit in \textit{Ford Motor Co.} was whether mandamus review was appropriate.\textsuperscript{110} However, there was no need to examine mandamus review here because the court allowed appellate review of this issue.\textsuperscript{111} But, the Third Circuit stated that if appellate jurisdiction was unavailable, then mandamus jurisdiction did exist.\textsuperscript{112} Pointing out the standard of review is different for appellate and mandamus jurisdiction, the Third Circuit reasoned the mandamus jurisdiction standard was much narrower.\textsuperscript{113} Conversely, the Third Circuit believed that appellate jurisdiction varies according to what issue the court is called upon to review.\textsuperscript{114} Thus, the Third Circuit reasoned the flexibility afforded review under appellate jurisdiction is more preferable than review under mandamus jurisdiction.\textsuperscript{115}

\textit{United States v. Philip Morris}, decided by the D.C. Circuit, is another case advocating a permissible approach to immediate appellate review involving attorney-client privilege orders.\textsuperscript{116} In \textit{Philip Morris}, the United States initiated a lawsuit against six major tobacco companies, alleging the defendants engaged in racketeering to conceal the risks of cigarette smoke.\textsuperscript{117} One of the defendants, British American Tobacco (Investments) Ltd. (“BATCo”) was forced to produce documents related to record keeping that concerned smoking, health, and addiction.\textsuperscript{118} Specifically, the government sought production of a memo known as the “Foyle Memorandum,” which advised BATCo to “modify[] its document

\begin{thebibliography}{99}
\bibitem{106} Id. (“The only remaining issue is the third element of the \textit{Cohen} test, whether Ford can seek effective review of the privilege and work product issues on appeal after final judgment.”).
\bibitem{107} Id. at 963.
\bibitem{108} McDaniel v. Temple Independent School Dist., 770 F.2d 1340, 1352 (5th Cir. 1985) (Rubin, J., dissenting) (referencing a passage from A. \textsc{Tolstoy}, \textsc{A Life of My Father}, 17-18 (1953)).
\bibitem{109} \textit{Ford Motor Co.}, 110 F.3d at 963-64.
\bibitem{110} Id. at 964.
\bibitem{111} Id.
\bibitem{112} Id.
\bibitem{113} Id.
\bibitem{114} Id.
\bibitem{115} \textit{Ford Motor Co.}, 110 F.3d at 964.
\bibitem{116} Philip Morris, 314 F.3d at 617 (recognizing that the “collateral order doctrine is a narrow exception to the general rule that appellate review is only available for final orders.”).
\bibitem{117} Id. at 615.
\bibitem{118} Id.
\end{thebibliography}
retention policy in light of increasing litigation against tobacco companies in the United States and Australia."

Arguing the Foyle Memorandum was protected by attorney-client privilege, BATCo felt the documents should not be produced. However, the court ruled that BATCo had waived its claim of “attorney-client privilege because the memo had not been listed in BATCo’s privilege log.” After maneuvering by both parties, BATCo finally submitted a sealed copy of the Foyle Memorandum to the district court and asked that the court reconsider its order. The district court refused to reconsider, and BATCo subsequently filed an appeal with an emergency stay pending expedited review. Agreeing to take up the issue, the DC Circuit had to determine if it did in fact have jurisdiction and if the appeal met the requirements for an emergency stay.

Addressing the issue of jurisdiction first, the D.C. Circuit went straight into a Cohen collateral-order doctrine analysis. Similar to the Third Circuit, the D.C. Circuit decided the first prong by establishing the district court order conclusively found that the Foyle Memorandum was not protected by attorney-client privilege. Again, similar to the Third Circuit, the D.C. Circuit then analyzed separability and importance under the second prong of Cohen, quickly determining that the privilege question of the Foyle Memorandum is separable from the merits of the case.

As to importance, the D.C. Circuit relied on much of the analysis given by the Third Circuit in Ford Motor Co. Applying the same balancing approach as in Ford Motor Co., the D.C. Circuit stated that importance is determined by the cost of piecemeal review weighed against the costs of delay. Having weighed the factors under Cohen’s second prong, the D.C. Circuit concluded “the institutional benefits of allowing interlocutory review of attorney-client privilege claims outweigh the costs of delay and piecemeal review that may result.” Analyzing the third prong of Cohen, the D.C. Circuit, similar to the Third Circuit, believed the district court’s discovery order could not be effectively

119. Id.
120. Id. at 616 (“Moreover, BATCo argued that the Foyle Memorandum was protected by the attorney-client privilege.”).
121. Id.
122. Philip Morris, 314 F.3d at 616.
123. Id. at 616-17.
124. Id. at 617 (“We first consider our jurisdiction over BATCo’s appeal and then address, in turn, the requirements of an emergency stay.”).
125. Id. (“BATCo argues that this Court has jurisdiction over its appeal under the collateral order doctrine . . . .”).
126. Id.
127. Id.
128. Philip Morris, 314 F.3d at 618-19.
129. Id. at 617-18.
130. Id. at 618.
reviewed on appeal from final judgment.\textsuperscript{131} If the entirety of the Foyle Memorandum was used at the trial level, the only remedy available to BATCo would be to remand the case for retrial.\textsuperscript{132} The court believed that at the point of remand, the whole memorandum would be disclosed to third parties making the issue of privilege moot.\textsuperscript{133} Therefore, BATCo met the requirements for jurisdiction under the \textit{Cohen} collateral-order doctrine.\textsuperscript{134}

