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The Misrepresentation Problem: An Analysis of 18 U.S.C. 1001

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THE MISREPRESENTATION PROBLEM: AN ANALYSIS OF 18 U.S.C. § 1001

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I. BACKGROUND

A. *History*

Had Congress enacted the Ninth Commandment verbatim, its latitude would surpass the present version of 18 U.S.C. § 1001 only slightly. The statute, a modern-day version of the ancient Biblical injunction proscribing false witness, has been limited by Congress to matters in which the federal government has some direct and immediate interest. The language of the statute reads as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States, knowing and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious, or fraudulent statements or representations or makes or uses any false writing, or document, knowing the same to contain any false, fictitious or fraudulent statments or entry, shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.[1]

A brief history of the statute is found in *United States v. Stark*,[2] in which Judge Chestnut reported it was enacted over one hundred years ago as the result of a congressional reaction to a spate of frauds upon the Government. The original language of the statute applied only to persons in the military service of the United States and prohibited them from presenting false claims to the Government for payment. Also prohibited in the same statute was the making of any false statement in documents supporting the false claim. At this point in the development of the statute, only false monetary claims were within the scope of the law. Until 1934, the law remained sub-

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1. 18 U.S.C. § 1001 (1964).
2. 131 F. Supp. 190 (D. Md. 1955).

stantially unchanged, although previously it had been amended to prohibit false statements made "for the purpose and with the intent of cheating and swindling or defrauding the Government."[3] The statute was amended in 1934 to include language which clearly marks the creation of a different type of offense, that of the false statement *per se*. The 1934 version contained the following language:

> [O]r whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any manner within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder.[4]

In *United States v. Gilliland*,[5] the United States Supreme Court commented on the 1934 amendment:

> The Amendment eliminated the words "cheating and swindling" and broadened the provision so as to leave no adequate basis for the limited construction which previously obtained . . . . In this, there was no restriction to cases involving pecuniary or property loss to the government.[6]

The most recent amendment to the statute occurred in 1948 and resulted in a separation of monetary and non-monetary fraud offenses into different statutory sections. The non-monetary fraud section is now 18 U.S.C. § 1001.

Use of the term "non-monetary fraud" herein should not be taken to mean that 18 U.S.C. § 1001 does not apply to false statements in connection with false claims, because, as will be more fully discussed, the statute clearly applies in those instances in which a false statement is made to a Government agency. The term is merely intended to mean that a monetary fraud is not necessary to complete the offense.

3. Act of Oct. 23, 1918, ch. 194, 40 Stat. 1015.
4. Act of June 18, 1934, ch. 587, 48 Stat. 996.
5. 312 U.S. 86 (1941).
6. *Id.* at 93.

B. Purpose of the Statute

In *Gilliland*, the United States Supreme Court, commenting on the 1934 amendment, defined its purpose as follows:

> The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described.[7]

The Ninth Circuit Court of Appeals described 18 U.S.C. § 1001 as servicing

> the vital public purpose of protecting governmental functions from frustration and distortion through deceptive practices, and it must not be construed as if its object were narrow and technical.[8]

A slightly different function was assigned in *United States v. Myers*,[9] in which a federal district court believed that the statute was designed

> to insure the whole world, governmental employees and the general public alike, that any record, document, instrument or statement made by a governmental employee, great or small, in his official capacity, and in the course of his official duties, can be relied upon by all.[10]

C. Scope of the Statute

Analysis of the statutory language reveals that three acts are prohibited. These acts are concealment of a material fact, false oral statements, and false written statements. The latter two acts, in reality, constitute the same basic offense. While the objective of false representation and concealment, moreover, are similar,

> to create or foster on the part of a Government agency, a misapprehension of a true state of affairs, the elements of proof differ. False representations, like common-law perjury, require proof of actual falsity; concealment requires proof of wilful non-disclosure by means of a trick, scheme or device.[11]

7. *Id.*
8. Ogden v. United States, 303 F.2d 724, 742 (9th Cir. 1962).
9. 131 F. Supp. 525 (N.D. Cal. 1955).
10. *Id.* at 531.
11. United States v. Diogo, 320 F.2d 898, 902 (2d Cir. 1963).

Of the two offenses described above, this paper will deal primarily with the offense of false representation, since most of the cases have developed in that area.

