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Expert Analysis

Time to Revisit the 'Klein' Conspiracy Doctrine

By
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Predicated on the 1957 decision by the U.S. Court of Appeals for the Second Circuit in *United States v. Klein*,[1] federal tax indictments often include an allegation that the defendants conspired to "defraud the United States and the Internal Revenue Service by impeding, impairing, defeating and obstructing the lawful governmental functions of the IRS in the ascertainment, evaluation, assessment, and collection of income taxes." While some commentators have questioned the statutory authority for the so-called *Klein* conspiracy,[2] given its extensive support in Supreme Court precedent and appellate case law, challenges to the charge have rarely gained traction.

In late November, however, the Second Circuit decided *United States v. Coplan*,[3] in which it recognized "infirmities in the history and deployment" of the conspiracy statute to efforts to impede or obstruct the IRS. (The author and his firm represented one of the defendants in *Coplan* at trial and served as co-counsel on that defendant's appeal.) Although the Second Circuit ultimately declined to overturn decades of jurisprudence, together with a 1993 decision by the U.S. Court of Appeals for the Ninth Circuit, the *Coplan* decision casts doubt on the validity of the *Klein* doctrine and gives criminal defense counsel reason to hope that the Supreme Court will ultimately decide the issue.

The 'Defraud' Prong

The federal conspiracy statute, currently codified at 18 U.S.C. §371, first appeared in the 1867 "Act to amend existing Laws relating to Internal Revenue and for other Purposes."[4] In addition to codifying the principle that an agreement to commit a crime constitutes a separate and distinct offense, the statute included a second prong making it a crime to "defraud" the United States or any of its agencies.[5]

Unlike other statutes that include a "defraud" element, the second prong of §371 has been broadly construed to encompass not just the common law concept of depriving the government of money or property through deceit or dishonesty, but any effort "to interfere with or obstruct one of its lawful governmental functions." This interpretation stems from two Supreme Court cases: *Haas v. Henkel*[6] and *Hammerschmidt v. United States*.[7]

In *Haas*, a Department of Agriculture statistician agreed to share confidential information with other individuals who planned to use it to speculate on grain futures. The Supreme Court found that the agreement was within the purview of the "defraud" prong of the conspiracy statute, not because it was fraudulent but because "[t]he statute is broad enough in its terms to include *any conspiracy* for the purpose of impairing, obstructing or defeating the lawful function of any department of government."[8] In sweeping language, the court concluded that, although the phrase "to defraud" has been construed in other criminal statutes to require proof that the defendant deprived his victim of property by dishonest means, the effect of "any conspiracy which is calculated to obstruct or impair [the government's] efficiency…would be to defraud the United States."[9]

Haas, however, did not support its far-reaching conclusion with either citations to the legislative history or the statutory text. Indeed, in *United States*

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v. Gradwell,[10] decided seven years after *Haas*, the Supreme Court appeared to question its own expansive interpretation of the "defraud" prong of the conspiracy statute. In *Gradwell*, the defendants were charged with conspiring to defraud the United States by bribing voters in two congressional elections. The government argued that because it has "the right to honest, free, and fair elections," a conspiracy to bribe voters would be a "denial and defeat of this right, and…therefore is a scheme to defraud the United States." In rejecting this theory of liability, the court stated that "it would be a strained and unreasonable construction to apply [the conspiracy statute], originally a law for the protection of the revenue" to a conspiracy to bribe voters at a congressional election.

Then, in *Hammerschmidt*, the court further scaled back the potential expansive interpretation of *Haas*. In *Hammerschmidt*, 13 defendants were convicted of a conspiracy to defraud for having printed, published and circulated brochures and handbills encouraging people not to obey the draft laws.[11] The prosecutors sought to justify the convictions on the grounds that the defendants' efforts served to impair the government's functioning.

The Supreme Court rejected this argument. Citing *Haas*, the court explained that "[t]o conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft, or trickery, or at least by means that are dishonest."[12] Because the defendants' "open defiance" of the draft lacked deceit or dishonesty, it could not support a conviction under the "defraud" prong.[13]

In *Klein*, the defendants were charged with substantive tax evasion counts as well as a conspiracy "to obstruct the Treasury Department in its collection of the revenue" under the "defraud" prong of §371. Though the trial court dismissed the substantive counts, the defendants were convicted of the conspiracy count. In upholding the conviction, the Second Circuit applied the *Hammerschmidt* principle to the tax context and enumerated several "acts of concealment of income" that constituted an effort to interfere with the government's tax collection program.[14]

Together with a 1993 Ninth Circuit decision, the 'Coplan' decision casts doubt on the validity of the 'Klein' doctrine.

