

Supreme Court's Reversal of "Bridgegate" Convictions Exposes Limits of Frequently-Charged Federal Crimes

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Whenever the United States Supreme Court unanimously reverses a criminal conviction – particularly in a high profile case and particularly when the Court conclusively rejects the reasoning of a highly regarded appeals court – it is worthy of note. So it was last week when the Supreme Court overturned the convictions of Bridget Kelly and William Baroni in a case arising from a widely-publicized public corruption scandal in New Jersey that came to be known as "Bridgegate."¹

The Supreme Court's ruling established meaningful limits on federal prosecutors' ability to use the wire fraud statute to prosecute public corruption cases, and it is a powerful reminder that "not every corrupt act by state or local officials is a federal crime."² The ruling is likely to have significant implications for public corruption cases in the future.

The Criminal Charges in "Bridgegate"

The charges against Kelly and Baroni grew out of what Baroni's lawyers described in their brief to the Supreme Court as "bareknuckle New Jersey politics."³ In 2013, New Jersey's then-Governor Chris Christie was seeking reelection, and he asked Kelly, his Deputy Chief of Staff, to reach out to local officials, including the Mayor of Fort Lee, to ask them to endorse the Governor. Fort Lee is on the New Jersey side of the George Washington Bridge, the world's busiest, connecting New Jersey to Manhattan.

When the Mayor of Fort Lee informed Kelly that he would not endorse the Governor, political payback came in the form of a plan to create massive traffic gridlock in Fort Lee by shutting down local access lanes to the George Washington Bridge. This had the predictable effect of backing up local traffic to the bridge, creating a nightmare situation for motorists, and preventing ambulances and police cars from being able to quickly respond to emergencies.

The plan was the brainchild of three people: Kelly, Baroni, who was Deputy Executive Director of the Port Authority of New York and New Jersey, the interstate agency that administers the George Washington Bridge, and Baroni's chief of staff, David Wildstein, who cooperated with the prosecution and testified against Kelly and Baroni. They agreed to reduce, from three to one, the number of toll lanes to the bridge that for years had been set aside for vehicles approaching from Fort Lee, and to reallocate those lanes to the broader set of lanes serving vehicles approaching the bridge from nearby highways.

¹ *Kelly v. United States*, No. 18-1059 (slip op.), 590 U.S. ____ (May 7, 2020), available at https://www.supremecourt.gov/opinions/19pdf/18-1059_e2p3.pdf.

² *Id.* at 13.

³ Br. for Respondent William E. Baroni, Jr. In Support of Petitioner, (Sept. 17, 2019), at 6.

To conceal that this realignment was done purely to punish the Mayor, the defendants made up a story that the Port Authority was conducting a traffic study to determine whether the dedicated local lanes were still needed. Wildstein even told Port Authority engineers to collect data on this subject, but neither Wildstein nor Baroni ever reviewed the findings of the engineers. In addition to the costs associated with the fake traffic study, the defendants' actions resulted in other labor costs for the Port Authority, since a backup toll collector was needed for the one remaining local access lane and that backup collector needed to be paid.

Kelly and Baroni were convicted at trial of conspiracy to commit, and the commission of, two crimes: (i) wire fraud, which prohibits schemes "[to defraud](#), or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," through the use of wire transmissions, 18 U.S.C. §1343; and (ii) federal program fraud, which makes it a crime for a person employed by a state agency that receives more than \$10,000 annually in federal funds (here, the Port Authority) to "obtain by fraud" property valued at \$5,000 or more, 18 U.S.C. §666(a)(1)(A). A three-judge panel of the Court of Appeals for the Third Circuit unanimously affirmed their convictions.⁴

The Supreme Court's Opinion

In reversing the Third Circuit, the Supreme Court made clear that although Kelly and Baroni's conduct was an abuse of power, it was not a federal crime because it did not implicate a federally-protected property interest. The Court held that it was not enough for the prosecution to prove that Kelly and Baroni engaged in deception – the lie about the traffic study. Rather, because federal fraud laws are "limited in scope to the protection of property rights,"⁵ the prosecution also had to show that an object of their scheme was to obtain money or property of the Port Authority. The prosecutors' theory of the case was that Kelly and Baroni had done just that: *first*, by taking control of two lanes of the George Washington Bridge; and *second*, by requiring the Port Authority to spend money it would not have – compensation to the engineers to collect traffic data for the fake study, and the cost of the backup toll collector.

