

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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BRIDGET ANNE KELLY, )  
 )  
 Petitioner, )  
 )  
 v. ) No. 18-1059  
 )  
 UNITED STATES, )  
 )  
 Respondent. )  
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Pages: 1 through 67  
Place: Washington, D.C.  
Date: January 14, 2020

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3     BRIDGET ANNE KELLY,                             )  
4                                    Petitioner,             )  
5                                    v.                                 ) No. 18-1059  
6     UNITED STATES,                                 )  
7                                    Respondent.                 )  
8     - - - - -

9  
10                                   Washington, D.C.  
11                                  Tuesday, January 14, 2020

12  
13                                  The above-entitled matter came on for  
14     oral argument before the Supreme Court of the  
15     United States at 10:12 a.m.

16  
17     APPEARANCES:

18     JACOB M. ROTH, Washington, D.C.;  
19             on behalf of the Petitioner.

20     MICHAEL LEVY, New York, New York;  
21             for Respondent William E. Baroni, Jr.  
22             in support of the Petitioner.

23     ERIC J. FEIGIN, Deputy Solicitor General,  
24             Department of Justice, Washington, D.C.;  
25             on behalf of the Respondent.

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P R O C E E D I N G S

(10:12 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 18-1059, Kelly versus United States.

Mr. Roth.

ORAL ARGUMENT OF JACOB M. ROTH  
ON BEHALF OF THE PETITIONER

MR. ROTH: Mr. Chief Justice, and may it please the Court:

Once again, the government is trying to use the open-ended federal fraud statutes to enforce honest government at the state and local levels. Its theory this time is that the defendants committed property fraud by reallocating two traffic lanes from one public road to another without disclosing their real political reason for doing so.

This theory turns the integrity of every official action at every level of government into a potential federal fraud investigation. It end-runs McNally and Skilling by subsuming honest services fraud within property fraud and by criminalizing ulterior motives even without bribes or kickbacks. It

1 would effect a sweeping expansion of federal  
2 criminal jurisdiction into a particularly  
3 fraught area.

4           This is not the law. This Court in  
5 Cleveland held that regulatory authority is not  
6 property. So an official who induces a  
7 sovereign decision through deceit has not  
8 obtained property by fraud. Only when the  
9 official lies to divert state resources to  
10 private use has he stepped outside the  
11 regulatory realm and committed property fraud.  
12 This rule distinguishes property fraud from  
13 honest services fraud and from routine political  
14 conduct.

15           Here, because the defendants simply  
16 reallocated the traffic lanes from one public  
17 use to another, the Port Authority at most was  
18 deprived of regulatory control, not property.  
19 And that's true regardless of whether, as the  
20 government now alleges, the defendants lacked  
21 the authority in some sense to order the  
22 realignment.

23           Mr. Levy will explain why the  
24 government is wrong to say that, but it's  
25 ultimately legally irrelevant because the fraud

1 statutes do not prohibit lying to take  
2 unauthorized state action. They prohibit lying  
3 to obtain property. And that simply is not what  
4 occurred in this case.

5 JUSTICE GINSBURG: You've said that if  
6 the resources were diverted to private use, then  
7 the prosecution would be okay. But why isn't it  
8 a private use to benefit defendants politically?

9 MR. ROTH: Your Honor, I'm trying to  
10 distinguish the use of the property from the  
11 motive for the decision. So here the decision  
12 was to realign the lanes from one set of public  
13 drivers to another set of public drivers. Both  
14 are public uses of the lanes.

15 Now, it's true the motive, the alleged  
16 motive, for that regulatory decision was  
17 improper. It was political, right? That's the  
18 allegation in the case. But that doesn't mean  
19 that -- that it's -- that the use of the lanes  
20 was private. It's not -- Your Honor, the  
21 typical case in which the government has  
22 prosecuted property fraud against a public  
23 official is where the official lies to take  
24 property from the government for his own use.

25 So a situation where you lie on your

1 expense report, you say you incurred this  
2 expense for business reasons and you did not.  
3 In that situation, you're lying and you're  
4 taking the property out -- away from the  
5 government for yourself. That is obtaining  
6 property.

7 Here, what the defendants influenced  
8 through their deceit was the decision about the  
9 alignment of the lanes. And if there's anything  
10 that is regulatory in nature --

11 JUSTICE KAGAN: So, Mr. Roth, on -- on  
12 that theory, would it or would it not make a  
13 difference if the defendants here, rather than  
14 doing everything that they did for a political  
15 reason, if they had done it to make their  
16 commutes easier or their families' commutes  
17 easier, so it wasn't anything about politics, it  
18 was their own personal interests, but they did  
19 exactly the same things, is that covered or is  
20 not -- is that not covered on your theory?

21 MR. ROTH: That, on -- on my theory,  
22 that is certainly not property fraud. The  
23 officials even in that case have not obtained  
24 property by fraud.

25 JUSTICE KAGAN: So you're not making

1 just a distinction between private uses and  
2 public uses? You know, private purposes and --  
3 and public purposes, maybe?

4 MR. ROTH: I'm certainly not making a  
5 distinction between the type of purpose. What I  
6 am trying to distinguish is the use of the  
7 property and is it a regulatory decision to  
8 realign the lanes for whatever purpose? Because  
9 if we're -- if what we're concerned about is the  
10 integrity of the purpose behind the decision,  
11 that really sounds in honest services fraud,  
12 right? Because what we're concerned about is  
13 not the government being cheated out of property  
14 that it has or that it owns; what we're  
15 concerned about is the good faith of the  
16 official in making the decision.

17 CHIEF JUSTICE ROBERTS: That's a hard  
18 -- can be a hard line to draw. I mean, if -- if  
19 the rerouting of the traffic is done for  
20 commercial benefit of the individual in whatever  
21 way, that would be a violation, right?

22 MR. ROTH: Your Honor, if it would --

23 CHIEF JUSTICE ROBERTS: He has got a  
24 -- a -- you know, a development or something,  
25 he's building a hotel in -- in Fort Lee, and he



1 wants the traffic redirected there or directed  
2 away from, whichever, because he thinks it will  
3 increase business at his hotel.

4 MR. ROTH: Your Honor, if the Court  
5 were to consider that as a kickback, then that  
6 would be honest services fraud. It would not be  
7 property fraud, because, again, the decision  
8 there is a -- is a decision about allocating  
9 scarce public resources among public uses.

10 Again, the concern in Your Honor's  
11 hypothetical is, well, what -- was it a good  
12 reason? Was it to benefit the public or was it  
13 to benefit himself? And what this Court said in  
14 Skilling is, if you make the decision because  
15 you were paid a bribe or because you were going  
16 to be getting a kickback, that is a violation of  
17 your honest services -- your duty to provide  
18 honest services to the public.

19 JUSTICE ALITO: What we're doing here  
20 is interpreting a statute. And it's not quite  
21 clear to me how your argument fits into the  
22 language of this statute.

23 So property -- money is property. And  
24 money was lost. So how does this fit into the  
25 language of the mail fraud statute -- the wire

1 fraud statute?

2 MR. ROTH: So, Your Honor is correct,  
3 the relevant word is "property" and the second  
4 relevant word is "obtain." And this Court in  
5 Cleveland explained that when the government is  
6 making sovereign decisions in its capacity as  
7 sovereign, implicating its regulatory interests,  
8 that is not property within the meaning that  
9 Congress had when it enacted --

10 JUSTICE ALITO: Was there a loss of  
11 money in -- in Cleveland?

12 MR. ROTH: Well, there wasn't -- it's  
13 not clear if there was lost property. Certainly  
14 I would say there was an official in that case  
15 who was processing the fraudulent application.  
16 And if he had not been given the fraudulent  
17 application to process, he would have been doing  
18 useful work for the agency.

19 And maybe he would have gone home an  
20 hour earlier and been paid a little bit less. I  
21 don't think any of that would have mattered to  
22 the result in Cleveland because it's -- all of  
23 that --

24 JUSTICE ALITO: But still, how does it  
25 fit in the statute? Is it that there isn't --

1 property isn't obtained when it is simply  
2 wasted? Is it that -- does it -- is it a gloss  
3 on the word "defraud"?

4 MR. ROTH: I -- I think it's two  
5 steps, Your Honor. The first step is to  
6 establish that the decision, the realignment, is  
7 not property because that's control. That is  
8 regulatory power.

