Misappropriation vs. Alteration: Post-*Kelly* Efforts to Criminalize Fraud Targeting Confidential Government Information

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The federal wire and mail fraud statutes criminalize "any scheme or artifice to defraud" that uses interstate wires or mailings to obtain "money or property by means of false or fraudulent pretenses, representations, or promises." But what exactly counts as property, triggering the statutes' criminal penalties? In Carpenter v. United States*, the Supreme Court held that confidential business information is property for purposes of the fraud statutes. In* Cleveland v. United States *and* Kelly v. United States*, the Court established that a scheme to alter a regulatory choice—which implicates the government's role as a sovereign—does not deprive the government of property. The Court has left unclear, however, whether confidential government information can satisfy the fraud statutes' property requirement.*

After highlighting the uncertain status of the law governing schemes that misappropriate confidential government information, this Note argues that as a matter of property theory, the government has a property interest in its confidential information because it has the right to exclude others from this information and that Kelly *represents a mere application of* Cleveland*'s narrow exception to this rule. Finally, this Note proposes a test to distinguish schemes that target government property from those that implicate the government's sovereign capacity: when fraudulent schemes seek to misappropriate confidential government information they*

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target property, but when they seek to alter a governmental decision, they do not.

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INTRODUCTION

The George Washington Bridge carries approximately 100 million vehicles per year, making it the busiest motor-vehicle bridge in the world.[1] In September 2013, New Jersey Governor Chris Christie hoped to secure the endorsement of the Democratic mayor of Fort Lee to bolster Christie's gubernatorial reelection campaign and budding presidential ambitions.[2] The mayor refused to do so.[3] As a result, public officials, including members of Christie's staff and his allies at the Port Authority of New York and New Jersey—the bi-state agency that manages the George Washington Bridge—decided that it was "[t]ime for some traffic problems in Fort Lee."[4] Disguising their efforts as a four-day "traffic study," the officials reduced the number of lanes allocated to traffic entering the bridge from Fort Lee from three to one—without notice to Fort Lee residents and officials.[5] Predictably, traffic on the world's busiest bridge came to a standstill.[6]

When the scheme came to light, public outrage was swift and severe.[7] Less than two years later, federal prosecutors charged Bridget Anne Kelly, Christie's then-deputy chief of staff, and William Baroni, the then-deputy executive director of the Port Authority, with numerous crimes, including wire fraud[8] and conspiracy to commit wire fraud.[9] The jury convicted both defendants on all counts,[10] and the Third Circuit affirmed the convictions.[11] The Supreme Court granted certiorari[12] to consider whether the defendants' lane-allocation scheme defrauded the

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1. *Traffic & Volume*, THE PORT AUTH. OF N.Y. AND N.J., https://www.panynj.gov/bridges-tunnels/en/traffic---volume-information---b-t.html [https://perma.cc/5QQU-G8YN].
2. Kelly v. United States, 140 S. Ct. 1565, 1569 (2020).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 1570.
7. Editorial, *Time for David Samson to Go*, N.Y. TIMES (Mar. 5, 2014), https://www.nytimes.com/2014/03/06/opinion/time-for-david-samson-to-go.html?_r=1 [https://perma.cc/HR9U-59GF]; Michael Barbaro, *With Bridge Case Charges, a Cloud Descends on Christie's White House Hopes*, N.Y. TIMES (May 1, 2015), https://www.nytimes.com/2015/05/02/nyregion/charges-in-bridge-scandal-pose-trouble-for-chris-christie.html [https://perma.cc/JC73-53Y2].
8. 18 U.S.C. § 1343.
9. 18 U.S.C. § 1349; United States v. Baroni, No. 2:15-CR-00193-SDW, 2017 WL 787122, at *1 (D.N.J. Mar. 1, 2017).
10. *Baroni*, 2017 WL 787122, at *1.
11. United States v. Baroni, 909 F.3d 550 (3d Cir. 2018).
12. Kelly v. United States, 139 S. Ct. 2777 (2019).

government of its property[13]—a requirement of the wire fraud statute.[14] In large part relying on *Cleveland v. United States*' holding that interfering with the government's regulatory interests does not deprive it of property,[15] the Court decided in *Kelly v. United States* that the scheme aimed to alter a regulatory choice rather than to deprive the government of its property.[16] A scheme to alter a regulatory choice aims to *change* a government decision, not take from the government something that counts as its property. A scheme to alter a regulatory choice implicates "intangible rights of allocation, exclusion, and control" that amount to "no more and no less than [the government's] sovereign power to regulate."[17] The scheme in *Kelly* sought to alter a regulatory choice: how to allocate the bridge's lanes amongst different groups of drivers.[18] Therefore, the Court ruled that the scheme did not fall within the prohibitions of the wire fraud statute despite the scheme showing "wrongdoing—deception, corruption, [and] abuse of power."[19]

In the wake of *Kelly*, the scope of the fraud statutes is unclear. Do the wire and mail fraud statutes (collectively, "the fraud statutes") cover schemes to fraudulently obtain intangible *government* property such as confidential government information, or do *Kelly* and *Cleveland* foreclose that result? Was *Kelly* a mere application of *Cleveland* to the facts before the Court? Or should *Kelly* be read broadly, as a unanimous rejection of an expansive reading of the fraud statutes?

The answers to these questions are important because the fraud statutes are critical tools that prosecutors frequently use to punish and deter a panoply of financial frauds.[20] The statutes'

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13. Petition for a Writ of Certiorari at i, *Kelly*, 139 S. Ct. 2777 (2019) (No. 18-1059).

14. McNally v. United States, 483 U.S. 350, 360 (1987) ([T]he federal mail fraud statute is "limited in scope to the protection of property rights.").

15. Cleveland v. United States, 531 U.S. 12, 20–21 (2000).

16. Kelly v. United States, 140 S. Ct. 1565, 1568–69 (2020).

17. *Cleveland*, 531 U.S. at 23.

18. *Kelly*, 140 S. Ct. at 1573 ("Baroni and Kelly regulated use of the lanes, as officials for roadways so often do—allocating lanes as between different groups of drivers.").

19. *Id.* at 1568.

20. *See* ELLEN S. PODGOR & JEROLD H. ISRAEL, WHITE COLLAR CRIME IN A NUTSHELL § 4.01, at 59 (4th ed. 2009) (noting statutes are "extensively used by federal prosecutors" due to their "breadth" and that an offense is often charged "despite the existence of a specific statute that criminalizes the conduct"); *see also* Jed S. Rakoff, *The Federal Mail Fraud Statute (Part 1)*, 18 DUQ. L. REV. 771, 771 (1980) ("To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love.").

omnipresence derives from their broad language, which allows prosecutors to charge a wide array of conduct.[21] Chief Justice Burger noted that the fraud statutes have "traditionally been used against fraudulent activity as a first line of defense" because "when a 'new' fraud develops—as constantly happens—the [fraud statutes become] a stopgap device to deal on a temporary basis with the new phenomenon, until particularized legislation can be developed and passed to deal directly with the evil."[22]

The fraud statutes therefore sit at the center of a number of important debates in American society. In fiscal year 2021, economic crimes represented the fourth-largest portion of all federal criminal convictions.[23] Still, many have argued that white-collar crime faces a crisis of underenforcement, pointing to the government's failure to prosecute any high-level executives in the wake of the 2008 financial crisis as evidence.[24] Some have pinned responsibility for this underenforcement on the Supreme Court, claiming the Court has unduly restrained and narrowed federal criminal statutes, thereby preventing prosecutors from pursuing charges against the wealthy and well-connected.[25] In addition to *Kelly* and *Cleveland*, which dealt with the definition of property under the fraud statutes, in *United States v. McDonnell*, the Court narrowed the definition of "official act" that the

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21. *See* Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 DUKE L.J. 945, 954 (1993) ("With regard to the statutory weapons available to prosecutors, [the fraud statutes] rank by analogy with hydrogen bombs on stealth aircraft.").

22. United States v. Maze, 414 U.S. 395, 405–06 (1974) (Burger, C.J., dissenting) ("[T]he mail fraud statute was used to stop credit card fraud, before Congress moved to provide particular protection by passing 15 U.S.C. § 1644.").

23. U.S. SENT'G COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2021, 21 (2022) https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/FY21_Overview_Federal_Criminal_Cases.pdf [https://perma.cc/TA9L-TSQ2].

24. *See generally*, *e.g.*, JOHN C. COFFEE JR., CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT (2020); JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES (2017); *see also* Michael Erman, *Five Years After Lehman, Americans Still Angry at Wall Street: Reuters/Ipsos Poll*, REUTERS (Sept. 15, 2013), https://www.reuters.com/article/us-wallstreet-crisis/five-years-after-lehman-americans-still-angry-at-wall-street-reuters-ipsos-poll-idUSBRE98E06Q20130915 [https://perma.cc/Y6PZ-UPFG] (reporting that 53% of polled Americans think not enough was done to prosecute bankers after the 2008 financial crisis, while only 15% were satisfied with the prosecutorial effort).

25. *See, e.g.*, Leah Litman, *The Supreme Court Says Sorry, It Just Can't Help with Political Corruption*, THE ATLANTIC (May 8, 2020), https://www.theatlantic.com/ideas/archive/2020/05/supreme-court-embracing-deep-cynicism-about-world/611374/ [https://perma.cc/C3RA-J5B3].

government was required to prove to convict the former governor of Virginia of honest services wire fraud and Hobbes Act extortion.[26] While the fraud statutes are not the only available tools to tackle white-collar crime, given their flexibility and expansiveness, they would be undoubtedly central to any increased efforts to prosecute and deter white-collar crime.

On the other hand, by criminalizing such a broad range of conduct, the fraud statutes are fertile ground for potentially significant issues related to criminal justice. Some scholars argue that the breadth of the fraud statutes actually risks *over*criminalization by punishing conduct that is not morally blameworthy.[27] Others point out that an expansive reading of the fraud statutes when the government is involved risks serious First Amendment concerns.[28] For example, it seems contrary to the constitutionally-grounded freedom of the press for a journalist who publishes confidential government information to be prosecuted under the fraud statutes.[29] Still others argue that interpreting the fraud statutes broadly raises serious concerns of

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26. United States v. McDonnell, 136 S. Ct. 2355 (2016). Honest services fraud is a non-property-based theory of wire fraud. *See* Skilling v. United States, 561 U.S. 358, 404 (2010) (construing honest services fraud to forbid "fraudulent schemes to deprive another of honest services through bribes or kickbacks"); *see also* 18 U.S.C § 1346 ("For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."). Although *McDonnell* did not involve a property-based theory of the fraud statutes, it is nonetheless a high-profile example of the Supreme Court narrowing the application of important federal criminal statutes that were used to charge financial crime and public corruption.

