



## HIGH COURT REJECTS EFFORT TO CRIMINALIZE BROAD SWATHS OF BUSINESS CONDUCT VIA THE TAX CODE

by David Debold

In *Marinello v. United States*, 138 S. Ct. 1101 (2018), the U.S. Supreme Court held that businesses and individuals cannot be convicted of obstructing “the due administration of” the Internal Revenue Code unless the government proves the defendant was aware of a pending tax-related proceeding or could reasonably foresee that such a proceeding would commence. In interpreting this felony violation much more narrowly than the government had urged, the Court reaffirmed important protections for business owners against aggressive prosecutions that would violate the fundamental twin constitutional protections of fair warning and even-handed application of the law.

Carlo Marinello, the owner of a freight services company, was convicted of eight counts of willfully failing to file his tax returns. His prosecution would have been unremarkable had the government been satisfied with those charges. The case was strong, to put it mildly. Marinello freely admitted to government agents and others that he could not remember the last time he had filed a tax return (it had been more than 10 years); he ignored warnings by an attorney and an accountant that the law required him to file returns and pay taxes; he gave an IRS agent demonstrably false reasons when first asked why he did not file; and he went on to admit that he knew he needed to file returns but “never got around to it.” He also admitted to routinely destroying records relevant to his tax obligations and paying employees in cash.

Despite this overwhelming proof on eight counts of willful failure to file tax returns—which exposed Marinello to up to eight years in prison (he got three years)—the government decided to add a ninth charge: the felony offense of corruptly obstructing the due administration of the Internal Revenue Code, also known as the Omnibus Clause of 26 U.S.C. § 7212(a). The jury convicted Marinello on that count too, even though the government could not prove he knew a tax-related proceeding (such as a particular investigation or audit of his taxes) was underway.

The Supreme Court, in a 7-2 decision, overturned Marinello’s conviction under this Omnibus Clause—the only conviction that Marinello challenged. The majority opinion, authored by Justice Breyer, sends a clear signal to the lower courts that the government cannot use “omnibus” or catch-all statutes to prosecute—or threaten the prosecution of—businesses and individuals for conduct just because that conduct might make it harder for the government to do its job.

The Court’s ruling is particularly encouraging because Justices across the ideological spectrum combined to agree on two important reasons for looking beyond the literal language of a potentially broad statute. First, Congress—not the Court—defines crimes, and thus a court should exercise restraint in assessing a criminal statute’s reach. Second, anyone subject to prosecution is entitled to fair warning, in language that the common world will understand, of the consequences that follow if a certain line is passed.

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Justice Thomas's dissent (joined by Justice Alito) makes a strong case that if text is all that matters, the Omnibus Clause would not confine the government to prosecuting the obstruction of Internal Revenue Code "proceedings." Rather, it proscribes obstruction of the due administration of the Code itself, and the Code is administered in many ways that do not rise to the level of a proceeding. This includes the routine gathering and processing of information from taxpayers and third parties, including many millions of tax returns. Under the dissent's view, Marinello could therefore be convicted of obstructing the IRS's ability to administer the Tax Code when he (i) failed to keep records, (ii) failed to provide his accountant with complete and accurate tax-related information; (iii) destroyed records; (iv) hid income; and (v) paid employees with cash. But not so under the majority's interpretation unless Marinello knew of, or reasonably foresaw, an audit or investigation when he did these things.

Why is this distinction important? The Tax Code, like many other federal statutes, contains a number of specified requirements ("thou shalt keep records of X" or "thou shalt not impede the performance of government duties Y and Z"), accompanied by fair warning of the penalty that may be imposed for crossing those clearly advertised lines. The government's reading of the Omnibus Clause dispensed with the need to prove violations of those more specific provisions. Instead, the government could just file a broadly worded charge that the taxpayer did a long list of things that tend to interfere with any and all manner of work by any federal employee who plays a part in administering the Code. This list could include, for example, failing to keep records even if that failure does not violate the Code's more specific record-keeping provisions.

The majority questioned how Congress could have intended such an odd outcome. It reasoned that if Congress wanted this omnibus provision to override a litany of detailed provisions that contain specific requirements applicable only under specified circumstances, it would say so more clearly than it did here. That is particularly so when, counterintuitively, the broader provision is a felony while many of the more specific provisions are only misdemeanors.

The Court also recognized that interpreting the Omnibus Clause as the government wished would beget another problem of particular importance to business owners trying to resolve allegations of wrongdoing that historically had been the subject of civil disputes: "To interpret the Omnibus Clause as applying to all Code administration would potentially transform many, if not all, of these misdemeanor provisions into felonies, making the specific provisions redundant, or perhaps the subject of plea bargaining." The Court's added reference to the plea bargaining implications of overly broad omnibus felony statutes is significant, because the severe pressure to settle criminal charges often operates beneath the surface, invisible to the courts. When the government has in its arsenal the plausible threat of a felony conviction under a statute interpreted to reach all types of interference with the government's work, the pressure can be immense to plead to a misdemeanor, even if there is a good faith basis for contesting the government's interpretation of a given Tax Code provision.

Take the government's interpretation here. The Court gave several examples of conduct that would be fodder for felony sentencing if the Omnibus Clause were not limited to obstruction of a proceeding. These include paying a babysitter in cash at a rate of \$41 per week (*i.e.*, more than \$1,000 a year) without withholding taxes; leaving large cash tips at restaurants; or failing to give every record to the accountant who prepares one's taxes. In each instance, the jury would need only find that the taxpayer knew to a fair degree of certainty that, for example, the babysitter would not declare the cash payment as income.

The *Marinello* decision cautions lower courts not to rely on "prosecutorial discretion" to "narrow the otherwise wide-ranging scope of a criminal statute's highly abstract general statutory language," because that approach "places great power in the hands of the prosecutor," thus risking the "nonuniform execution of that power across time and geographic location." The Supreme Court's continued vigilance in this area is a welcome reminder to lower courts of the need to protect businesses and individuals from prosecutorial overreach.