9 The second step is to say: Well then  
10 what about the costs of implementing it? And I  
11 would say the costs of implementing it -- of  
12 implementing that regulatory decision are part  
13 and parcel of it and it's -- the scheme is not  
14 to obtain that property.

15 The purpose of the -- the scheme, the  
16 object of the scheme, is to effect this policy  
17 decision, this regulatory decision, in the way  
18 that the officials want.

19 JUSTICE KAGAN: So in the case of  
20 sending city snowplows to -- to -- to clear your  
21 own house first or sending city maintenance  
22 people to paint your own house, if you're a  
23 public official, I was under the impression that  
24 you thought that that would be a crime.

25 Is that right?

1 MR. ROTH: If -- if the -- if you're  
2 sending the public employees to do private work,  
3 yes, absolutely. That's not regulatory. At  
4 that point you're just taking the city property  
5 and using it for private use, which is not --  
6 that's -- that's -- you're obtaining the  
7 property.

8 I would distinguish --

9 JUSTICE KAGAN: So even though --

10 MR. ROTH: -- that, though --

11 JUSTICE KAGAN: -- both are diversions  
12 of city resources or state resources, whatever  
13 it is, it's just one is regulatory and one is  
14 not because one involves personal benefit?

15 MR. ROTH: Personal use. Yes, Your  
16 Honor. I mean, every -- every regulatory  
17 decision diverts resources in some way. I mean,  
18 every time a public official makes a decision,  
19 there are implications for the bureaucracy and  
20 there are implications for public property.

21 So there is diversion going on and  
22 maybe the decision was made for a bad reason and  
23 if it's a bad enough reason, maybe it's an  
24 honest services violation.

25 JUSTICE KAVANAUGH: Is your theory

1 that the word "obtain" is what does the work in  
2 response to Justice Kagan's hypothetical?

3 MR. ROTH: I think it's obtaining  
4 property together. I don't necessarily think  
5 it's one or the other. Cleveland focused on  
6 property and what did Congress mean when it said  
7 "property." I think it said, we are concerned  
8 with cheating people out of their property  
9 rights.

10 And you can do that with a government  
11 entity. You can certainly cheat the government  
12 out of its property, Pasquantino is the example  
13 of that where the Court said, you owe tax -- you  
14 owe taxes to the government, you lied to avoid  
15 paying your taxes, you've committed property  
16 fraud. The same, by the way, could occur in a  
17 Port Authority situation.

18 You owe a toll and you lie to evade  
19 paying the toll, you have cheated the government  
20 out of property that it's owed. But if what  
21 you're doing is making a regulatory decision  
22 like allocating public resources among public  
23 uses, and there's no question that the main line  
24 is a public use, just as much as the special  
25 access roads are a public use of the property,

1 that is not obtaining property.

2 JUSTICE ALITO: I can understand the  
3 distinction between a regulatory decision and  
4 the deprivation of property when the regulation  
5 -- when the regulatory decision doesn't cause a  
6 loss of property, but when the regulatory  
7 decision cause a loss of property, I -- I find  
8 it more difficult to see the distinction.

9 MR. ROTH: Well, Your Honor --

10 JUSTICE ALITO: Explain it to me.

11 MR. ROTH: Your Honor, I think that  
12 every regulatory decision is going to have some  
13 consequences for public employee -- employee  
14 time, for example, which is the species of  
15 property that the government has invoked.

16 But in this case -- let's take this  
17 case, just as an example. What they focus on --  
18 the additional money that was spent was the toll  
19 keeper. The toll keeper had to do an additional  
20 shift. But the toll keeper was doing her job of  
21 collecting tolls for the public.

22 So the Port Authority was not deprived  
23 of her salary. She was earning her salary.  
24 The -- the objection is, if this regulatory  
25 decision had not been made, we would not have

1 had to hire that toll keeper for that work.

2 JUSTICE ALITO: Right. Well, I'll try  
3 this one last time. Tell me how this fits --  
4 when we write the opinion, if we were to write  
5 one in your favor, how would we explain your  
6 result within the language of the statute?

7 MR. ROTH: I think the Court would say  
8 the statute prohibits schemes to obtain property  
9 when you are using deceit to influence a  
10 regulatory decision, to change a regulatory  
11 decision, that is not obtaining property, and,  
12 in the corollary, that's important, is the costs  
13 of implementing a regulatory decision don't  
14 change the result.

15 JUSTICE KAGAN: I think I'll try mine  
16 once more too, Mr. Roth. Why when a public  
17 official says you -- to a city maintenance  
18 worker, you should paint my house before you do  
19 anything else, why isn't that similarly an  
20 allocation of resources?

21 MR. ROTH: Because it's not the job --

22 JUSTICE KAGAN: I mean --

23 MR. ROTH: -- of government --

24 JUSTICE KAGAN: -- it benefits me --

25 MR. ROTH: Right, but --

1 JUSTICE KAGAN: -- but, you know, I --  
2 I get to send, whether it's painting or  
3 snowplows, you know, you -- you -- you go plow  
4 my street first.

5 MR. ROTH: Right.

6 JUSTICE KAGAN: Why isn't that an  
7 allocation --

8 MR. ROTH: So, so --

9 JUSTICE KAGAN: -- of city resources.

10 MR. ROTH: Let me try to clarify  
11 because I think I may be -- I may have led to  
12 some confusion. If you're plowing public road,  
13 and you say I want to plow my street first or my  
14 neighborhood first, that is not obtaining  
15 property by fraud because that is an allocation  
16 of resources to a public use. It's a public use  
17 that happens to benefit you and maybe that was  
18 your motive and that's very bad, but it's not  
19 obtaining property by fraud.

20 If you instead trick the public  
21 employees not into plowing the public road but  
22 into plowing your private drive -- driveway,  
23 which is not the job of the government, right,  
24 that's not what the government does, the  
25 government is concerned with public property and



1 clearing public property.

2 If you trick the -- the employees into  
3 plowing your private driveway, then you have  
4 taken their services for your personal use,  
5 which is fundamentally different. That's no  
6 different from saying, I worked overtime when  
7 you didn't. Please pay me, you know, my hourly  
8 wage for the hour time that I didn't work.

9 JUSTICE KAGAN: And that difference  
10 is, just to go back to Justice Alito's question,  
11 where in the statute?

12 MR. ROTH: The difference is in the  
13 scheme to obtain property. That's -- that's  
14 where it is in the statute. And so you look at  
15 what is the object of the scheme.

16 And if the object of the scheme is to  
17 influence a regulatory decision, it's not a  
18 scheme to obtain property under -- that's --  
19 just follows from Cleveland. Otherwise every  
20 decision that public official makes is on the  
21 table and the only thing that is separated --

22 JUSTICE SOTOMAYOR: I'm sorry, I  
23 thought the scheme was to make life difficult  
24 for Fort Lee. If that was the scheme, and you  
25 defrauded the use of government property to

1 accomplish your goal, why is that any different  
2 than taking the maintenance worker to plow your  
3 road, your private street?

4 MR. ROTH: Your Honor, the difference  
5 is that here the alleged purpose, the alleged  
6 motive was what Your Honor said, right, to  
7 increase traffic --

8 JUSTICE SOTOMAYOR: That was the  
9 scheme.

10 MR. ROTH: Yeah. The scheme was to do  
11 that through a regulatory decision, right, by  
12 realigning the lanes from one public use to  
13 another public use.

14 So what we're -- what the objection is  
15 to the conduct here is an objection to the  
16 purpose, not the objective use of the property.  
17 That's the difference.

18 JUSTICE SOTOMAYOR: My -- my problem  
19 is, it's -- I don't think -- I can see a  
20 headline that would say it's okay for officials  
21 to use government public money in a way that is  
22 plainly unauthorized, not just in its motives  
23 but it's in end use, and an official can and  
24 should not be -- should never be liable for  
25 that. Our public officials now can use

1 government resources --

2 MR. ROTH: Your -- Your --

3 JUSTICE SOTOMAYOR: -- for their  
4 private ends.

5 MR. ROTH: -- Honor -- right. But,  
6 Your Honor, all -- all --

7 JUSTICE SOTOMAYOR: Not mixed motive,  
8 which is the interesting question here with the  
9 traffic study and whether you have enough --  
10 whether they have enough evidence that there  
11 wasn't a traffic study, but you're saying when  
12 it was -- and what the government has said,  
13 you're not authorized to do it, there's a  
14 question about that.

