Deprivation of right to honest service of government
Deprivation of right to due process
Deprivation of right to be informed of the nature and cause of accusation
Deprivation of right of honest service law is Title 18 USC 1346

Title 18 USC § 1346. Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

(Added Pub. L. 100–690, title VII, § 7603(a), Nov. 18, 1988, 102 Stat. 4508.)

OpEd - Our Intangible Right To "Honest Services" By Public Officials

By Valerie D Nixon

"The essence of public corruption is that public officials deprive people in the community of their honest efforts to represent them. That's theft of honest services, and that's what the statute covers." Assistant U.S. Attorney Shane Harrigan.

Honest services' law, 18 U.S.C. §1346, is a brief addendum to the federal mail and wire fraud statute that makes it possible to prosecute public officials for a variety of unethical and criminal activities. This addendum in short reads as a "scheme or artifice to deprive another of the intangible right of honest services."

The 1872 mail fraud statute incorporated the common law concept of fraud, which consists of depriving someone of property by lying. In the late 1980's, federal prosecutors persuaded lower federal courts to consider that the statute should also include deprivations of the intangible right to honest services. Congress responded by adding a new section to the mail fraud statute declaring that the public had a right to fair and honest representation by public officials. The federal mail fraud statute and honest services clause provides the federal government with jurisdiction to prosecute state and local officials, as well as federal officials. An extremely effective tool to fight public corruption, it is utilized more often than bribery or extortion charges.

In the Seventh Circuit, violating "intangible rights" constitutes a breach of fiduciary duty for personal gain, while most other courts seem to treat every legal duty of a public official as fiduciary. How "honest" must a public official be is a highly contested matter. Despite most citizens demand for honest government officials, we frequently ignore or excuse questionable behaviors by those in positions of power. On the other end of the spectrum, most federal courts of appeals have held in certain circumstances, even a government official's failure to disclose a material conflict of interest can fit within the meaning of the term "honest services", thus is prosecutable. Proving intent is the most difficult area in prosecution, with some cases not so clear cut.

Congressman Randy "Duke" Cunningham along with Washington defense contractor Mitchell Wade were recently convicted under the "honest services" statute, but they are not alone. Former Illinois Governor George Ryan joined the ranks of judges and attorneys who have been prosecuted for violations of the publics' trust. Corrupt government officials usually receive the most media attention with lesser known corporate agents being brought into the public eye when their crimes are so egregious as to demand justice for their victims.

"Honest Services" can also be an effective means for prosecution under RICO; Racketeer Influenced and Corrupt Organizations Act of 1970. When a rank and file union member pays union dues, the well paid Union Representatives have a fiduciary responsibility to perform their duties as the injured members' representative. When the Union Representatives fail to perform their services in an honest and ethical manner, when accusations fly of bribery, threats, intimidation, as well as secret meetings and questionable relationships between the Union Reps and contractors who are being accused of severe worker safety violations, this statute can encompass all the various charges under one heading, as the theft of honest services. A newly filed civil suit in the US District Court of SF may soon test this statute and how much protection and justice will be provided for injured workers.

Interestingly, the Ninth Circuit Court of Appeals recently declared that the public's right to "honest services" also applies to private individuals when there is a fiduciary relationship. United States v. Williams, 441 F.3d 716 (9th Cir. 2006). This inclusion may hold company officials personally responsible for illegal discretionary acts to which the individual personally benefited, instead of allowing the agency itself to bear the consequences for the misdeeds of it's employees. The federal First Circuit Court of Appeals, has expanded it's term of bribery in government official cases to include what it calls "coaxing," which is "a more generalized pattern of gratuities to coax 'ongoing favorable official action.'" United States v. Woodward, 149 F.3d 46, 55 (1st Cir. 1998).

If there was ever a more appropriate time to focus on honest, ethical and moral guidance in dealing with others, now there is one more reason, dishonesty may be a hazard to your liberty.

CITED REFERENCE MATERIALS:

Honest services' law vexes defense lawyers in fraud cases
The Intangible Right to Honest Services
'Honest services' fraud law gets frequent use
Appellate Courts Extend “Intangible Rights” Theory Of Mail & Wire Fraud
From Corrupt Government Officials To Private-Sector
6-13-06

Vagueness of statute on corruption stirs dispute

'Honest services' fraud law gets frequent use

By Kelly Thornton
STAFF WRITER

January 12, 2006

There is a common thread running through the federal corruption prosecutions that have ensnared San Diego politicians and judges in recent years: a controversial statute known as "honest services" fraud.

