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The Prosecution of 'Quasi-Public Officials' After 'Percoco v. United States'

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For decades, federal prosecutors have charged private individuals with public corruption when the individuals wielded substantial political power. Relying on the mail/wire fraud statutes, the government has charged such defendants as "quasi-public officials" who deprived the public of its right to "honest services."

This variant of honest services fraud was the basis of the pathbreaking prosecution more than 40 years ago of Joseph Margiotta. As Republican Party leader in Nassau County and the town of Hempstead, New York, Margiotta was convicted in 1981 of orchestrating a kickback scheme involving municipal insurance. Five years later, the U.S. Supreme Court rejected the honest services doctrine entirely in *McNally v. United States*, 483 U.S. 350 (1987), leading to Congress's enactment of 18 U.S.C. §1346, which established a specific statutory basis for charging "honest services" fraud. The prosecution of "quasi-public officials" for public corruption continued under Section 1346.

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This past term, the Supreme Court examined the law regarding a quasi-public official in *Percoco v. United States*, 598 U.S. 319 (2023), which arose from the prosecution of Joseph Percoco, former Executive Deputy Secretary to New York Governor Andrew Cuomo.

The court concluded that the jury instructions, which were based on the instructions upheld by the U.S. Court of Appeals for the Second Circuit in *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), did not give the jury a sufficiently clear and bounded definition of the "intangible right of honest services." It did not foreclose prosecution of private citizens for honest services fraud, but the *Percoco* decision raises questions as to the viability of such prosecutions in the future.

After briefly discussing honest services fraud generally, we turn to the Supreme Court's unanimous decision in *Percoco*, which invalidated the *Margiotta* decision as an "erroneous construction"

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of honest services law. We also discuss Justice Neil Gorsuch's concurring opinion, in which he expresses agreement with the view of Justice Antonin Scalia stated in his dissent in *Skilling v. United States*, 561 U.S. 358 (2010), namely that Section 1346 should be found unconstitutionally vague.

Honest Services Fraud

Beginning in the 1940s, prosecutors and judges interpreted the federal mail/wire fraud statutes to encompass schemes to deprive a person of intangible rights, including a right to "honest services." 18 U.S.C. §§1341, 1343. In 1987, the Supreme Court in *McNally*, in the context of alleged public corruption, held that the fraud statutes were not so broad as to permit prosecution for the deprivation of an intangible right to honest services. 483 U.S. at 360.

Percoco argued that the acts at issue occurred while he was a private citizen, and consequently he did not owe a duty of honest services to the citizenry.

Under 18 U.S.C. §1346, enacted in 1988, Congress made clear that "[f]or the purposes of [the mail and wire fraud statutes], the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

Almost three decades later, the Supreme Court took up a challenge to the statute on grounds of vagueness. In *Skilling v. United States*, it recognized that the statute raised due process concerns, but rather than invalidate the statute, the court restricted liability under Section 1346 to "the bribe-and-kickback core of the pre-*McNally* case law." 561 U.S. at 409.

Having identified this "core" of honest services fraud, the *Skilling* court held that criminal liability does not extend to public officials or private employees engaging in undisclosed self-dealing without a bribe or kickback. The decision did not have to address when a private citizen may be found to have violated a duty to provide honest services to the public.

Prosecution

Percoco was one of Governor Cuomo's top aides. The charges against him arose from a hiatus in his work as a state employee between April and December 2014. He left government to manage the governor's reelection campaign. In that period, Percoco agreed to help real-estate developer, Steven Aiello, convince Empire State Development (ESD), a state agency, to drop a labor-related requirement on a state-funded project. For assisting Aiello, Percoco received $35,000. Days before Percoco returned to his state position, he called a senior official at ESD and persuaded him to drop the requirement.

About 18 months later, Percoco was indicted and charged with, among other offenses, conspiracy to commit honest-services wire fraud. Percoco argued that the acts at issue occurred while he was a private citizen, and consequently he did not owe a duty of honest services to the citizenry.

Over Percoco's objection, the trial court instructed the jury that a private individual may owe honest services to the public if the individual was a "quasi-public official," meaning that (i) Percoco "dominated and controlled any governmental business" and (ii) "people working in the government actually relied on him because of a special relationship he had with the government." This two-part test derived from the Second Circuit's opinion in *Margiotta*.

Percoco was convicted at trial of two counts of honest-services fraud conspiracy and one count of bribery. On appeal, the Second Circuit concluded that the jury instructions upheld in *Margiotta* comported with honest-services law and held that the evidence was sufficient to prove that Percoco "owed New York State a duty of honest services while he was managing the [g]overnor's campaign." *United States v. Percoco*, 13 F.4th 180, 201 (2d Cir. 2021).

Percoco petitioned the Supreme Court to review the Second Circuit's affirmance of his conviction and answer the question whether a private citizen who "has informal political or other influence over governmental decisionmaking" owes a duty of honest services to the public.

The Court's Opinion

Justice Alito, writing for the court, held that a private citizen has a fiduciary duty to the public under very limited circumstances, and the jury instructions in *Percoco* did not sufficiently define those circumstances. The Supreme Court disagreed with the Second Circuit that Congress's enactment of Section 1346 "reinstated the *Margiotta*-theory cases" and disagreed with the government that Percoco could be held liable under alternative theories (discussed below).

