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Prosecutors Should Be Wary Of Overreach After Marinello

By **Stephen Cook, Justin Weddle and Daniel Day** (March 30, 2018, 11:26 AM EDT)

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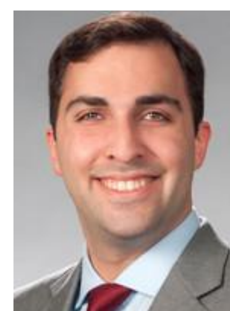

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On March 21, the U.S. Supreme Court rejected the government's broad interpretation of a criminal tax obstruction statute and overturned a courier freight service operator's three-year prison sentence in a decision that may have implications for the government's recent interpretation of omnibus criminal statutes, such as the "conspiracy to defraud the United States" clause of Section 371, in special counsel Robert Mueller's indictments, and in the case involving alleged leaks from the Public Company Accounting Oversight Board. The Supreme Court's Marinello decision is the latest warning about prosecutorial overreach where the government adopts broad interpretations of broad statutory language.

The government charged Carlo Marinello under the so-called "omnibus" clause of Internal Revenue Code Section 7212(a), which forbids "corruptly ... obstruct[ing] ... the due administration of [the Internal Revenue Code]." The government claimed that Marinello violated this omnibus clause by engaging in "at least one of eight different specified activities, including 'failing to maintain corporate books and records,' 'failing to provide' his tax accountant 'with complete and accurate' tax 'information,' 'destroying ... business records,' 'hiding income,' and 'paying employees ... with cash.'"[1] A jury convicted Marinello and he was sentenced to three years' imprisonment. The Second Circuit affirmed, holding that the omnibus charge did not require any "awareness of a particular [IRS] action or investigation."[2] In a scathing dissent from the denial of en banc review, Judge Dennis Jacobs, joined by Judge José Cabranes, criticized Marinello's criminal conviction "based on the most vague of residual clauses" that "cleared a garden path for prosecutorial abuse."[3] Judge Jacobs' dissent also highlighted the Supreme Court's increasing tendency to cast a "cold eye" towards "broad residual criminal statutes" and the court's preference "to cabin them."[4] Indeed, Judge Jacobs stated that a series of well-known Supreme Court reversals were animated by "alarm about fair warning and overbreadth."[5]

In a 7-2 decision, the Supreme Court reversed and remanded the Second Circuit's affirmation of Marinello's conviction, holding that to convict a defendant under the omnibus clause of Section 7212(a) of the Internal Revenue Code, the government must prove that the defendant was aware of a pending tax-related proceeding, such as a particular investigation or audit, or could reasonably foresee that such a proceeding would commence.

In reversing, the Supreme Court adopted the same "nexus requirement" that it used in United States v. Aguilar[6] in interpreting a similarly worded criminal obstruction statute. The court reasoned that it has "traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress and out of concern that 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'"[7] If the government cannot satisfy the nexus requirement, the court held that "the Government must show that the proceeding was ... at [ ] least ... reasonably foreseeable by the defendant."[8] The court emphasized that "[i]t is not enough for the Government to claim that the defendant knew the IRS may catch on to his unlawful scheme eventually. ... [T]he proceeding must at least be in the offing."[9]

Notably, as Judge Jacobs did in his dissent, the Supreme Court rejected the government's argument that prosecutorial discretion can be relied upon to ensure that the statute is appropriately limited, emphasizing that this would "place[] great power in the hands of the prosecutor ... to pursue their personal predilections, which could result in the nonuniform execution of that power across time and geographic location."[10]

Why might this decision impact the special counsel's cases and the PCAOB case? Because the Supreme Court itself emphasized that the Marinello decision was animated by concerns about overbroad prosecutions that swept well beyond the particular statute at issue in that case. Thus, the court pointed to Arthur Andersen LLP, Yates and McDonnell, despite the diversity of statutes at issue in those cases. Another broad statute that may well be ripe for review by the Supreme Court is Section 371's "conspiracy to defraud the United States," the very statute used by special counsel Mueller in some of his charges, and the statute used to charge a number of former KPMG and PCAOB employees with a felony for alleged leaks of PCAOB information.[11]

And, the government's broad interpretation of the "conspiracy to defraud the United States" clause (also known as a Klein conspiracy, based on the Second Circuit's decision in United States v. Klein) [12] has already been the target of pointed judicial criticism. For example, in United States v. Coplan, Judge José Cabranes of the Second Circuit criticized the case law interpreting Section 371 as overboard and creating a risk of prosecutorial overreach.[13] In addition, Judge Alex Kozinski leveled similar criticisms at overbroad Section 371 prosecutions, emphasizing that the government cannot use Section 371 to make "get[ting] in the government's way ... automatically a felony."[14]

Marinello can be seen not as a simple interpretation of a particular statute in the tax code, but rather as one of a number of decisions that have noted the dangers of prosecutorial overreach through novel or broad interpretations of criminal statutes, interpretations that fail to give fair warning of the line between foot-faults and felonies.

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[1] Marinello v. United States, No. 16-1144, slip op. at 2 (U.S. Mar. 21, 2018) (quoting lower court's decision at 839 F.3d 209, 213 (2d Cir. 2017)).

[2] United States v. Marinello, 839 F.3d 209, 221 (2d Cir. 2017) (citation omitted).

[3] United States v. Marinello, 855 F.3d 455, 455 (2d Cir. 2017) (Jacobs, J., dissenting).

[4] Id. at 456.

[5] Id. at 456–57 (discussing Arthur Andersen LLP v. United States, 544 U.S. 696 (2005); Skilling v. United States, 561 U.S. 358 (2010); Yates v. United States, 135 S. Ct. 1074 (2015); Johnson v. United States, 135 S. Ct. 2551 (2015); and McDonnell v. United States, 136 S. Ct. 2355 (2016)).

[6] 515 U.S. 593 (1995).

[7] Marinello v. United States, No. 16-1144, slip op. at 4 (U.S. Mar. 21, 2018) (quoting Aguilar, 515 U.S. at 600).

[8] Marinello, No. 16-1144, slip op. at 11 (citing Arthur Andersen LLP, 544 U.S. at 707–706).

[9] Marinello, No. 16-1144, slip op. at 11.

[10] Id. at 9 (internal citation omitted).

[11] Indictment, United States v. Middendorf et al., No. 18-cr-00036 (S.D.N.Y. Jan. 17, 2018). Brown Rudnick LLP serves as defense counsel in this case.

[12] 247 F.2d 908 (2d Cir. 1957).

[13] United States v. Coplan, 703 F.3d 46 (2d Cir. 2012).

[14] United States v. Caldwell, 989 F.2d 1056, 1060 (9th Cir. 1993).