That the statute reaches persons in all walks of life becomes evident upon a reading of the cases. Persons applying for janitorial positions[12] as well as members of Congress[13] have been convicted under it. Nor is the statute limited to representations made to the executive branch of the Government; it applies equally to the legislative and judicial branches as well.[14] Additionally, the statute is applicable so long as the Government has "colorable authority" to do what it is doing; and the fact that the law under which it is operating is later held to be unconstitutional is not a defense to a prosecution under 18 U.S.C. § 1001.[15] Even advice to private individuals as to the most effective method of presenting false documents to a government agency has been held punishable because "[t]he statute is broad enough to reach the brains behind a scheme, as well as the mere instrument of its execution."[16]

II. ELEMENTS OF THE OFFENSE

The elements of the offense of false representations have been stated to be as follows:

(1) a statement
(2) falsity
(3) that the statement be made "knowingly and wilfully" and
(4) that the false statement be made in a "matter within the jurisdiction of any department or agency of the United States."[17]

A. The Statement

(1) Written or Oral

Clearly, it makes no difference whether the false statement takes written or oral form, since the statute proscribes both.

(2) Materiality

12. Alire v. United States, 313 F.2d 31 (10th Cir. 1962), *cert. denied,* 373 U.S. 943 (1963).
13. United States v. Bramblett, 348 U.S. 503 (1955).
14. *Id.*
15. United States v. Meyer, 140 F.2d 652 (2d Cir. 1944).
16. United States v. Goldsmith, 108 F.2d 917, 921 (2d Cir. 1940).
17. United States v. McCue, 301 F.2d 452, 454 (2d Cir.), *cert. denied,* 370 U.S. 939 (1962), *motion for leave to file petition for rehearing denied,* 374 U.S. 858 (1963).

A more difficult distinction is whether or not the false statement must relate to a material fact. There seems to be no question that a *concealment* must be material, because materiality is expressly required by the statute. As to false representations, however, "the word 'material' modifying the word 'fact' would seem not to be grammatically applicable to the second or third categories."[18]

The rationale for this construction of the statutory language has been stated as follows:

> Obviously it endangers the public to give a governmental agency false information to act on, even if this information is as to an apparently immaterial detail, since this detail may perchance influence the action of the agency in fact. On the other hand, the mere fact that an immaterial detail is withheld from such agency cannot endanger the public. Such is the clear rationale of the very words in the statute which the Congress used to express its intent.[19]

Another court has held that the false representation need not be material:

> We suggest that it is of doubtful wisdom, not to say potentially dangerous, to import conditions into a penal statute which appear to have been studiously omitted by the lawmakers themselves . . . . An attempt to conceal or cover up may properly be limited only to facts which are important and material. On the other hand, a fact deliberately or wilfully mistated in a matter of appropriate governmental inquiry seems properly punishable even if it is only a gratuitous red herring. As such, of course, it can obstruct, delay, or deflect an inquiry which is pressing home to uncover fraud upon the Government.[20]

Following this decision, the Second Circuit has consistently held that materiality is not required.[21] Other courts have taken a different view.

18. United States v. Stark, 131 F. Supp. 190, 198 (D. Md. 1955).
19. United States v. Grossman, 154 F. Supp. 813, 817 (D.N.J. 1957).
20. United States v. Silver, 235 F.2d 375, 377 (2d Cir. 1956).
21. United States v. Marchisio, 344 F.2d 653 (2d Cir. 1965); United States v. McCue, 301 F.2d 452 (2d Cir. 1962).

> We think, however, that this highly penal statute must be construed as requiring a material falsification. The legislative purpose strongly implies that only material false statements were contemplated, *i.e.*, statements that could affect or influence the exercise of a governmental function . . . . No perversion of a governmental function could possibly result from a false statement that was incapable of affecting or influencing such function. And the greater weight of authority in the federal courts supports the view that materiality is an essential element of the offense described by § 1001.[22]

In the view of the Tenth,[23] Ninth,[24] Fifth,[25] and Fourth[26] Circuits, materiality *is* also required. This requirement, therefore, may be the majority rule.

The Eighth Circuit has determined that materiality is required, but has applied this test:

> In determining whether a false statement is material, the test is whether it 'has a natural tendency to influence, or was capable of influencing the decision of the tribunal in making a determination required to be made.' [27]

A similar definition of materiality is found in other cases.[28]

As a practical matter, as stated in *United States v. Silver*,[29] "[a] lie in a matter within [the] jurisdiction will rarely, if ever, prove to be really immaterial."[30]

(3) The Exculpatory "No"

In 1953 a federal district court in Colorado was faced with the problem of determining whether or not an individual who had made a false denial to an FBI agent was punishable under

22. Freidus v. United States, 223 F.2d 598, 601-02 (D.C. Cir. 1955).
23. Gonzalez v. United States, 286 F.2d 118 (10th Cir. 1960).
24. Brandow v. United States, 268 F.2d 559 (9th Cir. 1959).
25. Rolland v. United States, 200 F.2d 678 (5th Cir.), *cert. denied,* 345 U.S. 964 (1953).
26. United States v. Zambito, 315 F.2d 266 (4th Cir.), *cert. denied,* 373 U.S. 924 (1963).
27. Blake v. United States, 323 F.2d 245, 246 (8th Cir. 1963), *aff'g* 206 F. Supp. 706 (W.D. Mo. 1962).
28. *See* Weinstock v. United States, 231 F.2d 699 (D.C. Cir. 1956).
29. 235 F.2d 375 (2d Cir. 1956).
30. *Id.* at 378.