15 MR. ROTH: Yeah.

16 JUSTICE SOTOMAYOR: And you didn't  
17 have even a mixed motive. You had only a  
18 personal motive.

19 MR. ROTH: So, Your Honor, I'll let  
20 Mr. Levy speak a little bit more at length about  
21 unauthorized because actually the government's  
22 theory throughout the case was that he did have  
23 the authority and that he abused his power by  
24 making the decision.

25 JUSTICE SOTOMAYOR: A much more

1 difficult question.

2 MR. ROTH: Yeah.

3 JUSTICE SOTOMAYOR: Yes.

4 MR. ROTH: But what I will say is I'm  
5 not trying to suggest that this is okay. Okay?  
6 We don't want public officials acting for  
7 personal reasons. We don't want them acting  
8 necessarily for partisan or political reasons.

9 But what I'm saying is the remedy for  
10 that is not the federal property fraud statutes.  
11 We have certainly political remedies that were  
12 very much -- had pretty substantial  
13 repercussions here. There may also be state law  
14 constraints on official abuses of authority. In  
15 fact, New Jersey has a statute called "Official  
16 Misconduct" that is specifically directed toward  
17 unauthorized decisions with bad purposes.

18 That's not what the federal property  
19 fraud statute is concerned with. The federal  
20 property fraud statute is concerned with  
21 cheating the government out of its property  
22 rights. And that's just not what we have here.  
23 What we have here is an abuse of power, a  
24 political abuse of power, and -- and that's --  
25 if anything, again, that sounds in honest

1 services fraud, which this Court has limited,  
2 due to vagueness concerns, to bribes and  
3 kickbacks.

4 Your Honor, if there are no further  
5 questions, thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 counsel.

8 Mr. Levy.

9 ORAL ARGUMENT OF MICHAEL LEVY  
10 FOR RESPONDENT WILLIAM E. BARONI, JR.

11 IN SUPPORT OF THE PETITIONER

12 MR. LEVY: Mr. Chief Justice, and may  
13 it please the Court:

14 A public official who is acting  
15 politically and not for personal gain does not  
16 commit fraud by lying about his reason for an  
17 official decision if the decision was generally  
18 within his authority. The government disputed  
19 that below but now urges that as the rule in  
20 this Court.

21 That concession requires reversal.

22 The government alleged and proved that  
23 Mr. Baroni was the co-head of the Port  
24 Authority, responsible for supervising all  
25 aspects of its operations. The government

1     itself elicited that there was never any policy  
2     that precluded Mr. Baroni from using his plenary  
3     authority to alter a traffic pattern.

4             For the government's rule to work,  
5     this Court should require an objectively clear  
6     lack of authority, something not even arguably  
7     shown here.  Otherwise, any official who  
8     conceals his political motivation risks being  
9     convicted of fraud if a prosecutor or jury later  
10    disagrees about the scope of his authority.  If  
11    the government's rule is to provide any limits,  
12    this case must lie beyond those limits.

13            I'd like to begin by discussing what  
14    the government alleged, argued, and proved below  
15    about Mr. Baroni's authority before it decided  
16    in this Court that an official's authority is  
17    the line between guilt and innocence under the  
18    fraud statutes.

19            In the district court, the government  
20    alleged in the indictment that Mr. Baroni was  
21    responsible for the general supervision of all  
22    aspects of Port Authority business, including  
23    the operations of its transportation facilities.

24            From its main cooperating witness,  
25    Mr. Wildstein, the government elicited that

1 exact statement precisely, ticking off one of  
2 the allegations from the indictment. It  
3 elicited from Mr. Wildstein that the -- that the  
4 title "deputy executive director" was a  
5 misnomer; that within the Port Authority  
6 structure, the deputy executive director and the  
7 executive director had a 50/50 -- 50/50 split in  
8 terms of power sharing; that the deputy  
9 executive director was not the Number 2 position  
10 within the Port Authority. That's from the  
11 government's eliciting from its own cooperating  
12 witness.

13 The government also --

14 JUSTICE ALITO: The -- the arrangement  
15 is always that the -- there's a New York  
16 representative who's the executive director and  
17 the New Jersey representative who's the deputy;  
18 is that right?

19 MR. LEVY: That was at the time the --  
20 the arrangement. It was -- it was always  
21 appointed by the governor of New Jersey for the  
22 deputy executive director, and the governor of  
23 New York for the executive director. And it was  
24 understood within the agency by everyone, every  
25 -- all the witnesses the government called,

1 testified that that was the arrangement. They  
2 called Mr. Baroni's successor, who testified  
3 that that was the arrangement, that the one did  
4 not report to the other and that that --

5 JUSTICE ALITO: And this is -- this is  
6 a bi-state agency. Why -- why would New Jersey  
7 agree to an arrangement like that where its  
8 representative is always in the second seat, at  
9 least -- at least nominally -- nominally? Just  
10 the -- the big brother across the river; is that  
11 the --

12 MR. LEVY: I don't know the answer to  
13 that except that the -- the structure within the  
14 Port Authority was that that was not the case.  
15 So they, in fact, as it actually played out,  
16 didn't agree to play second fiddle. It was  
17 understood that within the Port Authority, the  
18 deputy executive director had equal authority.

19 The vice chairman testified about  
20 these parallel chains of -- of command that were  
21 understood. Particularly for -- for decisions  
22 made within New Jersey, it was understood that  
23 that would fall within the deputy executive  
24 director's scope of authority.

25 JUSTICE SOTOMAYOR: I think one of the



1 government's main arguments for -- on the  
2 sufficiency of the evidence, which is fairly  
3 pro-government, and in this situation, was that  
4 Mr. Wildstein had to lie to the Port Authority  
5 employees about the executive director knowing  
6 about this lane change.

7           If, in fact, the reality of the  
8 situation was that Mr. Baroni couldn't do this  
9 without the executive director's acquiescence or  
10 acceptance, doesn't that show his lack of  
11 authority? Isn't that -- why isn't that  
12 sufficient evidence?

13           MR. LEVY: So -- so two things, Your  
14 Honor. First of all, I don't believe we're here  
15 on a sufficiency ground and -- for reasons we  
16 argued in our reply brief. But, even within  
17 that, we're not saying the lie might not be a  
18 piece of evidence, but even the government  
19 concedes in this case that the lie does not show  
20 a lack of authority.

21           The government concedes that an  
22 authorized official is permitted to lie to their  
23 subordinates. And so it cannot be that,  
24 circularly, that lie automatically establishes  
25 the lack of authority. Here, all of the

1 evidence at trial was that Mr. Baroni had  
2 plenary authority over the operations of the  
3 Port Authority.

4           Mr. Wildstein actually testified --  
5 his first answer when he was asked why did you  
6 come up with this traffic study, his first  
7 answer was: For purposes of the media and for  
8 purposes of explaining it to local officials.  
9 When pressed by the government, he said: Also  
10 to give a reason to -- to career officials. But  
11 the fact that he has to -- not that he has to --  
12 that he chooses to tell a lie to career  
13 officials to -- to make this go over more  
14 smoothly in the same way that a public official  
15 wouldn't tell the world that they're doing  
16 something for a political reason.

17           JUSTICE SOTOMAYOR: Would you spend a  
18 moment on the traffic study?

19           MR. LEVY: Certainly, Your Honor. The  
20 -- the government has conceded that if Mr. --  
21 and, again, this is new in this Court, all of  
22 these concessions -- that if Mr. Baroni had  
23 authority to order a traffic study, then he  
24 could do so even with the intention of causing  
25 traffic in Fort Lee. And they concede that he

1 had the authority to order a traffic study. So  
2 all of that is conceded.

3 What they say is he lied about the  
4 existence of a traffic study. And as we point  
5 out in our reply brief, there was no lie about  
6 the existence of a traffic study. There was no  
7 representation at all about the existence of a  
8 traffic study.

9 Mr. Wildstein went to the bridge  
10 supervisors and told them: I would like to know  
11 what will happen, what the effect on traffic  
12 will be, if we switch these three lanes. Please  
13 switch these three lanes -- or maybe not with  
14 the "please" -- and -- and study the results.  
15 Collect the numbers and tell me what the results  
16 are.

17 The only part of that as a  
18 representation is the first part: I would like  
19 to know, my motivation is, my purpose is. And  
20 the government agrees that's not capable of  
21 being the lie for purposes of a fraud  
22 conviction, a money and property fraud  
23 conviction.

