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New York Law Journal

Is the 'Klein' Conspiracy Doctrine Doomed?

By Jeremy H. Temkin
November 15, 2023

In *United States v. Klein*, 247 F.2d 908 (1957), the U.S. Court of Appeals for the Second Circuit interpreted the general federal conspiracy statute as encompassing any interference with the operations of the federal government through deceptive conduct. Since then, prosecutors have used the statute to reach a wide range of activity affecting government functions including union officials submitting certifications to the National Labor Relations Board falsely disavowing affiliation with the Communist party, *Dennis v. United States*, 384 U.S. 855, 857-58 (1966), an attorney interfering with a Federal Bureau of Prisons administrative measure by sharing a statement with a journalist on behalf of her incarcerated client, *United States v. Stewart*, 590 F.3d 93, 109-10 (2d Cir. 2009) and a distributor offering medical products that were not approved by the Food and Drug Administration, *United States v. Ballistrea*, 101 F.3d 827, 830-31 (2d Cir. 1996).

In *United States v. Coplan*, 703 F.3d 46 (2012), the Second Circuit cast doubt on the continuing viability of the so-called *Klein* doctrine, but ultimately concluded that it was "bound to follow the dictates of Supreme Court precedents." *See* Jeremy H. Temkin, "Time to Revisit the '*Klein*' Conspiracy Doctrine," N.Y.L.J. (Jan. 25, 2013).

A series of recent U.S. Supreme Court decisions, however, has eroded *Klein*'s jurisprudential foundation, suggesting it is not a matter of if, but when, the doctrine falls.

The Defraud Clause's Limited Textual Scope

It is a long-settled principle of federal law that "there are no common-law offenses against the United States," *United States v. Gradwell*, 243 U.S. 476, 485 (1917), and that "[f]ederal crimes are defined by Congress, not the court," *United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997). Common-law crimes raise fundamental constitutional concerns, from separation of powers to vagueness, by "hand[ing] off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges" and "leav[ing] people with no sure way to know what consequences will attach to their conduct." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019).


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As drafted by Congress, 18 U.S.C. §371 prohibits any conspiracy "to commit any offense against the United States" (the "offense clause") or "to defraud the United States, or any agency thereof in any manner or for any purpose" (the defraud clause). The statute, however, does not define the phrase "to defraud," and under settled law, "where Congress uses terms that have accumulated settled meaning," courts must infer "that Congress means to incorporate the established meaning of th[e] terms." *Neder v. United States*, 527 U.S. 1, 21 (1999) (cleaned up).

When Congress enacted the predecessor to section 371 in 1867, the phrase "to defraud" commonly meant to acquire another's property by intentional misrepresentations. Thus, the Supreme Court described the original statute as prohibiting "any fraud against [the United States]" whether it be "against the coin,

or consist in cheating the government of its land or other property." *United States v. Hirsch*, 100 U.S. 33, 35 (1879).

Shaky Foundation of 'Klein'

The *Klein* conspiracy doctrine is rooted in the Supreme Court's century-old dicta discussing the defraud clause. In *Haas v. Henckel*, a government statistician conspired to give futures traders advance information from cotton crop reports. 216 U.S. 462, 478-79 (1910). The government prosecuted the defendants on the theory that divulging the information "would deprive th[e] reports of most of their value to the public, and degrade the [Department of Agriculture] in general estimation."

The court held that this theory satisfied the financial loss requirement of the statute but added in *dicta* that, even if it had not, the defraud clause 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."

Fourteen years later, the government relied on *Haas* in defending the convictions of 13 defendants charged with conspiring to defraud the United States by openly defying the draft. *Hammerschmidt v. United States*, 265 U.S. 182, 185-86 (1924). The Supreme Court rejected this theory, holding that open defiance of the draft did not involve the deceit required to constitute fraud under the statute.

The court again went further than necessary to its holding, stating that defrauding 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."

In *Klein*, the Second Circuit turned *Hammerschmidt*'s dicta into doctrine, holding that the defraud clause includes not only conduct that swindles the government out of money or property but conduct that impairs the government's ability to collect income taxes. 247 F.2d at 915-16.

The defendants in *Klein* were charged with substantive tax evasion and conspiring to defraud the United States by impeding the Treasury Department's collection of income tax revenue. The charged conduct included concealing the nature of the defendants' business activities and the source and nature of their income.

At trial, the defendants were acquitted of the tax evasion charges, but convicted of the conspiracy count. In affirming the conviction, the court relied on *Hammerschmidt* and held that the defraud clause not only prohibits "the cheating of the Government out of property or money, but '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'" (quoting *Hammerschmidt*, 265 U.S. at 188).

