

ELEGY FOR ANTI-CORRUPTION LAW: HOW THE BRIDGEGATE CASE COULD CRUSH CORRUPTION PROSECUTIONS AND BOOST LIARS

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This piece discusses how the case Kelly v. United States, which was pending before the Supreme Court when this piece was written, was likely to expand two different developments in the Roberts Court's jurisprudence: (1) expanding the constitutional protections for lying under the First Amendment and (2) narrowing the definition of corruption. This Piece describes how lower courts ruled in the Kelly case as well as arguments deployed by Kelly's lawyers at the Supreme Court to try to exonerate their client Bridget Anne Kelly for her role in the Bridgegate scandal.

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INTRODUCTION

Lawyers are frequently criticized for twisting the meaning of words from their quotidian meaning. Judges do this as well. As discussed in *Political Brands*, the Supreme Court under the leadership of Chief Justice John Roberts has earned an ignoble distinction of rebranding the meaning of “corruption” and “lies.”¹ The Roberts Court has whittled down what counts as corruption in both campaign finance cases and in white collar crime cases.² In the 2019 to 2020 Supreme Court term, the Roberts Court has a new opportunity to further degrade the concept of corruption in *Kelly v. United States*³ (better known as the Bridgegate case). Thus, the Bridgegate case could give the conservative majority on the Court a chance to punch even bigger holes in the swiss cheese that anti-corruption law is fast becoming. The Kelly in the case is Bridget Anne Kelly, a former employee of then-New Jersey Governor, Chris Christie. Meanwhile, the Roberts Court has also been hostile to statutes that require truthfulness.⁴ The Bridgegate case could be an opportunity for the Supreme Court to add to this line of jurisprudence on mendacity by immunizing political lying from criminal liability.

The Bridgegate scandal is summed up nicely by the Third Circuit thusly:

Defendants William E. Baroni, Jr. and Bridget Anne Kelly engaged in a scheme to impose crippling gridlock on the Borough of Fort Lee, New Jersey, after Fort Lee’s mayor refused to endorse the 2013 reelection bid of then-Governor Chris Christie. To this end, under the guise of conducting a “traffic study,” Baroni and Kelly, among others, conspired to limit Fort Lee motorists’ access to the George Washington Bridge—the world’s busiest bridge—over four days in early September 2013: the first week of Fort Lee’s school year. This

1. CIARA TORRES-SPELLISCY, *POLITICAL BRANDS* 19, 41 (2019).

2. For a more detailed exploration of what the Supreme Court has done with corruption, see Ciara Torres-Spelliscy, *Deregulating Corruption*, 13 HARV. L. & POL’Y REV. 471, 472 (2019).

3. 139 S. Ct. 2777, 2777 (2019) (granting cert.).

4. See, e.g., *United States v. Alvarez*, 567 U.S. 709, 714, 729–30 (2012) (holding that lying about receiving a Medal of Honor is protected speech under the First Amendment).

scheme caused vehicles to back up into the Borough, creating intense traffic jams. Extensive media coverage ensued, and the scandal became known as “Bridgewater.”⁵

For her role in Bridgewater, Ms. Kelly has been convicted of: misusing property of an organization receiving federal benefits; conspiring to commit, and actually committing, wire fraud; and conspiring to injure and oppress certain individuals’ civil rights, among other crimes.⁶ She appealed her convictions to the Supreme Court after losing in the Third Circuit, arguing that her convictions were inappropriate because overzealous prosecutors were trying to criminalize politics.⁷ The Supreme Court’s resolution of her case could make it harder for prosecutors to charge and convict corrupt elected and appointed politicians.

Here is how this piece will proceed. First, in Part I, this piece will explain some of the legal precedents that include the reshaping of what counts as corruption and legally actionable lies.⁸ Part II will explain the facts of the Bridgewater scandal.⁹ Part III will explore what has happened in the criminal cases arising out of Bridgewater.¹⁰ And then in Part IV, this piece will look at what is at risk as the Supreme Court considers the Bridgewater case for a final time.¹¹ This piece will consider the ways that the Bridgewater case will most likely water down the concept of corruption and lies even further, thereby making it harder for prosecutors to bring the next criminal corruption case.

5. *United States v. Baroni*, 909 F.3d 550, 555 (3d Cir. 2018), *cert. granted sub nom. Kelly v. United States*, 139 S. Ct. 2777 (2019).

6. *Id.* at 556.

7. Randall Eliason, *Symposium: Criminal Remedies for Political Misconduct*, SCOTUSBLOG (Sep. 24, 2019, 10:00 AM), <https://www.scotusblog.com/2019/09/symposium-criminal-remedies-for-political-misconduct> [<https://perma.cc/HE4J-ME6D>] (“The line between political mischief and criminal corruption can be blurry. It’s a treacherous area, because criminal prosecution can easily become a weapon wielded against political opponents.”).

8. *See infra* Part I.

9. *See infra* Part II.

10. *See infra* Part III.

11. *See infra* Part IV.

I. PAST AS PROLOGUE: BEFORE BRIDGEGATE, THERE WAS *CITIZENS UNITED*, ENRON, LAVISH GIFTS TO GOVERNOR MCDONNELL, AND A LIAR NAMED ALVAREZ

Before *Kelly*, the Roberts Court set the ground rules for political corruption and lying in a series of recent cases. The Roberts Court commenced on September 29, 2005.¹² From its very first term in 2005-2006, the new Supreme Court started making its mark by degrading the legal concept of “corruption.” As discussed in *Political Brands*,¹³ five conservative Justices on the Roberts Court have narrowed the meaning of the word in a series of election law cases that address the constitutionality of various campaign finance laws.¹⁴ Through infamous cases like *Citizens United v. FEC*,¹⁵ which allowed corporations the First Amendment right to spend an unlimited amount of money on political ads in American elections, and *McCutcheon v. FEC*,¹⁶ which allowed the rich to support as many federal candidates as they want with contributions, the Roberts Court effectively held five to four that “corruption” only means quid pro quo exchanges.

This approach to corruption sets the Roberts Court apart from previous Supreme Courts. For over a century, the Supreme Court upheld campaign finance laws and other regulations which tried to keep graft and political intimidation at bay precisely because, as the Supreme Court recognized in *Ex Parte Yarbrough*¹⁷ in 1884,

12. *Justices 1789 to Present*, SUP. CT. U.S., https://www.supremecourt.gov/about/members_text.aspx [<https://perma.cc/5HLW-G87P>].

13. TORRES-SPELLISCY, *supra* note 1, at 46.

14. *McCutcheon v. FEC*, 572 U.S. 185, 193 (2014) (plurality opinion) (invalidating an aggregate contribution limit for individuals); *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 728 (2011) (determining part of Arizona’s public financing system to be invalid); *Citizens United v. FEC*, 558 U.S. 310, 319 (2010) (invalidating the ban on corporate expenditures in elections); *Davis v. FEC*, 554 U.S. 724, 738 (2008) (ruling unconstitutional a law limiting personal contributions to personal campaigns); *FEC v. Wis. Right to Life, Inc. (WRTL II)*, 551 U.S. 449, 457 (2007) (narrowing part of the federal electioneering communications ban for nonprofits); *Randall v. Sorrell*, 548 U.S. 230, 236–37 (2006) (plurality opinion) (holding Vermont’s political contribution limit as impermissibly low).

