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Odd alliance formed in ‘Varsity Blues’ appeal

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It is not every day that a group of former U.S. attorneys urges a federal appeals court to overturn convictions secured by an office like the ones they once led.

But that is just one of the signals that there are critical issues at play in the appeal of John Wilson in the sprawling “Varsity Blues” case.

How the 1st U.S. Circuit Court of Appeals resolves that appeal could broadly impact the ambitions of federal prosecutors as they assess future conspiracy, fraud and bribery cases, say those watching the case closely.

At the heart of what makes his prosecution “fundamentally unfair” is that the jury heard chapter and verse about the worst conduct of Varsity Blues defendants, argues Wilson’s team of appellate attorneys, led by former U.S. Solicitor General Noel J. Francisco.

“The fact is that [Wilson’s] case is different from others in the Varsity Blues scandal. His children were qualified for admissions on their own merits, and none of his money was for enriching any one individual — instead it was for the schools and their athletic programs.”

— Noel J. Francisco, appellate lawyer for John Wilson

That conduct includes parents who paid test proctors to fix their children’s answers, college coaches who financed vacation homes with cash bribes they accepted for “recruiting” unqualified applicants, and families who staged or photoshopped images to make it appear their children were star athletes.

Wilson’s conduct was far more “banal,” his attorneys note. The Lynnfield man’s son was, in fact, a highly accomplished water-polo

player, and his daughters aced their ACTs and may well have warranted admission on their own merit.

At the suggestion of now-notorious college counselor Rick Singer, Wilson had used a “side door,” donating to an athletic program at the University of Southern California so that the coach would support the admission of his son using an “embellished” athletic profile. Wilson later agreed to make similar donations to help his two daughters.

“According to the Government, this constituted bribery and property fraud. But legally it was neither,” Wilson’s attorneys argue.

The issues are not being raised for the first time on appeal, said Boston attorney Martin G. Weinberg, who represented several Varsity Blues defendants, including Robert Zangrillo, who would have been tried alongside Wilson and his co-defendant, Gamal Abdelaziz, who is also challenging his conviction. But Zangrillo was among 73 people pardoned by President Trump on his way out of office.

Weinberg credited a “strong defense group” with identifying “core issues” that became the subject of lengthy motions to dismiss and now petitions to the 1st Circuit.

That group included Wilson’s trial attorneys, Michael Kendall and Lauren M. Papenhausen, of White & Case, and Andrew E. Tomback of McLaughlin & Stern in New York; Abdelaziz’s attorneys, Brian T. Kelly, Joshua C. Sharp and Lauren A. Maynard, of Nixon Peabody; along with lawyers from Latham & Watkins, Mintz Levin and Todd & Weld.

“That is the platform upon which this appeal is being based,” Weinberg said.

Given all that the court needs to digest, Weinberg predicts that the 1st Circuit’s opinion may well exceed 100 pages, with its ultimate impact hard to discern until its nuances can be scrutinized.

Convicted on all counts, Wilson was sentenced to 15 months in prison. But on May 19, U.S. District Court Judge Nathaniel M. Gorton granted Wilson and Abdelaziz’s motions for release pending appeal after the government withdrew its opposition to those motions.

In an emailed statement, Francisco said he took the government’s “highly unusual decision” to relent as further evidence of the strength of their grounds for appeal.

“The fact is that John’s case is different from others in the Varsity Blues scandal,” Francisco wrote of Wilson. “His children were

qualified for admissions on their own merits, and none of his money was for enriching any one individual — instead it was for the schools and their athletic programs.”

Time will tell if the 1st Circuit agrees.

Quintessential ‘rimless wheel’

What drew the former U.S. attorneys into the fray with Wilson’s appeal was Gorton’s decision to reject the defense’s argument that certain counts in Wilson’s indictment should be dismissed for failure to allege a single conspiracy.

In making that argument, the defendants relied on the 1946 U.S. Supreme Court decision in *Kotteakos v. United States*, which held that a so-called “rimless wheel” conspiracy cannot sustain conviction for a single conspiracy.

“A rimless wheel conspiracy is one in which various defendants enter into separate agreements with a common defendant, but where the defendants have no connection with one another, other than the common defendant’s involvement in each transaction,” Gorton explained.

To the defendants — and now the former U.S. attorneys, too — Wilson’s case is the quintessential “rimless wheel,” with Singer at its hub but with no interdependence between and among the parents. Indeed, they note that in many cases the parents were in competition with one another for a limited number of admissions slots to highly competitive colleges and universities.

But Gorton determined that the government had met its burden to survive dismissal by alleging “the scheme as a whole would not have been feasible without the participation of the codefendants.” The defendants were both aware of the nature and scope of the scheme and knew they were not the only participants, the government had alleged.

“That others had engaged successfully in the scheme tended to promote it and encouraged others to enroll,” Gorton noted.

But to the former U.S. attorneys — including Massachusetts’ Wayne A. Budd and Michael J. Sullivan — letting the jury hear about worse acts committed by other parents only served to deprive Wilson of a fair trial.

