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Bridgegate Has The Potential To Upend A Raft Of Prosecutions

By **Daniel Fetterman and Brian Choi** (May 21, 2020, 3:00 PM EDT)


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Earlier this month, the U.S. Supreme Court issued its decision in Kelly v. U.S., the final chapter in a long-running political saga whose immediate consequence — gridlock on the George Washington Bridge — was eclipsed by a cascade of events that ultimately vanquished the presidential aspirations of New Jersey's erstwhile Gov. Chris Christie.

In the case aptly coined "Bridgegate," prosecutors charged Christie's deputy chief of staff, Bridget Kelly, and the deputy executive director of the Port Authority of New York and New Jersey, William Baroni, with orchestrating the shutdown of several Manhattan-bound lanes on the George Washington Bridge. As epitomized by Kelly's infamous email hatching the scheme — "Time for some traffic problems in Fort Lee" — its objective was to exact political revenge on the Fort Lee mayor for his refusal to support Christie's reelection efforts.

Against that lurid backdrop, the Supreme Court unanimously reversed Kelly's and Baroni's convictions, holding that because their scheme did not aim to obtain money or property, neither defendant could have committed wire fraud.[1]

While the decision has garnered widespread attention, it reiterates what many courts have long considered settled law given the plain text of the wire fraud statute — that it "prohibits only deceptive schemes to deprive [the victim] of money or property."[2] In Kelly, the court held that the defendants engineered a scheme to retaliate against a mayor by wreaking havoc on his constituents' morning commutes, not to "obtain the Port Authority's money or property."[3]

And, while the government insisted that the Port Authority's resources expended in furtherance of the scheme — toll collectors' and engineers' wages — constituted cognizable property that was an object of the scheme, the court held that the property giving rise to liability "must play more than some bit part in a scheme: It must be an object of the fraud," not an incidental byproduct[4] of it.

Kelly underscores the Supreme Court's continuing displeasure with the government's attempted use of expansive theories of liability in public corruption cases. The decision is another in a progression of cases diminishing the reach of the wire (and mail) fraud statutes, which U.S. District Judge Jed Rakoff of the U.S. District Court for the Southern District of New York colorfully characterized early on as the federal prosecutor's "Stradivarius, Colt .45, Louisville Slugger, Cuisinart — and true love" because of their "simplicity, adaptability, and comfortable familiarity."[5]

Trend: Restraining the Government's Expansive Public Corruption Prosecutions

In Kelly, the Supreme Court thus continued to rein in the breadth of wire and mail fraud statutes in corruption and fraud cases. Indeed, the court's grant of certiorari on a long-settled issue — and its unanimous decision thereafter — signals its long-standing concern with the proliferation of novel interpretations of the wire fraud statute.

In fact, the court's effort to again make clear the parameters of public corruption cases is not surprising in view of its prior decisions cabining the theories on which the government can prosecute such cases.

The court's 2016 decision in McDonnell v. U.S. unanimously reshaped the notion of a quid pro quo in bribery cases, limiting the definition of an official act to something that must involve a formal exercise of government power by a public official.[6] Under that construct, showering a politician with gifts in exchange for brokering a meeting with another official on behalf of a friend would not run afoul of the bribery statute.

In its wake, McDonnell capsized several high-profile cases, resulting in retrials of powerful New York politicians Sheldon Silver and Dean Skelos, and a mistrial in the case against Sen. Robert Menendez.[7]

Similarly, in 2010, the court in Skilling v. U.S. limited the scope of honest services fraud cases, adding the requirement that a scheme to deprive a victim of honest services must involve the payment of bribes or kickbacks.[8] This decision effectively provided a safe harbor for defendants caught in general financial self-dealing or conflicts of interests but who had not received any bribes or kickbacks.

Kelly's Impact Beyond the Political Realm

Like McDonnell, Kelly has the potential to upend a raft of prosecutions. It signals a tightening of the nexus required between the object of a fraudulent scheme and a victim's loss of a cognizable money or property interest. Under Kelly, the victim's loss must be the object of the fraudulent scheme and not merely "an incidental (even if foreseen) byproduct" of it.[9]

Moreover, Kelly scrutinizes what does and does not constitute a cognizable property interest. This decision will no doubt create further hurdles for prosecutors attempting to prosecute schemes that are venal, deceitful and underhanded but in which the loss of money or property — while foreseeable — was not the objective.