24 The other two parts are an  
25 instruction. They were an instruction to do a

1 traffic study. And the employees at the Port  
2 Authority did that. That's what the government  
3 spent a great deal of time at trial proving, is  
4 that money was spent on a traffic study that  
5 they say was illegitimate because nobody ever  
6 cared about the results.

7 But the government agrees now that  
8 caring about the results is not an issue. They  
9 say the traffic study didn't exist. And that's  
10 just flatly contrary to --

11 JUSTICE KAGAN: Mr. Levy --

12 MR. LEVY: -- what's true.

13 JUSTICE KAGAN: -- is it your position  
14 that -- suppose Mr. Baroni had said I'm giving  
15 you no reason at all or suppose Mr. Baroni had  
16 said we're going to do a traffic study, but it's  
17 going to be a sham traffic study.

18 Would he still have had authority?

19 MR. LEVY: Certainly, the first one.  
20 He certainly had at any point the discretion to  
21 say, as somebody had done very early on in  
22 creating these three traffic lanes -- they  
23 weren't required by anything -- at any point in  
24 time could -- could have said I think they  
25 should have a fourth or I think they should have

1     only two or only one. And that was fully within  
2     his authority. And as the government argued and  
3     proved this case below, that was their point,  
4     that was their summation, was he abused the  
5     authority he was entrusted with.

6             JUSTICE KAGAN: And the second, we're  
7     going to do a sham traffic study?

8             MR. LEVY: I -- I think he can -- he  
9     can do that. I think, as a functional matter,  
10    who knows what actually results from that, but,  
11    yes, he has the authority to say we're going to  
12    do a traffic study because I want to do this  
13    thing and -- and for public reasons, it's easier  
14    to do a traffic study.

15            JUSTICE KAGAN: And you said that this  
16    was not a sufficiency question. But what is it  
17    if it's not a sufficiency question because, as I  
18    understand your arguments, you're not pointing  
19    to any instruction that was incorrect or to --  
20    to the rejection of an instruction that you  
21    offered, so how are we to look at this other  
22    than through a sufficiency lens?

23            MR. LEVY: Frankly, the -- the -- the  
24    most obvious way to do is as a government  
25    forfeiture of the issue. The -- the defendants

1 in the district court said the line is authority  
2 and if we were authorized, then -- then that is  
3 a complete defense and the government told the  
4 district court do not give that instruction.

5 And the district court said, I'm not  
6 giving that instruction because it is not a  
7 defense and I don't want to confuse the jury  
8 into believing it is.

9 Now, in this Court, the government is  
10 saying, actually, it turns out the hinge between  
11 guilt and innocence is whether or not he was  
12 authorized and we get the benefit of a  
13 sufficiency of the evidence deferential review,  
14 even though we told the district court that this  
15 issue didn't matter at all.

16 The government has forfeited the  
17 opportunity to prove that Mr. Baroni lacked  
18 authority. We offered to have that fight in the  
19 district court and they said it didn't matter.

20 Now, in this Court, this Court should  
21 assume that there was no lack of --

22 JUSTICE ALITO: Is there --

23 MR. LEVY: -- authority.

24 JUSTICE ALITO: -- any -- any reason  
25 to think that the jury actually made a finding

1 about Baroni's authority?

2 MR. LEVY: No, there is no reason  
3 whatsoever. The -- the district court was  
4 attempting to make sure that they didn't  
5 consider that to be relevant or that -- that was  
6 what we pressed, was this is the relevant  
7 distinction and the district court wanted to be  
8 sure that the jury did not believe that it would  
9 be a defense.

10 And nothing in the -- in the jury  
11 instructions suggested that it would be a  
12 defense. Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 Mr. Feigin.

16 ORAL ARGUMENT OF ERIC J. FEIGIN  
17 ON BEHALF OF THE RESPONDENT

18 MR. FEIGIN: Thank you, Mr. Chief  
19 Justice and may it please the Court:

20 The defendants in this case committed  
21 fraud by telling a lie to take control over the  
22 physical access lanes to the George Washington  
23 Bridge and the employee resources necessary to  
24 realign them. Unless they lied about the  
25 existence of a Port Authority traffic study,

1 none of them had the power to direct those  
2 resources and realign the lanes.

3 Because they told that lie, those  
4 resources were answering to them, to their own  
5 private purposes rather than to the public  
6 officials who were duly appointed to decide what  
7 those resources should be allocated to do.

8 Their actions in this case were fraud  
9 in just the same way that it would be fraud for  
10 someone with no connection to the Port Authority  
11 to impersonate Port Authority supervisors and  
12 order Port Authority employees to realign Port  
13 Authority lanes.

14 Or if we want to put this in the  
15 private context: For someone to usurp the  
16 authority by deception of a taxicab company's  
17 dispatcher and order the cabs and the drivers to  
18 go wherever the fraudster pleases.

19 They don't get a free pass simply  
20 because Baroni worked for the Port Authority  
21 when the evidence showed that he didn't have the  
22 power to direct these resources in this way  
23 without telling the lie.

24 They don't get a free pass because  
25 they're hypothesizing that legitimate



1 decision-makers might, in theory, have decided  
2 to realign the lanes when the precise point of  
3 their scheme was to take these resources out of  
4 the legitimate decision-maker's hands and put  
5 them into their own hands.

6           And they don't get a free pass simply  
7 because their motive happened to be political.  
8 Let me start with the legal argument that was  
9 made by Kelly's counsel, which seems to be  
10 drawing a distinction between public uses and  
11 private uses. And I think there are two main  
12 problems with that.

13           Actually, probably three. One is, I  
14 don't see where a license for that is in the  
15 statute. And that gets me right to the second  
16 problem, which is that it seems to draw a  
17 distinction between fraud where the victim is a  
18 public entity and fraud where the victim is a  
19 private entity. And the Court rejected that  
20 distinction in Pasquantino.

21           I don't know in the taxicab  
22 hypothetical what it means to say that it's only  
23 fraud if those cabs then go to private use.  
24 It's a -- we're talking about a private company  
25 in that context.

1                   And the third problem is, I don't know  
2                   how a jury -- I -- I think some justices on this  
3                   Court were grappling with this -- I don't know  
4                   how a jury decides the difference between a  
5                   public and a private use.

6                   JUSTICE BREYER:   How -- how --

7                   MR. FEIGIN:    There can be --

8                   JUSTICE BREYER:   -- do you -- I mean,  
9                   you have two separate points, I think.  One --  
10                  one is your statement now, which I think is  
11                  stronger than in your brief, that if you have  
12                  authority and you work for a government, only if  
13                  you say and tell them a lie, an untruth, then  
14                  you don't have authority.

15                  My goodness, the Code of Federal  
16                  Regulations, the rules of any department, the --  
17                  I mean, the government is filled with rules.  
18                  And there are numerous instances where a person  
19                  might say something untrue about something  
20                  related to a rule that gives him authority for  
21                  that.  That's enough to take -- we're -- we're  
22                  back to honest services.  And that's also true  
23                  of the second.

24                  If, in fact, I can -- there are two  
25                  separate parts to the second, I might as well

1 get both questions out, is that fair? The one  
2 on authority is I -- I don't know where that  
3 comes from. But if you have authority to do  
4 something in government, but you can't or you  
5 lie about some -- anything, that wouldn't -- you  
6 wouldn't without it, well, then you're in the  
7 property stealing statute.

8           And the second problem with your  
9 second claim is, if you don't have authority,  
10 but you put what you take to a public use --  
11 now, either that is, does, is -- is -- is -- is  
12 a conversion of property and -- a -- a --  
13 obtaining of property within the statute or it  
14 isn't.

15           If it is, I don't see how honest  
16 services fraud is not back in the statute, which  
17 has been ruled out since McNally. And if it  
18 isn't, I don't see how this case works.

