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,                    )

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 5              v.                     ) No. 18-1059

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 7              Respondent.           )

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10              Washington, D.C.

11            Tuesday, January 14, 2020

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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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1   C O N T E N T S

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1   P R O C E E D I N G S

2   (10:12 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear

4   argument first this morning in Case 18-1059,

5   Kelly versus United States.

6   Mr. Roth.

7   ORAL ARGUMENT OF JACOB M. ROTH

8   ON BEHALF OF THE PETITIONER

9   MR. ROTH: Mr. Chief Justice, and may

10   it please the Court:

11   Once again, the government is trying

12   to use the open-ended federal fraud statutes to

13   enforce honest government at the state and local

14   levels. Its theory this time is that the

15   defendants committed property fraud by

16   reallocating two traffic lanes from one public

17   road to another without disclosing their real

18   political reason for doing so.

19   This theory turns the integrity of

20   every official action at every level of

21   government into a potential federal fraud

22   investigation. It end-runs McNally and Skilling

23   by subsuming honest services fraud within

24   property fraud and by criminalizing ulterior

25   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. Was he --

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 -- to consider that as a kickback, then

6   that would be honest services fraud. It would

7   not be property fraud, because, again, the

8   decision there is a -- is a decision about

9   allocating scarce public resources among public

10   uses.

11   Again, the concern in Your Honor's

12   hypothetical is, well, what -- was it a good

13   reason? Was it to benefit the public or was it

14   to benefit himself? And what this Court said in

15   Skilling is, if you make the decision because

16   you were paid a bribe or because you were going

17   to be getting a kickback, that is a violation of

18   your honest services -- your duty to provide

19   honest services to the public.

20   JUSTICE ALITO: What we're doing here

21   is interpreting a statute. And it's not quite

22   clear to me how your argument fits into the

23   language of this statute.

24   So property -- money is property. And

25   money was lost. So how does this fit into the

1   language of the mail fraud statute -- the wire

2   fraud statute?

3   MR. ROTH: So, Your Honor is correct,

4   the relevant word is "property" and the second

5   relevant word is "obtain." And this Court in

6   Cleveland explained that when the government is

7   making sovereign decisions in its capacity as

8   sovereign, implicating its regulatory interests,

9   that is not property within the meaning that

10   Congress had when it enacted --

11   JUSTICE ALITO: Was there a loss of

12   money in -- in Cleveland?

13   MR. ROTH: Well, there wasn't -- it's

14   not clear if there was lost property. Certainly

15   I would say there was an official in that case

16   who was processing the fraudulent application.

17   And if he had not been given the fraudulent

18   application to process, he would have been doing

19   useful work for the agency.

20   And maybe he would have gone home an

21   hour earlier and been paid a little bit less. I

22   don't think any of that would have mattered to

23   the result in Cleveland because it's -- all of

24   that --

25   JUSTICE ALITO: But still, how does it

1   fit in the statute? Is it that there isn't --

2   property isn't obtained when it is simply

3   wasted? Is it that -- does it -- is it a gloss

4   on the word "defraud"?

5   MR. ROTH: I -- I think it's two

6   steps, Your Honor. The first step is to

7   establish that the decision, the realignment, is

8   not property because that's control. That is

9   regulatory power.

10   The second step is to say: Well then

11   what about the costs of implementing it? And I

12   would say the costs of implementing it -- of

13   implementing that regulatory decision are part

14   and parcel of it and it's -- the scheme is not

15   to obtain that property.

16   The purpose of the -- the scheme, the

17   object of the scheme, is to effect this policy

18   decision, this regulatory decision, in the way

19   that the officials want.

20   JUSTICE KAGAN: So in the case of

21   sending city snowplows to -- to -- to clear your

22   own house first or sending city maintenance

23   people to paint your own house, if you're a

24   public official, I was under the impression that

25   you thought that that would be a crime.

1   Is that right?

2   MR. ROTH: If -- if the -- if you're

3   sending the public employees to do private work,

4   yes, absolutely. That's not regulatory. At

5   that point you're just taking the city property

6   and using it for private use, which is not --

7   that's -- that's -- you're obtaining the

8   property.

9   I would distinguish --

10   JUSTICE KAGAN: So even though --

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

12   JUSTICE KAGAN: -- both are diversions

13   of city resources or state resources, whatever

14   it is, it's just one is regulatory and one is

15   not because one involves personal benefit?

16   MR. ROTH: Personal use. Yes, Your

17   Honor. I mean, every -- every regulatory

18   decision diverts resources in some way. I mean,

19   every time a public official makes a decision,

20   there are implications for the bureaucracy and

21   there are implications for public property.

22   So there is diversion going on and

23   maybe the decision was made for a bad reason and

24   if it's a bad enough reason, maybe it's an

25   honest services violation.

1   JUSTICE KAVANAUGH: Is your theory

2   that the word "obtain" is what does the work in

3   response to Justice Kagan's hypothetical?

4   MR. ROTH: I think it's "obtaining

5   property" together. I don't necessarily think

6   it's one or the other. Cleveland focused on

7   property and what did Congress mean when it said

8   "property." I think it said, we are concerned

9   with cheating people out of their property

10   rights.

11   And you can do that with a government

12   entity. You can certainly cheat the government

13   out of its property, Pasquantino is the example

14   of that where the Court said, you owe tax -- you

15   owe taxes to the government, you lied to avoid

16   paying your taxes, you've committed property

17   fraud. The same, by the way, could occur in a

18   Port Authority situation.

19   You owe a toll and you lie to evade

20   paying the toll, you have cheated the government

21   out of property that it's owed. But if what

22   you're doing is making a regulatory decision

23   like allocating public resources among public

24   uses, and there's no question that the main line

25   is a public use, just as much as the special

1   access roads are a public use of the property,

2   that is not obtaining property.

3   JUSTICE ALITO: I can understand the

4   distinction between a regulatory decision and

5   the deprivation of property when the regulation

6   -- when the regulatory decision doesn't cause a

7   loss of property, but when the regulatory

8   decision cause a loss of property, I -- I find

9   it more difficult to see the distinction.

10   MR. ROTH: Well, Your Honor --

11   JUSTICE ALITO: Explain it to me.

12   MR. ROTH: Your Honor, I think that

13   every regulatory decision is going to have some

14   consequences for public employee -- employee

15   time, for example, which is the species of

16   property that the government has invoked.

17   But in this case -- let's take this

18   case, just as an example. What they focus on --

19   the additional money that was spent was the toll

20   keeper. The toll keeper had to do an additional

21   shift. But the toll keeper was doing her job of

22   collecting tolls for the public.

23   So the Port Authority was not deprived

24   of her salary. She was earning her salary.

25   The -- the objection is, if this regulatory

 1   decision had not been made, we would not have

 2   had to hire that toll keeper for that work.

 3   JUSTICE ALITO: Right. Well, I'll try

 4   this one last time. Tell me how this fits in --

 5   when we write the opinion, if we were to write

 6   one in your favor, how would we explain your

 7   result within the language of the statute?

 8   MR. ROTH: I think the Court would say

 9   the statute prohibits schemes to obtain property

10   when you are using deceit to influence a

11   regulatory decision, to change a regulatory

12   decision, that is not obtaining property, and,

13   in the corollary, that's important, is the costs

14   of implementing a regulatory decision don't

15   change the result.