Rep. Randy "Duke" Cunningham pleaded guilty to it. Councilmen Ralph Inzunza, Michael Zucchet and Charles Lewis were charged with it. So were former Southwestern College President Serafin Zasueta, political consultant Larry Remer, a trio of judges, Peregrine company executives and, on a national level, influential Washington lobbyist Jack Abramoff.

Five more local officials were charged under the statute last week: the former top executive of the San Diego pension system, Lawrence Grissom; its lawyer, Loraine Chapin; and three former trustees, Ronald Saathoff, Teresa Webster and Cathy Lexin. They were indicted by a federal grand jury Friday and are scheduled to be arraigned Feb. 1.

Assistant U.S. Attorney Shane Harrigan said it may be the most frequently used means of prosecuting public corruption – used even more often than bribery or extortion charges, which are generally harder to prove.

Prosecutors like the law for the same reasons that defense attorneys dislike it: The language in the 28-word statute is so vague that it can be applied to conduct that doesn't fit into a specific category such as bribery. It also gives the federal government jurisdiction to prosecute state and local officials, not just federal officials.

"It's an extremely effective tool to fight public corruption," said Harrigan, chief of the office's criminal division. "The essence of public corruption is that public officials deprive people in the community of their honest efforts to represent them. That's theft of honest services, and that's what the statute covers."

The statute

The section of federal law at the heart of many recent government prosecutions:

"For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."
Defense attorneys say it is a catchall statute that is ill-defined and subject to a jury's interpretation, and is a way for prosecutors to convert almost any kind of behavior into a felony.

"Fraudulent schemes are so many and varied, prosecutors love it," said Charles La Bella, a former U.S. attorney in San Diego who used the statute to prosecute a judicial corruption case in 1997. He is now a criminal defense attorney.

"Where it's not so clear and where there is legal debate among scholars is, there might be unethical conduct by a politician, but is it truly criminal?"

The law has had a tortured existence. In the 1970s and 1980s, federal prosecutors extended the mail-and wire-fraud statutes to cover not only loss of money or property but to fraud that deprived citizens of honest services from officials.

In 1987, the Supreme Court ruled that the statute should be limited to its original intent – the protection of money and property.

However, the demise of the honest-services concept was short-lived. A year later, Congress reacted by enacting the honest-services statute that is so widely used today.

The statute is a short one: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

In Cunningham's charging documents, the government spelled out its definition of honest-services fraud. The defendant "conspired and agreed to devise a material scheme to defraud the United States of its right to defendant's honest services, including its right to his conscientious, loyal, faithful, disinterested, unbiased service, to be performed free of deceit, undue influence, conflict of interest, self-enrichment, self-dealing, concealment, bribery, fraud and corruption."

Unlike those of other politicians, the case of the former Republican congressman from Rancho Santa Fe was different in that he also was charged with bribery.

To prove wire fraud under the statute, the government must show that the defendants planned to deprive citizens of honest services, it must show intent, and it must show that defendants used or caused someone else to use the mail or a wire communication – such as a telephone – to carry out the plan, according to a book of standard jury instructions published by the 9th Circuit Court of Appeals in San Francisco.

But courts around the country have grappled with the interpretation of the statute, and how juries should be instructed.

"This seemingly straightforward, 28-word statute has caused fits for the courts and the defense bar since its enactment," Richard M. Strassberg and Roberto M. Braceras wrote in a 2002 article in the New York Law Journal. "What, after all, is the 'intangible right of honest services'? What 'honest services' are owed, and by whom? How are such 'honest services' breached?"

The case against the three former councilmen is one example of the confusion and controversy.

Councilmen Ralph Inzunza, Michael Zucchet and Charles Lewis were indicted on extortion and honest-services wire-fraud charges in 2003, along with strip club associates. They were accused of scheming to deprive citizens of honest services by trading efforts to repeal a law banning touching between strippers and patrons for campaign contributions.

Before the jury was instructed by the judge and deliberations began, prosecutors and defense lawyers had agreed that quid pro quo, a Latin term meaning "one thing in return for another," is an element of the crime of extortion, but they clashed on whether it should be an element of honest-services wire fraud.

U.S. District Judge Jeffrey T. Miller raised the bar for the prosecution by requiring the jury to find a quid-pro-quo agreement to convict on all counts of honest-services wire fraud and conspiracy, not just the extortion counts. The decision was seen as an advantage for the defense.