18 U.S.C. § 1001.[31] Posing the question in terms of intentionally failing to tell the truth, the court reviewed the statutory history and concluded, based on *Gilliland*:

> There was no indication that this construction would be extended to include false oral statements . . . made to an investigator or . . . any other person representing a department or agency of the United States in a matter within the jurisdiction of the department or agency.[32]

The court in *United States v. Stark*,[33] faced with similar facts, reached a similar conclusion and questioned whether a bare, negative, false denial could be given the dignity of the title "statement." The real question was "not merely whether they were 'statements' within the broad dictionary sense of the term, but rather, were they statements within the intent of Congress. . . ."[34] The court continued:

> [T]he problem here is not to be determined by the mere physical form of the statement, but rather by its intrinsic nature and purpose. Running through the whole Act there seems to be discussed the congressional purpose to . . . protect governmental agencies from perversion of their normal functioning. The purpose seems to be to protect the government from the affirmative or aggressive and voluntary actions of persons who take the initiative, or, in other words, to protect the government from being the victim of some positive statement, whether written or oral, which has the tendency and effect of perverting its normal activities.[35]

The Second Circuit, in *United States v. McCue*,[36] recognized the "exculpatory no" but held that it did not apply to the facts before it, where the accused had voluntarily furnished to the Government a large amount of false information. In *United States v. Citron*,[37] following the *McCue* case, a federal district court in New York commented:

31. United States v. Levin, 133 F. Supp. 88 (D. Colo. 1953).
32. *Id.* at 89.
33. 131 F. Supp. 190 (D. Md. 1955).
34. *Id.* at 204-05.
35. *Id.* at 205.
36. 301 F.2d 452 (2d Cir. 1962).
37. 221 F. Supp. 454 (S.D.N.Y. 1963).

> The Court of Appeals of this Circuit has suggested that such a rule upon appropriate facts might have application, albeit a narrow one, in excluding from Section 1001 "[t]he case of the citizen who replies to the policeman with an exculpatory 'no'." . . . This potential exception is based on the history of Section 1001 as a statute seeking to prevent the administration of Government programs from being subverted or frustrated by the false representations . . . although the line between "administration" and "investigation" cannot always be sharply drawn, it is arguable that the statute was not intended to require, in every conceivable situation . . . a citizen to answer truthfully questions put to him in the course of police or other criminal investigations.[38]

Other cases have recognized and upheld the "exculpatory no."[39]

Perhaps the most valid observations concerning the "exculpatory no" are those which identify the facts under which it does not exist. The "exculpatory no" by general agreement probably does not exist in matters which are purely administrative and not investigative. It probably does not exist in investigative matters in which the initiative for the false statement came from the accused.[40] Finally, it is doubtful if it exists where the false statement is much more than a bare negative response to inquiries by government agencies. In brief summary, the exculpatory denial is a small, unreliable exception to a broad statute.

B. Falsity

There seems to be general agreement on the meaning of "false, fictitious and fraudulent" and very little has been said regarding this element of the offense. One case has indicated that the falsity contemplated by the statute has reference to the substance of the statement and not to its form. In *Travis v. United States*,[41] a union official was prosecuted under 18

38. *Id.* at 455.
39. Paternostro v. United States, 311 F.2d 298 (5th Cir. 1962); United States v. Philippe, 173 F. Supp. 582 (S.D.N.Y. 1959); United States v. Davey, 155 F. Supp. 175 (S.D.N.Y. 1957).
40. United States v. Citron, 221 F. Supp. 454 (S.D.N.Y. 1963).
41. 269 F.2d 928 (10th Cir. 1959), *rev'd on other grounds,* 364 U.S. 631 (1961).

U.S.C. § 1001 for falsely stating that he was not a member of the Communist Party. He had resigned from the Party prior to making the statement, but the evidence indicated that his resignation was for the purpose of making the statement, and he had actively participated in party functions after his "resignation." Under these facts the court held that the resignation was not a defense.

