

Public Corruption and the Limits of Federal Fraud Statutes

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Over time, Congress has shown consistent interest in policing public-sector corruption, enacting a number of criminal [provisions](#) aimed at holding corrupt officials and those who entice them accountable for their actions under federal law. Federal prosecutors’ most potent existing tools for combating such corruption include the federal [mail](#) and [wire](#) fraud statutes and a [provision](#) defining those crimes as including so-called “honest services” fraud. This Sidebar provides an overview of the federal mail and wire fraud statutes and the development and codification of the “honest services” theory of fraud; surveys some of the major Supreme Court decisions limiting the reach of those statutes; and explores some considerations for Congress.

In summary, the mail and wire fraud statutes have been a source of contention between the courts and Congress for years. While Congress has passed broadly worded legislation to cover the self-interested actions of federal, state, and local officials, among others, the Supreme Court has repeatedly adopted narrow interpretations of the statutes, at times signaling that broad constructions could raise constitutional concerns about vagueness or federalism.

This trend continued in two cases the Supreme Court decided in May 2023—*Ciminelli v. United States* and *Percoco v. United States*. In those cases, the Court reversed two wire-fraud convictions: *Ciminelli* involved bid-rigging to obtain state-funded development projects, and *Percoco* involved bribery to assist a real-estate development company in its dealings with a state agency. The Court in both cases [rejected](#) statutory interpretations used by the lower courts that it [viewed](#) as “too vague” or as “vastly expand[ing] federal jurisdiction” to “an almost limitless variety of deceptive actions traditionally left to state . . . law.”

Overview of Mail and Wire Fraud Statutes

[18 U.S.C. § 1341](#) prohibits use of the mails (including the United States Postal Service and “any private or commercial interstate carrier”) for the purpose of executing “any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.” [18 U.S.C. § 1343](#) likewise prohibits transmissions “by means of wire, radio, or television communication in interstate or foreign commerce” for the purpose of executing such schemes or artifices. These federal crimes, commonly known as “mail fraud” and “wire fraud,” encompass multiple forms of fraudulent conduct using jurisdictional hooks that [reach](#) practically all forms of [modern communication](#). Because the

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two statutes essentially mirror each other (save for the medium used in connection with the offense), interpretations and analyses of one statute will typically [apply](#) to the other. As discussed in more detail below, [18 U.S.C. § 1346](#) establishes that the phrase “scheme or artifice to defraud” as used in the two statutes “includes a scheme or artifice to deprive another of the intangible right of honest services.”

To secure a mail or wire fraud conviction, the government must prove beyond a reasonable doubt the following [elements](#): (1) a scheme to defraud; (2) foreseeable use of the mail, a private commercial carrier, or a wire or radio communication in furtherance of said scheme; and (3) intent to defraud another of (4) money, property, or honest services. A scheme to defraud generally [encompasses](#) conduct reasonably calculated to deceive. The Supreme Court has established that the deception contemplated by a scheme to defraud [must](#) be “material,” meaning that the misrepresentation or concealment at issue must have “a natural tendency to influence, or [be] capable of influencing,” the person “to [whom] it was addressed.” The second element—foreseeable use of the mail or wire communication, among other things—covers the use of most modern forms of remote communication when [used](#) “in furtherance of” the fraudulent scheme, that is, as “part of the [execution](#) of the scheme as conceived by the perpetrator at the time.” The government must also prove that the defendant in a mail or wire fraud prosecution had the [intent to defraud](#), described by one court as “the specific intent to deceive for the purpose of causing pecuniary loss to another or bringing about some financial gain to himself.”

Finally, a scheme to defraud in violation of the mail or wire fraud statutes must have as its object [money](#), [property](#), or “[honest services](#).” These aspects of the statutes have been frequently litigated, and the subject of several notable Supreme Court decisions, over the past 25 years.

