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Law's 'Stradivarius'; Inside Trader Ruling Saves Mail Law As Key Tool for Federal Prosecutors

By STUART TAYLOR JR. and SPECIAL TO THE NEW YORK TIMES

"To Federal prosecutors of white-collar crime, the mail fraud statute is our Stradivarius, our Colt .45, our Louisville Slugger, our Cuisinart - and our true love," Jed S. Rakoff wrote in a 1980 law review article. Prosecutors may flirt with other laws, he said, but they always come home to mail fraud, "with its simplicity, adaptability, and comfortable familiarity."

After seven years as a Federal prosecutor in New York, Mr. Rakoff is now a defense lawyer in white-collar criminal cases. On Monday one of his clients, David Carpenter, came to rue the "adaptability" of the 115-year-old statute barring the use of the Federal mails in schemes to defraud, and its companion law against wire fraud.

The Court upheld Mr. Carpenter's conviction, along with those of R. Foster Winans, a former reporter for The Wall Street Journal, and another man on charges including mail and wire fraud for profiting in the stock market on the basis of Mr. Winans's advance knowledge of Journal articles.

In the process, the Court softened the impact of a June 24 decision that had alarmed Federal prosecutors. That ruling, overturning a long line of Federal appellate decisions, held that the mail fraud statute protected only property rights and thus could not be used to prosecute public officials under vague allegations of defrauding citizens of their "intangible rights to honest and impartial government." Cast Doubt on Convictions

The June decision, in McNally v. United States, cast doubt on more than 185 convictions in recent years and dozens of other pending investigations based on the amorphous "intangible rights" theory, according to Justice Department officials.
It led to the reversal last week of the 10-year-old mail fraud and racketeering convictions of former Gov. Marvin Mandel of Maryland and five associates in an allegedly corrupt scheme involving race track legislation.

The McNally decision's ambiguous language also caused concern among prosecutors that the Court might be ready, in the Winans case, to cut back drastically on the traditionally broad reach of the mail and wire fraud statutes by ruling that they outlawed only frauds directly involving money or tangible property.

This Monday's decision, however, reassured Federal prosecutors that the mail fraud law remains a Louisville Slugger, still available for bashing malefactors from inside traders to commercial spies to corrupt officials. Property Can Be Intangible

Justice Byron R. White, the author of both decisions, said in the Winans opinion that "the object of the scheme was to take The Journal's confidential business information," the publication schedule and content of future "Heard on the Street" columns. "Its intangible nature," he wrote, "does not make it any less 'property' protected by the mail and wire fraud statutes."

Thus, while the "intangible rights" doctrine is dead, the mail fraud statute clearly remains a potent weapon after the Winans decision's broad definition of "intangible property."

Prosecutors have long turned to the mail and wire fraud statutes as a means of prosecuting conduct they considered wrong but might have difficulty fitting into the narrower definitions in other federal criminal statutes. They have routinely included catch-all allegations of mail or wire fraud in indictments alleging more specific crimes.

According to legal experts, including Mr. Rakoff, Arthur F. Mathews of Washington, and William F. Weld, head of the Justice Department's Criminal Division, the Winans decision did not so much open new vistas for criminal prosecution as make it clear that prosecutors can confidently continue to bring most of the types of cases they have been bringing for many years. Law Dates to 1872

"It's not like the Supreme Court has changed a red light to a green light," Mr. Mathews said. "Prosecutors have assumed they could bring these cases all along, although there was a scare thrown up for a few months by the McNally decision."

Mr. Weld said today he was "delighted" with the Winans decision. " "We pleaded a lot of straight intangible-rights cases in the past which are now going down the tubes," he noted. But he said the Government could hope to win mail fraud convictions in similar public corruption cases in the future by basing them on allegations that the defendants in some way defrauded their government employers or others of property - their own salaries, for example.

Adopted in 1872, the mail fraud statute was one of several broad, open-ended laws expanding Federal criminal jurisdiction after the Civil War. Keeping the mails free of

fraudulent matter was deemed a Federal concern, and what would otherwise be crimes only under state law could be prosecuted in Federal courts.

The law's key language bars use of the mails in "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises."

A key sponsor said in Congressional debate the main purpose was to strike against frauds "by thieves, forgers and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country." Tie to Mails Can Be Weak

The Supreme Court has made it relatively easy for prosecutors to base Federal jurisdiction upon mailings with a rather tangential relationship to the alleged fraud. In the Winans case, for example, the Court held that the mails and wires were used in the scheme because The Wall Street Journal used these means to send the newspaper to its customers, even though there was no proof that the defendants themselves had used wires or mails.

The prosecutions of Mr. Mandel and many others on amorphous charges of defrauding citizens of their intangible rights to honest government were the farthest extension of the mail fraud law, making it seem almost limitless.

Mr. Rakoff, whose 1980 law review article was cited in both the majority and dissenting opinions in the McNally decision, said today that while he favors "flexible" interpretation of the mail fraud law, things had gone too far before that ruling. Knowing What Crime Is

He said the Court had corrected decades of acquiescence by lower courts in applications of the statute beyond the wildest contemplations of its framers.

"Before McNally," he said, "the courts had turned the mail fraud statute into a roving warrant to prosecute any misconduct that smelled bad to a prosecutor.

"In our system, we at least pay lip service and ought to pay more than lip service to the notion that criminal offenses ought to be narrowly defined so that a person knows whether something he is about to do is criminal before he does it."

Such arguments are not always successful in the Supreme Court, however, as the fate of Mr. Carpenter and Mr. Winans attests.

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