15. 558 U.S. 310, 319 (2010).

16. 572 U.S. 185, 193 (2014) (plurality opinion).

17. 110 U.S. 651 (1884).

In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source of danger. . . . [N]o lover of his country can shut his eyes to the fear of future danger from both sources.¹⁸

Even the Rehnquist Court—no bastion of liberals—which preceded the Roberts Court, believed that political corruption could be a systemic problem that permeated the relationship among elected officials and powerful private interests. In 2003, the Rehnquist Court upheld a restriction on corporate political contributions in *FEC v. Beaumont*¹⁹ because there is a “public interest in ‘restrict[ing] the influence of political war chests funneled through the corporate form.’”²⁰ Moreover, in a twin 2003 decision, *McConnell v. FEC*,²¹ the Rehnquist Court asserted that the “crabbed view of corruption”—which would limit the term to actual quid pro quo corruption—“ignores precedent, common sense, and the realities of political fundraising.”²²

The Roberts Court did not follow the Rehnquist Court’s (1986 to 2005)²³ sensible lead vis-à-vis political corruption. Rather, the Roberts Court has rapidly put that capacious concept of political corruption on a high unreachable shelf and invalidated nearly every campaign finance law it has been asked to review.²⁴ The Roberts Court left in place a ban on foreigners spending in U.S. elections in *Bluman v. FEC*²⁵ in summary affirmation of the D.C. Circuit Court’s reasoning, and left in place a ban on elected judges in Florida personally asking donors for money in *Williams-Yulee v. Florida Bar*.²⁶ But *Bluman* and *Williams-Yulee* are the exceptions that prove the rule of the Roberts Court’s deep hostility to limitations on money in politics generally for American citizens electing executives and legislators.

18. *Id.* at 666–67.

19. 539 U.S. 146 (2003).

20. *Id.* at 149, 154 (alteration in original) (quoting *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 500–01 (1985); *FEC v. Nat’l Right to Work Comm’n*, 459 U.S. 197, 207 (1982)).

21. 540 U.S. 93 (2003).

22. *Id.* at 152.

23. *See Justices 1789 to Present*, *supra* note 12.

24. *See, e.g., supra* note 14 (listing relevant cases).

25. 565 U.S. 1104 (2012).

26. 575 U.S. 433 (2015) (holding that “[j]udges are not politicians, even when they come to the bench by way of the ballot,” thus the Florida Bar’s limits on judicial candidates’ directly soliciting funds were constitutional).

Another way that the Roberts Court has rebranded corruption is by changing what counts as a white-collar crime. In 2010, in *Skilling v. United States*²⁷—a case brought by disgraced ex-CEO of Enron, Jeff Skilling, challenging his twenty-four-year prison sentence for defrauding the company’s shareholders—the Supreme Court agreed with Mr. Skilling that he should not have been charged with honest services fraud because his crimes did not involve a bribe or a kickback.²⁸ In other words, because Skilling’s many securities crimes did not involve a quid pro quo, he could not be properly charged with honest services fraud. This Supreme Court decision led to Mr. Skilling getting ten years shaved off of his original sentence.²⁹ He was released from jail in 2018 and left his halfway house in 2019.³⁰ Skilling is now a free man.³¹

Also, in the criminal context, the Roberts Court invalidated the conviction of ex-Governor of Virginia, Bob McDonnell, thereby building on a line of criminal cases that make prosecuting corruption more difficult.³² McDonnell, who had severe money troubles while he was

27. 561 U.S. 358 (2010).

28. *Id.* at 368 (“In proscribing fraudulent deprivations of ‘the intangible right of honest services,’ § 1346, Congress intended at least to reach schemes to defraud involving bribes and kickbacks. . . . Because Skilling’s alleged misconduct entailed no bribe or kickback, it does not fall within § 1346’s proscription.”).

29. Press Release, U.S. Dep’t of Justice, Former Enron CEO Jeffrey Skilling Resentenced to 168 Months for Fraud, Conspiracy Charges (Sept. 15, 2014), <https://www.justice.gov/opa/pr/former-enron-ceo-jeffrey-skilling-resentenced-168-months-fraud-conspiracy-charges> [<https://perma.cc/72SM-SKZP>].

30. L.M. Sixel, *Former Enron CEO Jeff Skilling Out of Prison, Sent to Halfway House*, HOUS. CHRON. (July 9, 2019), <https://www.chron.com/business/energy/article/Skilling-out-of-prison-sent-to-halfway-house-in-13194674.php> [<https://perma.cc/CLU5-K6R5>].

31. Jamie Ross, *Disgraced Enron Chief Jeffrey Skilling Released from Custody*, DAILY BEAST (Feb. 22, 2019), <https://www.thedailybeast.com/disgraced-enron-chief-jeffrey-skilling-released-from-custody> [<https://perma.cc/YTE3-47TH>].

32. Ellen Podgor, *Symposium: Corruption is Not a Crime*, SCOTUSBLOG (Sept. 25, 2019, 10:00 AM), <https://www.scotusblog.com/2019/09/symposium-corruption-is-not-a-crime> [<https://perma.cc/TJ4F-2GFY>] (“[T]he Supreme Court has appropriately struck down prosecutorial attempts to stretch the statutes using novel theories.”); *see also* McDonnell v. United States, 136 S. Ct. 2355, 2375 (2016) (holding a meeting or hosting an event is not an official act under 18 U.S.C. § 201); *Skilling*, 561 U.S. at 368 (requiring that bribery or kickbacks were necessary for honest services fraud); *Cleveland v. United States*, 531 U.S. 12, 15 (2000) (holding that licenses were not property under 18 U.S.C. § 1341); *McCormick v. United States*, 500 U.S. 257, 274 (1991) (finding that the Hobbs Act requires a quid pro quo when involving campaign contributions); *McNally v. United States*, 483 U.S. 350, 360–61 (1987) (finding that intangible property did not meet the definition of “money or property” in a 1909 statutory amendment), *overruled, as recognized by Skilling v. United*

Governor of Virginia, accepted money and gifts from a businessman named Jonnie Williams who wanted to sell his tobacco pills to Virginia employees and wanted to pass some of the research and development costs to the Commonwealth of Virginia.³³ The Governor set up a few meetings for Williams and once touted a bottle of the tobacco pills in a meeting.³⁴ According to a unanimous Supreme Court, the Governor's actions did not amount to "an official act" by a government official, thus he could not be guilty of a quid pro quo exchange with Williams, and therefore his conviction was set aside.³⁵ In *McDonnell v. United States*,³⁶ no one disputed that Williams had given the Governor lots of money. What the Supreme Court did not buy was that the Governor did enough in return for the largess to constitute a crime.

