

Supreme Court Overturns Wire Fraud Conviction of Private Citizen Under Honest-Services Theory After Holding That The Jury Instructions Given Were Too Vague

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Decided May 11, 2023 *Percoco v. United States*, No. 21-1158 Today, the Supreme Court overturned a wire fraud conviction based on an honest-services theory. The Court reasoned that while such a theory can potentially cover private persons, it does not extend to all private persons. The jury instructions given in this case were too vague because they failed to define the intangible right to honest services with sufficient definiteness. **Background:** Joseph Percoco resigned from his position in New York state government to serve in a private capacity as then-Governor Andrew Cuomo's campaign manager. Despite lacking an official government position, he continued to wield significant influence in the Cuomo administration. Recognizing that, an acquaintance paid Percoco \$35,000 to have him pressure a state agency to drop a requirement that would have forced the acquaintance's company to enter a costly agreement with a local union.

Federal prosecutors indicted Percoco under the honest-services component of the federal wire-fraud statute, which proscribes "depriv[ing] another of the intangible right of honest services." 18 U.S.C. § 1346. The statute is typically invoked in public-corruption cases involving public officials who take money in exchange for exercising their official power. But the Second Circuit concluded that the statute is broad enough to encompass Percoco's situation: a private citizen who takes money in exchange for wielding his substantial influence over government officials to persuade those officials to exercise their official powers in a certain way.

Issue: Whether private citizens can be convicted of depriving the public of honest services. **Court's Holding:** Potentially yes, because there is no absolute rule that would preclude convicting a private citizen under an honest-services theory (such as where a private citizen has become an actual agent of the government). But the conviction at issue could not be upheld because the jury instructions were too vague.

"[T]he intangible right of honest services' codified in § 1346 plainly does not extend a duty to the public to all private persons."

Justice Alito, writing for the Court

What It Means:

- Today's decision is one in a line of cases, including *McDonnell v. United States*, 579 U.S. 550 (2016), and *Skilling v. United States*, 561 U.S. 358 (2010), addressing expansive uses of the honest-services theory of wire fraud, and the Court's

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holding will make it more difficult for prosecutors to assert such theories as to private citizens such as lobbyists.

- Today's opinion suggests the government should focus on "heartland" cases of honest-services fraud, including when a private individual acts as the government's "actual agent" and therefore owes a fiduciary duty to both the government and the public.
- Justice Gorsuch, joined by Justice Thomas, concurred in the judgment only. Justice Gorsuch would have held that the honest-services fraud statute is void for vagueness because it fails to provide the fair notice that due process requires. After today's opinion, Justice Gorsuch wrote, "we now know a little bit more about when a duty of honest services *does not* arise, but we still have no idea when it *does*."

The Court's opinion is available [here](#).

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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