C. Knowingly and Wilfully

The issue which frequently arises regarding the element "knowingly and wilfully" concerns primarily the definition of "wilfulness." The cases are somewhat divided[42] as to whether or not wilful means "with evil intent" or simply "with knowledge." In *Hirsch v. Immigation & Naturalization Service*,[43] the Ninth Circuit decided that the Government need not prove

> that the defendant in fact had an evil intent. The word wilful means no more than that the forbidden act is done deliberately and with knowledge.[44]

Also, in *McClanahan v. United States*,[45] the accused complained that his motive could not have been evil since he had acted on the advice of counsel. His argument was rejected because "[t]he word 'wilful' means no more than . . . a forbidden act . . . done deliberately and with knowledge. . . . The advice of counsel would not justify . . . the wrongdoing condemned by the statutes."[46]

The Supreme Court has defined "wilful" in a different manner, although the offense which it was considering was a misdemeanor rather than a felony. In that case, *United States v. Murdock*, [47] "wilful" was defined thusly:

> The word often denotes an act which is intentional or knowing, or voluntary, as distinguished from accidental. But, when used in a criminal statute, it generally means an act done with a bad purpose . . . without justifiable excuse . . . stubbornly, obstinately, perversely . . . . The word is also employed to character-

42. H. BALTER, TAX FRAUD AND EVASION pt. 11, at 9 (3d ed. 1963).
43. 308 F.2d 562 (9th Cir. 1962).
44. *Id.* at 567.
45. 230 F.2d 919 (5th Cir. 1956).
46. *Id.* at 924.
47. 290 U.S. 389 (1933).

> ize a thing done without ground for believing it is lawful . . . or conduct marked by careless disregard whether or not one has the right to so act . . . .[48]

As support for the *Murdock* decision, in connection with the interpretation of the word "wilful", it should be noted that the statute uses not only the word "wilfully", but also the word "knowingly." If the word "wilful" has any function at all in the statute, it must mean something more than or different from "knowingly."

One writer has commented, however, that "it is doubtful whether a jury would be deterred from convicting, all other elements being present, solely on the basis of a broader or narrower instruction on wilfulness."[49]

D. "A Matter Within the Jurisdiction"

Whether or not a matter is within the jurisdiction involves at least two essential questions. The first question is whether or not the agency has jurisdiction over the subject matter. The second question assumes jurisdiction exists, but examines whether or not the false statement is "within" that jurisdiction. It is essential to a conviction that the agency have jurisdiction, and that the false statement be within that jurisdiction.

(1) Jurisdiction Over the Subject Matter

Some courts, in attempting to support the "exculpatory no" have asserted that a false "no" to an investigator does not pervert the function of the investigator which is to investigate.[50]

In *United States v. Davey*,[51] in which a false "no" was given by the defendant to an F.B.I. agent, the court refused to allow conviction under 18 U.S.C. § 1001, asking:

> Is it the authorized function of the Bureau to extract from the suspect only the truth, or, in view of the Fifth Amendment proscribing compulsory self-incrimination, to hear and record only such statement as the accused desires freely and voluntarily to make?[52]

48. *Id.* at 394-95.
49. H. BALTER, TAX FRAUD AND EVASION pt. 11, at 9 (3d ed. 1963).
50. Paternostro v. United States, 311 F.2d 298 (5th Cir. 1962); United States v. Davey, 155 F. Supp. 175 (S.D.N.Y. 1957); United States v. Stark, 131 F. Supp. 190 (D. Md. 1955).
51. 155 F. Supp. 175 (S.D.N.Y. 1957).
52. *Id.* at 178.

Similarly, in *United States v. Philippe*,[53] also dealing with the "exculpatory no" to an investigator, conviction was not allowed because the court felt that no perversion of function occurred:

> While the Special Agent may have been disappointed that the defendant would not truthfully answer himself into a felony conviction, we fail to see that his investigative function was in any way perverted. The only possible effect of exculpatory denials however false, received from a suspect such as the defendant is to stimulate the agent to carry out his function.[54]

All of the above cases dealt with the fact situation of "the citizen who replies to the policeman with an exculpatory 'no'."[55]

A different factual situation arose in the case of *Friedman v. United States*,[56] however, in which the defendant had been arrested by state authorities and upon his subsequent release, went to the F.B.I. and charged a state policeman with assault. Prosecuted under 18 U.S.C. § 1001, the defendant was convicted upon the jury's determination that his charge of assault was false. The Eighth Circuit reversed the conviction upon the rationale that the F.B.I. did not have the jurisdiction contemplated by 18 U.S.C. § 1001. Relying upon *Davey*, *Stark*, and *Paternostro*, the court held:

> In discussing jurisdiction, we must recognize the fundamental difference between the naked authority of a body to act and the power to make final and binding determinations. On one hand there exists a power to make monetary awards, grant governmental privileges, or promulgate binding administrative and regulative determinations. From this jurisdiction indicating a positive power, we must differentiate the mere authority to conduct an investigation in a given area without the power to dispose of the problems or compel action.
>
> . . . .
>
> The F.B.I. had authority to investigate, and in that broad sense it had 'jurisdiction.' However, it had no

53. 173 F. Supp. 582 (S.D.N.Y. 1959).
54. *Id.* at 584.
55. United States v. Citron, 221 F. Supp. 454, 455 (S.D.N.Y. 1963).
56. 374 F.2d 363 (8th Cir. 1967).

