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'Bridgegate' Further Cabins Public Corruption Prosecutions

By **Jason Halperin and David Drew** (June 4, 2020, 4:10 PM EDT)

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While working in Albany in the 1990s, the (older) author of this piece heard tales of Election Day shenanigans: how Democratic operatives in New York City had taken to stalling trucks during the afternoon rush hour on the Verrazano-Narrows Bridge to prevent voters in Staten Island, then New York City's only reliably Republican borough, from getting home to vote.

On May 7, the U.S. Supreme Court affirmed that this type of conduct — manipulating bridge traffic for political gain — is not necessarily a federal crime. In Kelly v. U.S., the court overturned convictions for wire fraud[1] and fraud on a federally funded program or entity[2] against Bridget Anne Kelly and William Baroni, two deputies to former New Jersey Gov. Chris Christie, who had been prosecuted for their roles in the scandal that soon became dubbed "Bridgegate."

For several days in September 2013, Kelly and Baroni redirected Port Authority of New York and New Jersey resources to arrange for the closure of all but a single lane at the toll plaza on the New Jersey side of the George Washington Bridge to punish the Democratic mayor of Fort Lee, New Jersey, for refusing to support Christie's reelection. Kelly and Baroni allegedly executed their scheme under the guise that they were conducting a traffic study.

The resulting gridlock caused a massive rush-hour overflow onto the streets of Fort Lee — a public nuisance, and a mayor's worst nightmare. Kelly's infamous email, "Time for some traffic problems in Fort Lee," went viral after the charges were announced.

But according to a unanimous Supreme Court last month, Kelly and Baroni committed no federal crimes. Justice Elena Kagan made clear that, though "[t]he evidence the jury heard no doubt shows wrongdoing — deception, corruption, abuse of power,"[3] "not every corrupt act by state or local officials is a federal crime."[4]

This was because neither defendant sought to personally acquire money or property from the traffic closure. "The property fraud statutes ... do not 'proscribe[] schemes to defraud citizens of their intangible rights to honest and impartial government,'" Justice Kagan wrote, "They bar only schemes for obtaining property."[5]

For many, the Kelly decision is nothing more than the coda to an absurd scandal. But for close observers of the court's public corruption jurisprudence, Kelly is simply the latest in a 20-year line of decisions — extending from Cleveland v. U.S. in 2000, and including Skilling v. U.S. in 2010 and McDonnell v. U.S. in 2016 — that have, in sum, drastically narrowed prosecutors' ability to use previously flexible public corruption statutes as tools to curtail putative public corruption by government officials.

Read together, the cases show an unmistakable arc: Public officials are freer than ever to act with impure motives, so long as they are not moving official levers of government power for their own personally corrupt ends.

What's more — despite arising during an era occasionally marked by bitter 5-4 splits on the court, these four cases were each the result of unanimous decisions from our highest court.[6] That is nothing short of remarkable. Indeed, three of the four cases mentioned above were authored by prominent justices on the court's liberal flank. The court's decisions in this area reflect a united effort to rein in federal oversight of local corruption, guided by concerns both constitutional and political (arguably even romantic).

The road that leads to Kelly begins most clearly in Cleveland v. U.S.[7] In this case, the court was tasked with examining whether a corrupt effort to sway Louisiana legislators and defraud Louisiana's video poker licensing regime constituted federal mail fraud under Title 18 of U.S. Code Section 1341. Cleveland, a lawyer, had been convicted of racketeering, with several counts of mail fraud serving as his predicate offenses; he had lied to the state concerning the beneficial ownership of the video poker entity whose application he submitted for licensing.

The Supreme Court unanimously reversed Cleveland's conviction and remanded his case, primarily because he did not seek to deprive the government of property. Justice Ruth Bader Ginsburg, writing for the court, noted that "whatever interests Louisiana might be said to have in its video poker licenses, the State's core concern is regulatory," i.e., the licenses were not state property that could form the object of a scheme to defraud.

Nor was interfering with the state's regulatory regime its own deprivation of property; the state's "intangible rights of allocation, exclusion, and control" were simply the trappings of sovereign authority, not alienable property interests.[8]

More consequentially, though, Justice Ginsburg's opinion expressed a fundamental view about what constitutes criminally corrupt conduct by public officials. In the court's view, letting federal prosecutors criminalize lying to state officials would not just affect how we read the law — it would affect the full allocation of enforcement authority between federal and state governments. The court thought this was going too far: "[a]bsent [a] clear statement by Congress," the court held, "we will not read the mail fraud statute to place under federal superintendence a vast array of conduct traditionally policed by the States."[9]