27. *See, e.g.*, John C. Coffee Jr., *Hush: The Criminal Status of Confidential Information After* McNally *and* Carpenter *and the Enduring Problem of Overcriminalization*, 26 AM. CRIM. L. REV. 121, 121–22 (1988) (arguing that "over-reliance" on criminal law to enforce economic regulations can "erode its moral authority" especially when the regulated behavior is "not generally recognized as immoral by the public at large"); Paul J. Larkin, Jr, *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 719–20 (2013) (defining the crux of overcriminalization as "the use of the criminal law to punish conduct that traditionally would not be deemed morally blameworthy" and noting numerous accompanying problems).

28. *See, e.g.*, Coffee, *supra* note 27, at 152 (warning that the fraud statutes "could even evolve into an Official Secrets Act which could threaten any governmental employee who leaks information").

29. *See* Eugene Volokh, *Journalists Might Be Felons for Publishing Leaked Governmental "Predecisional Information,"* REASON (Jan. 27, 2020, 11:43 AM), https://reason.com/volokh/2020/01/27/journalists-might-be-felons-for-publishing-leaked-governmental-predecisional-information/ [https://perma.cc/28CW-VA3Y] ("Say then that investigative journalists have a relationship with a federal government employee, and cooperate with the employee to get a leak of confidential government 'predecisional information' about the government's planned policy changes. Under the [*Blaszczak*] panel's theory, they too would be guilty of felony conversion of federal property and wire fraud.").

vagueness—a doctrine that refers to the constitutional prohibition on penal statutes that define criminal offenses with insufficient definiteness such that ordinary people are unable to understand what conduct is prohibited.[30] Therefore, the fraud statutes sit at the center of a critical debate in American criminal justice about how to determine what conduct is covered by these powerful tools of criminalization and how to limit them to avoid serious constitutional concerns.

This Note argues that *Cleveland* and *Kelly* represent a narrow exception to the otherwise general rule: misappropriated confidential information—whether taken from a business or the government—is property for purposes of the federal fraud statutes. Part I briefly details the history of intangible property rights and how courts have applied the federal fraud statutes to those rights. Part II highlights the uncertain status of the law governing prosecutions involving the misappropriation of confidential government information. Part III argues that confidential government information should be considered property for purposes of the fraud statutes and that *Kelly* represents a straightforward application of *Cleveland* such that it does not significantly alter the doctrine in this area. Finally, Part IV proposes a test to distinguish schemes that target government entities in their proprietary versus sovereign capacity: when fraudulent schemes seek to *misappropriate* confidential government information they target property, but when they seek to *alter* a governmental decision, they do not.

30. Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 703–04 (2017) ("If Congress passes a host of unclear laws, those laws will be defined by the facts of cases brought by prosecutors and decided by the courts. This is just what has occurred with statutes such as wire or mail fraud: Congress passed an incredibly broad—and, some would argue, vague—statute, allowing federal prosecutors and the courts to fill in its scope."); *see also id.* at 720–24 (discussing the history and application of the void-for-vagueness doctrine).

I. BACKGROUND

A. THE FRAUD STATUTES

18 U.S.C. § 1343, the federal wire fraud statute, provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire . . . in interstate or foreign commerce, any writings . . . for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. . . .[31]

18 U.S.C. § 1341, the federal mail fraud statute, contains nearly identical language, but prohibits frauds that utilize the postal system.[32] Courts interpret each statute in the same way,[33] and case law regarding one is applicable to the other.[34] As they are understood today, the elements of mail or wire fraud are: (1) the use of either mail or wire communications in the foreseeable furtherance (2) of a scheme to defraud (3) involving a material deception (4) with the intent to deprive another of (5) property.[35]

Prior to 1987, the fraud statutes could criminalize a scheme to deprive someone of an "intangible right," even if there was no deprivation of money or property.[36] As Paul Mogin has noted,[37]

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31. 18 U.S.C. § 1343.

32. 18 U.S.C. § 1341.

33. Except for the jurisdictional element. *Compare* United States v. Photogrammetric Data Services, 259 F.3d 229, 247–48 (4th Cir. 2001) (the mail fraud statute covers mailings through the U.S. Postal Service and private interstate delivery companies, regardless of whether the items are delivered out of state), *with* United States v. Phillips, 376 F. Supp. 2d 6 (D. Mass. 2005) (the wire fraud statute does not cover intrastate wire transmissions).

34. Pasquantino v. United States, 544 U.S. 349, 355 n.2 (2005) ("[W]e have construed identical language in the wire and mail fraud statutes *in pari materia*.").

35. DANIEL C. RICHMAN ET AL., DEFINING FEDERAL CRIMES 182 (2d ed. 2019).

36. *See e.g.*, United States v. Mandel, 591 F.2d 1347, 1363 (4th Cir. 1979), *aff'd on reh'g*, 602 F.2d 653 (4th Cir. 1979) (en banc) (criminalizing defrauding "the public and pertinent public bodies of their intangible rights to honest, loyal, faithful, and disinterested government"); United States v. Von Barta, 635 F.2d 999, 1006 (2d Cir. 1980) ("[I]t is now generally accepted that the object of the fraudulent scheme need not be the deprivation of a tangible interest. Artifices designed to cause losses of an intangible

pre-1987 wire and mail fraud prosecutions were premised on intangible rights such as "a private employer's right to the honest services of his employee,[38] a client's right to the undivided loyalty of his attorney,[39] 'the right to conscientious, loyal, faithful, disinterested and honest government,'[40] and the 'right to fair elections.'"[41] These courts generally reasoned that because the fraud statutes criminalized schemes or artifices "to defraud" *or* "for obtaining money or property" using disjunctive language, the money-or-property requirement of the latter phrase did not limit the former.[42] In *McNally v. United States*, however, the Supreme Court held that the fraud statutes only criminalize schemes or artifices to defraud that are aimed at obtaining money or property and do not extend to the citizenry's intangible right to good government.[43] The question then inevitably becomes: what counts as property?

If the scope of property determines the scope of the fraud statutes, whether the fraud statutes capture schemes that target confidential government information depends on the initial determination of whether that information is property. The following subpart briefly traces the evolution of American property law and summarizes contemporary debates surrounding this question.

B. A BRIEF HISTORY OF INTANGIBLE PROPERTY

Early American law generally confined property to physical objects. Blackstone defined property as the "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other

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nature also violate the statute."); *see also* Peter M. Oxman, *The Federal Mail Fraud Statute After* McNally v. United States*, 107 S. Ct. 2875 (1987): The Remains of the Intangible Rights Doctrine and Its Proposed Congressional Restoration*, 25 AM. CRIM. L. REV. 743, 744 (1988).

37. Paul Mogin, *The Property-Rights Limitation in Mail and Wire Fraud Cases*, 32-APR CHAMPION 24, 25 (2008).

38. *See Von Barta*, 635 F.2d at 1005–07 (2d Cir. 1980).

39. *See* United States v. Bronston, 658 F.2d 920, 927 (2d Cir. 1981).

40. *Mandel*, 591 F.2d at 1359; *see also* United States v. Isaacs, 493 F.2d 1124, 1150 (7th Cir. 1974) (per curiam); United States v. Clapps, 732 F.2d 1148, 1153 (3d Cir. 1984).

41. *See* United States v. States, 488 F.2d 761, 765–66 (8th Cir. 1973).

42. *See, e.g.*, *Clapps*, 732 F.2d at 1152; *States*, 488 F.2d at 764.

43. 483 U.S. 350, 360 (1987).

individual in the universe."[44] Liberal philosophers defined and justified the institution of property by relying on natural law.[45] Later, enlightenment philosophers justified and explained property with a positive, functional theoretical framework.[46] Modern commentators often conceptualize property as a legal institution or a social construct designed to accomplish certain functions.[47]

Today, the law generally recognizes both tangible and intangible property.[48] For example, courts recognize intangibles such as trade secrets,[49] patents,[50] and the news[51] as property. This more expansive understanding of property is difficult to define.[52] Courts and commentators frequently view the concept of

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44. 2 William Blackstone, Commentaries *2; *see also* JAMES W. ELY JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 32 (1992) (noting that American courts adopted the English common law of property and that Blackstone's views influenced American law long after the Revolution).

45. *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1204 (1967) (arguing that John Locke's "celebrated 'labor theory'" stands for the proposition that "whenever one mingles his effort with the raw stuff of the world, any resulting product ought—simply ought—to be his" (citing JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT ch. 5 (Thomas P. Peardon ed., 1952)).

46. Geraldine Szott Moohr, *Federal Criminal Fraud and the Development of Intangible Property Rights in Information*, 2000 U. ILL. L. REV. 683, 691 (2000).

47. *Id.*

48. *Id.*; *see also* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 732 (1998) ("[T]here is a consensus that the concept of property includes the rights of persons with respect to both tangible and intangible resources.").

49. *See* RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (AM. L. INST. 1939); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984). The Restatement of Torts offers a typical definition of a trade secret: "[A]ny formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers." RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (AM. L. INST. 1939).

50. *See* 35 U.S.C. § 261 ("Subject to the provisions of this title, patents shall have the attributes of personal property."); McCormick Harvesting Mach. Co. v. C. Aultman & Co., 169 U.S. 606, 609 (1898) ("[A granted patent] has become the property of the patentee."); *but see* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365 (2018) (distinguishing previous decisions referring to patents as "private property" as not inconsistent with the Court's ruling upholding the constitutionality of inter partes administrative reviews of patents).

51. Int'l News Serv. v. Associated Press, 248 U.S. 215, 241 (1918) (holding that the news itself—an intangible thing—"has all the attributes of property necessary for determining that a misappropriation of it by a competitor is unfair competition because contrary to good conscience").

52. *See* Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 533 (2005) ("[E]veryone knows what [property] is, but no one can define it.").

property as a "bundle of rights" made up of individual "sticks."[53] Different courts and commentators, however, include different "sticks" in the "bundle," which has led some legal realists to conclude that the bundle "has no fixed core or constituent elements. It is susceptible of an infinite number of variations, as different 'sticks' or 'strands' are expanded or diminished, added to or removed from the bundle altogether."[54] Among these "sticks," some have argued that the "right to exclude others" is the critical defining element of property.[55]

While defining the exact borders of property is difficult, for the purposes of this Note, it is sufficient to begin with the generally shared understanding that property rights can attach to intangible things, but the exact scope or justification for the property label is unsettled. Likewise, because the fraud statutes are property fraud statutes at their core, their exact scope is unsettled so long as property remains an imperfectly defined concept. It is precisely this unsettled scope that creates the legal ambiguities explored in the rest of this Note.