The D.C. Circuit also analyzed a secondary issue regarding the possibility that BATCo could effectively gain a final judgment by simply refusing to comply with the district court order.\textsuperscript{135} This tactic is known as the \textit{Cobbledick} rule and allows a final judgment to be entered when the adverse party refuses to comply with an order of the court.\textsuperscript{136} The D.C. Circuit gave two reasons why the disobedience approach is not favored.\textsuperscript{137} First, in the D.C. Circuit, civil contempt citations are not appealable as a collateral order.\textsuperscript{138} Focusing on the unreliability of these rulings, the D.C. Circuit believed the rulings did not create an avenue to appeal.\textsuperscript{139} Second, the D.C. Circuit stated, the sanctions imposed for disobeying a courts order could be so severe “that a reasonable party would not risk incurring them, even in order to preserve a clearly meritorious privilege claim.”\textsuperscript{140} Thus, the D.C. Circuit believed it properly had jurisdiction under the collateral-order doctrine to hear BATCo’s appeal.\textsuperscript{141}

By adopting a permissible approach to this issue, both the Third and D.C. Circuits have found that attorney-client privilege orders meet all three prongs of the \textit{Cohen} collateral-order doctrine.\textsuperscript{142} As such, these two circuits advocate the importance of protecting the attorney-client privilege correctly falls within this narrow exception to the final judgment rule.\textsuperscript{143} More importantly, the Third and

\textsuperscript{131. Id. at 619 (“In this case, the right sought to be protected – BATCo’s privilege – would be destroyed if interlocutory appeal is not allowed.”).}
\textsuperscript{132. Id.}
\textsuperscript{133. Id.}
\textsuperscript{134. \textit{Philip Morris}, 314 F.3d at 621.}
\textsuperscript{135. Id. at 619 (noting that other circuits have “suggested that a party might obtain effective review of an adverse privilege order by refusing to obey the district court’s discovery order and thereby standing in contempt or incurring some other sanction.”).}
\textsuperscript{136. \textit{Ogden}, 202 F.3d at 459 (“This praxis – insisting upon disobedience followed by contempt as a condition of reviewability – is commonly called the \textit{Cobbledick} rule.”).}
\textsuperscript{137. \textit{Philip Morris}, 314 F.3d at 619 (“It is principally because of the availability of the disobedience route to review that a majority of circuits to have considered the issue have held that the adverse privilege rulings are not appealable.”).}
\textsuperscript{138. Id. at 620 (“In this circuit, however, it is settled that a civil contempt citation is not appealable as a collateral order.”).}
\textsuperscript{139. Id.}
\textsuperscript{140. Id.}
\textsuperscript{141. Id. at 621.}
\textsuperscript{142. See cases cited supra note 17.}
\textsuperscript{143. See \textit{Philip Morris}, 314 F.3d at 618 (“[W]e today conclude that the institutional benefits of allowing interlocutory review of attorney-client privilege claims outweigh the costs of delay and piecemeal review that may result.”), \textit{and Ford Motor Co.}, 110 F.3d at 961 (“[T]he interests
D.C. Circuits further distinguished their opinions by analyzing the inherent problems with the approaches taken by other circuits. These problems will encompass one area of focus in the next section discussing the “forbidden” approach.

B. The Forbidden Approach

The approach taken by the majority of circuits refuses to allow appellate jurisdiction regarding attorney-client privilege orders. The best example of this approach is *Boughton v. Cotter Corporation*, decided by the Tenth Circuit in 1993. The Tenth Circuit not only rejected appellate jurisdiction of attorney-client privilege orders but also believed that a petition for mandamus was the proper course when the standard is met.

In *Boughton*, the plaintiff filed suit against both the Cotter Corporation and Commonwealth Edison Company arising out of their operation of a uranium mill in Canon City, Colorado. During the discovery process, the plaintiffs requested 125 documents that pertained to state and federal uranium mill licensing issues. In response, the defendants refused to disclose these materials on the grounds they were privileged. Subsequently, the federal magistrate judge ruled only thirteen documents were actually privileged and ordered the production of the remaining 112 documents. The district court refused to grant the defendants’ motion for reconsideration and further denied 28 U.S.C. § 1292(b) certification. The defendants immediately appealed this ruling and the Tenth Circuit issued a temporary stay to determine whether or not jurisdiction existed to decide the merits of the defendants’ claims.

The Tenth Circuit started its analysis by looking to the plain language of 28 U.S.C. § 1291. The district court refused to grant the defendants’ motion for reconsideration and further denied 28 U.S.C. § 1292(b) certification. The defendants immediately appealed this ruling and the Tenth Circuit issued a temporary stay to determine whether or not jurisdiction existed to decide the merits of the defendants’ claims.

protected by the privilege are significant relative to the interests advanced by adherence to the final judgment rule.”.

144. See, e.g., Philip Morris, 314 F.3d at 620 (recognizing that the *Cobbledick* rule would be inapplicable in the DC Circuit because “a civil contempt citation is not appealable as a collateral order.”).
145. See cases cited supra note 14.
146. *Boughton*, 10 F.3d at 746.
147. *Id.* at 752 (“[W]e hold that we do not have jurisdiction to review the challenged discovery order at this stage in the proceedings . . . .”).
148. *Id.* at 750 (“On Four occasions we have granted writs of mandamus to review claims of privilege which were granted or denied by the district court during the course of particular proceedings.”).
149. *Id.* at 748.
150. *Id.*
151. *Boughton*, 10 F.3d at 748.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
was not final and thus not subject to appellate review. Focusing on the policy aspects of Section 1291, the Tenth Circuit reasoned that allowing immediate appellate review before a final judgment is rendered would erode the deference appellate courts give to trial judges. However, the Tenth Circuit ordered it was also necessary to address the defendants’ assertion that jurisdiction was proper under the collateral-order doctrine.

The Tenth Circuit acknowledged that privileged documents met the first and second prongs of the Cohen doctrine, but found serious deficiencies in the defendant’s ability to satisfy the third prong. The defendants argued the third prong of Cohen was met because exposure of these documents at trial would make them effectively unreviewable on appeal. Disagreeing with this analysis, the Tenth Circuit determined that if the court heard an appeal after final judgment and found the documents were wrongly turned over, then it could easily reverse the adverse judgment and require a new trial without introduction of the documents. Concluding the collateral-order doctrine did not apply here, the Tenth Circuit stated that, “some matters . . . must rest primarily in the wise discretion of experienced trial judges.” Furthermore, the Tenth Circuit decided it was best not to elevate the status of attorney-client privilege orders to that garnering interlocutory appeal.

