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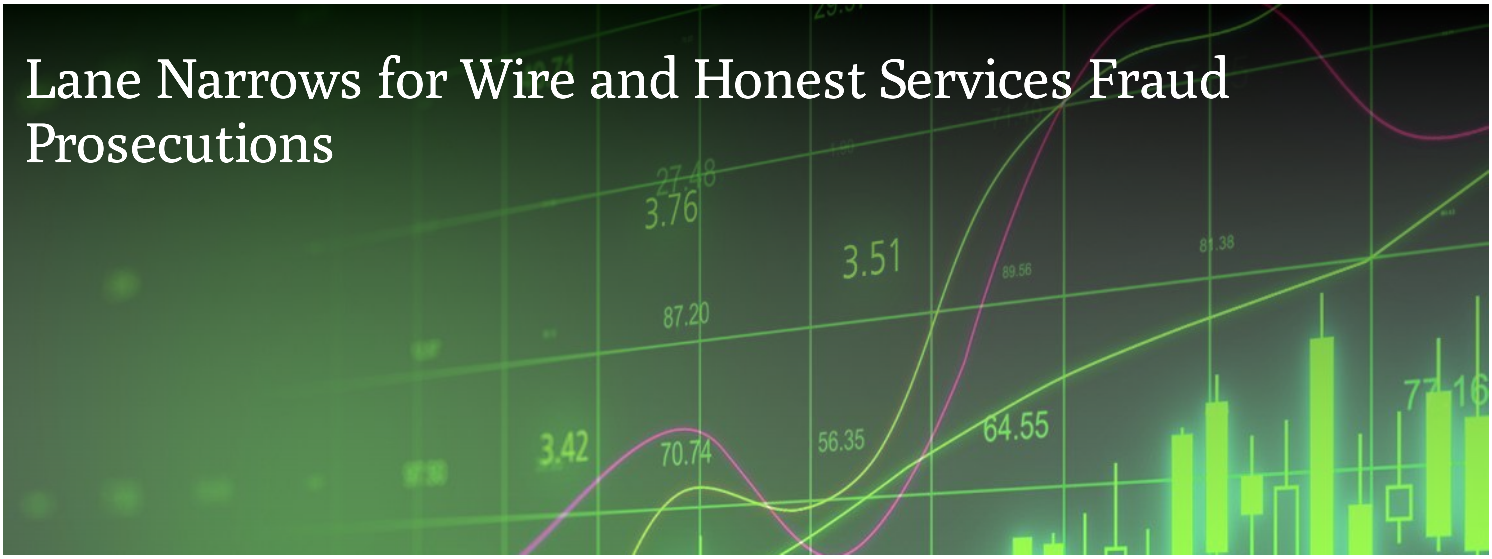
Lane Narrows for Wire and Honest Services Fraud Prosecutions



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The Supreme Court has likely significantly reined in federal prosecutions of wire and honest services fraud with its two unanimous reversals issued on May 11.

First, in *Ciminelli v. United States*, the court emphatically struck down the U.S. Court of Appeals for the Second Circuit's right-to-control theory of fraud, holding that it "cannot form the basis for a conviction under the federal fraud statutes."

The right-to-control theory allowed federal fraud prosecutions "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." Said another way, "a defendant is guilty of wire fraud if he schemes to deprive the victim of 'potentially valuable economic information' 'necessary to make discretionary economic decisions.'"

The *Ciminelli* defendant was convicted of wire fraud under the right-to-control-theory for his involvement in a scheme to rig the bidding process for a state-funded development project, which resulted in a $750 million contract for defendant's company.

Importantly, the government's charges were not based on the actual contract, or work done thereunder—potentially because the Second Circuit has rejected application of the federal fraud statutes where the "victim received the full economic benefit of its bargain." Instead the government alleged that the defendant deprived the entity awarding the contract of potentially valuable information by covertly altering the requests for proposal requirements in defendant's favor.

However, Justice Clarence Thomas, writing for the unanimous court, held that "the federal fraud statutes criminalize only schemes to deprive people of traditional property interests" and "potentially valuable economic information necessary to make discretionary economic decisions" is "not a traditional property interest."

Thomas explained that the right-to-control theory doesn't derive from the text or the structure and history of the federal fraud statutes, which are "limited in scope to the protection of property rights."

Thomas also noted the theory expands federal jurisdiction without authorization from Congress. The court warned that because the now-defunct theory treats information as the protected interest, “almost any deceptive act could be criminal.”

The court’s opinion strikes down numerous factual situations involving “intangible rights” that previously supported right-to-control convictions including:

- Failing to disclose conflicts of interest
- Concealing corporate information from shareholders that denies them the right-to-control how corporate assets are spent
- Deceiving financial institutions concerning the nature of a business
- Lying about how contractual promises would be paid

The court also cautioned against future prosecutions by stating that without explicit instruction from Congress the mail and wire fraud statutes do not “place under federal superintendence a vast array of conduct traditionally policed by the States” including deceptive actions normally handled under state contract and tort law.

Second, in *Percoco v. United States*, the court unanimously reversed an honest services wire fraud conviction because the “intangible right of honest services” codified in 18 U.S.C. § 1346, “plainly does not extend a duty to the public to *all* private persons.”

While the court rejected that a person “nominally outside public employment can *never* have the necessary fiduciary duty to the public” to sustain an honest services fraud conviction, the district court’s jury instruction that defendant owed a duty if he “dominated and controlled any governmental business” and “people working in the government actually relied on him,” was too vague.

The court emphasized that such a charge could turn “particularly well-connected and effective lobbyists” into federal criminals but “the public has no right to disinterested service” from such persons.

The court’s two unanimous opinions are the latest in a string of cases substantially restricting federal fraud prosecutions. Previously in *McNally v. United States*, the court confined the federal mail and wire fraud statutes to the “protect[ion of] individual property rights.”

Thereafter, in *Skilling v. United States*, the court limited the subsequently enacted honest services fraud provision to “*only* the bribe-and-kickback core of the pre-*McNally* case law,” rejecting the view that it criminalized “undisclosed self-dealing by a public official or private employee.”

And, in *Kelly v. United States*, the court unanimously overturned the fraud convictions of aides to former New Jersey Governor Chris Christie because there was no property right for which the government was deprived when his aides closed lanes on the George Washington Bridge for political retaliation.

The cases are Ciminelli v. United States, U.S., No. 21-1170, 5/11/23; Percoco v. United States, U.S., No. 21-1158, 5/11/23 Winston & Strawn law clerk Heather Donato contributed to this article.

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