



2020

## Can the Federal Government Use the Generic Wire Fraud Statute to Prosecute Public Officials for Corrupt Activities That Are Conducted for Political Rather than Private Gain?

Nora V. Demleitner

*Washington and Lee University School of Law*, [demleitner@wlu.edu](mailto:demleitner@wlu.edu)

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlufac>



Part of the [Criminal Law Commons](#), [Criminal Procedure Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Nora V. Demleitner, Can the Federal Government Use the Generic Wire Fraud Statute to Prosecute Public Officials for Corrupt Activities That Are Conducted for Political Rather than Private Gain?, *Preview U.S. Sup. Ct. Cas.*, Jan. 13, 2020, at 12.

This Article is brought to you for free and open access by the Faculty Scholarship at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Scholarly Articles by an authorized administrator of Washington and Lee University School of Law Scholarly Commons. For more information, please contact [christensena@wlu.edu](mailto:christensena@wlu.edu).

# Can the Federal Government Use the Generic Wire Fraud Statute to Prosecute Public Officials for Corrupt Activities That Are Conducted for Political Rather than Private Gain?

## CASE AT A GLANCE

The defendants, two former New Jersey officials convicted in “Bridgegate,” challenge the scope of federal prosecutorial power under the generic wire fraud statute, 18 U.S.C. § 1343. They argue that the government sidestepped the Court’s explicit prohibition on inquiries into an official’s real reasons for an official act, unless bribery or kickbacks are involved. The defendants urge the Court to foreclose the government from circumventing limitations on the honest-services fraud doctrine under *McNally v. United States*, 483 U.S. 350 (1987), and *Skilling v. United States*, 561 U.S. 358 (2010). The government argues that the defendants’ actions met all statutory elements without the jury having to assess their underlying political motives.

***Kelly v. United States***  
**Docket No. 18-1059**

**Argument Date: January 14, 2020**  
**From: The Third Circuit**

by Nora V. Demleitner  
Washington and Lee University, VA

## INTRODUCTION

Petitioner and the United States agree that lies may be decisive in this case. How, why, and even which lies, however, are in dispute. Petitioner presents the Court with a broad question about the acceptability of the government’s parsing of motives to obtain a conviction. The government, on the other hand, sets out a workman-like question about whether it met the elements of the offense. Even though petitioner appeals all counts of her conviction, the argument centers largely on the wire fraud statute, 18 U.S.C. § 1343.

## ISSUE

Does petitioner’s action of redirecting public resources meet the requirements set out under 18 U.S.C. § 1343 that she exceeded her authority and deprived the state of its property?

## FACTS

The case arises from the 2013 New Jersey “Bridgegate” scandal. At the time petitioner Bridget Anne Kelly worked as deputy chief of staff for New Jersey’s Office of Intergovernmental Affairs and was largely responsible for organizing local government officials in support of Governor Chris Christie. William E. Baroni Jr. served as deputy executive director (ED) of the Port Authority, an interstate governmental organization that oversees public transportation between New York and New Jersey, including the George Washington Bridge (GW). His chief of staff was David Wildstein.

Baroni, whose interests align with Kelly’s, joined the case as respondent to not delay the briefing schedule.

Despite having been courted by Governor Christie, in June 2013 the mayor of Fort Lee, NJ, indicated that he would not support Christie in his re-election bid. In response, Kelly informed Wildstein and Baroni that it was “[t]ime for some traffic problems in Fort Lee.”

The GW, the world’s busiest bridge, has 13 lanes and tollbooths at the entrance ramp from Fort Lee; 3 booths are dedicated to entry from Fort Lee. Kelly, Wildstein, and Baroni agreed that Baroni, in his role as deputy ED, should reallocate two of the three lanes from Fort Lee so as to be available for general use. Since only one lane would be open to Fort Lee traffic, Baroni and Wildstein authorized hiring a backup tollbooth operator to keep the single lane open at all times. To justify the lane changes to Port Authority staff, Wildstein invented a traffic study. Some staff time was allocated to the phony study, and Port Authority staff collected some data.

