

Blog



The Supreme Court recently [granted certiorari](#) in a criminal case arising from a fraudulent scheme to cause massive gridlock at the George Washington Bridge in September 2013—otherwise known as the "Bridgegate" scandal.



Bridget Anne Kelly, a staffer in then-Governor Chris Christie's office, was convicted of wire fraud for her role in fabricating a fake traffic study and orchestrating lane reallocations as an act of political retaliation against a local mayor. Affirming Kelly's wire fraud conviction, the Third Circuit [sustained](#) the Government's theory that Kelly and a fellow political operative fraudulently deprived the Port Authority of both physical property and intangible property, finding that the Port Authority has an "unquestionable" property interest in the Bridge's traffic allocation and its public employee labor, and that the Port Authority has an intangible property interest in the public employees' time and wages. **The Prosecution's Fraud Theory** At trial, the Government argued that the defendants sent emails in furtherance of a scheme to defraud the Port Authority of its physical property (traffic lanes and toll booths) and money (public employee labor) by creating the massive traffic jam. The defendants' pretextual traffic study constituted a "misrepresentation" which allowed them to carry out the lane reductions and to divert Port Authority property and money necessary to do so. Because of the defendants' fraudulent misrepresentation that they were conducting a traffic study, the Port Authority was deprived of its financial interest in the salaries of the public employees—including Kelly's co-defendant, Bill Baroni—who wasted their time in furtherance of the scheme. **The Third Circuit's Review** In post-trial motions, the defense argued that it is not a crime for a public official to take official action based on concealed political interests; specifically, the defense argued that the Government's fraud theory constitutes an "impermissible end-run" around Supreme Court limitations on the scope of "honest services fraud." However, the Third Circuit found the Supreme Court's ruling on honest services fraud to be inapposite. The Government presented evidence that the defendants "fraudulently conscripted fourteen Port Authority employees into their service" as part of the false traffic study, and this diversion of public employee salaries was sufficient for a rational juror to have concluded that the defendants deprived the Port Authority of its money or property. Furthermore, Baroni allegedly spent fifteen to twenty hours working on the lane reductions, and his compensation—as a Port Authority employee—was plainly "money" under Section 1343. The Third Circuit further rejected the defendants' argument that, as public officials, any fraud case against them necessarily entails the intangible right to honest services. In response, the Third Circuit cited a number of prosecutions of public officials for defrauding the government of money and property. **The Supreme Court Wades In** In its [petition for certiorari](#), the defense doubles down on its theory that DOJ cloaked an honest services fraud case in simple wire fraud, and harshly criticized the appellate court's ruling. In a petition heavy on policy implications and potential downstream effects of a broad holding, Kelly argues three main points: (1) the decision below would criminalize a vast swath of regular, accepted political activity; (2) the decision below circumvents the Supreme Court's narrowing of Section 1346 post-*Skilling*; and (3) the decision below would also leave in place a circuit split. Kelly first argues that under the Third Circuit's reasoning "any official (federal, state, or local) who conceals or misrepresents her *subjective motive* for making an otherwise-lawful decision . . . has thereby defrauded the government of property (her own labor if nothing else)." But the defense elides an important distinction: *Kelly's* own labor and financial compensation were not part of the intangible property or money interests of which the Third Circuit held she defrauded the government. Kelly also cautions against criminalizing political "spin," citing a list of well-publicized recent cases before the Court, including the "Muslim Ban," the challenge to DACA rescission, and the Commerce Secretary's attempts to add a citizenship question to the federal census. Kelly suggests that these civil suits for injunctive or declaratory relief could easily become criminal prosecutions under the Third Circuit's theory, if a jury could find that public officials lied about the "true purpose" behind the policy. By contrast, the Government's opposition brief emphasizes the extensive trial evidence establishing the Port Authority's loss of thousands of dollars in overtime wages as a direct result of the fraudulent scheme, as well as evidence establishing that the defendants would not have been able to realign the lanes if they had provided the actual reason, or no reason at all, for the lane changes—conclusively establishing the requisite fraudulent misrepresentation. Crucially, the Government notes that Kelly does not identify any statutory element of wire fraud that her own conduct or the conduct of her co-conspirators failed to satisfy. The Supreme Court's ruling on this particular question presented is poised to impact public corruption cases for years to come. If Kelly's view is endorsed by the Court, it would suggest that the Government will face a potentially insurmountable bar when attempting to prosecute public officials who have misappropriated public resources based on fraudulent misrepresentations. Alternatively, the Court may

share the Third's Circuit view that political motivations do "not remove intentional conduct from the ambit of the federal criminal law."

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