



# Tying Up Traffic May Be a Federal Crime

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## **Introduction**

The U.S. Supreme Court has [agreed](#) to review “Bridgegate,” the case in which two former New Jersey officials were convicted of fraud after, for political reasons, they redirected traffic leading to the George Washington Bridge. The defendants in the case, *Kelly v. U.S.*, argue that the lower court opinion conflicts with other appellate court decisions and is at odds with the Supreme Court’s [condemnation](#) of “the us[e] of vague federal criminal laws to impose ‘standards of ... good government’ on ‘local and state officials.’”

## **Background**

One of the defendants, Bridget Kelly, served as a member of the New Jersey governor’s staff; the other, William Baroni, as the Deputy Executive Director of the Port Authority of New York and New Jersey. The Port Authority operates the George Washington Bridge, which connects New Jersey and New York. By long standing political agreement, access to three of the bridge’s twelve toll booths that guard entrance to the bridge’s twelve lanes is reserved to local traffic from Fort Lee, New Jersey. The defendants ordered the number of the toll booths dedicated to Fort Lee reduced from three to one and the number of toll booths available to the “main line” increased from nine to eleven, ostensibly in conjunction with a traffic survey, but in reality as an act of political retribution directed against the Mayor of Fort Lee. Traffic flow in the main line improved. Traffic at the Fort Lee toll booth, however, backed up and gridlock in Fort Lee ensued. In the political fallout, the Governor fired Kelly and Baroni, and a federal grand jury indicted them on conspiracy, fraud, and civil rights charges.

## **Criminal Charges**

The indictment charged violations of six federal criminal offenses: conspiracy to violate federal law; conspiracy to commit wire fraud; conspiracy against civil rights; obtaining the property of a recipient of federal funds by fraud; wire fraud; and deprivation of civil rights under color of law. The federal-funds offense occurs when the agent of a substantially federally funded entity defrauds the entity of property valued at more than \$5,000. Offenders face the prospect of imprisonment for not more than 10 years upon

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conviction. Conspiracy to commit this or any other federal crime is a separate five-year felony. Wire fraud consists of a scheme to defraud another of his property when the internet or a phone is used, or caused to be used, in the course of the scheme. Wire fraud is a 20-year felony. Wire fraud has its own conspiracy attendant. Conspiracy to commit wire fraud is a separate 20-year felony. Conspiracy to deprive another of his civil rights is a 10-year felony. The substantive civil rights offense under the circumstances here is one-year misdemeanor. The jury convicted the defendants on all counts.

### **Kelly in the Third Circuit**

On [appeal](#), the U.S. Court of Appeals for the Third Circuit (Third Circuit) threw out the civil rights convictions, but affirmed the defendants' convictions on each of the other counts. The defendants raised two arguments before the Third Circuit. First, they contended that their conduct did not constitute fraud under either of the substantive offenses, without which the conspiracy convictions could not stand. Second, they asserted that the prosecution was nothing more than a poorly disguised effort to avoid the Supreme Court's limited interpretation of honest services fraud.

The defendants [argued](#) they had not committed fraud. Baroni had authority to order a traffic study and to redirect access to the bridge as part of the study. Moreover, they asserted that Baroni's actions had not deprived the Port Authority of any property. The Third Circuit remained [unconvinced](#). It noted that Deputy Director Baroni's "authority" rested on the traffic-study cover story and his lie that the Director knew of the plan. The court found the defendant's property contention no more compelling. It [explained](#) that, "[t]he Government's evidence that Defendants fraudulently conscripted fourteen Port Authority employees into their service, and that Baroni ... accepted compensation for time spent conspiring to defraud the Port Authority, is alone sufficient for a rational juror to have concluded Defendants deprived the Port Authority of its money or property." Although unnecessary to resolve the property issue, the court [observed](#) that defendants would fare no better under a theory that the exclusive right to control property is a recognized property interest. The Port Authority had a property interest in operation of the toll bridge, and the court stated, "Defendants invented a sham traffic study to usurp that exclusive interest, reallocating the flow of traffic and commandeering public employee time in a manner that made no economic or practical sense."

