UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

United States	:	
	:	
v.	:	**No. 3:01cr263(JBA)**
	:	
Joseph P. Ganim	:	

Ruling on Motion for Clarification [Doc. #79]

The Court's September 12, 2002 ruling on defendant Ganim's motion to dismiss the indictment concluded that the jury's consideration of those portions of the indictment charging theft of honest services[1] would be "confined to whether the Government has proved a scheme whereby Ganim demanded, sought, received or agreed to receive something of value either with the specific corrupt intent to be influenced in the performance of an official act (bribery) or through the unlawful use of force, violence or fear (extortion)." United States v. Ganim, 225 F. Supp. 2d 145, 147 (D. Conn. 2002) ("Ganim I"). By motion for "clarification," the Government asks that the jury's consideration be expanded to allow a finding of guilt on the honest services counts if the Government proves a scheme in which a public official "fail[s] to disclose a personal financial stake in matters over which the official exercised decision-making authority." [Doc. #79]

[1]See 18 U.S.C. §§ 1341 and 1346.

at 5-6.

As set out in Ganim I, § 1346 is burdened by serious notice issues. See generally United States v. Handakas, 286 F.3d 92 (2d Cir. 2002).[2] While the broad wording of the statute could theoretically be stretched to apply to almost any ethical lapse by a public official or even a private citizen,[3] § 1346 has been closely cabined in this Circuit. In Handakas, the Second Circuit held that its precedents mandated

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[2]See also Order, United States v. Rybicki, Nos. 00-1043(L), 00-1044(CON), 00-1052(XAP), 00-1055(CON) (2d Cir. July 3, 2002) (accepting en banc review of panel decision reported at 287 F.3d 257 and directing parties to brief "whether 18 U.S.C. § 1346 is unconstitutionally vague on its face"); cf. Geraldine Szott Moohr, Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us, 31 Harv. J. Legis. 153, 196 (1994) ("'Honest services' is an evolving, aspirational term that describes a level of conduct that may never be obtained . . . . In real world politics, only a blurred and shifting line separates political corruption from political patronage, and honest from dishonest service.") (citations omitted).

[3]See Handakas, 286 F.3d at 108 ("By invoking § 1346, prosecutors are free to invite juries 'to apply a legal standard which amounts to little more than the rhetoric of sixth grade civics classes.' If the 'honest services' clause can be used to punish a failure to honor the [School Construction Authority's] insistence on the payment of prevailing rate of wages, it could make a criminal out of anyone who breaches any contractual representation: that tuna was netted dolphin-free; that stationery is made of recycled paper; that sneakers or T-shirts are not made by child workers; that grapes are picked by union labor – in sum so called consumer protection law and far more.") (quoting United States v. Margiotta, 688 F.2d 108, 142 (2d Cir. 1982) (Winter, J., dissenting)).

a conclusion that § 1346 is not unconstitutionally vague when applied to "a scheme to harm another by the breach of a duty enforceable by an action in tort." 286 F.3d at 106. In Ganim I, this Court recognized, based on language in Handakas and in light of concessions from the defendant at oral argument, that (in addition to the tort-based exception) sufficient notice of the criminality of schemes of bribery and extortion was provided by § 1346 and other state and federal criminal laws. See Ganim I, 225 F. Supp. 2d at 154.[4]

The Government now attempts to expand the reach of § 1346 to include a public official's failure to "disclose his personal financial interest in matters over which he exercised decision-making authority." [Doc. #79] at 1. As with the Government's earlier theory that the receipt of gratuities (in

[4]"[T]he controlling law of this Circuit is that § 1346 is not unconstitutional on its face. Ganim concedes as much and agrees that if the honest services provisions of the indictment are construed as charges of a bribery or extortion scheme, his vagueness claims would be obviated. * * * Insofar as § 1346 contains an ascertainable standard of conduct (and the law in this Circuit is that it does), bribe receiving and extortion by elected officials are squarely within the heartland of the statute, as represented by the cases distinguished by the Handakas majority. Without doubt, an elected official is on notice that demanding, seeking, receiving or agreeing to receive something of value either with the specific intent to be influenced in the performance of an official act or through the unlawful use of force, violence or fear, is unlawful and is criminalized by numerous statutes." (citations and footnote omitted)

whatever amount and without intent by the recipient to be influenced) was actionable as a theft of honest services form of mail fraud, there is nothing in the language of § 1341 or § 1346 that would put a public official on notice that a conflict of interest would subject him or her to a possible twenty-year federal prison term for mail fraud. While few dispute that elected officials' failure to disclose personal financial interests affecting their official decision making is anathema to good government, even those circuits that have taken a more expansive view of § 1346 conclude that it does not operate as a federal ethics code for all public employees. United States v. Brumley, 116 F.3d 728, 734 (5th Cir. 1997)[5]; United States v. Sawyer, 85 F.3d 713, 728 (1st Cir. 1996).[6] Similarly, while the Government has cited various portions of the Bridgeport Ethics Code, including § 2.38.030(A),[7] such

[5]"We find nothing to suggest that Congress was attempting in § 1346 to garner to the federal government the right to impose upon states a federal vision of appropriate services – to establish, in other words, an ethical regime for state employees. Such a taking of power would sorely tax separation of powers and erode our federalist structure."

