

## WHITE-COLLAR CRIME

## Expert Analysis

# A Bridge Too Far? Federalism And the ‘Bridgewater’ Prosecution

Federalism is a bedrock of our Constitution and political system. But the division of power between federal and state governments remains controversial despite its long history. Consider the present debate over the U.S. Senate and the system for electing the president, which give disproportionate power to states with smaller populations.

In white-collar criminal law, principles of federalism have influenced how the Supreme Court has interpreted the broadly-worded mail and wire fraud statutes, particularly in prosecutions of state and local officials, as we have previously discussed. See, e.g., Elkan Abramowitz & Jonathan Sack, *Limits on the Scope of Honest Services Fraud*, N.Y.L.J., Nov. 7, 2017. The Supreme Court has expressed reservations about federal prosecutors becoming excessively involved in the regulation of state and local political behavior.

In its present term, the Supreme Court will hear an appeal arising from the controversy known as “Bridgewater”:

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ELKAN ABRAMOWITZ and JONATHAN SACK are members of Morvillo Abramowitz Grand Iason & Anello. Mr. Abramowitz is a former chief of the criminal division in the U.S. Attorney’s Office for the Southern District of New York. Mr. Sack is a former chief of the criminal division in the U.S. Attorney’s Office for the Eastern District of New York. JOSHUA BUSSEN, an associate of the firm, contributed to this article.



By  
**Elkan  
Abramowitz**



And  
**Jonathan S.  
Sack**

the politically-motivated closure in 2013 of two lanes on the George Washington Bridge that served Fort Lee, N.J. The government alleged that

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defendants Bridget Kelly and William Baroni Jr. ordered the lanes closed for political reasons which they concealed by falsely saying the closure was part of a “traffic study.” The Supreme Court granted certiorari to decide the defendants’ claim that the federal wire fraud statute should not be held to extend to the sharp-elbowed local politics underlying the prosecution.

After describing the factual and legal background, we discuss the arguments of the defense and the government in

the Supreme Court. These arguments touch directly on the proper reach of federal criminal law into the realm of local politics.

### Federalism and The Fraud Statutes

Federalism concerns have been central to the Supreme Court’s consideration of the “honest services” theory of mail/wire fraud—a theory of fraud invoked in federal prosecutions of public corruption.

In *McNally v. United States*, 483 U.S. 350 (1987), a mail fraud prosecution of state officials for secretly profiting from insurance contracts, the Supreme Court confined mail fraud to the deprivation of money or property, holding that the statute did not reach the deprivation of the “intangible right of the citizenry to good government.” *Id.* at 359. The decision had the effect of invalidating the “honest services” theory that underlay a generation of federal prosecutions of local and state officials for corruption. In rejecting a broader interpretation of the mail fraud statute, the court said that it would not “construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in *setting standards of disclosure and good government for local and state officials.*” *Id.* at 360 (emphasis added). In 1988, Congress passed 18 U.S.C. §1346, which effectively overruled

*McNally* and authorized prosecutions of state and local officials (and others) for the deprivation “of the intangible right of honest services.”

In *United States v. McDonnell*, 136 S. Ct. 2355 (2016), a prosecution of a state governor for accepting substantial gifts from a local businessman, the Supreme Court reversed an “honest services” wire fraud conviction on the basis of a narrow interpretation of “official act”—an element of the general federal bribery law (18 U.S.C. §201) deemed to apply in an honest services fraud prosecution. While calling the governor’s conduct “distasteful,” the court grounded its unanimous decision in part on principles of federalism, observing that the states have the “prerogative to regulate the permissible scope of interactions between state officials and their constituents.” Prosecutors may not stretch federal criminal “statute[s] in a manner that leaves [their] outer boundaries ambiguous and involves the Federal Government in setting standards’ of ‘good government for local and state officials.’” *McDonnell*, 136 S. Ct. at 2373, 2375 (quoting *McNally*, 483 U.S. at 360).

### ‘U.S. v. Baroni and Kelly’

In 2013, while Republican Governor Chris Christie was seeking re-election, his aides sought endorsements from Democratic officeholders throughout the state to generate bipartisan support. Democratic Mayor Mark Sokolich of Fort Lee declined to endorse Christie. Bridget Kelly, a Christie aide and Deputy Chief of Staff in the Office for Intergovernmental Affairs, joined with two officials from the Port Authority of New York and New Jersey (Port Authority), David Wildstein and Baroni, to punish the mayor for his decision.

Kelly, Baroni and Wildstein devised a plan to close two of the three lanes on the upper roadway of the George Washington Bridge serving Fort Lee. Though

justified within the Port Authority as part of a traffic study, the lane closure, in fact, was carried out in response to the mayor’s decision not to endorse Christie. On Sept. 9, 2013, the first day of school, the two lanes were closed, and the backup of cars clogged the streets of Fort Lee, which blocked emergency vehicles, commuters and school buses. Police and paramedics had difficulty responding to reports of a missing child and a cardiac arrest on account of the traffic jam.

The U.S. Attorney’s Office for the District of New Jersey conducted an investigation, and a grand jury returned an indictment that charged Baroni and Kelly with federal benefit program fraud in violation of 18 U.S.C. §666, wire fraud in violation of 18 U.S.C. §1343, deprivation of civil rights in violation of 18 U.S.C. §242, and a conspiracy to commit these offenses. Wildstein pleaded guilty to conspiracy to commit federal benefit program fraud and conspiracy against civil rights, and cooperated with the government and testified at trial against Kelly and Baroni.

