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THE LEGAL CONSEQUENCES OF FALSIFYING STATEMENTS MADE TO THE FEDERAL GOVERNMENT—A WHITE COLLAR CRIME—FACT OR FICTION?

Warren H. Hyman*

I. INTRODUCTION

This article focuses on the laws affecting the making of false statements primarily in connection with white collar crimes. Two statutes cover these types of statements. One, Title 18 of the United States Code, Section 1001,1 broadly defines statements and entries, while the other, Title 18 of the United States Code, Section 1005,2 is

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   Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully 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 statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.


   Whoever, being an officer, director, agent or employee of any Federal Reserve bank, member bank, national bank or insured bank, without authority from the directors of such bank, issues or puts in circulation any notes of such bank; or Whoever, without such authority, makes, draws, issues, puts forth, or assigns any certificate of deposit, draft, order, bill of exchange, acceptance, note, debenture, bond, or other obligation, or mortgage, judgment or decree; or Whoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System—

   Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank or trust company, which has become a member of one of the Federal Reserve banks; and "insured bank" includes any state bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.
more restrictive, covering only false entries made in connection with banking matters. These statutes are slowly being eroded by courts attempting to find hidden meanings in what appear to be very straightforward provisions. These hidden meanings have evolved into exceptions which threaten to sap the very usefulness of these sanctions. The various circuit courts have failed to establish unanimity regarding the proper interpretation of these statutes, however, and the debate rages on.

A. The Historical Evolution of 18 U.S.C. Section 1001

The history of the false statement statute can be traced to the 1863 enactment of “An Act to Prevent and Punish Frauds upon the Government of the United States”. In the Act, both the presentation of false claims to the government and the making of false statements for the purpose of gaining approval of false claims were outlawed. Although broadly worded, application of the statute was limited to military personnel. A false claim was prohibited if made by someone in the military, but it was not specified to whom the statement had to be made in order to be a violation.

In the early 1900’s minor revisions of the statute were passed but these revisions, it was later held, were not broad enough to encompass punishments for persons committing frauds on government corporations created during World War I. In 1918, the false claims provision was extended to cover false statements made “for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, . . . or any corporation in

3. Act of March 2, 1863, ch. 47, 12 Stat. 696 (codified in R.S. § 5438 (2d ed. 1878)). The Act reads in pertinent part:

That any person in the land or naval forces of the United States, or in the militia in actual service of the United States, in time of war, who shall make or cause to be made, or present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, any person in such forces or service who shall for the purpose of obtaining, or aiding in obtaining the approval or payment of such claim, make, use, or cause to be made or used, any false bill, receipt, voucher, entry, roll, account, claim, statement, certificate, affidavit, or disposition, knowing the same to contain any false or fraudulent statement or entry . . .


5. Id. at 505.


which the United States of America is a stockholder . . . .”8 Although broadening the application of the Act, the Supreme Court, in construing this additional provision, limited its focus to “the fraudulent causing of pecuniary or property loss” to the Government.9

No further changes were made in the statute until 1934, when Congress, at the urging of the Secretary of the Interior,10 removed the “cheating and swindling or defrauding” language of the 1918 amendment. The 1934 amendment11 expanded the scope of the false statement provision by abolishing the restriction of suits to cases involving pecuniary or property loss to the Government.12 As a result, a false statement could be covered under the statute provided it related to a material fact, was knowingly or willfully made, and came within the jurisdiction of an agency or department. Prior to 1934, “the law was lacking under which prosecutions might be had ‘for the presentation of false papers.’”13 The 1934 amendment also prohibited this kind of fraud.

In spite of various amendments to the section, courts continued to be plagued with questions regarding its appropriate scope. The Supreme Court in *Gilliland v. United States*14 found a broad Congressional purpose in enacting Section 1001 which was “to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described.”15 However, twenty-five years later, the Eighth Circuit applied a narrowing intent to the amendments and stated that the

10. The Secretary of the Interior had sought to prosecute false statements made to the government during transportation of ‘hot oil’ shipments. Gilliland, 312 U.S. at 93-96. Bramblett, 120 F. Supp. at 861.
11. Act of June 18, 1934, ch. 587, 48 Stat. 996 states in pertinent part:
   Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer. . . . Any claim upon or against the Government of the United States . . . Knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully 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 . . . Knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States . . . Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.
12. Gilliland, 312 U.S. at 93.
13. *Id.* at 94.
14. 312 U.S. 86 (1941).
15. *Id.* at 93.
obvious reason for the amendments was "to curtail the flow of false information to the newly created regulative agencies."16