The Third Circuit [attributed](#) the defendants' honest services position to the Supreme Court's decision in *Skilling*, where the Supreme Court deflected a vagueness challenge by limiting the term "honest services" to services corrupted by bribery or kickbacks. The Third Circuit considered *Skilling* inapplicable because in the eyes of the court, the defendants defrauded the Port Authority of money and property, not of the honest services of its public officials. The court also [considered](#) the federal interest in the Port Authority sufficient to negate the suggestion that the prosecution of the defendants represented an example of the federal government's setting good government standards for state and local governments.

### **In the Supreme Court**

The governor's staff member, Kelly, successfully [petitioned](#) the Supreme Court to consider whether "a public official 'defraud[s]' 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." Her petition argued that under the logic of the Third Circuit's opinion, a paid public official's decision of which snow-closed streets to plow first or which potholes to fill first would become a federal crime of fraud if based on *unannounced* political considerations conflicting with announced reasons. She contended that this is contrary to both the Supreme Court's precedents and the interpretations of other lower federal appellate courts.

Her petition [declares](#) that "[f]or over three decades, this Court has repeatedly warned against using vague federal criminal laws to impose 'standards of ... good government' on local and state officials" and cites Supreme Court precedents of *McNally v. United States*, *Skilling v. United States*, and *McDonnell v. United States*. In *McNally*, the Court [held](#) that the proscriptions of the mail fraud statute did not include

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defrauding citizens of their intangible right to honest and impartial government. Congress responded with a statute that added honest services fraud to the schemes condemned in the mail and wire fraud statutes. In *Skilling*, in order to avoid vagueness concerns, the Court **construed** the honest services statute to reach only bribery and kickback cases. In *McDonnell*, the Court **read** the official act element of federal bribery laws narrowly, out of a reluctance “to construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards’ of ‘good government for local and state officials.’” The petition **asserts** that the Third Circuit “adopted a theory of fraud so incredibly potent as to undo – in one fell swoop – the restrictions this Court imposed in *all* of those decisions. Its opinion is a playbook for how to prosecute political adversaries, and transforms the federal judiciary into a Ministry of Truth for every public official in the nation.”

Kelly **sees** a conflict between the Third Circuit’s opinions and the decisions of the Seventh Circuit in *Blagojevich* and *Thompson*, the First Circuit in *Ochs*, and the Eleventh Circuit in *Goodrich*. In one way or another, the cases each reflect a hesitancy to consider politics-as-usual fraudulent; a hesitancy the Third Circuit was able to overcome. Kelly suggests that faced with the facts in *Blagojevich* and *Thompson* the Third Circuit would have found fraud, “in both instances because [the defendant] concealed his ‘real reason’ for the official decision by engaging in [political] spin. This is a reading of the statutes that the Seventh Circuit not only rejected, but deemed ‘implausible’ and ‘preposterous.’”

Kelly also **claims** parallels in the First and Eleventh Circuit sleight-of-hand fraud cases:

The First Circuit has explained that courts may not circumvent *McNally* by so easily recasting an honest-services case as a money-or-property case: “[W]e do not think courts are free simply to recharacterize every breach of fiduciary duty as a financial harm, and thereby to let in through the back door the very prosecution theory that the Supreme Court tossed out the front.”... So too, the Eleventh Circuit has ruled that a “‘property interest’ [that] is indistinguishable from the intangible right to good government described in *McNally* ... cannot sustain [a] mail fraud count,” even if reframed in property terms.

The government’s brief in opposition to Supreme Court review **emphasizes** that the evidence found by the trial jury satisfied each of the elements of the offenses of conviction. Kelly’s petition **claimed** that Fort Lee residents accounted for 5% of the traffic on the bridge and the rest of the traffic going through the reserved toll booths came from motorists cutting through Fort Lee to avoid congestion leading to the main line toll booths. Although devotion of 25% of bridge access for 5% of the traffic might seem to call for a traffic study and the study indicated the realignment reduced congestion on the main line, the petition made no real effort to suggest that the study was anything but a cover for a political trick. Moreover, the government’s brief **points out** that “‘the jury was instructed that’ it would be ‘a complete defense’ if petitioner had ‘believed the traffic study was legitimate.’”

The Supreme Court faces the question of whether a federal crime of fraud occurs when a state or local official performs a politically motivated official act under the guise of a legitimate purpose. The government says it does. Kelly says it shouldn’t.