The government’s theory of wire fraud was that, by virtue of the false reasons given for the lane closures, Baroni and Kelly fraudulently deprived the Port Authority of money and property by wrongfully (1) depriving the Port Authority of control over its property (i.e., the lanes themselves), and (2) causing the Port Authority to pay regular and overtime wages of employees who conducted the traffic study and responded to its aftermath. The government did not pursue an honest services fraud theory of liability—the more traditional means of prosecuting alleged public corruption—because the government did not claim the defendants profited from the scheme via a bribe or kickback, which is required to sustain an honest services fraud charge. See *Skilling v. United States*, 561 U.S. 358 (2010).

After a six-week trial, Baroni and Kelly were convicted on all counts. The district court sentenced Kelly to 18 months, and Baroni to 24 months, imprisonment. They appealed to the Third Circuit, which affirmed all but the civil rights conviction. *United States v. Baroni*, 909 F.3d 550 (3d Cir. 2018).

Baroni opted to begin serving his sentence, and Kelly petitioned the Supreme Court for certiorari. Baroni began serving his sentence in April 2019; Kelly remained on bail. Baroni was later released after the Supreme Court granted certiorari.

### Arguments in Supreme Court

In their Supreme Court briefs, Kelly and Baroni argue that even if their actions were “petty, insensitive, and ill-advised”—which the defendants concede—their actions were not sufficient to constitute federal wire fraud. In their view, the convictions under the wire (and federal program) fraud statutes are flawed in regard to both (1) the money or property alleged to have been misappropriated from the Port Authority and (2) the false statements alleged to have deceived the Port Authority.

The defendants challenge both types of money or property deprivation claimed by the government. As to the loss of regular and overtime wages, the defendants argue that, because employee time was under the control of Baroni as a Port Authority official and was used for Port Authority business, the alleged traffic study was not a deprivation as contemplated by the wire fraud statute; and as to the loss of Port Authority control over the Bridge, they argue that control over use of the Bridge is a matter of regulatory authority, not a state property interest, under *Cleveland v. United States*, 531 U.S. 12, 23 (2000). As to the misrepresentations underlying the convictions—false statements about the motivation for the purported traffic study—the defendants

contend that they are not the sort of statements on which wire fraud may be based; a government official does not commit fraud by lying about her subjective motives for a political decision, in their view.

A theme running through the appeal is that the government overreached to charge “money or property” wire fraud because it could not charge honest services fraud in the absence of a bribe or kickback—an essential element of “honest services” fraud. In the defense view, the Bridgegate charges involve the very sort of “honest services” fraud held to be beyond the scope of §1346, namely, a public action motivated not by a bribe or kickback but by a hidden self-interest. *Skilling*, 561 U.S. at 408. In the absence of tangible gain to the public official, the defense says, prosecutors would be able to turn almost any unstated political motivation and use of public funds into a wire fraud prosecution.

Recognizing the Supreme Court’s concern with excessive federal oversight of state and local politics, Kelly and Baroni seek to reinforce their doctrinal arguments by pointing to a parade of horrors from affirmance of their convictions. They posit a hypothetical “deputy mayor who orders pothole repair to reward her boss’s political base,” or an official who appoints a friend to a job, saying she is best qualified when she is not. In their view, both routine public actions would be subject to federal criminal prosecution under the government’s theory of wire fraud. In that event, the federal “judiciary [would be transformed] into a Ministry of Truth for every public official in the nation,” “readily enable[ing] partisans not just to harangue and harass political opponents—but to prosecute and jail them.” *Kelly v. United States*, No. 18-1059, Kelly Br. at 1. The Supreme Court cited this same concern in *McDonnell*, stating

that such an interpretation would “cast a pall of potential prosecution” over “nearly anything a public official does.” *McDonnell*, 136 S. Ct. at 2372.

The government, not surprisingly, views the defendants’ conduct as so egregious that federal prosecution should not be viewed as undue interference with local politics. As to money and property, the government argues that under black letter law the labor of public employees can be “property” for purposes of the fraud statutes, and that in this case the Port Authority had to pay thousands of dollars in extra regular and overtime wages for employees as a result of the unjustified lane closures, including the work of Baroni and Wildstein themselves. The government further argues that the Port Authority had a property interest in its right to control the flow of traffic

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across the bridge; Kelly and Baroni did not have authority over the personnel and facilities at issue, and they wrongfully commandeered that control for their own secret purposes.

As to the false statements, the government argues that Kelly’s and Baroni’s lies were not a run-of-the-mill instance in which a public official seeks to hide the political motivation for a public act. The defendants were not merely camouflaging their true motive for an otherwise proper exercise of authority. Rather, in the government’s view, the defendants needed to lie about the traffic study in order to have the Fort Lee lanes closed in the first place, which negates the defen-

dants’ argument that affirmance would subject the routine acts of local officials to federal criminal prosecution.

In sum, the government maintains that its theory of prosecution is an appropriate check on abuses of power and would not interfere with garden variety political decisions. The deputy mayor who lies about why she first repaired potholes in the district of a political friend would not be guilty of fraud because she had the authority to allocate resources to fix potholes in the first place. In this view, an official would not be subject to federal prosecution just because she allows a decision to be influenced by an unstated, or even mischaracterized, political motive.

## Conclusion

Citing principles of federalism, the Supreme Court has limited federal prosecutors’ use of the mail/wire fraud statutes to prosecute misconduct by state and local officials. While not condoning such misconduct, the court has expressed reservations over the involvement of federal prosecutors, and thereby federal courts, in policing state and local political behavior. In the Bridgegate prosecution, we may see once more how the court seeks to reconcile principles of federalism with federal prosecution of local official misconduct.