IRS in the Offing? *Marinello* Limits Tax Obstruction Prosecutions

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The Supreme Court's decision in *Marinello* left much for the lower courts to determine.

In *Marinello*,[1] the U.S. Supreme Court dealt taxpayers a rare win by significantly constraining the government's ability to employ the criminal tax obstruction of justice statute. Construing the Section 7212(a) "Omnibus Clause," which makes it a felony "corruptly or by force" to "endeavo[r] to obstruct or imped[e]… the due administration of [the Internal Revenue Code]," the Court rejected the notion that the statute covers "virtually all governmental efforts to collect taxes." Concerned that the statute could reach, among other things, cash payments to a babysitter, the Court instead engrafted seemingly important nexus requirements to the statute. Specifically, the Court held that the provision requires specific interference with targeted governmental tax-related proceedings, "such as an investigation, an audit, or other targeted administrative action." As discussed below, it will be up to the lower courts to determine the full scope of this limitation.

Factual Background

Between 2004 and 2009, the IRS opened, then closed, then reopened an investigation into the tax activities of Carlo Marinello. In 2012, a federal grand jury returned an indictment of Marinello, charging him with violations of several criminal tax statutes including the Omnibus Clause.[2] The indictment specifically charged that Marinello had engaged 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."

Marinello proceeded to trial on the charges, and the jury was instructed that to convict him of violating the Omnibus Clause, it must find unanimously that he engaged in at least one of the eight practices just mentioned, that the jurors need not agree on which one, and that he did so "corruptly," broadly defined as acting "with the intent to secure an unlawful advantage or benefit, either for [himself] or for another." The trial judge did not, however, instruct the jury that it must find that Marinello knew he was under investigation and intended corruptly to interfere with that investigation. The jury subsequently convicted Marinello on all counts.

On appeal to the Second Circuit,[3] Marinello argued, among other things, that a violation of the Omnibus Clause requires the government to prove that the defendant had tried to interfere with a "pending IRS proceeding," such as a particular investigation. The appeals court disagreed, holding that a defendant need not possess "'an awareness of a particular [IRS] action or investigation.'" The appeals court also affirmed the convictions based on overt acts that were omissions (failing to maintain or turn over records) as well as acts of commission (such as the destruction of records). Practitioners were concerned that if omissions could be charged based on pre-audit conduct, the scope of an already broad statute could be dramatically increased.

Marinello then petitioned for certiorari, asking the Supreme Court to decide whether the Omnibus Clause requires the government to prove the defendant was aware of "a pending IRS action or proceeding, such as an investigation or audit," when he "engaged in the purportedly obstructive conduct." In light of a circuit conflict on this point, the Court granted the petition.[4]

Background Regarding Section 7212(a)

Section 7212(a), has two substantive clauses. The first clause forbids "corruptly or by force or threats of force (including any threatening letter or communication) endeavor[ing] to intimidate or impede any *officer or employee* of the United States acting in an official capacity under [the Internal Revenue Code]." The second clause, the one at issue in *Marinello*, forbids one who "corruptly or by force or threats of force (including any threatening letter or communication) obstruct[ing] or imped[ing], or endeavor[ing] to obstruct or impede, *the due administration* of [the Internal Revenue Code]." This second clause, as noted, is referred to as the Omnibus Clause of the statute.

Justice Breyer's Opinion for the Court

The Supreme Court reversed the conviction in a 7-2 ruling with only Justices Alito and Thomas dissenting. The Court's opinion was written by Justice Breyer, who at oral argument raised the specter of charging with obstruction a homeowner who was paying his gardener, and later in his opinion expressed concerns about charging a homeowner who paid his babysitter in cash.

Justice Breyer began by reviewing *Aguilar*,[5] where the Court interpreted a similarly worded criminal statute, which made it a felony "'corruptly or by threats or force, or by any threatening letter or communication, [to] influenc[e], obstruc[t], or imped[e], or endeavo[r] to influence, obstruct, or impede, the due administration of justice.' 18 U.S.C. § 1503(a). The statute concerned not (as here) 'the due administration' of *the Internal Revenue Code* but rather 'the due administration of *justice*.'" In interpreting that statute, the Court reviewed earlier cases in which courts had held, in order to limit the scope of the statute, that the government was required to prove "an intent to influence judicial or grand jury proceedings." *Aguilar*.[6] The Court noted that some of the lower courts had imposed a "nexus" requirement, which required a demonstration that the defendant's "act must have a relationship in time, causation, or logic with the judicial proceedings."[7]