19           MR. FEIGIN: Well, Your Honor, let me  
20 answer the second part of your question first  
21 and then I'll try to get back to the first part.  
22 To answer the second part of your question, I  
23 don't -- as I was saying, I don't think there's  
24 a distinction between private and public uses  
25 works, because that's not a distinction that the

1 statute draws. It's not a distinction --  
2 JUSTICE BREYER: Well, then --  
3 MR. FEIGIN: -- you can draw --  
4 JUSTICE BREYER: -- we're back to --  
5 MR. FEIGIN: -- with public entities  
6 --  
7 JUSTICE BREYER: My point was --  
8 MR. FEIGIN: -- and --  
9 JUSTICE BREYER: -- why then -- we're  
10 back to honest services.  
11 MR. FEIGIN: So --  
12 JUSTICE BREYER: There is no  
13 deprivation --  
14 MR. FEIGIN: But that's --  
15 JUSTICE BREYER: -- of honest services  
16 that does not require somebody in the government  
17 to spend some time or use some paper or use a  
18 telephone in order to achieve that dishonest  
19 thing, all right?  
20 If you're going to count that as  
21 property, well, fine, you could do it, I guess  
22 under some statute, but if you do it under this  
23 statute, this statute then prohibits the taking  
24 of dishonest services, exactly what the Court  
25 has held it doesn't do.

1           MR. FEIGIN: So, Your Honor, if -- if  
2 I might answer that, it will take me a second to  
3 play this out, but I think it's a very important  
4 distinction. They're trying to lump a bunch of  
5 different kinds of frauds together and make them  
6 all sound as if they're the same. This case is  
7 about a very specific kind of fraud,  
8 commandeering fraud.

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

14           So, for example, if there's a snowplow  
15 sitting there and I take the keys to the  
16 snowplow and I drive off in the snowplow,  
17 everyone would agree that I've obtained the  
18 snowplow.

19           If I instead put on one of those masks  
20 from the mission impossible TV show or the movie  
21 and I impersonate the boss of the snowplow  
22 driver and I tell the snowplow driver to drive  
23 around in the snowplow and do the exact same  
24 thing that I was going to do, I have obtained  
25 the snowplow and the driver services by fraud.

1 CHIEF JUSTICE ROBERTS: Well, but --  
2 but --

3 MR. FEIGIN: But not every fraudulent  
4 scheme and not every deceptive scheme works that  
5 way. Sometimes there are deceptive schemes in  
6 which somebody simply wants an agency to do  
7 something or wants a private victim to do  
8 something on his behalf. And then you have to  
9 look at what is actually the object of the  
10 scheme and how the scheme works to see if the  
11 agency is deprived of property. So --

12 CHIEF JUSTICE ROBERTS: But the basic  
13 difference between the taking the snowplow is  
14 that the official has no authority to take the  
15 snowplow for his private uses. The official  
16 does have authority to regulate how lanes are  
17 used on -- on the -- on the highway and say  
18 these are going to be used for Fort Lee, these  
19 aren't.

20 MR. FEIGIN: Well, first of all, Your  
21 Honor, Baroni did not have that authority in  
22 this case, and --

23 CHIEF JUSTICE ROBERTS: Well, that's  
24 --

25 MR. FEIGIN: -- and I can get to the

1 evidence --

2 CHIEF JUSTICE ROBERTS: -- disputed.

3 MR. FEIGIN: I can get to the -- I can  
4 get to the evidence of that in a second. But  
5 also I -- I don't think that it's fair to call  
6 this a public use. What we would say is a  
7 public use is the use to which the legitimate  
8 supervisors of the Port Authority have decided  
9 to put the Port Authority --

10 CHIEF JUSTICE ROBERTS: Okay. So what  
11 you're saying, your theory is that by the  
12 actions in this case, they have commandeered the  
13 lanes on the expressway?

14 MR. FEIGIN: Yes, Your Honor.  
15 That's -- they commandeered the lanes and the  
16 resources necessary to reallocate.

17 CHIEF JUSTICE ROBERTS: They're still  
18 being used for public purposes.

19 MR. FEIGIN: Your Honor, I'm not sure  
20 what they mean when they say they are being used  
21 for public purposes. So if --

22 CHIEF JUSTICE ROBERTS: Because if  
23 other people want to use the highway to get to  
24 Fort Lee, they can.

25 MR. FEIGIN: So --

1 CHIEF JUSTICE ROBERTS: They have  
2 nothing to do with the scheme at all.

3 MR. FEIGIN: So, Your Honor, I -- I  
4 guess I would -- I would push back on this to  
5 this extent. If they decided to close the  
6 bridge, is that a public use or private use? If  
7 they decide that only Kelly can use that lane,  
8 is that a public use or a private use? If they  
9 decide that only red cars can go down that lane,  
10 is that public or private use?

11 JUSTICE BREYER: They didn't decide  
12 any of those things.

13 MR. FEIGIN: Well --

14 JUSTICE BREYER: They said anybody.  
15 It was just a problem getting there --

16 MR. FEIGIN: Well, Your Honor --

17 JUSTICE BREYER: -- which was quite a  
18 problem, I grant you. Quite a problem. But  
19 they used it for cars going down. Well,  
20 snowplow.

21 MR. FEIGIN: Well, Your Honor --

22 JUSTICE BREYER: Hey, there's a law  
23 here, a rule, a rule, no, a rule: Treat every  
24 street alike. And you know what the snowplow  
25 operator did? He snowplowed the mayor's street



1 first.

2 Now, that is not a good thing to do.  
3 It is really undesirable. And maybe it should  
4 be a crime. But 30 years in prison? That, I'm  
5 not sure. And that's -- this statute has to do  
6 with property fraud. And is taking the snowplow  
7 and putting it to the use of the public streets  
8 in violation of a rule, treating the mayor  
9 better -- is that a property crime?

10 MR. FEIGIN: Your Honor, in that --  
11 in that law -- in that hypothetical, there is --  
12 we would not say that is fraud. There is no  
13 lie. There's nothing material. There's --

14 JUSTICE BREYER: Oh, of course, there  
15 is.

16 MR. FEIGIN: -- no intent to fraud.

17 JUSTICE BREYER: My -- my where are  
18 you going? I am going to Fifth Street first,  
19 and then I will go to the grocery store down the  
20 street --

21 MR. FEIGIN: Yeah.

22 JUSTICE BREYER: --- and then I -- Ah.  
23 And you know what he did? He went to the city  
24 councilman's street. All right? There's a lie.  
25 It's easy to make up cases that there's a lie

1 in, and that's my problem, same problem. We're  
2 back into honest services fraud, which is fraud  
3 and bad. And -- and the question is does this  
4 statute get it?

5 MR. FEIGIN: We are not in honest  
6 services fraud, Your Honor. First of all, the  
7 lie in your hypothetical was not a lie that was  
8 told to obtain property. It was just a lie  
9 about what he was going to do.

10 But here's the reason we're not in --

11 JUSTICE BREYER: They wouldn't have --

12 MR. FEIGIN: -- honest services  
13 fraud --

14 JUSTICE BREYER: They wouldn't have  
15 given it to him if they --

16 MR. FEIGIN: In -- in the honest  
17 services frauds -- fraud cases, in McNally, for  
18 example, there was no dispute that the  
19 defendants in McNally had the authority to  
20 decide who was going to insure the State of  
21 Kentucky.

22 JUSTICE BREYER: Well --

23 MR. FEIGIN: The problem was --

24 JUSTICE ALITO: Mr. Feigin, that --  
25 this is what troubles me about your -- your

1 argument. Your argument is that, if Baroni was  
2 authorized, he could not be convicted; am I  
3 right?

4 MR. FEIGIN: Yes --

5 JUSTICE ALITO: If he had the  
6 authority --

7 MR. FEIGIN: -- if Baroni had the  
8 authority to do what he did, then he's not  
9 committing fraud.

10 JUSTICE ALITO: All right. And you  
11 say --

12 MR. FEIGIN: Even if he tells a lie.

13 JUSTICE ALITO: Okay. And -- and you  
14 say that takes care of a lot of these  
15 hypotheticals that seem -- that are disturbing  
16 to some people. And you say: But the jury  
17 found that he was authorized, and there's  
18 sufficient evidence to support that finding.  
19 That's the --

20 MR. FEIGIN: The jury found he wasn't  
21 authorized --

22 JUSTICE ALITO: I'm sorry. The jury  
23 found --

24 MR. FEIGIN: Yes.

25 JUSTICE ALITO: -- he was not

1 authorized, and there's sufficient --

2 MR. FEIGIN: That's correct.

3 JUSTICE ALITO: -- evidence, viewing  
4 the evidence in the light most favorable to the  
5 verdict to support the finding.