The court reaffirmed this notion in Skilling v. U.S.[10] Jeffrey Skilling, the former CEO of Enron Corp., was convicted of conspiracy to commit "honest-services" wire fraud[11] for Enron's wide-ranging efforts to conceal its internal accounting scandal. Skilling challenged the statute for unconstitutional vagueness; Section 1346's prohibition against efforts to fraudulently obtain "the intangible right of honest services" was simply too unclear to sufficiently provide fair notice to the public and constrain enforcement authority.[12]

To survive a vagueness challenge, the court wrote, the statute must be carefully construed to cover what it prohibited at "its core ... fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived."[13] While Skilling related to conduct by a private individual, it deploys the same interpretive moves as Cleveland and its successors and results in the same consequences: a restriction of the government's ability to police corruption, again motivated by the court's concern about upholding a criminal conviction for the conduct at issue, "absent Congress' clear instruction otherwise."[14]

It is in McDonnell v. U.S.,[15] that one sees most clearly the court's larger animating theory behind its hesitancy to allow for what it viewed as broad-spectrum, loosely defined enforcement of federal public corruption law. McDonnell concerned former Virginia Gov. Robert McDonnell and his wife Maureen, who were each convicted on multiple counts of honest services fraud and Hobbs Act extortion.[16] The governor and his wife had received a number of luxury goods and benefited from the lavish spending of a donor, for whom the governor provided special access and helped arrange a meeting with Virginia's Health and Human Services secretary."[17]

The court again unanimously decided to rein in prosecutorial authority, premised this time on a close reading of the official act requirement in the federal bribery statute.[18] Chief Justice John Roberts wrote for the court, ultimately holding that the favors McDonnell pulled for his donor friend simply were not sufficient to support a criminal conviction: "Setting up a meeting, talking to another official, or organizing an event (or agreeing to do so) — without more — does not fit that definition of 'official act.'"[19]

But rather than rest purely on canons of statutory interpretation or clear statement requirements, this time the court made clear that they were guided by a romantic, or some would say more realistic, view of politics — one that acknowledges that decisions will always, to some degree, be influenced by direct, personal or emotional considerations:

> Conscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time. The basic compact underlying representative government assumes that public officials will hear from their constituents and act appropriately on their concerns — whether it is the union official worried about a plant closing or the homeowners who wonder why it took five days to restore power to their neighborhood after a storm.[20]

Allowing prosecutors to look too closely at this side of politics would not just cause the federal superintendence that Justice Ginsburg warned of in Cleveland. It:

> could cast a pall of potential prosecution over these relationships if the union had given a campaign contribution in the past or the homeowners invited the official to join them on their annual outing to the ballgame. Officials might wonder whether they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse.[21]

Thus, when viewing these previous cases in a line, once the Supreme Court decided to hear the Kelly case, the outcome should not have been a surprise.

Kelly is the nasty flip side of the McDonnell coin. Just as our political system is predicated on concern for constituents, the court also seems to be saying politics does, in fact, contain some good old hardball.

If prosecutors should not investigate state or local officials for self-dealing when they might just be

working to, as Chief Justice Roberts put it, "respond to even the most commonplace requests for assistance," or if they might be joining their neighbors for the "annual outing to the ballgame," even if the box at the ballgame happens to be full of lobbyists (McDonnell), prosecutors also lose the ability to charge them for acts that are clearly mean-spirited and vindictive but not financially self-interested — like creating massive traffic on the George Washington Bridge to punish a political rival.

In short, the court's decision last month in Kelly is only the latest clear sign that the Supreme Court means business about reining in public corruption prosecutions that the court sees as too aggressive or that involve readings of the statutes that are too broad. And the court is also admonishing prosecutors that even though politics sometimes stinks, that does not mean that every instance of behavior more worthy of Tammany Hall than Mount Rushmore warrants a federal prosecution.

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[1] 18 U.S.C. § 1343.

[2] 18 U.S.C. § 666(a)(1)(A).

[3] Kelly v. United States, No. 18-1059, at 2 (U.S. May 7, 2020).

[4] Kelly at 13.

[5] Kelly at 12 (quoting McNally v. United States, 483 U.S. 350, 355 (1987)).

[6] In Skilling, the Court was not unanimous on other issues presented, but remained unanimous as to its analysis of the public corruption laws.

[7] Cleveland v. United States, 531 U.S. 12 (2000).

[8] Id. at 23.

[9] Id. at 14.

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

[11] 18 U.S.C. § 1346.

[12] Skilling, 561 U.S. at 412.

[13] Id. at 404.

[14] Id. at 411.

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

[16] Id. at 2366.

[17] Id. at 2365.

[18] 18 U.S.C. § 201(a)(3).

[19] McDonnell, 136 S. Ct. at 2372.

[20] Id. at 2359.

[21] Id. at 2360.