The reallocation was to go in effect on Monday, September 9, 2013, the first day of the new school year. In contrast to Port Authority operating procedures, Baroni and Wildstein intentionally withheld information about the change from local authorities and the Port Authority’s executive director, Patrick Foye. Yet, both told Port Authority staff that Foye supported the changes.

Traffic in Fort Lee quickly ground to a halt that Monday, presenting safety and security hazards. When the ED learned of the closure later that week, he immediately reversed the lane realignment. Once the political background to “Bridgegate” became apparent, Governor Christie dismissed all three involved. He could never shake the political stain either.

In 2015, Kelly and Baroni were charged with conspiracies to commit wire fraud under 18 U.S.C. §§ 1349 and 1343 and federal program fraud under 18 U.S.C. §§ 371 and 666(a)(1)(A), and to violate civil rights under 18 U.S.C. § 241, the underlying substantive crimes of wire fraud, federal program fraud, and deprivation of civil rights under color of law, 18 U.S.C. § 242. The government’s theory of the case was that defendants had conspired to fraudulently use Port Authority resources and property. Wildstein pled guilty to two counts and cooperated with the government.

A jury convicted both defendants on all counts. The district court originally sentenced Kelly to 18 months and Baroni to 24 months in prison, each with one year of supervised release to follow. The Third Circuit, 909 F.3d 550 (3rd Cir. 2018), petition for rehearing denied (Feb. 5, 2019), vacated the civil rights convictions but affirmed all other counts. At resentencing, the judge shortened Kelly’s and Baroni’s prison terms by 5 and 6 months, respectively.

After the petition for rehearing was denied, Kelly filed for a writ of *certiorari*. Baroni, who had not requested rehearing, filed in support of Kelly’s brief. When the Supreme Court granted *certiorari*, Baroni joined as respondent so that any decision the Court renders will impact him directly.

## CASE ANALYSIS

Petitioner argues that she was convicted of “an otherwise-legitimate official act” because she concealed her political motive—to punish the mayor of Fort Lee for his refusal to support the governor. The lower court decisions must be wrong as they assessed the defendants’ true political reasons rather than adhering to their stated policy grounds in violation of Supreme Court precedent.

Baroni argues that “Bridgegate is a case of bareknuckle New Jersey politics, not graft,” for which all paid a political price. The federal government’s prosecution here overreached. According to Baroni, the government circumvented the Supreme Court’s limitations on use of the “honest services” doctrine set out in *Skilling* and *McDonnell v. United States*, 136 S. Ct. 2355 (2016).

The federal wire fraud statute requires three crucial elements to be met. First, petitioner argues officials empowered to make decisions on behalf of the state may breach their fiduciary duty if using “bad” or deceitful reasons but do not incur criminal liability. Since Baroni effectively represented the victim—the Port Authority—he could not have deceived it even when his given rationale was pretextual. The defendants argue Baroni was authorized to act on behalf of the Port Authority without giving any rationale. He and the ED each could issue decisions the other could not override. Any lie about his true motive was therefore irrelevant.

Petitioner and respondent also note that a narrow argument about final decision-makers is generally misleading as there is almost never an ultimate authority. In addition, they point to the anomaly that it would be the most powerful elected and appointed officials who would escape liability under the government’s approach.

In response, the United States notes that in most organizations, the question of who has final authority is clearly delineated. That is not true for the Port Authority, which appears to operate without written policies and procedures. The issue of whether Baroni exercised ultimate decision-making authority was therefore correctly left to the jury, which found against him. Based on the evidence, which included Baroni and Wildstein lying about the ED’s assent to the realignment and his immediate reversal of the traffic change once he found out about it, a rational jury could find in the government’s favor.

Baroni’s pretense of the nonexistent traffic study was not at issue legally but served to indicate his lack of ultimate authority. That turned his action into “*unauthorized* commandeering of Port Authority resources,” bringing it within purview of the fraud statute, the government argues.