C. INTANGIBLE PROPERTY AND THE FRAUD STATUTES AT THE SUPREME COURT

The Supreme Court has recognized that intangible property interests exist and has applied the fraud statutes in a series of decisions implicating intangible property rights. While the Court has not adopted any general standard for identifying what counts as property under the fraud statutes,[56] the Court has made at

53. A.M. Honoré identifies at least eleven "sticks" in the property rights "bundle": (1) the right to possess; (2) the right to use; (3) the right to manage; (4) the right to the income of the thing; (5) the right to the capital; (6) the right to security; (7) the incident of transmissibility; (8) the incident of absence of term; (9) the duty to prevent harm; (10) liability to execution; and (11) the incident of residuality. A.M. Honoré, *Ownership*, *in* THE NATURE AND PROCESS OF LAW, AN INTRODUCTION TO LEGAL PHILOSOPHY 370, 371–75 (Patricia Smith ed., 1993); *see also* Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (noting that the property owner "lost one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others"); United States v. Shotts, 145 F.3d 1289, 1296 (11th Cir. 1998) (referring to the "modern theory that property is a 'bundle of rights'"); United States v. Frost, 125 F.3d 346, 367 (6th Cir. 1997) (stating that "property" refers to a "bundle of rights" that includes the rights to possess, use, exclude, profit, and dispose); United States v. Bucuvalas, 970 F.2d 937, 945 (1st Cir. 1992) (noting that "a 'property' interest resides in the holder of any of the elements comprising the 'bundle of rights'").

54. Merrill, *supra* note 48, at 737.

55. *Id.* at 740.

56. Mogin, *supra* note 37, at 24.

least one distinction clear: confidential business information is property, but certain rights held by the government in its sovereign capacity are not.

Carpenter v. United States[57] was the first Supreme Court case to recognize that the fraud statutes criminalize schemes to obtain intangible property. Defendant R. Foster Winans was a reporter at *The Wall Street Journal* (the *Journal*) and wrote "Heard on the Street," a daily column that discussed and reviewed selected stocks or groups of stocks.[58] Because of the column's perceived quality and integrity, "it had the potential of affecting the price of the stocks which it examined."[59] The *Journal* had a policy that the pre-publication contents of the column were the *Journal*'s confidential information.[60] Despite this rule, Winans engaged in a scheme to provide his co-defendants advance information on the timing and contents of the column.[61] The co-defendants then bought and sold stocks based on the probable impact the column would have on stock prices. They shared in the profits, which ultimately totaled a net of about $690,000.[62]

After a bench trial, the defendants were convicted of insider trading under the securities laws,[63] and, as relevant here, 18 U.S.C. §§ 1341 and 1343.[64] The Supreme Court granted certiorari and affirmed the wire fraud convictions in a short, unanimous opinion.[65] The Court explicitly held that the *Journal*'s "interest in the confidentiality of the contents and timing of the 'Heard' column" was a property right and its "intangible nature d[id] not make it any less 'property' protected by the mail and wire fraud statutes."[66] The Court reasoned that "[c]onfidential business information ha[d] long been recognized as property."[67] Lastly, the Court held that monetary loss to the

57. Carpenter v. United States, 484 U.S. 19 (1987).
58. *Id.* at 22.
59. *Id.*
60. *Id.* at 23.
61. *Id.*
62. *Id.*
63. 15 U.S.C. § 78j(b); 17 CFR § 240.10b-5.
64. Carpenter v. United States, 484 U.S. 19, 20 (1987).
65. However, the court was evenly divided with respect to the securities fraud convictions and therefore affirmed the court below without an opinion. *See id.* at 24.
66. *Id.* at 24–25.
67. *Id.* at 26 (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001–04 (1984)); Dirks v. SEC, 463 U.S. 646, 653 n.10 (1983); Bd. of Trade of Chicago v. Christie Grain & Stock Co., 198 U.S. 236, 250–51 (1905); *cf.* 5 U.S.C. § 552(b)(4) (excluding "trade secrets

Journal was not necessary to sustain the convictions under the fraud statutes. Rather, it reasoned that "it is sufficient that the *Journal* has been deprived of its right to exclusive use of the information, for exclusivity is an important aspect of confidential business information and most private property for that matter."[68]

Thirteen years later, the Court decided *Cleveland v. United States*.[69] In *Cleveland*, the defendant was convicted of wire fraud for making false statements to the State of Louisiana when applying for a license to operate video poker machines.[70] In another unanimous opinion, the Supreme Court vacated the defendant's convictions, concluding that the scheme was outside the scope of the fraud statutes because "[s]tate and municipal licenses in general, and Louisiana's video poker licenses in particular . . . do not rank as 'property' for purposes of § 1341 in the hands of the official licensor."[71] To fall within the fraud statutes, the Court held that the thing obtained "must be property in the hands of the victim."[72] The Court reasoned that Louisiana's interest in the licenses was *regulatory*, despite the fact that the State had a substantial economic stake in the video poker industry.[73] Unlike the confidential business information in *Carpenter* that had "long been recognized as property," the licenses controlled by a state agency in *Cleveland* were "intangible rights of allocation, exclusion, and control" that "amount[ed] to no more and no less than Louisiana's sovereign power to regulate."[74] To further support its conclusion, the Court cited both federalism concerns[75] and the rule of lenity.[76] The Court left open the possibility, however, that there could be some

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and commercial or financial information obtained from a person and privileged or confidential" from the Freedom of Information Act).

68. *Carpenter*, 484 U.S. at 26–27.

69. Cleveland v. United States, 531 U.S. 12 (2000).

70. *Id.* at 16–17.

71. *Id.* at 15.

72. *Id.*

73. *Id.* at 20, 22.

74. *Id.* at 23 (citing Carpenter v. United States, 484 U.S. 19, 26 (1987)).

75. Cleveland v. United States, 531 U.S. 12, 24 (2000) ("Equating issuance of licenses or permits with deprivation of property would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities.").

76. *Id.* at 25 ("[T]o the extent that the word 'property' is ambiguous as placed in § 1341, we have instructed that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" (citing Rewis v. United States, 401 U.S. 808, 812 (1971))).

category of property interests held by the government provided that "any benefit which the Government derives from the statute . . . be limited to *the Government's interests as property holder*."[77]

So, as of November 2000, the Supreme Court had held that confidential *business* information is property for purposes of the fraud statutes, but a *government's* interest in an unissued permit or license is not.

II. CONFIDENTIAL GOVERNMENT INFORMATION AS PROPERTY AND THE UNCERTAIN IMPACT OF *KELLY*

The Court's holdings in *Carpenter* and *Cleveland* thus leave the scope of the property-based fraud statutes uncertain.[78] The fraud statutes protect whatever courts determine to be property, but the Supreme Court has given litigants few data points and no clear guiding principles in determining what it will recognize as property. This uncertainty has generated scholarship[79] and criticism.[80] While there is much that can be said about the space between *Carpenter* and *Cleveland*, this Note focuses on a particular unsettled aspect: whether confidential government information counts as property for purposes of the fraud statutes and the impact of *Kelly* on the answer to that question. This Part details the pre-*Kelly* state of the doctrine on this question, examines the *Kelly* decision in detail, and highlights important uncertainties that remain in *Kelly*'s wake.

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77. *Id.* at 26 (emphasis in original) (quoting McNally v. United States, 483 U.S. 350, 359 n.8 (1987)).

78. Mogin, *supra* note 37, at 24 (arguing that "the scope of these two oft-charged statutes [remains] uncertain" because "the Court has not adopted a federal standard for identifying property under these statutes").

79. *See, e.g.*, Brette M. Tannenbaum, *Reframing the Right: Using Theories of Intangible Property to Target Honest Services Fraud After Skilling*, 112 COLUM. L. REV. 359 (2012) (arguing that, post-*Carpenter*, prosecutors can use the flexible doctrine of intangible property to charge mail and wire fraud schemes to end-around the Supreme Court's narrowing of the honest services fraud doctrine, subject only to the narrow exception of government licenses from *Cleveland*).

80. *See e.g.*, Moohr, *supra* note 46, at 730–38 (arguing that criminal law is not an appropriate context in which to create property rights, and that courts should limit the use of the fraud statutes when intangible property is involved).

A. GOVERNMENT PROPERTY UNDER THE FRAUD STATUTES PRE-*KELLY*

Five years after *Cleveland*, the Supreme Court in *Pasquantino v. United States*[81] held that uncollected excise taxes on liquor imported into Canada by the defendants is property in the hands of the Canadian government.[82] The Court reasoned that Canada's entitlement to collect money it is owed "is a straightforward 'economic' interest" that "has long thought to be a species of property."[83] Importantly, the Court also reasoned that "[t]he fact that the victim of the fraud happens to be the government, rather than a private party, does not lessen the injury."[84] The Court in *Pasquantino* thus made clear that at least *some* things held by the government are property under the fraud statutes. While unissued licenses are not property, uncollected tax revenues and other straightforward economic interests are. What about confidential information akin to the *Journal*'s pre-publication contents of a column in *Carpenter*, but held by the government? This was the question posed in *United States v. Blaszczak*, a Second Circuit case decided in 2019.[85]

In *Blaszczak*, the defendants were convicted of wire fraud and other property-based fraud offenses[86] for misappropriating a government agency's confidential nonpublic information. The Centers for Medicare & Medicaid Services (CMS), is a federal government agency within the Department of Health and Human Services.[87] As relevant to the charged scheme, CMS promulgates rules and regulations concerning Medicare and Medicaid's reimbursement rates for certain medical treatments—decisions that affect the value of the treatment provider's stock.[88] Blaszczak, a former employee of CMS, had unique access to the agency's predecisional information through his inside sources at

81. Pasquantino v. United States, 544 U.S. 349 (2005).
82. *Id.* at 355.
83. *Id.* at 356–57.
84. *Id.* at 356.
85. United States v. Blaszczak, 947 F.3d 19 (2d Cir. 2019), *cert. granted, judgment vacated sub nom. Olan v. United States*, 141 S. Ct. 1040 (2021). Part II.C *infra* explains *Blaszczak*'s subsequent history.
86. 18 U.S.C. §§ 1343, 1348, and 641.
87. *About CMS*, CTRS. FOR MEDICARE & MEDICAID SERVS., https://www.cms.gov/About-CMS/About-CMS [https://perma.cc/TLC4-Y7RQ].
88. *Blaszczak*, 947 F.3d at 26–28.

the agency.[89] He used these sources to collect predecisional, confidential information from CMS, which he passed along to two different hedge funds, who then traded on the misappropriated information for combined profits upwards of $1 million.[90]

The Second Circuit upheld the defendants' wire fraud convictions, holding that "in general, confidential government information may constitute government 'property'" for purposes of the fraud statutes.[91] The court found it significant that "CMS possesses a 'right to exclude' that is comparable to the proprietary right recognized in *Carpenter*."[92] Distinguishing the video poker licenses at issue in *Cleveland*—which the court considered a "paradigmatic exercise [ ] of the [state's] traditional police powers"[93]—CMS's "right to exclude the public from accessing its confidential predecisional information squarely implicates the government's role as property holder, not as sovereign."[94] The court explicitly declined to apply *Cleveland*'s holding expansively,[95] stating that "*Carpenter*'s reasoning applies with equal force [to government entities], since exclusivity is no less important in the context of confidential government information."[96]

In sum, through *Blaszczak*, the Second Circuit answered a question posed by this Note in the affirmative. Confidential government information can be property for purposes of the fraud statutes and therefore fraudulent misappropriation of that information can form the basis for a wire or mail fraud prosecution. The Supreme Court, however, quickly called the Second Circuit's holding into question.