The final issue discussed by the Tenth Circuit involved writs of mandamus. Speaking to the rarity of granting writs of mandamus, the Tenth Circuit stated these writs should only be issued in exceptional circumstances to “correct ‘a clear abuse of discretion, an abdication of the judicial function, or the usurpation of judicial power.’” Using this limiting approach, the Tenth Circuit believed the issue was not an abuse of discretion at the trial level and because the rulings can be reviewed after final judgment, the writ of mandamus should be denied.

The majority of other circuits have adopted the same restrictive approach espoused in Boughton. These cases include Chase Manhattan Bank v. Turner & Newall from the Second Circuit, Texaco v. Louisiana Land and Exploration

156. Id. (“District court orders for the production of documents during the course of litigation are not ‘final orders’ subject to immediate appellate review.”).
158. Id. at 748.
159. Id. at 749.
160. Id.
161. Id.
162. Id. at 750 (quoting American Exp. Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 281-82 (2d Cir. 1967)).
163. Id. (citing American Exp. Warehousing, Ltd., 380 F.2d at 281-82).
164. Boughton, 10 F.3d at 750.
165. Id. at 751 (quoting Paramount Film Distrib. Corp. v. Civic Center Theatre, Inc., 333 F.2d 358, 361 (10th Cir. 1964)).
166. Id.
167. See cases cited supra note 14.
Co. from the Fifth Circuit and *Reise v. Board of Regents of the University of Wisconsin* from the Seventh Circuit. 168 Each of these cases refused to grant appellate jurisdiction under the *Cohen* collateral-order doctrine. 169

In *Chase Manhattan Bank*, the Second Circuit was faced with the issue of whether hundreds of documents commanded to be disclosed by Turner and Newell garnered appellate jurisdiction. 170 Claiming the documents were privileged and properly accounted for in a privilege log, Turner and Newell asked the Second Circuit to grant appellate jurisdiction over the matter and, in the alternative, treat the appeal as a writ of mandamus. 171 Analyzing the issue under the *Cohen* doctrine, the Second Circuit held this case contained no extraordinarily significant or novel issues requiring appellate review. 172 However, the Second Circuit took the extraordinary step of exercising mandamus review of the issue. 173 Finding that counsel would be allowed access to information possibly privileged, the Second Circuit believed a certain aspect of confidentiality would be lost. 174 In this regard, the Second Circuit does not stray from the reasoning used by the Third and D.C. Circuits who allow appellate jurisdiction of the same issue.

In *Texaco v. Louisiana Land and Exploration Co.*, 175 the Fifth Circuit was asked to review attorney-client privilege orders under appellate and/or mandamus review. 176 In *Texaco*, the plaintiff, Texaco, Inc., filed a writ of mandamus so the Fifth Circuit could review an order of the federal magistrate judge requiring production of certain documents. 177 Denying the mandamus petition, the Fifth Circuit simply stated that the petitioners have not met the high standard required for review. 178 The plaintiffs then pursued appellate jurisdiction under the *Cohen* collateral-order doctrine. 179 Again the Fifth Circuit

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168. See cases cited supra note 14.
169. See *Chase Manhattan Bank*, 964 F.2d at 163 (reaffirming its long-stated view that *Cohen* does not provide jurisdiction to review interlocutory discovery orders); *Texaco*, 995 F.2d 44 (holding that an order requiring production of documents claimed to be privileged was not appealable); and *Reise*, 957 F.2d at 293 (holding that an order to submit to a physical or mental examination is not appealable under *Cohen*).
171. Id. at 162.
172. Id. at 163.
173. Id.
174. Id. at 165 (“If opposing counsel is allowed access to information arguably protected by the privilege before an adjudication as to whether the privilege applies, a pertinent aspect of confidentiality will be lost . . . .”)
175. *Texaco*, 995 F.2d at 43.
176. Id. (“Seeking relief from the order, Texaco filed with this court a petition for writ of mandamus and/or prohibition.”).
177. Id.
178. Id.
179. Id. at 44.
denied jurisdiction, holding that “a discovery order incident to a pending action is not subject to appeal.”

Finally, in *Reise v. Board of Regents of the University of Wisconsin System*, the Seventh Circuit weighed in. In *Reise*, the Seventh Circuit was presented with the issue of whether an order requiring a medical examination was reviewable on appeal. Similar to the other circuits advocating the “forbidden” approach, the Seventh Circuit stated “because all interlocutory orders would end in affirmance, the costs of delay via appeal, and the cost of entertaining these appeals exceed the aggregate costs of the few orders that might be corrected were appeals available.” Furthermore, the Seventh Circuit believed that any discovery order was readily reviewable after a final judgment had been entered.

The similarity in all of these decisions is that each circuit reasons other options available besides appellate review for aggrieved parties. What these circuits do not take into consideration is how inconsistent and unpredictable those options are. The next section of this article will discuss why appellate review creates a more consistent and fair option for review of attorney-client privilege rulings.

