

Marinello v. United States: SCOTUS Reins In the Tax Division

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Adopted in 1954, 26 U.S.C. § 7212(a) criminalizes “[a]ttempts to interfere with [the] administration of the internal revenue laws.” While section 7212(a) appears to focus on conduct directed against IRS agents and employees, the Department of Justice has long used the so-called Omnibus Clause of that section – which makes it a crime to “in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstruct[] or impede[], or endeavor[] to obstruct or impede, the due administration of this title,” *id.* – to prosecute conduct occurring outside of audits or investigations.

In *Marinello v. United States*,¹ the Supreme Court rejected the government’s broad interpretation of the Omnibus Clause, handing the white-collar defense bar an important victory. Significantly, the Court in *Marinello* continued its recent trend of narrowly construing broadly-framed criminal statutes and restricted the application of the Omnibus Clause to conduct that obstructs a particular investigation or proceeding of which the defendant was (or should have been) aware.

Factual Background

Between 1992 and 2010, Carlo Marinello operated a courier business in Buffalo, New York. In connection with that business, Marinello failed to keep records reflecting its income or expenses, often destroying or shredding documents. He also paid his employees in cash; failed to report their income to the IRS; paid personal expenses with corporate funds; and, most significantly, did not file personal or corporate tax returns.

In December 2004, the IRS initiated an investigation into Marinello’s tax compliance. That investigation was eventually closed because the IRS could not determine the extent of Marinello’s unreported income. While Marinello was apparently unaware of that investigation, in 2005, on the advice of counsel, he consulted a CPA regarding his non-compliance. The CPA asked for documentation necessary to prepare corporate tax returns, but Marinello was unable

to provide the necessary records. Despite having been advised of the importance of good documentation, Marinello failed to keep appropriate books and records over the ensuing years.

In 2009, the IRS re-opened its investigation. In the course of the investigation, an IRS agent interviewed Marinello, who admitted that he had earned sufficient income to require payment of taxes but claimed he “never got around to” filing returns. Marinello also admitted paying personal expenses out of his business and confirmed that he had not kept (or had shredded) records reflecting the business’s income and expenses.

Marinello was indicted on eight misdemeanor counts of willfully failing to file tax returns in violation of 26 U.S.C. § 7203, and one felony count of corruptly endeavoring to obstruct and impede the due administration of the Internal Revenue laws in violation of 26 U.S.C. § 7212(a). Specifically, the 7212(a) charge was predicated on Marinello’s (1) failure to maintain proper books and records; (2) failure to provide information to his accountant; (3) destruction of records; (4) cashing of checks issued to the business; (5) concealment of business income in non-business accounts; (6) transferring assets to another person to conceal their improper use; (7) paying employees in cash; and (8) paying personal expenses out of the business.² Following his conviction and the denial of his post-trial motion, Marinello was sentenced principally to three years in prison.

The Second Circuit Opinions

On appeal to the United States Court of Appeals for the Second Circuit, Marinello argued that, to obtain a conviction under the Omnibus Clause, the government must establish (a) the existence of a pending IRS investigation and the defendant’s knowledge of that investigation, and (b) an affirmative act as opposed to an omission. On October 14, 2016, a unanimous panel consisting of Circuit Judges Robert Sack and Rosemary

Pooler and Southern District Judge Katherine Polk Failla, sitting by designation, rejected both arguments and affirmed the conviction in its entirety.³

The court first found that the Omnibus Clause could be violated in the absence of an IRS investigation or proceeding. In this regard, the Second Circuit declined to follow *United States v. Kassouf*,⁴ in which the Sixth Circuit interpreted the Omnibus Clause narrowly in light of the Supreme Court's restrictive reading of another federal obstruction statute (18 U.S.C. § 1503) in *United States v. Aguilar*.⁵ While *Kassouf* relied on *Aguilar* in concluding that section 7212(a) required both a nexus between the defendant's conduct and a pending investigation, and proof that the defendant was aware of that investigation, the Second Circuit concluded that *Aguilar* was inapposite.

In this regard, the Second Circuit noted that unlike section 1503, which criminalizes obstruction of the "due administration of justice," the "plain language of section 7212(a)'s omnibus clause 'prohibits any effort to obstruct the administration of the tax code, not merely investigations and proceedings conducted by tax authorities.'"⁶ Given its conclusion that the IRS's administration of the tax code extends to conduct predating the filing of any return, the Second Circuit rejected Marinello's argument that a conviction under section 7212(a) requires a showing that the defendant was aware of a pending IRS investigation or proceeding.