The only change in the false statement statute since the 1934 amendments has been to divide it into two provisions: one, a false claim provision in Title 18 of the United States Code, Section 287 and the other, a false statement provision in Title 18 of the United States Code, Section 1001. At least one federal court has been called upon to deal with violations of both provisions. In that case the court held: "The very purpose of Sections 287 and 1001 is to protect the government against those who would cheat or mislead it in the administration of its programs . . . ."17

In 1948 the ten-year term of imprisonment for violation of Section 1001 was changed to five years in order to "harmonize the punishment provisions of comparable sections involving offenses of the gravity of felonies, but not of such heinous character as to warrant ten-year punishment."18 This revision of section 1001 is the last change in this section to date.19

B. Purpose of Section 1005

The second federal statute which proscribes the making of false statements deals specifically with banks regulated by the Federal Reserve System or insured by the Federal Deposit Insurance Corporation. According to the Fifth Circuit Court of Appeals, the aim of this statute is "to give assurance that upon an inspection of a bank, public officers and others would discover in its books of account a picture of its true condition."20

II. PRECONDITIONS TO FALSE STATEMENT LIABILITY

A. Introduction

Violations of both Section 1001 and 1005 include substantially the same elements,21 a false statement of a material fact, within the jurisdiction of the government or federal agency, and made with fraudulent intent.22 However, just as there are conflicting views of

19. See supra note 1 for text of the Act.
22. United States v. Race, 632 F.2d 1114, 1116 (4th Cir. 1980); United States v. Weather-
the appropriate scope of the statutes, there is also disagreement among the circuits regarding the existence of the requirement of materiality and the appropriate interpretation of the "statement" and "jurisdiction" terms.

B. Statement/Entries

1. Broad Interpretation

The plain meaning of the provision of Title 18 of the United States Code Section 1001 which reads "... any false, fictitious or fraudulent statements. ..." suggests that Congress intended all false statements to fall within this portion of the law. In keeping with this broad interpretation, courts have held that a statement does not have to be made under oath to be in violation of the statute. The courts have also held that no distinction should be made between oral and written statements, and when the statement is false, the fact that it is not responsive to the question asked is immaterial.

Similarly, courts have been willing to read broadly the provision in Title 18 of the United States Code, Section 1005 which states: "Whoever makes any false entry in any book, report or statement. ..." The Sixth Circuit, in holding that a false statement in an inter-office memo was covered, stated: "It seems obvious that Section 1005 is intended to be broad enough to cover any document or record of the bank that would reveal pertinent information for the officers or directors of the bank." In 1982, the Fifth Circuit also gave a broad interpretation to the above provision when it concluded that false statements made in any document submitted in connection with a loan application were included. At least one state has passed similar legislation intended to guarantee that the


28. Bramblett, 348 U.S. at 509-10; Gilliland, 312 U.S. at 91-93.


30. United States v. Grugette, 678 F.2d 600, 602 (5th Cir. 1982).
books and records of corporations engaging in the banking business within its boundaries will reflect the true financial condition of the corporation.\textsuperscript{31}

2. \textit{Narrow Interpretation}

On the other hand, courts have found a variety of ways to restrict application of the false statement statutes. By far the most successful technique has been to restrict the scope of the term "statement". The most restrictive interpretation allows the inclusion of only two categories: first, those false statements made in support of fraudulent claims and, second, those tending to "pervert authorized functions of departments and agencies".\textsuperscript{32} In \textit{Friedman v. United States},\textsuperscript{33} the Eighth Circuit determined that false statement prosecutions could be classified in four categories:

1. Giving of false information with the purpose of receiving a monetary or proprietary benefit;\textsuperscript{34}
2. The resisting of monetary claims by the United States by presentation of false information;\textsuperscript{35}
3. The seeking of some governmental privilege such as employment or security clearance on the basis of falsified information;\textsuperscript{36}
4. The giving of false information which frustrates lawful regulation.\textsuperscript{37}

Another successful limiting tactic has been the use of "\textit{ejusdem generis}" as a rule of statutory construction.\textsuperscript{38} This rule is applied to determine the meaning of a word by looking at the relationship of the word to words surrounding it. In this statute, the phrase affected

\textsuperscript{31} \textit{Del. Code Ann.}, tit. 5, § 123 (1974). The statute provides:
Every director, officer, agent, clerk or employee of any institution affected by the provisions of 122 of this title, who willfully and knowingly subscribes or makes any false statement of facts or false entries in the books of the institution, or knowingly subscribes or exhibits any false paper, with intent to deceive any person authorized to examine as to the condition of the institution, or willfully or knowingly subscribes to or makes any false report, shall be fined or imprisoned, or both. (emphasis supplied).