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89. *Id.* at 26.

90. *Id.* at 27–28.

91. United States v. Blaszczak, 947 F.3d 19, 34 (2d Cir. 2019), *cert. granted, judgment vacated sub nom. Olan v. United States*, 141 S. Ct. 1040 (2021).

92. *Id.* at 33.

93. *Id.* at 33 (quoting Cleveland v. United States, 531 U.S. 12, 23 (2000)).

94. *Id.*

95. *Id.* at 32.

96. *Id.* at 34. Judge Kearse dissented from the majority's property fraud holdings, finding the CMS's confidential information was more akin to the licenses at issue in *Cleveland* than the confidential business information in *Carpenter* because CMS's information was not its "stock in trade." *Id.* at 47 (Kearse, J., dissenting) (quoting Carpenter v. United States, 484 U.S. 19, 26 (1987)). Judge Kearse also reasoned that CMS had not been deprived of property because, "[g]iven that CMS, notwithstanding any premature disclosure of its predecisional regulatory information, can issue a regulation that adheres to its preliminary inclination or can issue a different regulation." *Id.* at 47–48 (Kearse, J., dissenting).

B. *KELLY V. UNITED STATES*

Less than five months after *Blaszczak*, the Supreme Court decided *Kelly v. United States*.[97] As detailed in the introduction to this Note, the defendants in *Kelly* reduced the number of traffic lanes reserved for Fort Lee commuters to cross the George Washington Bridge during the morning rush hour.[98] They claimed that the lane reallocation was part of a "traffic study"; but in reality, the change was an act of political retribution against the mayor of Fort Lee for declining to endorse then-Governor Chris Christie for reelection.[99] The defendants were charged with numerous crimes for this scheme, including wire fraud.[100] The Department of Justice argued that the property at issue in the defendants' scheme was: (1) the time and labor costs of Port Authority employees who unknowingly implemented the scheme; and (2) the Port Authority's interest in the physical, real property of the lanes on the George Washington Bridge.[101] The Court, however, reversed the convictions, holding that the lane reallocation scheme had not deprived the Port Authority of property within the meaning of the fraud statutes.[102]

Rather than affecting the government in its property-holding capacity, the Court ruled that "[t]he realignment of the toll lanes was an exercise of regulatory power," which, pursuant to *Cleveland*'s holding, did not satisfy the fraud statutes' property requirement.[103] The lane realignment implicated the government's role as a sovereign because the defendants "exercised the regulatory rights of 'allocation, exclusion, and control'" by "deciding that drivers from Fort Lee should get two fewer lanes while drivers from nearby highways should get two more."[104] The fact that they did so for unsavory reasons and by resorting to lies, did not change the fact that the defendants

97. Kelly v. United States, 140 S. Ct. 1565 (2020).
98. *Id.* at 1569.
99. *Id.*
100. *Id.* at 1568.
101. Brief for the United States at 31–32, *Kelly*, 140 S. Ct. 1565 (2020) (No. 18-1059); *see also* Transcript of Oral Argument at 59, *Kelly*, 140 S. Ct. 1565 (2020) (No. 18-1059) ("MR. FEIGIN: [T]he object of the scheme was for them to take control of real property, physical lanes, accessing the George Washington Bridge, and have those lanes be allocated the way they wanted.").
102. *Kelly*, 140 S. Ct. at 1574.
103. Kelly v. United States, 140 S. Ct. 1565, 1568–69 (2020).
104. *Id.* at 1573.

altered the Port Authority's regulatory decision about the toll plaza's use.[105]

The Court also rejected DOJ's time and labor argument, reasoning that the employees' labor "was just the incidental cost of [the exercise of regulatory power], rather than itself an object of the officials' scheme."[106] In order to undergird a property fraud prosecution, the property itself must be an "object of the fraud."[107]

C. *KELLY*'S AFTERMATH

Kelly quickly had an effect on *Blaszczak* and other cases where the defendants had misappropriated confidential government information. The *Blaszczak* defendants filed a petition for a writ of certiorari, arguing, among other things, that *Kelly* mandated a reversal of their convictions.[108] The U.S. Solicitor General asked the Court to grant the petitions, vacate the Second Circuit's decision, and remand the case for further consideration in light of *Kelly,*[109] and the Court did so.[110]

On remand, and at the Solicitor General's direction ,[111] DOJ confessed error and argued that the property fraud convictions should be reversed.[112] The government reasoned that "[i]n light of the Supreme Court's holding in *Kelly*, it is now the position of

105. *Id.* at 1573–74.

106. *Id.* at 1569.

107. *Id.* at 1573 (quoting Pasquantino v. United States, 544 U.S. 349, 357 (2005)); *see, e.g.*, United States v. Delano, 55 F.3d 720, 723 (2d Cir. 1995) (a city parks commissioner induced his employees to do gardening work for political contributors); United States v. Pabey, 664, F.3d 1084, 1089 (7th Cir. 2011) (a mayor used deception to get "on-the-clock" city workers to renovate his daughter's new home). It is also worth noting that there was not a viable theory in *Kelly* based on lost toll revenue from the scheme. The government did not pursue that theory and the Court did not address it because at least theoretically, the same number of vehicles went through the toll plaza (albeit delayed) regardless of the scheme. Therefore, the government would not have been deprived of any revenue. Nor would it have been obtained by the defendants—they didn't line their own pockets. Finally, a toll revenue theory would also fail because obtaining toll revenue from the Port Authority was not the object of the defendant's fraud.

108. Petition for a Writ of Certiorari at 1, Olan v. United States, 141 S. Ct. 1040 (2020) (No. 20-306).

109. Brief on Remand for the United States at 2, United States v. Blaszczak, No. 18-2811 (2d Cir. Apr. 2, 2021).

110. *Olan*, 141 S. Ct. 1040 (2021) (mem.); Blaszczak v. United States, 141 S. Ct. 1040 (2021) (mem.).

111. *See* Brief on Remand for the United States, *supra* note 109, at 2 ("The brief was prepared in consultation with the Office of the Solicitor General to reflect the Department of Justice's post-*Kelly* position on the scope of 'property' under 18 U.S.C. §§ 1343 and 1348 and 'thing of value' under 18 U.S.C. § 641, which this Office is constrained to follow.").

112. *Id.* at 7.

the Department of Justice that in a case involving confidential government information, that information typically must have economic value in the hands of the relevant government entity to constitute 'property'" for purposes of the fraud statutes.[113] DOJ also argued that the CMS employees' time at issue in *Blaszczak* did not constitute "'an object of the fraud,' and thus the associated 'labor costs could not sustain the conviction[s]' here."[114]

After DOJ confessed error, the Second Circuit appointed counsel as *amicus curiae* to argue that *Kelly* "does not invalidate the original panel's holding that the confidential government information at issue here constituted 'property.'"[115] The appointed *amicus* argued that "*Kelly* did not express new law or overrule any of the precedent on which the *Blaszczak* panel relied" and did not change "the traditional analysis of the nature of 'property' that the Supreme Court outlined in *Carpenter*," which centered around the "right to exclusive use."[116] Unlike the defendants in *Cleveland* and *Kelly*, the defendants in *Blaszczak* did not scheme to alter a regulatory choice. In fact, as *amicus* pointed out, the defendants' scheme actually depended on the regulatory choice staying the same.[117] In order for the hedge funds to capitalize on the information misappropriated from CMS, the information needed to be accurate and CMS's plans needed to stay consistent with the advance information. *Amicus* also argued that *Kelly*'s primary contribution to the doctrine—its "object of the fraud" holding—had no impact on *Blaszczak* because "[i]nsofar as CMS had a property interest in its predecisional information . . . obtaining that information was the object of the fraud."[118] The Second Circuit held oral argument in June 2021 and at the time of this Note's publication, a decision is still pending.[119]

Kelly's impact in this area was not limited to *Blaszczak*. Other cases where the government's property theory was premised on

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113. *Id.*

114. *Id.* at 8 (quoting Kelly v. United States, 140 S. Ct. 1565, 1573 (2020)).

115. Order, United States v. Blaszczak, No. 18-2811 (2d Cir. Apr. 16, 2021) (disclosing the court's intention to invite *amicus curiae* to brief and argue the issue); Order, United States v. Blaszczak, No. 18-2811 (2d Cir. Apr. 26, 2021) (officially ordering appointment of *amicus curiae*, setting briefing schedule, and scheduling oral argument).

116. Court-Appointed *Amicus Curiae*'s Letter Brief at 2, *Blaszczak*, No. 18-2811 (2d Cir. May 21, 2021).

117. *Id.* at 10.

118. *Id.* at 16.

119. *See* Minute Entry, *Blaszczak*, No. 18-2811 (2d Cir. June 9, 2021), ECF No. 500.

confidential government information have either been dismissed[120] or put on hold pending the Second Circuit's opinion in *Blaszczak* on remand.[121] In the following Part, this Note argues that neither property theory nor the holding of *Kelly* itself warrant this broad a response.

III. CONFIDENTIAL GOVERNMENT INFORMATION IS PROPERTY UNDER THE FRAUD STATUTES

Having traced the trajectory of the doctrine on the intersection of the property-based fraud statutes and confidential government information, this Part makes two related arguments. First, as a matter of property theory and doctrine, confidential government information should be considered property for purposes of the fraud statutes. Second, as a descriptive matter, *Kelly* did not meaningfully change the doctrine concerning confidential government information and property and thus DOJ's change of position in *Blaszczak* is unwarranted.

A. CONFIDENTIAL GOVERNMENT INFORMATION IS GENERALLY PROPERTY

Confidential government information is property for purposes of the fraud statutes because the government has the "right to exclude" others from that information. My view is grounded in Professor Thomas Merrill's article, *Property and the Right to*

120. *See, e.g.*, Declaration in Support of Motion to Dismiss the Appeal, United States v. Aytes, No. 19-3981 (2d Cir. Apr. 12, 2021). In *Aytes*, a former employee of the FDIC took "resolution plans" for four large banks regulated by the FDIC. *Id.* at 1–2. The defendant was convicted of violating 18 U.S.C. § 641, but the district court granted her motion for a judgement of acquittal. *Id.* at 2. DOJ appealed that decision, but later moved to dismiss the appeal given DOJ's post-*Kelly* position that such confidential information is not property under the fraud statutes or a "thing of value" under § 641. *Id.* at 5–6. The Second Circuit granted DOJ's motion to dismiss. *See* Order, *Aytes*, No. 19-3981 (2d Cir. Apr. 13, 2021) (granting DOJ's motion to dismiss the appeal).

121. For example, in United States v. Middendorf, No. 18-CR-36 (JPO), 2018 WL 3443117 (S.D.N.Y. July 17, 2018), the defendants schemed to improve KPMG's performance on audit inspections conducted by the Public Company Accounting Oversight Board (the "PCAOB") by misappropriating confidential PCAOB inspection planning lists and devoting extra resources to the audits that would be inspected. The district court ruled pre-*Kelly* that the PCAOB lists were property for purposes of the fraud statutes. *Id.* at *7–9. The *Kelly* decision was issued during the pendency of the appeal and the proceedings have been stayed pending resolution of *Blaszczak* on remand. Order, *Middendorf*, No. 19-2983 (2d Cir. Feb. 16, 2021).