To be sure, Kelly does not so much constitute a sea change in the law as it portends the court's unanimous willingness to clearly articulate and enforce the boundaries of the wire fraud statute. The question that prosecutors must now grapple with in every wire and mail fraud case is twofold: whether a victim's property is the object — rather than the incidental byproduct — of the scheme to defraud, and if so, whether the property interest at issue is cognizable under the wire (and mail) fraud statutes.[10]

Kelly's impact has been swift. Only days after it was issued, the U.S. Court of Appeals for the Second Circuit directed the parties in U.S. v. Gatto to "address[] the impact, if any, of Kelly on the adjudication" of the appeal.[11] Gatto, with U.S. v. Person,[12] are among the National Collegiate Athletic

Association basketball recruiting scandal cases that the government brought against college coaches, athlete advisors and an athletic wear executive for their roles in a bribery scheme to recruit college basketball players.

In Gatto, college basketball recruits were bribed to sign with universities sponsored by a particular athletic wear company. And in Person, college coaches were paid to steer their players toward retaining certain financial advisors once they turned professional.

At the heart of the government's theory in the NCAA recruiting scandal cases is that the defendants deprived colleges of property in two ways: (1) by causing them to award financial scholarships to student-athletes rendered ineligible because they were bribed, and (2) by depriving them of their ability to control their assets (scholarships) and exposing them to the risk of NCAA sanctions.

In a post-Kelly world, the defendants could argue that the object of their scheme was to structure an association between a highly recruited athlete and a sports brand to reap the monetary benefits of that relationship. Stated differently, the scheme was not primarily designed to induce the universities to part with their property or even deprive them of their ability to control their property — they were always going to award scholarships to highly talented athletes.

Rather, those supposed costs, the defendants could argue, "were an incidental (even if foreseen) byproduct" of the defendants' scheme to pair a particular recruit with a sports brand.[13]

The court's use of the word "incidental" also is telling. Under its plain meaning, "incidental" is defined as something that is "less important than the thing [it] is connected with or part of."[14] In the Gatto schemes, the defendants may argue, the universities' property interests — scholarships and even decisions about whom to award such scholarships — were secondary to, or less important than, the objective of partnering high-profile athletes with certain brands.

Equally striking is the Court's observation that it does not matter whether the incidental harm to property interests was foreseen. There is no question that the Gatto defendants contemplated the inevitable expenditure of university resources, but Kelly now arguably relegates those expenditures to the category of implementation costs or what was needed to realize the final plan"[15]

Kelly also may augur future challenges in the Varsity Blues college admission cases, where more than 50 individuals were prosecuted for bribing college administrators to designate applicants as recruited athletes and inflating their credentials to secure their admission into elite universities. In some of those cases, the defendants already contend that the object of the conspiracy was to gain admission to the universities — not deprive a university of any money or property.

In addition, to the extent the government relies on a university's right to control the quality of its scholarship or admissions process, Kelly may signal an increased likelihood that the court would review the issue of whether the universities' right to control constitutes a cognizable property interest under the wire fraud statute should the opportunity be presented. The court in Kelly characterized Kelly's and Baroni's intent to "commandeer" the bridge lanes as an exercise of regulatory power — as opposed to a deprivation of the Port Authority's property interest in controlling the bridge.

The court's willingness to define these boundaries suggests that it might be receptive to arguments that a university's right to control the quality of its student body or the acceptances of its outstanding scholarship offers are not the kinds of property interests cognizable under the wire fraud statute.[16]

For the college admissions cases in particular, whether an offer of admission constitutes the kind of property subject to the reach of the wire fraud statute is a question that courts may want to scrutinize closely going forward.

Whatever its impact on pending prosecutions, the Kelly decision undoubtedly again raises the bar for the government in prosecuting cases involving political corruption and fraudulent schemes affecting nontraditional property interests. It also provides white collar defense lawyers with additional arguments in defense of clients charged with such schemes.

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[1] The Government also charged the defendants with fraud on a federally funded program (18 U.S.C. § 666), which reflects the same property element in the wire fraud statute.