\textsuperscript{32} United States v. Chevoor, 526 F.2d 178, 183 (1st Cir. 1975), cert. denied. 425 U.S. 935 (1975).

\textsuperscript{33} 374 F.2d 363 (8th Cir. 1976).

\textsuperscript{34} United States v. Bramblett, 348 U.S. 503 (1955).

\textsuperscript{35} United States v. McCue, 301 F.2d 452 (2d Cir. 1962).

\textsuperscript{36} Marzani v. United States, 168 F.2d 133 (D.C. Cir. 1948), aff'd by an equally divided court, 335 U.S. 895 (1948).

\textsuperscript{37} United States v. Gilliland, 312 U.S. 86 (1941).

by this approach is “. . . .” fraudulent statements or representations. . . .” Much attention has focused on the use of the disjunctive in this provision. The close proximity of these alternative provisions has led some courts to find that Congress did not intend to include situations in which the defendants were not legally required to make the statements, or in which defendants did not volunteer statements for the purpose of making a claim or inducing improper action by the government.39 Under this restrictive interpretation, a representation is considered a voluntary statement rather than a mere passive answer.40

The requirement that a false statement be aggressively and deliberately initiated by the person sought to be charged in order to come within the meaning of the term “statement” in Section 1001 has prevented the conviction of persons giving false answers in response to questions posed by Internal Revenue Service agents.41 Similarly, this narrow “exculpatory no” exception has also thwarted attempts to convict persons for lying to agents of the Federal Bureau of Investigation.42

Courts have been careful to define the boundaries of the narrow “exculpatory no” exception. In 1980 the Seventh Circuit defined the scope of the exception as “limited to simple negative answers, . . . without affirmative discursive falsehood under circumstances indicating that the defendant is unaware that he is under investigation . . . and is not making a claim against or seeking employment with the government.”43 Under this analysis, if a person is aware of the fact that he is under criminal investigation, his Fifth Amendment protection against self-incrimination would require that he receive Miranda warnings and any statement he made would be outside the scope of Section 1001.

This “exculpatory no” exception has also been applied in the area of customs interrogations. In most cases the courts have held that negative answers given to questions posed by customs officials which were false were not covered by Section 1001.44 The reason was that “no aggressive or deliberate positive or affirmative statement” was made.45

39. Id.
40. Paternostro v. United States, 311 F.2d 298, 302 (5th Cir. 1962).
41. Id. at 309.
42. Stark, 131 F. Supp. at 208.
43. United States v. King, 613 F.2d 670, 674 (7th Cir. 1980).
44. United States v. Schnaiderman, 568 F.2d 1208 (5th Cir. 1978).
45. United States v. Hajecate, 683 F.2d 894, 900 (5th Cir. 1982).
Statutes in two states cover the making of false written statements. However, these statutes are more closely aligned with perjury violations since both require that the written instrument bear a notice to the effect that false statements are punishable. Violations of both are punishable by fine and/or imprisonment.

C. Jurisdiction

Some courts have been equally creative in finding exceptions to the false statement statutes by restrictively construing the jurisdiction requirement. By defining an agency's jurisdiction as either investigative or administrative, or by labeling an agency action as simply a "housekeeping" matter and not a use of the department's machinery, the courts have limited the scope of the statute. However, concerning the topic of jurisdiction, the Supreme Court has explicitly stated that it should not be given a narrow or technical meaning.

1. Broad Interpretation

The Fifth and Seventh Circuit Courts of Appeal have broadly viewed the jurisdiction element. The question arises most often in the context of false information given to agents of the IRS or FBI. Statements which falsely allege criminal conduct have been found to carry a "substantial potential for wasting the Bureau's time and thus perverting its central function . . . ." The Fifth Circuit has decided that Section 1001 is clearly intended to cover situations in which a person voluntarily seeks out a government agency with a statement which he knows to be false and which he has every reason to expect the agency to pursue.

46. N.Y. PENAL LAW § 210.45 (McKinney 1975) that provides: "A person is guilty of making a punishable false written statement when he knowingly makes a false statement, which he does not believe to be true, in a written instrument bearing a legally authorized form notice to the effect that false statements made therein are punishable. Making a punishable false written statement is a class A misdemeanor." (emphasis supplied).