Exclude.[122] Professor Merrill argues that the right to exclude "is more than just 'one of the most essential' constituents of property—it is the sine qua non."[123] The right to exclude is logically necessary and sufficient for something to be considered property in a way that the other "sticks" in the property bundle are not.[124] History also supports the primacy of the right to exclude because it was the first property right to emerge in early property systems and therefore provides the key to understanding the nature of property itself.[125] Had there been no right to exclude, modern conceptions of property would have failed to develop.[126] This history is also in accord with contemporary law and practice. Unsurprisingly, the U.S. Reports are replete with references to the right to exclude being central to the definition of property.[127]

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122. *See* Merrill, *supra* note 48; *see also* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2073 (2021) (citing Professor Merrill's article with approval).

123. *See* Merrill, *supra* note 48, at 730; *see also* Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y 593, 661 (2008) ("The right to exclude, then, remains the defining ideal of property.").

124. Merrill, *supra* note 48, at 740 ("If one starts with the right to exclude, it is possible to derive most of the other attributes commonly associated with property through the addition of relatively minor clarifications about the domain of the exclusion right. On the other hand, if one starts with any other attribute of property, one cannot derive the right to exclude by extending the domain of that other attribute; rather, one must add the right to exclude as an additional premise.").

125. *Id.* at 745 ("There is strong evidence that, with respect to interests in land, the right to exclude is the first right to emerge in primitive property rights systems. Only as property systems evolve in complexity and sophistication do other rights, such as the rights of transfer, inheritance, pledging as collateral, subdivision, and so forth, develop. The fact that the right to exclude can be found in even the most primitive land-rights systems provides further support for the conclusion that the gatekeeper right provides the key to understanding the nature of property.").

126. *Id.* at 747 ("[T]his historical evidence suggests that the right to exclude, because it was the first right to evolve in time, is more basic to the institution of property than are other incidents of property recognized in mature property systems. It appears the first step in the evolution of property rights in land was the recognition of the right to exclude; once this was established, then and only then was it possible to add other rights to the bundle.").

127. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) (referring to the right to exclude as "one of the most treasured strands" of the property rights bundle); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (characterizing the right to exclude as "one of the most essential sticks"); *id.* at 179–80 (describing the right to exclude as a "universally held . . . fundamental element" of property); *see also* Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (describing the right to exclude as "one of the most essential sticks in the bundle of rights that are commonly characterized as property"); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987) (same).

The definitional power of the right to exclude also applies to intangible property. In fact, the right to exclude is *more* important in the context of intangibles for defining what counts as property and what does not.[128] For example, copyrights, trademarks, patents, and trade secrets are all forms of intangible property where "the core of the property right is the right to exclude others from interfering with or using the right in specified ways."[129] Without a right to exclude, these intangible property rights would lose nearly all of their utility.

The definitional power of an exclusion-oriented approach is not exclusive to property held by private parties. Property in the hands of the government is generally considered public property[130] and the right to exclude is as essential to defining the government's property interest as it is to defining private property interests. Professor Merrill illustrates this point using the example of Yellowstone National Park. The National Park Service, a bureau in the Department of the Interior, can exercise the right to exclude by: (1) deciding who may enter a park and on what terms; (2) conditioning entry on certain conduct; or (3) closing a park down altogether.[131] Despite clearly owning the property that is Yellowstone, however, the National Park Service is severely restricted in how it may use and transfigure the land; for example, it is prohibited from transferring it or borrowing against it.[132] Thus, we recognize that Yellowstone is public property—rather than common property[133] or an unowned

128. Merrill, *supra* note 48, at 749 ("The law with respect to intangible rights in intellectual property is, if anything, even more striking in the degree to which the property right and the right to exclude go hand-in-hand.").

129. *Id.*

130. Public property "may be said to exist where governmental entities have certain rights with respect to valuable resources, analogous to the rights of private property owners. An example would be a municipal airport." *Id.* at 733; *Id.* at 749 ("Public property is simply property in which the right to exclude is exercised by a designated governmental entity.").

131. *Id.* at 749. In fact, Yellowstone was closed to visitors between March 24 and May 18, 2020 as a result of the COVID-19 pandemic. *See Covid-19 Reopening Plan Yellowstone National Park*, NAT'L PARK SERV., https://www.nps.gov/yell/learn/news/upload/Yellowstone-COVID-19-Reopening-Plan-2020.pdf [https://perma.cc/WS3N-8AXV].

132. Merrill, *supra* note 48, at 749.

133. Common property includes things like common pasture rights open to all residents of a farm town where the resource is "open to appropriation by any qualified member of a designated community." *Id.* at 750.

resource[134]—precisely because we give the government the right to exclude.[135]

In sum, whether held by a private party or the government and whether tangible or intangible, the right to exclude confers a property right.[136] Because the government possesses a right to exclude others from certain confidential information, it follows that the confidential information is property in the hands of the government. As such, a scheme to defraud the government of that property should be sufficient to undergird a prosecution under the fraud statutes.

B. *KELLY* DID NOT MERIT DOJ'S REVERSAL IN *BLASZCZAK*

If confidential government information should be considered property as a matter of property theory, and pre-*Kelly* Supreme Court precedent did not squarely address the issue, DOJ's change in position in *Blaszczak* would have to be supported by some new contribution to the doctrine. This Part argues that *Kelly* did not meaningfully change the doctrine in this area, rendering DOJ's confession of error unwarranted.

Kelly was a straightforward application of *Cleveland* to the facts of that case. The Port Authority *regulates* the use of lanes at the George Washington Bridge toll plaza. The defendants schemed to alter that regulatory choice by changing the allocation of the lanes, just as the defendants in *Cleveland* schemed to alter Louisiana's decision whether or not to issue a license. The *Kelly*

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134. Unowned resources "include things like the upper atmosphere and the aquatic life found in the deep seas. They are unclaimed and uncontrolled by any community and hence are open to appropriation by any and all." *Id.*

135. *Id.* at 749–50 ("The single strong point of linkage between public property and private property is the fact that in both cases some designated person or entity exercises a gatekeeper right with respect to the property. This point of linkage justifies us in calling something like a national park public property. All other incidents of private property under conditions of full ownership are either severely restricted or are missing altogether.").

136. Of course, an important caveat to this claim is the holding in *Cleveland*. *See* discussion *supra* Part I.C. *Cleveland* represents a narrow exception to the idea that the right to exclude creates property. This is because violating the right to exclude others from making regulatory choices on its behalf is better characterized as interfering with the government's sovereign power itself, not its property rights. *See* Cleveland v. United States, 531 U.S. 12, 24 (2000) (finding that Louisiana's authority to select video poker licensees rests "upon the State's *sovereign right* to exclude applicants deemed unsuitable to run video poker operations" (emphasis added)). Therefore, the government does not have a *property*-based right to exclude others from making its regulatory decisions—it has a *sovereignty*-based right to do so, which is not captured by the fraud statutes.

Court did not purport to redefine property or to express new law.[137] It did not even mention *Carpenter*, much less call its reasoning into question. Rather, *Kelly*'s contribution to the doctrine was to establish that while government employee time and labor can sometimes satisfy the property element of the fraud statutes, it cannot do so when the diversion of employee time and labor is an "incidental byproduct" of the scheme rather than an object of the fraud.[138] This relatively narrow holding does not meaningfully change the pre-*Kelly* equilibrium between *Carpenter* and *Cleveland*.

To better understand *Kelly*'s property fraud holding, it is helpful to look at the arguments DOJ made before the Court and how the Court addressed each of them. As detailed in Part II.B *supra*, DOJ argued that the property that was object of the defendants' fraud was: (1) the time and labor costs of Port Authority employees who unknowingly implemented the scheme; and (2) the Port Authority's interest in the physical real property of the lanes on the George Washington Bridge.[139]

As to the first property theory—the time and labor costs—the Court recognized that in some instances, government employee time and labor is property that can undergird a property fraud prosecution, but that time and labor must be an object of the fraud.[140] This holding has no impact on the space between *Carpenter* and *Cleveland* as it plainly leaves open the possibility that a scheme to misappropriate confidential government information may support a property fraud prosecution, so long as that information is itself an object of the fraud as opposed to an incidental byproduct.

As to the second property theory—the Port Authority's interest in the real property of the lanes—the Court reasoned that the defendants did not "commandeer" the Bridge's lanes because they did not walk away with them or convert them to a non-public use.[141] In many ways one can conceptualize the commandeering holding the same way as the time and labor holding: the defendants did not seek to "commandeer" the lanes

137. Kelly v. United States, 140 S. Ct. 1565, 1573 (2020) (adopting *Cleveland*'s logic by analyzing the government's interest in "which drivers had a 'license' to use which lanes").

138. *Id.* at 1573–74.

139. Brief for the United States, *supra* note 101, at 31–32; *see also* Transcript of Oral Argument, *supra* note 101, at 59.

140. *Kelly*, 140 S. Ct. at 1573.

141. *Id.* at 1572–73.

of the bridge (which are, of course, real property) and so the object of the fraud was not to obtain property.[142] Thus, the Court left open the possibility that if the defendants' scheme *had* sought to obtain actual property—in this case, by taking possession of the lanes or misappropriating the lanes for their own non-public use—government property could have formed the basis for a property fraud prosecution.

In arguing that *Kelly* did change the doctrine, DOJ reasoned in *Blaszczak* that when property in a fraud prosecution is "wholly subsumed" within a purely regulatory function, it must be treated as regulatory in character because "[n]either the information nor its confidentiality can meaningfully be separated from the regulatory function that they serve[ ]."[143] DOJ also emphasized that the Court in *Kelly* did not find property fraud even though the lanes on the George Washington Bridge are indisputably property as traditionally understood, which arguably cannot be said about confidential government information.[144]

In its attempt to walk back its prior arguments in *Blaszczak*, DOJ overread *Kelly*. The Court in *Kelly* did *not* hold that the defendants' scheme sought to obtain property, and yet the property was "wholly subsumed" within a purely regulatory scheme. It simply held that the fraud did not target government property in the first place.[145] The defendants did not take or misappropriate the lanes, but merely altered how the government allocated those lanes to different groups of the public.[146] The defendants did not scheme to obtain the extra time and labor of the Port Authority employees; rather, they schemed for political

142. *See* Transcript of Oral Argument, *supra* note 101, at 59 ("JUSTICE KAGAN: "But wasn't the commandeering here completely incidental, indeed unnecessary to the scheme being carried out?"); *see also id.* at 63 ("CHIEF JUSTICE ROBERTS: "Well, here the object—the object of the scheme was not to commandeer lanes on the bridge. The object was to cause a traffic jam in Fort Lee. And if they could have done it some other way, they would have done it some other way. The use of the traffic—you know, altering the traffic lane configuration was just the incidental means of achieving the objective.").

