The Supreme Court's Continued Reshaping of Public Corruption Law

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The U.S. Supreme Court decided a pair of public corruption cases this term that continue the high court's reshaping of public corruption law. The two cases, *Ciminelli v. United States* and *Percoco v. United States*, both restrict prosecutors' use of federal fraud statutes to criminalize broad swaths of what many would consider to be unethical conduct as criminal violations of federal law. The cases also raise important questions about what comes next in this high-profile but often ill-defined area of federal criminal law.

This article addresses three related topics. First, the article places *Ciminelli* and *Percoco* in context, highlighting the Court's prior rulings on the use of federal mail and wire fraud statutes in corruption cases. Second, the article analyzes the *Ciminelli* and *Percoco* opinions. Finally, the article explores the cases' key takeaways for legal practitioners, companies, political organizations, lobbyists, and public officials.

The Court's Path to *Ciminelli* and *Percoco*

Domestic public corruption—corruption involving U.S. federal, state, and local officials—is not novel in the U.S., or to the Supreme Court, which first addressed the issue in 1810. See *Fletcher v. Peck*, **10 U.S. 87**, **130**–31 (1810) (discussing whether a legislative act may be voided if procured by corruption). Yet there was no general federal bribery law until 1853, following "concerns about fraudulent claims related to the Mexican War." Zephyr Teachout, Corruption in America 116 (2014). Nearly two decades later, in 1872, Congress enacted a prohibition that now-Senior District Judge Jed S. Rakoff would describe as white-collar prosecutors' "true love": the mail fraud statute. Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duquesne L. Rev. 771, 771 (1980).

"Honest Services Fraud"

As originally enacted, the mail fraud statute criminalized the use of the mails to advance "any scheme or artifice to defraud." In 1909, the statute was amended to prohibit "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Thereafter, courts began to view the "money or property" clause as distinct from the "scheme to defraud" clause and concluded that the statute prohibited not only schemes to deprive another of money or property, but also schemes to deprive others "of intangible rights." One such "intangible right" was the so-called right to "honest services."

Under this theory, a defendant could be convicted of mail fraud for depriving his employer, or the public, of its intangible right to the defendant's honest services, typically in violation of a fiduciary duty. This theory was most often used to prosecute public corruption cases, but was also deployed against private actors.

That is, until the Supreme Court decided *McNally v. United States*, **483 U.S. 350** (1987). In *McNally*, the Court held that "[t]he mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." Thus, the Court restricted application of the statute to schemes involving deprivation of money or property. As the Court explained, "[r]ather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has."

Congress did. A year-and-a-half later, Congress emended the mail fraud statute, providing expressly that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

But what, exactly, did this "intangible right of honest services include?" The Supreme Court confronted exactly that question in *Skilling v. United States*, **561 U.S. 358** (2010). Jeffrey Skilling, an executive at Enron Corporation, was convicted for honest services fraud in connection with his self-dealing prior to Enron's collapse. Evaluating Skilling's void-for-vagueness challenge to § 1346, the Court noted that the statute was "meant to reinstate the body of pre-*McNally* honest-services law." Although the Court acknowledged that "honest-services decisions preceding *McNally* were not models of clarity or consistency," rather than strike down the statute as unconstitutionally vague, the Court limited § 1346's application to the "core" of pre-*McNally* case law—cases in which a defendant participated in a bribery or kickback scheme in violation of a fiduciary duty. Skilling's undisclosed self-dealing fell outside this "core," so the Court vacated his conviction. The door appeared to remain open, it seemed, for prosecutors to charge corruption cases as honest services violations at least in classic cases where the public official defendant received a bribe or kickback.

Prosecuting Corruption as "Money or Property" Fraud

Prosecutors have not solely relied on the "honest services fraud" theory when using the mail and wire fraud statutes to pursue public corruption cases, at times alleging that the corrupt scheme involved a straightforward deprivation of "money or property." Over the years, however the Supreme Court largely closed the door to this charging theory.