As to the second condition, petitioner argues the lower level courts misconstrued the meaning of “property” under the fraud statute. Two types of property are at issue though there is disagreement as to which of these definitions may be properly before the Court. One is the lost wages of Port Authority staff recruited to participate in the phony traffic study, Baroni and Wildstein’s time, and the additional expense for the second tollbooth collector. The Third Circuit based its decision largely on the lost labor of public employees. The other definitional question, merely flagged by the Third Circuit, pertains to the Port Authority’s “right to control” the exclusive operation of the GW.

Petitioner argues that since the underlying decision to realign lanes was not fraudulent, it cannot amount to fraud to use the resources to implement such decision. After all, the costs attendant to the realignment were solely incidental and not the object of the scheme to defraud.

Petitioner also claims that “intangible rights of allocation, exclusion, and control” do not fit the definition of “property” under the fraud statute. The Port Authority’s regulatory decision-making power over the bridge is not a property interest but rather part of a state’s sovereign power to regulate akin to the state licenses in *Cleveland v. United States*, 531 U.S. 12 (2000).

The government notes Kelly and Baroni procured the labor of public employees, which included both staff and Baroni and Wildstein’s time, under false or fraudulent pretenses. Because they deprived the Port Authority of its money, the Third Circuit did not need to decide whether they also ran afoul of the “right to control,” though the court found sufficient evidence to that effect. As the lanes and tollbooths on the GW generate revenue, the Port Authority has not only a purely regulatory but also property interests in the exclusive operation of the bridge.

The third condition, in fraud, a lie is only actionable if it pertains to the essential terms of a transaction that deprive a party of the

benefit of the bargain. According to petitioner, a motive for an action is not an essential part of the bargain. Any discussion about the defendant's motive therefore threatens to criminalize politics. After all, in fraud statutes the alleged offender's objective decision rather than their subjective motive is at issue.

The cover story about the traffic study, the government claims, was a "material" falsehood because reasonable persons would attach importance to it in determining their action. Baroni could only accomplish "by trick" the object of the scheme—control over the bridge and employee time and labor. Without that false statement, he would have never been able to commandeer Port Authority resources.

The government notes that the underlying political motive was not at issue in determining whether an offense occurred. It was raised at trial only to provide the jury with a coherent explanation as to why the offense occurred at all.

Petitioner charges the government with contravening the Supreme Court's carefully constructed limitations on the "honest services" doctrine, as set out in *McNally*, *Skilling*, and *McDonnell*. Honest services fraud is limited to bribery or kickbacks where an official action furthers undisclosed personal interests while purporting to advance a public interest. If the wire fraud statute were applied as the government proposes, Baroni argues, it would thwart the limitations the Court imposed on the "honest services" doctrine. In contravention of precedent, the United States uses federal fraud statutes to set out good government requirements for local officials. That raises serious questions of federalism. In addition, the government's theory criminalizes a wide range of political activity not only in local but also in national politics whenever questions of motive are raised. These issues should be resolved at the ballot box rather than in the courtroom, the Court noted in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

The government rejects the notion that this is an honest services fraud case in disguise but rather that it simply involved money and property fraud. Kelly and Baroni's political motive was ultimately irrelevant; only their *mens rea* mattered. The material lies at issue did not pertain to the goal of the lane realignment but rather to the existence of the traffic study. It was that lie that allowed Baroni to misappropriate Port Authority resources.

The contravention of the Supreme Court's mandate is not the only objectionable feature of the government's approach, according to petitioner and respondent. The government's theory of the case also violates every canon of construction. Its parsing of an official's true motive will cast a pall over every local government decision and will allow federal prosecutors to become roving ambassadors of good government, leaving in their wake countless random and perhaps partisan-based criminal convictions. Baroni states that such interpretation of the statute "injects a potent new weapon into a highly charged, hyper-partisan political environment in which voices on both sides are already regularly clamoring for their rivals to be prosecuted." The vagueness of the statute allows prosecutors and judges, rather than the legislature, to define crimes and will lead to arbitrary and discriminatory enforcement. It raises fair notice concerns and at a minimum demands application of the doctrine of lenity.