The court also rejected both Marinello's vagueness or overbreadth challenge and his claim that a violation of the Omnibus Clause required proof that the defendant engaged in an affirmative act. With respect to the former argument, the panel held that the requirement that the defendant acted "corruptly," which encompasses any conduct that is intended to "secure an unlawful advantage or benefit either for one's self or for another," was sufficient to alleviate any vagueness concerns.⁷ As for Marinello's latter argument, the court concluded that a defendant could not escape liability merely because he delayed the IRS in the administration of its duties through a corrupt omission.⁸

On October 26, 2016, Marinello petitioned the Second Circuit for rehearing and rehearing en banc. Over the strong dissent of Judge Dennis Jacobs (joined by Judge José Cabranes), the court denied the petition. Importantly, Judge Jacobs expressed reservations regarding both the panel's statutory interpretation and its implications for prosecutorial power.⁹ Citing *Aguilar* and other recent cases, Judge Jacobs noted that "[i]ncreasingly, the Supreme Court casts a cold eye on broad residual criminal statutes (particularly omnibus clauses like the one here), and has saved such statutes [only] by construing the statutory text to cabin them."

Nor was Judge Jacobs comforted by the requirement that the government prove that the defendant acted corruptly:

Any such comfort is surely an illusion, for two reasons. First, the risk of wrongful conviction, even with a *mens rea* requirement, is real: the line between aggressive tax avoidance and "corrupt" obstruction can be hard to discern, especially when no IRS investigation is active. Second, *alleging* a corrupt motive is no burden at all. Prosecutorial power is not just the power to convict those we are sure have guilty minds; it is also the power to destroy people. How easy it is under the panel's opinion for an overzealous or partisan prosecutor to investigate, to threaten, to force into pleading, or perhaps (with luck) to convict *anybody*.¹²

The Supreme Court Opinion

The Supreme Court granted certiorari and, in a 7-2 decision written by Justice Breyer, reversed the conviction. The Court began with a discussion of *Aguilar*, explaining that, in the interest of providing fair notice to citizens and of respecting the wishes of Congress, it had historically imposed a nexus requirement upon broadly-worded criminal obstruction statutes.¹³ The Court then found that the "statutory context confirms that the text [of section 7212(a)] refers to specific, targeted acts" by the IRS, rather than to any act that could potentially touch upon an IRS administrative function.¹⁴

The Court next addressed the broader implications of each party's position – particularly in regard to individual rights and prosecutorial discretion. As did the Second Circuit dissenters, the Court expressed concern that the Omnibus Clause, as interpreted by the government, would sweep in innocent and time-barred conduct, and would permit the government to turn routine misdemeanors into felonies. The Court therefore declined the government's invitation to leave enforcement discretion in the hands of the prosecutors and refused to "construe a criminal statute on the assumption that the Government will use it responsibly."¹⁵ The Court observed that, "to rely upon prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute's highly abstract general statutory language places great power in the hands of the prosecutor. Doing so risks allowing 'policemen, prosecutors, and juries to pursue their personal predilections,' which could result in the nonuniform execution of that power across time and geographic location."¹⁶

The Court therefore held that, "to secure a conviction under the Omnibus Clause, the Government must show (among other things) that there is a 'nexus' between the defendant's conduct and a particular administrative proceeding, such as an investigation, an audit, or other targeted administrative action."¹⁷ The Court then clarified that

[b]y 'particular administrative proceeding' we do not mean every act carried out by IRS employees in the course of their 'continuous, ubiquitous, and universally known' administration of the Tax Code. While we need not here exhaustively itemize the types of administrative conduct that fall within the scope of the statute, that conduct does not include routine, day-to-day work carried out in the ordinary course by the IRS, such as the review of tax returns.¹⁸

The Court further required the government to "show that the proceeding was pending at the time the defendant engaged in the obstructive conduct or, at the least, was then reasonably foreseeable by the defendant."¹⁹

In a dissenting opinion joined by Justice Alito, Justice Thomas agreed with the Second Circuit's conclusion regarding the inapplicability of *Aguilar* and took on the majority's holding that the phrase "due administration of this title" referred only to pending investigations. He observed that the "'administration' of the Tax Code includes four basic steps: information gathering, assessment, levy, and collection." Limiting the Omnibus Clause to active proceedings, argued Justice Thomas, ignores the vast number of other tasks necessary for the IRS to carry out its mission, and therefore fails to give effect to the statutory text.²¹

Putting a finer point on the matter, Justice Thomas went on to criticize the majority's view that its decision provided taxpayers with "'fair warning' of what [the Omnibus Clause] prohibits," accused the majority of providing its purported clarity "in only the vaguest of terms."²² Justice Thomas criticized the "nexus" and "reasonable foreseeability" requirements as being "defined negatively," rather than prospectively explaining to taxpayers what they could or could not do.²³ As such, Justice Thomas concluded that "[t]he Court, in its effort to exclude hypotheticals, has constructed an opening in the Omnibus Clause large enough that even the worst offenders can escape liability."²⁴

Marinello's Impact

As Judge Jacobs observed, it is the rare defendant who could be charged with obstructing an IRS investigation and would not also be liable for some substantive tax offense.²⁵ The government's pre-*Marinello* approach to the Omnibus Clause allowed it to bootstrap a misdemeanor violation into a felony obstruction charge, thereby serving as a powerful tool that could be (and was) used to increase the severity of charges and thereby induce guilty pleas.

