



SUPREME COURT PRIMED
TO FURTHER NARROW APPLICATION OF
WIRE AND MAIL FRAUD STATUTES IN
CORRUPTION CASES

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**MAIL AND WIRE FRAUD CHARGES REQUIRE THE GOVERNMENT
TO PROVE THE DEFENDANT PARTICIPATED IN A “SCHEME
OR ARTIFICE TO DEFRAUD” BY MEANS OF A MATERIAL
DECEPTION, WITH INTENT TO DEFRAUD, WHILE USING THE
MAIL OR WIRES IN FURTHERANCE OF THE SCHEME.**



Few statutes are as popular among federal prosecutors as the mail and wire fraud statutes. These statutes allow prosecutors to charge schemes as varied as garden-variety scams to complex and high-profile public corruption cases. In recent decades, the Supreme Court has reigned in prosecutors' use of the mail and wire fraud statutes in public corruption cases and issued other decisions restricting prosecutors' ability to broadly apply laws frequently charged in such cases.

The Court is poised to continue that trend. In a case slated for briefing and argument in the upcoming term – *Percoco v. United States* – the Court will consider whether a non-government employee can commit honest-services fraud, and whether the right-to-control theory of economic harm supports conviction for mail or wire fraud.

Mail and wire fraud in public corruption cases

Mail and wire fraud charges require the government to prove the defendant participated in a “scheme or artifice to defraud” by means of a material deception, with intent to defraud, while using the mail or wires in furtherance of the scheme.¹ Additionally, the scheme must result, or would have resulted, in the loss of money or property. *Id.* Loss of intangible property rights – such as intellectual property rights or the desire to maintain confidentiality of information – can support conviction. See *Carpenter v. United States*, 484 U.S. 19 (1987). So can the loss of “honest services.”²

1. 18 U.S.C. §§1341, 1343

2. 18 U.S.C. §1346

Under the honest-services theory, a public or private employee can be prosecuted for mail or wire fraud if the employee “breache[d] his allegiance to his employer by accepting bribes or kickbacks in the course of his employment.” *Skilling v. United States*, 561 U.S. 358, 401 (2010). Put differently, in accepting the bribes or kickbacks, the employee deprives his employer of the employer’s right to honest services.

In recent decades, the Supreme Court has limited the application of the mail and wire fraud statutes in cases involving corruption. In *Skilling v. United States*, the Court narrowed the scope of the honest-services-fraud statute.³ It interpreted the statute to criminalise only bribery and kickback schemes.⁴ Schemes to deprive an employer of honest services through other means – such as an employee’s undisclosed conflict of interest – could not support conviction under §1346. *Id.*

The Supreme Court narrowed the corruption statutes again in *McDonnell v. United States*, 579 U.S. 550 (2016). That case involved allegations that the former governor of Virginia committed honest-services fraud by accepting bribes in the form of loans and gifts. The Supreme Court disagreed. Interpreting the federal bribery statute, the Supreme Court narrowed the definition of “official act,” limiting it to “a decision or action on a ‘question, matter, cause, suit, proceeding or controversy’” that “involve[s] a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee.” *Id.* at 574.

3. 561 U.S. 358 (2010)

4. 561 U.S. at 412



Most recently, in *Kelly v. United States* 140 S. Ct. 1565 (2020), the Supreme Court concluded that the wire fraud statute did not criminalise conduct associated with New Jersey’s “Bridgegate” scandal... Prosecutors alleged that public officials with ties to the New Jersey governor reallocated toll lanes as retribution for a local mayor’s refusal to back the governor’s re-election. *Id.* at 1569-70. The Supreme Court agreed that the conduct was an “abuse of power,” but concluded it was not wire fraud. *Id.* at 1574. The re-allocation of the toll lanes, the Court explained, did not involve a loss of property –intangible or otherwise. Rather, it involved “a quintessential exercise of regulatory power.” *Id.* at 1572. A “scheme to alter such a regulatory choice is not one to appropriate the government’s property.” *Id.*

***Percoco v. United States* presents significant questions concerning the use of mail and wire fraud to prosecute public corruption**

In *Percoco*, the Supreme Court appears primed to issue yet another decision narrowing the scope of the mail and wire fraud statutes in public corruption prosecutions. First, the Court will decide whether an individual who is not a government employee can commit honest-services fraud in a case involving allegations of public corruption. Second, the Court will decide whether the right-to-control theory can support conviction for mail or wire fraud.

Honest-services fraud committed by a non-governmental employee

In *United States v. Percoco*, 13 F.4th 180, 193 (2d Cir. 2021), the Court of Appeals concluded that a “formal employment relationship, that is, public office,” is not “a rigid prerequisite to a finding of fiduciary duty in the public sector.” The court therefore held

that someone who is not a government employee could nonetheless commit honest-services fraud if the individual “dominated and controlled any governmental business” and “people working in the government actually relied on [the individual] because of a special relationship he had with the government.” *Id.* at 194.

The Supreme Court will decide whether a non-government employee can owe fiduciary duties to the public such that the public is entitled to that individual’s “honest services.” The case presents a significant line-drawing question: When – if at all – does an individual who is not a public official, but who has close connections to public officials, have sufficient influence that he cannot use those connections for his own personal gain because he instead owes fiduciary duties to the public? The question has broad applicability. Many lobbyists, former government officials, and other advocates draw on their informal influence and close relationships with government actors to affect policy. An expansive interpretation of the statute that endorses the court of appeals decision could chill legitimate advocacy. It could also vest prosecutors with vast discretionary authority without providing clear guidance as to where the line between legal and criminal conduct might lie.

The Right-To-Control Theory

In *Percoco*, the Supreme Court will also consider the viability of the “right-to-control” theory of wire fraud. Under that theory, the court of appeals explained, harm under the fraud statutes “occurs where the defendant’s scheme denies the victim the right to control its assets by depriving it of information necessary to make discretionary economic decisions.” Under that theory,

“withholding or inaccurate reporting of information that could impact... economic decisions” can support conviction for mail or wire fraud charge. See *United States v. Gatto*, 986 F.3d 104, 126 (2d Cir. 2021).

Here, too, the Supreme Court may reign in prosecutors’ use of the mail and wire fraud statutes. For one thing, an undisclosed conflict of interest can be described as “withholding information that could impact economic decisions.” In that way, the right-to-control theory provides an end-run around the Supreme Court’s conclusion in *Skilling* that an undisclosed conflict of interest cannot be punished as honest-services fraud. The right-to-control

theory also nearly eliminates the requirement that the scheme to defraud target money or property. It affords prosecutors essentially unbounded discretion to prosecute misrepresentations or nondisclosures whenever the misrepresentation or nondisclosure might have some connection to an economic decision.

Whatever the outcome, *Percoco*’s presence on the Supreme Court’s docket will make 2022 a blockbuster term for white collar practitioners, offering the Court an opportunity to further clarify the scope of the mail and wire fraud statutes.



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