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Is the Cover-Up Worse Than the Crime?

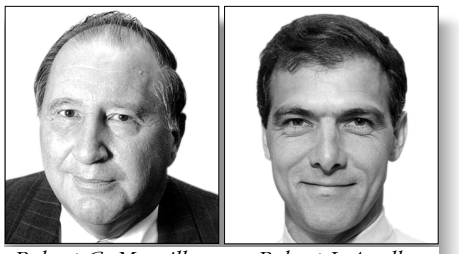
In several recent high-visibility cases, when the underlying investigation of alleged criminality proved unfruitful, the government nevertheless proceeded to prosecute those under investigation for allegedly impeding the primary investigation.

With the prosecutions of Frank Quattrone, Martha Stewart [whom Mr. Morvillo represented at trial] and the officers of Computer Associates, the U.S. Attorney's offices for the Southern and Eastern Districts of New York have shown that what goes on during an investigation is equally, and in some cases, more important than the underlying allegations that caused the investigation to be initiated.

The false statements,[1] obstruction of justice,[2] obstruction of an agency proceeding,[3] and witness tampering [4] statutes are those most commonly employed in these types of cases.

False Statement Statute

Seemingly, the broadest of these catch-all statutes is 18 USC §1001, the false statements statute, which prohibits the knowing and willful making of a material false statement to a federal government agent or agency. Any time a potential witness is even casually interviewed in a federal matter, §1001 is implicated. Because no oath is involved, because materiality is easily established, and because neither the courts nor Department of Justice policy has mandated that government agents give a warning of §1001's applicability to an interview, §1001 is perilous. Even a purely local problem can be escalated into a federal crime by virtue of the involvement, however peripheral, of federal authorities.[5]



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The use of §1001 as a substitute for proof of more substantive criminal activity, and the concern over its unfairness, is not a new topic. Going back to Watergate, where the cover-up proved to be far more damaging than the third-rate burglary that preceded it, the fairness of applying §1001 to investigative interviews was scrutinized by the respected Judge Gerhard A. Gesell and found wanting. In *United States v. Ehrlichman*,[6] the judge dismissed a §1001 case after a jury verdict of conviction, emphasizing the lack of an oath, the lack of a strict rule of materiality and the lack of a guarantee that the proceeding be transcribed or reduced to memorandum. Judge Gesell noted that an "F.B.I. interview may occur ... under extremely informal circumstances which do not sufficiently alert the person interviewed to the danger that false statements may lead to a felony conviction."

Often, agent interviews take place in the field, where intimidation ranks high and access to legal advice is unavailable. A favorite law enforcement tactic is to descend, without notice, on a subject and his or her family at night at home, give no warnings of any kind and ask questions about the subject's involvement in criminal conduct. The agent takes advantage of the stress and surprise engendered by a nighttime law enforcement visit, the embarrassment of such a visitation in front of other family members and the ignorance of the subject about his or her legal rights. Any misstatement the usually nervous and fearful subject makes, ranging from a simple denial of guilt to a complex explanation of the subject's state of mind, can then result in a false statement prosecution.

Purpose and Pitfalls

The breadth of §1001 and the potential for abuse inherent in false-statement cases were well explored by Justice Ginsberg in *Brogan v. United States*,[7] the case that held that even a simple exculpatory "no" can violate the statute. In a concurring opinion,[8] Justice Ruth Bader Ginsberg wrote "to call attention to the extraordinary authority Congress, perhaps unwittingly, has conferred on prosecutors to manufacture crimes." She noted that

> the prospect remains that an over-zealous prosecutor or investigator — aware that a person has committed some suspicious acts, but unable to make a criminal case — will create a crime by surprising the suspect, asking about

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those acts, and receiving a false denial.

Prosecutors should heed Justice Ginsberg's articulation of the underlying rationale and policy supporting §1001. After reviewing the legislative history of §1001 in her concurring opinion in *Brogan*, she concluded that it demonstrated that §1001's "purpose was to protect the government from the affirmative, aggressive and voluntary actions of persons who take the initiative; and to protect the Government from being the victim of some positive statement which has the tendency and effect of perverting normal and proper governmental activities and functions."