16   JUSTICE KAGAN: I think I'll try mine

17   once more too, Mr. Roth. Why when a public

18   official says you -- to a city maintenance

19   worker, you should paint my house before you do

20   anything else, why isn't that similarly an

21   allocation of resources?

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

23   JUSTICE KAGAN: I mean --

24   MR. ROTH: -- of government --

25   JUSTICE KAGAN: -- it benefits me --

1   MR. ROTH: Right, but --

2   JUSTICE KAGAN: -- but, you know, I --

3   I get to send, whether it's painting or

4   snowplows, you know, you -- you -- you go plow

5   my street first.

6   MR. ROTH: Right.

7   JUSTICE KAGAN: Why isn't that an

8   allocation --

9   MR. ROTH: So, so --

10   JUSTICE KAGAN: -- of city resources?

11   MR. ROTH: Let me try to clarify

12   because I think I may be -- I may have led to

13   some confusion. If you're plowing public road,

14   and you say I want to plow my street first or my

15   neighborhood first, that is not obtaining

16   property by fraud because that is an allocation

17   of resources to a public use. It's a public use

18   that happens to benefit you and maybe that was

19   your motive and that's very bad, but it's not

20   obtaining property by fraud.

21   If you instead trick the public

22   employees not into plowing the public road but

23   into plowing your private drive -- driveway,

24   which is not the job of the government, right,

25   that's not what the government does, the

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 1    government is concerned with public property and

 2    clearing public property.

 3            If you trick the -- the employees into

 4    plowing your private driveway, then you have

 5    taken their services for your personal use,

 6    which is fundamentally different.  That's no

 7    different from saying, I worked overtime when

 8    you didn't.  Please pay me, you know, my hourly

 9    wage for the hour time that I didn't work.

10            JUSTICE KAGAN:  And that difference

11    is, just to go back to Justice Alito's question,

12    where in the statute?

13            MR. ROTH:  The difference is in the

14    scheme to obtain property.  That's -- that's

15    where it is in the statute.  And so you look at

16    what is the object of the scheme.

17            And if the object of the scheme is to

18    influence a regulatory decision, it's not a

19    scheme to obtain property under -- that's --

20    just follows from Cleveland.  Otherwise every

21    decision that public official makes is on the

22    table and the only thing that is separated --

23            JUSTICE SOTOMAYOR:  I'm sorry, I

24    thought the scheme was to make life difficult

25    for Fort Lee.  If that was the scheme, and you
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1   defrauded the use of government property to

2   accomplish your goal, why is that any different

3   than taking the maintenance worker to plow your

4   road, your private street?

5   MR. ROTH: Your Honor, the difference

6   is that here the alleged purpose, the alleged

7   motive was what Your Honor said, right, to

8   increase traffic --

9   JUSTICE SOTOMAYOR: That was the

10   scheme.

11   MR. ROTH: Yeah. The scheme was to do

12   that through a regulatory decision, right, by

13   realigning the lanes from one public use to

14   another public use.

15   So what we're -- what the objection is

16   to the conduct here is an objection to the

17   purpose, not the objective use of the property.

18   That's the difference.

19   JUSTICE SOTOMAYOR: My -- my problem

20   is, it's -- I don't think -- I can see a

21   headline that would say it's okay for officials

22   to use government public money in a way that is

23   plainly unauthorized, not just in its motives

24   but it's in end use, and an official can and

25   should not be -- should never be liable for

1   that. Our public officials now can use

2   government resources --

3   MR. ROTH: Your -- Your --

4   JUSTICE SOTOMAYOR: -- for their

5   private ends.

6   MR. ROTH: -- Honor -- right. But,

7   Your Honor, all -- all --

8   JUSTICE SOTOMAYOR: Not mixed motive,

9   which is the interesting question here with the

10   traffic study and whether you have enough --

11   whether they have enough evidence that there

12   wasn't a traffic study, but you're saying when

13   it was -- and what the government has said,

14   you're not authorized to do it, there's a

15   question about that.

16   MR. ROTH: Yeah.

17   JUSTICE SOTOMAYOR: And you didn't

18   have even a mixed motive. You had only a

19   personal motive.

20   MR. ROTH: So, Your Honor, I'll let

21   Mr. Levy speak a little bit more at length about

22   unauthorized because actually the government's

23   theory throughout the case was that he did have

24   the authority and that he abused his power by

25   making the decision.

1   JUSTICE SOTOMAYOR: A much more

2   difficult question.

3   MR. ROTH: Yeah.

4   JUSTICE SOTOMAYOR: Yes.

5   MR. ROTH: But what I will say is I'm

6   not trying to suggest that this is okay. Okay?

7   We don't want public officials acting for

8   personal reasons. We don't want them acting

9   necessarily for partisan or political reasons.

10   But what I'm saying is the remedy for

11   that is not the federal property fraud statutes.

12   We have certainly political remedies that were

13   very much -- had pretty substantial

14   repercussions here. There may also be state law

15   constraints on official abuses of authority. In

16   fact, New Jersey has a statute called "Official

17   Misconduct" that is specifically directed toward

18   unauthorized decisions with bad purposes.

19   That's not what the federal property

20   fraud statute is concerned with. The federal

21   property fraud statute is concerned with

22   cheating the government out of its property

23   rights. And that's just not what we have here.

24   What we have here is an abuse of power, a

25   political abuse of power, and -- and that's --

1   if anything, again, that sounds in honest

2   services fraud, which this Court has limited,

3   due to vagueness concerns, to bribes and

4   kickbacks.

5   Your Honor, if there are no further

6   questions, thank you.

7   CHIEF JUSTICE ROBERTS: Thank you,

8   counsel.

9   Mr. Levy.

10   ORAL ARGUMENT OF MICHAEL LEVY

11   FOR RESPONDENT WILLIAM E. BARONI, JR.

12   IN SUPPORT OF THE PETITIONER

13   MR. LEVY: Mr. Chief Justice, and may

14   it please the Court:

15   A public official who is acting

16   politically and not for personal gain does not

17   commit fraud by lying about his reason for an

18   official decision if the decision was generally

19   within his authority. The government disputed

20   that below but now urges that as the rule in

21   this Court.

22   That concession requires reversal.

23   The government alleged and proved that

24   Mr. Baroni was the co-head of the Port

25   Authority, responsible for supervising all

1   aspects of its operations. The government

2   itself elicited that there was never any policy

3   that precluded Mr. Baroni from using his plenary

4   authority to alter a traffic pattern.

5   For the government's rule to work,

6   this Court should require an objectively clear

7   lack of authority, something not even arguably

8   shown here. Otherwise, any official who

9   conceals his political motivation risks being

10   convicted of fraud if a prosecutor or jury later

11   disagrees about the scope of his authority. If

12   the government's rule is to provide any limits,

13   this case must lie beyond those limits.

14   I'd like to begin by discussing what

15   the government alleged, argued, and proved below

16   about Mr. Baroni's authority before it decided

17   in this Court that an official's authority is

18   the line between guilt and innocence under the

19   fraud statutes.

20   In the district court, the government

21   alleged in the indictment that Mr. Baroni was

22   responsible for the general supervision of all

23   aspects of Port Authority business, including

24   the operations of its transportation facilities.

25   From its main cooperating witness,

 1   Mr. Wildstein, the government elicited that

 2   exact statement precisely, ticking off one of

 3   the allegations from the indictment. It

 4   elicited from Mr. Wildstein that the -- that the

 5   title "deputy executive director" was a

 6   misnomer; that within the Port Authority

 7   structure, the deputy executive director and the

 8   executive director had a 50/50 -- 50/50 split in

 9   terms of power sharing; that the deputy

10   executive director was not the Number 2 position

11   within the Port Authority. That's from the

12   government's eliciting from its own cooperating

13   witness.

