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High Court Criminal Tax Ruling Is Part Of A Trend

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In a 7-2 decision authored by Justice Stephen Breyer, Marinello v. United States, the U.S. Supreme Court added the so-called "omnibus clause" of 26 U.S.C. § 7212(a) to the growing list of obstruction statutes in need of some "interpretive 'restraint.'"[1] The omnibus clause forbids "corruptly ... obstruct[ing] or imped[ing], or endeavor[ing] to obstruct or impede, the due administration of [the Internal Revenue Code]."[2] The majority analogized the omnibus clause to 18 U.S.C. § 1503, which was construed by the court in United States v. Aguilar in 1995. Like the omnibus clause, Section 1503 makes it a crime to "corruptly ... influence[], obstruct[], or impede[] ... the due administration of justice." The court held that the omnibus clause, like Section 1503, must be interpreted to prohibit only obstructive conduct that has a "nexus" to a particular proceeding.

Marinello follows three prior rulings that have narrowed the reach of obstruction of justice statutes in white collar criminal investigations: Aguilar (1995), Arthur Andersen v. United States (2005) and Yates v. United States (2015). As in Marinello, the Supreme Court elected to read broad obstruction statutes more narrowly than suggested by the statutes' plain language. The court's recurring concern remains that the government cannot be entrusted to enforce wisely a broad obstruction of justice statute, and should have its discretion limited in order to prevent injustice.

Background

Defendant Carlo Marinello owned and managed a company that provided courier services. He routinely shredded or discarded most of his company's business records and paid his employees in cash. The IRS began investigating Marinello in 2004 and discovered that he had filed neither corporate nor personal tax returns since at least 1992. The IRS closed its investigation, however, after it was stymied by lack of information about Marinello's earnings. Marinello thereafter failed to pay taxes or keep records for another four years, despite being advised to do so by an attorney and accountant. The IRS reopened its investigation in 2009, and Marinello ultimately admitted to shredding documents and other misconduct, telling investigators that he "took the easy way out." In 2012, the government indicted Marinello for, inter alia, violating § 7212(a)'s omnibus clause.

At trial, a jury convicted Marinello on all counts. On appeal to the Second Circuit, Marinello argued that

conviction under the omnibus clause requires proof that the defendant's obstructive conduct interfered with a pending IRS proceeding, such as a particular investigation. The Second Circuit affirmed, finding no such requirement. Due to a circuit split,[3] the Supreme Court granted Marinello's petition for certiorari.[4]

The Supreme Court Interprets § 7212(a)'s Omnibus Clause to Include a Nexus Requirement

In an opinion authored by Justice Breyer, the Supreme Court reversed Marinello's conviction. Analogizing to its decision in Aguilar, the court found that § 7212(a)'s omnibus clause requires the government to prove a nexus between the defendant's obstructive conduct and a particular administrative proceeding. Justice Clarence Thomas dissented, joined by Justice Samuel Alito.

The majority in Marinello began with a discussion of Aguilar, which addressed a statute prohibiting "corruptly or by threats of force, or by any threatening letter or communication, [to] influenc[e], obstruc[t], or imped[e], or endeavor[r] to influence, obstruct, or impede, the due administration of justice."[5] The court interpreted that statute to include a "'nexus' requirement": The defendant's obstructive act "must have a relationship in time, causation, or logic with the judicial proceedings" being obstructed.[6] Analogizing to Aguilar, the majority in Marinello held that § 7212(a)'s omnibus clause should be interpreted to include a similar nexus requirement because (1) the clause "appears in the middle of a statutory sentence" prohibiting intimidation of or impeding U.S. officials;[7] and (2) the companion statute, § 7212(b) prohibits the "forcibl[e] rescu[e]" of "any property after it shall have been seized," meaning that both provisions refer to actions taken against identifiable persons or property.[8] This context cabins the omnibus clause's broad language: "the ... Clause logically serves as a 'catchall' in respect to the obstructive conduct the subsection sets forth, not as a 'catchall' for every violation that interferes with what the government describes as the 'continuous, ubiquitous, and universally known administration of the Internal Revenue Code."[9]

As a second justification, the majority noted that a broad reading of the omnibus clause would cause its prohibition to overlap with numerous misdemeanors in the Internal Revenue Code. Although redundancy is common among criminal provisions, the omnibus clause could be used to transform the code's misdemeanor provisions into felony obstruction — indeed, even seemingly innocent conduct like "pay[ing] a babysitter $41 per week in cash without withholding taxes ... leav[ing] a large cash tip in a restaurant ... fail[ing] to keep donation receipts from every charity to which [one] contributes, or fail[ing] to provide every record to an accountant" could constitute felony obstruction under the government's broader interpretation of § 7212(a).[10] The majority rejected the government's argument that prosecutorial discretion can prevent such unseemly results, noting that the attorney general's recently released sentencing policy instructs that prosecutors should, when given a choice, charge defendants under the most punitive provision provable at trial.[11]

The government and dissent argued that any overlap with a misdemeanor provision is avoided by § 7212(a)'s requirement that obstructive conduct be done "corruptly" — i.e., with "'the specific intent to obtain an unlawful advantage' for the defendant or another." This intent requirement is stricter than those of other provisions of the tax code, most of which require the defendant to act "willfully" — i.e., with knowledge of and intent to violate a duty imposed by law. The majority was unconvinced: "practically speaking," the court said, "we struggle to imagine a scenario where a taxpayer would 'willfully' violate the Tax Code ... without intending someone to obtain an unlawful advantage."[12]