Lewis died before trial. The others were convicted, despite the quid-pro-quo hurdle.

When the councilmen appeared for sentencing, Miller threw out Zucchet's convictions, acquitting him of seven counts and ordering a new trial on the remaining two.

Miller in essence concluded there was insufficient evidence of a quid-pro-quo agreement and indicated that the statute was wrongly applied to Zucchet. In his ruling, he noted that "the record amply shows that Zucchet engaged in deceitful conduct," but the judge questioned whether a crime was committed.

The prosecution has indicated that Miller's instruction to the jury will be an element of its appeal, if the Justice Department authorizes it. The U.S. Attorney's Office is awaiting that decision.

Zucchet's attorney, Jerry Coughlan, said he would not be surprised if the case went to the U.S. Supreme Court based on the controversy over the honest-services statute.

The federal judge assigned to the federal pension case, Roger T. Benitez, may or may not require what Miller did.

The pension-case defendants are charged with conspiring to deprive the city and pensioners of their right to honest services by illegally obtaining enhanced retirement benefits for themselves in exchange for allowing the financially strapped city to underfund the pension system.

Several San Diego defense attorneys, and Zucchet's lawyer in particular, have said federal prosecutors in San Diego have used the law inappropriately in several cases.

"I believe they're interpreting it too broadly, and that creates tremendous risks to our judicial system and our criminal justice system and public officials who are trying to do their jobs," said Coughlan, who also represents pension-case defendant Saathoff.

Juries are in a difficult position when faced with honest-services cases, defense lawyers said.

"Courts have struggled with this, and very few courts have come up with a reasonable instruction that anybody can understand so that it's not so broad that poor jurors have to go back and figure it out on their own," said Mario Conte, former head of the federal defender's office and now a professor at California Western School of Law.

Proving honest-services cases is no slam-dunk, experts said. The difficulty for the government in honest-services cases is proving intent. That threshold is a built-in protection for defendants, Harrigan said.

"We still have to prove all the elements of wire fraud," he said.

Appellate Courts Extend "Intangible Rights" Theory of Mail and Wire Fraud from Corrupt Government Officials to Private-Sector
May 2006
Joseph G. Poluka & Jerry Bernstein

White Collar Alert

The federal Ninth Circuit Court of Appeals recently made clear that the so-called "honest services intangible rights" theory of mail and wire fraud—i.e., that one can commit mail or wire fraud by failing to provide honest services—applies not just to corrupt government officials, but also to private-sector individuals, at least where a fiduciary relationship exists between the defendant and the victim. United States v. Williams, 441 F.3d 716 (9th Cir. 2006).

Prior to 1987, the federal government typically used the mail and wire fraud statutes to charge government officials with criminal wrongdoing upon the theory that public officials committed wire fraud when, for example, they accepted bribes because bribery deprived the public of its right to the official's honest services. The government relied on this theory because in the typical bribery situation there may be no victim, since the person paying the bribe is more than happy to do so, and may have actually initiated the scheme. In McNally v. United States, 483 U.S. 359 (1987), the Supreme Court nixed this theory, interpreting the mail and wire fraud statutes to protect only property rights, and not the intangible right of citizens to good government.

In 1988, Congress responded to McNally by enacting section 1346 of the Federal Criminal Code. This section defines the term "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C.

§ 1346. It did not, however, define the term "intangible right of honest services," or otherwise indicate whether the services involved were limited to those provided by a government employee. ***The statute since has allowed the federal government to charge and convict corrupt federal, state, and local government officials of fraud, but has been more controversial with respect to its application to private, non-governmental persons.***

The new Ninth Circuit case involved a criminal prosecution brought against John Anthony Williams, a self-employed insurance salesman and licensed financial planner who was retained as a commissioned agent by Waddell & Reed, a financial services company. In 1998, Williams sold an $88,000 annuity to the victim, an 87-year-old man with only an eighth-grade education. Combined with an inheritance he had received on his brother's life insurance policy and the purchase of other annuities from Williams, the victim's financial holdings totaled over $635,000. On Williams's instruction, the victim signed a durable power of attorney naming Williams as his agent. Williams then opened a private mailbox in the victim's name without his knowledge, opened a joint bank account in both of their names, and presented the victim with surrender forms for three of his annuities. Williams used the surrender forms to liquidate the annuities,

and deposited the proceeds into the joint bank account. He then transferred the money into accounts that he controlled and used it for personal items, such as a condominium in Belize.

