

## Supreme Court Overturns ‘Bridgegate’ Convictions: Decision Will Have Ramifications for Traditional Business-Crime Prosecutions

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### Key Points

- The Supreme Court has unanimously reversed the convictions of the state officials in the “Bridgegate” scandal.
- This decision will have broader implications beyond the context of political corruption and will also affect more traditional business-crime prosecutions.

On May 7, 2020, the Supreme Court unanimously reversed the federal fraud convictions of two former state government officials in the infamous “Bridgegate” scandal. *Kelly v. United States*, No. 18-1059, 2020 WL 2200833 (May 7, 2020). This decision continues a recent trend by the Supreme Court of limiting the reach of the wire fraud statute and similar antifraud laws. Although *Kelly* arose in the particular context of alleged political corruption, the Court’s reasoning will likely have implications for more traditional business-crime prosecutions.

### *Kelly v. United States*

The background to the *Kelly* case is both familiar and notorious. In 2013, former New Jersey Governor Chris Christie was up for reelection and was seeking the endorsement of Democratic Mayor Mark Sokolich of Fort Lee. 2020 WL 2200833, at \*3. When Mayor Sokolich declined to endorse Gov. Christie, three state government officials (Bridget Kelly, the Governor’s Chief of Staff; William Baroni, the Deputy Executive Director of the Port Authority of New York and New Jersey; and David Wildstein, Baroni’s chief of staff) took steps to punish him by cutting Fort Lee’s designated local traffic access lanes on the George Washington Bridge from three lanes to one. *Id.* As Kelly stated in an email to Wildstein, “Time for some traffic problems in Fort Lee.” *Id.*

In furtherance of the plan, Wildstein devised a cover story that the lane change was part of a spurious traffic study to assess whether to retain the Fort Lee lanes in the future. *Id.* To bolster the cover story, Wildstein directed Port Authority engineers to collect data on the volume of traffic that was backed up in Fort Lee because of the changes in the lane allocations at the bridge. *Id.* However, neither Wildstein nor Baroni

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reviewed the engineers' findings, which were not in the form normally used for bona fide traffic studies. *Id.* Baroni, Wildstein and Kelly also agreed that the Port Authority would need to assign an additional toll collector to provide backup for the solitary collector for Fort Lee's lane when that person needed to leave the toll booth for a break. *Id.* The defendants managed to keep the lanes closed for three days until the executive director of the Port Authority (an appointee of the Governor of New York) discovered what had happened, and promptly reopened the lanes. *Id.* at \*4.

A criminal investigation ensued. Wildstein pleaded guilty and became a cooperating witness against Baroni and Kelly, who were indicted on charges of wire fraud (18 U.S.C. § 1343), fraud on a federally funded program or entity (18 U.S.C. § 666(a)(1)(A)) and conspiracy to commit each of those crimes. *Id.* The jury found them guilty on all counts, and the Third Circuit affirmed. *Id.*

In an opinion authored by Justice Kagan, the Supreme Court unanimously reversed. The wire fraud statute makes it unlawful to engage in a fraud scheme by use of interstate wires to obtain "money or property," 18 U.S.C. § 1343, and the federal program fraud statute contains similar language. Accordingly, to establish a violation of these statutes, the government was required to prove that Baroni and Kelly had engaged in a fraudulent scheme whose object was to obtain the Port Authority's "property." *Id.* On appeal, the government argued that the evidence satisfied this requirement in two different ways: (1) Baroni and Kelly "commandeered" part of the bridge itself by taking control of the lane allocations; and (2) the defendants took the Port Authority's "property" by reassigning traffic engineers to conduct a bogus study and an extra toll collector to serve as backup, in effect depriving the agency of the value of these employees' services. *Id.*

The Supreme Court was not persuaded by either theory. Although it described the defendants' scheme as reflecting "deception, corruption, [and] abuse of power," the Court held that the reallocation of the bridge's access lanes was "an exercise of regulatory power—something this Court has already held fails to meet the statutes' property requirement." *Id.* at \*2. In *Cleveland v. United States*, 531 U.S. 12 (2000), the Court rejected a wire fraud theory predicated on the corrupt issuance of Louisiana gaming licenses, holding that such regulatory decisions do not constitute "property" under the federal fraud statutes.

As to the government's first argument regarding the "property" requirement, Justice Kagan rejected the proposition that Baroni and Kelly had "commandeered" the lanes for their own use as factually unsupported. In fact, they had merely reallocated the lanes for drivers not originating in Fort Lee, which was a quintessential exercise of regulatory power.

The Court's analysis of the government's second argument was more subtle, and potentially more important for white collar practitioners. Justice Kagan found that although a scheme to usurp public employees' paid time and labor could appropriately be prosecuted under the wire fraud statute, because the paid labor of public employees can constitute a "property" interest owned by the government entity that employs them, this theory of prosecution is viable only if the core object of the scheme is to obtain the value of the employees' labor. Bridgegate did not meet this standard, because the *object* of the fraud was to punish Mayor Sokolich and obtain a political benefit for Governor Christie, not to misappropriate the value of the Port Authority employees' labor. *Id.* at \*5-6. Justice Kagan contrasted Baroni and Kelly's behavior

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with other public officials who committed property fraud by, for example, assigning public employees to renovate a family member's home or perform gardening work for political contributors. *Id.* at \*6 (citing *United States v. Pabey*, 664 F.3d 1084 (7th Cir. 2011) and *United States v. Delano*, 55 F.3d 720 (2d Cir. 1995)). In those cases, the entire point of the scheme was to obtain the employees' services. *Id.* In Bridgegate, by contrast, the time and labor of Port Authority employees was merely the "implementation costs" and an "incidental (even if foreseen) byproduct" of the scheme to reallocate the bridge's lanes. *Id.*

In its analysis, the Court alluded to the tortured history of the government's overbroad prosecutions under the "honest services" theory, ranging from *McNally v. United States*, 483 U.S. 350, 352 (1987), which held that "money or property" did not encompass the intangible right to honest services; to 18 U.S.C. § 1346, which legislatively overruled *McNally*; to *Skilling v. United States*, 561 U.S. 358 (2010), in which the Court adopted a limiting construction requiring proof of kickbacks or bribes to sustain a conviction under § 1346. See *Kelly*, 2020 WL 2200833, at \*4. Because the Bridgegate scandal did not involve bribes or kickbacks, the Court noted that the government was required to prove a traditional scheme to wrongfully obtain the Port Authority's *property*, and that the evidence at trial did not support this theory.

In one sense, *Kelly* stands as the latest in a series of recent political corruption prosecutions in which courts have found that the behavior of government officials, though unsavory, was not criminal under federal law. See also *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (former Virginia governor's honest services fraud and Hobbs Act convictions reversed where defendant allegedly accepted bribes in exchange for setting up meetings because defendant's conduct did not meet the definition of an "official act" as required by both statutes); *United States v. Silver*, 864 F.3d 102 (2d Cir. 2017) (former Speaker of the New York Assembly's honest services fraud and Hobbs Act convictions reversed because jury instructions defining an "official act" for both statutes improperly included post-*McDonnell* "any action taken or to be taken under color of official authority") (emphasis in original). But the case also has broader implications for more traditional business-crime prosecutions. Going forward, white-collar defense counsel can be expected to closely scrutinize the government's theory of prosecution and to insist on symmetry between the *object* of an alleged fraud scheme—in straightforward and practical terms—and the *property interest* that is the predicate for invocation of the federal mail and wire fraud statutes. Unless the two converge, there will be a strong argument, under *Kelly*, that the conduct does not fall within the federal fraud statutes.

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