Accordingly, the court held that a conviction under § 7212(a)'s omnibus clause requires the government to show a "nexus" — that is, a "relationship in time, causation, or logic" — with "a particular

administrative proceeding, such as an investigation, an audit, or other targeted administrative action." In defining "particular administrative proceeding," the court held that it cannot mean merely the "routine, day-to-day work carried out in the ordinary course by the IRS, such as review of tax returns." In addition, the court held that conviction under the omnibus clause requires the government to show that a particular proceeding was either pending or reasonably foreseeable by the defendant at the time he or she engaged in the obstructive conduct.[13] This follows the Supreme Court's prior decision in Arthur Andersen.[14] The court held that "reasonably foreseeable" requires more than a defendant's knowledge that "the IRS may catch on to his unlawful scheme eventually."[15]

Justice Thomas' Dissent

The dissent's primary critique was that the majority deviated from the plain language of the omnibus clause, which by its terms prohibits obstructing the "due administration of" the entire Tax Code — not just a particular proceeding.[16] The dissent further argued that the nexus requirement merely substituted breadth for ambiguity, insofar as "[t]he Court outline[d] its ... proceeding requirement in only the vaguest of terms."[17] Finally, the dissent provided a more thorough discussion of the facts, noting, for example, that Marinello's only explanation for intentionally shredding documents and failing to maintain business records for decades was that he "took the easy way out."[18] In its effort to rescue big tippers and charitable donors, the dissent opined, the court "constructed an opening in the Omnibus Clause large enough that even the worst offenders can escape liability."[19]

Analysis

Marinello can best be understood as a continuation of a trend embodied by three prior decisions: Aguilar, Arthur Andersen and Yates. In Aguilar, a federal judge made false statements to the FBI. The court imposed a nexus requirement to make sure the defendant knew his false statements would be conveyed to the grand jury, thereby obstructing justice. As in Marinello, the Aguilar court imagined a prosecution that could result without a nexus requirement: "a man could be found guilty ... if he knew of a pending investigation and lied to his wife ... thinking that an FBI agent might decide to interview her and that she might in turn be influenced in her statement to the agent by her husband's false account."[20]

Arthur Andersen, which imposed a "proceeding" requirement, involved a prosecution widely viewed as unfair: A large business with mostly innocent employees was driven out of business by an indictment based on the wrongdoing of a few bad apples.[21] The Supreme Court would not sustain the company's conviction for destruction of documents unless the defendant "ha[d] in contemplation any particular official proceeding in which those documents might be material."[22]

Finally, in Yates, the Supreme Court interpreted 18 U.S.C. § 1519, which makes it a crime to "knowingly ... destroy ... any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction ... of the United States." The defendant threw back fish into the Gulf of Mexico after being directed by fishing authorities to preserve the fish as undersized and illegally caught. The court rejected this prosecution, as it "would cut §1519 loose from its financial-fraud mooring." Only where the tangible object is "one used to record or preserve information" can there be a prosecution under Section 1519.[23] The court "resist[ed] reading §1519 expansively to create a coverall spoliation of evidence statute."[24]

Read in context, Marinello is the latest expression of the Supreme Court's recognition that the government needs to be checked when it comes to prosecuting obstruction of justice. As the Yates

dissent was forced to admit, "§1519 is a bad law—too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion."[25] Justice Breyer explained in Marinello that broad obstruction statutes "risk the lack of fair warning and related kinds of unfairness."[26] This is particularly important in tax law (and white collar practice more generally), where there is the potential to engage in an illegal act without a guilty state of mind. To be sure, as the Marinello dissent pointed out, the particular defendant whose case was before the court demonstrated a total disregard for the tax law. But defendants who engage in "'major' obstructive acts will typically be punished for a different legal violation"[27] and Marinello was convicted on other counts. It is wise for the court, especially when confronted with prosecutors who admittedly are determined to charge the most severe count regardless of the equities, to continue to exercise interpretive restraint in this area of the law.

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[1] Marinello v. United States, No. 16-1144 (U.S. Mar. 21, 2018), slip op. at 7.

[2] 26 U.S.C. §7212(a).

[3] Compare United States v. Kassouf, 144 F.3d 952 (6th Cir. 1998), with United States v. Marinello, 839 F.3d 209, 221 (2d Cir. 2016) (disagreeing with Kassouf).

[4] Marinello, slip op. at 3.

[5] Id. at 3 (quoting 18 U.S.C. §1503(a)).

[6] Id. at 4 (quoting Aguilar, 515 U.S. at 599).

[7] Id. at 5.

[8] Id. (quoting 26 U.S.C. §7212(a)).

[9] Id.

[10] Id. at 6-7.

[11] Id. at 8-9 (citing Office of the Attorney General, Department Charging and Sentencing Policy (May 10, 2017)).

[12] Id. at 8

[13] Id. at 10-11.

[14] 544 U.S. 696 (2005).

[15] Id.

[16] Marinello, dissent slip op. at 2-5.

[17] Id. at 11.

[18] Id. at 2.

[19] Id. at 12.

[20] 515 U.S. at 601-02.

[21] See, e.g., Amir Efrati, Former Enron Prosecutor Speakers Out: Criminal Charges Shouldn't Be So Easy, Wall Street Journal (Nov. 21, 2008) (describing Arthur Andersen prosecution as "instrumental in the downfall of the large firm" and "roundly criticized by the U.S. business community").

[22] Arthur Andersen, 544 U.S. at 708.

[23] Yates, 135 S. Ct. at 1078-79.

[24] Id. at 1088.

[25] Id. at 1101 (Kagan, J., dissenting).

[26] Marinello, slip op. at 7.

[27] Yates, 135 S. Ct. at 1088 n.8.