> power to adjudicate rights, establish binding regulations, compel the action or finally dispose of the problem giving rise to the inquiry. In this restrictive sense, the investigation of a possible violation of the criminal law is not a matter over which the F.B.I. exercises 'jurisdiction.' It is in this more restrictive sense, we believe Congress intended to use the word 'jurisdiction' in determining violations of § 1001.[57]

In a lengthy and well reasoned dissent, Judge Register pointed out that the cases on which the majority relied to find that the F.B.I. had no "jurisdiction" were predicated on the question of whether or not the "exculpatory no" was a "statement" within the meaning of 18 U.S.C. § 1001. Judge Register commented further that the majority opinion would exclude all statements made in criminal matters since only a court has the necessary jurisdiction to act under the majority's definition of jurisdiction. Judge Register concluded:

> I see no sound reason in principle, based on public policy or otherwise, why the statute should be construed as being applicable to 'statements' made to investigative officers of agencies or departments which have the power to 'finally dispose' of the matter in inquiry, but not applicable to statements of like character made to investigative officers of the F.B.I. or of any other agency . . . which does not have such power . . . . The fact is, false statements made in matters peculiarly within the 'investigative jurisdiction' and authorized governmental function of the Department of Justice may be exceedingly vicious and potentially dangerous and harmful to others . . . . Any such statements would necessarily initiate expensive and time-consuming proceedings by government agents and the substantial exercise by them of their authorized official functions—matters of much more public concern, in my opinion, than a relatively innocuous false civil claim for monetary benefit or personal privilege.[58]

Subsequently, the Second Circuit in *United States v. Adler*,[59] briefly reviewed *Friedman* but refused to follow its reasoning,

57. *Id.* at 367-68.
58. *Id.* at 376-77 (dissenting opinion).
59. 380 F.2d 917 (2d Cir. 1967).

believing it not to be in accordance with the statutory purpose. The court said: "In only the so-called 'exculpatory no' cases have the Courts shown a reluctance to extend § 1001 'to cover the investigation of criminal conduct'."[60]

(2) "Within The Jurisdiction"

The question here is when does the false statement come "within" the jurisdiction. It is obvious that the making of a false statement alone does not complete the offense. The circumstances in which the false statement is made, however, are crucial. It is clear that if a person makes the false statement directly to a government employee in the course of his official duties, the statute applies. It is where the false statement takes a more circuitous route, however, that the question whether or not the false statement was made "within" the jurisdiction of a department or agency of the United States is raised. In the case of *Lowe v. United States*,[61] the defendant was the employee of a company which was performing a defense contract with the United States, pursuant to which the Government reimbursed the company for its payroll expenses. The defendant falsified the number of hours he worked to his company and was subsequently prosecuted under 18 U.S.C. § 1001. The court concluded:

> [T]he validity of the indictment depends upon whether the alleged fact that the United States reimbursed the company for its payroll payments was sufficient to make the alleged misrepresentation with respect to the payroll entry a matter within the jurisdiction of a department or agency of the United States . . . .
> Accepting the allegations of the indictment as true, appellant's employment was derived from his private contract with a private corporation. His hours of work and rate of pay, and the control and supervision over the duties he performed, were matters within the exclusive dominion of its private employer. The misrepresentation as to hours worked was made to an employee of the private corporation under an arrangement whereby the wages were to be paid by the corporation. Insofar as the employee was concerned, every

60. *Id.* at 922. *See also* Knowles v. United States, 224 F.2d 168 (10th Cir. 1955); United States v. Van Valkenburg, 157 F. Supp. 599 (D. Alas. 1958).
61. 141 F.2d 1005 (5th Cir. 1944).

> aspect of his employment was exactly the same as it would have been had there been no contract with any governmental agency of any kind . . . . The contract . . . at least so far as the record shows, did not designate the payroll department of the company as an agency of the United States.[62]

In *Terry v. United States*[63] the defendant falsely told a lender that he possessed collateral for a loan. The misrepresentations were made upon applications printed by the FHA which contained a warning that misrepresentations were violations of federal law. The lender, although not FHA approved, at times sold its loans to an FHA approved institution. Prosecuted under 18 U.S.C. § 1001 and convicted, the defendant appealed and the conviction was reversed on the ground that the misrepresentation was not a matter within the jurisdiction of a federal agency at the time that the misrepresentations were made. The court was impressed by the fact that there was no guarantee that the particular loan in question would be sold to the FHA insured institution. The fact that the loan was in fact sold and thus insured by FHA was not considered important by the court because, "[a]n act which is not criminal at the time of its commission may not be converted into a crime at a subsequent time by the independent action of other persons."[64] It is clear that in both of the cases discussed above, the court felt that the false statement was sufficiently insulated from governmental jurisdiction to prohibit the application of the statute.