A "*Klein* conspiracy" is now common shorthand for "a conspiracy to frustrate the government (particularly the IRS) in its lawful information gathering functions."[15] This construction has indisputably broad reach and can potentially criminalize "any agreement to behave unethically in dealings with the Government, which…might in some measure impair the efficient operation of one of the Government's myriad activities," leading at least one commentator to protest that the textual or historical basis for the theory is still unexplained and "[a]ll that can be said with certainty about [the conspiracy statute] is that it was enacted at a time and in a setting which strongly suggest that it was aimed at conspiracies either to commit offenses against the internal revenue or to defraud the United States of internal revenue."[16]

Ninth Circuit's Limitation

Prior to the Second Circuit's opinion in *Coplan*, courts had been surprisingly uncritical of the extension of the "defraud" prong of the conspiracy statute "beyond its common law usage [to] include[] interference or obstruction of a lawful government function."[17] A notable exception was *United States v. Caldwell*, a 1993 case in which the U.S. Court of Appeals for the Ninth Circuit reversed the conviction of a bookkeeper for a "warehouse bank" that "used numbered accounts, promised to keep no records of clients' transactions and vowed not to disclose information about the accounts to third parties."[18] While the bank's "ostensible goal" was to maintain client privacy, this privacy "helped the [bank's] customers avoid paying taxes."

In its jury instructions, the district court omitted the requirement that the prosecution prove not merely that the conspirators agreed to obstruct a lawful governmental function, but further that they agreed to do so through deceitful or deceptive means. In defending the ensuing conviction, the government argued that any conspiracy to interfere with or impede the government's functioning was unlawful.

In an opinion by Judge Alex Kozinski, the Ninth Circuit began by noting that while the text of §371 "seems to cover only defrauding in the normal sense of the word—acquiring another's property by intentional misrepresentations…the [statute] has been read much more broadly."[19] Given the broad reach of the statute and its capacity to "subject[] a wide range of activity to potential criminal penalties," the court lambasted the government's "spurious" theory of the "defraud" conspiracy that would "forbid all things that obstruct the government, or require citizens to do all those things that could make the government's job easier."[20] Though the court did not address the foundations of the *Klein* doctrine, it did express concern about the doctrine's reach and sought to confirm a limiting principle—that the underlying conduct be illegal, or at the very least, dishonest and deceitful.

Further Doubts in 'Coplan'

In *Coplan*, four partners of Ernst & Young were prosecuted in connection with that firm's promotion of five separate tax shelters in the late 1990s and early 2000s.[21] The indictment alleged that only one of the five shelters at issue gave rise to substantive tax eva-

sion charges, but that the defendants and their coconspirators structured, marketed and ultimately defended the remaining four shelters in a manner that frustrated and impaired the "lawful government functions of the IRS."[22] Following a 10-week trial, a jury convicted each of the four defendants on all counts.[23] On appeal, the defendants challenged the *Klein* conspiracy charge, arguing that the doctrine is not grounded "on any principle of statutory interpretation," but rather is "judicially created" and justified by "a (judicially generated) policy concern that government interests deserve greater protection than private interests, and thus that the phrase 'to defraud the government' must mean something broader than the phrase 'to defraud a citizen.'"[24]

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Writing for the court, Judge José Cabranes addressed the defendants' challenge to the *Klein* doctrine. Cabranes noted that the government's primary argument in its brief was that the defendants' claim "is squarely foreclosed by nearly a century's worth of established precedent."[25] For the court, this position indicated that the government "implicitly concede[d] that the Klein conspiracy is a common law crime…[which] alone warrants considerable judicial skepticism."[26] Reviewing the history of the Supreme Court cases underpinning the *Klein* conspiracy doctrine, the court agreed that the "defraud" prong of §371 has been interpreted differently because of a "policy judgment that… government interests justify broader protection [than] the interests of private parties—rather than [because of] any principle of statutory interpretation."[27]

In their briefs, the defendants argued that the U.S. Supreme Court's decision in *Skilling v. United States*,[28] which limited the application of the honest services fraud statute to kickbacks or bribes and not to other dishonest conduct, gave the Second Circuit an opportunity to correct a judicial overexpansion of another broadly used criminal statute. The defendants contended that in *Skilling*, "[t]he case law had not succeeded in clarifying the very general statutory language" of the provision, which led the Supreme Court to narrow its application. The defendants further argued that much like the honest services doctrine, the "defraud" prong of §371 should be pared to its common law core: limited to conspiracies "to deprive [the government] of property rights through deceptive means," not merely to impede or obstruct its functioning.[29]