50. United States v. Lambert, 501 F.2d 943, 946 (5th Cir. 1974).

51. United States v. Massey, 550 F.2d 300, 305 (5th Cir. 1977).
Perhaps the broadest reading of jurisdiction may be attributed to the Seventh Circuit. In a case defining the limits of the Securities and Exchange Commission's jurisdiction, the court found that as long as a statutory basis existed for the agency's request for information, Section 1001 jurisdiction was established. Thus, the court had no need to put labels on the various functions of the SEC to limit the application of Section 1001.

Although the Supreme Court's holding in *Bryson v. United States* appeared to establish a broad interpretation of the jurisdiction element of Section 1001, a significant problem arose. *Bryson* involved a false denial of Communist affiliation submitted on an application to the National Labor Relations Board. Prior to *Bryson*, the NLRB filing requirement concerning Communist affiliation was declared unconstitutional as a Bill of Attainder. However, the *Bryson* Court, reading a broad definition into the jurisdiction element, stated: "it cannot be thought that as a general principle of our law a citizen has the privilege to answer fraudulently a question that the government should not have asked." A valid legislative interest in protecting the integrity of official inquiries was given as justification for the holding.

2. Narrow Interpretation

The *Bryson* decision was written two years after the Eighth Circuit decided *Friedman v. United States*. Friedman had been accused of violating Section 1001 by volunteering to agents of the Federal Bureau of Investigation false information concerning mistreatment by an arresting officer. The Eighth Circuit decided that the investigation of a possible criminal law violation was not a matter over which the F.B.I. exercises jurisdiction since the F.B.I. had no power to allow a privilege or grant an award. The Eighth Circuit clearly pointed out the two opposing views regarding jurisdiction. The majority opinion in *Friedman* stated: "When the false statement is made to the Agency with the power to allow the privilege or grant the award, jurisdiction of the agency is established so

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55. *Bryson*, 396 U.S. at 72.
56. *Id.* at 70.
57. 374 F.2d 363 (8th Cir. 1967).
58. *Id.* at 369.
as to warrant a prosecution under Section 1001."\textsuperscript{59} The court in \textit{Friedman} effectively limited the agency functions which could establish Section 1001 jurisdiction. However, Judge Register in his dissent sided with the advocates of the plain meaning approach and found the expansive Congressional purpose to be the protection of all authorized functions of the government.\textsuperscript{60} The Supreme Court relegated \textit{Friedman} to a footnote in its \textit{Bryson} opinion and found no occasion to either approve or disapprove the holding in \textit{Friedman}.\textsuperscript{61} However, Mr. Justice Douglas, in his dissent in \textit{Bryson},\textsuperscript{62} stated: "the question of what is 'within the jurisdiction' of an agency should be construed in a restrictive, not an expansive way."\textsuperscript{63} Since the petitioner's union was entitled to his services without the filing of any affidavit, no valid legislative interest in protecting the integrity of official inquiries existed.\textsuperscript{64}

Some courts have further restricted the jurisdictional scope of Section 1001 by distinguishing between the functions of the IRS and FBI.\textsuperscript{65} Many courts have determined the F.B.I.'s role to be merely "investigative" with no authority to decide and act upon particular subject matter. But the Seventh Circuit has specifically addressed the jurisdictional difference between the FBI and IRS. In convicting Otto Kerner, a former governor of Illinois, for making false statements to the IRS, the court stated: "The IRS differs from the FBI in that it has regulatory responsibilities in the administration and enforcement of our self-assessment income tax system."\textsuperscript{66} The enforcement responsibility of the I.R.S. was the key factor in the establishment of agency jurisdiction under Section 1001.\textsuperscript{67}