14   The government also --

15   JUSTICE ALITO: The -- the arrangement

16   is always that the -- there's a New York

17   representative who's the executive director and

18   the New Jersey representative who's the deputy;

19   is that right?

20   MR. LEVY: That was at the time the --

21   the arrangement. It was -- it was always

22   appointed by the governor of New Jersey for the

23   deputy executive director, and the governor of

24   New York for the executive director. And it was

25   understood within the agency by everyone, every

1   -- all the witnesses the government called,

2   testified that that was the arrangement. They

3   called Mr. Baroni's successor, who testified

4   that that was the arrangement, that the one did

5   not report to the other and that that --

6   JUSTICE ALITO: And this is -- this is

7   a bi-state agency. Why -- why would New Jersey

8   agree to an arrangement like that where its

9   representative is always in the second seat, at

10   least -- at least nominally -- nominally? Is it

11   just the -- the big brother across the river; is

12   that the --

13   MR. LEVY: I don't know the answer to

14   that except that the -- the structure within the

15   Port Authority was that that was not the case.

16   So they, in fact, as it actually played out,

17   didn't agree to play second fiddle. It was

18   understood that within the Port Authority, the

19   deputy executive director had equal authority.

20   The vice chairman testified about

21   these parallel chains of -- of command that were

22   understood. Particularly for -- for decisions

23   made within New Jersey, it was understood that

24   that would fall within the deputy executive

25   director's scope of authority.

1   JUSTICE SOTOMAYOR: I think one of the

2   government's main arguments for -- on the

3   sufficiency of the evidence, which is fairly

4   pro-government, and in this situation, was that

5   Mr. Wildstein had to lie to the Port Authority

6   employees about the executive director knowing

7   about this lane change.

8   If, in fact, the reality of the

9   situation was that Mr. Baroni couldn't do this

10   without the executive director's acquiescence or

11   acceptance, doesn't that show his lack of

12   authority? Isn't that -- why isn't that

13   sufficient evidence?

14   MR. LEVY: So -- so two things, Your

15   Honor. First of all, I don't believe we're here

16   on a sufficiency ground and -- for reasons we

17   argued in our reply brief. But, even within

18   that, we're not saying the lie might not be a

19   piece of evidence, but even the government

20   concedes in this case that the lie does not show

21   a lack of authority.

22   The government concedes that an

23   authorized official is permitted to lie to their

24   subordinates. And so it cannot be that,

25   circularly, that lie automatically establishes

1   the lack of authority. Here, all of the

2   evidence at trial was that Mr. Baroni had

3   plenary authority over the operations of the

4   Port Authority.

5   Mr. Wildstein actually testified --

6   his first answer when he was asked why did you

7   come up with this traffic study, his first

8   answer was: For purposes of the media and for

9   purposes of explaining it to local officials.

10   When pressed by the government, he said: Also

11   to give a reason to -- to career officials. But

12   the fact that he has to -- not that he has to --

13   that he chooses to tell a lie to career

14   officials to -- to make this go over more

15   smoothly in the same way that a public official

16   wouldn't tell the world that they're doing

17   something for a political reason.

18   JUSTICE SOTOMAYOR: Would you spend a

19   moment on the traffic study?

20   MR. LEVY: Certainly, Your Honor. The

21   -- the government has conceded that if Mr. --

22   and, again, this is new in this Court, all of

23   these concessions -- that if Mr. Baroni had

24   authority to order a traffic study, then he

25   could do so even with the intention of causing

 1   traffic in Fort Lee. And they concede that he

 2   had the authority to order a traffic study. So

 3   all of that is conceded.

 4   What they say is he lied about the

 5   existence of a traffic study. And as we point

 6   out in our reply brief, there was no lie about

 7   the existence of a traffic study. There was no

 8   representation at all about the existence of a

 9   traffic study.

10   Mr. Wildstein went to the bridge

11   supervisors and told them: I would like to know

12   what will happen, what the effect on traffic

13   will be, if we switch these three lanes. Please

14   switch these three lanes -- or maybe not with

15   the "please" -- and -- and study the results.

16   Collect the numbers and tell me what the results

17   are.

18   The only part of that as a

19   representation is the first part: I would like

20   to know, my motivation is, my purpose is. And

21   the government agrees that's not capable of

22   being the lie for purposes of a fraud

23   conviction, a money and property fraud

24   conviction.

25   The other two parts are an

1   instruction. They were an instruction to do a

2   traffic study. And the employees at the Port

3   Authority did that. That's what the government

4   spent a great deal of time at trial proving, is

5   that money was spent on a traffic study that

6   they say was illegitimate because nobody ever

7   cared about the results.

8   But the government agrees now that

9   caring about the results is not an issue. They

10   say the traffic study didn't exist. And that's

11   just flatly contrary to --

12   JUSTICE KAGAN: Mr. Levy --

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

14   JUSTICE KAGAN: -- is it your position

15   that -- suppose Mr. Baroni had said I'm giving

16   you no reason at all or suppose Mr. Baroni had

17   said we're going to do a traffic study, but it's

18   going to be a sham traffic study.

19   Would he still have had authority?

20   MR. LEVY: Certainly, the first one.

21   He certainly had at any point the discretion to

22   say, as somebody had done very early on in

23   creating these three traffic lanes -- they

24   weren't required by anything -- at any point in

25   time could -- could have said I think they

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 1    should have a fourth or I think they should have
 2    only two or only one.  And that was fully within
 3    his authority.  And as the government argued and
 4    proved this case below, that was their point,
 5    that was their summation, was he abused the
 6    authority he was entrusted with.
 7              JUSTICE KAGAN:  And the second, we're
 8    going to do a sham traffic study?
 9              MR. LEVY:  I -- I think he can -- he
10    can do that.  I think, as a functional matter,
11    who knows what actually results from that, but,
12    yes, he has the authority to say we're going to
13    do a traffic study because I want to do this
14    thing and -- and for public reasons, it's easier
15    to do a traffic study.
16              JUSTICE KAGAN:  And you said that this
17    was not a sufficiency question.  But what is it
18    if it's not a sufficiency question because, as I
19    understand your arguments, you're not pointing
20    to any instruction that was incorrect or to --
21    to the rejection of an instruction that you
22    offered, so how are we to look at this other
23    than through a sufficiency lens?
24              MR. LEVY:  Frankly, the -- the -- the
25    most obvious way to do is as a government
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1   forfeiture of the issue. The -- the defendants

2   in the district court said the line is authority

3   and if we were authorized, then -- then that is

4   a complete defense and the government told the

5   district court do not give that instruction.

6   And the district court said, I'm not

7   giving that instruction because it is not a

8   defense and I don't want to confuse the jury

9   into believing it is.

10   Now, in this Court, the government is

11   saying, actually, it turns out the hinge between

12   guilt and innocence is whether or not he was

13   authorized and we get the benefit of a

14   sufficiency of the evidence deferential review,

15   even though we told the district court that this

16   issue didn't matter at all.

17   The government has forfeited the

18   opportunity to prove that Mr. Baroni lacked

19   authority. We offered to have that fight in the

20   district court and they said it didn't matter.

