

Supreme Court Emphasizes Limits of Federal Fraud Statutes

The Supreme Court has again tightened the reins on the government's efforts to prosecute what it claims is fraud and political corruption. In *Kelly v. United States* (decided May 7, 2020), the government alleged that state government officials created a traffic jam in a town whose mayor failed to support then-Governor Chris Christie's re-election effort. The Court held the conduct outside the reach of the charged offenses — 18 U.S.C. §§ 1343 (wire fraud), 666 (fraud on a government program receiving federal funds), and 371 (conspiracy) — because the **goal** alleged by the government was not to deprive anyone of money or property.

This decision is part of a recent trend of restricting the application of federal fraud statutes. It is also consistent with the Court's close reading of the federal bribery statute, 18 U.S.C. § 201, and the meaning of "official act" in the case of former Virginia Governor Robert McDonnell. See *McDonnell v. United States*, 136 S. Ct. 2355 (2016).

Background

The background of this case has been widely discussed. At trial, the government alleged that, after learning in mid-2013 that Fort Lee's mayor would not back Governor Christie's re-election campaign, Christie's deputy chief of staff allegedly devised a plan with officials of the New York/New Jersey Port Authority: create a traffic jam on the George Washington Bridge — which links Fort Lee and Manhattan — to send a message to Fort Lee's mayor. Described as a traffic study, the officials allegedly arranged to funnel all traffic from Fort Lee (usually spread across three lanes) into a single lane on the morning of the first day of school and the following three days. Eventually, federal prosecutors charged officials with wire fraud, fraud on a federally funded program or entity (i.e., the Port Authority), and conspiracy to commit each of those offenses.

Legal Analysis

Based upon "settled precedent," the Court reasoned that the defendant-officials could violate the charged laws only if the alleged plan was intended "to obtain the Port Authority's money or property." Slip op. at 2. Even if the government had proved that the traffic study was a "cover story," that would be insufficient for a conviction because the government was required to prove that the object of the defendants' alleged plan was "for obtaining money or property." Slip op. at 6; see also 18 U.S.C. § 1343.

The link to the Port Authority's money or property was indirect — and thus insufficient. The Court characterized the defendants' conduct (realignment of the toll lanes) as an exercise of their regulatory authority, not a "commandeering" of the lanes as the government argued. By contrast, the asserted money and property at issue (the effect on Port Authority employees' paid time) "was incidental to — the mere cost of implementing — the sought-after regulation of the Bridge's toll lanes." Slip op. at 9.

Conclusion

The *Kelly* decision reflects the decade-long trend of the Court paring down the use of federal fraud statutes to criminalize political activity. See, e.g., *McDonnell*, 136 S. Ct. 2355 (noting that a public official simply setting up a meeting, talking to another official, or organizing an event does not constitute an "official act" for purposes of a bribery offense); *Skilling v. United States*, 561 U.S. 358 (2010) (limiting the use of "honest services fraud" to conduct involving bribery or kickbacks). Fundamentally, the decision was another salvo from a Court concerned about federal prosecutors using property fraud statutes to promote their view of "good government." Slip op. at 12 ("In effect, the Federal Government could use the criminal law to enforce (its view of) integrity in broad swaths of state and local policymaking. The property fraud statutes do not countenance that outcome.").



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Even outside the political context, prosecutors should expect to see criminal defense counsel wielding the *Kelly* case as part of an effort to invalidate federal fraud charges that lack a sufficiently direct connection to deprivations of “money or property.”