More recently, however, the Second Circuit has recognized the common-law roots of the *Klein* doctrine and criticized the government for defending the doctrine based "entirely on the construction of [the defraud clause] in *Hammerschmidt*" rather than on "plain meaning, legislative history, or interpretive canons." *Coplan*, 703 F.3d at 61.

The court noted that some courts justified such an expansive reading of the defraud clause on the theory that "a conspiracy to defraud the government is to be read more broadly than a conspiracy to defraud a private person," but rejected this premise as "rest[ing] on a policy judgment—that, in the nature of things, government interests justify broader protection tha[n] the interests of private parties—rather than on any principle of statutory interpretation."

Nevertheless, while recognizing the "infirmities in the history and deployment of the statute," the court held that it was bound by Circuit precedent, which was supported by "long-lived Supreme Court decisions."

Supreme Court Cabins Sweeping Theories of Prosecution

A recent line of Supreme Court decisions rejecting overbroad readings of federal fraud statutes suggests that *Klein*'s time may be dwindling. In *Kelly v. United States*, 140 S. Ct. 1565, 1568 (2020), two former aides to then-Governor Chris Christie realigned traffic lanes across the George Washington Bridge for politically motivated reasons. In defending the aides' conviction under the federal wire fraud statute, 18 U.S.C. §1343, the government argued that the conduct constituted a scheme to defraud the government of its "money or property" by commandeering the physical traffic lanes and usurping Port Authority workers' paid time.

The Supreme Court rejected this expansive view of the phrase "money or property," finding that the wire fraud statute did not criminalize "all acts of dishonesty" but only schemes where property is the object of the fraud.

Last term, the Supreme Court likewise limited the scope of the federal honest services fraud statute. *See* 18 U.S.C. §1346. In *Percoco v. United States*, 598 U.S. 319, 323 (2023), a former New York state government employee allegedly used his influence to benefit a real-estate developer in exchange for $35,000. At trial, the court instructed the jury that it could find the defendant, a private citizen, had a duty to provide honest services to the public if "he dominated and controlled any governmental business" and if "people working in the government actually relied on him because of a special relationship he had with the government."

The Supreme Court rejected this broad interpretation of the statute, stating that it does not have "an indeterminate breadth that would sweep in any conception of 'intangible rights of honest services.'" Noting that there have long been "individuals who lacked any formal government position but nevertheless exercised very strong influence over government decisions," the court vacated the conviction because the jury instructions failed to define the statute "with sufficient definiteness that ordinary people can understand what conduct is prohibited, or in a manner that does not encourage arbitrary and discriminatory enforcement" (cleaned up).

On the same day it decided *Percoco*, the Supreme Court further limited the scope of the federal wire fraud statute. In *Ciminelli v. United States*, 598 U.S. 306, 309-10 (2023), the defendants were charged with conspiracy and substantive wire fraud counts arising out of an alleged scheme to rig the bidding process for obtaining certain state-funded construction contracts.

Relying solely on the "right-to-control" theory, the government argued at trial that the defendants' bid-rigging scheme deprived the nonprofit awarding the government contracts of "potentially valuable economic information necessary to make discretionary economic decisions" with its property—specifically, how best to award the construction contracts.

The Supreme Court rejected the right-to-control theory, stating that it was unmoored from the text of the federal fraud statutes which do not "protect intangible interests unconnected to traditional property rights." Rather, the court concluded that the "'right to control' is not an interest that had long been recognized as property when the wire fraud statute was enacted," (cleaned up), and "[b]ecause the theory treats mere information as the protected interest," it impermissibly "makes a federal crime of an almost limitless variety of deceptive actions" and "vastly expands federal jurisdiction without statutory authorization."

Conclusion

Like the sweeping theories of fraud at issue in *Kelly*, *Percoco* and *Ciminelli*, the *Klein* doctrine offers prosecutors a near limitless means to target private conduct that does not deprive the government of an interest connected to traditional property rights. Neither the text of the defraud clause, nor the legal tradition at the time it was enacted, supports the government's supposed "right" to gather information and function efficiently. That concept, which underlies *Klein*, sweeps more broadly than the statute provides while both failing to give the public fair notice of what conduct is prohibited and granting the government unfettered discretion to charge conduct it deems unlawful.

Congress might want to prohibit some conduct that impedes the efficient administration of government, but to do so, it must speak more clearly than prohibiting conspiracies "to defraud the United States." Until it does, the Supreme Court's recent pronouncements limiting fraud statutes to their textual core suggests that time may no longer be on *Klein*'s side.

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