21   Now, in this Court, this Court should

22   assume that there was no lack of --

23   JUSTICE ALITO: Is there --

24   MR. LEVY: -- authority.

25   JUSTICE ALITO: -- any -- any reason

1   to think that the jury actually made a finding

2   about Baroni's authority?

3   MR. LEVY: No, there is no reason

4   whatsoever. The -- the district court was

5   attempting to make sure that they didn't

6   consider that to be relevant or that -- that was

7   what we pressed, was this is the relevant

8   distinction and the district court wanted to be

9   sure that the jury did not believe that it would

10   be a defense.

11   And nothing in the -- in the jury

12   instructions suggested that it would be a

13   defense. Thank you.

14   CHIEF JUSTICE ROBERTS: Thank you,

15   counsel.

16   Mr. Feigin.

17   ORAL ARGUMENT OF ERIC J. FEIGIN

18   ON BEHALF OF THE RESPONDENT

19   MR. FEIGIN: Thank you, Mr. Chief

20   Justice and may it please the Court:

21   The defendants in this case committed

22   fraud by telling a lie to take control over the

23   physical access lanes to the George Washington

24   Bridge and the employee resources necessary to

25   realign them. Unless they lied about the

1   existence of a Port Authority traffic study,

2   none of them had the power to direct those

3   resources and realign the lanes.

4   Because they told that lie, those

5   resources were answering to them, to their own

6   private purposes rather than to the public

7   officials who were duly appointed to decide what

8   those resources should be allocated to do.

9   Their actions in this case were fraud

10   in just the same way that it would be fraud for

11   someone with no connection to the Port Authority

12   to impersonate Port Authority supervisors and

13   order Port Authority employees to realign Port

14   Authority lanes.

15   Or if we want to put this in the

16   private context: For someone to usurp the

17   authority by deception of a taxicab company's

18   dispatcher and order the cabs and the drivers to

19   go wherever the fraudster pleases.

20   They don't get a free pass simply

21   because Baroni worked for the Port Authority

22   when the evidence showed that he didn't have the

23   power to direct these resources in this way

24   without telling the lie.

25   They don't get a free pass because

 1   they're hypothesizing that legitimate

 2   decision-makers might, in theory, have decided

 3   to realign the lanes when the precise point of

 4   their scheme was to take these resources out of

 5   the legitimate decision-maker's hands and put

 6   them into their own hands.

 7   And they don't get a free pass simply

 8   because their motive happened to be political.

 9   Let me start with the legal argument that was

10   made by Kelly's counsel, which seems to be

11   drawing a distinction between public uses and

12   private uses. And I think there are two main

13   problems with that.

14   Actually, probably three. One is, I

15   don't see where a license for that is in the

16   statute. And that gets me right to the second

17   problem, which is that it seems to draw a

18   distinction between fraud where the victim is a

19   public entity and fraud where the victim is a

20   private entity. And the Court rejected that

21   distinction in Pasquantino.

22   I don't know in the taxicab

23   hypothetical what it means to say that it's only

24   fraud if those cabs then go to private use.

25   It's a -- we're talking about a private company

1   in that context.

2   And the third problem is, I don't know

3   how a jury -- I -- I think some justices on this

4   Court were grappling with this -- I don't know

5   how a jury decides the difference between a

6   public and a private use.

7   JUSTICE BREYER: How -- how --

8   MR. FEIGIN: There can be --

9   JUSTICE BREYER: -- do you -- I mean,

10   you have two separate points, I think. One --

11   one is your statement now, which I think is

12   stronger than in your brief, that if you have

13   authority and you work for a government, only if

14   you say and tell them a lie, an untruth, then

15   you don't have authority.

16   My goodness, the Code of Federal

17   Regulations, the rules of any department, the --

18   I mean, the government is filled with rules.

19   And there are numerous instances where a person

20   might say something untrue about something

21   related to a rule that gives him authority for

22   that. That's enough to take -- we're -- we're

23   back to honest services. And that's also true

24   of the second.

25   If, in fact, I can -- there are two

1   separate parts to the second, I might as well

2   get both questions out, is that fair? The one

3   on authority is I -- I don't know where that

4   comes from. But if you have authority to do

5   something in government, but you can't or you

6   lie about some -- anything, that wouldn't -- you

7   wouldn't without it, well, then you're in the

8   property stealing statute.

9   And the second problem with your

10   second claim is, if you don't have authority,

11   but you put what you take to a public use --

12   now, either that is, does, is -- is -- is -- is

13   a conversion of property and -- a -- a --

14   obtaining of property within the statute or it

15   isn't.

16   If it is, I don't see how honest

17   services fraud is not back in the statute, which

18   has been ruled out since McNally. And if it

19   isn't, I don't see how this case works.

20   MR. FEIGIN: Well, Your Honor, let me

21   answer the second part of your question first

22   and then I'll try to get back to the first part.

23   To answer the second part of your question, I

24   don't -- as I was saying, I don't think there's

25   a distinction between private and public uses

1   works, because that's not a distinction that the

2   statute draws. It's not a distinction --

3   JUSTICE BREYER: Well, then --

4   MR. FEIGIN: -- you can draw --

5   JUSTICE BREYER: -- we're back to --

6   MR. FEIGIN: -- with public entities

7   --

8   JUSTICE BREYER: My point was --

9   MR. FEIGIN: -- and --

10   JUSTICE BREYER: -- why then -- we're

11   back to honest services.

12   MR. FEIGIN: So --

13   JUSTICE BREYER: There is no

14   deprivation --

15   MR. FEIGIN: But that's --

16   JUSTICE BREYER: -- of honest services

17   that does not require somebody in the government

18   to spend some time or use some paper or use a

19   telephone in order to achieve that dishonest

20   thing, all right?

21   If you're going to count that as

22   property, well, fine, you could do it, I guess

23   under some statute, but if you do it under this

24   statute, this statute then prohibits the taking

25   of dishonest services, exactly what the Court

1   has held it doesn't do.

2   MR. FEIGIN: So, Your Honor, if -- if

3   I might answer that, it will take me a second to

4   play this out, but I think it's a very important

5   distinction. They're trying to lump a bunch of

6   different kinds of frauds together and make them

7   all sound as if they're the same. This case is

8   about a very specific kind of fraud,

9   commandeering fraud.

10   It is when the defendant tries to take

11   over property that is in the hands of the victim

12   and manage it as if it is his own property.

13   That's what they were doing with the lanes on

14   the bridge and the employee resources.

15   So, for example, if there's a snowplow

16   sitting there and I take the keys to the

17   snowplow and I drive off in the snowplow,

18   everyone would agree that I've obtained the

19   snowplow.

20   If I instead put on one of those masks

21   from the mission impossible TV show or the movie

22   and I impersonate the boss of the snowplow

23   driver and I tell the snowplow driver to drive

24   around in the snowplow and do the exact same

25   thing that I was going to do, I have obtained

1   the snowplow and the driver services by fraud.

2   CHIEF JUSTICE ROBERTS: Well, but --

3   but --

4   MR. FEIGIN: But not every fraudulent

5   scheme and not every deceptive scheme works that

6   way. Sometimes there are deceptive schemes in

7   which somebody simply wants an agency to do

8   something or wants a private victim to do

9   something on his behalf. And then you have to

10   look at what is actually the object of the

11   scheme and how the scheme works to see if the

12   agency is deprived of property. So --

13   CHIEF JUSTICE ROBERTS: But the basic

14   difference between the taking the snowplow is

15   that the official has no authority to take the

16   snowplow for his private uses. The official

17   does have authority to regulate how lanes are

18   used on -- on the -- on the highway and say

19   these are going to be used for Fort Lee, these

20   aren't.