In other cases the insulation has not been sufficient. *United States v. Giarraputo*[65] dealt with a contractor producing classified weapons for the Department of the Navy. Employees of the contractor were required to fill out a "Defense Personnel Security Questionnaire" which was forwarded to the Navy Department. The defendant, an employee of the contractor, made a false statement on the questionnaire and was convicted under 18 U.S.C. § 1001. The defendant complained that the false statement was made to his employer and not to an agency or department of the government, and therefore the falsity was not a "matter within the jurisdiction." The court rejected this

62. *Id.* at 1006.
63. 131 F.2d 40 (8th Cir. 1942).
64. *Id.*
65. 140 F. Supp. 831 (E.D.N.Y. 1956).

argument, reasoning that the false statement need not be directly presented to the government agency. The case differed from the *Terry* case in that the questionnaire was certain to be presented to the government. It differed from the *Lowe* case in that the questionnaire was clearly a government questionnaire; it referred to 18 U.S.C. § 1001 and warned of the consequences of a false statement, and the defendant knew that the questionnaire would be eventually forwarded to a government agency.

In *Ebeling v. United States*[66] a sub-contractor falsely claimed non-existent costs against a prime contractor dealing with the Government on a contract. The sub-contractor's defense was that the papers were not furnished to the Government but only to the prime contractor. The court held, however, that the statute contemplated the use of a false statement "in intended relationship" to a matter within the jurisdiction of a governmental agency and that the direct presentation to the Government of a false statement was not necessary. The case was distinguished from *Lowe* on the basis that the employee in *Lowe* did not make his false claim "in intended relationship" to governmental matters. *Lowe* was not aware that his false statement would be used in a matter within the jurisdiction of the government. Such was not the case, however, in *Giarraputo* and *Ebeling*.

It is clear from the preceeding cases that for the false statement to come "within" the jurisdiction, it must be used "in intended relationship" to a governmental matter, and there must be some certainty that the false statement will eventually be received by a government department or agency.

E. Agency or Department of the United States

The term agency or department of the United States as used in 18 U.S.C. § 1001 has also been the subject of judicial interpretation. 18 U.S.C. § 6 defines department and agency thusly:

> As used in this Title:
>
> The term "department" means one of the executive departments enumerated in Section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of government.

66. 248 F.2d 429 (8th Cir. 1957).

> The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.[67]

In *United States v. Bramblett*,[68] the United States Supreme Court held that the context of the statute indicated a broader application:

> The context in which this language is used calls for an unrestricted interpretation. This is enforced by its legislative history. It would do violence to the purpose of Congress to limit the section to falsifications made to the executive departments. Congress could not have intended to leave frauds such as this without penalty. The development, scope and purpose of the section shows that "department" as used in this context was meant to describe the executive, legislative and judicial branches of the Government.[69]

Courts have determined that other organizations are agencies of the Government, as for example, an army post exchange,[70] an exclusion board in a military area established by executive order,[71] the Commodity Credit Corporation,[72] and the United States Tax Court.[73] These are but a few of the varied organizations held to be government agencies or departments.

III. NON-ELEMENTS OF THE OFFENSE

A. Pecuniary Fraud

As stated previously, early versions of 18 U.S.C. § 1001 were specifically directed against pecuniary fraud. However, the Supreme Court has clearly held the statute is not restricted to cases involving pecuniary or property loss to the Government.[74] The *Friedman* case, if followed by other circuits, may herald

67. 18 U.S.C. § 6 (1964).
68. 348 U.S. 503 (1955).
69. *Id.* at 508.
70. United States v. Brethauer, 214 F. Supp. (W.D. Mo. 1963).
71. United States v. Meyer, 140 F.2d 652 (2d Cir. 1944).
72. Spivey v. United States, 109 F.2d 181 (5th Cir. 1940).
73. Stein v. United States, 363 F.2d 587 (5th Cir. 1966).
74. United States v. Gilliland, 312 U.S. 86 (1941).

an interesting trend in the development of the statute. Although the Eighth Circuit in *Friedman* makes no attempt to limit the statute to pecuniary fraud, it does appear to limit the statute to those cases in which something is being sought from the Government. Thus a new element, specifically the intent to use a false statement for some gain or advantage, not necessarily pecuniary, may be coming into the picture. If so, it would seem to be at odds with the broad statements of the statutory purpose quoted earlier herein. At present, it is doubtful that the *Friedman* decision is in accord with the meaning and purpose of the statute as interpreted by most of the decisions.

