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## PERSPECTIVE

## REVIEWS OF RECENT U.S. SUPREME COURT DECISIONS

## Supreme Court reins in government's fraud theories...again

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**T**he Supreme Court issued two opinions limiting the reach of the federal fraud statutes and eliminating often-used theories from the government's arsenal.

The Supreme Court issued two opinions, *Ciminelli v. United States*, 598 U. S. \_\_ (2023) and *Percoco v. United States*, 598 U. S. \_\_ (2023), limiting the reach of federal wire fraud statutes. These decisions are just the latest example of the Supreme Court overturning convictions involving conduct that could be considered unethical, but does not fall within the defined categories of fraud or corruption.

The wire fraud statute, 18 U.S.C. § 1343, criminalizes the use of interstate wires for "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." The honest services fraud statute, 18 U.S.C. § 1346, defines "scheme or artifice to defraud" to include a scheme to deprive another of the intangible right-of-honest services.

The Supreme Court has a history of overturning wire and honest services fraud convictions based on conduct that (per the Court) Congress did not intend the statutes to criminalize. In *Skilling v. United States*, 561 U.S. 358 (2010), the former Enron CEO's conviction for artificially inflating stock prices

was reversed because honest services fraud only criminalizes bribes and kickbacks. In *McDonnell v. United States*, 579 U.S. 550 (2016), the Court overturned a former Virginia governor's conviction for honest services fraud because the governor's conduct was not an "official act" under the federal bribery statutes. And in *Kelly v. United States*, 140 S. Ct. 1565 (2020), the Court reversed honest services and wire fraud convictions because reconfiguring bridge lanes was not considered a taking of money or property. *Ciminelli* and *Percoco* follow these decisions.

### SCOTUS rejects "right-to-control" theory

In *Ciminelli*, the Supreme Court held that the "right-to-control" theory cannot support a wire fraud conviction. The Court overturned Louis Ciminelli's conviction for par-

ticipating in a scheme to rig bids for New York state-funded projects, known as the "Buffalo Billion" initiative, in which proposals were strategically drafted to give preferential treatment to Ciminelli's company. Ciminelli was convicted of wire fraud under the "right-to-control" theory because the scheme deprived the entity responsible for awarding the state-funded projects of necessary information to make the awards.

A unanimous Supreme Court held that the wire fraud statute only reaches traditional property interests. According to the Court, the right to valuable economic information needed to make discretionary economic decisions – known as the "right-to-control" – is not a traditional property interest. Therefore, the "right-to-control" theory could not support a conviction under the federal fraud statutes. Importantly, the Court

highlighted the Government's concession that the "right-to-control" theory risked "expanding the federal fraud statutes beyond property fraud as defined at common law and as Congress would have understood it." It also criticized the use of the "right-to-control" theory to regulate ethics, noting that "[f]ederal prosecutors may not use property fraud statutes to set standards of disclosure and good government for state and local officials."

### Standard to convict private citizens of honest services fraud is too vague

In *Percoco*, the Supreme Court overturned the honest services fraud conviction of Joseph Percoco – a former aide to then-Governor Andrew Cuomo, who left his government position temporarily and assumed a private role as the Gov-

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ernor's campaign manager. While a campaign manager, Percoco accepted \$35,000 in exchange for using his influence to persuade a state agency to drop a funding requirement applicable to a developer.

Although a private citizen at the time of the payments, Percoco was convicted of honest services fraud, a statute traditionally used to prosecute public officials. At issue was the trial court's jury instruction that Percoco, despite being a private citizen at the time of the alleged bribes, could owe a duty of honest services if Percoco met the test in *United States v. Margiotta*: (1) he dominated and controlled any governmental business; and (2) people working in the government relied on him because of a

special relationship he had with the government. 688 F.2d 108 (2d Cir. 1981).

The Court held that this jury instruction was vague because it relied on a defendant's "clout" exceeding some ill-defined threshold. The jury instruction, therefore, did not identify what conduct was prohibited and could permit arbitrary and discriminatory enforcement. While the Court reversed Percoco's conviction, it stopped short of holding that a private citizen could never be guilty of honest services fraud, leaving open the question of liability for individuals who are not formally employed by the government, but enter into agreements authorizing them to act as agents on the government's behalf.

#### **Current state of fraud statutes**

*Ciminelli* and *Percoco* reflect the Court's continued rejection of fraud prosecutions of conduct considered "unethical," but not of the kind that Congress actually criminalized. *Ciminelli*, especially, dealt a blow to prosecutors (particularly those in the Second Circuit) who have had success in recent years obtaining convictions against defendants under an arguably easier to prove "right-to-control" theory. See *United States v. Johnson*, 945 F.3d 606, 612 (2d Cir. 2019) (wire fraud conviction based on deprivation of victim's right to control its assets); see also *United States v. Gatto*, 986 F.3d 104, 126 (2d Cir. 2021) (wire fraud conviction based, in part, on deprivation of information resulting in the loss of the right to

control the award of scholarships).

*Percoco*, however, did not close the door on honest services fraud charges against private citizens. Although the Supreme Court invalidated the 2d Circuit's *Margiotta* test as too vague, it firmly rejected a per se rule that a private citizen can never be guilty of honest services fraud. It will be interesting to see the government's willingness to bring honest services fraud charges against a private citizen in future cases. The Court declined to hold whether charges could be brought against a private citizen under hypotheticals raised by the government, but noted that as an agent for the government, a private citizen could owe a fiduciary duty to the government and, thus, to the public it serves.