ALERT MEMORANDUM

Supreme Court Puts the Brakes on the "Bridgegate" Scandal and Affirms That Property Must Be the Object of Federal Fraud Schemes

May 11, 2020

On May 7, 2020, the Supreme Court unanimously held in *Kelly v. United States* that the "Bridgegate" political retribution scheme did not violate the wire fraud or federal-program fraud statutes.[1] Although the government proved that the defendants devised and facilitated the closing of multiple lanes of the George Washington Bridge in September 2013, resulting in days of traffic gridlock, the Court reasoned that the charged conduct was an exercise of regulatory power that did not concern a property interest, and any implementation costs associated with the traffic lane realignment, although government property, were a byproduct of the scheme rather than its object. Because the defendants' scheme did not have property as its object, as the federal fraud statutes require, the Court overturned their convictions. The *Kelly* decision is yet another chapter in a line of cases in recent years in which the Court has pushed back against what it found to be prosecutorial overreach in criminalizing conduct that, while unscrupulous, nonetheless does not violate federal fraud laws.

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[1] *Kelly v. United States*, 590 U.S. ___, No. 18-1059, slip op. (May 7 2020).

Background

As alleged in the indictment, after the mayor of Fort Lee refused to endorse New Jersey Governor Chris Christie for reelection in 2013, public officials with political ties to the former governor sought to punish the mayor.[2] Over a four-day period, without notice, the officials reduced the number of lanes reserved at the George Washington Bridge toll plaza for Fort Lee's commuters into Manhattan, from three lanes—as was the norm for decades—to one.[3] This caused a traffic gridlock in Fort Lee, delaying commuters, school buses, and police and other emergency vehicles.[4]

To disguise the lane realignment as part of a traffic study rather than political retribution, the defendants asked Port Authority traffic engineers to collect data on the effects of the lane change.[5] They also agreed to pay for an extra toll collector, so that the one open Fort Lee lane would not have to close if the collector on duty needed to step away for a break.[6]

The defendants were charged under federal statutes prohibiting wire fraud and fraud on a federally funded program or entity, and conspiracy charges tied to these substantive offenses.[7] One official pleaded guilty to the conspiracy charges and became a cooperating witness for the government. Two others—the defendants here—were found guilty on all counts at trial in the District of New Jersey. The Third Circuit affirmed.

The Supreme Court's Decision

Against a detailed explanation of the facts underlying the defendants' plot to punish the Fort Lee mayor—colored with incriminating quotes from trial testimony, text messages, and emails—Justice Kagan, writing for the unanimous Court, noted that federal fraud laws do not criminalize all acts of dishonesty by state and local officials.[8]

The Court explained that it has long rebuffed efforts to use the federal criminal law to set "standards of disclosure and good government" on local and state officials.[9] In *McNally v. United States*, a case concerning the application of the federal mail fraud statute, the Court held that federal fraud statutes are "limited in scope to the protection of property rights"[10] rather than to the broad protection over citizens' "intangible rights to honest and impartial government."[11] Similarly, in *Skilling v. United States*, the Court limited the honest services wire fraud statute to prohibit only those schemes that involve bribes or kickbacks, and not those that deprive citizens of "the intangible right of honest services."[12] Given these precedents, the defendants' actions in *Kelly* would run afoul of federal fraud statutes only if their scheme involved property, under *McNally*, or bribes and kickbacks, under *Skilling*.

Since the defendants' scheme did not involve bribes or kickbacks, the question before the Court was whether the defendants committed "property fraud" under the wire fraud and federal-program fraud statutes.[13] The federal wire fraud statute prohibits the use of the wires for "any scheme or artifice to defraud, or *for obtaining money or property* by means of false or fraudulent pretenses, representations, or promises."[14] The federal-program fraud statute bars "obtain[ing] by fraud" the "*property*" of a federally funded program or entity.[15] To violate these statutes, the defendants must have not only engaged in deception—which the Court easily found on the facts here—but must have also sought to obtain property through the fraudulent

[2] *See Kelly*, slip op. at 4.
[3] *See id.* at 1.
[4] *See id.* at 5.
[5] *See id.* at 4.
[6] *See id.*
[7] *See* 18 U.S.C. §§ 1343 and 666(a)(1)(A).
[8] *See Kelly*, slip op. at 7.
[9] *Id.* (citing *McNally v. United States*, 483 U.S. 350, 360 (1987)).
[10] *McNally*, 483 U.S. at 360.
[11] *Id.* at 355.
[12] *Skilling v. United States*, 561 U.S. 358, 405, 410 (2010).
[13] *Kelly*, slip op. at 2.
[14] 18 U.S.C. § 1434 (emphasis added).
[15] 18 U.S.C. § 666(a)(1)(A) (emphasis added).

scheme. In other words, property must be an "object of the fraud."[16]

The government argued that the defendants sought to obtain property through their scheme in two ways. First, by "commandeer[ing]" part of the George Washington Bridge, by taking control over its physical traffic lanes.[17] And second, by diverting the wages and labor of engineers for the traffic study and back-up toll collectors for the single open lane.[18]

