

PUBLICATION

Reining it in: Supreme Court Again Restricts Honest-Services Fraud

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On May 11, 2023, in *Percoco v. United States*, 598 U.S. ____ (2023), the U.S. Supreme Court once again reined in an expansive public corruption prosecution brought by the Department of Justice by overturning a wire fraud conviction based on an honest-services theory against a private individual who had "influence" in government. The *Percoco* case involved the payment of \$35,000 by a real estate development company to Joseph Percoco, an aide to former New York Governor Andrew Cuomo, in connection with that company's dealings with a New York state agency. In November 2016, a federal grand jury indicted Percoco (and others) on a range of counts, one of them being honest-services wire fraud in connection with his receipt of the payment from the real estate development company. Several years later, Percoco was convicted.

Now, over six years later – in a decision likely to come as a relief to lobbyists, advisors, and other political influences – the Supreme Court unanimously tossed that honest-services wire fraud conviction, holding that the jury received the wrong instruction for when and how a private individual can be held guilty for honest-services wire fraud.

Background

Percoco was a longtime political associate of former New York Governor Andrew Cuomo who – with a brief but important exception of eight months in 2014 – served as Governor Cuomo's Deputy Secretary from 2011 through 2016. During that eight-month hiatus, Percoco resigned from his governmental position, though he continued to work on Governor Cuomo's re-election campaign. While on break from governmental service, Percoco was approached by a real estate developer to assist with a state agency's requirement that the developer enter into a "Labor Peace Agreement" with local unions to receive state funding for a lucrative real estate project. Percoco agreed to assist and received two payments totaling \$35,000; in exchange, Percoco contacted a senior official at the state agency, urging him to drop the peace agreement requirement – which he promptly did.

Several years later, Percoco's dealings (in this and other matters) came to the attention of the Department of Justice, which obtained a multicount indictment against Percoco and others for a variety of schemes. One count of honest-services wire fraud pertained to Percoco's acceptance of the payments from the real estate developer. At trial, the prosecution introduced evidence to support its claim that, even during his eight-month hiatus, Percoco continued to function as a senior advisor to Governor Cuomo and expressed intent to resume official service after the election. Over Percoco's objection, the trial court (erroneously) instructed the jury that, even if Percoco was not a public official at the time of the acceptance of the payments, he could nonetheless be convicted of honest-services wire fraud if the jury concluded that (1) he "dominated and controlled any governmental business" and (2) "people working in government actually relied on him because of a special relationship he had with the government." Percoco was subsequently convicted of honest-services wire fraud and sentenced to 72 months imprisonment.

On appeal, the U.S. Court of Appeals for the Second Circuit affirmed this count of conviction, finding that the jury instruction "[fit] comfortably" with another Second Circuit 1982 decision, *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982). The *Margiotta* Court had held that a private person "owes a fiduciary duty to the

general citizenry" and that a private citizen's "dominance" in government may give rise to liability, including violating a duty of honest services.

Supreme Court's Unanimous Decision

On appeal to the Supreme Court, Percoco presented the following issue: "whether a private citizen who has 'information political or other influence over governmental decisionmaking' can be convicted of honest-services fraud." The crux of Percoco's argument before the Court was that a private citizen cannot be convicted of depriving the public of honest services.

In a rare unanimous decision, the Supreme Court reversed Percoco's honest-services wire fraud count of conviction, holding that the jury was not instructed properly as to when and how a private citizen can be convicted of honest services. Importantly, the Supreme Court held that Percoco's main argument – that a private individual cannot be held criminally responsible for honest services wire fraud – "swe[pt] too broadly," and that, although most honest-services fraud convictions involved public officials, private citizens may, in some cases, hold a necessary fiduciary duty to the public. Stated differently, the Supreme Court rejected the argument that a "person nominally outside public employment can *never* have the necessary fiduciary duty to the public." Rejecting the *per se* rule, though, was not enough for the Supreme Court to sustain Percoco's conviction because the instructions employed by the trial court (and upheld by the Second Circuit) were too vague.