In *Cleveland v. United States*, **531 U.S. 12** (2000), the Government maintained that a lawyer violated the mail fraud statute by concealing his and a client's ownership interests in a limited partnership that applied for a Louisiana video poker license. Before the Supreme Court, the lawyer argued that he did not commit mail fraud because the licenses he ostensibly deprived the State of were not "property" under the statute.

The Supreme Court agreed. The Court explained that a regulatory license in the Government's possession is not property. Any "intangible rights of allocation, exclusion, and control amount[ed] to no more and no less that Louisiana's sovereign power to regulate." The Court rejected the Government's "property" theory "not simply because [it] stray[ed] from traditional concepts of property," but also because adopting the theory would "approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress."

The Supreme Court dealt a further blow to corruption prosecutions under the "money or property" theory in *Kelly v. United States*, **140 S. Ct. 1565** (2020), *Kelly* arose from the "Bridgegate" scandal, whereby members of Governor Chris Christie's staff ordered a "realignment of 12 toll lanes leading to the George Washington Bridge," grinding traffic to a halt in Fort Lee, New Jersey because the Mayor of Fort Lee refused to support Governor Christie's reelection campaign. In *Kelly*, the Court was asked to decide whether, by "commandeer[ing]" the Bridge's access lanes and "divert[ing] the wage labor of Port Authority employees used in that effort" under false pretenses, the defendants deprived the Port Authority of "money or property" under the wire fraud statute.

The Court answered both questions in the negative, citing *Cleveland*. The lane realignment was not a deprivation of "property" because the defendants "allocat[ed] lanes as between different groups of drivers," which was a "run-of-the-mine exercise of regulatory power." As to the Port Authority employees' time and labor, these costs "were just the implementation costs of the defendants' scheme"; such "incidental costs" are insufficient to ground a fraud conviction. Rather, the "property" deprived must be an "object of the fraud." The Court thus reversed the defendants' convictions, emphasizing that "not every corrupt act by state or local officials is a federal crime."

Ciminelli* and *Percoco

The Supreme Court's skepticism of expansive uses of the federal fraud statutes is no secret. Nor is the Court's willingness to reverse public corruption convictions on statutory interpretation grounds. See also *McDonnell v. United States*, **579 U.S. 550** (2016); *United States v. Sun-Diamond Growers*, **526 U.S. 398** (1999); *McCormick v. United States*, **500 U.S. 257** (1991). In fact, based on its record, one could make the rather unremarkable observation that the Supreme Court does not ordinarily grant certiorari in public corruption cases in order to affirm the convictions. Accordingly, when the Court granted certiorari in *Ciminelli* and *Percoco*, commentators widely expected the defendants to prevail. And prevail they did.

Ciminelli

Louis Ciminelli, a real estate developer, sought state funding from the Buffalo Billion initiative, an economic development project in western New York ostensibly administered by the Fort Schuyler Management Corporation. Ciminelli, through his company LPCiminelli, paid Todd Howe—a lobbyist with ties to Cuomo's administration—$100,00 to $180,000 each year in support of this effort. In 2013, Howe and Alain Kaloyeros—a member of the Fort Schuyler Board of Directors and the person responsible for developing project proposals for Buffalo Billion—agreed to alter Fort Schuyler's bidding process to ensure LPCiminelli "would be given the first opportunity to negotiate with Fort Schuyler for specific projects." Howe, Kaloyeros, and Ciminelli then jointly developed requests for proposals that guaranteed LPCiminelli's selection. As a result, LPCiminelli secured a $750 million project.