As discussed in deeper detail in *Political Brands*, the Supreme Court's role in gutting corruption has been put to quick use by politicians facing corruption prosecutions.³⁷ Legal briefs in multiple criminal cases charging politicians with crimes like bribery and fraud include citations to white-collar crime cases like *Skilling* and *McDonnell*, as well as citations to campaign finance cases like *Citizens United* and *McCutcheon*, as reasons

States, 561 U.S. 358 (2010) (acknowledging that *McNally* was superseded by statute in the enactment of 18 U.S.C. § 1346).

33. Jennifer Ahearn & Noah Bookbinder, *Symposium: "Paralyzing Gridlock" in Criminal Public-Corruption Law*, SCOTUSBLOG (Sep. 25, 2019, 1:00 PM), <https://www.scotusblog.com/2019/09/symposium-paralyzing-gridlock-in-criminal-public-corruption-law> [<https://perma.cc/LA8S-3Q2S>] (noting that "some members of the court seem to have looked quickly past the corrupt nature of the actions in question" in "previous criminal public-corruption cases").

34. See Jackie Morlock, *McDonnell Trial: Was Star Scientific CEO Jonnie Williams Buying Support or Just a Generous Friend?*, WTKR (Aug. 12, 2014), <https://wtkr.com/2014/08/12/mcdonnell-trial-was-star-scientific-ceo-jonnie-williams-buying-support-or-just-a-generous-friend> [<https://perma.cc/RG4H-Z728>] (describing meetings set up by the Governor after receiving gifts and loans from a pharmaceutical representative); Amy Davidson Sorkin, *The McDonnells' Friend Jonnie*, NEW YORKER (Aug. 1, 2014), <https://www.newyorker.com/news/amy-davidson/mcdonnell-virginia> (describing the exorbitant gifts received by the then-Virginia Governor).

35. *McDonnell*, 136 S. Ct. at 2375; see also Nick Corasaniti, *Why the 'Bridgegate' Scandal Could Backfire on Prosecutors*, N.Y. TIMES (July 3, 2019), <https://www.nytimes.com/2019/07/03/nyregion/bridgegate-supreme-court.html> (explaining how the Supreme Court found setting up meetings after accepting "luxury items" was not an "official act").

36. *McDonnell*, 136 S. Ct. at 2361.

37. See TORRES-PELLISY, *supra* note 1, at 41.

why the politician should be exonerated.³⁸ Perhaps just as troubling, courts are actually vacating criminal convictions based on these cases.³⁹

Another legal wrinkle, which may seem unrelated at first glance to the issue of political corruption, is what the Supreme Court has done in the area of lying and truthfulness. In *United States v. Alvarez*,⁴⁰ the Supreme Court considered the constitutionality of a federal law called the Stolen Valor Act, which made lying about earning military and congressional honors a crime.⁴¹ Ultimately, in *Alvarez*, the Court invalidated a federal law against lying about congressional and military honors.⁴² The Court ruled that the Stolen Valor Act violated the First Amendment right of Xavier Alvarez, an elected member of a water district board in California, to lie about earning the Congressional Medal of Honor.⁴³ Embracing a classic slippery slope argument, the Supreme Court posited in *Alvarez* that if Congress were allowed to criminalize lying about the receipt of the Congressional Medal of Honor, “there could be an endless list of subjects the National Government or the States could single out.”⁴⁴ *Alvarez*, taken to its logical extreme, could excuse Ms. Kelly’s lying too.

38. For example, in 2013, ex-Illinois Governor, Rod Blagojevich, appealed his convictions. At points, he cited *Citizens United* in support of his argument: “Blagojevich’s decision to ask [a particular individual] to help fundraise . . . did not make it a crime.” Brief & Short Appendix for Defendant-Appellant Rod Blagojevich at 58, *United States v. Blagojevich*, 794 F.3d 729 (7th Cir. 2013) (No. 08 CR 888), 2013 WL 3914027 (citation omitted). In 2017, Blagojevich’s cert. petition cited to *McDonnell* and *McCutcheon*. See Petition for Writ of Certiorari at 27, 30, *Blagojevich v. United States*, 138 S. Ct. 1545 (2018) (No. 17–658) (mem.), 2017 WL 8794297.

39. *United States v. Silver*, 864 F.3d 102, 105–06 (2d Cir. 2017) (vacating a conviction after a nearly one-month jury trial because “the District Court’s instructions on honest services fraud and extortion do not comport with *McDonnell*”); *United States v. Bruno*, 531 F. App’x 47, 48 (2d Cir. 2013) (“In light of *Skilling*, we vacated Bruno’s convictions.”); Grace Segers, *Percoco Verdict Proves Corruption Won’t Go Unpunished, After All*, CITY & STATE N.Y. (Mar. 13, 2018), www.cityandstateny.com/articles/politics/new-york-state/percoco-found-guilty-corruption-charges.html [<https://perma.cc/QL42-GYZ3>] (noting that charges were vacated based on *McDonnell v. United States*).

40. 567 U.S. 709 (2012) (plurality opinion).

41. See 18 U.S.C. § 704 (2012), *invalidated* by *United States v. Alvarez*, 567 U.S. 709, 715 (2012).

42. *Alvarez*, 567 U.S. at 715.

43. *Id.*

44. *Id.* at 723.

II. BACKGROUND TO THE BRIDGEGATE CASE: A PARTIALLY CLOSED BRIDGE AND A POLITICAL LIE

“Bridgagate” happened in 2013, when lanes on the George Washington Bridge were unexpectedly closed during the first week of school for Fort Lee, New Jersey. The George Washington Bridge is the busiest bridge in the world because it serves as a key commuter route for residents of New Jersey who work in New York City as well as travelers who are trying to get to New York from points further south. When these lanes of the bridge were closed, traffic snarled to a stop in Fort Lee, which is right next to the bridge. The Port Authority of New York and New Jersey manages critical transportation infrastructure that impact both states.⁴⁵

As it turned out, a woman named Bridget Anne Kelly had worked with William E. Baroni Jr., Deputy Executive Director of the Port Authority, to close the lanes on the bridge. Ms. Kelly was Deputy Chief of Staff of New Jersey Governor, Chris Christie, during “Bridgagate,” when two of three toll lanes on the George Washington Bridge were closed to punish the Mayor of Fort Lee, Mark Sokolich, for not supporting Christie politically.⁴⁶ Contemporaneously, Ms. Kelly sent a famous email to David Wildstein, a Christie appointee who was Director of Interstate Capital Projects at the Port Authority, that said, “time for some traffic problems in Fort Lee.”⁴⁷ Oddly enough, the lane closures came without warning, when typically the public is given weeks, if not months, of warning of closures on such a heavily used bridge.⁴⁸ When public outrage at the deadly traffic followed (ambulances couldn’t get through it with normal alacrity), Kelly

45. See generally *We Keep The Region Moving*, PORT AUTHORITY N.Y. & N.J., <https://www.panynj.gov> [<https://perma.cc/J4MP-6AGW>] (“Whether by air, land, rail or sea, we are dedicated to getting critical healthcare workers, first responders, and other essential workers where they need to be to address those most impacted by the COVID-19 crisis and to keep the supply chains open to ensure goods and supplies keep flowing throughout the region.”).