143. Government Letter Response to Amicus at 4–5, United States v. Blaszczak, No. 18-2811 (2d Cir. June 4, 2021).

144. *Id.* at 5.

145. Kelly v. United States, 140 S. Ct. 1565, 1573 (2020) ("Contrary to the Government's view, the two defendants did not 'commandeer' the Bridge's access lanes (supposing that word bears its normal meaning). They (of course) did not walk away with the lanes; nor did they take the lanes from the Government by converting them to a non-public use.").

146. *Id.*

revenge with the time and labor being mere "implementation costs."[147] Contrary to DOJ's position, nothing in *Kelly*'s holding indicates that a fraudulent scheme that has the object of obtaining property nonetheless evades coverage by the fraud statutes when the property is related to a regulatory scheme. *Kelly* ultimately does not shed any significant new light on what kind of property (tangible or intangible) can form the basis of a property fraud prosecution.

IV. THE BEST TEST: MISAPPROPRIATION VS. ALTERATION

Given that (1) by virtue of having the right to exclude, the government can have a property interest in confidential information sufficient to undergird a prosecution under the federal fraud statutes, and (2) *Kelly* did not meaningfully change the doctrine in this area, the question remains how courts should apply *Cleveland*, read in light of *Kelly*, when confidential government information is involved in a scheme to defraud. This Part argues that the best test that emerges from the case law is to ask whether the defendant's scheme sought to *alter* a government regulatory decision or whether the scheme sought to *obtain* or *misappropriate*[148] intangible government property, such as confidential information. A scheme in the former category does not target property and cannot form the basis for a property fraud prosecution, but a scheme in the latter category does target property and therefore can be covered by the fraud statutes.

Cleveland, read in light of *Kelly*, makes clear that a scheme to *alter* a regulatory decision does not target property. In

147. *Id.* at 1573–74.

148. Misappropriation is "[t]he application of another's property or money dishonestly to one's own use." *Misappropriation*, BLACK'S LAW DICTIONARY (11th ed. 2019). In the governmental context, one clarification to this definition is necessary. The application of another's property or money dishonestly needs to be to one's own *private* use. Under this definition, the defendants in *Kelly* did not misappropriate the lanes because they did not convert them to their own private use. If misappropriation included applying another's property dishonestly to one's own *public* or *political* use, courts would be dragged into a thicket of difficult questions about when a public official's insincere justification to conceal a political motive crosses the line into criminality. *See* Brief for Petitioner at 2–3, *Kelly*, 140 S. Ct. 1565 (2020) (No. 18-1059) ("[T]he 'fraud' here . . . was *the concealment of political motives for an otherwise-legitimate official act*. All that separates a routine decision by a public official from a federal felony, per the opinion below, is a jury finding that her public-policy justification for the decision was not *really and truly* her subjective reason for making it. There is no way that could be the law. Taken seriously, it would allow any federal, state, or local official to be indicted on nothing more than the (ubiquitous) allegation that she lied in claiming to act in the public interest.").

Cleveland, the defendants lied and concealed information when applying for a video poker license from Louisiana.[149] They did so because they had tax and financial problems that could have undermined their suitability to receive the license.[150] They lied to *alter* Louisiana's regulatory decision itself.[151] They wanted a license, but, if revealed, the information about their financial woes would have severely reduced their chances of getting it. Put simply, they lied so that the government would exercise its regulatory authority in their favor—i.e., issue a license. The same is true in *Kelly*. The defendants lied to effectuate a regulatory change. To punish the mayor of Fort Lee, they changed the allocation of lanes between different members of the public in a way that suited their interests. At bottom, they sought to *alter* the exercise of the Port Authority's regulatory authority.

A scheme to *obtain* or *misappropriate* confidential information, in contrast, is a scheme that targets property. For example, in *Blaszczak*, the defendants did not seek to change the regulatory decisions made by CMS to suit their interests. In fact, the success of their scheme depended on CMS's regulatory decision staying the same.[152] Rather, the defendants sought to *obtain* the confidential information about the unissued regulatory decisions and *misappropriate* that information by converting it from a public use to a private one by trading on the non-public information for pecuniary gain.

Another way to conceptualize the distinction is through *Kelly*'s "object of the fraud" analysis. A scheme to *alter* a regulatory

149. Cleveland v. United States, 531 U.S. 12, 17 (2000).

150. *Id.* (citing La. Rev. Stat. Ann. § 27:310(B)(1) (West Supp. 2000) (detailing suitability requirements)).

151. Kelly v. United States, 140 S. Ct. 1565, 1572 (2020) ("[T]his Court has already held that a scheme to alter such a regulatory choice is not one to appropriate the government's property." (citing *Cleveland*, 531 U.S. at 23)).

152. *See* United States v. Blaszczak, 947 F.3d 19, 27 (2d Cir. 2019) ("Blaszczak passed [three Deerfield hedge fund partners] nonpublic CMS information concerning both the timing and substance of an upcoming proposed CMS rule change that would reduce the reimbursement rate for certain radiation oncology treatments. The Deerfield partners sought to maximize this market edge by trading while 'the information wasn't known to others, and . . . wasn't public.' In late June 2009, Olan, Huber, and Fogel directed Deerfield to enter orders shorting approximately $33 million worth of stock in radiation-device manufacturer Varian Medical Systems ("Varian"), a company that would be hurt by CMS's proposed rule. Blaszczak's information was consistent with the proposed rule that CMS ultimately announced on July 1, 2009, and as a result of the Varian trade, Deerfield made $2.76 million in profits." (emphasis added) (internal citations omitted)), *cert. granted, judgment vacated sub nom. Olan v. United States*, 141 S. Ct. 1040 (2021).

choice cannot support a property fraud prosecution because even if the defendants obtain some confidential government information or deprive the government of some other kind of property—for example the time and labor of its employees—neither of those things are an object of the fraud itself. Altering a regulation remains the object of the fraud. In contrast, the object of the fraud in a scheme to *obtain* or *misappropriate* confidential government information is the confidential information itself, which constitutes property in the hands of the government.

The misappropriation vs. alteration test is therefore consistent with *Cleveland*, *Kelly*, and *Blaszczak*.[153] Meanwhile, DOJ's position that confidential information "wholly subsumed" within a regulatory scheme is not property, finds no support in the case law.

A. HYBRID CASES

The misappropriation vs. alteration test is complicated by hybrid schemes that seek to misappropriate confidential government information *and* alter a government regulation. The test is nonetheless capable of distinguishing schemes that fall within the fraud statutes while respecting existing case law. *Kelly* makes clear that a scheme is fraudulent under federal law if property was *an* object of the fraud and the property deprivation was not incidental.[154]

United States v. Middendorf is an example of a hybrid case.[155] There, the defendants schemed to improve KPMG's performance on audit inspections conducted by the Public Company Accounting Oversight Board (PCAOB).[156] Through relationships

153. Although it dealt with the misappropriation of confidential information from a private business rather than the government, the decision in *Carpenter* is also consistent with the misappropriation vs. alteration test. The Defendants misappropriated the confidential information held by the *Journal* and used it for their own private use—stock trades based on the information and the ensuing profits. Carpenter v. United States, 484 U.S. 19, 22–23 (1987). The scheme was not to *alter* the confidential information or any decision made by the *Journal*. Rather, in much the same way as the scheme in *Blaszczak*, the success of the scheme depended on the confidential information remaining the same.

154. *Kelly*, 140 S. Ct. at 1568–69.

155. United States v. Middendorf, No. 18-CR-36 (JPO), 2018 WL 3443117 (S.D.N.Y. July 17, 2018).

156. *Id.* at *1–2. Technically, the PCAOB is a nonprofit corporation created by the Sarbanes-Oxley Act of 2002 and overseen by the Securities and Exchange Commission. *Middendorf*, 2018 WL 3443117 at *1; 15 U.S.C. § 7211(b) ("The [PCAOB] shall not be an agency or establishment of the United States Government. . . ."). However, in Free Enter.

and recruiting former PCAOB employees, certain KPMG employees gained access to confidential PCAOB planning documents that specified which KPMG audits would be inspected.[157] In turn, the KPMG employees used the PCAOB's information to focus extra attention and resources on the to-be-inspected audits to improve the quality of the work prior to inspection and avoid negative comments in PCAOB reports.[158]

One could describe the object of the defendants' fraud as property. They schemed to *misappropriate* the PCAOB's confidential government information—the inspection lists—and that scheme depended on the lists staying the same prior to the implementation of the regulatory decision, which was the initiation of the audit inspections. On the other hand, one could characterize the object of the defendants' fraud as seeking to *alter* a regulatory decision. The reason the defendants wanted the confidential inspection lists was so that they could alter the PCAOB's decision whether to issue critical comments in official reports. It seems, then, that any test must identify which goal is the object of the fraud.[159]

This apparent difficulty is not as formidable as it first appears. The Court in *Kelly* required that the Port Authority's money or property be *an* object of the scheme, not necessarily *the* object.[160] The Court thereby recognized that schemes can have multiple objectives—some of which are not the misappropriation of property—and yet still fall within the prohibitions of the fraud

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Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010), the Supreme Court held that "[b]oard members are not Government officials for statutory purposes," but the Board is "party of the Government for constitutional purposes." *Id.* at 486. On appeal in *Middendorf*, the government maintains that the PCAOB's quasi-nongovernmental status renders *Cleveland* inapplicable. Brief for the United States at 21, United States v. Middendorf, No. 19-2983 (2d Cir. June 12, 2020). This Note does not address this issue and for purposes of this exercise, the author will assume that the PCAOB is a regular government agency.

157. *Middendorf*, 2018 WL 3443117, at *1–2.

158. *Id.*

159. The district court in *Middendorf* held that confidential government information is property for purposes of the fraud statutes because such information is more akin to the information at issue in *Carpenter* than the license at issue in *Cleveland*. *Id.* at *7–9. It did so, however, prior to the Second Circuit's initial decision in *Blaszczak* and prior to the Supreme Court's decision in *Kelly*. Therefore, the court did not engage in an "object of the fraud" analysis. As of the date of this Note's publication, *Middendorf* is stayed on appeal pending the resolution of *Blaszczak* on remand. *See* Order, *supra* note 121.

160. Kelly v. United States, 140 S. Ct. 1565, 1568 (2020); *see also* United States v. Gatto, 986 F.3d 104, 116 (2d Cir. 2021) ("Defendants may have had multiple objectives, but property need only be '*an* object' of their scheme, not the sole or primary goal." (internal citations omitted)).

statutes.[161] Applying the misappropriation vs. alteration test to a hybrid case is therefore straightforward: so long as the misappropriation of property is *an* object of the scheme, the fraud statutes remain applicable.

B. APPLYING *KELLY*'S ACTUAL HOLDING

This solution is qualified by an important caveat: *Kelly* made clear that a property deprivation that is a mere "incidental byproduct" of the scheme does not satisfy the object of the fraud requirement.[162] The question then becomes which property deprivations count as "an object" of the fraud and which are merely "incidental." In making this determination, courts should avoid two primary dangers.