IV. ANALYSIS

Adopting a permissible approach for appellate review of attorney-client privilege rulings is sound for the following reasons. First, attorney-client privilege rulings are at the foundation of the legal system and all efforts should be made to strengthen this privilege not weaken it. Second, attorney-client privilege rulings properly fall within the *Cohen* collateral-order doctrine. Third, allowing attorney-client privilege rulings appellate review would negate the inconsistency amongst circuits interpreting the *Cobbledick* Rule. Fourth,

180. *Id.*
181. *Reise*, 957 F.2d at 293.
182. *Id.* at 294 (considering whether the Circuit court has jurisdiction to reverse the district court’s order that Reise submit to a medical examination). Other cases in the Seventh Circuit have followed *Reise*. They include *Simmons v. City of Racine, PFC*, 37 F.3d 325, 329 (7th Cir. 1994) (“[W]e must adhere Seventh Circuit Authority that we lack jurisdiction to decide this controversy at this time.”) and *Dellwood Farms, Inc. v. Cargill, Inc.* 128 F.3d 1122, 1125 (7th Cir. 1997) (noting that “a discovery order is not deemed collateral even if it is an order denying a claim of privilege.”).
183. *Reise*, 957 F.2d at 295 (“Reise has filed a separate appeal asking us to reverse the judge’s order that he submit to a mental examination under Fed. R.Civ. P. 35. * * * All then depends on whether an order under Rule 35 is a final decision for purposes of 28 U.S.C. §1291.”).
184. *Id.*
185. *Id.*
186. See *Chase Manhattan Bank*, 964 F.2d at 166 (entertaining review via the writ of mandamus); *Texaco*, 995 F.2d at 43 (recognizing the possibility of obtaining review via a writ of mandamus); and *Reise*, 957 F.2d at 295 (postulating that Reise can obtain review once final judgment has been rendered or by simply refusing to comply with the order).
adopting the permissible approach also ends the inconsistencies involved with seeking writs of mandamus for attorney-client privilege rulings. Thus, adopting the permissible approach guarantees the protection necessary for attorney-client privilege issues, while staying within the framework of 28 U.S.C. § 1291.

A. Attorney-Client Privilege Orders

According to the leading case in this area of law, *Upjohn Co. v. United States*, the attorney-client privilege is meant to promote freedom of consultation between legal advisers and their clients. Moreover, the attorney-client privilege should promote “full and frank communication between attorneys and their clients” encouraging the public to seek legal assistance early in the dispute. Cases already cited by this article support the view that attorney-client privilege is at the foundation of the legal system. Following these precedents, sound legal reasoning requires all circuits to adopt the permissible approach because it strengthens the attorney-client privilege, while remaining narrowly tailored to prevent giving a flood of discovery orders appellate review.

The permissible approach strengthens the attorney-client privilege by extending it beyond possible disclosure at trial. As the court in *Chase Manhattan Bank* observed, the limited assurance that privilege issues will not be disclosed does not suffice to ensure free and frank communication by clients who feel it is only operative at the time of trial. While the Second Circuit in *Chase Manhattan Bank* ultimately disallowed appellate review, it realized the repercussions which might occur if the privilege was not adequately protected. This impact would leave clients fearing information given could be disclosed at trial, and once the information is disclosed the chance of review is slim. The resulting chain of events directly marginalizes full and frank communications. On the other hand, if a client in a permissible approach jurisdiction understands the layers of review available to protect the privilege, then that client should be

188. Id. at 389.
189. Id.
190. See, e.g., *Philip Morris*, 314 F.3d at 618 (“The attorney-client privilege rests at the center of our adversary system . . . .”); and *Chase Manhattan Bank*, 964 F.2d at 165 (“The existence of the privilege thus allows attorneys to assure clients that any information given to their attorneys will remain confidential.”).
191. *Chase Manhattan Bank*, 964 F.2d at 165.
192. Id.
193. Id. (“At best, an attorney can assure the client that the communication, although made known to adversaries, will not be admissible as evidence at trial. This limited assurance, however, will not suffice to ensure free and frank communication by clients who do not rate highly a privilege that is operative only at the time of trial.”).
194. Id.
more forthcoming with information. A document claiming privilege should receive the proper due diligence guaranteeing the document is in fact privileged. By not adopting the permissible approach to appellate review, the underlying principles of attorney-client privilege are weakened for nothing more that supposed “judicial economy.”

The main counter-argument proffered when a new exception such as the permissible approach arises, is that the new exception will open the floodgates causing courts to be overwhelmed with these types of requests. The court in Reise, without offering any empirical data, falls squarely within the aforementioned “floodgates” argument. In Reise, the court stated that, because most interlocutory appeals from discovery end in affirmance, the costs of delay and the costs to the judiciary exceed the costs of those few orders that might be corrected. Not only is this view given without supporting data, but it is also misunderstands the essentials of the attorney-client privilege.

The correct view is that when the privilege is invoked, the trial court usually reduces the documents to a bare minimum. Inevitably, these documents are ancillary matters that allow for discovery to remain ongoing while an appeal is taken, briefed, and oral arguments heard before the original trial date. Thus, not only can the principal proceeding keep moving forward but the extra layer of analysis offered by appellate review provides fairness at trial while strengthening the attorney-client privilege. Furthermore, attorney-client privilege is a unique discovery order because it can pass through the Cohen collateral-order doctrine as evidenced in the next section.

B. **Attorney-Client Privilege Orders meet all three prongs of Cohen**

As stated, almost all courts dealing with appellate review of attorney-client privilege at some point filter the issue through the Cohen collateral-order

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195. Id. (“The existence of the privilege thus allows attorneys to assure clients that any information given to their attorneys will remain confidential.”).
196. Id. (recognizing that the economies of the pre-disclosure adjudication are off-set by “‘fruit of the poisoned tree’ arguments that will inevitably arise when an adversary attorney is allowed to see documents that are later held to be privileged and inadmissible at trial”).
197. Reise, 957 F.2d at 295 (“Because almost all interlocutory appeals from discovery orders would end in affirmance (the district court possesses discretion, and the review is deferential), the costs of delay via appeal, and the costs to the judicial system of entertaining these appeals, exceed in aggregate the costs of the few erroneous discovery orders that might be corrected were appeals available.”).
198. Id.
199. Id.
200. Ford Motor Co., 110 F.3d at 957. Originally, the district court in Ford Motor Co. was asked to order the disclosure of a wide variety of documents. However, the issue ended up revolving around just two specific sets of documents because the district court did believe the others were privileged.
201. Id. at 958 (“The most familiar aspect of the second prong of Cohen is separability from the merits.”).
doctrine.\textsuperscript{202} Even though a circuit-split exists regarding this issue,\textsuperscript{203} the circuits have found common ground when analyzing the first two prongs of the \textit{Cohen} doctrine.\textsuperscript{204} Thus, attorney-client privilege decisions analyzed under the \textit{Cohen} doctrine specifically focus on the third prong.\textsuperscript{205} This prong asks a court to determine whether effective review of the privilege issue is available after final judgment.\textsuperscript{206} However, effective review following an improper disclosure of privileged documents is practically impossible. Therefore, the permissible approach is sound because it passes the third prong of \textit{Cohen} for the following three reasons.