46. See *United States v. Baroni*, 909 F.3d 550, 555 (3d Cir. 2018), cert. granted sub nom. *Kelly v. United States*, 139 S. Ct. 2777 (2019).

47. David Porter, *‘Time for Some Traffic Problems in Fort Lee’: Witness in GWB Trial Recounts Getting Key Email*, NBC N.Y. (Sept. 26, 2016), <https://www.nbcnewyork.com/news/local/David-Wildstein-George-Washington-Bridge-Lane-Closure-Trial-Port-Authority-Chris-Christie-394821791.html> [<https://perma.cc/SUW6-JLM9>].

48. *Baroni*, 909 F.3d at 558 (“According to Wildstein, he and Baroni discussed when to implement the lane closure at the end of August 2013, and they selected Monday, September 9, 2013—the first day of school in Fort Lee. But Wildstein waited to give the instruction until Friday, September 6 . . . This directly contravened normal Port Authority protocol, with any lane closures announced to the public weeks, and even months, in advance.”).

and others in the Christie administration lied to the public and said that the lane closure was part of a bogus traffic study.⁴⁹ The resulting traffic also caused several workers at the Port Authority to work longer hours, triggering overtime pay at taxpayer expense.⁵⁰ In other words, this was not just a costless political prank; there were real-world consequences, including the outlay of extra public money.

III. THE BRIDGEGATE TRIALS

A. *The District of New Jersey Criminal Trial*

In April of 2015 a federal grand jury indicted Kelly (of the Christie Administration) and Baroni (of the Port Authority) for

(1) obtaining by fraud, knowingly converting, and intentionally misapplying Port Authority property and conspiring to do so in violation of 18 U.S.C. §§ 371 and 666; (2) conspiring to commit and committing wire fraud in violation of 18 U.S.C. §§ 1349 and 1343; and (3) conspiring to deprive and depriving others of a constitutional right in violation of 18 U.S.C. §§ 241 and 242.⁵¹

On May 1, 2015, the Department of Justice (DOJ) announced the indictments of Baroni and Kelly for their role in the Bridgegate scheme to close the lanes on the George Washington Bridge.⁵² That same day, David Wildstein (of the Port Authority) pled guilty to his role in the crime and provided evidence against Kelly and Baroni.⁵³ Wildstein entered a

49. Devin Dwyer, *Supreme Court Hears 'Bridgegate' Appeal by Former Gov. Christie Allies*, ABC NEWS (Jan. 14, 2020, 4:11 AM), <https://abcnews.go.com/Politics/supreme-court-hears-bridgegate-appeal-gov-christie-allies/story?id=68250349> [<https://perma.cc/5QYB-QNLD>] (stating that the prosecutor's focus was not so much on Kelly's and Christie's motives, but that they had lied on the "existence of a traffic study" to "divert[] the agency's resources to serve their own personal ends").

50. Brief for the United States in Opposition at 12, *Kelly v. United States*, 139 S. Ct. 2777 (2019) (No. 18-1059) (stating that the Port Authority paid thousands of dollars to eleven toll workers for extra shifts needed due to the petitioner's scheme).

51. Respondent William Baroni's Brief in Support of the Petition for a Writ of Certiorari at 9, *Kelly*, 139 S. Ct. 2777 (No. 18-1059).

52. Amy Howe, *Symposium: "Bridgegate" Scandal Comes to the Court (Corrected)*, SCOTUSBLOG (Sept. 23, 2019, 1:19 PM), <https://www.scotusblog.com/2019/09/symposium-bridgegate-scandal-comes-to-the-court> [<https://perma.cc/77MQ-M2X9>]; Press Release, U.S. Dep't of Justice, Former Deputy Exec. Dir. of Port Auth. and Former Deputy Chief of Staff in N.J. Governor's Office Indicted (May 1, 2015), <https://www.justice.gov/usao-nj/pr/former-deputy-executive-director-port-authority-and-former-deputy-chief-staff-nj-governor> [<https://perma.cc/692R-PC9Y>].

53. Press Release, U.S. Dep't of Justice, *supra* note 52.

plea agreement and eventually only got probation instead of jail time because of his cooperation with prosecutors.⁵⁴ By contrast, Kelly and Baroni were tried criminally. During the trial,

[David] Wildstein testified he told Baroni he “received an email from Miss Kelly that [he] viewed as instructing [him] to begin to put leverage on Mayor Sokolich by doing a lane closure.” He also testified he told Baroni “that Miss Kelly wanted the Fort Lee lanes closed . . . [f]or the purpose of punishing Mayor Sokolich . . . [b]ecause he had not endorsed Governor Christie” and that “Mr. Baroni was fine with that.”⁵⁵

After a jury trial, Baroni and Kelly were found guilty on all counts.⁵⁶ The defendants moved for an acquittal and for a new trial, but the judge denied both motions.⁵⁷ Eventually, the trial court sentenced Baroni to twenty-four months and Kelly to eighteen months in prison.⁵⁸ They then appealed to the Third Circuit.

B. *Appeal to the Third Circuit*

The Third Circuit affirmed most of the charges arising out of Bridgegate, ruling that Baroni and Kelly had defrauded the Port Authority of its property—the tollbooth lanes and the cost of employee labor—because they had lied about the reason for the lane reallocation and used the excuse of a bogus traffic study to conceal their true political motives, which included punishing the Mayor of Fort Lee.⁵⁹ As Amy Howe explained:

The U.S. Court of Appeals for the 3rd Circuit upheld Kelly’s and Baroni’s convictions, concluding that the requirements of the fraud statutes had been met: Kelly and Baroni had engaged in deception when they made up the fictitious traffic study to justify the change to the traffic patterns, and their lies deprived the Port Authority of property—the otherwise unnecessary labor of its employees and its right to control the bridge lanes.⁶⁰

54. Nick Corasaniti, *David Wildstein, Ex-Christie Ally, Gets Probation for Lane Closings*, N.Y. TIMES (July 12, 2017), <https://www.nytimes.com/2017/07/12/nyregion/david-wildstein-bridgegate-sentenced.html>.

55. *United States v. Baroni*, 909 F.3d 550, 557 (3d Cir. 2018) (alterations in original) (citations omitted), *cert. granted sub nom. Kelly v. United States*, 139 S. Ct. 2777 (2019).

56. Respondent William Baroni’s Brief in Support of the Petition for a Writ of Certiorari, *supra* note 51, at 9.

57. *Baroni*, 909 F.3d at 560.

58. *Id.*

59. *Id.* at 560, 562.