First, prosecutors and courts could potentially characterize an object of the fraud at higher and higher levels of generality in order to find property. *United States v. Palma*[163] offers a recent example. There, federal prosecutors charged the defendant with wire fraud in connection with a scheme by Fiat Chrysler Automobiles (FCA) to mislead the Environmental Protection Agency, FCA's customers, and the general public regarding the emissions of FCA's diesel vehicles.[164] DOJ admitted that lying to obtain regulatory approval to sell the vehicles could not be the basis for a wire fraud charge.[165] DOJ nonetheless argued that the scheme also had an object of obtaining money by selling vehicles to the public.[166] If this argument were successful, *Cleveland* would be rendered a dead letter because the facts of *Cleveland* could be repackaged as a scheme to obtain money in the video poker industry.[167]

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161. *See* United States v. Sullivan, No. 20-CR-00337-WHO-1, 2022 WL 2317441, at *3 (N.D. Cal. June 28, 2022) ("*Kelly* did not foreclose the possibility that a scheme may have more than one object. The Court repeatedly described the issue as whether obtaining money or property was '*an* object' of the scheme, not *the* object.").

162. *Kelly*, 140 S. Ct. at 1573.

163. United States v. Palma, No. 19-20626, 2020 WL 6743144 (E.D. Mich. Nov. 17, 2020).

164. *Id.* at *1–2.

165. *Id.* at *3 ("Defendant argues that to the extent the indictment alleges the purpose of the scheme was to obtain regulatory approval to sell the Subject Vehicles, this cannot be the basis for the wire fraud counts . . . The government does not dispute this point. . . .").

166. *Id.* at *3–4.

167. The court in *Palma* rejected the government's arguments and dismissed the wire fraud charges, reasoning that there was not a sufficient causal connection between the defendant's alleged deceit and any loss of money. *See id.* at *4.

Courts should take precautions against this first danger in two ways. First, they should deploy *Cleveland*'s holding that the relevant property deprivation must be money or property *in the victim's hands*.[168] The money that the defendants in *Palma* made from selling cars was not taken from the government. Second, courts should hold prosecutors to the textual requirements of the fraud statutes. The statutes require that the obtaining of money or property be "*by means of* false or fraudulent pretenses, representations, or promises."[169] "By means of," "typically indicates that the given result (the 'end') is achieved, at least in part, *through* the specified action, instrument, or method (the 'means'), such that the connection between the two is something more than oblique, indirect, and incidental."[170] Therefore, "not every but-for cause will do," and the defendant's fraud must be the mechanism that "naturally induc[es]" the victim to part with money or property.[171] The First Circuit has held that a scheme to fraudulently obtain medical licenses did not "naturally induce" healthcare consumers to part with their money.[172] So too, regulatory approval for cars in *Palma* did not "naturally induce" consumers to part with their money.

The second danger is that prosecutors and courts could count *de minimis* property deprivations as an object of the scheme. If successful, the misappropriation vs. alteration distinction would fade into meaninglessness as inventive prosecutors strain to find some property deprivation in every case. The Supreme Court explicitly rejected such an attempt in *Kelly* when it considered the extra time and labor of toll collectors "incidental" and an "implementation cost."[173]

In approaching the question of what counts as incidental to vs. an object of the fraud, courts in clear cases should use common sense to prevent clear *de minimis* property deprivations from being swept up by the fraud statutes. For example, in *Kelly*, the Court pointed to the fact that the defendants never sought to

168. Cleveland v. United States, 531 U.S. 12, 26–27 (2000).
169. 18 U.S.C. § 1341 (emphasis added); 18 U.S.C. § 1343 (identical language).
170. Loughrin v. United States, 573 U.S. 351, 363 (2014). Although *Loughrin* interpreted the bank fraud statute, the First Circuit has applied this same analysis to identical language in the wire fraud statute. *See* United States v. Berroa, 856 F.3d 141, 149–54 (1st Cir. 2017).
171. *Loughrin*, 573 U.S. at 363.
172. *Berroa*, 856 F.3d at 149.
173. Kelly v. United States, 140 S. Ct. 1565, 1574 (2020).

obtain the services that the toll collectors provided, their original plan would not have required the toll collectors, and the defendants did not hope to obtain the data that traffic engineers spent time collecting.[174] In closer cases, determining the factual question of whether a defendant had an object of depriving the government of its property should be left to the jury.[175] In such cases, the jury should be instructed that in order to convict under the fraud statutes, any deprivation of property suffered by the victim at the hands of the defendant must have been "an object" (or "a goal")[176] of the fraud and not merely "incidental."

While the exact boundaries of *Kelly*'s "incidental" holding are uncertain, the misappropriation vs. alteration test remains helpful in solving most cases and by appropriately framing the inquiry in the most difficult cases. Courts should first ask whether the scheme seeks to misappropriate confidential government information or seeks to alter a regulatory decision. The former falls on the side of *Carpenter* and criminalization; the latter falls in the realm of *Cleveland*, *Kelly*, and beyond the reach of the fraud statutes. If a scheme arguably seeks to do both, it can be criminalized so long as property is *an* object rather than an incidental byproduct of the scheme. In making that determination courts should ensure: (1) that the thing obtained was property *in the victim's hands*; (2) that the fraud *naturally induced* the deprivation of money or property; and (3) that either common sense or a jury determination supports a finding that the deprivation was *an* object of the fraud.

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174. *Id.* In contrast, the Second Circuit rejected an incidental deprivation argument in United States v. Gatto, 986 F.3d 103 (2d Cir. 2021). There, the defendants were convicted of defrauding certain universities by paying money to high school basketball players to induce them to attend the universities affiliated with Adidas, contrary to the rules of the NCAA. *Id.* at 109. The court held that the scheme targeted a property interest of the universities—their ability to control the allocation of athletic-based scholarships—and that the deprivation was "at the heart" of the scheme, rather than incidental. *Id.* at 115–17. This was because "the scheme depended on the Universities awarding ineligible student-athletes athletic-based aid; without the aid, the recruits would have gone elsewhere." *Id.* at 116.

175. A district court judge in the Northern District of California has recently come to the same conclusion. *See* United States v. Sullivan, No. 20-CR-00337-WHO-1, 2022 WL 2317441, at *4 (N.D. Cal. June 28, 2022) ("Whether obtaining those fees was in fact an object of [the defendant's] scheme or merely an incidental byproduct is a question for the jury to decide.").

176. *See Object*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("2. Something sought to be attained or accomplished; an end, goal, or purpose.").

C. COUNTERARGUMENTS AND RESPONSES

There are two main criticisms of the argument that confidential government information is property for purposes of the fraud statutes. First, interpreting the fraud statutes so broadly could raise First Amendment concerns. Second, interpreting the fraud statutes to criminalize the conduct this Note has identified as criminal, could render the statutes unconstitutionally vague.

1. *First Amendment Concerns*

As far back as 1988, in the immediate wake of *Carpenter*, commentators and lawyers warned that criminalizing the release of confidential (but unclassified) government information under the fraud statutes raised serious First Amendment concerns.[177] For example, if a government employee leaks confidential information to a reporter who publishes the information, criminalizing that conduct could be considered an abridgement of freedom of speech and freedom of the press, in violation of the First Amendment.[178] In such a hypothetical case, a journalist could even potentially be prosecuted under an aiding and abetting theory of liability.[179] Such a blanket law against government leaks seems contrary to our political history and culture.[180] In a brief to the original panel,[181] and in their joint

177. *See, e.g.*, Coffee, *supra* note 27, at 121 ("[A] governmental employee could conceivably be prosecuted for leaking confidential information to the press—a result that would convert the mail and wire fraud statute into an Official Secrets Act.").

178. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 102 (1979) ("[S]tate action to punish the publication of truthful information seldom can satisfy constitutional standards."); *id.* at 103 ("[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order.").

179. *See* 18 U.S.C. § 2(a) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.").

180. Unlike other countries such as the United Kingdom, the United States does not have an Official Secrets Act, "a comprehensive statute that prohibits leaks of all confidential government information, irrespective of the information type and its recipient." Irina Dmitrieva, *Stealing Information: Application of a Criminal Anti-Theft Statute to Leaks of Confidential Government Information*, 55 FLA. L. REV. 1043, 1060 (2003). In fact, in 2000, President Clinton vetoed legislation that critics charged would

brief on remand,[182] defendants in *Blaszczak* raised this exact hypothetical as a reason to find that confidential government information is not property.[183]

These First Amendment concerns should not prevent recognizing confidential government information as property nor dictate the result in *Middendorf*, *Blaszczak*, or any other pending cases on this issue. There are several reasons to support this stance. First, the Supreme Court has repeatedly made clear that First Amendment concerns should not be mapped onto cases that do not present them.[184] Neither *Blaszczak*, *Middendorf*, nor any other pending case on this issue involves activity protected by the First Amendment because they do not involve protected speech or the freedom of the press.

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have created a UK-like Official Secrets Act. Intelligence Authorization Act for Fiscal Year 2001, H.R. 4392, 106th Cong. § 303(a) (2000) ("Whoever, being an officer or employee of the United States, a former or retired officer or employee of the United States, any other person with authorized access to classified information, or any other person formerly with authorized access to classified information, knowingly and willfully discloses, or attempts to disclose, any classified information acquired as a result of such person's authorized access to classified information to a person (other than an officer or employee of the United States) who is not authorized access to such classified information, knowing that the person is not authorized access to such classified information, shall be fined under this title, imprisoned not more than 3 years, or both.").

181. Brief for Appellant Robert Olan at 15, United States v. Blaszczak, 947 F.3d 19 (2d Cir. 2019) (No. 18-2811).

182. Appellants' Joint Brief on Remand at 20, *Blaszczak*, No. 18-2811 (2d Cir. Feb. 5, 2021).

183. *See also*, Volokh, *supra* note 29 ("Say then that investigative journalists have a relationship with a federal government employee, and cooperate with the employee to get a leak of confidential government 'predecisional information' about the government's planned policy changes. Under the panel's theory, they too would be guilty of felony conversion of federal property and wire fraud.").

184. *See* United States v. Mazurie, 419 U.S. 544, 550 (1975) ("[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."); United States v. Raines, 362 U.S. 17, 22 (1960) ("The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases . . . [A] limiting construction could be given to the statute by the court responsible for its construction if an application of doubtful constitutionality were in fact concretely presented. We might add that application of this rule frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy."); *see also* United States v. Girard, 601 F.2d 69, 71 (2d Cir. 1979) ("Where, as here, we are not dealing with defendants' exercise of a first amendment freedom, we should not search for statutory vagueness that did not exist for the defendants themselves. Neither should we find a constitutional infirmity simply because the statute might conceivably trespass upon the first amendment rights of others." (internal citations omitted)).