21   MR. FEIGIN: Well, first of all, Your

22   Honor, Baroni did not have that authority in

23   this case, and --

24   CHIEF JUSTICE ROBERTS: Well, that's

25   --

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

 2      evidence --

 3              CHIEF JUSTICE ROBERTS:  -- disputed.

 4              MR. FEIGIN:  I can get to the -- I can

 5      get to the evidence of that in a second.  But

 6      also I -- I don't think that it's fair to call

 7      this a public use.  What we would say is a

 8      public use is the use to which the legitimate

 9      supervisors of the Port Authority have decided

10      to put the Port Authority --

11              CHIEF JUSTICE ROBERTS:  Okay.  So what

12      you're saying, your theory is that by the

13      actions in this case, they have commandeered the

14      lanes on the expressway?

15              MR. FEIGIN:  Yes, Your Honor.

16      That's -- they commandeered the lanes and the

17      resources necessary to reallocate.

18              CHIEF JUSTICE ROBERTS:  They're still

19      being used for public purposes.

20              MR. FEIGIN:  Your Honor, I'm not sure

21      what they mean when they say they are being used

22      for public purposes.  So if --

23              CHIEF JUSTICE ROBERTS:  Because if

24      other people want to use the highway to get to

25      Fort Lee, they can.
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1               MR. FEIGIN:  So --

2               CHIEF JUSTICE ROBERTS:  They have

3     nothing to do with the scheme at all.

4               MR. FEIGIN:  So, Your Honor, I -- I

5     guess I would -- I would push back on this to

6     this extent.  If they decided to close the

7     bridge, is that a public use or private use?  If

8     they decide that only Kelly can use that lane,

9     is that a public use or a private use?  If they

10    decide that only red cars can go down that lane,

11    is that public or private use?

12              JUSTICE BREYER:  They didn't decide

13    any of those things.

14              MR. FEIGIN:  Well --

15              JUSTICE BREYER:  They said anybody.

16    It was just a problem getting there --

17              MR. FEIGIN:  Well, Your Honor --

18              JUSTICE BREYER:  -- which was quite a

19    problem, I grant you.  Quite a problem.  But

20    they used it for cars going down.  Well,

21    snowplow.

22              MR. FEIGIN:  Well, Your Honor --

23              JUSTICE BREYER:  Hey, there's a law

24    here, a rule, a rule, no, a rule:  Treat every

25    street alike.  And you know what the snowplow
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1   operator did? He snowplowed the mayor's street

2   first.

3   Now, that is not a good thing to do.

4   It is really undesirable. And maybe it should

5   be a crime. But 30 years in prison? That, I'm

6   not sure. And that's -- this statute has to do

7   with property fraud. And is taking the snowplow

8   and putting it to the use of the public streets

9   in violation of a rule, treating the mayor

10   better -- is that a property crime?

11   MR. FEIGIN: Your Honor, in that --

12   in that law -- in that hypothetical, there is --

13   we would not say that is fraud. There is no

14   lie. There's nothing material. There's --

15   JUSTICE BREYER: Oh, of course, there

16   is.

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

18   JUSTICE BREYER: My -- my where are

19   you going? I am going to Fifth Street first,

20   and then I will go to the grocery store down the

21   street --

22   MR. FEIGIN: Yeah.

23   JUSTICE BREYER: --- and then I -- Ah.

24   And you know what he did? He went to the city

25   councilman's street. All right? There's a lie.

1   It's easy to make up cases that there's a lie

2   in, and that's my problem, same problem. We're

3   back into honest services fraud, which is fraud

4   and bad. And -- and the question is does this

5   statute get it?

6   MR. FEIGIN: We are not in honest

7   services fraud, Your Honor. First of all, the

8   lie in your hypothetical was not a lie that was

9   told to obtain property. It was just a lie

10   about what he was going to do.

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

12   JUSTICE BREYER: They wouldn't have --

13   MR. FEIGIN: -- honest services

14   fraud --

15   JUSTICE BREYER: They wouldn't have

16   given it to him if they --

17   MR. FEIGIN: In -- in the honest

18   services frauds -- fraud cases, in McNally, for

19   example, there was no dispute that the

20   defendants in McNally had the authority to

21   decide who was going to insure the State of

22   Kentucky.

23   JUSTICE BREYER: Well --

24   MR. FEIGIN: The problem was --

25   JUSTICE ALITO: Mr. Feigin, that --

1   this is what troubles me about your -- your

2   argument. Your argument is that, if Baroni was

3   authorized, he could not be convicted; am I

4   right?

5   MR. FEIGIN: Yes --

6   JUSTICE ALITO: If he had the

7   authority --

8   MR. FEIGIN: -- if Baroni had the

9   authority to do what he did, then he's not

10   committing fraud.

11   JUSTICE ALITO: All right. And you

12   say --

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

14   JUSTICE ALITO: Okay. And -- and you

15   say that takes care of a lot of these

16   hypotheticals that seem -- that are disturbing

17   to some people. And you say: But the jury

18   found that he was authorized, and there's

19   sufficient evidence to support that finding.

20   That's the --

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

22   authorized --

23   JUSTICE ALITO: I'm sorry. The jury

24   found --

25   MR. FEIGIN: Yes.

1   JUSTICE ALITO: -- he was not

2   authorized, and there's sufficient --

3   MR. FEIGIN: That's correct.

4   JUSTICE ALITO: -- evidence, viewing

5   the evidence in the light most favorable to the

6   verdict to support the finding.

7   But I see no indication whatsoever, no

8   reason to believe the jury made any such

9   finding. I've read these jury instructions

10   several times. There's nothing in there that

11   would alert a jury, a juror, to the obligation

12   to find that Baroni was unauthorized, unless I

13   missed something.

14   MR. FEIGIN: Let me say a couple

15   things about that. One, they did not make an

16   objection to the jury instructions properly

17   either -- in the court of appeals. It's not

18   part of the --

19   JUSTICE ALITO: No, I --

20   MR. FEIGIN: -- question presented

21   here.

22   JUSTICE ALITO: I know that. But I've

23   never --

24   MR. FEIGIN: Okay.

25   JUSTICE ALITO: -- I've never seen a

1   criminal case where we're asked to defer to a

2   jury's finding on something that the jury didn't

3   find. Putting aside the question of whether

4   there's any evidence to show that he lacked

5   authority.

6   MR. FEIGIN: So let me point you to a

7   -- a couple of places, and then let me talk a

8   little about the evidence of lack of authority.

9   First of all, there's the instruction

10   that the court of appeals deemed adequate, and

11   that's at page 875 of the Joint Appendix, which

12   is the instruction on obtaining property, which

13   the court of appeals deemed sufficient to notify

14   the jury that when someone is acting on behalf

15   of an organization, acting as the agent of that

16   organization, he's not obtaining property when

17   he exercises the authority that the agency is

18   duly conferred on him.