60. Howe, *supra* note 52.

But the Third Circuit vacated two counts of the indictment that related to depriving persons of their civil rights.⁶¹ Thus, the Third Circuit required resentencing for both Baroni and Kelly.⁶² Mr. Baroni ended up with an eighteen month sentence (down from twenty-four) and Ms. Kelly ended up with a thirteen month sentence (down from eighteen).⁶³

C. *The Supreme Court Certiorari Petition*

After the Third Circuit threw out some of Ms. Kelly's convictions but upheld other charges,⁶⁴ Kelly's lawyers asked the Supreme Court to review the case. In Kelly's certiorari (cert.) petition to the Supreme Court, her lawyers cited to the *McDonnell* and *Skilling* cases (highlighted above) repeatedly. Indeed, the opening paragraph of her cert. petition is a doosey. Her lawyers asserted:

For 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." *McNally v. United States*, 483 U.S. 350, 360 (1987); *see also Skilling v. United States*, 561 U.S. 358 (2010); *McDonnell v. United States*, 136 S. Ct. 2355 (2016). This case proves that some prosecutors still resist that directive—and some courts still refuse to rein them in. The court below 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.⁶⁵

A brief from Baroni's lawyers in favor of Kelly's cert. petition argued, "the decision below [against Kelly and Baroni] criminalizes the ordinary activity of public officials, turning nearly every public official into a felon."⁶⁶ His lawyers continued:

61. *Baroni*, 909 F.3d at 588.

62. *Id.*

63. Corasaniti, *supra* note 35.

64. *Baroni*, 909 F.3d at 556; Respondent William Baroni's Brief in Support of the Petition for a Writ of Certiorari, *supra* note 51, at 10.

65. Petition for a Writ of Certiorari at 1, *Kelly v. United States*, 139 S. Ct. 2777 (2019) (No. 18-1059) (mem.), 2019 WL 645257.

66. Respondent William Baroni's Brief in Support of the Petition for a Writ of Certiorari, *supra* note 51, at 22; *see also* Brief for Petitioner at 19, *Kelly*, 139 S. Ct. 2777 (No. 18-1059), 2019 WL 4568203 ("The Government's Theory Criminalizes Politics and Chills Public Service.").

The court of appeals' decision criminalizes ordinary political practices. It has no limiting principle. Here, the criminal practice was punitive resource allocation. In the next case, prosecutors will pursue state lawmakers overseeing an earmarking process, or local political leaders making patronage appointments. Those may be unappealing, but they have never before been deemed criminal. Now, any public official who is *not* indicted when he or she engages in such activity will have to thank the grace of prosecutorial discretion.⁶⁷

Meanwhile, Kelly's lawyers argued that allowing Kelly's conviction to stand would invite all manner of politically motivated prosecutions.⁶⁸ The gravamen of Kelly's claims to the Supreme Court is that she was allowed to use political "spin" (e.g., her lies) without triggering criminal penalties.⁶⁹ By contrast, the United States argued against granting cert. by stating that the Third Circuit "correctly determined that the trial evidence was sufficient to show that petitioner's and her co-conspirators' lies about the traffic study were necessary to carry out the scheme."⁷⁰ After looking at the briefing from both sides, the Supreme Court granted cert. in the *Kelly* case on the last day of the term.⁷¹

67. Respondent William Baroni's Brief in Support of the Petition for a Writ of Certiorari, *supra* note 51, at 22 (emphasis added).

68. Petition for a Writ of Certiorari, *supra* note 65, at 19 ("But the problem is actually far worse. All that is needed to obtain an indictment is an *allegation* that the official concealed his political motives. Making that allegation and then throwing the issue to a jury, to probe the inner workings of the public official's decisionmaking, could not be easier.").

69. *Id.* at 15 ("Under the decision below, any official (federal, state, or local) who conceals or misrepresents her *subjective motive* for making an otherwise-lawful decision—including by purporting to act for public-policy reasons without admitting to her ulterior political goals, commonly known as political 'spin'—has thereby defrauded the government of property (her own labor if nothing else). And if she used a phone or email in connection with that scheme, or if her government accepted federal funds during the same year (as virtually all do), then she is guilty of *federal crimes*"); see also Brief for Respondent William E. Baroni, Jr. in Support of Petitioner at 42, *Kelly*, 139 S. Ct. 2777 (No. 18-1059), 2019 WL 4671000 ("The Government's Theory of Fraud Criminalizes a Wide Range of Ordinary Political Activity.").

70. Brief for the United States in Opposition, *supra* note 50, at 12; see also Petition for a Writ of Certiorari, *supra* note 65, at 14–15 ("Petitioner does not identify any statutory element that her own conduct or the conduct of her co-conspirators failed to satisfy. She instead principally argues that the court of appeals erred by purportedly holding that '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.' But the court adopted no such rule." (internal citation omitted)).

71. Mike Kelly, *With the Bridgegate case before the Supreme Court, what will change?*, NORTH JERSEY REC. (June 28, 2019, 1:59 PM), <https://www.northjersey.com/story/news/columnists/mike-kelly/2019/06/28/bridgegate-heads-supreme-court->

Throughout her criminal trial and her appeal to the Third Circuit, Ms. Kelly stayed silent. This made her easy to vilify since she was not providing any counter-narrative. And Governor Chris Christie took no steps to either exonerate her or implicate himself in the Bridgegate fiasco. But by 2019, with her case on the way to the Supreme Court, Ms. Kelly broke her silence, indicating that Governor Christie had been involved in Bridgegate all along. She said in a press conference after being sentenced to jail time,

[t]he fact that I am on these steps in place of others from the Christie administration, and the governor himself, does not prove my guilt. It only proves that justice is not blind,' [Ms. Kelly] said, speaking from a prepared statement and at times choking back tears. 'It has favorites. It misses the mark. It misses the truth. And it picks winners and losers that are sometimes beyond anyone's control.'⁷²

And she added, "I don't even know [Fort Lee Mayor] Mark Sokolich. Never met him in my life . . . [i]f somebody wanted to punish Mark Sokolich, that was above my pay grade."⁷³ A day later, Ms. Kelly also pointedly asked Governor Chris Christie to tell the truth about his role in Bridgegate, stating, "I would like Gov. Christie to acknowledge . . . that he's—by doing what he has done, which is not telling the truth, has

what-it-means/1512751001 [https://perma.cc/7EZ4-CDED] (stating that Baroni is grateful to the Court for taking his case and confident that he and Kelly will be found innocent of any wrongdoing); Rory Little, *Overview of the Court's Criminal Docket for OT 19—Sizeable and Significant*, SCOTUSBLOG (Sept. 9, 2019, 12:03 PM), <https://www.scotusblog.com/2019/09/overview-of-the-courts-criminal-docket-for-ot-19-sizeable-and-significant> [https://perma.cc/FEE8-SZFT] ("In *Kelly v. United States*, the court granted certiorari on the last day of the previous term . . . In light of recent limiting decisions (see *McDonnell v. United States* and *Skilling v. United States*), the justices will consider whether further restrictions on the application of federal criminal fraud statutes are required.").

