

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 06-CR-020

GEORGIA THOMPSON,

Defendant.

**DEFENDANT'S MEMORANDUM SUPPORTING
MOTION TO DISMISS COUNT TWO**

I.

INTRODUCTION

Count Two of Georgia Thompson's indictment advances a theory that Thompson schemed to defraud the State of Wisconsin "of the right of honest services." The statutory support for that theory, which the United States Supreme Court had held beyond the scope of the mail fraud statute, 18 U.S.C. § 1341, lies entirely in 18 U.S.C. § 1346. This memorandum explains why § 1346 is incompatible with Article III, § 3 of the United States Constitution. The statute yields. Count Two next must be dismissed, for it lacks constitutional footing.

II.

FACTS

In its second count, the indictment alleges that Thompson “did knowingly devise and participate in a scheme to defraud the State of Wisconsin of the right of honest services.” She “intended her actions to cause political advantage for her supervisors,” the grand jury advises. Indictment, Count Two, ¶ 3. Further, her actions “helped and were intended to help her job security.” Indictment, Count Two, ¶ 4. Count Two avers violation of 18 U.S.C. §§ 2, 1341, and 1346.

In its common allegations, the indictment posits that Thompson’s obligations under state law included a “duty” to “provide honest services in the evaluation and selection process” pertaining to travel services proposals. Indictment, Common Allegations, ¶ 11.

Today, Thompson moves to dismiss Count Two. Her challenge is constitutional and invites no factual inquiry outside the indictment.

III.

ARGUMENT

Thompson raises in this motion no vagueness, overbreadth, Tenth Amendment or federalism challenge to § 1346. She confronts a more fundamental problem left unconsidered.

In *McNally v. United States*, 483 U.S. 350, 356-61 (1987), the Supreme Court ruled that the mail fraud statute did not embrace schemes to deprive persons of an “intangible right,” such as a posited right to good government. Prosecution theories of the kind then were in vogue. *McNally* ended them.

Congress disliked *McNally*. In 1988, it enacted 18 U.S.C. § 1346. That statute provides in full:

For 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.

Overnight, prosecutions for fraudulently depriving persons of their “right” to honest services flourished anew.

As an initial matter, § 1346 is incoherent. Its adjectival reference to “intangible” rights necessarily suggests other rights instead tangible. That is nonsense. Charitably, the construct is redundant; all rights, properly named, are intangible. They are incorporeal, have no physical quality, and are incapable of being touched. They denote legal relations of a particular kind. Carefully understood, a right is a “claim” and always exists in correlation to another’s duty. Wesley Newcomb Hohfeld, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 36-38 (Yale U. Press, 3d ed. 1964) (first published at 23 *YALE L.J.* 16 (1913), and 26 *YALE L.J.* 710 (1917)).

But for today, the more substantial objection to § 1346 is to its purport. The statute would make criminal a fraudulent deprivation of honest services, when there is a right to them. That legislative effort requires first understanding the relationships, in a jurisprudential sense, under which the law might recognize a “right” of *K* to enjoy *L*’s honest services. Second, it requires understanding how then law might impose the correlative duty on *L* to provide those services to *K* (which again the latter has a right to enjoy). Third, it requires understanding what remedy the law might afford *K* for denial of his right, and more importantly now, what penalty the law might exact from *L* for her failing of duty. Common law provides these three answers. Fourth and finally, the legislative effort requires discerning whether any supervening change in the law disables the government at least from imposing a criminal penalty on *L* for her dereliction. After all else, it is a criminal penalty for violating a supposed duty, correlative to a supposed right, that the Court must address here. The United States Constitution provides this last answer.

In succeeding subsections, Thompson turns to these four questions and their answers.

a. Lawyers, judges, and laity chronically misapprehend the legal relation that is, or is not, a “right.” We mistake immunities, powers, and privileges all for rights. Hohfeld, *FUNDAMENTAL LEGAL CONCEPTIONS* at 36. At a

minimum, ever changing contexts create confusion. *Cf. United States v. Patrick*, 54 F. 338, 348 (C.C.M.D. Tenn. 1893).

Formalist ideas matter here, because Congress chose in § 1346 to speak of a “right.” The late Professor Hohfeld (1879-1918), first of Stanford Law School and later of Yale Law School, was in his short lifetime the preeminent expositor of jurisprudence as a formal philosophical study, even science,¹ of legal relations (he preferred jural relations). His jurisprudence is a distillation and classification of the common law’s relationships, as he discovered them in judicial opinions. For Hohfeld, a right of one person always is correlated to a duty of another. If *C* has a right, or claim, to receive of 1,000 lbs. of soy beans, then his neighbor and contractual partner *D* has the duty to deliver the beans. Right and duty are jural correlatives. Hohfeld, *supra*, at 36, 65.