In particular, the Supreme Court held that the *Margiotta* test, and the instruction employed by the trial court – that a private individual may owe a duty of honest services to the public if he "dominated and controlled any governmental business" and "people working in the government actually relied on him because of a special relationship he had with the government" – was too vague to withstand scrutiny. If countenanced, such a theory could (among other concerns) be "used to charge particularly well-connected and effective lobbyists" and thereby used to prosecute political party officials. And, importantly, the *Margiotta* test (and that employed by the trial court in Percoco's case) could apply liability "whenever such persons' clout exceeds some ill-defined threshold." Would it be enough, the Court mused, "if an elected official almost always heed[ed] the advice of a long-time political advisor?" Or, what about the scenario where "an office holder leans very heavily on recommendations provided by a highly respected predecessor, family member, or old friend?" These murky scenarios led the Court to conclude that the *Margiotta* test was too vague and that the conviction, therefore, could not be sustained.

In an effort to save its count of conviction, the Government advanced two additional arguments – that a private individual owes a duty of honest services (1) "when the person has been selected to work for the government" in the future and (2) "when the person exercises the functions of a government position with the acquiescence of relevant government personnel." As to the first theory, it differed substantially from the *Margiotta* test and the jury instruction in *Percoco* thus, even if there was "some merit" in it, the mis-instructions to the jury were not harmless. As to the second theory, the Court held it was akin to *Margiotta* erroneous construction of the law and was likewise rejected.

The Court's Trend of Limiting Political Corruption and Theories of Prosecution

Percoco is yet another example of the Court's pattern of expressed skepticism in public corruption cases and its trend of narrowing the ability of federal law enforcement to prosecute political corruption and white-collar crime. The honest services fraud theory – which theorizes that an individual whose official acts were influenced in some unlawful way that deprives the government or public of the "intangible right" to his/her honest services – has been a favorite of federal prosecutors. But beginning in 1987, the Supreme Court has chipped away at such an "intangible rights theory" of fraud, and *Percoco* is the fourth of a more recent series of cases further narrowing the permissible scope of honest-services fraud:

1. In 2010, the Court overturned former Enron CEO Jeff Skilling's honest-services fraud conviction, finding that such a theory only applies to classic bribe-and-kickback schemes in exchange for official acts by that public official on the matter at issue – rather than, for instance, undisclosed conflicts of interest possessed by the defendant. *Skilling v. United States*, 561 U.S. 358, 398-411 (2010).
2. Likewise, in 2016, the Court unanimously overturned the conviction of former Virginia Governor Bob McDonnell, who had arranged meetings, attended events, and pulled strings for a businessman who had showered him with luxury vacations, products, and loans, finding that federal bribery law did not cover such conduct and that something more – like significant policy decisions – was required to demonstrate official action. *McDonnell v. United States*, 136 S. Ct. 2355 (2016).
3. Four years later, in 2020, the Supreme Court unanimously overturned the conviction of two top associates of former New Jersey Governor Chris Christie in *Kelly v. United States*, 140 S.Ct. 1565 (2020), reasoning that, while the public officials at issue there may have engaged in wrongdoing by abusing their authority in restricting highway lane access and diverting the employment of certain governmental employees, no federal crime existed to punish such decisions, even if undertaken for "bad reasons."

While *Percoco* involves disparate facts and a private actor (instead of a public official), the Supreme Court's rejection of the Government's honest-services fraud theory is another example of its continuing scaling-back of anti-corruption laws.

What Does *Percoco* Mean for Future Prosecutions?

While traditional public corruption cases – *i.e.* a public official who accepts bribes or kickbacks in exchange for official acts – are clearly within the "heartland" of honest-services fraud, the Supreme Court, from *Skilling*, to *McDonnell*, to *Kelly*, and now to *Percoco*, seems intent on limiting the Government's envelope-pushing theories of political or public corruption. Indeed, two justices – Justice Gorsuch and Justice Thomas – concurred in judgment but would go father to strike down the honest services wire fraud statute in its entirety as being too vague. In writing the concurrence, Justice Gorsuch stated, "Even 80 years after lower courts began experimenting with the honest-services-fraud theory, no one can say what sort of fiduciary relationship is enough to sustain a federal felony conviction and decades in federal prison."

For now, honest-services fraud remains an important, though weakened, tool in the Government's prosecutorial toolbox. But the *Percoco* decision will, no doubt, make it more difficult for the Government to assert honest-services fraud theories against private individuals moving forward.

With extensive Government Enforcement and Investigations and Government Relations experience, Baker Donelson has the tools to help clients navigate potential challenges posed by the uncertainty of the limits of honest-services fraud and beyond. If you have any questions about this article, please reach out to [Lindsay E. Ray](#), [Matthew S. Chester](#), or any member of Baker Donelson's [Government Enforcement Investigations Group](#).