The government's indictment charged Williams with mail and wire fraud under the traditional theory that Williams had defrauded the victim of money, and also under the "intangible rights" theory, alleging that Williams scheme also had deprived the victim of Williams's honest services. The jury returned a "general" verdict that found Williams guilty of mail and wire fraud, but did not specify the theory under which he was found guilty. On appeal, Williams argued that the "intangible rights" theory applies only to government officials and that, in the absence of a "special" verdict identifying the specific theory used by the jury, his conviction must be set aside because of the danger that the jury relied upon the purportedly improper "intangible rights" theory.

In finding that Williams properly could be charged with, and convicted of, mail and wire fraud under the "intangible rights" theory, the Ninth Circuit held that, because the victim employed Williams as a fiduciary, Williams "therefore undertook the high duties of honesty and loyalty to him." 441 F.3d at 724. The Court also rejected Williams' argument that the "intangible rights" provision was unconstitutional because it was too vague, holding that a "person of ordinary intelligence would reasonably understand" that obtaining a power of attorney from an 87-year-old client and then stealing $400,000 from him was a crime. Id. at 724-25.

The Ninth Circuit's Williams decision makes clear a trend in the federal courts of appeals to apply the "intangible rights" theory not only to government officials, but also to persons engaged in private enterprise. As the Ninth Circuit itself acknowledged, five of 12 federal circuit courts of appeals have so held. See United States v. Rybicki, 354 F.3d 124, 127 (2d Cir. 2003) (private lawyers); United States v. Vinyard, 266 F.3d 320, 326 (4th Cir. 2001) (private attorney); United States v. Frost, 125 F.3d 346, 366 (6th Cir. 1997) (university professors); United States v. deVegter, 198 F.3d 1324, 1330 (11th Cir. 1999); United States v. Sun-Diamond Growers of Cal., 138 F.3d 961, 973 (D.C. Cir. 1998).

The trend is of special importance to corporate officers and directors, as virtually every court in every state views them as owing fiduciary duties to their corporation's shareholders and, in some instances, creditors. Moreover, most federal courts of appeals have held that, in certain circumstances, a government official's failure to disclose a material conflict of interest can fit within the meaning of the term "honest services." For example, even before the enactment of section 1346 the Ninth Circuit had held that a "non-disclosure of material information" can be honest services mail fraud. United States v. Bohonus, 628 F.2d 1167, 1171 (9th Cir. 1980). The Third Circuit recently affirmed a fraud conviction of a government official on this conflict of interest notion. United States v. Panarella, 277 F.3d 678, 691 (3d Cir.) ("where a public official takes discretionary action that the official knows will directly benefit a financial interest that the official has concealed in violation of a state criminal law, that official has deprived the public of his honest services under 18 U.S.C. § 1346"), cert. denied, 123 S. Ct. 95 (2002). Williams and like cases create potential exposure to criminal liability for corporate officials who approve or enter into corporate transactions while having a conflict of interest. The federal First Circuit Court of Appeals, moreover, has expanded the term "bribery" in government official cases to include what it calls "coaxing," which is "a more generalized pattern of gratuities to coax

'ongoing favorable official action.'" United States v. Woodward, 149 F.3d 46, 55 (1st Cir. 1998) (citation omitted).

As one commentator noted a dozen years ago in discussing the "intangible rights" theory applied to government officials, "'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." G. Moohr, Mail Fraud and the Intangible Rights Doctrine Someone to Watch Over Us, 31 Harv. J. Legis. 153, 196 (1994) (citations omitted). It appears that the term "honest services" is evolving yet again, with a growing number of federal courts applying the theory to private actors with fiduciary duties.

The Intangible Right to Honest Services

This is the second in a series of posts in which I use the George Ryan trial to illustrate the unfairness of federal mail fraud and RICO prosecutions.

The Mail Fraud statute, enacted in 1872, forbids "devis[ing] any scheme or artifice to defraud" and then placing something in the mail for the purpose of executing this scheme. The 1872 statute incorporated the common law concept of fraud, which consists of depriving someone of property by lying.

Federal prosecutors in the 1970s sought to use the statute to convict people who had not deprived anyone of property. They persuaded lower federal courts to hold that the statute outlawed deprivations of "the intangible right to honest services." One of the earliest cases was the prosecution of a former governor of Illinois, Otto Kerner, by a United States Attorney who became Illinois' longest serving governor himself, James Thompson. The Supreme Court ultimately rejected the prosecutors' gambit, concluding that the mail fraud statute did not outlaw deprivations of an ill-defined intangible right to honest services.