To offset some of the potential unfairness of the application of §1001 to informal interviews, the defense bar has sought to persuade the courts that, to establish requisite willfulness, the subject of the interview must be proved to have known that it is unlawful to make a false statement under these circumstances. Such a rule would at least cause subjects of informal, spontaneous interviews to be warned of the consequences of their statements. To date, the courts have resisted this urging, but this question remains open in the U.S. Court of Appeals for the Second Circuit.[9]

The accuracy of an agent's recollection of the actual statements made during an interview is another potential problem in this area. The use of tape recorders during interviews is not common and may even violate the policy of some law enforcement agencies. Sometimes agents do not make notes until after the completion of an interview, and even when they do take notes contemporaneously, they often do not create memos of the interview until a later time, when memories begin to recede. Thus, in the absence of a tape recording or actual court-reported transcript, prosecutions can be based on faulty renderings of the interview. Who will the jury believe — the FBI agent who asked the questions or the defendant who answered them? In the Martha Stewart case, the notes of the defense attorney who attended the government-initiated interview differed from those of the FBI agent on one of the specifications of falsity.

So enamored are prosecutors with §1001 that they based one recent prosecution on the application of the *Pinkerton* theory.[10] The Second Circuit reversed the resulting convictions, finding that the defendants, who were not present when the statements were made, could not "have reasonably foreseen when they entered into their false-statement conspiracy in 1994 that [another conspirator] as a natural or necessary consequence of their agreement, would make a false statement to an FBI agent in the course of a federal grand jury investigation that was convened six years later."[11]

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Justice Ginsburg in *Brogan* made the point that the Department of Justice maintained a policy against bringing §1001 prosecutions for statements amounting to an "exculpatory no," referring to language in the U.S. Attorneys' Manual: "[i]t is the Department's policy not to charge a §1001 violation in situations in which a suspect, during an investigation, merely denies guilt in response to questioning by the government." This language is still in effect, though the current Manual goes on to limit it: "[t]his policy is to be narrowly construed, however; affirmative, discursive and voluntary statements to Federal criminal investigators would not fall within the policy." Moreover, "untruthful 'no's' when the defendant initiated contact with the government in order to obtain a benefit" also are "prosecutable."[12]

Some commentators have opined that the seeming increase in the use of §1001 runs counter to law enforcement interests.[13] Many in the defense bar are concerned about exposing clients to any form of government questioning because of the risk of a §1001 prosecution. To the extent that this concern limits the government's opportunity to uncover relevant information, overuse of §1001 will impede rather than assist the investigative process.

Given our human frailty of avoiding problems by attempting to evade the truth in many aspects of life, criminal investigations, proceedings and even trials are rife with deliberate misstatements, most of which go ignored by prosecutors. Yet, the Department of Justice has issued no policy standards as to when §1001 should be utilized, leaving prosecutorial decision-making subject to the vagaries of individual agents and prosecutors.

1. 18 US.C. §1001.
2. 18 US.C. §1503.
3. 18 US.C. §1505.
4. 18 US.C. §1512.
5. See, eg., *United States v. Tabor*, 788 F2d 714 (11th Cir. 1986).
6. 379 F Supp. 291 (D.D.C. 1974).
7. 522 U.S. 398 (1998).
8. The majority opinion of Justice AntoninScalia in *Brogan* did not disavow the concurring opinion
9. See *United States v. Whab*, 355 F3d 155 (2d Cir.) (holding that trial court did not commit plain error in failing to instruct that term "willfully" required defendant's specific knowledge that lying to agent was illegal under §1001; also declining to decide issue of first impression in Circuit whether "willfully" requires defendant's specific knowledge that his conduct was criminal), cert. denied, 124 S. Ct. 2055 (2004); *United States v. Weiner*, 96 F.3d 35 (2d Cir. 1996); see also *United States v. Grotke*, 702 F.2d 49 (2d Cir. 1983) (fact that defendant was aware that false statements were criminal supported conviction under §1001).
10. In *Pinkerton v. United States*, 328 U.S. 640 (1946), the Supreme Court held that a defendant who does not directly commit a substantive offense may nevertheless be liable if the commission of the offense by a co-conspirator in furtherance of the conspiracy was reasonably foreseeable to the defendant as a consequence of their criminal agreement.
11. *United States v. Bruno*, No. 03-1349(L), 03-1351(CON), 2004 WL 2039421 (2d Cir. Sept. 14, 2004).
12. United States Attorneys' Manual, 9-42160, "False Statements to a Federal Criminal Investigator," available at www.usdoj.gov.
13. See Joel Cohen, "Lying to the Feds — Clamming Up — For Safety," National Law Journal., Sept. 13, 2004, p. 26, col. 2.