Three amici weigh in on Kelly's side. Lord Conrad Black and Governor Robert F. McDonnell, who both saw the Supreme Court overturn their convictions, consider the government's action an end run around the limitations imposed in their cases and a testament to governmental overreach facilitated by the vast array of federal criminal statutes.

Two other amici weigh in on the control theory and the property definition, respectively. The National Association of Criminal Defense Lawyers argues that neither state government functions nor regulatory actions can be "property" for purposes of the wire fraud statute without nullifying the Supreme Court's decision in *Cleveland*. If the government is permitted to consider the right to regulate traffic on the GW Bridge as property, that statute will become unbounded.

Senator Sheldon Whitehouse files the sole amicus brief on behalf of the government, asking the Court essentially to stay out of the political process and respect the jury's verdict to prevent the further corruption of the political process.

## SIGNIFICANCE

Petitioner and respondent style this case as the next chapter in the line of decisions from *McNally* to *McDonnell* that reign in governmental prosecutions in cases of public (and private) "corruption." Accordingly, they charge the government with prosecutorial overreach, with subverting the Court's prior limitations, and with the criminalization of merely political actions. The government attempts to dial down the stakes.

The full facts raise questions as to whether this case presents the correct vehicle for further restriction on public corruption prosecutions. Petitioner and respondent win the competition of rhetorical flourish and memorable lines, but two of the pivotal questions—Baroni's authority and the status of the traffic study—seem to have been allocated correctly to the jury, with the evidence adduced meeting at least a sufficiency standard.

Despite the facts' shortcomings and the government's attempt to avoid a broad ruling, most commentators expect the Court to use the case as an opportunity to further limit federal prosecutions of local officials in cases involving corrupt conduct that does not directly benefit the involved financially. That may serve well those who fear the breadth of criminal statutes and federal prosecutions. The concept of "property" the United States proposes might provide the easiest hook, especially as the government cites Baroni and Wildstein's time expended in the plot as basis for the loss involved.

One can safely assume that the defendants here never expected a criminal prosecution, which raises notice concerns. Still, the stakes and the actions seem qualitatively different from those in the earlier cases petitioner cites.

In the end, Senator Whitehouse's amicus brief may have hit a nerve in his invocation of jury sensibilities to actionable "corruption." Still it is upon Congress to draft statutes that provide notice and bounded definitions of criminality.

Nora V. Demleitner is the Roy L. Steinheimer Jr. Professor of Law at Washington and Lee University (Virginia). She is the lead author of *Sentencing Law and Policy* (Wolters Kluwer/Aspen 4th ed. 2018). She also serves as an editor of the *Federal Sentencing Reporter* and is a board member of the *Prison Policy Initiative* and the *Collateral Consequences Resource Center*. She tweets @NDemleitner. demleitner@wlu.edu; 516.639.7505 (cell)

*PREVIEW of United States Supreme Court Cases 47*, no. 4 (January 13, 2020): 12–15. © 2020 American Bar Association

## ATTORNEYS FOR THE PARTIES

For Petitioner Bridget Anne Kelly (Yaakov Moshe Roth, 202.879.3939)

For Respondent William Baroni (Michael Alexander Levy, 212.839.7341)

For Respondent United States (Jeffrey Bryan Wall, Acting Solicitor General, 202.514.2217)

## AMICUS BRIEFS

### In Support of Petitioner Bridget Anne Kelly

Lord Conrad Black and Former Governor Robert F. McDonnell (Ryan Joseph Walsh, 312.660.7600)

Michael Binday (David William Shapiro, 510.906.4906)

National Association of Criminal Defense Lawyers (Joshua Lewis Dratel, 212.732.0707)

### In Support of Respondent United States

Senator Sheldon Whitehouse (Michael Dominic Meuti, 216.363.6246)