First, as the court in \textit{Ford Motor Co.} correctly points out, if “putatively protected material is disclosed [at trial], the very ‘right sought to be protected’ has been destroyed.”\textsuperscript{207} Consequently, the effectiveness of any review after final judgment will be suspect for the party forced to disclose the potentially privileged materials. As stated, the notion of attorney-client privilege is to promote full and frank communications between the attorney and client.\textsuperscript{208} Thus, not allowing a permissible approach to attorney-client privilege orders not only chills the dialogue between attorney and client, but also hinders the effectiveness the attorney will have at defending or prosecuting the original trial.\textsuperscript{209} If an attorney cannot defend or prosecute the case as they see fit, the review of the tainted trial will be no more effective than the original proceeding itself.

\textsuperscript{202} See generally, \textit{Ford Motor Co.}, 110 F.3d at 958 (“[T]he collateral order doctrine . . . provides a narrow exception to the general rule permitting appellate review only of final orders.”); \textit{Philip Morris}, 314 F.3d at 617 (“The collateral order doctrine is a narrow exception to the general rule that appellate review is only available for final orders.”); \textit{Boughton}, 10 F.3d at 749 (addressing the defendants’ argument that “the challenged discovery order is properly classified as an appealable ‘collateral order’”); \textit{Chase Manhattan Bank}, 964 F.2d at 163 (“We thus reaffirm our long-stated view that \textit{Cohen} does not provide jurisdiction to review interlocutory discovery orders.”); \textit{Texaco}, 995 F.2d at 44 (citing precedent for the proposition that a discovery order is appealable under the \textit{Cohen} doctrine); and \textit{Reise}, 957 F.2d at 296 (“[A]n order to submit to a physical or mental examination is not appealable under \textit{Cohen} . . . .”).

\textsuperscript{203} See cases cited supra note 13.

\textsuperscript{204} See, e.g., \textit{Ford Motor Co.}, 110 F.3d at 962 (“Thus, for the same reasons put forth in our treatment of the attorney-client privilege, core work product, such as at issue here, meets the importance criterion and satisfies the second \textit{Cohen} prong.”); \textit{Philip Morris}, 314 F.3d at 617, 619 (finding that both the first and second prong of \textit{Cohen} was satisfied); and \textit{Boughton}, 10 F.3d at 749 (“The instant discovery order arguably meets the first and second prongs of the relevant test.”). Although the cases cited here take different approaches to the issue with \textit{Ford Motor Co.} and \textit{Philip Morris} adopting the permissive approach while \textit{Boughton} adopts the forbidden approach, each court believed the facts of its specific case met both the first and second prongs of \textit{Cohen}.

\textsuperscript{205} See cases cited supra note 204. These cases all believe that the third prong of \textit{Cohen} is pivotal.

\textsuperscript{206} \textit{Ford Motor Co.}, 110 F.3d at 962.

\textsuperscript{207} \textit{Id.} at 963 (quoting \textit{Bogosian} 738 F.2d at 591).

\textsuperscript{208} \textit{Upjohn}, 449 U.S. at 389.

\textsuperscript{209} See generally, 81 AM. JUR. 2D Witnesses § 327 (“[P]reservation [of the privilege] is essential to the just and orderly operation of the legal system.”).
Second, regardless of what axiom one chooses to use, “the cat is out of the bag,”210 or “there is no way to unscramble the egg,”211 the logic behind these statements correctly defines the rulings in the case of attorney-client privilege orders.219 As the court in Ford Motor Co. stated: “[a]ttorneys cannot unlearn what has been disclosed to them in discovery.”212 Even Leo Tolstoy, when forced to stand in the corner and not think about the white bear could not keep himself from thinking of the white bear.213 Certainly, whatever an attorney learns during the discovery process is going to affect their prosecution or defense of the case. If a disputed attorney-client privilege order is allowed introduction at trial without having been reviewed by a higher court, then the effectiveness of review after final judgment is indeed questionable.214 This opinion is backed by the court in Philip Morris when the D.C. Circuit reasoned that, after the materials had been initially disclosed, a “re-trial without the use of privileged materials . . . mak[es] the issue of privilege effectively moot.”215 Following the reasoning of the D.C. Circuit, even if the disclosure of the disputed privilege order is found to be incorrect after final judgment and remanded for retrial, the party who disclosed the document will not be made whole.216 After initial disclosure, attorneys, as a result of seeing the documents during the first trial, will have formulated new strategies, new evidentiary leads, and new witnesses to interview.217 Even circuits using the forbidden approach recognize that a dilemma is created.218 For example, in Boughton, the Tenth Circuit compared the dilemma to harmless error by stating that “to the extent that trial strategy is thus uncovered, the harm occasioned resembles that suffered in any retrial.”219 This position fails because not all issues that cause a re-trial may be classified as collateral in nature.220 Attorney-client privilege review is unique because the review may proceed while other pre-trial functions continue without affecting the central issue of the case. Because a trial court cannot successfully