The Supreme Court squarely rejected both theories. As to the claim that Kelly and Baroni had sought to "commandeer" part of the George Washington Bridge by realigning lanes, the Court ruled that this did not constitute a taking of government property but rather was a decision as to which motorists could use which lanes, or a "quintessential exercise of regulatory power."⁶ The Court relied on its precedent in *Cleveland v. United States*, which held that the federal mail fraud statute, 18 U.S.C. § 1341, does not criminalize false statements in an application to obtain a state license because the state's decision to grant a license is an exercise of regulatory power, not a property interest.⁷ Bridgegate, similarly, involved the regulation of the use of lanes on the George Washington Bridge, not the taking of the Port Authority's property.

⁴ *United States v. Baroni*, 909 F.3d 550 (3d Cir. 2018).

⁵ *Kelly* at 7 (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987)).

⁶ *Id.* at 8.

⁷ 531 U.S. 12 (2000).

As to the Government's second theory, the Third Circuit had found it particularly persuasive that additional Port Authority expenses were incurred as a result of the fake traffic study and the backup toll collector, noting in its opinion affirming the convictions that there was "ample evidence [that Kelly and Baroni] obtained by false or fraudulent pretenses . . . public employees' . . . time and wages, in which the Port Authority maintain[ed] a financial interest."⁸ But the Supreme Court disagreed, finding that these labor costs were an "incidental byproduct of the scheme" rather than the "object of the fraud."⁹ The Court held that Kelly and Baroni did not seek to obtain the services of the traffic engineers and backup toll collectors to implement their scheme. Instead, these costs were the "byproduct of [the defendants'] regulatory object" – to reallocate access lanes.¹⁰

Potential Implications

The *Kelly* opinion is likely to have lasting impact on public corruption prosecutions. The latest in a line of Supreme Court cases limiting federal prosecutors' ability to target state and local public corruption,¹¹ *Kelly* may discourage prosecutors from bringing these cases in federal courts. If prosecutors do continue to seek federal indictments of these cases, they will have to confront questions such as: What is the object of the scheme and does it target a federally protected property interest? Where is the line between a loss to a governmental victim that is central to the scheme versus one that is merely "incidental"? And, if indictments lack clarity on these points, defense lawyers will pursue all avenues of challenge, including motions to dismiss and motions for a bill of particulars to tease out the theory of the prosecution. For cases that are charged federally that go to trial, jury charges will likely include instructions on these points, forcing prosecutors and defense lawyers to present their case and make arguments in new ways.

The ultimate effect might be that more of these cases will be brought in state courts rather than federal. Indeed, the Supreme Court in *Kelly* noted that "federal fraud law leaves much corruption to the States,"¹² and conspicuously included a reference to the New Jersey state criminal code provision that appears to have squarely applied to Baroni and Kelly: the prohibition on acts of official misconduct, which makes it a crime for a public servant to act outside of his or her official duties to benefit himself or injure or deprive another person of a benefit.¹³ This type of charge may see increasing use in public corruption cases in the future. Ultimately, it may be up to the States to decide how "bareknuckled" they want their local politics to be.

⁸ *Baroni*, 909 F.3d at 565.

⁹ *Kelly* at 10 (citation and internal quotation marks omitted).

¹⁰ *Id.* at 11.

¹¹ See *Skilling v. United States*, 561 U.S. 358 (2010) (limiting cases charging public officials with schemes "to deprive another of the intangible right of honest services," 18 U.S.C. § 1346 (honest services fraud), to schemes involving bribes or kickbacks); *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (charges of bribery require that an "official act" done in exchange for a loan or a gift must involve more than setting up a meeting or organizing an event).

¹² *Kelly* at 7.

¹³ *Id.* (citing N.J. Stat. Ann. § 2C:30-2).

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