

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

BRIDGET ANNE KELLY,)
)
 Petitioner,)
)
 v.) No. 18-1059
)
 UNITED STATES,)
)
 Respondent.)

Pages: 1 through 67
Place: Washington, D.C.
Date: January 14, 2020

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BRIDGET ANNE KELLY,)
Petitioner,)

v.) No. 18-1059

UNITED STATES,)
Respondent.)

- - - - -

Washington, D.C.

Tuesday, January 14, 2020

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

APPEARANCES:

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

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

ERIC J. FEIGIN, Deputy Solicitor General,
Department of Justice, Washington, D.C.;
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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