\begin{itemize}
  \item \textsuperscript{59} \textit{Id.}
  \item \textsuperscript{60} \textit{Id.} at 372 (Register, J., dissenting).
  \item \textsuperscript{61} \textit{Bryson}, 396 U.S. at 71 n.10.
  \item \textsuperscript{62} \textit{Id.} at 73 (Douglas, J., dissenting).
  \item \textsuperscript{63} \textit{Id.} at 74.
  \item \textsuperscript{64} \textit{Id.} at 76.
  \item \textsuperscript{66} United States v. Isaacs, 493 F.2d 1124, 1157 (7th Cir. 1974), \textit{cert. denied}, 417 U.S. 976 (1974).
  \item \textsuperscript{67} At least one state, Florida, has enacted legislation explicitly to cover reports of criminal activity which are known to be false and which are made to any law enforcement officer. Such a false report is punishable by imprisonment for a year or less or a fine of One thousand dollars. \textit{FLA. STAT. ANN. § 817.49} (West 1975) that provides: "Whoever willfully imparts, conveys or causes to be imparted or conveyed to any law enforcement officer false information or reports concerning the alleged commission of any crime under the laws of this state, knowing such information or report to be false, in that no such crime had actually been committed, shall upon conviction thereof be guilty of a misdemeanor of the first degree, punishable as provided in §§ 775.082 or 775.083." (emphasis supplied).
\end{itemize}
This restrictive approach to jurisdiction can, however, give unexpected results. One court has refused to allow the "exculpatory no" defense in customs interrogation cases due to the "administrative" distinction. In a Tenth Circuit case the defendant was entering the United States from Canada and was given a declaration form for customs purposes while he was still on board the plane.\textsuperscript{68} He did not declare that he was carrying more than five thousand dollars in currency on the customs form, and answered "no" when questioned by the customs official. The court found that the submission of the form to the defendant while on board the plane was exclusively administrative in nature. The "exculpatory no" defense was not available because there was no showing that the defendant would have suffered any penalty or sanction in the hands of customs officials, if he had truthfully reported the currency in his possession.

D. Interpretation of "False"

There has been general agreement upon the proper interpretation of the "false" element for false statement liability. Material omissions as well as false statements are explicitly prohibited by Section 1005.\textsuperscript{69} While Section 1005 prohibits only false entries by its terms, it has been interpreted to cover material omissions as well.\textsuperscript{70} However, the key to a successful charge involving the "false" element centers on determining what should be charged in the indictment. Although the objective of both the making of a false statement and the omission of a material fact may be the same, what must be proved to establish each offense differs significantly.\textsuperscript{71} For this reason, if the prosecution files an indictment charging the defendant with making a false statement, but then at trial proves the elements of an omission, the indictment must be dismissed.\textsuperscript{72}

An interesting question arises under Section 1005 concerning the accurate recording of a fraudulent act in the records of a bank. Most courts say such an entry is not "false" under the statute.\textsuperscript{73} The Supreme Court has stated: "[T]he making of a false entry is a concrete offence [sic] which is not committed where the transaction en-

\textsuperscript{68} United States v. Fitzgibbon, 619 F.2d 874 (10th Cir. 1980).
\textsuperscript{69} United States v. Krepps, 605 F.2d 101 (3rd Cir. 1979).
\textsuperscript{70} BUSINESS CRIMES, supra note 21, at 13.
\textsuperscript{71} United States v. Diogo, 320 F.2d 898 (2d Cir. 1963).
\textsuperscript{72} BUSINESS CRIMES, supra note 21, at 13.
\textsuperscript{73} Coffin v. United States, 156 U.S. 432 (1895); United States v. Erickson, 601 F.2d 296 (7th Cir. 1979), cert. denied, 444 U.S. 979 (1979); United States v. Manderson, 511 F.2d 179 (5th Cir. 1975).
tered actually took place, and is entered exactly as it occurred.” 74 Following this interpretation, the Seventh Circuit found: “Although entries recording fictitious transactions or inaccurately recording actual transactions are false within the meaning of 18 U.S.C. 1005, an entry recording an actual transaction on a bank’s books exactly as it occurred is not a false entry under that statute even though it is a part of a fraudulent or otherwise illegal scheme.” 75

E. Materiality

The threshold question under the “material” requirement to false statement liability is whether or not such a condition exists. Under Section 1005 there is no express provision of materiality. Materiality under Section 1001 is explicitly required only in regard to the knowing and willful falsification, concealment or covering up of facts, but the statute is silent with respect to false statements. 76 If a court finds that materiality is required, it must then decide what test of materiality should govern. On this point the circuits are also divided.