Ciminelli was charged with wire fraud and conspiracy to commit wire fraud. The prosecution relied on the so-called "right to control" theory of fraud. Under that theory, a defendant commits fraud if he "schemed to deprive a victim of potentially valuable economic information necessary to make discretionary economic decisions." In Ciminelli's case, that meant depriving Fort Schuyler of the fact that Ciminelli, Howe, and Kaloyeros had engaged in a bid-rigging scheme to favor LPCiminelli. Ciminelli was found guilty, and his conviction was upheld on appeal. Ciminelli sought review by the Supreme Court, asserting that the "right to control" theory was invalid.

In *Ciminelli*, the Supreme Court unanimously disavowed the "right to control" theory. The Court emphasized that the theory "cannot be squared with the federal fraud statutes, which are 'limited in scope to the protection of property rights.'" The "right to control" one's property is not itself "an interest that had 'long been recognized as property,'" and is inconsistent with "traditional concepts of property." Further, the Court reasoned that while § 1346 revived the intangible right to "honest services," Congress' silence about other intangible interests–such as the "right to control"–"foreclose[d] the expansion of the wire fraud statute to cover the intangible right to control."

The Court also expressed concern about the expansion of federal criminal authority that embracing the "right to control" theory would precipitate. Indeed, under the "right to control theory," deceptive conduct historically regulated by "state contract and tort law" would become a federal crime. Likewise, the Court reiterated its admonition in *Kelly* that "federal prosecutors may not use the property fraud statutes to set standards of disclosure and good government for state and local officials."

Percoco

Joseph Percoco served as Governor Andrew Cuomo's Executive Deputy Secretary from 2011 to 2016, except for eight months in 2014 when Percoco stepped away to manage Cuomo's reelection campaign. While employed with the campaign, Percoco agreed to assist real estate developer Steven Aiello with an issue involving a New York state agency, Empire State Development. Specifically, in exchange for $35,000, Percoco called a senior official at the agency and urged him to drop a requirement that Aiello's company enter into a "labor peace agreement" with local unions in order to obtain state funding. The day after Percoco's call, the agency informed Aiello that the agreement was no longer required. Days later, Percoco re-joined Governor Cuomo's office. At trial, the prosecution introduced evidence that Percoco "had expressed his intent and had made plans to resume official service after the election."

Percoco was convicted of conspiracy to commit honest services fraud. Percoco challenged his conviction on the basis that a private individual cannot commit "honest services fraud" based on the individual's own duty of honest services to the public. Relying on its decision in *United States v. Margiotta*, **688 F.2d 108** (1982), the Second Circuit rejected Percoco's contention. In *Margiotta*, the Second Circuit upheld the "honest services fraud" conviction of a local political party chair, concluding that a private person could commit "honest services fraud" if he or she "dominate[d] the government." The *Margiotta* decision articulated a two-part test to evaluate this standard, asking (1) whether "others rel[ied] upon [the accused] because of [his] special relationship with the government," and (2) whether the accused exercised "de factor control" over "governmental decisions." In Percoco's case, the Second Circuit emphasized that the trial judge's jury instructions mirrored this standard.

The Supreme Court reversed Percoco's conviction, but declined to endorse the absolutist position Percoco asserted. Although the Court acknowledged that "[m]ost of the pre-*McNally* honest-services prosecutions . . . involved public officials," it "reject[ed] the argument that a person nominally outside public employment can *never* have the necessary fiduciary duty to the public." According to the Court, "individuals not formally employed by a government entity may enter into agreements that make them actual agents of the government," and under traditional agency principles, such persons would owe "a fiduciary duty to the government and thus to the public it serves." At the same time, the Court explained that "§ 1346 plainly does not extent a duty to the public to *all* private persons."

The Court rejected *Margiotta*'s test, explaining that to the extent it encompassed individuals merely because of the scale or success of their influence on government affairs, it was too broad. Indeed, the *Margiotta* standard, according to the Court, could "be used to charge particularly well-connected lobbyists."