Money or Property

Sections 1341 and 1343 speak of schemes “for obtaining money or property.” A straightforward [example](#) of covered fraud is filing an insurance claim for a car accident that never happened in order to obtain a payout from the insurance company. In addition to money and tangible property, the statutes also apply to [intangible](#) interests, such as confidential business information, that have “long been recognized as property.” If an interest [lacks](#) value in the hands of the ostensible victim, however, it is not protected by the statutes as “property.” For instance, the Supreme Court held in *Kelly v. United States* that “the regulatory rights of allocation, exclusion, and control” are not property interests of the government for purposes of the wire fraud statute, as they [implicate](#) the government’s “role as sovereign wielding traditional police powers—not its role as property holder.”

Honest Services

Although the text and legislative history of the mail and wire fraud statutes arguably [suggest](#) that Congress initially contemplated only frauds involving money or property, lower federal [courts](#) up to 1987 interpreted the statutes also to cover deprivations of some intangible, nonproperty rights. “Most” of these cases [involved](#) public officials who “made governmental decisions with the objective of benefitting themselves or promoting their own interests, instead of fulfilling their legal commitment to provide the citizens of the State or local government with their loyal service and honest government.” Regardless of whether the betrayed party (the citizenry) was or would be financially harmed, under this theory, the violation lay in the deprivation of that party’s intangible right to the official’s “honest services.” Some courts also applied the statutes to deprivations of other intangible rights like the right to [privacy](#) and the right to honest [elections](#).

In 1987, in *McNally v. United States*, the Supreme Court halted these applications of the statutes, concluding that the mail fraud statute was “limited in scope to the protection of property rights.” In the Court’s view, a broader reading would “leave [the statute’s] outer boundaries ambiguous and involve[] the Federal Government in setting standards of disclosure and good government for local and state officials.”

Ultimately, the Court in *McNally* declined to adopt a reading of the mail fraud statute that would risk these results absent a decision by Congress to “speak more clearly than it has.”

Within a short time, Congress had accepted the Court’s invitation to speak by passing legislation, now codified at 18 U.S.C. § 1346, which **clarified** that “the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.” Following the enactment of 18 U.S.C. § 1346, the lower federal courts continued to apply the mail and wire fraud statutes to a range of fraudulent conduct on the part of both public officials and private parties implicating the deprivation of an intangible right of honest services. Typical cases **involved** “either bribery . . . or [the] failure to disclose a conflict of interest, resulting in personal gain.”

Once again, however, the Supreme Court stepped in to limit the scope of the mail and wire fraud statutes based on concerns about vagueness. In *United States v. Skilling*, the Court held that honest services mail or wire fraud must involve “offenders who, in violation of a fiduciary duty, participate[] in bribery or kickback schemes.” The Court expressly rejected applications of the wire fraud statute to broader forms of dishonest conduct like undisclosed self-dealing, which the Court worried would “encounter a vagueness shoal.”

Following *Skilling*, caselaw developments regarding honest services fraud have primarily centered on fleshing out the scope of the terms “bribery” and “kickbacks,” as well as the source and scope of requisite fiduciary duties. For instance, the Supreme Court in a 2016 case applied a narrow definition of bribery **requiring** some “formal exercise of governmental power” in exchange for remuneration. Additionally, in response to the Court’s limiting constructions, some federal prosecutors have appeared to reframe cases that might previously have been brought on an honest services theory as traditional “money or property” wire fraud, aided by lower-court decisions recognizing intangible property interests based on things like a right to control one’s assets.

Ciminelli and Percoco

On May 11, 2023, the Supreme Court issued two opinions stemming from federal corruption prosecutions in New York State. One of the cases—*Ciminelli v. United States*—involved the wire fraud conviction of a developer named Louis Ciminelli in connection with a \$750 million state-funded project in Buffalo. Ciminelli’s company had obtained the contract through a bid process rigged to “effectively guarant[ee]” that it would have “priority status to negotiate for specific projects.” Two associates of the then-Governor of New York engineered the process. One of them had been paid by Ciminelli’s company to help it obtain state-funded projects. The other served on the board of directors of the nonprofit tasked with negotiating with developers for the Buffalo project. Federal prosecutors charged Ciminelli with wire fraud and relied on the Second Circuit’s “**right to control**” theory, under which “the Government can establish wire fraud by showing that the defendant schemed to deprive a victim of potentially valuable economic information necessary to make discretionary economic decisions.” Prosecutors argued that Ciminelli was guilty of wire fraud if the scheme he participated in deprived the nonprofit of information relevant to its selection of contractors for the projects it administered for the state. A **jury** convicted Ciminelli.