The Court found neither argument persuasive, and concluded that the defendants' scheme was not "directed" at property.[19] Although the defendants reduced the number of physical traffic lanes at the George Washington Bridge, doing so was a "quintessential exercise of regulatory power" and not an appropriation of government property.[20] Since the defendants did not convert the public lanes into non-public use, but rather allocated the lanes between different groups of drivers, doing so was a regulatory decision and not the taking of property, the Court reasoned, even if done "for bad reasons."[21]

Further, the Court explained that although a public employee's time, paid for with public funds, is government property, the use of this time was not an "object" of the defendants' scheme.[22] The Court found that the defendants did not intend to obtain the employees' services, and that employee time and labor were merely an implementation cost of the defendants' reallocation of the traffic lanes.[23] The Court concluded that a property fraud conviction cannot hinge on a loss that is "only an incidental byproduct of the scheme" and not its object.[24]

Observations

At its core, *Kelly* stands for the proposition that "[n]ot every corrupt act by state or local officials is a federal crime."[25] "If U.S. Attorneys could prosecute as property fraud every lie a state or local official tells in making [a regulatory] decision, the result would be . . . a sweeping expansion of federal criminal jurisdiction"—a result the Court declined to adopt.[26]

Interpretations of federal fraud statues in *McNally* and *Skilling* are not the only instances before *Kelly* in which the Court has held the federal government to a more exacting standard for fraud prosecutions of state government officials. More recently, in *McDonnell v. United States*, the Court adopted a limited interpretation of the federal bribery statute and unanimously reversed the conviction of the former Virginia governor.[27] The Court held that arranging meetings, calls, and a luncheon in exchange for $175,000 in loans, gifts, vacations, and other benefits from a Virginia businessman were not "official acts" under 18 U.S.C. § 201(a)(3).[28] In response to the government's argument that an "official act" can be almost any activity by a public official in his or her official capacity, Chief Justice Roberts, writing for the Court, explained that the Court's "concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the broader legal implications of the Government's boundless interpretation of the federal bribery statute."[29]

[16] *Kelly*, slip op. at 7 (citing *Cleveland v. United States*, 531 U.S. 12, 26 (2000)).
[17] *Id.* at 2.
[18] *See id.*
[19] *Id.* at 8.
[20] *Id.* (citing *Cleveland*, 531 U.S. at 23 (finding that "allocation, exclusion, and control" of gaming licenses is a state regulatory power and does not create a property interest)).
[21] *Id.* at 10.
[22] *Id.* at 8–9.
[23] *See id.* at 10–11.
[24] *Id.* at 10. The Court distinguished this case from *United States v. Pabey*, 664 F. 3d 1084, 1089 (7th Cir. 2011) (involving a mayor who had city workers renovate his daughter's home) and *United States v. Delano*, 55 F. 3d 720, 723 (2d Cir. 1995) (involving a city parks commissioner who induced employees into doing gardening work for political contributors).
[25] *Id.* at 13.
[26] *Id.* at 12 (internal quotations and citation omitted).
[27] *See McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016).
[28] *Id.* at 2374.
[29] *Id.* at 2375.

Nor is the Court's approach limited to the criminal law context, or to prosecutions of public officials. In *Gabelli v. SEC*, a civil enforcement action against an investment adviser for fraudulent conduct, the Court unanimously held that the applicable statute of limitations, which runs for five years from "the date when the claim first accrued," runs from the date of the defendant's conduct and not from the date that the Securities and Exchange Commission ("SEC") discovered it.[30] The Court noted the SEC's purpose to root out fraud and authority to impose penalties, which are "intended to punish, and label defendants wrongdoers."[31] If a statute of limitations were to run from the date of discovery of the conduct, the Court reasoned, defendants would be left exposed to government enforcement for an "uncertain period into the future."[32] By limiting the statute of limitations, the Court curtailed a potential expansion of the SEC's reach to penalize in enforcement actions. Further, in *Kokesh v. SEC*, another civil enforcement action against an investment adviser, the Court concluded that claims for disgorgement, described as bearing "all the hallmarks of a penalty," are subject to the statute of limitations and its interpretation in *Gabelli*.[33]

Application of the *Kelly* decision and the line of Supreme Court decisions before it will be a barrier to prosecutions for fraud schemes that do not demonstrably entail money or property as their object, even if those fraud schemes occur outside the sphere of public corruption. For example, charges filed last year in the "Varsity Blues" scandal for defendants' alleged involvement in a conspiracy—which concerned cheating on college entrance exams and admission of students with fabricated profiles into elite colleges as athletes—rest in part on similar substantive offenses as the "Bridgegate" scandal. The Court's decision in *Kelly* may provide a potential defense that the object of the conspiracy, admission to a competitive college, is not "property" under the federal fraud statute. Time will tell whether *Kelly* will have an impact outside of the unique facts of "Bridgegate," but there is no doubt that the decision represents another example of the Supreme Court's willingness to step in to limit what it believes to be overly aggressive federal corruption and fraud prosecutions.

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[30] *Gabelli v. S.E.C.*, 568 U.S. 442, 442 (2013); 28 U.S.C. § 2462.
[31] *Id.* at 452.
[32] *Id.*
[33] *Kokesh v. S.E.C.*, 137 S. Ct. 1635, 1644 (2017).