6 But I see no indication whatsoever, no  
7 reason to believe the jury made any such  
8 finding. I've read these jury instructions  
9 several times. There's nothing in there that  
10 would alert a jury, a juror, to the obligation  
11 to find that Baroni was unauthorized, unless I  
12 missed something.

13 MR. FEIGIN: Let me say a couple  
14 things about that. One, they did not make an  
15 objection to the jury instructions properly  
16 either -- in the court of appeals. It's not  
17 part of the --

18 JUSTICE ALITO: No, I --

19 MR. FEIGIN: -- question presented  
20 here.

21 JUSTICE ALITO: I know that. But I've  
22 never --

23 MR. FEIGIN: Okay.

24 JUSTICE ALITO: -- I've never seen a  
25 criminal case where we're asked to defer to a

1 jury's finding on something that the jury didn't  
2 find. Putting aside the question of whether  
3 there's any evidence to show that he lacked  
4 authority.

5 MR. FEIGIN: So let me point you to a  
6 -- a couple of places, and then let me talk a  
7 little about the evidence of lack of authority.

8 First of all, there's the instruction  
9 that the court of appeals deemed adequate, and  
10 that's at page 875 of the Joint Appendix, which  
11 is the instruction on obtaining property, which  
12 the court of appeals deemed sufficient to notify  
13 the jury that when someone is acting on behalf  
14 of an organization, acting as the agent of that  
15 organization, he's not obtaining property when  
16 he exercises the authority that the agency is  
17 duly conferred on him.

18 But even better than that is the  
19 materiality instruction from pages 875 to 876,  
20 which says that if you find that the  
21 representation that the lane and toll booth  
22 reductions was for the purpose of a -- for the  
23 -- was for the purpose of a traffic study was  
24 false, you must determine whether that  
25 representation was one that a reasonable person

1 might have considered important in making his or  
2 her decision to commit Port Authority resources  
3 for that endeavor, including services of Port  
4 Authority personnel.

5 JUSTICE ALITO: What -- what does  
6 that --

7 MR. FEIGIN: That --

8 JUSTICE ALITO: What does that say  
9 about authorize -- about authority to --

10 MR. FEIGIN: Your Honor, if --

11 JUSTICE ALITO: -- to reallocate the  
12 lanes?

13 MR. FEIGIN: If Baroni actually had  
14 the authority to reallocate the lanes for any  
15 reason or no reason, as his counsel just stated  
16 to this Court that he did, I don't see how the  
17 jury could have found that the lies that they  
18 told were material. Baroni --

19 JUSTICE SOTOMAYOR: Mr. Feigin,  
20 everybody has authority to spend or do their act  
21 on behalf of the agency. Anybody who does it  
22 for their own personal purposes is unauthorized.  
23 So it's meaningless to say is he authorized or  
24 not. Did he have authority to close the lanes  
25 under certain circumstances?

1                   MR. FEIGIN: Well, Your Honor, I  
2                   don't --

3                   JUSTICE SOTOMAYOR: Did he have  
4                   authority to close the lanes on his own say?

5                   MR. FEIGIN: He might have, Your  
6                   Honor. What he didn't have --

7                   JUSTICE SOTOMAYOR: Did you prove --

8                   MR. FEIGIN: -- was the authority --

9                   JUSTICE SOTOMAYOR: -- that -- did you  
10                  prove that he had limited authority? Where did  
11                  you prove that?

12                  MR. FEIGIN: We proved that he did not  
13                  have the authority to close the lanes under  
14                  these circumstances without telling the lie.  
15                  And I -- I can explain why if you would like.

16                  In -- when Wildstein proposed the idea  
17                  of realigning the lanes, Baroni's response was  
18                  to ask Wildstein how he was going to do that.  
19                  Wildstein then came up with the idea that they  
20                  would have a traffic cover story -- the cover  
21                  story of a traffic study, and he explained at  
22                  the time to Kelly that one purpose of the  
23                  traffic study cover story was in order to enlist  
24                  the Port Authority officials that they would  
25                  need in order to realign the lanes.

1                   He then had to lie to both the manager  
2 of the George Washington Bridge and the manager  
3 of tunnels, bridges, and terminals that the  
4 executive director was aware of this and  
5 apparently had tacitly approved of it; where, in  
6 fact, they were absolutely concealing it from  
7 the executive director.

8                   JUSTICE SOTOMAYOR: By the way --

9                   MR. FEIGIN: Wildstein --

10                  JUSTICE SOTOMAYOR: -- if -- if,  
11 contrary to the -- their expectations, there had  
12 been no slowing of traffic and, in fact, the  
13 lanes on -- one-lane traffic remained the same  
14 or maybe improved, would you still have a case  
15 here?

16                  MR. FEIGIN: Yes, Your Honor. It's  
17 not about the effect of --

18                  JUSTICE SOTOMAYOR: And so --

19                  MR. FEIGIN: -- although the effect  
20 was catastrophic and that was a reason why the  
21 prosecution was brought, because of the  
22 incredible danger in which they put the citizens  
23 and commuters of Fort Lee, but they would still  
24 have committed the same crime.

25                  And they were hiding it from the



1 executive director. Wildstein testified  
2 directly that there were processes in place to  
3 use the Port Authority resources, and he didn't  
4 follow them. And when the executive director  
5 found out, he immediately canceled it and he  
6 stated that the process had been "subverted."

7 JUSTICE KAGAN: Mr. Feigin --

8 MR. FEIGIN: Now, Baroni clearly had  
9 significant authority within the Port Authority  
10 organization, but when someone questions how  
11 they're going to do something, has no idea how  
12 he's going to do something, and has to lie in  
13 order to accomplish it, has to lie that his boss  
14 has approved it, has to conceal it from his boss  
15 and has to avoid every legitimate --

16 JUSTICE ALITO: But isn't it --

17 MR. FEIGIN: -- process --

18 JUSTICE ALITO: -- isn't it often the  
19 case that somebody who has the authority to do  
20 something may lie about why the person is doing  
21 the thing because, if the real reason was  
22 exposed, there would be -- it would cause a  
23 furor, people would be angry, but that doesn't  
24 show the person doesn't have the authority to do  
25 it.

1           A person hires his brother-in-law for  
2 a position. Why did you hire this particular  
3 person? Well, this person is the very best  
4 qualified person for this job. When the real  
5 reason is his wife wants him to do it.

6           (Laughter.)

7           JUSTICE ALITO: He doesn't want to say  
8 it. Does that show he didn't have the authority  
9 to fill this position?

10          MR. FEIGIN: No, Your Honor, then --  
11 but that's not the only piece of evidence we're  
12 relying on, and it's a different kind of lie.  
13 This isn't a lie about why they're doing it.  
14 This is a lie that -- Wildstein directly  
15 testified that they needed to tell in order to  
16 get the resources that they -- that they needed.

17          It was clearly important to the George  
18 Washington Bridge manager and the manager of  
19 tunnels, bridges, and terminals. This was  
20 something the executive director knew about.  
21 Both the executive director and the vice  
22 chairman of the Port Authority Board of  
23 Commissioners testified that they would expect  
24 to be notified about something that was even an  
25 order of magnitude less disruptive than this was

1 ever going to be, and they weren't notified.

2 JUSTICE BREYER: Why --

3 JUSTICE KAGAN: Mr. Feigin --

4 JUSTICE BREYER: What do you do about  
5 this, this is the same, but I don't want to lose  
6 what the question was in light of the  
7 instructions given.

8 And what I have so far found is that  
9 the defense did ask the jury to be instructed to  
10 do just what you want. They asked the jury --  
11 they said: Judge, tell the jury that if the  
12 Port Authority granted or bestowed on the  
13 defendants the power or authority to control the  
14 property, the bridge, et cetera, and that they  
15 acted within the bounds of that authority, then  
16 you can't find the scheme to defraud.

17 I think you agree with that. And the  
18 problem is the judge said no, I won't give that  
19 instruction. Then what the judge gave as an  
20 instruction -- insofar as the court of  
21 appeals -- and we're reviewing the court of  
22 appeals. Insofar as the court of appeals said,  
23 well, they gave the essence of it, this was the  
24 instruction supposed to be the essence of it.

25 To establish a scheme to defraud, the

1 government must also prove that the scheme  
2 contemplated depriving the authority -- the Port  
3 Authority, the port people, of money and  
4 property. What?