B. Reliance of the Agency or Department upon the False Statement

In common law fraud, reliance upon a false statement is a necessary element of the offense. Defendants prosecuted under 18 U.S.C. § 1001 have argued, generally unsuccessfully, that the Government must have relied upon the false statement before the offense is complete. This argument was expressly rejected in *Blake v. United States*,[75] in which the court said:

> Consideration must be given to the fact that the negative answer did not induce the government to grant the application; in other words, there was no reliance upon the negative answer of the defendant. This fact does not exempt the conduct of the defendant from the operation of Section 1001. It seems well established in federal criminal jurisprudence that actual influence of the department or agency involved is not essential to a prosecution under Section 1001.[76]

In *Brandow v. United States*,[77] the court held that the punishable conduct was the willful submission of false statements calculated to induce agency reliance or action irrespective of whether actual favorable action was, for other reasons, impossible. Numerous other cases[78] have reached similar conclusions and the law in this area appears to be well settled.

75. 206 F. Supp. 706 (W.D. Mo. 1962), *aff'd*, 323 F.2d 245 (8th Cir. 1963).
76. *Id.* at 708.
77. 268 F.2d 559 (9th Cir. 1959).
78. *E.g.*, United States v. Coastal Contracting & Eng'r Co., 174 F. Supp. 474 (D. Md. 1959); United States v. Apex Distribut. Co., 148 F. Supp. 365 (D.R.I. 1957).

C. Statements Required by Law

In the case of *Cohen v. United States*,[79] the defendant was convicted under 18 U.S.C. § 1001 for voluntarily furnishing false information to the Internal Revenue Service. Based on the facts of *Gilliland*, which involved a statement required by law, the defendant in *Cohen* complained that the statute was only applicable to statements which the law required. The court rejected this argument.

> We do not agree. Although the particular false statements in issue in *United States v. Gilliland* . . . were contained in reports and affidavits which were required to be made, the Supreme Court did not indicate that this was an essential condition to the applicability of [18 U.S.C. § 1001].[80]

Similarly, in *Neely v. United States*,[81] the court held that "statements of which there can be convictions under Section 1001 are not limited to those required to be made by law or regulation." The foregoing appears to be the law despite some early language to the contrary.[82]

D. Statements Under Oath

Some defendants have tried to argue that the statute only applies to statements that were made under oath. This interpretation has not been accepted by the courts. In *Neely* the court specifically rejected the argument citing the language of *Marzani v. United States*,[83] as follows:

> The pertinent statute does not limit the offense to formal statements, to written statements, or to statements under oath. It applies to 'any false or fraudulent statements or representations . . . in any matter within the jurisdiction of any department or agency of the United States.[84]

Again, the *Friedman* case, takes a contrary view which may be merely dictum.

79. 201 F.2d 386 (9th Cir. 1953).
80. *Id.* at 391.
81. 300 F.2d 67 (9th Cir. 1962).
82. *See* United States v. Levin, 133 F. Supp. 88 (D. Colo. 1953).
83. 168 F.2d 133 (D.C. Cir. 1948).
84. 300 F.2d at 70.

E. The Two-Witness Rule.

In attempting to avoid conviction, many defendants have attempted to incorporate into the offense elements from similar statutes. Thus, the two-witness rule of the perjury statute has often been asserted to be a part of 18 U.S.C. § 1001. In *Neely* the court refused to accept the argument and adhered to numerous prior decisions[85] which were cited therein. These decisions indicate no difference of opinion as to the inapplicability of the two-witness rule.

F. Submitting the False Statement to the Government

The question of whether or not the statement must be submitted to the government has been discussed previously herein under the question of when a false statement comes "within" the jurisdiction of a governmental agency. Suffice it to say that it is not necessary that the false statement be submitted by a defendant to the Government.[86] It is necessary, however, that the false statement be made "in intended relationship" to governmental matters[87] and that there be some guarantee that it will eventually be received by the government.[88]

IV. OTHER DEFENSES

A. The Overlap of 18 U.S.C. § 1001 with Other Similar Statutes

18 U.S.C. § 1001 is not the only federal statute dealing with false statements. There are various other statutes applicable to the same offense which are, however, normally limited to a particular area of federal activity. Defendants prosecuted under 18 U.S.C. § 1001 frequently argue that the government should more properly proceed under a false statement statute dealing specifically with the particular offense. In *United States v. Rayor*,[89] faced with such an argument, the court concluded that it was not the taxpayer's privilege to say that the government should have proceeded under a statutory provision other than the one it chose. Expanding the argument further, some defendants

85. *E.g.*, Fisher v. United States, 254 F.2d 302 (9th Cir. 1958); DeCasaus v. United States, 250 F.2d 150 (9th Cir. 1957); Fisher v. United States, 231 F.2d 99 (9th Cir. 1956).
86. Ebeling v. United States, 248 F.2d 429 (8th Cir. 1957).
87. Lowe v. United States, 141 F.2d 1005 (5th Cir. 1944).
88. *Cf.* Terry v. United States, 131 F.2d 40 (8th Cir. 1942).
89. 204 F. Supp. 486 (S.D. Cal. 1962).

have said that the enactment of a more specific statute in the same area impliedly repeals 18 U.S.C. § 1001 in that area. In *Cohen* the court dismissed that argument with this language:

> [T]he broad false statement provisions of [18 U.S.C. § 1001] have their place as a "fitting complement" to other statutes dealing with false statements in particular fields. . . . A number of . . . cases illustrate that specific legislation will not be held to have repealed by implication more general legislation in this field where another reasonable construction can be applied.[90]

The court further stated that, although similar, the statutes were actually designed to accomplish different purposes.

