

Could Trump's Conspiracy Case Disrupt Criminal Tax Law?

by Nathan J. Richman

The former president's multiplying legal woes include a nontax conspiracy charge based on the same precedent that undergirds many tax conspiracy charges.

The top charge in the federal election interference indictment against former President Trump alleges a conspiracy to defraud the government by impairing, obstructing, and defeating the lawful federal governmental function of certifying presidential election results.

Under 18 U.S.C. section 371, the statute underlying that conspiracy charge, a defendant can be accused of either conspiring to commit an offense against the government (a so-called offense conspiracy) or of conspiring to defraud the government (a so-called defraud conspiracy).

The Supreme Court determined in *Haas v. Henkel*, 216 U.S. 462 (1910), and *Hammerschmidt v. United States*, 265 U.S. 182 (1924), that section 371 defraud conspiracies need not merely seek to extract money from the government but can also include attempts to impair the lawful functions of the government — at least so long as the defendants tried to do so via deceit or dishonest means.

The Second Circuit explicitly extended that holding to conspiracies to interfere with the IRS in *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957), *cert. denied*, 355 U.S. 924 (1958). Thus, many tax conspiracy charges under section 371 are called *Klein* conspiracies.

Attacks on *Klein* and *Hammerschmidt* from more ordinary defendants haven't succeeded, but what about the famously litigious former president? Might he be able to pry open the doors of the Supreme Court, especially having nominated a third of the bench?

Earlier Shots

Ever since the Supreme Court placed limits on tax obstruction charges under section 7212(a), the criminal tax defense bar has sought to import those limitations to *Klein* conspiracy charges.

In *Marinello v. United States*, 138 S. Ct. 1101 (2018), the Court said that tax obstruction can take place only if the defendant's conduct targets an

existing or expected proceeding of some sort. As a corollary, routine tax administration like the ubiquitous annual return filing requirement isn't enough of a proceeding to obstruct.

Most federal courts considering the issue have rejected arguments calling for restraints like those imposed by *Marinello* to apply in *Klein* conspiracy cases.

The Supreme Court has already declined at least one invitation to build on *Marinello* by reexamining *Klein*. In that case, amici argued that *Hammerschmidt* didn't create a workable standard for section 371 defraud conspiracies. Both *Hammerschmidt* and *Klein* implicate the rule of lenity, a principle requiring that uncertainty in criminal statutes be resolved in favor of defendants, and they leave tax conspiracy law unconstitutionally vague, the amicus brief unsuccessfully argued.

But the Famous Guy

If Trump gets the Supreme Court to weigh in again on defraud conspiracies, to either pare back or excise *Hammerschmidt*, it stands to reason that tax conspiracy law under *Klein* will be subject to at least those effects, if not even further changes.

Ian M. Comisky of Fox Rothschild LLP has pressed the attack on *Klein* conspiracies in multiple cases, including a failed attempt to obtain certiorari to the Supreme Court. He told *Tax Notes* that he expects Trump's attorneys in the federal election interference case to challenge the *Hammerschmidt* application of section 371.

"As we've seen already in some of the earlier litigation, some areas seem to be getting treated differently than they would for the rest of the population because of the person who they're considering the issue with — as you put it, the famous person," Comisky said when asked whether a Trump appeal might have special appeal to the Supreme Court.

Given recent case law like *Marinello*, there's some hope that this Court could be inclined to narrow the broad interpretations of defraud conspiracy law under *Hammerschmidt* and *Klein*, Comisky said. Tax lawyers will keep raising the issue because the statute doesn't include many boundaries under the current interpretations, he added.

If the Supreme Court doesn't fix it, Congress should amend section 371, Comisky said.

A Supreme Court opinion addressing *Hammerschmidt* in Trump's case could be a huge disruption to tax conspiracy law, according to Anthony Box of Gray Reed & McGraw LLP. He pointed to *Marinello* and the reversal of the so-called Bridgegate convictions as strong indications that Trump's case could spell the end of the current state of *Klein*.

It's probably time for the Court to weigh in on defraud conspiracy issues, said Box, a former U.S. attorney. While prosecutors should be careful about when they charge *Klein* conspiracies, the Court should add some restrictions to the case law, he said.

If Trump's challenge to defraud conspiracy law fails, the status quo will likely continue until another strong reason to question *Klein* conspiracies emerges, Box said. Even if the Court accepts Trump's challenge and restricts *Hammerschmidt* and *Klein* conspiracies, tax prosecutors may still be able to use section 371 offense conspiracies to cover much of the same conduct when they can prove specific acts beyond mere omissions, he said.

Michelle F. Schwerin of Capes, Sokol, Goodman & Sarachan PC noted that the arguments against *Hammerschmidt* have been raised in several circuit courts. Those appellate courts seemed to acknowledge that *Hammerschmidt* added a vague conspiracy charge to the statute, but refused to overrule the standard because it comes from clear Supreme Court precedent.

Schwerin said that Trump may have a better chance of getting the Court to take up a case reconsidering *Hammerschmidt* than the clients she typically defends.

Sanford J. Boxerman of Capes, Sokol, Goodman & Sarachan pointed to *United States v. Coplan*, 703 F.3D 46 (2d Cir. 2012), in which the Second Circuit — the court that decided *Klein* — acknowledged the existing case law. The court there seemed to suggest the Supreme Court might want to reconsider *Hammerschmidt*, but nothing came of it, he said.

The Supreme Court taking up a case is "a bit of a lightning strike," but any change on

Hammerschmidt and *Klein* would have to come there, Boxerman said.

"I can be cynical — if Trump gets convicted, I personally believe there's at least a couple of people on the Supreme Court who will do everything they can to get the case heard and to help out the former president. I think the thumbs are on the scale, for sure. I don't know whether enough thumbs are on the scale to make a difference," Boxerman said.

On the question of offense conspiracy charges replacing *Klein* charges, Boxerman noted that *Klein* involved additional tax evasion charges on which the trial court ordered acquittal. The more substantive conspiracy charges could be harder for the government to prove, he said. ■