72. Ted Sherman, 'Mr. Christie, You are a Bully!' Declares Bridget Kelly, as the Former Aide is Again Sentenced to Prison for Her Part in the Bridgegate Scandal, NJ.COM (Apr. 24, 2019), <https://www.nj.com/politics/2019/04/mr-christie-you-are-a-bully-declares-bridget-kelly-as-former-aide-is-again-sentenced-to-prison-for-her-part-in-bridgegate-scandal.html> [https://perma.cc/X5KK-25C6].

73. Mike Kelly, *Bridget Anne Kelly Says She Was Scapegoated by Chris Christie in Bridgegate*, USA TODAY (Apr. 24, 2019, 5:19 PM), <https://www.usatoday.com/story/news/nation/2019/04/24/bridgegate-bridget-anne-kelly-scapegoated-chris-christie/3566662002> [https://perma.cc/XZS7-BBR2].

destroyed my life[.]”⁷⁴ Chris Christie, in response, issued a canned denial that he had any role in Bridgegate.⁷⁵

D. Oral Argument at the Supreme Court

The oral argument in *Kelly v. United States* did not go well for the government. Although the lawyer for the government, Deputy Solicitor General Eric J. Feigin, argued clearly that “[t]he defendants in this case committed fraud by telling a lie to take control over the physical access lanes to the George Washington Bridge and the employee resources necessary to realign them,”⁷⁶ Jacob Roth, counsel for Ms. Kelly, repeatedly contended that, “the [federal] fraud statutes do not prohibit lying to take unauthorized state action. They prohibit lying to obtain property. And that simply is not what occurred in this case.”⁷⁷ Michael Levy, counsel for Respondent William E. Baroni, Jr., amplified this argument by stating, “[a] public official who is acting politically and not for personal gain does not commit fraud by lying about his reason for an official decision if the decision was generally within his authority.”⁷⁸

During oral argument, the majority of the Justices seemed to take as a given that there was a problem with charging Baroni and Kelly with taking government property via their lies about a traffic study. And so the Justices seemed to get wound around the axel of exactly what type of fraud they committed, if any, and whether there was sufficient property at issue. In response, the lawyer for the government said,

74. *Bridget Kelly Speaks Out After “Bridgegate” Sentencing: Former Gov. Chris Christie Is “Lying,”* CBS NEWS (Apr. 25, 2019, 7:23 AM), <https://www.cbsnews.com/news/bridget-anne-kelly-speaks-out-bridgegate-sentencing-says-chris-christie-is-lying> [<https://perma.cc/2LRV-5RAU>]; see also Nick Corasaniti, *She Was Loyal to Chris Christie. Now She Will Go to Prison for Bridgegate.*, N.Y. TIMES (Apr. 24, 2019), <https://www.nytimes.com/2019/04/24/nyregion/bridget-anne-kelly-gwb-chris-christie.html> (“Just because someone has the title of governor doesn’t give them the right to mislead others. It’s dishonorable, and it only shows that person for the coward that they are,” [Kelly] said.”).

75. See Sherman, *supra* note 72 (“Christie, through a spokesman, again denied he was told about the plan. ‘As I have said before, I had no knowledge of this scheme prior to or during these lane realignments, and had no role in authorizing them. No credible evidence was ever presented to contradict that fact. Anything said to the contrary is simply untrue,’ said the former governor.”).

76. Transcript of Oral Argument at 30, *Kelly v. United States*, 139 S. Ct. 2777 (2019) (No. 18-1059).

77. *Id.* at 4–5.

78. *Id.* at 20.

[Kelly's and Baroni's lawyers are] trying to lump a bunch of different kinds of frauds together and make them all sound as if they're the same. This case is about a very specific kind of fraud, commandeering fraud.

It is when the defendant tries to take over property that is in the hands of the victim and manage it as if it is his own property. That's what they were doing with the lanes on the bridge and the employee resources.⁷⁹

Although the lawyer for the government noted that lying was integral to the Kelly/Baroni scheme,⁸⁰ most of the Justices also did not take kindly to the idea that it was a federal crime to lie during government service. For example, Justice Breyer said, "[m]y goodness, the Code of Federal Regulations, the rules of any department . . . government is filled with rules. And there are numerous instances where a person might say something untrue about something related to a rule that gives him authority."⁸¹ And even though the prosecutors had proved at trial that there was not a real traffic study on the George Washington Bridge, Chief Justice Roberts chimed in unprompted "[w]ell that's . . . disputed."⁸² So, if oral argument is any indication of where the Supreme Court's collective head is, it seems poised to cause the exoneration of Ms. Kelly and her codefendant Mr. Baroni.

79. *Id.* at 36.

80. *Id.* at 46 ("We proved that [Baroni] did not have the authority to close the lanes under these circumstances without telling the lie."); *id.* at 49–50 ("This isn't a lie about why they're doing it. This is a lie that—Wildstein directly testified that they needed to tell in order to get the resources that they—that they needed. It was clearly important to the George Washington Bridge manager and the manager of tunnels, bridges, and terminals. This was something the executive director knew about. Both the executive director and the vice chairman of the Port Authority Board of Commissioners testified that they would expect to be notified about something that was even an order of magnitude less disruptive than this was ever going to be, and they weren't notified."); *id.* at 64 ("The lie they told to the Port Authority to get the Port Authority resources was . . . a lie they told in order to get those resources. The causing of the traffic jam was what they wanted to accomplish with those resources.")

81. *Id.* at 33.

82. *Id.* at 37–38.

IV. WHAT'S AT STAKE IN THE BRIDGEGATE CASE AT THE SUPREME COURT

The Bridgagate case, *Kelly v. United States*, could be a double-header for making bad law. On one hand, the Supreme Court could use the case as a new excuse to further narrow the definition of corruption into oblivion. On the other hand, the Supreme Court could use the case, which is centered on mendacity from a public official, to expand the ability of public servants to lie without accountability.

A. *Expanding the Ability to Lie Under Alvarez*

The issue in the Bridgagate case that was pending before the Supreme Court was 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.”⁸³ In other words, the Supreme Court is considering whether Kelly can get away with lying about why the lanes on the bridge were really closed and whether Kelly can be held criminally liable for this reprehensible behavior.

As may be clear from the description of the Bridgagate scandal above, lies were key to the scheme. In essence, Bridget Anne Kelly had to lie about there being a traffic study to try to get away with causing the crippling traffic in Fort Lee and on the George Washington Bridge and triggering the expenditure of overtime pay at taxpayers’ expense. The ruse of the traffic study was only cover for political retribution on the Mayor of Fort Lee for his failure to endorse Governor Chris Christie for his re-election bid.