[6]"To allow every transgression of state governmental obligations to amount to mail fraud would effectively turn every such violation into a federal felony; this cannot be countenanced."

[7]"[N]o official or employee shall have any interest, financial or otherwise, direct or indirect, or engage in any business, employment transactions or professional activity

provisions serve at most as notice of the ethical impropriety of a failure to disclose or recuse, but provide no notice that their violation exposes the official or employee to prosecution for a federal felony.

The Government correctly notes that courts in other circuits have concluded that failure to disclose conflicts of interest violates § 1346. See, e.g., U.S. v. Antico, 275 F.3d 245, 262 (3rd Cir. 2001). However, the Second Circuit has sharply limited § 1346, and there is no post-McNally Second Circuit case applying § 1346 to such conduct.[8] Unlike other circuits, the Second Circuit has specifically foreclosed the use of pre-McNally cases to construe § 1346, United States v. Sancho, 157 F.3d 918, 922 (2d Cir. 1998),[9] and has taken a

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which is in substantial conflict with the proper discharge of his duties."

[8]While the Government relies on United States v. Middlemiss, 217 F.3d 112 (2d Cir. 2000), as supporting a failure to disclose § 1346 conviction, Middlemiss has been subsequently construed by the Second Circuit as an example of the category of honest services schemes "in which the defendant breached or induced the breach of a duty owed by an employee or agent to his employer or principal that was enforceable by an action at tort." Rybicki, 287 F.3d at 264; accord Handakas, 286 F.3d at 106-07 ("Together, then, Sancho and Middlemiss appear to stand for the proposition that a scheme to harm another by the breach of a duty enforceable by an action in tort may support a conviction for a scheme to defraud another of 'honest services.'").

[9]"What the government must prove to satisfy [the honest services] element of the offense is defined by § 1346 - not by

jaundiced view of the constitutionality of § 1346, see Handakas, 286 F.3d at 104.[10] Contrary to the Government's contention, the citation of certain out of circuit cases by the majority in Handakas, see 286 F.3d at 111-12,[11] did not implicitly endorse a failure to disclose theory but rather, as the accompanying explanatory parentheticals establish, implicitly staked out a heartland of core conduct, exemplified specifically by bribery, as falling within the meaning of the "honest services." Based on that implication, this Court concluded that § 1346 criminalizes and provides sufficient notice of the criminality of schemes of bribery and extortion.

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judicial decisions that sought to interpret the mail and wire fraud statutes prior to the passage of § 1346."

[10]"If we were the first panel attempting to discern the meaning of the phrase 'honest services' in § 1346, we would likely find that part of the statute so vague as to be unconstitutional on its face . . . . The plain meaning of 'honest services' in the text of § 1346 simply provides no clue to the public or the courts as to what conduct is prohibited under the statute."

[11]"United States v. Brumley . . . (rejecting constitutional challenge based on vagueness where defendant was a state employee who solicited bribes . . .); United States v. Paradies . . . (rejecting as applied challenge where scheme involved bribery of a public official) . . . ; United States v. Bryan . . . (rejecting as-applied challenge where defendant was a state official that rigged bidding for state agency contracts) . . . ; United States v. Waymer . . . (rejecting facial and as-applied challenges where defendant was a government official that accepted kickbacks) . . . " (emphasis added)

The Court therefore adheres to its prior view that under controlling Second Circuit caselaw, § 1346 applies only to schemes of bribery, extortion and breaches of duty in the agency context that are enforceable in tort.[12] The Government's "failure to disclose" theory of criminal liability constitutes none of these schemes, as it is plainly not limited to bribery or extortion, and Connecticut municipalities have no recognized action in tort against their elected officials for damages resulting from their officials' failure to disclose personal financial interests in connection with matters over which the official exercises decision making authority. While the Government cites City of Waterbury v. Santopietro, No. 117006, 1994 WL 442527 (Conn. Super. Aug. 11, 1994), as an example of a municipality's tort claim against its mayor for breach of duty related to the manner in which

[12]The Government's reliance on the Court's quotation from United States v. Viertel, No. S2 01 CR. 571(JGK), 2002 WL 1560805 at *9 (S.D.N.Y. July 15, 2002), is misplaced. Viertel was not a failure to disclose case, and does not support expanding § 1346 beyond the narrow confines of Handakas and Rybicki. It is cited in footnote 17 of Ganim I in connection with the Court's interpretation of Second Circuit precedent, because there are two ways of reading Handakas and Rybicki. They could be read as limiting § 1346 to only the tort exception, or they could be read as limiting § 1346 to both the tort exception and schemes encompassing bribery and extortion. The Court (with the defendant's agreement) concluded that the former reading was unduly restrictive, a conclusion which finds support in Viertel.

state, local, and federal funds are administered, Santopietro stands merely for the proposition that a city may sue its mayor in tort for conversion of public funds. See id. at *5. It does not stand for the proposition that the failure to disclose the theft of such funds gives rise to an action in tort by the wronged municipality.

Inasmuch as the Government's Motion for "Clarification" [Doc. #79] seeks expansion of the honest services theory beyond the bounds set by controlling Second Circuit case law, such motion is DENIED.

IT IS SO ORDERED.

/s/

Janet Bond Arterton
United States District Judge

Dated at New Haven, Connecticut, this 12th of December, 2002.