19   But even better than that is the

20   materiality instruction from pages 875 to 876,

21   which says that if you find that the

22   representation that the lane and toll booth

23   reductions was for the purpose of a -- for the

24   -- was for the purpose of a traffic study was

25   false, you must determine whether that

1 representation was one that a reasonable person

2 might have considered important in making his or

3 her decision to commit Port Authority resources

4 for that endeavor, including services of Port

5 Authority personnel.

6   JUSTICE ALITO: What -- what does

7 that --

8   MR. FEIGIN: That --

9   JUSTICE ALITO: What does that say

10 about authorize -- about authority to --

11   MR. FEIGIN: Your Honor, if --

12   JUSTICE ALITO: -- to reallocate the

13 lanes?

14   MR. FEIGIN: If Baroni actually had

15 the authority to reallocate the lanes for any

16 reason or no reason, as his counsel just stated

17 to this Court that he did, I don't see how the

18 jury could have found that the lies that they

19 told were material. Baroni --

20   JUSTICE SOTOMAYOR: Mr. Feigin,

21 everybody has authority to spend or do their act

22 on behalf of the agency. Anybody who does it

23 for their own personal purposes is unauthorized.

24 So it's meaningless to say is he authorized or

25 not. Did he have authority to close the lanes

1   under certain circumstances?

2   MR. FEIGIN: Well, Your Honor, I

3   don't --

4   JUSTICE SOTOMAYOR: Did he have

5   authority to close the lanes on his own say?

6   MR. FEIGIN: He might have, Your

7   Honor. What he didn't have --

8   JUSTICE SOTOMAYOR: Did you prove --

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

10   JUSTICE SOTOMAYOR: -- that -- did you

11   prove that he had limited authority? Where did

12   you prove that?

13   MR. FEIGIN: We proved that he did not

14   have the authority to close the lanes under

15   these circumstances without telling the lie.

16   And I -- I can explain why if you would like.

17   In -- when Wildstein proposed the idea

18   of realigning the lanes, Baroni's immediate

19   response was to ask Wildstein how he was going

20   to do that. Wildstein then came up with the

21   idea that they would have a traffic cover story

22   -- the cover story of a traffic study, and he

23   explained at the time to Kelly that one purpose

24   of the traffic study cover story was in order to

25   enlist the Port Authority officials that they

1   would need in order to realign the lanes.

2   He then had to lie to both the manager

3   of the George Washington Bridge and the manager

4   of tunnels, bridges, and terminals that the

5   executive director was aware of this and

6   apparently had tacitly approved of it; where, in

7   fact, they were absolutely concealing it from

8   the executive director.

9   JUSTICE SOTOMAYOR: By the way --

10   MR. FEIGIN: Wildstein --

11   JUSTICE SOTOMAYOR: -- if -- if,

12   contrary to the -- their expectations, there had

13   been no slowing of traffic and, in fact, the

14   lanes on one-lane traffic remained the same or

15   maybe improved, would you still have a case

16   here?

17   MR. FEIGIN: Yes, Your Honor. It's

18   not about the effect of --

19   JUSTICE SOTOMAYOR: And so --

20   MR. FEIGIN: -- although the effect

21   was catastrophic and that was a reason why the

22   prosecution was brought, because of the

23   incredible danger in which they put the citizens

24   and commuters of Fort Lee, but they would still

25   have committed the same crime.

1   And they were hiding it from the

2   executive director. Wildstein testified

3   directly that there were processes in place to

4   use the Port Authority resources, and he didn't

5   follow them. And when the executive director

6   found out, he immediately canceled it and he

7   stated that the process had been "subverted."

8   JUSTICE KAGAN: Mr. Feigin --

9   MR. FEIGIN: Now, Baroni clearly had

10   significant authority within the Port Authority

11   organization, but when someone questions how

12   they're going to do something, has no idea how

13   he's going to do something, and has to lie in

14   order to accomplish it, has to lie that his boss

15   has approved it, has to conceal it from his boss

16   and has to avoid every legitimate --

17   JUSTICE ALITO: But isn't it --

18   MR. FEIGIN: -- process verification.

19   JUSTICE ALITO: -- isn't it often the

20   case that somebody who has the authority to do

21   something may lie about why the person is doing

22   the thing because, if the real reason was

23   exposed, there would be -- it would cause a

24   furor, people would be angry, but that doesn't

25   show the person doesn't have the authority to do

 1   it.

 2   A person hires his brother-in-law for

 3   a position. Why did you hire this particular

 4   person? Well, this person is the very best

 5   qualified person for this job. When the real

 6   reason is his wife wants him to do it.

 7   (Laughter.)

 8   JUSTICE ALITO: He doesn't want to say

 9   it. Does that show he didn't have the authority

10   to fill this position?

11   MR. FEIGIN: No, Your Honor, then --

12   but that's not the only piece of evidence we're

13   relying on, and it's a different kind of lie.

14   This isn't a lie about why they're doing it.

15   This is a lie that Wildstein directly testified

16   that they needed to tell in order to get the

17   resources that they -- that they needed.

18   It was clearly important to the George

19   Washington Bridge manager and the manager of

20   tunnels, bridges, and terminals. This was

21   something the executive director knew about.

22   Both the executive director and the vice

23   chairman of the Port Authority Board of

24   Commissioners testified that they would expect

25   to be notified about something that was even an

1   order of magnitude less disruptive than this was

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

3   JUSTICE BREYER: Why --

4   JUSTICE KAGAN: Mr. Feigin --

5   JUSTICE BREYER: What do you do about

6   this, this is the same, but I don't want to lose

7   what the question was in light of the

8   instructions given.

9   And what I have so far found is that

10   the defense did ask the jury to be instructed to

11   do just what you want. They asked the jury --

12   they said: Judge, tell the jury that if the

13   Port Authority granted or bestowed on the

14   defendants the power or authority to control the

15   property, the bridge, et cetera, and that they

16   acted within the bounds of that authority, then

17   you can't find the scheme to defraud.

18   I think you agree with that. And the

19   problem is the judge said no, I won't give that

20   instruction. Then what the judge gave as an

21   instruction -- insofar as the court of

22   appeals -- and we're reviewing the court of

23   appeals. Insofar as the court of appeals said,

24   well, they gave the essence of it, this was the

25   instruction supposed to be the essence of it.

1   To establish a scheme to defraud, the

2   government must also prove that the scheme

3   contemplated depriving the authority -- the Port

4   Authority, the port people, of money and

5   property. What?

6   That's the essence of what he didn't

7   give? Now, I -- I -- I haven't read the two

8   instructions you read, but the one that I read,

9   I think, is the one that the court of appeals

10   relied upon.

11   MR. FEIGIN: So, Your Honor --

12   JUSTICE BREYER: So what do we do

13   about that?

14   MR. FEIGIN: Well, Your Honor, I would

15   look back at the materiality instruction I was

16   discussing with Justice --

17   JUSTICE BREYER: Yeah.

18   MR. FEIGIN: -- Alito.

19   JUSTICE BREYER: But that isn't what

20   the court of appeals relied on.

21   MR. FEIGIN: Well, Your Honor, I think

22   if the court of appeals got the substance of it

23   right, and you don't agree with its particular

24   reasoning, there is no reason to reverse,

25   particularly when the question hasn't even been

 1   presented to this Court.

 2   This question -- this point was only

 3   really raised in the reply brief of Baroni who

 4   didn't even petition. But let me address the

 5   authority instruction that was rejected by the

 6   district court directly.

 7   That instruction was proposed in the

 8   context primarily of an instruction on 18 U.S.C.

 9   666, which is the more general misappropriation

10   of federal funds statute. And the instruction

11   on that, which appears at page 870 of the Joint

12   Appendix, already itself contains a reference to

13   authority.