In *Aquilar*, the Court adopted a "nexus" requirement, noting that it "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.'"[8]

In *Marinello*, the Court determined that both of these reasons applied to the Omnibus Clause of the obstruction statute. As to Congress' intent, the Court concluded that the literal language of the statute is neutral. Stating the obvious, the Court noted that the statutory words "obstruct or impede" are broad:

> They can refer to anything that "block[s]," "make[s] difficult," or "hinder[s]." But the verbs "obstruct" and "impede" suggest an object – the taxpayer must hinder a particular person or thing. Here, the object is the "due administration of this title." The word "administration" can be read literally to refer to every "[a]ct or process of administering" including every act of "managing" or "conduct[ing]" any "office," or "performing the executive duties of" any "institution, business, or the like." But the whole phrase – the due administration of the Tax Code – is best viewed, like the due administration of justice, as referring to only

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1 138 S. Ct. 1101, 121 AFTR2d 2018-1053 (2018).
2 110 AFTR2d 2012-5133 (DC NY, 2012).
3 839 F.3d 209, 118 AFTR2d 2016-6127 (CA-2, 2016).
4 Compare *Kassouf*, 144 F.3d 952, 81 AFTR2d 98-2066 (CA-6, 1998) (requiring showing of a pending proceeding), with *Marinello*, 839 F.3d 203 (CA-2, 2016) (refusing to follow *Kassouf*).
5 515 U.S. 593 (1995).
6 *Id*. at 599 (citing Brown, 688 F.2d 596, 598 (CA-9, 1982)).
7 *Id*. at 599 (citing *Wood*, 6 F.3d 692, 696 (CA-10, 1993), and *Walasek*, 527 F.2d 676, 679, and n. 12 (CA-3, 1975)).
8 *Id*. at 600 (quoting *McBoyle*, 283 U.S. 25, 27 (1931); citation omitted).

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some of those acts or to some separable parts of an institution or business.[9]

Justice Breyer then looked to the statutory context in concluding that the language of the obstruction statute "refers to specific, targeted acts of administration." "The Omnibus Clause appears in the middle of a statutory sentence that refers specifically to efforts to 'intimidate or impede *any officer or employee of the United States* acting in an official capacity.'"[10] The Court noted that the first part of the sentence referred to "'force or threats of force,'" which the statute elsewhere defined as "'threats of bodily harm to the *officer or employee of the United States or to a member of his family.*'"[11] "The following subsection referred to the 'forcibl[e] rescu[e]' of 'any *property* after it shall have been seized under' the Internal Revenue Code. § 7212(b) (emphasis added)." The Court concluded that subsections (a) and (b) referred to corrupt or forceful actions taken against individual identifiable persons or property. The Court stated, in that context "the Omnibus 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. Brief in Opposition 9."[12]

Justice Breyer then found confirmation of the more limited scope of the Omnibus Clause in legislative history.[13] "According to the House Report, § 7212 'provides for the punishment of threats or threatening acts against *agents* of the Internal Revenue Service, or any other *officer* or *employee* of the United States, or *members of the families of such persons,* on account of the performance by such agents or officers or employees of their official duties' and '*will also punish the corrupt solicitation of an internal revenue employee.*' H. R. Rep. No. 1337, at A426 (emphasis added)." The Court also referenced the Senate Report description of the section as aimed at targeting officers and employees. "It says that § 7212 'covers all cases where the *officer* is intimidated or injured; *that is*, where corruptly, by force or threat of force, directly or by communication, an attempt is made to impede the administration of the internal-revenue laws.' S. Rep. No. 1622, at 147 (emphasis added)." Justice Breyer concluded that "nothing in the statute's history suggest[s] that Congress intended the Omnibus Clause as a catchall applicable to the entire Code including the routine processing of tax returns, receipt of tax payments, and issuance of tax refunds."[14]

Justice Breyer's opinion also analyzed the Omnibus Clause in the broader statutory context of the Code, which created numerous misdemeanors, ranging from the willful failure to furnish a required statement to employees, Section 7204, to failure to keep required records, Section 7203, to misrepresenting the number of exemptions to which an employee is entitled on an IRS Form W-4, Section 7205, to failure to pay any tax owed, however small the amount, Section 7203. According to Justice Breyer, "[t]o 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 matter of plea bargaining." Noting that some overlap is "inevitable" in criminal provisions, the Court had found no case creating the overlap and redundancy that would result from the government's broad reading of the statute.