5 That's the essence of what he didn't  
6 give? Now, I -- I -- I haven't read the two  
7 instructions you read, but the one that I read,  
8 I think, is the one that the court of appeals  
9 relied upon.

10 MR. FEIGIN: So, Your Honor --

11 JUSTICE BREYER: So what do we do  
12 about that?

13 MR. FEIGIN: Well, Your Honor, I would  
14 look back at the materiality instruction I was  
15 discussing with Justice --

16 JUSTICE BREYER: Yeah.

17 MR. FEIGIN: -- Alito.

18 JUSTICE BREYER: But that isn't what  
19 the court of appeals relied upon.

20 MR. FEIGIN: Well, Your Honor, I think  
21 if the court of appeals got the substance of it  
22 right, and you don't agree with its particular  
23 reasoning, there is no reason to reverse,  
24 particularly when the question hasn't even been  
25 presented to this Court.

1           This question -- this point was only  
2 really raised in the reply brief of Baroni who  
3 didn't even petition. But let me address the  
4 authority instruction that was rejected by the  
5 district court directly.

6           That instruction was proposed in the  
7 context primarily of an instruction on 18 U.S.C.  
8 666, which is the more general misappropriation  
9 of federal funds statute. And the instruction  
10 on that, which appears at page 870 of the Joint  
11 Appendix, already itself contains a reference to  
12 authority.

13           Both the government and the district  
14 court were quite clear in the district court --  
15 and you'll see this finding by both the court of  
16 appeals and the district court -- that Baroni  
17 and Kelly were free to argue the authority  
18 issue. The only question was whether the jury  
19 was going to get a specific instruction on that  
20 point.

21           And the government believed the  
22 instruction was unnecessary. It was -- it would  
23 have been a novel addition to the Third  
24 Circuit's pattern jury instruction on section  
25 666, and, moreover, I don't know that their

1 instruction was, in fact, correct because it  
2 would -- might have confused the jury into  
3 thinking -- and this goes back to my colloquy  
4 with Justice Sotomayor -- that if Baroni had  
5 some authority under some circumstances, that  
6 that would exonerate --

7 CHIEF JUSTICE ROBERTS: But you say --

8 MR. FEIGIN: -- all of the defendants.

9 CHIEF JUSTICE ROBERTS: -- the  
10 instruction -- you -- you thought the  
11 instruction was unnecessary. Well, that may  
12 have been the case in light of your theory at  
13 the time, but surely after your focus here on  
14 the authority point, you -- you wouldn't make  
15 that same statement.

16 MR. FEIGIN: Well, Your Honor, I think  
17 that in retrospect it might have been better to  
18 instruct the jury somewhat more specifically on  
19 authority. I don't know that there's specific  
20 --

21 CHIEF JUSTICE ROBERTS: Somewhat more  
22 --

23 MR. FEIGIN: -- their specific --

24 CHIEF JUSTICE ROBERTS: --  
25 specifically on the central point of your

1 argument before us today.

2 MR. FEIGIN: I don't know their  
3 specific instruction would have accomplished it.  
4 And I don't know the instructional issue is  
5 before the Court -- is before the Court today.

6 But we are defending this -- these  
7 convictions on the precise same ground that they  
8 were found to be valid by both the court of  
9 appeals and the district court, which addressed  
10 the authority issue.

11 The district court addressed the  
12 authority issue before trial telling the  
13 defendants they could argue it at trial. It  
14 addressed it after trial, saying it believed the  
15 authority had been proven. And then the Third  
16 Circuit addressed it.

17 And we have been consistent throughout  
18 in that -- that we have never argued, to my  
19 knowledge -- and I certainly haven't identified  
20 a place where we have argued -- that if Baroni,  
21 in fact, had the authority that his counsel just  
22 claimed he had, which is to realign the lanes  
23 for any reason or no reason, that these  
24 defendants could have --

25 JUSTICE SOTOMAYOR: Mr. Feigin --

1                   MR. FEIGIN:  -- been convicted of  
2 fraud.

3                   JUSTICE SOTOMAYOR:  -- nobody, no  
4 decision-maker has the authority to make any  
5 decision for no reason.  That's a misnomer in  
6 terms.

7                   People have authority to do things  
8 only in the interest of the agency.  So give me  
9 a line drawing of for a reason or no reason,  
10 meaning, I don't think anybody in the Port  
11 Authority, including the executive director,  
12 could on whim say:  Ah, you know, I like playing  
13 on a board.  Let's change it to one lane because  
14 I just like to see a different pattern today.

15                   MR. FEIGIN:  So my -- my apologies,  
16 Your Honor.

17                   JUSTICE SOTOMAYOR:  I -- I --

18                   MR. FEIGIN:  I simply --

19                   JUSTICE SOTOMAYOR:  -- I -- so -- so  
20 give me your definition of what authorized  
21 means, if he had the ability -- and when I first  
22 read your brief, it was if he had the ability to  
23 change the lanes on his own, then he had  
24 authority.

25                   MR. FEIGIN:  Yeah.  That --



1 JUSTICE SOTOMAYOR: All right. Now,  
2 what the limits of that authority are, is where  
3 I -- where I'm trying to get you.

4 MR. FEIGIN: So, Your Honor, if he  
5 were --

6 JUSTICE SOTOMAYOR: How -- but it  
7 can't be no -- no authority.

8 MR. FEIGIN: So, Your Honor --

9 JUSTICE SOTOMAYOR: Does he never have  
10 authority --

11 MR. FEIGIN: -- I was -- I apologize,  
12 I was simply repeating the language that the  
13 court of appeals itself used which may have been  
14 a little hyperbolic, but if he were the person  
15 to whom the Port Authority entrusted the  
16 decision of whether there should be three lanes  
17 or one, such that his decision under these  
18 circumstances would govern, then he had the  
19 authority.

20 I think the evidence showed that he  
21 was not that person. Again, he had to lie --

22 JUSTICE SOTOMAYOR: The fact that --

23 MR. FEIGIN: -- about his boss --

24 JUSTICE SOTOMAYOR: -- the -- the fact  
25 that the executive director could overturn him

1 doesn't prove the positive.

2 MR. FEIGIN: That's right, Your Honor.  
3 We wouldn't rely on that piece of evidence  
4 alone, just like, Justice Alito, we're not  
5 relying alone on the fact -- on the fact that he  
6 had -- that he told a lie. We're relying on a  
7 combination of circumstances.

8 Again, as -- as I was saying earlier,  
9 if -- when an idea of something to do with my  
10 organization's resources is raised to me and my  
11 initial reaction is, how are we going to do  
12 that, and then the idea is to tell a lie that  
13 will get everyone onboard with it, and then we  
14 lie about the fact that my boss is aware of it  
15 and -- and tacitly approves of it, we avoid  
16 every legitimate process and we conceal it from  
17 my boss.

18 I think a reasonable jury can  
19 rationally conclude that I'm doing something  
20 that I don't have the authority to do. And  
21 that's --

22 JUSTICE KAGAN: Mr. Feigin -- please  
23 finish.

24 MR. FEIGIN: Sorry, I was just going  
25 to say, that's what Baroni did here. Apologies

1 to Justice Kagan.

2 JUSTICE KAGAN: Can -- can -- can I  
3 switch, because the statute clearly says that a  
4 scheme of deception has to -- the object of it  
5 has to be to obtain property. So can we talk  
6 about that for a minute?

7 Because if I look at this, and I'm an  
8 ordinary juror, I'm thinking, you know, the  
9 object of this deception was not to obtain  
10 property. The object was to create a traffic  
11 jam. The object was to benefit people  
12 politically. You can frame the object in lots  
13 of ways.

14 But notwithstanding that some employee  
15 time was given over to this scheme, that was not  
16 the object of the scheme, was it, to appropriate  
17 that employee time?

18 MR. FEIGIN: Well, Your Honor, I think  
19 it was because this was -- this gets back to  
20 what I was saying to Justice Breyer earlier.

21 This is a particular type of fraud,  
22 where -- it's commandeering fraud, where what  
23 they're trying to do is to take property that's  
24 in the victim's hands, here the Port Authority,  
25 and convert it to their own uses.

1                   It may be that if I take a knife off  
2 the table and stab -- that doesn't belong to me,  
3 and stab someone, my end goal is to stab someone  
4 but I've still stolen the knife.