“Defendants in criminal prosecutions should be judged based on their conduct, not the conduct of individuals with whom they have no material connection,” their brief reads.

The potential for expanding the universe of admissible evidence is helping to fuel a proliferation of conspiracy prosecutions across the country, said William C. Killian, who served as U.S. attorney for the Eastern District of Tennessee from 2010 to 2015, a signatory to the brief.

“I think you push the envelope as far as you can as a prosecutor; that’s the job,” Killian said.

But this was a case in which the trial court made an error in not putting a check on that impulse, he said.

Killian said that the 1st Circuit has in Wilson’s appeal an important opportunity to offer a reminder that *Kotteakos* “is still good law, for good reason”: preventing the exact kind of “evidentiary spillover” that was on stark display in Wilson’s case.

“If there needs to be some reaffirmation of [the *Kotteakos*] principle, it is important, because frequently U.S. Attorney’s Offices charge conspiracies in all sorts of situations because it allows the introduction of otherwise inadmissible evidence,” he said.

Bribe ‘victims’ also beneficiaries

Wilson has also received amicus support from a group of law school professors, including former U.S. District Court Judge Nancy Gertner, now a Harvard Law School lecturer.

The professors’ brief focuses on what they believe is an imprudent broadening of what constitutes bribery under federal law in Wilson’s case. They note that bribery is “historically and conceptually an offense predicated on personal gain by an agent that is not shared by the principal and corrupts an agent’s loyalty.”

But here, the “principal” — the university — was the ultimate recipient of the so-called “bribe.”

While it is important to prevent and punish the type of “corrupt misalignments of interest” that bribes foster, Wilson’s case does not fit that mold, the professors argue.

“If, however, the principal knows about the payment, approves of it, and is in fact the one receiving the benefit, then there is no violation of duty, no private benefit to the agent, and, by definition, no bribery,” they write.

Gertner calls the Wilson case a “classic example of overreach” by the government.

If what Wilson did is deemed an illegal bribe, so too would be parents making a substantial donation to a college, expecting the

admissions office to look more favorably on their child’s application. By that standard, Charles Kushner would have committed a crime when he gave $2.5 million to Harvard not long before the school admitted his son, Jared, Gertner noted.

To be sure, one might regard it as a form of “corruption” that wealth can hold such influence in college admissions, or in the political system.

“But that is ‘corruption’ with a small ‘c,’ not ‘corruption’ in the sense that it should be criminalized,” Gertner said.

In their brief, the law professors argue that charging Wilson with bribery “is just the sort of unprincipled expansion of federal corruption law that the Supreme Court has repeatedly rejected.”

The first in that line of cases was *McNally v. United States* in 1987, in which the court held that the federal mail fraud statute, 18 U.S.C. §1341, protects only property rights, not “intangible rights to honest and impartial government.”

After Congress enacted 18 U.S.C. §1346 to sweep in “a scheme or artifice to deprive another of the intangible right of honest services” under the fraud statute, the Supreme Court in 2010 again intervened in companion cases — *Skilling v. United States* and *Black v. United States* — to limit §1346 to “core” cases involving bribes and kickbacks.

The 1st Circuit should similarly resist the government’s attempt to “shoehorn” Wilson’s conduct into a “traditional bribery paradigm,” the professors argue.

“People may disagree whether it is fair or socially desirable for private universities to admit the children of wealthy donors,” the brief reads. “But before this prosecution, no one ever suggested that a parent who made such a donation, hoping his or her child might benefit, could be risking federal prosecution and prison.”

Colleagues disagree

Wilson is also challenging Gorton’s decision to allow the prosecution to pursue the theory that Wilson had defrauded the schools out of “money or property” by using deception to induce admissions offers for his children.

Looking at the same issue in a different Varsity Blues case, U.S. District Court Judge Indira Talwani came out the other way, concluding that an admissions offer is not property within the meaning of the federal fraud statutes.

“Rather, an admission slot is just an offer to engage in a transaction

— education in exchange for tuition — and the school does not lose property so long as the student pays full tuition, as contemplated here,” Wilson’s attorneys write in their brief.

Whatever interest schools have in the composition of their student bodies and the integrity of their admissions systems, it does not sound in property, Wilson’s attorneys argue.

The government’s theory, sanctioned by Gorton, is “boundless,” notes the National Association of Criminal Defense Lawyers in its brief. It cites the examples of a student who backs out on a binding “early decision” admissions offer, which hurts the school’s “yield”; a child who pretends to be friends with a classmate to use her swimming pool; or a journalist who lies about his identity to investigate a lead.

“The government’s theory makes felons of them all,” the organization writes.

Gertner noted that District Court judges are not technically obliged to hew to decisions of their colleagues, even in related matters that are contemporaneous.

“But it’s troubling when they don’t,” she said.

Weinberg was more circumspect in assessing the disagreement between Gorton and Talwani, calling it the result of “two principled federal judges reaching separate conclusions.”

“This is why we have appellate courts: to resolve conflicts,” he said.