211. Ford Motor Co., 110 F.3d at 963.
213. Id. (quoting Chase Manhattan Bank, 964 F.2d at 165) (holding that attorney-client privilege orders do not meet the standard for appellate review).
213. Id. (quoting Chase Manhattan Bank, 964 F.2d at 165) (holding that attorney-client privilege orders do not meet the standard for appellate review).
214. Id.
215. Id.
216. Id.
217. Id.
218. Ford Motor Co., 110 F.3d at 963 (recognizing that attorneys are likely to use improper disclosures “for evidentiary leads, strategy decisions, or the like”).
218. See generally, Boughton 10 F.3d at 750, and Chase Manhattan Bank, 964 F.2d at 163 (finding that if they failed to act now, the attorney-client privilege would be undermined).
219. Boughton, 10 F.3d at 750 (quoting American Express Warehousing, 380 F.2d at 281).
220. See Phav v. Trueblood, Inc., 915 F.2d 764, 766 (1st Cir. 1990) (¨An inadequate damages award may constitute sufficient reason for a new trial¨), and Richardson v. United States, 468 U.S. 317, 323-24 (1984) (holding that a hung jury can cause a re-trial and the re-trial does not violate the Double Jeopardy Clause). Each of these non-collateral situations cited may cause a re-trial.
regulate all of the information gleaned from the discovery at the original trial, the permissible approach is the only way to give the issue effective review.

Finally, the trend in current litigation centers completely around the discovery process. With only three percent of civil cases ever reaching the trial phase, the emphasis on discovery becomes increasingly important. What attorneys learn during this phase may raise or lower their settlement authority. Thus, an adverse decision requiring the release of privileged documents may force a party to settle when non-disclosure of these same documents could have produced a favorable result for the party at trial. The “forced” settlement issue is rarely discussed and hard to analyze because appellate review of these situations is rare at best. However, this does not belittle the fact that the situation arises, and when it does, justice is marginalized.

C. The Cobbleick Rule creates inconsistent results

One theory advocated by the circuits using the forbidden approach is that a party may obtain final judgment by simply refusing to obey the trial court’s order. In other words, these circuits believe that civil disobedience allows the adverse party to receive appellate review without ever disclosing the privileged documents. This approach – “insisting upon disobedience followed by contempt as a condition to reviewability – is commonly called the Cobbleick rule.” However, this rule is not consistently interpreted in the circuits and thus does not give a standard approach all courts may use. Because the path of disobedience is not consistently followed in every circuit, the risk versus reward may be too great for the affected party to bear.

The presumption in some circuits is that disobedience of a privilege order will automatically lead to a contempt citation resulting in an appealable order. However, as the Philip Morris court stated, “it is well settled [in the D.C.
Circuit] that a civil contempt citation is not appealable as a collateral order. 

Furthermore, the court in Philip Morris reasoned that because the sanctions imposed for disobedience falls within the discretion of the trial judge a non-reliable avenue to appeal is created. Backing up this point, the court in Reise stated that the probable sanction in a situation like this would be an order striking certain damages. The Seventh Circuit that decided Reise forbids privilege orders appellate review. Because this circuit refuses such review, a closer look at the language chosen in advocating the disobedience route is telling. The strongest word the Seventh Circuit could come up with to describe what the sanction would be is “probable.” The ramification of this word is clear; circuits can neither compel nor predict what the trial judge’s sanction will be in any given manner. Therefore, adopting the permissible approach to attorney-client privilege orders would clean-up this area of law in two key ways.

First, as the D.C. Circuit has shown, because its case law does not allow appellate review for civil disobedience, this approach can never be implemented across the circuits. By adopting the permissible approach, the Supreme Court would create a clear standard for appeal that all circuits could follow and swallow up those circuits who believe disobedience can act as an exception. This approach would also allow attorneys to confidently lay out the scenario for clients affected by the adverse ruling. Instead of giving the client four different options to choose from, an attorney under the permissible approach may advise his client to simply appeal the privilege order.

Second, the current system creates an unfair risk versus reward for the adverse client. Under the current setup, and depending on the jurisdiction, an

229. Id. 230. Id. (quoting from In re Sealed Cases, 151 F.3d 1059, 1065 (D.C. Cir. 1998)) (“[W]e have expressed concern that a party that seeks review does not know in advance ‘whether refusal to comply with the discovery order will result in a civil contempt order or a criminal order.’”)

231. Reise, 957 F.2d at 295 (“The probable sanction in a case such as this is an order striking Reise’s claim for damages on account of mental and physical distress.”).

232. Id. at 296.

233. Id. at 295 (“The probable sanction in a case such as this is an order striking Reise’s claim for damages on account of mental and physical distress.”).

234. Id.

235. See Philip Morris, 314 F.3d at 620 (finding the Cobble Dick Rule inapplicable because in the D.C. Circuit “a civil contempt citation is not appealable as a collateral order”).

236. See 28 U.S.C. § 1291 (2000) (establishing that courts of appeal may have jurisdiction when final decisions have been rendered); Cohen 337 U.S. at 546-47 (holding that there are some exceptions to the final judgment rule); Cobble Dick, 309 U.S. at 327 (holding that parties may refuse to disclose the requested material, be sanctioned by the court, and appeal from the sanction); and 28 U.S.C. § 1651 (2000) (establishing that courts may issue any writ necessary to properly effectuate justice). Each of these citations represents one of the four ways attorneys may seek review for their clients.

237. See Philip Morris, 314 F.3d at 620 (Sanctions “may be of such severity that a reasonable party would not risk incurring them, even in order to preserve a clearly meritorious privilege claim.”).
attorney advising his client to execute the disobedience strategy must also provide the myriad of possibilities that come with this defense. As discussed, one such possibility is that the trial judge orders a judgment on the merits of the case and then a separate trial on the damages. Following this reasoning, the court in *Reise* believed the probable course for a trial judge faced with the civil disobedience route is to issue an order allowing the other party to prevail on the merits but not obtain damages. The *Reise* court stated, the expense and inconvenience of multiple trials is not persuasive because many discovery orders create a possibility for two trials.