Ciminelli challenged the right to control theory on appeal. In a **unanimous opinion** authored by Justice Thomas, the Supreme Court rejected the “right to control” theory as irreconcilable with the text of the wire and mail fraud statutes. According to the Court, those statutes are limited to “**traditional property interests**” and the “**so-called ‘right to control’**” is not one of them. The Court held that “[b]ecause ‘potentially valuable economic information’ ‘necessary to make discretionary economic decisions’ is not a traditional property interest . . . the right-to-control theory is not a valid basis” for **wire fraud liability**. The *Ciminelli* Court further emphasized that a broad reading of the wire fraud statute encompassing a right to control as a protected property interest could criminalize “almost any **deceptive act**,” and would “criminalize[] traditionally civil matters and federalize[] traditionally state matters.”

In the other decision, *Percoco v. United States*, the Supreme Court examined “whether a private citizen with influence over government decision-making” can be convicted of wire fraud on an honest-services theory. The **defendant** in the case, Joseph Percoco, was a high-ranking gubernatorial aide except for a brief period when he resigned his official position to manage the Governor’s reelection campaign. During that hiatus, Percoco accepted payments from a real-estate company to use his influence with state officials to help it avoid a labor requirement imposed by a state agency. The agency dropped the requirement soon after one of its senior officials received a call from Percoco “mere days” before he was scheduled to return to his job in the Governor’s office. Relying on **Second Circuit precedent**, the trial judge instructed the jury that during his time as a private citizen, Percoco still “owed a duty of honest services to the public if (1) he ‘dominated and controlled any governmental business’ and (2) ‘people working in the government actually relied on him because of a special relationship he had with the government.’” The jury convicted Percoco.

In an opinion authored by Justice Alito, the Court rejected this standard for honest-services fraud on vagueness grounds, expressing concern that it could be used to “charge particularly well-connected and effective **lobbyists**.” According to the Court, the Second Circuit standard would have implied a public right to “‘disinterested service’ from lobbyists and political party officials . . . whenever such persons’ clout exceeds some ill-defined threshold.” Nevertheless, the Court recognized that individuals “nominally outside public employment” may sometimes owe a duty of honest services to the public—particularly if they “enter into agreements that make them **actual agents** of the government.” In a **concurring opinion**, Justice Gorsuch (joined by Justice Thomas) argued that no jury instructions could have resolved the vagueness issue, writing that “to this day, no one knows what ‘honest-services fraud’ encompasses.” Justice Gorsuch called on **Congress** to clarify the honest-services statute’s scope.

Considerations for Congress

Some commentators have lamented what they view as the Supreme Court’s blunting of a previously sharp weapon to combat public corruption, **arguing** that the Court’s decisions have placed too little weight on “the interests of citizens in honest government” and urging Congress to find a legislative fix. Other observers, however, have suggested that the deleterious impact of the decisions is overstated, pointing out that federal prosecutors still have multiple legal means to combat corruption in the public sphere. In any event, should Congress revisit and reconsider the scope of mail and wire fraud, understanding the vagueness and federalism concerns that have animated the Supreme Court’s repeated limiting constructions of the statutes may help prevent further judicial limitations. One place to start could be the questions that the *Skilling* Court **identified** as relevant to “the enterprise of criminalizing undisclosed self-dealing.” These questions include (1) how “direct or significant” a conflicting financial interest must be; (2) the extent to which an “official” act or action must further the conflicting financial interest in order to constitute fraud; and (3) to whom a disclosure must be made, and what information it must contain, for a conflicted official to avoid criminal liability.

Author Information

Peter G. Berris
Legislative Attorney

Michael A. Foster
Section Research Manager

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