The Department of Justice then complained that the Court's decision had deprived it of an important tool in its fight against government corruption. Although the Department could have asked Congress to enact a straightforward statute outlawing state and local bribery, it urged Congress to restore the prosecutors' gimmick instead. Congress (which in the area of criminal justice nearly always lets the Department do its work for it) responded by adding a new section to the mail fraud statute declaring that a scheme or artifice to defraud includes a scheme "to deprive another of the intangible right to honest services."

No one knows what this language means. A three-judge panel of the Second Circuit held it too vague to give fair notice to defendants, but the en banc Second Circuit set this ruling aside, offering its own unique definition of the term "honest services." The Seventh Circuit similarly rejected a claim that the statutory language was unconstitutionally vague, and it provided a different, equally distinctive definition. In the Seventh Circuit (and nowhere else), the "intangible rights doctrine" encompasses every breach of a fiduciary duty for personal gain. Other circuits' definitions also emphasize the breach of a fiduciary duty.

What, then, is a fiduciary duty? Again, no one knows, but the courts seem to treat every legal duty of a public official as "fiduciary." Five pages of the 91-page Ryan indictment are devoted to setting forth the "Laws, Duties, Policies and Procedures Applicable to" the defendants. None of the laws listed in this section are federal laws. They include provisions of the Illinois State Constitution, state criminal laws, non-criminal state regulations, a policy memorandum of the Illinois Secretary of State's office, and George Ryan's announced personal policy of not accepting gifts worth more than $50. With occasional exceptions, the indictment's later allegations of wrongdoing make no effort to specify which of the asserted state law duties the defendants violated.

In the Ryan case and others, prosecutors have used the intangible rights doctrine to stand federalism on its head. In effect, federal prosecutors prosecute state officials and private

individuals for state crimes in the federal courts. Worse, they use the mail fraud statute to bootstrap minor state crimes and violations of non-criminal regulations into 20-year federal felonies.

In the Ryan case, the prosecutors may transform even the violation of Ryan's announced personal policy into a 20-year felony. If Ryan pledged not to accept gifts worth more than $50 and then did so despite his pledge, did he deprive the people of Illinois of the intangible right to his honest services? Does every broken promise by a politician ("read my lips") now constitute mail fraud? Most of the "sweetheart deals" at the heart of the Ryan case do not appear to meet the legal definition of bribery. Nevertheless, the Ryan jury probably will be instructed to determine without substantial guidance whether these transactions deprived the state of the intangible right to Ryan's honest services.

Telling Local Government Officials About Honest Services Fraud

One argument rarely made for effective government ethics programs is that they will prevent government officials from being prosecuted for "honest services fraud."

Honest services fraud is to bribery what manslaughter is to murder. Sort of. By this I mean that many officials accused of bribery plead down to honest services fraud, a lesser, but still serious crime (the maximum sentence is 20 years).

Here's the statutory definition of honest services fraud (18 U.S.C. § 1346, part of the mail and wire fraud statute):

For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services.

Fraud is depriving someone of something by lying. That something was originally limited to tangible things, especially money and property. Honest services fraud extended, originally through court decisions, what could be deprived to intangible things.

The creation of honest services fraud recognized that government officials have fiduciary duties to citizens, and that citizens have a right to their honest services fulfilling these duties. Thus, lying on financial disclosure forms can lead to honest services fraud, as can the failure to disclose a conflict. At the center of each honest services fraud case, as varied as they are, is a lie or a secret, and usually personal gain.

In 1987, in McNally v. United States, 483 U.S. 350, the Supreme Court overruled prior decisions on intangible rights fraud. The next year Congress brought it back in statutory form, and it has continued to be an important way to prosecute government corruption at every level.

Honest services fraud is controversial for the vagueness of the statutory language and the many ways it has been applied in different jurisdictions. Most recently (last week, to be exact), in a dissent from denial of certiorari in Sorich v. United States*, Justice Scalia wanted the court to take the case in order to place limits on the interpretation of the statute. He wrote about "the prospect of federal prosecutors' (or federal courts') creating ethics codes and setting disclosure requirements for local and state officials. Is it the role of the Federal Government to define the fiduciary duties that a town alderman or school board trustee owes to his constituents?" And he called the statutory provision "nothing more than an invitation for federal courts to develop a common-law crime of unethical conduct."