But if *C* wishes to grow the necessary soy beans himself on his own land, it makes no sense to say that he has a right to do so; there is no correlative

¹ The legal realist Professor Walter Wheeler Cook’s introduction to Hohfeld’s book ascribed science to Hohfeld. Hohfeld, *supra*, introduction at 3. Strictly speaking, Hohfeld’s work was not science. He neither employed the scientific method nor offered falsifiable hypotheses. An improved comparison is to taxonomy, in the tradition of the great eighteenth century Swedish botanist, Carl von Linne. Like Linnaeus (as he is better known), Hohfeld offered a logically rigorous, internally consistent system of classification. Through such a system, one can begin to see, and then to understand, the subtle relationships that bind together — in the case of Linnaeus’ work — all of the plant and animal kingdoms. With Hohfeld, one has a chance to begin to see and understand the relationships that form collectively the kingdom of law; that is, of jurisprudence.

duty. Instead, *C* has a “privilege” (synonymous with “liberty,” *id.* at 42, 47) to grow his own beans, and the correlative interest is that neighbor *D* has, in Hohfeld’s lexicon, only “no-right” to insist that *C* not grow the beans.

To continue with Hohfeld’s analytical scheme in outline, if *C* now has the “power” to undercut *D*’s price and to sell his excess soy crop to merchant *E*, then *D* has the correlative “liability” that *C* will do so. Here Hohfeld uses the term “liability” a bit idiosyncratically to suggest risk or vulnerability. *See id.* at 55.² Finally, an “immunity” correlates to a “disability” (that is, a “no-power,” *id.* at 60). Immunity has the same relation to power that privilege bears to right: a power is one’s affirmative control over a given legal relation to another, while immunity is freedom from that power or control; right is an affirmative legal claim against another, while privilege is freedom from the other’s right or claim. *Id.* at 60. Immunities often are confused with rights, *id.* at 62, but Hohfeld understood the difference in relation.

With this framework, it becomes apparent that *K* can have a right to *L*’s honest services, or a right to good or honest government, only if *L* has a correlative duty to provide that. But whence in a democracy, precisely speaking, arises a “right” to a government employee who will not intend her actions “to

² Although Professor Samuel Williston evidently agreed that Hohfeld’s analysis was sound, he balked at the choice of “liability,” among other terms. Hohfeld, *supra*, Professor Arthur L. Corbin’s foreword at xii.

cause political advantage for her supervisors,” in the indictment’s terms? Who will not intend “to help her job security”? The citizen who favors the supervisors as a political matter will wish the government employee to act in a certain way. The citizen who disfavors the supervisors politically will wish that she act in an opposite or at least different fashion. Neither can point to any legal right.

Rather, in any polity, *K*, as our surrogate for the public, more accurately has a *power* to remove *L* or to alter her behavior by removing her supervisors. And *L* correlatively has the *liability* that she may be removed or redirected, either immediately or through the mediate step of the removal of her supervisors. In a peaceful democracy, ideally that power is exercised through the ballot. But in an unquiet democracy, or in a polity that affords no access to the ballot, it may be exercised by popular uprising. Either way, it is power, not right.

The noted lawyer Frank Oliver put it poetically:

Assertion of a right to good government wars with logic and history. It is at best inane, at worst, dangerous. Engines for insuring good government or eliminating bad government are powers, not rights. They are political, not legal. We have used them both.

They are the ballot and revolution.

Messinger v. United States, No. 87-C-6158, Petitioner’s Response to Motion to Dismiss Post-Conviction Petition at 10 (N.D. Ill. 1988) (copy in files of undersigned counsel).

Were a property interest at issue, this case might be different. Both personalty (including currency and other negotiable instruments) and realty lend themselves to creation of rights and duties. But here, Congress in § 1346 disavowed anything so tangible as physical property. It, and this indictment, are concerned only with intangibles.

b. There being no property interest or other corporeal thing at issue, the source of the duty correlating to the presumed, but elusive, right is obscure as well. The posited right appears no more than a hope or expectation, which in turn might actuate or provide a reason to use the power that *K* (the public) more correctly, and concededly, has. However, here the sovereign — a democratic majority, for our purposes — has the privilege to create and impose upon *L* the opposite, a duty, if it chooses. If one has a privilege to do *X*, the jural opposite is a duty not to do *X*. *Id.* at 39. Correlatively, again, unless there is some supervening bar (for example, the Constitution, which may trump ordinary legislative action), there is Hohfeld's "no-right" of the minority or the government employee *L* to resist exercise of that privilege of creating duty.