Lying has been a point of legal contention in legal briefs in the *Kelly v. United States* case at the Supreme Court. For example, Kelly’s brief on the merits argues that “[a]n [o]fficial [d]oes [n]ot [c]ommit [f]raud by [l]ying about [h]is [or her] [s]ubjective [m]otives.”⁸⁴ Her codefendant, Baroni, makes an identical argument: “[A] public official does not commit ‘money or property’ fraud when he or she acts to further political interests while purporting to act in the broader public interest.”⁸⁵ Similarly, an amicus brief from the National Association of Criminal Defense Lawyers argues, “[t]he deception charged in this

83. Respondent William Baroni’s Brief in Support of the Petition for a Writ of Certiorari, *supra* note 51, at i.

84. Brief for Petitioner, *supra* note 66, at 49.

85. Brief for Respondent William E. Baroni, Jr. in Support of Petitioner, *supra* note 69, at 21.

case—lying about the motivation for state governmental policy—is not cognizable as fraud under the mail fraud statute.”⁸⁶

The Supreme Court will likely exonerate Ms. Kelly for her actions. To do this, the Justices could build on the 2012 *Alvarez* case in which the Court invalidated a federal law called the Stolen Valor Act, which made lying about earning congressional and military honors illegal. And they could thereby adopt a First Amendment reason for why punishing her lying would infringe on Ms. Kelly’s free speech rights. Just as Mr. Alvarez had the First Amendment right to lie about earning military medals that he had not earned, so the logic would go Ms. Kelly had a constitutional right to spin why she closed the George Washington Bridge. This would be an absurd result, but not out of character for the Roberts Court.

Expanding on *Alvarez* is not the only way to deal with Ms. Kelly. The other direction that the Supreme Court might take in the Bridgegate case is to actually hold Bridget Anne Kelly responsible for her actions and for telling the truth. This is a long shot. However, in the recent case about the 2020 Census, *Department of Commerce v. New York*,⁸⁷ the Supreme Court held that the Commerce Department could not add a citizenship question to the 2020 U.S. Census because the original reason the Department provided for including the citizenship question was pretextual.⁸⁸ In essence, the Trump administration’s Department of Commerce argued that they needed the citizenship question on the census to enforce the Voting Rights Act.⁸⁹ This excuse was preposterous to election lawyers for many reasons, including that the last time this question was asked on the census to the entire population was before the Voting Rights Act came into effect. Thus, for the entire time the Voting Rights Act has been in existence, the census has not been used in this way to enforce that law. The other thing that made this excuse outlandish was that during the Trump presidency, the DOJ has consistently taken positions adverse to enforcing the Voting Rights Act in day to day prosecutorial choices and in ongoing litigation.⁹⁰ As Justice Sotomayor said during oral argument, the

86. Brief of the Nat’l Ass’n of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner at 11, *Kelly v. United States*, 139 S. Ct. 2777 (2019) (No. 18-1059) (mem.), 2019 WL 4729854.

87. 139 S. Ct. 2551 (2019).

88. *Id.* at 2561, 2576.

89. *See id.* at 2562.

90. *See* Michael Wines, *Protection of Voting Rights for Minorities Has Fallen Sharply, a New Report Finds*, N.Y. TIMES (Sept. 12, 2018), <https://www.nytimes.com/2018/09/12/>

Commerce Department was shopping for a post-hoc reason to justify adding the citizenship question when it landed on the weak-tea-Voting-Rights-Act ruse.⁹¹ The Court was also on notice from lawyers in a separate case called *Rucho v. Common Cause*⁹² that reasons given by the Trump administration were pretextual.⁹³

In the end, in *Department of Commerce v. New York*, the Supreme Court decided five to four that the Commerce Department was not allowed to provide the public a pretextual reason for why it added the citizenship question under the Administrative Procedure Act.⁹⁴ If the Court chooses to apply the logic of *Department of Commerce v. New York* to Kelly's Bridgegate case, then it may rule that she too is not allowed to give a pretextual reason (the bogus traffic study) for why she had the lanes on the George Washington Bridge closed in September 2013.

us/voting-rights-minorities.html (stating that only four lawsuits for VRA violations have been filed by the Department of Justice since 2013, all of them brought under the Obama administration).

91. Transcript of Oral Argument at 38–39, *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019) (No. 18-966).

92. 139 S. Ct. 2484 (2019).

93. See Letter from Dale E. Ho, Counsel of Record for Respondents N.Y. Immigration Coal., et al, ACLU, to Scott S. Harris, Clerk of the Court, Supreme Court of the U.S., Re: Department of Commerce, et al. v. New York, et al., No. 18-966 (May 30, 2019), https://www.supremecourt.gov/DocketPDF/18/18-966/101439/20190530142417722_2019.05.30%20NYIC%20Respondents%20Notice%20of%20Filing%20-%20Final.pdf [<https://perma.cc/WV43-TUQF>] (noting “new evidence contradicting the sworn testimony of Secretary Ross’s expert advisor A. Mark Neuman and senior DOJ official John Gore, and representations by Petitioners to the district court, in this case”); see also Mark Joseph Stern, *The New Trove of Secret Gerrymandering Files Will Be a Nightmare for the GOP*, SLATE (May 31, 2019), <https://slate.com/news-and-politics/2019/05/thomas-hofeller-secret-gerrymandering-files-north-carolina.html> [<https://perma.cc/2AMT-K3C4>].

94. *Dep't of Commerce*, 139 S. Ct. at 2575–76.

B. Narrowing Corruption Even Further

As bad as the Supreme Court's jurisprudence on corruption is presently, it could always degenerate further.⁹⁵ As Professor Frank Bowman worries, "now that the [Bridgegate] case is before the court, it could too easily be a vehicle for further unfortunate limitations on the government's power to prosecute government corruption in the vein of *Skilling v. United States* and *McDonnell v. United States*."⁹⁶

And there is good reason for Professor Bowman to worry as Kelly's lawyers cite repeatedly to *Skilling* in their Supreme Court briefs. They argued that the Bridgegate convictions—a "souped-up version" of the fraud theory constrained in *Skilling*—"would allow any [government] official to be indicted on nothing more than the (ubiquitous) allegation that she lied in claiming to act in the public interest" and that the Third Circuit had effectively "blessed a back-door route to criminalize all of the same conduct (and more)."⁹⁷ Kelly's lawyers added that "[f]ederal prosecutors have long been tempted to pursue public officials for perceived malfeasance in advancing 'the public good'" and that the Court had limited such misconduct to bribery and kickbacks in *Skilling*.⁹⁸ They continued by arguing, "[t]here is no end to the (bipartisan) mischief that such a regime would facilitate, or to the chilling effect it would carry. That is why this Court, in . . . *Skilling*, rebuffed efforts to use criminal fraud laws to police the ethical duty of public officials to advance the public interest. The opinion below nullifies those seminal precedents by allowing all the same conduct to be reframed as a deprivation of property."⁹⁹ They concluded, that "[t]he other dead giveaway that the Third Circuit erred is the effect its opinion would have on this Court's seminal decisions" because it effectively circumvents *Skilling's* rejection of the "honest-services fraud" theory by replacing it with the application of dishonest politics to a "deprivation[] of property" theory.¹⁰⁰

95. See Corasaniti, *supra* note 35 ("There has been this stream of cases coming from the Supreme Court that has continued to limit prosecutorial discretion and prosecutorial authority when it comes to corruption cases," said Jessica Tillipman, an assistant dean at the George Washington University Law School. "So the fact that they took on another corruption case to me signals that there's a good chance that the statutes will be further narrowed once again.").