While *Marinello* precludes application of the Omnibus Clause to elevate problematic record-keeping practices or the failure to file returns in a pre-investigation context to a felony obstruction charge, the Court has left the government some room to maneuver. Not only is the Omnibus Clause available to prosecute the destruction of records in the middle of an audit, but by expressly permitting its use where an investigation was “reasonably foreseeable,” the Court left open the possibility of a prosecution predicated on evidence that the defendant destroyed documents after learning that the IRS had initiated an investigation of a business associate, or had designated a particular industry or type of transaction (e.g., offshore bank accounts or tax shelters marketed by a particular accounting firm) as an enforcement priority.

Nevertheless, the opinion will have the critical effect of barring the government from turning minor violations of the tax code, such as the payment of a babysitter in cash or the failure to file a Form 1099 for a housekeeper’s salary, into “a prosecutor’s hammer that can be brought down upon any citizen.”²⁶ More broadly, *Marinello* is a continuation of the Court’s efforts to cabin broadly-worded criminal statutes, and to remove from the hands of federal prosecutors a level of discretion that, “insofar as the public fears arbitrary prosecution, . . . risks undermining necessary confidence in the criminal justice system.”²⁷ In this regard, *Marinello* provides defense lawyers with yet another tool to represent their clients and to push back against seemingly unbounded prosecutorial discretion.²⁸ 

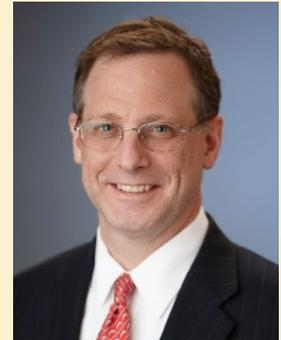
NOTES:

1. ___ S. Ct. ___, 2018 WL 1402426 (March 21, 2018).
2. *Marinello*, 839 F.3d 209, 213 (2d Cir. 2016).
3. *Marinello*, 839 F.3d 209.
4. 144 F.3d 952 (1998).
5. 515 U.S. 593 (1995).
6. *Marinello*, 839 F.3d at 221 (quoting *United States v. Willner*, No. 07 Cr. 183 (GEL), 2007 WL 2963711, at *5 (S.D.N.Y. Oct. 11, 2007) (emphasis in the original)).
7. *Id.* at 219 (citation omitted).

8. *Id.* at 224.
9. *United States v. Marinello*, 855 F.3d 455, 459 (2d Cir. 2017) (Jacobs, J., dissenting from denial of rehearing en banc).
10. *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) (interpreting 18 U.S.C. § 1512); *Skilling v. United States*, 561 U.S. 358 (2010) (interpreting 18 U.S.C. § 1346); *Yates v. United States*, 135 S. Ct. 1074 (2015) (interpreting 18 U.S.C. § 1519); *Johnson v. United States*, 135 S. Ct. 2551 (2015) (interpreting 18 U.S.C. § 924(e)); *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (interpreting 18 U.S.C. § 201).
11. *Marinello*, 855 F.3d 456.
12. *Id.* at 457.
13. See *Marinello*, ___ S. Ct. ___, 2018 WL 1402426 at *4 (quoting *Aguilar*, 515 U.S. at 600).
14. *Id.*
15. *Id.* (citing *McDonnell v. United States*, 136 S. Ct. 2355 (2016); *United States v. Stevens*, 559 U.S. 460 (2010)). In particular, the Court rejected the government’s assertion that the requirement that the defendant act “corruptly” limited prosecutorial discretion. Rather, finding no appreciable difference between “corruptly” and “willfully” – the mens rea standard for substantive tax crimes – the Court “struggle[d] to imagine a scenario where a taxpayer would ‘willfully’ violate the Tax Code . . . without intending someone to obtain an unlawful advantage.” *Marinello*, ___ S. Ct. ___, 2018 WL 1402426 at *6 (citations omitted).
16. *Id.* at *6 (citation omitted). While not referenced in the Court’s decision, it bears noting that the use of the Omnibus Clause in *Marinello* was seemingly at odds with Tax Division Directive No. 129. While that Directive does not explicitly preclude application of the Omnibus Clause to conduct (or omissions) that predate any proceeding, it notes that the Clause “is particularly appropriate for corrupt conduct that is intended to impede an IRS audit or investigation” and that it “can also be authorized in appropriate circumstances to prosecute a person who, prior to any audit or investigation, engaged in large-scale obstructive conduct involving the tax liabilities of third parties.”
17. *Id.* at *7.
18. *Id.* (citation omitted).
19. *Id.* at *8 (citing *Arthur Andersen*, 544 U.S. at 703, 707-08).
20. *Id.* at *11.
21. *Id.* at *11-12.
22. *Id.* at *15.
23. *Id.*
24. *Id.* at *16.
25. *Marinello*, 855 F.3d at 457 (Jacobs, J., dissenting).
26. *Id.*
27. *Marinello*, ___ S. Ct. ___, 2018 WL 1402426 at *6.

About the Author

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