The common law in fact did by the twelfth century or earlier create a duty of faith and obedience on the part of certain subordinates — servants, wives, secular and religious subjects of prelates — to superiors who were not sovereign. It also recognized a similar duty of citizens and aliens living in the

realm to give fealty and obedience to the sovereign as the institution of monarchy unified power at more distant removes and replaced a feudal system of social organization. This duty of faith and obedience, or loyalty, became the law of treason. While its enforcement in early centuries was through displacement of property interests, either escheat to a local lord or forfeiture to the king, the duty itself was quite unrestricted to property. The duty related, in the vulgar argot of Congress, to the intangible. And it had the effect of creating a correlative right in the sovereign or the private superior.

The third question, then, concerns the historical development of this duty, now renewed in § 1346. The fourth explores the possibility of a supervening bar to continuation of that duty.

c. At common law, well before the limits that the 1352 Statute of Treasons imposed during the reign of Edward III, it was petty treason for a servant to slay his master, a wife her husband, or a man his prelate. The treason arose from the fact that the subordinate "oweth Faith and Obedience" to the superior. Statute of Treasons, 25 Edw. III. c. 2 (1352). "These are clearly hierarchical duties owed by the lower-standing members of society, servants, wives, and lay people, each relative to someone of higher standing. The breach of the hierarchical duty expresses the feudal nature of the crime." George P.

Fletcher, *Ambivalence About Treason*, 82 N.C. L. REV. 1611, 1614 (2004). High treason consisted in breaching the duty of faith and obedience to the king.

In petty treason lies the origin of punishment for betrayal of the “faith and obedience” that a subordinate owed as duty to a superior who was not the sovereign. The superior in turn had the right to the subordinate’s faith and obedience. Both duty and right may be captured succinctly with the term loyalty.

Over time, both high and petty treason came to apply to breaches of that duty less serious than homicide. Much earlier than 1352, English law acknowledged malefactions short of homicide (or regicide) as constructive forms of treason, petty or high. Glanvill listed as high treason not just slaying the king or betraying the realm, but also falsifying a royal charter. Ranulf de Glanvill, TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND ch. XIV, 7 (ca. 1188). Borrowing from the Romans to refer to high treason as the crime of lese-majesty (*crimen laesae majestatis*), Bracton added hardly half a century later forgery of the king’s seal and counterfeiting, for two more examples. 2 Henrici de Bracton, ON THE LAWS AND CUSTOMS OF ENGLAND 334-35, 337-38 (ca. 1220-50). Bracton expressly distinguished these forms of treason from homicide, although the denial of bail except upon special instructions of the king was the same. 2 Bracton, at 335-36.

While the Statute of Treasons surely was designed to stem the growth of constructive treasons by legislation or judicial recognition, it had not that effect. Sir Matthew Hale complained in his treatise that, “[W]e need no greater instance of this multiplication of constructive treasons than the troublesome reign of king Richard II, which, tho it were after the limitation of treasons by the statute of 25 E. 3, yet things were so carried by factions and parties in this king’s reign, that this statute was little observed.”¹ Matthew Hale, HISTORY OF PLEAS OF THE CROWN 83 (1736).

During the reign of Henry VII (1485-1509), Parliament enacted an overt act requirement to restrict the spread of constructive treasons. Edward Coke, THIRD INSTITUTE 38 (1641).³ Again, the idea was to stem the judicial and legislative expansions of treason, high and petty, that came of convenience or political whim.

Yet the expansion continued apace. By the time of Blackstone, a contemporary of the founding fathers, he could write:

Treason, *proditio*, in it’s very name (which is borrowed from the French) imports a betraying, treachery, or breach of faith. It therefore happens only between allies, saith the mirror: for treason is indeed a general appellation, made use of by the law, to denote not only offences against the king and government, but also that accumulation of guilt which arises

³ America’s constitutional convention later adopted exactly that Tudor limitation in Article III, § 3 of the new Constitution.

whenever a superior reposes a confidence in a subject or inferior, between whom and himself there subsists a natural, a civil, or even a spiritual relation; and the inferior so abuses that confidence, so forgets the obligations of duty, subjection, and allegiance, as to destroy the life of any such his superior or lord. This is looked upon as proceeding from the same principle of treachery in private life, as would have urged him who harbours it to have conspired in public against his liege lord and sovereign: and therefore for a wife to kill her lord or husband, a servant his lord or master, and an ecclesiastic his lord or ordinary; these, being breaches of the lower allegiance, of private and domestic faith, are denominated *petit* treasons. But when disloyalty so rears its crest, as to attack even majesty itself, it is called by way of eminent distinction *high* treason, *alta proditio*; being equivalent to the *crimen laesae majestatis* of the Romans, as Glanvill denominates it also in our English law.