96. Frank Bowman, *Symposium: Kelly v. United States: There is No Political Exception to Fraud*, SCOTUSBLOG (Sept. 24, 2019, 1:00 PM), <https://www.scotusblog.com/2019/09/kelly-v-united-states-there-is-no-political-exception-to-fraud> [<https://perma.cc/Z3KY-2BC6>].

97. Brief for Petitioner, *supra* note 66, at 3 (internal citations omitted).

98. *Id.* at 16 (citing *Skilling v. United States*, 561 U.S. 358, 408–10 (2010)).

99. *Id.* at 17.

100. *Id.* at 29.

The attorneys for Kelly's criminal codefendant, Baroni, have also cited *Skilling* in their Supreme Court briefs, arguing:

The convictions here do more than just run headlong into the reasoning of *Skilling*. . . . As a practical matter, if the government's theory is right, *Skilling*. . . [is] a dead letter. Every decision by every public official can be shown to have required some amount of resources either to make the decision or to effectuate it; often more, no doubt, than the relatively paltry \$14,314 at issue here. . . . More importantly, if that is correct, every current or future public official serves with the Sword of Damocles dangling overhead, because the federal government will now have free rein to charge and convict officials for all manner of political deals, favors, and rebukes, unless those officials are brutally candid about their true political motivations. If the government prevails, "the room where it happens" will become a crime scene.¹⁰¹

Baroni's lawyers insist that the convictions should be reversed "b]ecause every official decision requires the expenditure of at least *some* money or property" and that subjecting state officials to the same standards as federal ones would invalidate *Skilling*.¹⁰²

Lawyers Jennifer Ahearn and Noah Bookbinder worry that the Supreme Court could use the Bridgegate case to expand on the worst aspects of the *McDonnell* case. As they wrote:

Now, just a few years after *McDonnell*, it seems almost certain that *Kelly v. United States* will be the next case in this line. Just as *McDonnell* did, it appears that Kelly and her fellow defendants have succeeded in framing the case in a way that aligns with the court's dim view of the use of criminal law to rein in corruption among public officials.¹⁰³

There is ample reason to be concerned about the Supreme Court building on *McDonnell* as Kelly's lawyers also cite to *McDonnell* in their Supreme Court briefs. For example, they state that the fraud pointed to in *Kelly* reinforces previously rejected statutory interpretations that can "cast a pall of potential prosecution" and relate to "nearly anything a public official does."¹⁰⁴ They further posit that this unwarranted statutory construction will allow prosecutors and juries to pursue and convict "any official whose spin is deemed too aggressive."¹⁰⁵

101. Brief for Respondent William E. Baroni, Jr. in Support of Petitioner, *supra* note 69, at 4–5 (citing LIN-MANUEL MIRANDA, *The Room Where it Happens*, on HAMILTON (Atl. Recording Co. 2015)).

102. *Id.* at 20.

103. Ahearn & Bookbinder, *supra* note 33.

104. Brief for Petitioner, *supra* note 66, at 29.

105. *Id.*

And not surprisingly codefendant Baroni's team similarly cited to *McDonnell*, arguing that constitutional principles should guide statutory interpretation, specifically in the realm of official corruption.¹⁰⁶ They argue that a statute "that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter."¹⁰⁷ They added,

special restraint is warranted when contemplating the interpretation of a statute to be brandished against public officials. In particular, there are 'significant constitutional concerns' whenever a criminal statute is rendered so as to 'cast a pall of potential prosecution' over 'nearly anything a public official does.' *McDonnell*, 136 S. Ct. at 2372.

But that is exactly what will happen if these convictions are upheld.¹⁰⁸

Because ex-Governor of Virginia Bob McDonnell apparently has no sense of shame, he is now putting in briefs at the Supreme Court in favor of Bridget Anne Kelly arguing, "[t]he decision below permits prosecutors to end-run . . . *Skilling*[] and *McDonnell*"¹⁰⁹ and that "[t]his case reflects a disturbing trend in federal charging: the routine indictment of alleged fraud with only attenuated effects on abstract 'intangible property' interests."¹¹⁰

CONCLUSION

It is always perilous to write about a case that is likely to be decided while this piece is going into production. My sense of legal realism is that the Bridgegate case will do maximum damage. The *Kelly* case gives the Roberts Supreme Court, which now has two Trump appointees on the bench, another bite at the corruption apple, which is nearly completely devoured after fourteen years of hostile decisions. One more bite and "corruption" could really be done as a useful legal concept. And the Supreme Court is doing all of this while there is a bumper crop of corruption scandals springing up—from the President, to his cabinet, to his 2016 campaign, to his inaugural committee. As predicted by this piece, the Supreme Court vacated the

106. Brief for Respondent William E. Baroni, Jr. in Support of Petitioner, *supra* note 69, at 33 (internal citation omitted) (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 108 (1946)).

107. *Id.*

108. *Id.* at 42.

109. Brief for Amici Curiae Lord Conrad Black & Former Governor Robert F. McDonnell in Support of Petitioner at 3, *Kelly v. United States*, 139 S. Ct. 2777 (2019) (No. 18-1059), 2019 WL 1275301.

110. *Id.* at 8.

criminal conviction of Bridget Anne Kelly in 2020, and the decision will, as feared, broaden the parameter of acceptable lying by elected and appointed government officials.¹¹¹ Americans are a long way from criminalizing ordinary politics.¹¹² But citizens need to be able to rely on anti-corruption laws to punish the worst abusers of the public trust.¹¹³

111. *Kelly v. United States*, No. 18–1059, slip op. at 2 (U.S. May 7, 2020); see Bowman, *supra* note 96 (“[Kelly] contends that, even if a defendant deprives the government of property by telling lies about historical events or the purposes for which the property is to be used, there is no crime so as long [sic] the defendant’s motive is to gain political advantage. That surely cannot and should not be the law.”).

112. See Eliason, *supra* note 7 (“For better or worse, politicians routinely act for political reasons while purporting to be acting in the public interest. . . . However unseemly, it has never been thought of as criminal. The remedy for such misdeeds should be at the ballot box, not in the jury box.”).

113. See Corasaniti, *supra* note 35 (“Dan Weiner, a senior counsel at the Brennan Center for Justice [said] ‘I would like to see the courts grapple more earnestly with the thinking that . . . allowing conduct like this to go unsanctioned and any suggestion that this is just politics is just corrosive.’”); see also Brief for Amicus Curiae Senator Sheldon Whitehouse in Support of Respondent, United States of America at 1, *Kelly*, 139 S. Ct. 2777 (No. 18-1059), 2019 WL 6464591 (“To function properly, our democracy must have tools to address corruption in the political system.”).