Although local government ethics practitioners don't deal directly with this statute, it is important to know about and understand. It is especially important to let local government officials know that one other reason they should disclose and deal responsibly with all their possible conflicts of interest is that they could be prosecuted by the local U.S. Attorney. It's also another reason why ethics training and clear ethics guidelines are important.

Local government officials need to realize that ethics isn't so much about catching them, as about protecting them, and prosecution for honest services fraud is definitely something they will want

to be protected from. The Broward County (FL) Attorney tried to do this just this week, according to an article on Browardbeat.com. Here are some excerpts from his memo to county commissioners:

The U. S. Attorney's Office is now using this statute, and particularly [the honest services fraud] provision, to criminally charge and prosecute local public officials for ethical offenses, including conflict of interest. .... As construed in recent cases, when a political official uses his/her office for personal gain, he or she deprives his/her constituents of their right to have him/her perform his/her officials duties in their best interest.

The county attorney warned commissioners that the "statute is extremely broad." He wrote that commissioners who have an undisclosed conflict of interest violate the law "regardless of how that intent manifests itself." Prosecution only requires that "the defendant knowingly participated in a scheme to defraud" and used the mail, wires or a private commercial carrier to further the scheme.

Unfortunately, the Broward County attorney waited until a full-fledged scandal was underway. This sort of warning should be given to local government officials before it is too late. It can't be emphasized too much that government ethics provides guidelines that help prevent officials getting into trouble. Telling them about the honest services fraud provision is yet another guideline, and one that might scare some officials on the fence into jumping back down onto the ethical side.

For an excellent summary of honest services fraud law, although two years old, see an article by Ian D. Lanoff and Mark C. Nielsen. Also see a recent article in the Wall Street Journal, and an article from the San Diego Union-Tribune (San Diego has been the site of many uses of the honest services fraud provision).
*Sorich v. U.S. is a case where Chicago employees were found to have engaged in fraudulent political-patronage hiring for local civil-service jobs. For more on the situation that led to the case see my blog entry.

Vagueness of statute on corruption stirs dispute

'Honest services' fraud law gets frequent use

By Kelly Thornton
STAFF WRITER

January 12, 2006

There is a common thread running through the federal corruption prosecutions that have ensnared San Diego politicians and judges in recent years: a controversial statute known as "honest services" fraud.

Rep. Randy "Duke" Cunningham pleaded guilty to it. Councilmen Ralph Inzunza, Michael Zucchet and Charles Lewis were charged with it. So were former Southwestern College President Serafin Zasueta, political consultant Larry Remer, a trio of judges, Peregrine company executives and, on a national level, influential Washington lobbyist Jack Abramoff.

Five more local officials were charged under the statute last week: the former top executive of the San Diego pension system, Lawrence Grissom; its lawyer, Loraine Chapin; and three former trustees, Ronald Saathoff, Teresa Webster and Cathy Lexin. They were indicted by a federal grand jury Friday and are scheduled to be arraigned Feb. 1.

Assistant U.S. Attorney Shane Harrigan said it may be the most frequently used means of prosecuting public corruption – used even more often than bribery or extortion charges, which are generally harder to prove.

Prosecutors like the law for the same reasons that defense attorneys dislike it: The language in the 28-word statute is so vague that it can be applied to conduct that doesn't fit into a specific category such as bribery. It also gives the federal government jurisdiction to prosecute state and local officials, not just federal officials.

"It's an extremely effective tool to fight public corruption," said Harrigan, chief of the office's criminal division. "The essence of public corruption is that public officials deprive people in the community of their honest efforts to represent them. That's theft of honest services, and that's what the statute covers."

The statute

The section of federal law at the heart of many recent government prosecutions:

"For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."
Defense attorneys say it is a catchall statute that is ill-defined and subject to a jury's interpretation, and is a way for prosecutors to convert almost any kind of behavior into a felony.

"Fraudulent schemes are so many and varied, prosecutors love it," said Charles La Bella, a former U.S. attorney in San Diego who used the statute to prosecute a judicial corruption case in 1997. He is now a criminal defense attorney.

"Where it's not so clear and where there is legal debate among scholars is, there might be unethical conduct by a politician, but is it truly criminal?"