Justice Breyer further concluded that a broad interpretation would also "risk the lack of fair warning and related kinds of unfairness that led this Court in *Aguilar* to 'exercise' interpretive 'restraint.'" Interpreted broadly, Justice Breyer determined that the obstruction provision could apply to any person who:

- Pays a babysitter $41 per week in cash without withholding taxes.
- Leaves a large cash tip in a restaurant.
- Fails to keep donation receipts from every charity to which he or she contributes.
- Fails to provide every record to an accountant.

"Such an individual may sometimes believe that, in doing so, he is running the risk of having violated an IRS rule, but we sincerely doubt he would believe he is facing a potential felony prosecution for tax obstruction. Had Congress intended that outcome, it would have spoken with more clarity than it did in § 7212(a)."[15]

The government attempted to salvage its broad reading of the statute by arguing that the requirement to show the defendant's obstructive conduct was done "corruptly" would cure any overbreadth problem, but the Court rejected this contention. The government argued that "corruptly" means acting with "the specific intent to obtain an unlawful advantage" for the defendant or another, but "we struggle to imagine a scenario where a taxpayer would 'willfully' violate the Code (the *mens rea* requirement of various tax crimes, including misdemeanors, *see*, *e.g.*,26 U.S.C. § § 7203, 7204, 7207) without intending someone to obtain an unlawful advantage… A taxpayer may know with a fair degree of certainty that her babysitter will not declare a cash payment as income – and, if so, a jury could readily find that the taxpayer acted to obtain an unlawful benefit for another. For the same reason, we find unconvincing the dissent's argument that the distinction between 'willfully' and 'corruptly' – at least as defined by the Government – reflects any meaningful difference in culpability."[16]

Justice Breyer's opinion also rejected the notion that prosecutorial discretion could narrow the statute's scope.

> True, the Government used the Omnibus Clause only sparingly during the first few decades after its enactment. But it used the clause more often after the early 1990's. Brief for Petitioner 9. And, at oral argu-

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[9] *Id.* at 1106.
[10] Section 7212(a) (emphasis added).
[11] *Id.* (emphasis added).
[12] *Id.* at 1107.
[13] *See* H. R. Rep.'t No. 1337, 83d Cong., 2d Sess. (1954); S. Rep.'t No. 1622, 83d Cong., 2d Sess. (1954).
[14] *Id.*
[15] *Id.* at 1108.
[16] *Id.*
[17] *Id.*at 1109.
[18] *Id.*
[19] *Id.* at 1111.
[20] *Id.*

ment the government told us that, where more punitive and less punitive criminal provisions both apply to a defendant's conduct, the Government will charge a violation of the more punitive provision as long as it can readily prove that violation at trial. Tr. of Oral Arg. 46–47, 55–57; *see* Office of the Attorney General, Department Charging and Sentencing Policy (May 10, 2017), online at http://www.justice.gov/opa/press-release/file/965896/download (as last visited Mar. 16, 2018).

In an important conclusion applicable in other contexts, the Court stated that

> [r]egardless, 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," *Smith v. Goguen*, 415 U.S. 566, 575 (1974), which could result in the nonuniform execution of that power across time and geographic location. And insofar as the public fears arbitrary prosecution, it risks undermining necessary confidence in the criminal justice system. That is one reason why we have said that we "cannot construe a criminal statute on the assumption that the government will 'use it responsibly.'" *McDonnell v. United States*, 579 U.S. ___, ___ (2016) (slip op., at 23) (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010)). And it is why "[w]e have traditionally exercised restraint in assessing the reach of a federal criminal statute." *Aguilar*, *supra,* at 600.[17]

The Court concluded by stating:

> [i]n sum, we follow the approach we have taken in similar cases in interpreting § 7212(a)'s Omnibus Clause. To be sure, the language and history of the provision at issue here differ somewhat from that of other obstruction provisions we have considered in the past. See *Aguilar, supra* (interpreting a statute prohibiting the obstruction of "the due administration of justice"); *Arthur Andersen* [*v. United States*, 544 U.S. 696 (2005)], *supra* (interpreting a statute prohibiting the destruction of an object with intent to impair its integrity or availability for use in an official proceeding); *Yates* [*v United States,* 574 U.S. __, 135 S.Ct. 1074 (2015)*, supra* (interpreting a statute prohibiting the destruction, concealment, or covering up of any "record, document, or tangible object with the intent to" obstruct the "investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States").[18]

To limit the statute, the Court 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. That nexus requires a "relationship in time, causation, or logic with the [administrative] proceeding." *Aguilar*, 515 U. S., at 599 (citing *Wood*, 6 F.3d, at 696). By "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. Brief in Opposition 9. 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.