14   Both the government and the district

15   court were quite clear in the district court --

16   and you'll see this finding by both the court of

17   appeals and the district court -- that Baroni

18   and Kelly were free to argue the authority

19   issue. The only question was whether the jury

20   was going to get a specific instruction on that

21   point.

22   And the government believed the

23   instruction was unnecessary. It was -- it would

24   have been a novel addition to the Third

25   Circuit's pattern jury instruction on section

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1      666, and, moreover, I don't know that their

2      instruction was, in fact, correct because it

3      would -- might have confused the jury into

4      thinking -- and this goes back to my colloquy

5      with Justice Sotomayor -- that if Baroni had

6      some authority under some circumstances, that

7      that would exonerate --

8                CHIEF JUSTICE ROBERTS:  But you say --

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

10               CHIEF JUSTICE ROBERTS:  -- the

11     instruction -- you -- you thought the

12     instruction was unnecessary.  Well, that may

13     have been the case in light of your theory at

14     the time, but surely after your focus here on

15     the authority point, you -- you wouldn't make

16     that same statement.

17               MR. FEIGIN:  Well, Your Honor, I think

18     that in retrospect it might have been better to

19     instruct the jury somewhat more specifically on

20     authority.  I don't know that there's specific

21     --

22               CHIEF JUSTICE ROBERTS:  Somewhat more

23     --

24               MR. FEIGIN:  -- their specific --

25               CHIEF JUSTICE ROBERTS:  --
```

1   specifically on the central point of your

2   argument before us today.

3   MR. FEIGIN: I don't know their

4   specific instruction would have accomplished it.

5   And I don't know the instructional issue is

6   before the Court -- is before the Court today.

7   But we are defending this -- these

8   convictions on the precise same ground that they

9   were found to be valid by both the court of

10   appeals and the district court, which addressed

11   the authority issue.

12   The district court addressed the

13   authority issue before trial telling the

14   defendants they could argue it at trial. It

15   addressed it after trial, saying it believed the

16   authority had been proven. And then the Third

17   Circuit addressed it.

18   And we have been consistent throughout

19   in that -- that we have never argued, to my

20   knowledge -- and I certainly haven't identified

21   a place where we have argued -- that if Baroni,

22   in fact, had the authority that his counsel just

23   claimed he had, which is to realign the lanes

24   for any reason or no reason, that these

25   defendants could have --

1   JUSTICE SOTOMAYOR: Mr. Feigin --

2   MR. FEIGIN: -- been convicted of

3   fraud.

4   JUSTICE SOTOMAYOR: -- nobody, no

5   decision-maker has the authority to make any

6   decision for no reason. That's a misnomer in

7   terms.

8   People have authority to do things

9   only in the interest of the agency. So give me

10   a line drawing of for a reason or no reason,

11   meaning, I don't think anybody in the Port

12   Authority, including the executive director,

13   could on whim say: Ah, you know, I like playing

14   on a board. Let's change it to one lane because

15   I just like to see a different pattern today.

16   MR. FEIGIN: So my -- my apologies,

17   Your Honor.

18   JUSTICE SOTOMAYOR: I -- I --

19   MR. FEIGIN: I simply --

20   JUSTICE SOTOMAYOR: -- I -- so -- so

21   give me your definition of what "authorized"

22   means, if he had the ability -- and when I first

23   read your brief, it was if he had the ability to

24   change the lanes on his own, then he had

25   authority.

1   MR. FEIGIN: Yeah. That --

2   JUSTICE SOTOMAYOR: All right. Now,

3   what the limits of that authority are, is where

4   I -- where I'm trying to get you.

5   MR. FEIGIN: So, Your Honor, if he

6   were --

7   JUSTICE SOTOMAYOR: How -- but it

8   can't be no -- no authority.

9   MR. FEIGIN: So, Your Honor --

10   JUSTICE SOTOMAYOR: Does he never have

11   authority --

12   MR. FEIGIN: -- I was -- I apologize,

13   I was simply repeating the language that the

14   court of appeals itself used which may have been

15   a little hyperbolic, but if he were the person

16   to whom the Port Authority entrusted the

17   decision of whether there should be three lanes

18   or one, such that his decision under these

19   circumstances would govern, then he had the

20   authority.

21   I think the evidence showed that he

22   was not that person. Again, he had to lie --

23   JUSTICE SOTOMAYOR: The fact that --

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

25   JUSTICE SOTOMAYOR: -- the -- the fact

1   that the executive director could overturn him

2   doesn't prove the positive.

3   MR. FEIGIN: That's right, Your Honor.

4   We wouldn't rely on that piece of evidence

5   alone, just like, Justice Alito, we're not

6   relying alone on the fact -- on the fact that he

7   had -- that he told a lie. We're relying on a

8   combination of circumstances.

9   Again, as -- as I was saying earlier,

10   if -- when an idea of something to do with my

11   organization's resources is raised to me and my

12   initial reaction is, how are we going to do

13   that, and then the idea is to tell a lie that

14   will get everyone onboard with it, and then we

15   lie about the fact that my boss is aware of it

16   and -- and tacitly approves of it, we avoid

17   every legitimate process and we conceal it from

18   my boss.

19   I think a reasonable jury can

20   rationally conclude that I'm doing something

21   that I don't have the authority to do. And

22   that's --

23   JUSTICE KAGAN: Mr. Feigin -- please

24   finish.

25   MR. FEIGIN: Sorry, I was just going

1   to say, that's what Baroni did here. Apologies

2   --

3   JUSTICE KAGAN: Can -- can --

4   MR. FEIGIN: -- Justice Kagan.

5   JUSTICE KAGAN: Can I switch, because

6   the statute clearly says that a scheme of

7   deception has to -- the object of it has to be

8   to obtain property. So can we talk about that

9   for a minute?

10   Because if I look at this, and I'm an

11   ordinary juror, I'm thinking, you know, the

12   object of this deception was not to obtain

13   property. The object was to create a traffic

14   jam. The object was to benefit people

15   politically. You can frame the object in lots

16   of ways.

17   But notwithstanding that some employee

18   time was given over to this scheme, that was not

19   the object of the scheme, was it, to appropriate

20   that employee time?

21   MR. FEIGIN: Well, Your Honor, I think

22   it was because this was -- this gets back to

23   what I was saying to Justice Breyer earlier.

24   This is a particular type of fraud,

25   where -- it's commandeering fraud, where what

1   they're trying to do is to take property that's

2   in the victim's hands, here the Port Authority,

3   and convert it to their own uses.

4   It may be that if I take a knife off a

5   table and stab -- that doesn't belong to me, and

6   stab someone, my end goal is to stab someone but

7   I've still stolen the knife.

8   JUSTICE KAGAN: But wasn't the

9   commandeering here completely incidental, indeed

10   unnecessary to the scheme being carried out? In

11   other words, you know, there was a little bit

12   of -- of -- of time for an extra toll person,

13   actually to mitigate the -- the problems of the

14   traffic jam or there were some people running

15   around counting cars to conceal the purpose for

16   what they were -- of what they were doing, but

17   that was not the object of the scheme.

18   MR. FEIGIN: No, Your Honor, the

19   object of the scheme was for them to take

20   control of real property, physical lanes,

21   accessing the George Washington Bridge, and have

22   those lanes be allocated the way they wanted.

23   JUSTICE KAGAN: Okay. So that's a

24   different theory. That's not the employee time

25   and labor. That's something about like

 1   appropriating the George Washington Bridge; is