5                   JUSTICE KAGAN: But wasn't the  
6 commandeering here completely incidental, indeed  
7 unnecessary to the scheme being carried out? In  
8 other words, you know, there was a little bit  
9 of -- of -- of time for an extra toll person,  
10 actually to mitigate the -- the problems of the  
11 traffic jam or there were some people running  
12 around counting cars to conceal the purpose for  
13 what they were -- of what they were doing, but  
14 that was not the object of the scheme.

15                   MR. FEIGIN: No, Your Honor, the  
16 object of the scheme was for them to take  
17 control of real property, physical lanes,  
18 accessing the George Washington Bridge, and have  
19 those lanes be allocated the way they wanted.

20                   JUSTICE KAGAN: Okay. So that's a  
21 different theory. That's not the employee time  
22 and labor. That's something about like  
23 appropriating the George Washington Bridge; is  
24 that right?

25                   MR. FEIGIN: That is one --

1 JUSTICE KAGAN: It's not appropriating  
2 the George Washington Bridge, it's reallocating  
3 lanes on the George Washington Bridge and I  
4 would have thought that Cleveland makes clear  
5 that that's not an appropriation of property  
6 either.

7 MR. FEIGIN: I -- I -- Your Honor, I  
8 think it's both because they needed the employee  
9 resources in order to accomplish what they were  
10 trying to do with the bridge.

11 And if I could address Cleveland for a  
12 second, this case and Cleveland do both involve  
13 governmental decision-making but that's where  
14 the similarities end.

15 In Cleveland, the object of the scheme  
16 was to obtain a license under a regulatory  
17 scheme that had no private analog whatsoever.  
18 The Court rejected every private analog the  
19 government offered for it. And the license  
20 wasn't property in the government's hands.

21 Here you're talking about real  
22 property, physical lanes and who can access  
23 those lanes, and access rights to physical  
24 property are quintessential forms of private  
25 property, probably one of the oldest forms of

1 property we have.

2 And then you have the employee  
3 resources necessary to reallocate the lanes,  
4 which I think even they acknowledge are property  
5 under the fraud statute. They acknowledge that  
6 if you send painters to paint the mayor's house,  
7 that that's going to be property fraud because  
8 you're taking the employee services.

9 JUSTICE KAGAN: That's because the  
10 object of the scheme is to use the employee  
11 labor to get your house painted, but I -- I  
12 don't think that you can say the same thing  
13 here.

14 MR. FEIGIN: Your Honor, the reason --

15 JUSTICE KAGAN: You were not using the  
16 employee labor to create the traffic jam.

17 MR. FEIGIN: They are using the  
18 employee labor as if it were theirs, not as if  
19 it were something that the Port Authority gets  
20 to use. So, again, in the private context, if I  
21 were to impersonate the boss and start ordering  
22 around the company jet, I think I have obtained  
23 the company jet and probably --

24 CHIEF JUSTICE ROBERTS: Well, but you  
25 picked --

1                   MR. FEIGIN:  -- the pilot's time as  
2                   well.

3                   CHIEF JUSTICE ROBERTS:  You -- you  
4                   picked -- you picked an example that is easy for  
5                   you.  I mean, the example that's hard for you, I  
6                   think, is you tell the employee to pick up the  
7                   phone and call somebody and say this.  That's a  
8                   bad thing.

9                   And then immediately you say:  Okay,  
10                  it's property fraud because I've used the -- the  
11                  employee has used the telephone, or I've used  
12                  the four minutes of that employee's time  
13                  necessary to convey the message.

14                  MR. FEIGIN:  So --

15                  CHIEF JUSTICE ROBERTS:  Your theory  
16                  would say that that's taking of property so it's  
17                  covered by the fraud statutes.

18                  MR. FEIGIN:  We wouldn't, Your Honor,  
19                  and I'm -- I'm actually glad to have a -- a  
20                  chance to -- to make this perfectly clear.  And  
21                  this gets back to Justice Kagan's question as  
22                  well.

23                  Incidental uses of property that are  
24                  not the object of the scheme are not going to be  
25                  sufficient for property fraud.  And I think the

1 easiest place to look for that is this Court's  
2 decision in Loughrin, which involved bank fraud.  
3 And the Court said there that if you tell a lie  
4 and the object of your lie is to obtain money,  
5 it's not bank fraud simply because, unrelated to  
6 your lie, you didn't really care how the money  
7 came to you. The money comes to you in the form  
8 of a check, which is bank property, as opposed  
9 to in the form of cash, which isn't.

10           If someone is -- if someone tells a  
11 lie and the object is to obtain a license from  
12 the State of Louisiana to operate a video poker  
13 machine, which is not property, they're not  
14 committing property fraud just because some  
15 employee needs to spend some time processing the  
16 license. That's not the object.

17           CHIEF JUSTICE ROBERTS: Well, here the  
18 object -- the object of the scheme was not to  
19 commandeer lanes on the bridge. The object was  
20 to cause a traffic jam in Fort Lee. And if they  
21 could have done it some other way, they would  
22 have done it some other way.

23           The use of the traffic -- you know,  
24 altering the traffic lane configuration was just  
25 the incidental means of achieving the objective.



1           MR. FEIGIN: I don't think that's  
2 right, Your Honor. The lie they told to the  
3 Port Authority to get the Port Authority  
4 resources was to -- a lie they told in order to  
5 get those resources. The causing of the traffic  
6 jam was what they wanted to accomplish with  
7 those resources.

8           If I tell a lie to get access to the  
9 company jet, it may be that my goal is to take  
10 it on a vacation trip to Macao, but that's not  
11 the object of the scheme as far as the fraud is  
12 concerned and the victim of the fraud.

13           Thank you.

14           CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16           Two minutes, Mr. Roth.

17           REBUTTAL ARGUMENT OF JACOB M. ROTH  
18           ON BEHALF OF THE PETITIONER

19           MR. ROTH: Thank you. Your Honor, the  
20 -- the federal property fraud statute prohibits  
21 schemes to obtain property. And the  
22 government's theory of property here, as I think  
23 we just heard, is that the officials, by making  
24 this decision about lane alignment, commandeered  
25 the control over the George Washington Bridge.

1 That is exactly the type of regulatory control  
2 that Cleveland said is not property. Cleveland  
3 referred to the intangible rights of allocation,  
4 exclusion, and control. And the sovereign's  
5 intangible rights of allocation, exclusion, and  
6 control are not property for purposes of this  
7 statute.

8 And, therefore, if what the officials  
9 did was used a seat to influence the exercise of  
10 those rights, they have not obtained property  
11 from the Port Authority. If that is not  
12 correct, then everything an official does is --  
13 falls within the scope of this statute, and the  
14 only question that is open is was there some  
15 deceit involved?

16 And if -- if that is right, I think  
17 the chilling effect on honest public servants is  
18 going to be severe.

19 JUSTICE KAGAN: Mr. Roth, you  
20 responded to one-half of their theory. One-half  
21 of their theory is the allocation of lanes.

22 MR. ROTH: Yes.

23 JUSTICE KAGAN: And the other half is  
24 the employee time.

25 MR. ROTH: Yes.

1 JUSTICE KAGAN: So what's your  
2 response to that?

3 MR. ROTH: My response to that, it's  
4 actually what he said at the end, which is that  
5 the incidental costs of a decision are not the  
6 -- are not its object. And it's what Your Honor  
7 asked in earlier question. The implementation  
8 of the regulatory decision is going to use some  
9 public resources. That cannot possibly change  
10 the result, or else Cleveland is a complete dead  
11 letter.

12 JUSTICE GINSBURG: Why do you call it  
13 incidental? I mean, it was essential to the  
14 scheme.

15 MR. ROTH: Because it's incidental,  
16 Your Honor, in that it -- it was the  
17 implementation cost. It flowed as -- as a  
18 result of the regulatory decision. The  
19 regulatory decision was to realign the lanes.  
20 That required some employee time in terms of  
21 taking tolls and studying the traffic effect,  
22 but that was not the object. That was how it  
23 got done.

24 JUSTICE ALITO: What if it cost a  
25 million dollars? Would it be incidental?

1                   MR. ROTH:  No -- yes, Your Honor.  It  
2                   would be a incidental.  It's not a de minimis  
3                   test.  It's a question of what is the object.  
4                   Thank you.

5                   CHIEF JUSTICE ROBERTS:  Thank you,  
6                   counsel.  The case is submitted.

7                   (Whereupon, at 11:12 a.m., the case  
8                   was submitted.)

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