The Court specifically stated by way of limitation of the scope of the statute that "[j]ust because a taxpayer knows that the IRS will review her tax return every year does not transform every violation of the Tax Code into an obstruction charge."

In addition to satisfying this nexus requirement, the Court imposed a second requirement. Here, however, the Court added language certain to be subject to discussion and further development stating:

> that the government must 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. See *Arthur Andersen*, 544 U.S., at 703, 707–708 (requiring the Government to prove a proceeding was foreseeable in order to convict a defendant for persuading others to shred documents to prevent their "use in an official proceeding")… It is not enough for the Government to claim that the defendant knew the IRS may catch on to his unlawful scheme eventually. To use a maritime analogy, the proceeding must at least be in the offing." *Id.* at 1110.

Justice Thomas' Dissenting Opinion

Justice Thomas authored the dissenting opinion, joined by Justice Alito. In their view, the Omnibus Clause referred to "Title 26, which contains the entire Tax Code and authorizes the Internal Revenue Service (IRS) to calculate, assess, and collect taxes. I would hold that the Omnibus Clause does what it says: forbid corrupt efforts to impede the IRS from *performing* any of these activities."[19]

The dissent began by reprising the facts that the petitioner owned and managed a company that provided courier services; kept almost no records of the company's earnings or expenditures; shredded or discarded most business records; paid his employees in cash and did not give them tax documents; and took tens of thousands of dollars from the company each year to pay his personal expenses.[20] The dissent focused on other unfavorable facts noting that the IRS learned that he had not filed a tax return – corporate or individual – since at least 1992. However, the investigation came to a standstill because the IRS did not have enough information about his earnings. After the investigation ended, the petitioner consulted a lawyer and an accountant, both of whom advised him that he needed to file tax returns and keep business records. Despite these warnings, he did neither for another four years.

In 2009, the IRS decided to investigate Marinello again. In an interview with an IRS agent, Marinello initially claimed he was exempt from filing tax returns because he made less than $1,000 per year. On further questioning, however, Marinello "changed his story." He admitted that he earned more than $1,000 per year, but said he "never got around" to paying taxes. He also admitted that he shredded documents, did not keep

track of the company's income or expenses, and used the company's income for personal bills. His only excuse was that he "took the easy way out."[21]

The dissent began by agreeing with the majority's interpretations of "obstruct or impede" and "due administration," which together refer to conduct that hinders the IRS' performance of its official duties. It also agreed that the object of these words – the thing a person is prohibited from obstructing the due administration of – is "this title," *i.e.,* Title 26, which contains the entire Tax Code. The dissent parted ways with the majority when it concluded that the whole phrase "due administration of the Tax Code" means "only some of" the Tax Code – specifically "particular [IRS] proceeding[s], such as an investigation, an audit, or other targeted administrative action." In its view, the plain text of the Omnibus Clause prohibits obstructing the due administration of the Tax Code in its entirety, not just particular IRS proceedings.[22]

The view of the dissent was that the words "'this title' cannot be read to mean 'only some of this title.' As this Court recently reiterated, phrases such as 'this title' most naturally refer to the cited provision 'as a whole.' *Rubin v. Islamic Republic of Iran*, 583 U. S. ___, ___ (2018) (slip op., at 8). Congress used 'this title' throughout Title 26 to refer to the Tax Code in its entirety… And, '[w]hen Congress wanted to refer only to a particular subsection or paragraph, it said so…' Thus, 'this title' must refer to the Tax Code as a whole."[23]

The dissent likewise concluded that the phrase "due administration of this title" likewise refers to the due administration of the entire Tax Code. Noting, "[a]s this Court has recognized, 'administration' of the Tax Code includes four basic steps: information gathering, assessment, levy, and collection. *See Direct Marketing Assn. v. Brohl*, 575 U.S. ___, ___–___ (2015) (slip op., at 6– 7)." Noting that subtitle F of the Tax Code – titled "Procedure and Administration" – contains directives related to each of these steps, the dissent concluded that the phrase "due administration of this title" "refers to the entire process of taxation, from gathering information to assessing tax liabilities to collecting and levying taxes. It is not limited to only a few specific provisions within the Tax Code."[24]