Yet the Court was silent on how to determine if a private individual owes a duty of honest services to the public. The Court indicated such a duty may arise from traditional agency principles, but did not suggest this was the exclusive circumstance in which this duty exists. In a concurring opinion, Justice Gorsuch lambasted that silence, noting "we may now know a little bit more about when a duty of honest services *does not* arise, but we still have no idea when it *does*."

Implications & Takeaways

So, what can be gleaned from these decisions, and what lessons should practitioners and their clients draw? At a high-level, it is clear the Court remains skeptical of broad interpretations of the federal mail and wire fraud statutes, especially when used to regulate state and local government ethics. It is similarly clear that the core lesson from that *Kelly*—money or property must be the "object" of the scheme, not an incidental byproduct—remains a focus of the Court.

Moving forward, prosecutors will need to think carefully about the "object" of any particular scheme, and should hesitate to rely on a "property fraud" theory where the scheme's "object" cannot be easily described as a "traditional property interest." Defense counsel should consider how the "property interests" at issue in a case may not be "traditional," from a historical perspective or otherwise. Defining the boundaries of "traditional property interests" and identifying the proper framework for this analysis—including any need to reference state property law or evaluate societal conceptions of "property" at various points in history—will be crucial to understanding how to construe the mail and wire fraud statutes after *Ciminelli*.

Percoco also leaves questions unanswered that will have to be addressed in the trial courts. *Percoco* is clear that private individuals can owe a duty of honest services to the public, and thus be convicted as a bribe recipient. Yet what is difficult to determine from the decision itself is when that duty might arise, at least outside of direct agency relationships. Although Justice Gorsuch suggested that Congress should intervene, legislation is unlikely and might not provide complete doctrinal clarity if enacted. Prosecutors will need to think hard before charging a private individual for breaching a supposed duty of honest services to the public without strong evidence that such a duty actually existed. Absent a binding agreement between a government agency and a private citizen setting out such a duty, defense counsel will have a great deal of room to argue that the duty is too amorphous to rest an honest services case upon.

Given that *Cimenelli* and especially *Percoco* leave many questions unanswered, both government entities and private organizations will need to evaluate whether additional policies, procedures, or controls might reduce risks.

Practically speaking, organizations should conduct regular, timely, and risk-based diligence on third parties engaged for government affairs work. *Percoco* highlights that such diligence is of heightened importance with respect to individuals—especially lobbyists—that have recently departed public service, or have been selected for a future government role. Relatedly, organizations should ensure, at the time of contracting and periodically thereafter, that payments to lobbyists are commensurate with the services provided; Percoco, for example, was paid $35,000 for essentially a single phone call—an enormous red flag.

Next, in-house legal and compliance personnel should familiarize themselves and ensure compliance with any applicable "revolving-door" laws. Clear policies, proactive diligence, and reliable internal controls aimed at ensuring adherence to these proscriptions can be effective at avoiding problematic interactions with government officials that might trigger scrutiny.

Moreover, lobbyists—particularly those who recently departed government service—should be candid in their advocacy efforts as to who they represent; even a mistaken implication that a lobbyist is speaking for or on behalf of a former or future government employer can prompt prosecutorial scrutiny, resulting in expensive and intrusive investigations and defense efforts, even where charges are ultimately not brought.

Finally, political campaigns—which ordinarily will involve personnel expecting to serve in a subsequent governmental administration or legislative office—should be vigilant regarding these issues. Campaigns should set forth clear guidelines regarding staffers' communications with current government officials, and should consider restricting outright their employees or consultants from accepting employment as a lobbyist while employed by the campaign.

Conclusion

The long-term impact of *Ciminelli* and *Percoco* remains to be seen. Counsel can be confident on at least one point, however. Despite the Court's repeated admonitions against excessive federal regulation of state government misconduct, federal prosecutors can be expected to continue aggressively pursuing state and local corruption cases—especially where states are unable or unwilling to address corruption issues themselves. At the end of the day, domestic corruption is not going anywhere, and nor will DOJ.