1. Section 1001

The requirement that an omission be material is explicitly stated in the statute. However, courts have been required to look back into the congressional history to determine if this requirement applies to false statements. With the exception of the Second Circuit, all courts that have addressed the issue have found that false statements must also be material. Relying upon the plain meaning of Section 1001, the Second Circuit has consistently held that “the false statements proscribed by Section 1001 need not be proved to be material.” 77 There is no indication in either the committee reports or in the congressional debates that the scope of the statute was to be in any way restricted. 78

Concerned more with the threat of harsh punishment for trivial falsehoods, the Fifth, Seventh, Eighth, Ninth and Tenth Circuits have read into the statute the requirement of materiality with respect to false statements. As the Fifth Circuit stated, “Under familiar canons of construction a penal act of the harshness and rigor of

74. Coffin, 156 U.S. at 463.
75. Erickson, 601 F.2d at 302.
76. See supra, note 1 for text of the Act.
78. McCue, 301 F.2d at 454.
this one . . . will not be stretched beyond, it will be strictly confined within, the fair meaning of its terms." 79 Unfortunately, in their zealous protection of the confines of Section 1001, these circuits may have gone beyond protecting the fair meaning of its terms and unnecessarily restricted the statute's application.

Having imposed the requirement of materiality on false statements, the problem then becomes how to apply that term. The broadest interpretation of materiality was stated by the Seventh Circuit in a case involving statements made to the Securities and Exchange Commission. The court held that even preliminary information given to the SEC to determine the solvency of a company was material if it might "affect the agency's decision to continue the investigation." 80

Another test of materiality looks at the intrinsic capabilities of the false statement itself rather than at what it may possibly accomplish. 81 The Ninth Circuit has also stated that "the statute serves as a catch-all, reaching those false representations that might 'substantially impair the basic functions entrusted by the law to [the particular] agency' but which are not prohibited by other statutes." 82 This "substantial impairment" test is the most rigorous of the materiality tests as evidenced by the case where a mere negative response to an inquiry by a customs official was held to be material. 83 The court held that such a response might tend to prevent customs from fulfilling its administrative duty of requiring persons entering the United States to fill out reporting forms, and was thus sufficient to constitute perversion of a government function. 84

Another test of materiality was adopted by the Fifth Circuit with the "intrinsic capabilities" analysis. The court in United States v. McIntosh found that "it is not necessary that the agent rely or act to a detriment, but the government must show that the concealment had the capacity to deceive the federal agency." 85 The Fifth Circuit took a more traditional approach in an earlier case when it determined that if the functioning of a department would not have been materially affected had it relied on the statement, the statement must

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79. United States v. Moore, 185 F.2d 92, 95 (5th Cir. 1950).
80. Di Fonzo, 603 F.2d at 1266.
81. United States v. Goldfine, 538 F.2d 815 (9th Cir. 1976).
82. United States v. Rose, 570 F.2d 1358, 1363 (9th Cir. 1978).
83. United States v. Carrier, 654 F.2d 559 (9th Cir. 1981).
84. Id. at 562.
85. United States v. McIntosh, 655 F.2d 80, 82 (5th Cir. 1981).
necessarily be immaterial. The Eighth Circuit has likewise adopted a "natural tendency to influence" test.

2. **Section 1005**

The case law on the materiality requirement under Section 1005 is scarce. The Supreme Court did not explicitly find that a false entry must be material but it did state, "The crime of making false entries . . . with intent to defraud . . . includes any entry on the books of the bank which is intentionally made to represent what is not true or does not exist, with the intent either to deceive its officers or to defraud the association." Therefore, it would seem that the materiality requirement would be closely related to the intent issue. It is difficult to imagine any nonmaterial statement which would be made with the intent to deceive. The Tenth Circuit adopted this reasoning when it allowed the fact finders to focus on "whether the transaction is real and substantial as opposed to merely formal."

F. **Intent**

Both false statement statutes clearly state that the wrongdoer must act with the requisite intent. Section 1005 requires any person making a false entry in any book act "with intent to injure or defraud" and Section 1001 states that a wrongdoer must "[k]nowingly and willfully falsify[, conceal[ or cover[ up . . . a material fact . . . ] in order to be a violation.

1. **Section 1001**

Several circuits have looked into the question of intent involved in Section 1001 liability. The Seventh Circuit, in convicting Otto Kerner of making false statements to IRS agents, found that "Kerner's statements were positive and affirmative, and were calculated to pervert the authorized functions of the government."