However, this reasoning is unsound for two reasons. First, an attorney-client privilege order could be appealed and ruled upon before the original trial ever begins. It seems a waste of time and financial resources to try essentially the same case twice when an alternative route is available that is cheaper and more expedient. Second, few clients will want to default on liability and leave themselves vulnerable to a trial on damages. The risk of a large damage award greatly outweighs the “possible” reward of reversal on appeal after judgment. Therefore, the civil disobedience approach makes little sense and is certainly not a better avenue for a client to use than directly appealing the attorney-client privilege order.

D. *The permissible approach keeps mandamus review for truly “extraordinary circumstances”*

A writ of mandamus exists to give aggrieved parties one final shot at review before the matter is resolved in the trial court. On the surface, a writ of mandamus seems a sound alternative for those circuits advocating the forbidden approach. In the eyes of these circuits, mandamus review is available when

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238. *Reise*, 957 F.3d at 295.
239. *Id.*
240. *Id.*
241. *Id.*
242. See 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3935.1 at 589 (2d ed. 1992) (“Mandamus long seemed available as a matter of course to protect the right to jury trial against orders that explicitly deny jury trial or simply provide for prior court decisions of issues that might be precluded from reconsideration in later jury proceedings.”). *See also*, Ex parte Simons, 247 U.S. 231, 239 (1918) (finding the mandamus order “should be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake.”).
243. *See Chase Manhattan Bank*, 964 F.2d at 166 (holding that the issue at bar met the standard set forth for a writ of mandamus to issue). *But see also Rhone-Poulenc*, 32 F.3d at 861 (holding that “[m]andamus may properly be used as a means of immediate appellate review of orders compelling the disclosure of documents and information claimed to be protected . . . by privilege . . .”). The Third Circuit is amongst those who use the permissive approach. However, the *Rhone-Poulenc* case also rationalizes that mandamus review is available and can be appropriate. Again, the adoption of the permissive approach would standardize, as this author has stated, “myriad” of possibilities available for review.
certain requirements are met. 244 Unfortunately, these requirements are vague and open to different interpretation. For instance, American Jurisprudence states that federal courts of appeal have the discretion to grant the drastic remedy of mandamus but should do so only under “extraordinary circumstances.” 245 Granting mandamus review is also considered an extraordinary exercise of the court’s jurisdiction. 246 Thus, an issue that may qualify for mandamus in one circuit may not qualify in another. 247

In other words, inconsistency exists across the circuits yet again, only this time in regards to mandamus review for attorney-client privilege orders. 248 Therefore, a writ of mandamus is no better at guaranteeing an adverse party review of attorney-client privilege orders than the Cobble Dick Rule. Yet, by adopting the permissible approach, circuits can standardize how attorney-client privilege orders are reviewed leaving mandamus review for only the rarest of situations.

The inconsistencies created with mandamus review are too numerous for serious consideration as an alternative for appellate review of attorney-client privilege orders. 249 For example, in Boughton, the Tenth Circuit stated its policy towards granting mandamus review. 250 Accordingly, in the Tenth Circuit, a writ of mandamus will issue only when a party can prove exceptional circumstances to correct “a clear abuse of discretion, an abdication of the judicial function, or the usurpation of judicial power.” 251 In particular, when discovery orders are involved, the Tenth Circuit requires both that the disclosure render impossible any appellate review and that the disclosure is substantially important. 252 To show just how strictly this review is enforced, the Boughton court noted granting writs of mandamus to review privilege orders on only four prior occasions. 253 Moreover, because this reasoning closely resembles the Cohen collateral-order

244. Compare Chase Manhattan Bank, 964 F.2d at 163 (holding that mandamus review will lie if: (1) an issue of importance is raised (2) the privilege will be lost if the review must await final judgment (3) immediate resolution will avoid the development of discovery practices); with Rhone-Poulenc, 32 F.3d at 861 (the Third Circuit has adopted the permissive approach, but in this case the court stated that “[t]he two prerequisites for the issuance of a writ of mandamus were that the petitioners have no other adequate means to obtain the relief sought and that . . . their right to the writ is clear and indisputable.”).
245. 52 AM. JUR. 2d Mandamus § 16 (emphasis added).
246. Id.
247. Compare Chase Manhattan Bank, 964 F.2d at 163 (using a mandamus test which is similar to the Cohen test), with Boughton, 10 F.3d at 751 (using a mandamus test which relies heavily on the “exceptional circumstances” standard “to correct a clear abuse of discretion”).
248. See cases cited supra note 247.
249. See cases cited supra, note 247.
250. Boughton, 10 F.3d at 751 (quoting Paramount Film Distrib. Corp., 333 F.2d at 361) (“The writ of mandamus issues only in exceptional circumstances to correct ‘a clear abuse of discretion, an abdication of the judicial function, or the usurpation of judicial power.’”).
251. Id.
252. Id.
253. Id. at 750. Boughton was decided in 1993. Certainly, the Tenth Circuit has addressed this issue on more than four occasions at the time of this writing.
doctrine, an adverse party seeking review of an attorney-client privilege order may be denied review twice by supposedly separate doctrines when in effect each is decided using the same logic.

Compare the analysis for writs of mandamus in the Tenth Circuit with that of the Second Circuit.254 In the Second Circuit, the court settled in Chase Manhattan Bank that writs of mandamus relating to claims of privilege will issue when: (1) an issue of importance is raised; (2) the privilege will be lost if the review must wait until after final judgment; and (3) immediate resolution will avoid undermining the privilege.255 Once again, this standard seems strikingly similar to the three prong approach used in a Cohen collateral-order doctrine analysis.256 However, in Chase Manhattan Bank the court felt the privilege order met the standard for mandamus review and so granted the request.257 The Second Circuit granted review because of the unusual nature of the discovery request and the important issues it raised.258

Finally, comparing these two circuits with a permissible approach circuit highlights the rulings’ inconsistencies. In Ford Motor Co., after granting appellate review, the court analyzed the issue to see if it could also grant mandamus review.259 Reasoning that if appellate review was not available, the court believed a writ of mandamus would be appropriate.260 But, the court specifically pointed out that appellate review is superior because of the different standard of review available to each.261 The court in Ford Motor Co. believed that mandamus review is exceedingly narrow while review under appellate jurisdiction varies depending on the issue.262 Applying this reasoning, the court felt mandamus jurisdiction gives “an appellate court less opportunity to correct district court error.”263 Adding to this reasoning, the court in Ford Motor Co.