The dissent then proceeded to attack piece-by-piece the conclusion of the majority. The dissent stated that the text of the Omnibus Clause was not "neutral;" that specific clauses in a statute typically do not limit the scope of a general omnibus clause; that a reading that allegedly prevents the Omnibus Clause from overlapping with certain misdemeanors in the Tax Code did not create a redundancy problem because these provisions had different *mens rea* requirements and, under basic principles of criminal law, the law recognizes that the same conduct, when committed with a higher *mens rea*, is more culpable and thus more deserving of punishment and noted that redundancy abounds in both the criminal law and the Tax Code.[25]

The dissent then took the majority to task for its claim that its narrow reading of "due administration of this title" was supported by three decisions interpreting other obstruction statutes. The dissent notes that the majority admitted that the "language and history" of the Omnibus Clause "differ somewhat" from those other obstruction provisions.[26] The Court stated that:

> *Aguilar* interpreted 18 U.S.C. § 1503. The omnibus clause of § 1503 forbids corruptly endeavoring to obstruct "the due administration of justice." The Court concluded that this language requires the prosecution to prove a "nexus" between the defendant's obstructive act and "judicial proceedings." 515 U.S., at 599–600. But this nexus requirement was based on the specific history of § 1503. The predecessor to that statute prohibited obstructing "the due administration of justice" "in any *court* of the United States." *Pettibone v. United States*, 148 U.S. 197, 202 (1893) (citing Rev. Stat. § 5399). Based on this statutory history, the Court assumed that § 1503 continued to refer to the administration of justice in a court. *Aguilar*, *supra,* at 599. None of that history is present here.[27]

The dissent stated that *Arthur Anderson* was "even further afield."

> There, the Court interpreted 18 U.S.C. § 1512(b)(2)(A), which prohibits "knowingly … corruptly persuad[ing] another person … with intent to … cause or induce [that] person to … withhold testimony, or withhold a record, document, or other object, from an official proceeding." Relying on *Aguilar*, the Court concluded that § 1512(b)(2)(A) required the Government to show a "nexus" with "[a] particular proceeding." 544 U.S., at 707–708. But this nexus requirement came from the statutory text, which expressly included "an official proceeding." If anything, then, § 1512(b)(2)(A) cuts against the Court's interpretation of the Omnibus Clause because it shows that Congress knows how to impose a "proceeding" requirement when it wants to do so.

Finally, according to the dissent, *Yates* underscored this point.

> There the Court interpreted 18 U.S.C. § 1519, which prohibits obstructing "the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States." The four Justices in the plurality recognized that this language made § 1519 broader than other obstruction statutes: Section 1519 "covers conduct intended to impede any federal investigation or proceeding, including one not even on the verge of commencement." 574 U.S., at ___ (slip op., at 18). The plurality contrasted the term "official proceeding" with the phrase "investigation or proper administration of any matter within the jurisdiction of any department or agency," noting that the latter is broader. *Id.,* at ___–___ (slip op., at 12–13). The same is true for the broad language of the Omnibus Clause.[28]

The dissent then discussed the majority's "resort" to "lenity-sounding concerns" to justify reading its proceeding requirement into the Omnibus Clause. To the dissent, there was no uncertainty

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[21] *Id.* at 1112.
[22] *Id.*
[23] *Id.* (citation omitted).
[24] *Id.* at 1113.
[25] *Id.* at 1114-1115.
[26] Citing *Aguilar*, Note 5, *supra*; *Arthur Andersen LLP*, 544 U.S. 696 (2005); *Yates*, 135 S. Ct. 1074 (2015).
[27] *Id.* at 1115-16.
[28] *Id.* at 1116.
[29] *Id.*
[30] 247 F.2d 908, 52 AFTR2d 614 (CA-2, 1957).
[31] See *Caplan*, 703 F.3d 46, 110 AFTR2d 2012-6832 (CA-2, 2012).

in the statute and if the Court is concerned that the Omnibus Clause does not give defendants "fair warning" of what it prohibits, the dissent stated that it was

> hard pressed to see how today's decision makes things better. The Court outlines its atextual proceeding requirement in only the vaguest of terms. Under its interpretation, the prosecution must prove a "nexus" between the defendant's conduct and some "particular administrative proceeding." … Further, the Government must prove that the proceeding was "reasonably foreseeable" to the defendant… It is hard to see how the Court's statute is less vague than the one Congress drafted, which simply instructed individuals not to corruptly obstruct or impede the IRS' administration of the Tax Code.[29]

The dissent concluded that:

> [t]o be sure, § 7212(a) is a sweeping obstruction statute. Congress may well have concluded that a broad statute was warranted because "our tax structure is based on a system of self-reporting"and "the Government depends upon the good faith and integrity of each potential taxpayer to disclose honestly all information relevant to tax liability." *United States v. Bisceglia*, 420 U.S. 141, 145 (1975). Whether or not we agree with Congress' judgment, we must leave the ultimate "[r]esolution of the pros and cons of whether a statute should sweep broadly or narrowly ... for Congress." *United States v. Rodgers*, 466 U.S. 475, 484 (1984). "[I]t is not our task to assess the consequences of each approach and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted." *Lewis v. Chicago*, 560 U.S. 205, 217 (2010).