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87. Blake v. United States, 323 F.2d 245, 246 (8th Cir. 1963) (quoting Gonzoles v. United States, 286 F.2d 118, 122 (10th Cir. 1960)).
88. United States v. Darby, 289 U.S. 224 (1933) (quoting Agnew v. United States, 165 U.S. 36, 52 (1897)).
89. United States v. Krepps, 605 F.2d 101, 109 (3d Cir. 1979), See also Laws v. United States, 66 F.2d 870 (10th Cir. 1933).
90. See supra note 2.
91. See supra note 1.
92. Isaacs, 493 F.2d at 1158.
The Fifth Circuit in a recent case became involved in determining the difference between an intent to deceive and an intent to defraud. The case involved the false designation of 1150 cases of bonded scotch whiskey as "vessel supplies" on a U.S. customs form. The court found that, in order to violate Section 1001, "[t]he statement must have been made with an intent to deceive, a design to induce belief in the falsity or to mislead, but [that] Section 1001 does not require an intent to defraud—that is, the intent to deprive someone of something by means of deceit." Therefore, as long as a person intends to manipulate or pervert an agency’s functioning by means of a false statement, they will be found to be subject to Section 1001 liability.

No evil intent on the part of the person making the false statement need be proven for Section 1001 liability. To willfully make a false statement, a defendant must have the specific intent of bringing about the forbidden act or pervert the agency's functioning, but it is not necessary that the government prove that the appellant in fact had an evil intent. Willful means no more than that the forbidden act is done deliberately and with knowledge.

The issue of "recklessness" has also been confronted by the courts in a Section 1001 context. The Fifth Circuit has held that "[t]he misrepresentation must have been made deliberately, knowingly, and willfully, or at least with reckless disregard of the truth and with a conscious purpose to avoid learning the truth." A person will be deemed to have knowledge of the falsity of his statement where he exhibits this conscious disregard for learning its truthfulness.

The Second Circuit has also adopted the "recklessness" theory. In a case involving a defendant who had allegedly signed his wife’s name to a loan agreement believing that he was authorized to do so, the court held that "[a] defendant may be convicted of making a false statement only if the government proves beyond a reasonable doubt that the defendant either knew the statement was

94. Id. at 1276-77.
95. Carrier, 654 F.2d at 561.
96. Id.
97. United States v. Lange, 528 F.2d 1280, 1288 (5th Cir. 1976).
98. United States v. Evans, 559 F.2d 244, 246 (5th Cir. 1977), cert. denied, 434 U.S. 1015 (1978).
false or acted with a conscious purpose to avoid learning the truth."

The intent provision has come under close scrutiny in the customs area. Once again it is the Fifth Circuit which has been the most active in this area. The issue usually arises when people entering the United States are unaware of the purpose for currency reporting and suspect that it might be illegal to transport more than five thousand dollars in currency into the United States. This mistaken belief often negates the intent requirement for a Section 1001 violation. As the Fifth Circuit has stated, "Proof of the requisite knowledge and willfullness, . . . is almost impossible unless affirmative steps are taken by the government to make the laws' requirements known." Concern for our constitutional privilege against self-incrimination was the rationale for the Fifth Circuit's warning that, "[u]nless customs officials disabuse travelers of the belief that bringing currency into the country is illegal, solicitude for fifth amendment values, prevents us from attaching Section 1001 liability."

However, the Tenth Circuit has found that a person may exhibit the requisite intent regardless of the government's attempts to make the laws' requirements known. In a 1980 case the court inferred that the defendant knew of the requirement to fill out the form when he said he wanted "to avoid a hassle with the . . . IRS." The court also said the "exculpatory no" defense was not available since the defendant did not show that a truthful answer would have in any way incriminated him. The Second Circuit went even further in a similar case and held: "Even where an individual correctly believes that an answer to an inquiry by a government agent may be incriminating this does not create a privilege to lie."

The Georgia state courts have been called upon to interpret the intent requirement of their false statement statute. The Georgia

100. Id. at 19.
102. Granda, 565 F.2d at 926.
103. Anderez, 661 F.2d at 409.
104. Fitzgibbon, 619 F.2d at 874.
105. Id. at 880.
107. GA. CODE ANN. § 16-10-20 (1982) provides in part:

A person who knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact; makes a false, fictitious, or fraudulent statement
Supreme Court, in a 1982 case, found that violation of the statute required an affirmative act on the part of the defendant in order to comport with the fifth amendment rights. Therefore, an inadvertent typographical error was not found to exhibit the requisite intent to violate the Georgia statute.

2. Section 1005

The Supreme Court has had the opportunity to interpret the intent requirements of Section 1005. It was decided that an intent to deceive is an “intent to deceive the official agents concerned in overseeing the bank and supervising its operation and the conduct of its business. . . .” Officials included the Comptroller of the Currency, his agents and any other officials charged with examining the books and records to determine the financial condition of a bank.

