

PUBLICATION

A Bridge Too Far? Supreme Court Grants Certiorari in "Bridgegate" Case

Authors: Matthew Scott Chester

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On June 28, 2019, the U.S. Supreme Court agreed to hear the appeal brought by Bridget Kelly, the Deputy Chief of Staff for New Jersey's Office of Intergovernmental Affairs, which was joined in by Bill Baroni, the Deputy Executive Director of the Port Authority of New York and New Jersey, in connection with the so-called "Bridgegate" affair.¹ The Supreme Court's granting of certiorari could signal yet another blow to the government's attempts to prosecute corruption under novel prosecutorial theories.

Background

In 2015, a federal grand jury indicted both Baroni and Kelly for creating a scheme to impose gridlock on the Borough of Fort Lee, New Jersey, to punish Fort Lee's mayor for refusing to endorse the 2013 reelection bid of then-Governor Chris Christie.² Under the guise of conducting a "traffic study," Baroni and Kelly (among others) reallocated several traffic lanes on the George Washington Bridge – the world's busiest bridge – over four days in September 2013, causing vehicles to back up in that borough and creating intense traffic jams. In short, the government's theory was that Baroni and Kelly deprived the government of property or money (for example, the employment of an extra toll booth worker required as a result of the scheme, the payment of monies to Port Authority employees to collect and analyze the data for the "traffic study," and the traffic lanes themselves) through the use of false pretenses, namely, the sham "traffic study." After a six-week trial, Baroni and Kelly were convicted on all nine counts against them – a combination of wire fraud (18 U.S.C. § 1343), governmental fraud (18 U.S.C. § 666(a)(1)(A)), conspiracy (18 U.S.C. § 371), and civil rights violations (18 U.S.C. §§ 241, 242).³

Third Circuit Decision

On November 27, 2018, the Third Circuit largely affirmed the jury's verdict, upholding seven of the nine counts of conviction.⁴ In affirming the sufficiency of the evidence as to the fraud counts, the Third Circuit held that the defendants' actions in reallocating the traffic lanes caused the Port Authority to expend additional funds, including monies to employ an additional toll booth worker and monies to pay Port Authority employees to gather and analyze the data for the sham study.⁵ That work, according to the Third Circuit, was unnecessary but for the defendants' scheme and, therefore, sufficed to meet the requirement that the defendants' scheme deprived the Port Authority of property.⁶ Likewise, the traffic study "cover story" concocted by the defendants to justify the reallocation of the lanes was sufficient to satisfy the requirement that the property deprivation at issue result from false pretenses.⁷

The Third Circuit also addressed the defendants' argument that the government's prosecutorial theory was actually the now-repudiated theory of honest services fraud thinly veiled as a traditional money-or-property fraud.⁸ Contrary to traditional money-or-property fraud, honest services fraud is the theory that the government or the public is the victim of a corrupt public official whose official acts were influenced in some unlawful way.⁹ The honest services fraud theory reasons that the corrupt public official deprives the government or the public of the "intangible right" to his/her honest services. Since 1987, the Supreme Court has chipped away at the so-called "intangible rights theory" of fraud, including most recently holding that such a theory only applies to classic bribe-and-kickback schemes in exchange for official acts by that public official on the matter at issue.¹⁰ Citing these decisions, and noting the lack of bribes or kickbacks, the defendants argued that the government's theory was an improper attempt to police "bad government." The Third Circuit disagreed, holding, among other

things, that the government did not charge honest services fraud, that the defendants' actions satisfied the elements of the charged money or property fraud theory, and that the government's theory was not overbroad.¹¹

Kelly's Petition for Writ of Certiorari

On February 12, 2019, Kelly filed her Petition for Writ of Certiorari to the U.S. Supreme Court,¹² focusing on one issue: "Does a public official 'defraud' the government of its property by advancing a 'public policy reason' for an official decision that is not her subjective 'real reason' for making the decision?"¹³ The crux of Kelly's argument was that her actions amounted to nothing more than concealing political motives – *i.e.* the punishing of Fort Lee's mayor for refusing to endorse Governor Christie – for an otherwise legitimate official act, *i.e.* reallocating the traffic lanes on the bridge.¹⁴ Indeed, Kelly argued that nearly *every* decision made by a public official involves some money and/or property and thus, a politician's "spin" behind those decisions, if not entirely truthful, would be the basis for a fraud prosecution under the Third Circuit's reasoning.¹⁵ For example, determining which school will get a large funding increase clearly involves money or property; if the public official who makes the decision justifies it on the basis of a "good government" reason (such as the effectiveness of the school's use of the funds) but, in reality, bases that decision on a less public-spirited reason (such as the school's principal being a key campaign supporter), the Third Circuit's decision would render that action criminal.¹⁶ Indeed, Kelly upped the ante by citing to a number of controversial political decisions in recent years that may arguably have been publicly justified based on good government, but were also potentially infected with politically-motivated decision-making, such as decisions made by the Obama administration concerning funding for green energy programs, including the now-defunct Solyndra Corporation,¹⁷ and decisions made by the current administration concerning immigration policies.¹⁸ According to Kelly, these decisions -- arguably infused with political motivations that may not have been transparently revealed by the decision-makers -- would be considered criminal under the Third Circuit's decision.¹⁹