Second, these concerns have existed at least since the Court decided *Carpenter* in 1987,[185] and yet they have not come to fruition: federal prosecutors have not generally used the fraud statutes to prosecute unclassified leaks that implicate freedom of speech or freedom of the press.[186] One potential reason for this lack of enforcement is that DOJ's regulations and internal policies severely restrict prosecutors' ability to investigate and charge members of the media. For example, recognizing "the essential role of the free press in fostering government accountability and an open society,"[187] DOJ has imposed limits on its prosecutors' ability to seek subpoenas[188] and search warrants[189] from journalists, as well as their ability to question, arrest, or charge members of the media.[190] Restrictions include the requirement to obtain the authorization of the U.S. Attorney General,[191] the need to make all reasonable attempts to obtain the information from an alternative source,[192] and the requirement to pursue negotiations with the journalist.[193] In addition, when considering a request to charge or arrest a member of the news media, the Attorney General is required to consider the risk of "unreasonably impair[ing] newsgathering activities."[194]

DOJ's own internal policies also prohibit the precise hypothetical critics have imagined. It views a property fraud prosecution as "inappropriate" when:

> (1) the subject of the theft is intangible property, i.e., government information owned by, or under the care,

185. *See* Coffee, *supra* note 27 (raising First Amendment concerns in 1988).

186. The author was unable to find a case were a court dismissed a prosecution under the fraud statutes for a leak of unclassified information because of First Amendment freedom of speech or press. However, in 2001, DOJ charged a Drug Enforcement Agency employee with wire fraud and other offenses for leaking unclassified information from a DEA database to a reporter who published a series of articles using that information. *See* Ashcroft v. Randel, 391 F. Supp. 2d 1214, 1217–18 (N.D. Ga. 2005). The defendant subsequently pled guilty to a single violation of 18 U.S.C. § 641. *Id.*

187. 28 C.F.R. § 50.10(a)(2).

188. *Id.* at § (c).

189. *Id.* at § (d).

190. *Id.* at § (f).

191. *See, e.g.*, *id.* at (c)(1) (requiring DOJ prosecutors to obtain the Attorney General's authorization to issue a subpoena to a member of the news media).

192. *See, e.g.*, *id.* at (c)(4)(iii) ("The government should have made all reasonable attempts to obtain the information from alternative, non-media sources.").

193. *See, e.g.*, *id.* at (c)(4)(iv)(A).

194. *Id.* at (f)(5) (requiring the Attorney General to consider the principles in § (a)).

> custody, or control of the United States; (2) the defendant obtained or used the property primarily for the purpose of disseminating it to the public; *and* (3) the property was not obtained as a result of wiretapping, (18 U.S.C. § 2511) interception of correspondence (18 U.S.C. §§ 1702, 1708), criminal entry, or criminal or civil trespass.[195]

This policy is explicitly intended to protect whistleblowers who have the primary purpose of exposing the information to the public.[196] It is also designed to "protect members of the press from the threat of being prosecuted for theft or receipt of stolen property when, motivated primarily by the interest in public dissemination thereof, they publish information owned by or under the custody of the government after they obtained such information."[197] While this policy explicitly applies to 18 U.S.C. § 641, which prohibits theft or receipt of a "thing of value" (including property) from the government, its logic and reasoning applies equally to prosecutions under the fraud statutes targeting confidential government information. DOJ has thus recognized the potential First Amendment concerns of prosecuting cases involving confidential government information and has issued policies and regulations to restrict their own ability to do so.

Even if these regulations and policies were to change, there are still compelling arguments that such leaks still would not get prosecuted. Professor David Pozen offers a persuasive account of why there are so few prosecutions for leaks of classified information in the national security area—an area that almost certainly provides a greater incentive for the government to prosecute than a leak of non-classified information that does not implicate national security.[198] He observes "de minimis" criminal enforcement, including *zero* prosecutions in the last half-century,

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195. U.S. DEP'T OF JUST., CRIMINAL RESOURCE MANUAL § 1664, https://www.justice.gov/archives/jm/criminal-resource-manual-1664-protection-government-property-theft-government-information [https://perma.cc/U84M-XZNM].

196. *Id.*

197. *Id.*

198. David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512 (2013). For an extensive discussion of the legal framework governing leaks of classified information, including discussions of notable prosecutions of leakers, see STEPHEN P. MULLIGAN & JENNIFER K. ELSEA, CONG. RSCH. SERV., R41404, CRIMINAL PROHIBITIONS ON LEAKS AND OTHER DISCLOSURES OF CLASSIFIED DEFENSE INFORMATION (2017), https://sgp.fas.org/crs/secrecy/R41404.pdf [https://perma.cc/E3EY-PN7X].

against a member of the media for publishing or possessing leaked national security information.[199] He argues that this lack of enforcement derives from a "nuanced set of informal social controls" that have "come to supplement, and nearly supplant, the formal disciplinary scheme."[200] This set of informal controls has replaced enforcement because executive toleration of leaks "is a rational power-enhancing strategy and not simply a product of prosecutorial limitations, a feature, not a bug, of the system."[201] The system is set up this way primarily because "it helps preserve a robust ability to use the media to convey anonymous statements that serve administration ends—that is, to plant."[202]

Third, courts are capable of distinguishing between schemes that aim to misappropriate confidential information for private use or profit from schemes that aim to leak information for public speech purposes. While it is no doubt true that one could characterize a news organization's aim in publishing leaked information as private (publishing the story could lead to more subscribers, page views, ad clicks, and so on), courts are nonetheless capable of recognizing when certain information is a matter of public concern and therefore entitled to First Amendment protection. For example, in *Bartnicki v. Vopper*, the Supreme Court precluded civil liability on First Amendment grounds against a radio broadcaster for publishing a recording of a conversation that was illegally recorded by someone else.[203] The Court found it critical that "the subject matter of the conversation was a matter of public concern" and therefore First Amendment protections were triggered.[204] As such, even if overzealous federal prosecutors charge a journalist or leaker with misappropriating confidential government information, the courts stand ready,

199. Pozen, *supra* note 198, at 535–36. However, in 2010, DOJ charged a former Central Intelligence Agency agent with mail fraud and other offenses for leaking classified information to a journalist who later wrote a book that included the classified information. *See* United States v. Sterling, 860 F.3d 233, 238–40 (4th Cir. 2017). At the conclusion of DOJ's case-in-chief, the district court dismissed the mail fraud charge for reasons unrelated to the First Amendment. *See* Trial Transcript at 1338–43, United States v. Sterling, No. 10-CR-485 (E.D. Va. Jan. 21, 2015), ECF No. 492.

200. *Id.* at 515.

201. *Id.*

202. *Id.* at 559.

203. Bartnicki v. Vopper, 532 U.S. 514 (2001).

204. *Id.* at 525.

willing, and able to protect First Amendment interests by dismissing a prosecution in an as-applied challenge.[205]

2. *Vagueness Concerns*

The doctrine of vagueness refers to the constitutional prohibition on penal statutes that define criminal offenses with insufficient definiteness such that ordinary people are unable to understand what conduct is prohibited.[206] It also acts to dissuade arbitrary or discriminatory law enforcement.[207] Some scholars and commentators have argued that the breadth and flexibility of the fraud statutes render them unconstitutionally vague.[208] In addition, some defendants facing prosecution under the fraud statutes for the misappropriation of confidential government information have pressed these arguments.[209]

Statutory vagueness does not exist for a particular defendant, however, if the defendant "must have known" that the disclosure of the confidential information at issue was unauthorized, regardless of the defendant's knowledge of that information's status as property under the fraud statutes.[210] For example, in

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205. *See* Broadrick v. Oklahoma, 413 U.S. 601, 615–16 (1973) ("[T]he overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep . . . [W]hatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which [an allegedly overbroad law's] sanctions, assertedly, may not be applied.").

206. Kolender v. Lawson, 461 U.S. 352, 357 (1983).

207. *Id.*; *see also* City of Chicago v. Morales, 527 U.S. 41, 56 (1999) ("Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.").

208. *See, e.g.*, Hopwood, *supra* note 30, at 703–04 ("If Congress passes a host of unclear laws, those laws will be defined by the facts of cases brought by prosecutors and decided by the courts. This is just what has occurred with statutes such as wire or mail fraud: Congress passed an incredibly broad—and, some would argue, vague—statute, allowing federal prosecutors and the courts to fill in its scope."); *id.* at 704 n.55 ("Because fraud has been criminalized federally for over a century, those statutes are clear as to run-of-the-mill fraud. But when federal prosecutors and courts started broadening the statute to cover honest-services fraud and the like, the statute became unwieldy and, it could be argued, now requires a clear statement from Congress on what conduct it wishes to cover.").

209. *See, e.g.*, Brief of Respondent Christopher Worrall at 18–22, Olan v. United States, 141 S. Ct. 1040 (2021) (mem.) (No. 20-306).

210. United States v. Girard, 601 F.2d 69, 71 (2d Cir. 1979); *see also*, Samuel W. Buell, *Novel Criminal Fraud*, 81 N.Y.U. L. REV. 1971 (2006) (arguing that consciousness of wrongdoing is the critical element of fraud that separates culpable conduct susceptible to criminalization under the fraud statutes from less blameworthy conduct that does not rise to the level of fraud).

Blaszczak, the court found that current and former CMS employees were trained on the confidentiality of the agency's predecisional information and that consultants and securities traders must have known that they should not trade on this confidential nonpublic information.[211] If prosecutors were to bring a case in which the defendant could not have known that the conduct they engaged in was prohibited or wrongful, the courts stand ready to dismiss the case on an as-applied vagueness ground.[212] As a result, vagueness concerns should not prevent courts from recognizing confidential government information as property as a general rule, and courts should adjudicate vagueness concerns on a case by case basis.

CONCLUSION

The Supreme Court's recent opinion in *Kelly* has caused DOJ to change its position on what counts as property for purposes of the fraud statutes. It has thereby unnecessarily circumscribed its own ability to prosecute frauds that seek to obtain and misappropriate confidential government information. *Kelly* simply does not require DOJ's change of position in *Blaszczak* and is better read as a straightforward application of *Cleveland* to the facts before the Court. Treating confidential government information as property is also consistent with persuasive academic and philosophical accounts that the "right to exclude" is the defining characteristic of property.

Going forward, prosecutors and courts should look to see whether a scheme seeks to obtain or misappropriate government property—including confidential government information—or if it seeks to alter a government decision, even if the scheme obtains some government property as an incidental result. The former should fall within the prohibitions of the fraud statutes, while the latter should not. This approach would allow prosecutors to punish culpable conduct, while adhering to the property requirements of the fraud statutes.

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211. United States v. Blaszczak, 947 F.3d 19, 40–41 (2d Cir. 2019), *cert. granted, judgment vacated sub nom. Olan v. United States*, 141 S. Ct. 1040 (2021).

212. United States v. Rybicki, 354 F.3d 124, 129 (2003) ("[W]hen, as in the case before us, the interpretation of a statute does not implicate First Amendment rights, it is assessed for vagueness only 'as applied,' i.e., 'in light of the specific facts of the case at hand and not with regard to the statute's facial validity.'" (quoting United States v. Nadi, 996 F.2d 548, 550 (2d Cir. 1993))).