The dissent could not leave alone the babysitter and other examples cited in the majority opinion regarding the statute's potential overbreadth. According to the dissent, whether the statute reaches that far and whether the government would waste its resources identifying and prosecuting them is debatable. However, what should not be debatable is that the statute covered Marinello and concluded that the majority "in its effort to exclude hypotheticals, has constructed an opening in the Omnibus Clause large enough that even the worst offenders can escape liability." A Supreme Court concerned about the scope of the Omnibus provision thus found a way to limit its scope.

Analysis

Post-*Marinello*, numerous issues remain for the lower courts to resolve. Preliminarily, the Criminal Tax Manual Directive No. 129 contained language authorizing the use of Section 7212(a) for pre-audit conduct where one "engaged in large-scale obstructive conduct involving the tax liability of third parties." The example given was of an individual who assisted in preparing or filing a large number of fraudulent tax returns. This will necessarily need to be revised post-*Marinello.* The Criminal Tax Manual already contains a case alert for *Marinello* focusing on the majority's use of the phrase that a "proceeding must at least be in the offing...." Post-*Marinello,* the attempt to employ this statute for other than the destruction of records after receipt of a subpoena or summons is unclear.

The courts will have to develop case law to interpret the contours of *Marinello*'s assorted holdings and explanatory language. There will certainly be issues with respect to foreseeability. In addition to the in the offing language, the Court further stated that even if a tax return is reviewed every year, not every violation of the Code becomes an obstruction charge. Does this suggest that record destruction to evade taxes cannot be obstruction under any circumstances if an audit has not yet commenced?

The Court's use of the term "targeted administrative proceeding" also raises myriad issues. What if a taxpayer has an affair, and on ending the affair is told by his mistress that unless she is "taken care of," she will go to the IRS? If, after that discussion, the taxpayer destroys records, does this constitute tax obstruction? Alternatively, what about a taxpayer participating in an IRS voluntary disclosure program who submits inaccurate returns despite knowing that the returns will be reviewed as part of the program? Or, what if a related party has been issued a subpoena that makes it possible/likely that the taxpayer will also be subject to audit scrutiny or to an investigation?

Another set of open issues post-*Marinello* concern whether obstruction can occur by *omission* rather than *commission*. The Supreme Court did not find it necessary to reach this issue in the majority opinion. Consider the case of a taxpayer who, on receiving notice from the IRS that his income tax return has been selected for audit, informs his accountant that he never maintained records sufficient to support travel and entertainment expenses and charitable deductions reflected on the return. Is this taxpayer's *omission* sufficient to sustain an obstruction charge? In the alternative, a taxpayer who has refused to fill out an "organizer" provided by his accountant that contained questions relating to foreign bank accounts and the return ends up being filed inaccurately failing to disclose accounts offshore?

Relatedly, certain provisions of federal law require the maintenance of records. If such records were not maintained, or were maintained outside of the U.S., and the IRS commences an income tax audit, would the taxpayer's failure to maintain records be sufficient to support an obstruction charge?

Moreover, the holding of *Marinello* may apply in other contexts. Section 371 of Title 18, U.S. Code, makes it a crime when "two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner for any purpose." This "defraud" language has for years served as the predicate for what is known as a *Klein* conspiracy (based on the decision in *Klein).*[30] Subsequent decisions have noted that this statute may reach any conspiracy, which has as its purpose obstructing or defeating the lawful function of the IRS.[31] *Caplan* ultimately rejected a challenge to the scope of the conspiracy statute, stating it was for the Supreme Court to consider. Now, post-*Marinello*, there is a Supreme Court decision that raises the issue of whether *Klein* conspiracies also reach too far.

Conclusion

All of these issues, and likely many more, remain to be decided another day in the post-*Marinello* world. As this article goes to press, the composite of the Supreme Court may be changing yet again. Yet, for now, taxpayers can bask in the glow of a significant victory, with the tax obstruction statute having been substantially limited. ●