Kelly also reiterated her argument that the government's theory was an honest services fraud theory masquerading as a traditional money-or-property theory, focusing on a number of Supreme Court decisions that have limited fraud prosecutions under an honest services theory.²⁰ Interestingly, Kelly noted that if the government's money or property theory in this case is viable, it would render superfluous a number of other federal statutes -- including the honest services fraud statute that the Supreme Court has wrestled with for years.²¹ In other words, if upheld, the Third Circuit's decision, and the government's novel money or property theory employed, gives prosecutors all the power they need to prosecute purported corruption in the absence of bribes or kickbacks.

Conclusion

On June 28, 2019, the U.S. Supreme Court granted Kelly's petition for certiorari.²² It remains to be seen, of course, how the Court will address Kelly's arguments concerning the Government's money-or-property theory but, as noted above, recent decisions concerning the limits of prosecutorial power in the public corruption arena have not been kind to the government. Were the Court to invalidate Kelly's (and Baroni's) convictions, it would be yet another brushback to prosecutors attempting to stretch federal criminal law in the political arena in the absence of bribes or kickbacks. In the meantime, Baroni, who already began serving his sentence, sought release from custody on the basis of the Supreme Court's grant of certiorari, a request that was granted by the district court.²³ Kelly, whose prison term is set to begin in a matter of days, sought to delay her reporting to prison, a request the trial judge granted.²⁴ The case is likely to be heard by the Court in the Fall of 2019.

¹ See *Kelly v. United States*, --- S.Ct. ---, 2019 EL 588845 (June 28, 2019).

² See *United States v. Baroni, et al.*, No. 2:15-CR-00193 (D.N.J. 2015) (ECF No. 1).

³ See *id.* (ECF No. 282).

⁴ See *United States v. Baroni, et al.*, 909 F.3d 550 (3d Cir. 2018). The Third Circuit vacated two civil rights counts of conviction.

⁵ See *id.* at 563-66.

⁶ See *id.* at 566, 574-75.

⁷ *Id.* at 562-63, 568-69.

⁸ See *id.* at 567-69.

⁹ See *Skilling v. United States*, 561 U.S. 358, 398-411 (2010).

¹⁰ See *Skilling*, 561 U.S. at 398-411; *McDonnell v. United States*, 136 S.Ct. 2355, 2370-2372 (2016).

¹¹ See *id.*; see also *id.* at 571-74 (addressing overbreadth concerns for convictions under 18 U.S.C. § 666).

¹² Kelly's Petition for Writ of Certiorari was supported by Baroni, her co-defendant, as well as Lord Conrad Black and Former Virginia Governor Robert McDonnell, both of whom had their honest services fraud convictions reversed by the Supreme Court. See William Baroni's Brief in Support of Petition for Writ of Certiorari, *Kelly v. United States*, No. 18-1059, 2019 WL 1240050 (Mar. 15, 2019); Brief for Amici Curiae Lord Conrad Black and Former Governor Robert F. McDonnell, *Kelly v. United States*, No. 18-1059, 2019 WL 1275301 (Mar. 15, 2019).

¹³ Petition for Writ of Certiorari, *Kelly v. United States*, No. 18-1059, 2019 WL 645257 (Feb. 12, 2019) at *i.

¹⁴ See *id.* at *1-3, *13-21.

¹⁵ *Id.*

¹⁶ *Id.* at *18, *29.

¹⁷ *Id.* at *19.

¹⁸ *Id.* at *20.

¹⁹ See *id.* at *21.

²⁰ See *id.* at *22-25 (citing *McNally v. United States*, 483 U.S. 350 (1987); *Skilling v. United States*, 561 U.S. 358 (2010); *McDonnell v. United States*, 136 S.Ct. 2355 (2016)).

²¹ See *id.* at *24, 27-28 (citing statutes).

²² See *Kelly v. United States*, --- S.Ct. ---, 2019 EL 588845 (June 28, 2019).

²³ See *United States v. Baroni, et al.*, No. 2:15-CR-00193 (D.N.J. 2015) (ECF No. 395).

²⁴ See *id.* (ECF No. 397).