[2] Kelly v. United States , 590 U.S. __, No. 18-1059, slip op. at 6 (May 7, 2020) (quoting McNally v. United States, 483 U.S. 350, 358 (1987)).

[3] Id. at 2.

[4] Id. at 10 (citing Pasquantino v. United States, 544 U.S. 349, 356 (2005)).

[5] Jed S. Rakoff, The Federal Mail Fraud Statute (Part I), Duquesne Law Rev., Vol. 18, No. 4, 1980.

[6] McDonnell v. United States, 136 S.Ct. 2355 (2016).

[7] United States v. Skelos, 707 F. App'x 733, 740 (2d Cir. 2017); United States v. Silver, 864 F.3d 102, 106 (2d Cir. 2017); see United States v. Menendez, 291 F. Supp. 3d 606, 611 (D.N.J. 2018); see also United States' Mot. to Dismiss Superseding Indictment in United States v. Menendez, No. 2:15-cr-155, ECF Dkt. No. 322, Jan. 31, 2018. Silver and Skelos were again convicted under the narrower definition of "official act." Silver appealed again, and the Second Circuit reversed the conviction in part, holding that, post-McDonnell, the jury instructions defined quid pro quo too broadly and thus failed to convey that Silver could not be convicted of honest services fraud unless the Government proved that, at the time the bribe was accepted, Silver promised to take official action on a specific and focused question or matter as the opportunities to take such action arose. United States v. Silver, 948 F.3d 538, 545 (2d Cir. 2020).

[8] Skilling v. United States, 561 U.S. 358 (2010).

[9] Kelly, slip op. at 11.

[10] The scope of this article does not address honest services fraud under 18 U.S.C. § 1346, which provides that a scheme to defraud a victim of honest services does not require the loss of money or

property.

[11] United States v. Gatto, No. 19-783-cr, ECF Dkt. No. 158 (2d Cir. May 8, 2020).

[12] See United States v. Gatto, No. 19-cr-686 (S.D.N.Y.); United States v. Person, No. 17-cr-683 (S.D.N.Y.).

[13] Kelly, slip op. at 11.

[14] "Incidental," Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/incidental (May 18, 2020).

[15] Kelly, slip op. at 11, 12.

[16] Such an appeal could jeopardize the "right to control" theory that the Government relies on in Gatto to substantiate the universities' loss of property, particularly given that currently there appears to be a split among Circuit Courts of Appeal on this issue. Compare United States v. Sadler, 750 F.3d 585, 591 (6th Cir. 2014) (rejecting fraud based on "the ethereal right to accurate information"); United States v. Bruchhausen, 977 F.2d 464, 470 (9th Cir. 1992) (holding that the right to control is "not 'property' of the kind that Congress intended to reach in the wire fraud statute"); United States v. Walters, 997 F.2d 1219, 1226 n.3 (7th Cir. 1993) (rejecting argument based on right to control theory because it was "an intangible rights theory once removed—weaker even than the position rejected in [previous cases] because Walters was not the universities' fiduciary"); United States v. Zauber, 857 F.2d 137, 147 (3d Cir. 1988) (rejecting "right to control" theory because it is "too amorphous to constitute a violation of the mail fraud statute as it is currently written") with United States v. Gray, 405 F.3d 227, 234 (4th Cir.) (holding that "the mail fraud and wire fraud statutes cover fraudulent schemes to deprive victims of their rights to control the disposition of their own assets"); United States v. Fagan, 821 F.2d 1002, 1010 n.6 (5th Cir. 1987) ("[T]here is sufficient evidence that the scheme here was one to deprive Texoma of its property rights, viz: its control over its money . . .,"); United States v. Granberry, 908 F.2d 278, 280 (8th Cir. 1990) (holding that "the right to control a thing, for example, money, is an integral part of the property right in the thing itself"); United States v. Welch, 327 F.3d 1081, 1108 (10th Cir. 2003) (holding that "the intangible right to control one's property is a property interest within the purview of the mail and wire fraud statutes"); United States v. Maxwell, 579 F.3d 1282, 1288 (11th Cir. 2009) (implicitly adopting the "right to control" theory because loss involved agencies' right to control to whom they awarded construction contracts, not substandard performance).