The Fifth Circuit, in 1979, was faced with the issue of whether “recklessness” was sufficient to constitute specific intent to violate Section 1005. The court found:

As pertains to Section 1005, however, this court has never held “recklessness” to be sufficient to satisfy the specific intent requirement nor do we think it should. We agree that “recklessness” may be a reasonable basis in some cases for punishing the making of a “false entry” such as where it appears that there has been a deliberate attempt to avoid knowing whether the entry is fraudulent or deceptive. However, it does not necessarily follow that in all cases proof of a specific intent to injure or defraud should be eliminated by a vague generalization equating recklessness with intent to defraud.

It would appear that courts must be very careful to distinguish between mere negligence and true recklessness in the context of Section 1005 violations. Recklessness requires that more than mere

or representation; or makes or uses any false writing or document, knowing the same to contain any false, fictitious, or fraudulent statement or entry, in any matter within the jurisdiction of any department or agency of state government or of the government of any county, city, or other political subdivision of this state shall, upon conviction thereof, be punished by a fine of not more than $1,000.00 or by imprisonment for not less than one nor more than five years, or both.

111. United States v. Welliver, 601 F.2d 203 (5th Cir. 1979).
112. Id. at 210.
negligence, carelessness, thoughtlessness or inadvertence be found before the specific intent element of Section 1005 will be satisfied.\textsuperscript{113}

III. DEFENSES TO FALSE STATEMENT LIABILITY

A. \textit{Exclusivity}

The legislative history of Section 1001 is ambiguous concerning the question of multiple penalties, and there is nothing within its provisions to suggest that its penal terms must be exclusive.\textsuperscript{114} The Tenth Circuit was presented with a case which would have been proper under Title 18 of the United States Code, Section 1001 or under Title 42 of the United States Code, Section 408, a more specific and recent misdemeanor statute covering false statements made for use in determining Medicare payments.\textsuperscript{115} The court held that prosecution under Section 1001 was proper since there was "no indication of an intent to make the later act a substitute for any part of the earlier statute."\textsuperscript{116}

Some support does exist for the defense theory that prosecution should be under a more specific statute. The Fifth Circuit has stated, "Given the well recognized antagonism toward general, open-ended criminal statutes, and the presence here of a specific legislative enactment, the prosecutor might well have proceeded under the specifically applicable statute, Title 18 of the United States Code, Section 1005."\textsuperscript{117} However, this was dicta since the court reversed based on the failure to prove materiality.

The Ninth Circuit Court of Appeals in \textit{United States v. Rose} was more specific when asked to rule on whether a single false statement could justify convictions under Title 18 of the United States Code, Section 1001 and Title 18 of the United States Code, Section 542.\textsuperscript{118} The court held:

\begin{quote}
[T]he statute (Section 1001 serves as a catch-all, reaching those false representations that might "substantially impair" the basic functions entrusted by law to (the particular) agency, but which are not prohibited by other statutes. The legislative history reveals no evidence of an intent to pyramid punishment for of-
\end{quote}

\begin{flushright}
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Anderez}, 661 F.2d at 406.
\textsuperscript{116} \textit{Id.} at 567-68.
\textsuperscript{117} \textit{Beer}, 518 F.2d at 173.
\textsuperscript{118} 570 F.2d 1358 (9th Cir. 1958).
\end{flushright}
fenses covered by another statute as well as by Section 1001.119

B. Reliance on an Expert

A second defense, based upon a theory of reliance, has been successful in the area of tax evasion cases. This reliance defense is designed to refute the government's proof that the defendant intended to commit the offense.120 The essential elements of the defense are a full disclosure of all pertinent facts to an expert and a good faith reliance on the expert's advice.121

IV. CONCLUSION

The courts which have insisted on narrowing the scope of the false statement statutes profess a fear of harshly punishing trivial falsehoods. There is concern that the free flow of information between governmental agencies and private citizens will be stifled if people are threatened by false statement prosecution. However, there seem to be two fatal flaws in this scenario. First, it will be only the makers of intentionally false statements that will have anything to fear. The others will not be subject to prosecution simply if they are negligent or careless in their reporting. Second, the self-interest of the various agencies should work to prevent too vigorous an application of these statutes. The FBI realizes its dependence on private citizens coming forth with the information and will seek to balance this need for information against its use of criminal prosecution.

The courts should not attempt to do piecemeal that which they feel Congress should have done initially. The fact that the sanctions for making a false statement under Sections 1001 or 1005 are more severe than the punishment for making a false statement under oath is not something which the judicial branch should take upon itself to rectify.

119. Id. at 1363.
121. Id. at 237.