The law has had a tortured existence. In the 1970s and 1980s, federal prosecutors extended the mail-and wire-fraud statutes to cover not only loss of money or property but to fraud that deprived citizens of honest services from officials.

In 1987, the Supreme Court ruled that the statute should be limited to its original intent – the protection of money and property.

However, the demise of the honest-services concept was short-lived. A year later, Congress reacted by enacting the honest-services statute that is so widely used today.

The statute is a short one: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

In Cunningham's charging documents, the government spelled out its definition of honest-services fraud. The defendant "conspired and agreed to devise a material scheme to defraud the United States of its right to defendant's honest services, including its right to his conscientious, loyal, faithful, disinterested, unbiased service, to be performed free of deceit, undue influence, conflict of interest, self-enrichment, self-dealing, concealment, bribery, fraud and corruption."

Unlike those of other politicians, the case of the former Republican congressman from Rancho Santa Fe was different in that he also was charged with bribery.

To prove wire fraud under the statute, the government must show that the defendants planned to deprive citizens of honest services, it must show intent, and it must show that defendants used or caused someone else to use the mail or a wire communication – such as a telephone – to carry out the plan, according to a book of standard jury instructions published by the 9th Circuit Court of Appeals in San Francisco.

But courts around the country have grappled with the interpretation of the statute, and how juries should be instructed.

"This seemingly straightforward, 28-word statute has caused fits for the courts and the defense bar since its enactment," Richard M. Strassberg and Roberto M. Braceras wrote in a 2002 article in the New York Law Journal. "What, after all, is the 'intangible right of honest services'? What 'honest services' are owed, and by whom? How are such 'honest services' breached?"

The case against the three former councilmen is one example of the confusion and controversy.

Councilmen Ralph Inzunza, Michael Zucchet and Charles Lewis were indicted on extortion and honest-services wire-fraud charges in 2003, along with strip club associates. They were accused of scheming to deprive citizens of honest services by trading efforts to repeal a law banning touching between strippers and patrons for campaign contributions.

Before the jury was instructed by the judge and deliberations began, prosecutors and defense lawyers had agreed that quid pro quo, a Latin term meaning "one thing in return for another," is an element of the crime of extortion, but they clashed on whether it should be an element of honest-services wire fraud.

U.S. District Judge Jeffrey T. Miller raised the bar for the prosecution by requiring the jury to find a quid-pro-quo agreement to convict on all counts of honest-services wire fraud and conspiracy, not just the extortion counts. The decision was seen as an advantage for the defense.

Lewis died before trial. The others were convicted, despite the quid-pro-quo hurdle.

When the councilmen appeared for sentencing, Miller threw out Zucchet's convictions, acquitting him of seven counts and ordering a new trial on the remaining two.

Miller in essence concluded there was insufficient evidence of a quid-pro-quo agreement and indicated that the statute was wrongly applied to Zucchet. In his ruling, he noted that "the record amply shows that Zucchet engaged in deceitful conduct," but the judge questioned whether a crime was committed.

The prosecution has indicated that Miller's instruction to the jury will be an element of its appeal, if the Justice Department authorizes it. The U.S. Attorney's Office is awaiting that decision.

Zucchet's attorney, Jerry Coughlan, said he would not be surprised if the case went to the U.S. Supreme Court based on the controversy over the honest-services statute.

The federal judge assigned to the federal pension case, Roger T. Benitez, may or may not require what Miller did.

The pension-case defendants are charged with conspiring to deprive the city and pensioners of their right to honest services by illegally obtaining enhanced retirement benefits for themselves in exchange for allowing the financially strapped city to underfund the pension system.

Several San Diego defense attorneys, and Zucchet's lawyer in particular, have said federal prosecutors in San Diego have used the law inappropriately in several cases.

"I believe they're interpreting it too broadly, and that creates tremendous risks to our judicial system and our criminal justice system and public officials who are trying to do their jobs," said Coughlan, who also represents pension-case defendant Saathoff.

Juries are in a difficult position when faced with honest-services cases, defense lawyers said.

"Courts have struggled with this, and very few courts have come up with a reasonable instruction that anybody can understand so that it's not so broad that poor jurors have to go back and figure it out on their own," said Mario Conte, former head of the federal defender's office and now a professor at California Western School of Law.

Proving honest-services cases is no slam-dunk, experts said. The difficulty for the government in honest-services cases is proving intent. That threshold is a built-in protection for defendants, Harrigan said.

"We still have to prove all the elements of wire fraud," he said.