The court took issue with the two-part Margiotta test because it set the bar too low for determining whether an individual's influence went beyond "minimum participation in the processes of government."

The court began by placing *Margiotta* in the context of broader legal developments. In 1982, a divided Second Circuit panel held that, despite not holding an "elective office," Margiotta owed a fiduciary duty to the general public to render honest services because (1) he exercised "de facto control" over governmental decisions, such that he "dominated and controlled" governmental business and (2) "others rel[ied] upon him because of a special relationship in the government." 688 F.2d at 122. Then the Supreme Court decided *McNally*, and Section 1346 was enacted the next year, as noted earlier.

In affirming Percoco's conviction, the Second Circuit reasoned that Section 1346 revived *Margiotta*-theory prosecutions by effectively overturning the *McNally* decision. 13 F.4th at 196. The Supreme Court disagreed.

The court concluded that in *Percoco,* the Second Circuit had ignored the teachings of *Skilling*, namely, that the intangible right of honest services "must be defined with the clarity typical of criminal statutes and should not be held to reach an ill-defined category of circumstances simply because of a smattering of pre-*McNally* decisions." 598 U.S. at 328.

The court took issue with the two-part *Margiotta* test because it set the bar too low for determining whether an individual's influence went beyond "minimum participation in the processes of government." Without clarity on what "dominat[ion]" means, it warned, the public will not know what conduct is prohibited, and such an "ill-defined" threshold may lead prosecutors to sweep in well-connected lobbyists and political party officials who do not owe the public a right to disinterested service. It gave several hypotheticals to emphasize the vagueness problem generated by the *Margiotta* standard.

Despite invalidating the "*Margiotta*-theory" of prosecution, the court did not go so far as the defense urged—i.e., that a private citizen may *never* be convicted of depriving the public of honest services. It held that a duty of honest services may apply to an individual not formally employed by the government if the individual becomes an "actual agent[]" of the government. It found support in what it called a "well-established principle" that individuals "'delegated authority to act on behalf' of a public official and to perform government duties have a duty to provide honest services."

Notably, the government did not defend the *Margiotta*-based jury instructions in the Supreme Court. It argued that the defects in the instructions were harmless because two alternative theories supported Percoco's conviction.

First, the government argued that Percoco owed a duty of honest services because he had been selected for future government service. The court found this theory problematic because the jury could have convicted Percoco under the *Margiotta*-based instructions without relying on evidence of Percoco's future service.

Second, the government argued that Percoco owed a duty of honest services because he had "exercise[d] the functions of a government position with the acquiescence of government personnel." This theory was problematic because, in the court's view, it "restate[s] *Margiotta*'s erroneous construction of the law," and the jury was not instructed to find that government personnel had to "acquiesce" in Percoco's exercise of government functions. The Supreme Court reversed the Second Circuit's decision and remanded the case for further proceedings.

The Concurring Opinion

Justice Gorsuch, joined by Justice Clarence Thomas, concurred in the court's decision, agreeing that the jury instructions were erroneous, but the concurring justices went further and called into question the entirety of the honest-services fraud doctrine, echoing Justice Scalia's dissent in *Skilling*.

Justice Gorsuch wrote that the "problem runs deeper" because "no set of instructions" could cure the vagueness of Section 1346. Like Justice Scalia, Justice Gorsuch found that the language of Section 1346 fails to address *McNally*'s concern that "honest-services fraud" is "unworkably vague," and the *Percoco* decision is one more example of the court's effort to invent rather than interpret the scope of criminal liability under the statute.

Justice Gorsuch expressed concern that the court's decision, which failed to define when a duty of honest services arises, leaves prosecutors and lower courts to "continue guessing" what type of relationship gives rise to a duty of honest services, and at the end of the day it is the public who will be the victims of the prosecutors' experimentation.

Justice Gorsuch concluded by calling on Congress, as the only branch able to revise Section 1346, to "provide the clarity it desperately needs." This suggestion is, of course, ironic because Section 1346 was drafted for the very purpose of addressing *McNally*'s earlier call for a clear legislative definition of criminal liability.

Conclusion

The *Percoco* decision is yet another instance of the Supreme Court's discomfort with what it perceives as unduly expansive interpretations of the mail/wire fraud statutes. This discomfort was manifest this past term in *Ciminelli v. United States*, 598 U.S. 306 (2023), which rejected the "right to control" theory of mail/wire fraud, and several years ago in *Kelly v. United States*, 140 S. Ct. 1565 (2020), which held that that misuse of regulatory authority did not constitute mail/wire fraud.

To be sure, prosecutors will still be interested in pursuing corruption charges against individuals who wield political power despite not being public employees.

How will such cases be brought in the future?

One possibility is Section 666 of Title 18, which was recently given a broad interpretation by the First Circuit in a Varsity Blues prosecution. *See* Elkan Abramowitz & Jonathan Sack, *Varsity Blues: First Circuit Overturns College Admissions Scheme Convictions – Part Two*, N.Y.L.J. (July 20, 2023).

No doubt other statutes and theories will be found. Time will tell how such prosecutions are framed going forward.