In *United States v. Beacon Brass Co.*,[91] defendant was charged with attempting to evade taxes under a section of the Internal Revenue Code. Since the gist of the offense was a false statement, the defendant argued that he should have been prosecuted under 18 U.S.C. § 1001 which at the time of the prosecution was barred by its statute of limitations. The defendant argued that since Section 1001 dealt specifically with false statements while the other statute dealt generally with attempts to evade taxes, prosecution could only proceed under 18 U.S.C. § 1001. The court affirmed the conviction and said:

> We do not believe that Congress intended to require the tax enforcement authorities to deal differently with false statements than with other methods of tax evasion. By providing that the sanctions of § 145(b) should be 'in addition to other penalties provided by law,' Congress recognized that some methods of attempting to evade taxes would violate other statutes as well.[92]

In *United States v. Heine*,[93] the defendant was convicted for making false statements under a presidential proclamation requiring all aliens to apply for a certificate of identification. He appealed on the grounds that the proclamation and accompanying regulation contained their own punishment, namely, deten-

90. 201 F.2d at 392-93.
91. 344 U.S. 43 (1952).
92. *Id.* at 46.
93. 149 F.2d 485 (2d Cir. 1945).

tion, internment, etc. The court, however, affirmed the conviction holding: "Thus it [18 U.S.C. § 1001] prescribes an over-all penalty for falsification, no matter what other penalties the statutes or regulations in connection with which the falsification occurs may dictate."[94] It is thus clear that a defendant has no right to choose the statute under which he is prosecuted, and has no right to complain if another statute exists which is more specific.

B. Governmental Implementation of an Unconstitutional Statute.

As stated previously, it is not a defense to a prosecution under 18 U.S.C. § 1001 that the governmental operations in which the false statements were made were in fact vulnerable to constitutional attack.[95] The number of cases supporting this proposition clearly indicate that it is settled law.

V. SUMMARY

This summary will state the prevailing rule regarding the purpose of the statute, its elements, those matters which are not elements, and other defenses to prosecutions under the statute.

The purpose of the statute is to protect the authorized functions of governmental departments and agencies. The statements contemplated by the statute are both oral and written, and according to the general rule, must be material; although those circuit courts which require materiality define it in accordance with the expressed statutory purpose. An "exculpatory no", if limited to no more than that, in the investigatory field, may not be a "statement" within the meaning of the statute. The prohibited statement must be false, and it must be wilfully made. There is some dispute as to whether wilful means with evil intent; but where used in conjunction with the term "knowingly" as in "knowingly and wilfully," if it has any meaning separate from knowingly, then it must mean with evil intent. With respect to when a matter is within the jurisdiction, dealing specifically with jurisdiction, the *Friedman* case has raised a definitional problem which would restrict the application of the statute. The *Friedman* case appears to be in the minority at this time and it is presently to be doubted that

94. *Id.* at 487.
95. United States v. Kapp, 302 U.S. 214 (1937); Ogden v. United States, 303 F.2d 724 (9th Cir. 1962); *cf.* Kay v. United States, 303 U.S. 1 (1938).

jurisdictions other than the Eighth Circuit require that for a matter to be within the jurisdiction of an agency, the agency must have the power to make monetary award, grant governmental privileges, etc. To come "within" the jurisdiction, the false statement does not have to be submitted directly to the Government; but it must be made "in intended relationship" to a governmental matter and must inexorably find its way into governmental hands, for the offense to be complete. The terms "agency" or "department" are broadly defined and cover the three branches of Government and their subordinate agencies and departments. With respect to those matters which are not elements, it is not necessary that the false statement relate to a pecuniary fraud, nor be made under oath, nor be required by law, nor be corroborated by two witnesses, nor be directly submitted to the Government, nor be relied upon by the Government. With respect to other defenses, it is irrelevant that 18 U.S.C. § 1001 overlaps with other statutes, and it makes no difference whether or not the statute under which the Government was proceeding was unconstitutional at the time that the false statement was made.

VI. A CONCLUSION

The fifth amendment prohibits the state from requiring persons to speak if speaking would thereby incriminate them. All that 18 U.S.C. § 1001 requires is that when a person does speak to the state, he must speak the truth. His alternatives therefore are either to speak truthfully or to say nothing. Since his silence is protected, the consequences of his misrepresentations are of his own making.