Ultimately, while acknowledging the "infirmities in the history and deployment of the statute," the court concluded that it was bound by circuit law and Supreme Court precedent and rejected the challenge to the *Klein* theory. The court, however, found "the arguments for breaking loose from the moorings of established judicial norms by 'paring' a statute" to be "persuasive" and suggested that the defendant's "forceful[]" *Skilling* argument should be "properly directed to a higher authority."[30]

The Future of 'Klein'?

Together with the Ninth Circuit's decision in *Caldwell*, the Second Circuit's decision in *Coplan* puts in doubt a long-accepted and widely used theory of criminal liability. Given the extensive Supreme Court precedent girding the government's interpretation of the conspiracy statute, the Second Circuit concluded that only the Supreme Court can redefine the scope of the prohibition on conspiracies to "defraud" the government.

Though reversing decades of law might appear daunting, *Skilling* demonstrates the Supreme Court's willingness to critically examine the foundations of criminal liability. The Second and Ninth Circuits' thoughtful and well-reasoned critiques of the *Klein* conspiracy theory should lead other courts to reconsider the doctrine, and defense counsel can be hopeful that the Supreme Court will accept the Second Circuit's invitation to resolve the issue.

1. 247 F.2d 908 (2d Cir. 1957).
2. See, e.g., John A. Townsend, "Tax Obstruction Crimes: Is Making the IRS's Job Harder Enough?" 9 Hous. Bus. & Tax. L.J. 255 (2009).
3. —F. 3d—, 2012 WL 5954654 (Nov. 29, 2012). The Second Circuit reversed the convictions of two defendants (including the author's client) on sufficiency grounds. See Martin Flumenbaum and Brad Karp, "White Collar Conviction Reversed for Insufficient Scienter," *New York Law Journal* (Dec. 26, 2012).
4. Abraham S. Goldstein, "Conspiracy to Defraud the United States," 68 *Yale L.J.* 405, 418 (1959).
5. Id.
6. 216 U.S. 462 (1910).
7. 265 U.S. 182 (1924).
8. 216 U.S. at 479 (emphasis added).
9. Id.
10. 243 U.S. 476 (1917).
11. 265 U.S. at 185.
12. Id. at 188.
13. Id. at 189; see also *United States v. Ballistrea*, 101 F.3d 827, 832 (2d Cir. 1996).
14. 247 F. 2d at 210.
15. *United States v. Alston*, 77 F.3d 713, 720 (3d Cir. 1996). See also *United States v. Romer*, 148 F.3d 359 (4th Cir. 1998); *United States v. Khalife*, 106 F.3d 1300 (6th Cir. 1997); *United States v. Goldberg*, 105 F.3d 770 (1st Cir. 1997).
16. Goldstein, 68 *Yale L.J.* at 418, 436.
17. See, e.g., *United States v. Licciardi*, 30 F. 3d 1127, 1131 (9th Cir. 1994).
18. 989 F.2d, 1056, 1058 (9th Cir. 1993).
19. Id.
20. Id. at 1061.
21. 2012 WL 5954654 at *1.
22. 2012 WL 5954654 at *4. The defendants were also variously charged with substantive tax evasion, individual tax obstruction and false statement offenses.
23. Id. A fifth defendant pled guilty prior to trial.
24. Brief for Defendant-Appellant Robert Coplan ("Coplan Brief") at 28-29, *United States v. Coplan*, No. 10-cr-583 (2d Cir. Sept. 30, 2010), quoting *McNally v. United States*, 483 U.S. 350, 359 n. 8 (1987). One or more of the defendants also challenged, inter alia, (a) the sufficiency of the evidence; (b) aspects of the jury instructions, including a theory of defense instruction with respect to the Klein conspiracy charge; (c) the proper venue of the false statements charge; and (d) various evidentiary issues, including the admission of coconspirator statements. As noted above, the Court reversed the convictions of two of the defendants on sufficiency grounds.
25. Brief for Appellee United States of America at 85, *United States v. Coplan*, No. 10-cr-583 (2d Cir. Sep. 30, 2010).
26. Id.
27. Id. at *8.
28. 130 S. Ct. 2896 (2010)
29. Coplan Brief at *36-42.
30. Id.