254. See cases cited supra note 247.
255. Chase Manhattan Bank, 964 F.2d at 163.
256. Compare Cohen, 337 U.S. at 546 (“This decision appears to fall into that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.”), with Chase Manhattan Bank, 964 F.2d at 163 (“In sum, we will exercise mandamus review of discovery orders relating to claims of privilege where: (i) an issue of importance and of first impression is raised; (ii) the privilege will be lost in the particular case if review must await a final judgment; and (iii) immediate resolution will avoid the development of discovery practices or doctrine undermining the privilege.”).
257. Chase Manhattan Bank, 964 F.2d at 166.
258. Id.
259. Ford Motor Co., 110 F.3d at 964 (“[W]e also believe that if we did not have appellate jurisdiction, we would have mandamus jurisdiction to review the district court’s order.”).
260. Id.
261. Id. (“Review under appellate jurisdiction is therefore preferable to review under mandamus jurisdiction.”).
262. Id.
263. Id.
believed that conformity between the district and appellate courts are best served when mandamus review is only granted in extraordinary circumstances.264

Having analyzed three different approaches to the mandamus issue, it is apparent that inconsistencies abound.265 These inconsistencies exist because using a standard such as “extraordinary circumstances” is purely subjective. Thus, every time an attorney-client privilege order requests mandamus review each court will subjectively decide whether or not this specific order meets the standard. In other words, each circuit interprets the order according to its own view of what is extraordinary. However, if these circuits were to adopt the permissible approach and allow appellate review, this inconsistency would disappear. The permissible approach would simply do away with the need for mandamus review of these orders. Of course mandamus review will still be available to an adverse party, but higher courts will be more hesitant to grant mandamus review after both a trial judge and possibly an appellate court have looked at the issue.

V. CONCLUSION

A circuit split exists in regards to whether attorney-client privilege orders should garner appellate review.266 The majority of circuits adopt the forbidden approach refusing to give appellate review to attorney-client privilege orders.267 While there are a number of reasons why these circuits have refused to allow appellate review, the most consistent stance is that attorney-client privilege orders do not pass the Cohen collateral-order doctrine.268 However, a minority of circuits take the opposite view and adopt a permissible approach allowing attorney-client privilege orders appellate review.269

Despite being heavily outnumbered, the minority permissible approach should be adopted across the circuits for the following four reasons. First, allowing attorney-client privilege orders immediate appellate review strengthens the attorney-client relationship. Clients who feel the attorney-client privilege could be compromised without immediate review will inevitably be less forthcoming. Second, because effective review is always going to be compromised once potentially privileged information is disclosed, attorney-client privilege orders meet all three prongs of the Cohen collateral-order

264. Id.
265. See cases cited supra note 247.
266. See cases cited supra note 13.
267. See cases cited supra note 14.
268. See Chase Manhattan Bank, 964 F.2d at 163 (“Cohen does not provide jurisdiction to review interlocutory discovery orders.”); Texaco, 995 F.2d at 44 (rejecting plaintiff’s case law which held that discovery orders were appealable under the Cohen doctrine); Reise, 957 F.2d at 296 (“[A]n order to submit to a physical or mental examination is not appealable under Cohen.”); and Boughton, 10 F.3d at 750 (“[W]e hold that the instant appeal is not permissible under the Cohen exception.”).
269. See cases cited supra note 17.
doctrine. Third, some circuits advance the idea of refusing to comply with the trial judge’s order until being sanctioned. From this sanction the aggrieved party may appeal, but the risk versus reward is heavily tilted against the party willing to be sanctioned. Fourth, appellate review allows mandamus review to remain for only “extraordinary circumstances.” Moreover, because the standard used by the circuits when granting mandamus review substantially varies, appellate review offers a more standardized approach for circuits dealing with documents claiming attorney-client privilege. As such, the permissible approach provides much better protection not only for large corporate clients but for smaller clients relying on the attorney-client privilege.

270. See cases cited supra note 247.
WHO’S SELLING THE NEXT ROUND: WINES, STATE LINES, THE TWENTY-FIRST AMENDMENT AND THE COMMERCE CLAUSE

Thomas E. Rutledge and Micah C. Daniels


On August 21, 2006, Judge Charles R. Simpson III ruled that the restriction of “farm winery” and “small winery” (K.R.S. §§ 241.101(22) and 243.156(1)(a)) to those based in Kentucky, the restriction of farm wineries to producing wine from grapes, fruit or honey produced in Kentucky (K.R.S. §§ 241.010(45) and 243.156(c)), and the limitation of direct purchases from farm and small wineries to intra-state wineries (K.R.S. §§ 243.155(1)(f)(1), 243.156(h)(1)) were struck down as violating the Commerce Clause. The state was enjoined from the enforcement of the felony statute (K.R.S. § 244.165) against licensed out of state small and farm wineries. (Editors’ Note: At the time of publication, Judge Simpson’s decision is being appealed to the United States Court of Appeals for the Sixth Circuit.)

The references in footnotes 394, 439, and 441 to K.R.S. § 244.065(2) should be to K.R.S. § 244.165(2). In footnote 449, the second textual sentence thereof should begin “It is obvious that the cost of travel . . . .” The correct name of the firm of co-author Thomas E. Rutledge is Stoll Keenon Ogden PLLC.

EXECUTING THE POLITICAL QUESTION DOCTRINE

Jared S. Pettinato


We mistakenly published Mr. Pettinato’s article with several errors. Please accept our apology for any problems that this might have caused. The corrected version is available on Westlaw and LexisNexis.