 2   that right?

 3   MR. FEIGIN: That is one --

 4   JUSTICE KAGAN: But it's not

 5   appropriating the George Washington Bridge, it's

 6   reallocating lanes on the George Washington

 7   Bridge and I would have thought that Cleveland

 8   makes clear that that's not an appropriation of

 9   property either.

10   MR. FEIGIN: I -- I -- Your Honor, I

11   think it's both because they needed the employee

12   resources in order to accomplish what they were

13   trying to do with the bridge.

14   And if I could address Cleveland for a

15   second, this case and Cleveland do both involve

16   governmental decision-making but that's where

17   the similarities end.

18   In Cleveland, the object of the scheme

19   was to obtain a license under a regulatory

20   scheme that had no private analog whatsoever.

21   The Court rejected every private analog the

22   government offered for it. And the license

23   wasn't property in the government's hands.

24   Here you're talking about real

25   property, physical lanes and who can access

 1   those lanes, and access rights to physical

 2   property are quintessential forms of private

 3   property, probably one of the oldest forms of

 4   property we have.

 5   And then you have the employee

 6   resources necessary to reallocate the lanes,

 7   which I think even they acknowledge are property

 8   under the fraud statute. They acknowledge that

 9   if you send painters to paint the mayor's house,

10   that that's going to be property fraud because

11   you're taking the employee services.

12   JUSTICE KAGAN: But that's because the

13   object of the scheme is to use the employee

14   labor to get your house painted, but I -- I

15   don't think that you can say the same thing

16   here.

17   MR. FEIGIN: Your Honor, the --

18   JUSTICE KAGAN: You were not --

19   MR. FEIGIN: -- reason --

20   JUSTICE KAGAN: -- using the employee

21   labor to create the traffic jam.

22   MR. FEIGIN: They are using the

23   employee labor as if it were theirs, not as if

24   it were something that the Port Authority gets

25   to use. So, again, in the private context, if I

1   were to impersonate the boss and start ordering

2   around the company jet, I think I have obtained

3   the company jet and probably --

4   CHIEF JUSTICE ROBERTS: Well, but you

5   picked --

6   MR. FEIGIN: -- the pilot's time as

7   well.

8   CHIEF JUSTICE ROBERTS: You -- you

9   picked -- you picked an example that is easy for

10   you. I mean, the example that's hard for you, I

11   think, is you tell the employee to pick up the

12   phone and call somebody and say this. That's a

13   bad thing.

14   And then immediately you say: Okay,

15   it's property fraud because I've used the -- the

16   employee has used the telephone, or I've used

17   the four minutes of that employee's time

18   necessary to convey the message.

19   MR. FEIGIN: So --

20   CHIEF JUSTICE ROBERTS: Your theory

21   would say that that's taking of property so it's

22   covered by the fraud statutes.

23   MR. FEIGIN: We wouldn't, Your Honor,

24   and I'm -- I'm actually glad to have a -- a

25   chance to -- to make this perfectly clear. And

1   this gets back to Justice Kagan's question as

2   well.

3   Incidental uses of property that are

4   not the object of the scheme are not going to be

5   sufficient for property fraud. And I think the

6   easiest place to look for that is this Court's

7   decision in Loughrin, which involved bank fraud.

8   And the Court said there that if you tell a lie

9   and the object of your lie is to obtain money,

10   it's not bank fraud simply because, unrelated to

11   your lie, you didn't really care how the money

12   came to you. The money comes to you in the form

13   of a check, which is bank property, as opposed

14   to in the form of cash, which isn't.

15   If someone is -- if someone tells a

16   lie and the object is to obtain a license from

17   the State of Louisiana to operate a video poker

18   machine, which is not property, they're not

19   committing property fraud just because some

20   employee needs to spend some time processing the

21   license. That's not the object.

22   CHIEF JUSTICE ROBERTS: Well, here the

23   object -- the object of the scheme was not to

24   commandeer lanes on the bridge. The object was

25   to cause a traffic jam in Fort Lee. And if they

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1 could have done it some other way, they would

2 have done it some other way.

3 The use of the traffic -- you know,

4 altering the traffic lane configuration was just

5 the incidental means of achieving the objective.

6 MR. FEIGIN: I don't think that's

7 right, Your Honor. The lie they told to the

8 Port Authority to get the Port Authority

9 resources was to -- a lie they told in order to

10 get those resources. The causing of the traffic

11 jam was what they wanted to accomplish with

12 those resources.

13 If I tell a lie to get access to the

14 company jet, it may be that my goal is to take

15 it on a vacation trip to Macao, but that's not

16 the object of the scheme as far as the fraud is

17 concerned and the victim of the fraud.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,

20 counsel.

21 Two minutes, Mr. Roth.

22 REBUTTAL ARGUMENT OF JACOB M. ROTH

23 ON BEHALF OF THE PETITIONER

24 MR. ROTH: Thank you. Your Honor, the

25 -- the federal property fraud statute prohibits

1   schemes to obtain property. And the

2   government's theory of property here, as I think

3   we just heard, is that the officials, by making

4   this decision about lane alignment, commandeered

5   the control over the George Washington Bridge.

6   That is exactly the type of regulatory control

7   that Cleveland said is not property. Cleveland

8   referred to the intangible rights of allocation,

9   exclusion, and control. And the sovereign's

10   intangible rights of allocation, exclusion, and

11   control are not property for purposes of this

12   statute.

13   And, therefore, if what the officials

14   did was used a seat to influence the exercise of

15   those rights, they have not obtained property

16   from the Port Authority. If that is not

17   correct, then everything an official does is --

18   falls within the scope of this statute, and the

19   only question that is open is was there some

20   deceit involved?

21   And if -- if that is right, I think

22   the chilling effect on honest public servants is

23   going to be severe.

24   JUSTICE KAGAN: Mr. Roth, you

25   responded to one-half of their theory. One-half

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 1    of their theory is the allocation of lanes.
 2              MR. ROTH:  Yes.
 3              JUSTICE KAGAN:  And the other half is
 4    the employee time.
 5              MR. ROTH:  Yes.
 6              JUSTICE KAGAN:  So what's your
 7    response to that?
 8              MR. ROTH:  My response to that, it's
 9    actually what he said at the end, which is that
10    the incidental costs of a decision are not the
11    -- are not its object.  And it's what Your Honor
12    asked in earlier question.  The implementation
13    of the regulatory decision is going to use some
14    public resources.  That cannot possibly change
15    the result, or else Cleveland is a complete dead
16    letter.
17              JUSTICE GINSBURG:  Why do you call it
18    incidental?  I mean, it was essential to the
19    scheme.
20              MR. ROTH:  Because it's incidental,
21    Your Honor, in that it -- it was the
22    implementation cost.  It flowed as -- as a
23    result of the regulatory decision.  The
24    regulatory decision was to realign the lanes.
25    That required some employee time in terms of
```

1   taking tolls and studying the traffic effect,

2   but that was not the object. That was how it

3   got done.

4   JUSTICE ALITO: What if it cost a

5   million dollars? Would it be incidental?

6   MR. ROTH: No -- yes, Your Honor. It

7   would be a incidental. It's not a de minimis

8   test. It's a question of what is the object.

9   Thank you.

10   CHIEF JUSTICE ROBERTS: Thank you,

11   counsel. The case is submitted.

12   (Whereupon, at 11:12 a.m., the case

13   was submitted.)

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