Blogs
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DOJ Trims Away Some Excess of the Federal False Statement Statute

The federal statute criminalizing false statements, 18 U.S.C. § 1001, is one of the most widely-used tools in a federal prosecutor's toolbox.

The statute criminalizes "knowingly and willfully" making a false statement to a federal officer, including law enforcement agents. Recently, however, the Department of Justice has signaled that it intends to rein in some of the breadth of the statute, endorsing the interpretation that Section 1001 requires the government to meet a higher burden when demonstrating that the defendant "willfully" made a false statement. In short, the DOJ now takes the view that to successfully convict a defendant under Section 1001, the defendant must have made the false statement knowing that the act of doing so was a violation of federal law. Courts have previously searched for ways to carve away some of Section 1001's perceived overbreadth. For example, in 1962, the Fifth Circuit held that "mere negative responses" to an investigating agent's questions were not "statements." Other circuits had similarly concurred that Section 1001 does not criminalize these "exculpatory no" denials of wrongdoing, but the U.S. Supreme Court foreclosed that defense in 1998, holding that even an "exculpatory no" is a criminal false statement under the statute. While the Supreme Court settled among the circuits what qualifies as a "statement" under Section 1001, the circuits still disagree as to what the government must show to demonstrate that the defendant "wilfully and knowingly" made a false statement. In the majority of circuits, the government must simply show that the defendant **knew the statement was false**, and made that statement "deliberately and not out of confusion, mistake or surprise." In other circuits, the government must show that the defendant made the false statement with "**knowledge of the general unlawfulness**" of their false statement. In recent filings with the Supreme Court, Solicitor General Donald Verrilli has indicated that the DOJ intends to adopt the narrow view of what constitutes willfulness, stating that, "it is now the view of the United States that the 'willfully' element of Sections 1001 . . . requires proof that the defendant made a false statement **with knowledge that his conduct was unlawful**." The effect of this policy shift is rippling across pending prosecutions, and in two cases—*Ajoku, v. United States* and *Russell v. United States*—the Supreme Court vacated and remanded to the circuit courts "for further consideration in light of the confession of error" by the DOJ. The shift may lead to a reinvigoration of the "exculpatory no" doctrine, inasmuch as spontaneous denials of wrongdoing are unlikely to

have been made with knowledge that the denial itself is a violation of federal law. In federal investigations involving "white collar" crimes, however, it may be more likely that a defendant will have been warned in advance of the criminal risks attendant to false statements, and the "willful" hurdle may be easier for a federal prosecutor to clear.

Authors

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