As this is the highest civil crime, which (considered as a member of the community) any man can possibly commit, it ought therefore to be the most precisely ascertained. For if the crime of high treason be indeterminate, this alone (says the president Montesquieu) is sufficient to make any government degenerate into arbitrary power. And yet, by the antient common law, there was a great latitude left in the breast of the judges, to determine what was treason, or not so: whereby the creatures of tyrannical princes had opportunity to create abundance of constructive treasons; that is, to raise, by forced and arbitrary constructions, offences into the crime and punishment of treason, which never were suspected to be such.

4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 74-91 (1769).

Blackstone then went on to list seven categories of high treason.

Even after Parliament acted again during the reign of Queen Mary, 1 Mar., c. 1, to roll back treason to the limits of the statute of 1352, new variations appeared. The

famed commentator listed three more such innovations. Blackstone, COMMENTARIES 74-91.

Section 1346, with its assertion of a right to honest services, unwittingly partakes in this tradition of unprincipled, and oppressive, expansion of the law of treason. The 1988 statute stems from no other seed than petty treason or, if the person deprived of his asserted right be the sovereign, high treason or lese-majesty. From there grew every English crime of disloyalty, disobedience, or faithlessness of servant to master, all forms of treason. Section 1346 is but the greenest sprout.

d. Petty treason, unavoidably the common law antecedent of § 1346 and the statute's necessary historical framework today, was in the late eighteenth century among eight major common law offenses that carried the death penalty. *Furman v. Georgia*, 408 U.S. 238, 334 (1972) (Marshall, J., concurring), citing Theodore F.T. Plucknett, A CONCISE HISTORY OF THE COMMON LAW 424-54 (Little, Brown & Co. 5th ed. 1956). Especially given its notorious history of constructive expansion, the framers of the United States Constitution sought to cabin such a crime. They chose not to punish criminally, as England and even the colonies continued to do, the violation of private duties binding servant (or slave⁴) to obey

⁴ See William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1782 (1996) (citation omitted).

the master; or wife⁵ to serve to her husband; or subject (secular or religious) to honor his prelate.⁶ They also sought to restrict the expansion of high treason, although to retain one core aspect as the Statute of Treasons defined it.

The framers accomplished these limitations on the reach of treason prosecutions with Article III, § 3. There the Constitution prescribes:

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

U.S. CONST. art. III, § 3.

With that provision, the Constitution entirely abolished petty treason as a federal offense. It preserved part of the common law of high treason – specific betrayals of the sovereign⁷ – only. At that, the Constitution admitted

⁵ See *Barney's Case*, 87 Eng. Rep. 683 (K.B. 1701) (admitting to bail of a wife indicted for petty treason for the killing of her husband).

⁶ John G. Bellamy, *THE LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES* viii (D.E.C. Yale, ed., 1970).

⁷ See Statute of Treasons, 25 Edw. III., Stat. 5 (1352); Bellamy, *THE LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES* 59. Note that it took many years, centuries, for treason to be understood as a felony at all. Initially, it was a statutory offense with “a history all of its own.” 2 Frederick Pollock & Frederic W. Maitland, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 502 (Cambridge 1895). Ordinary felonies, including petty treason, meant escheat of the vassal's fee or tenement to the feudal lord, not

prosecutions only of those species of high treason that threaten the nation's collective security from external enemies, or that entail traitorous war on the nation by its own.

In short, the Constitution leaves no room for § 1346. This statute is a form of petty treason legislatively contrived in slapdash fashion, just as Hale and Blackstone report of Parliament during the time of King Richard II (1377-99), in the second quarter century after the limitation on treasons effected under Edward III. The framers would have heard immediately the historical echoes of § 1346 from the time of Richard II. And they would have silenced that echo.

Indeed, they did. James Madison, writing one of his serial contributions to THE FEDERALIST, explained:

As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it. But as new-fangled and artificial treasons have been the great engine by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity upon one another, the [Constitutional] convention have, with great judgment, opposed a barrier to this particular danger by inserting a constitutional definition of the crime . . .

THE FEDERALIST, No. 43 (January 23, 1788).

forfeiture to the king. High treason resulted in royal forfeiture rather than feudal escheat, and that offense lost benefit of clergy much earlier than did petty treason. Bellamy, THE LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES vii-ix & n. 6; 1 Pollock & Maitland, HISTORY OF ENGLISH LAW 446.

Article III, § 3 forbids the restoration of this form of petty treason. Even assuming a sovereign people in a democracy owned the “right” to honest services of government officials, § 1346 in this application also supposes a duty that would be but a forbidden form of high treason.

IV.

CONCLUSION

Georgia Thompson prays the Court dismiss Count Two of the indictment, because 18 U.S.C. § 1346 offends Article III, § 3 of the United States Constitution. Without § 1346, the count alleges no crime.

Dated this 28th day of February, 2006.

Respectfully submitted,

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