My Notes/Memos on False Statements/obstruction

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To: OIC attorneys 6/20/96

From: Stephen Bates

re: materiality standards
for false statements and perjury

1. General principles

Materiality is an element under the false statement statute (Section 1001) and the perjury statutes (Sections 1621 and 1623). See Freidus v. United States, 223 F.2d 598, 601 (D.C. Cir. 1955) (Section 1001); United States v. Voorhees, 593 F.2d 346, 349 (8th Cir.) (Section 1001), cert. denied, 441 U.S. 936 (1979); United States v. Koonce, 485 F.2d 374, 381 (8th Cir. 1973) (Sections 1621 and 1623).

In 1995, the Supreme Court held that materiality is a question of fact that must go to the jury. United States v. Gaudin, 115 S. Ct. 2310 (1995) (construing Section 1001); see United States v. Levine, 1995 WL 761834 at *2 (D.C. Cir.) (extending Gaudin to Section 1621); United States v. Keys, 67 F.3d 801, 808 (9th Cir. 1995) (extending Gaudin to Section 1623), rehearing en banc granted, 78 F.3d 465 (9th Cir. 1996). Prior to Gaudin, most courts had treated materiality as a question of law.

2. Materiality formulations

A misrepresentation or concealment is material if it "was predictably capable of affecting, i.e., had a natural tendency to affect, the official decision," Kungys v. United States, 485 U.S. 759, 771 (1988)[1]; or if it is "'a fact that would be of importance to a reasonable person in making a decision about a particular matter or transaction,'" United States v. Winstead, 74 F.3d 1313, 1320 (D.C. Cir. 1996) (quoting and approving language in jury instructions); or if "a truthful answer would have aided the inquiry," United States v. Cunningham, 723 F.2d 217, 226 (2d Cir. 1983), cert. denied, 466 U.S. 951 (1984). "[T]he effect necessary to meet the materiality test is relatively slight, and certainly not substantial . . . ." United States v. Moore, 613 F.2d 1029, 1038 (D.C. Cir. 1979) (distinguishing materiality from

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[1] Although Kungys construes a denaturalization statute rather than Section 1001 or a perjury statute, the Court indicates that "material" bears the same meaning in all three spheres. See id. at 769-72. Kungys also might be distinguished on the ground that it treats materiality as a question of law, see id. at 772, a doctrine that Gaudin overturned. But Gaudin does not modify the materiality standard; in fact it cites Kungys for the applicable standard. 115 S. Ct. at 2313.

"substantial effect" standard of perjury recantation provision), cert. denied, 446 U.S. 954 (1980).

Materiality is a higher threshold than relevance. "To be 'relevant' means to relate to the issue. To be 'material' means to have probative weight, i.e., reasonably likely to influence the tribunal in making a determination required to be made. A statement may be relevant but not material." Weinstock v. United States, 231 F.2d 699, 701 (D.C. Cir. 1956).

A statement can be material even though it bears only indirectly on an issue, and even though that issue is a collateral one, so long as the statement has "some weight in the process of reaching a decision." Id. at 703.

The impact of a false statement need not be immediate. The Eighth Circuit found a military concessionaire's false declaration of net profit to be material even though his payments to the government were based on his gross receipts, because accurate reports would have provided a basis for deciding whether the contract should be renegotiated. Brethauer v. United States, 333 F.2d 302, 306 (8th Cir. 1964).

The materiality inquiry looks to the topic of the remark more than to the magnitude of the falsehood. On this ground, the Sixth Circuit held that a falsehood on a union financial statement, though it involved only a small portion of the total budget, was material. Hughes v. United States, 899 F.2d 1495, 1499 (6th Cir.), cert. denied, 498 U.S. 980 (1990). Similarly, the Fifth Circuit deemed material the false statement that the affiant had given cash gifts to a taxpayer under investigation even though the document did not specify the amounts of the gifts; "it gave [the taxpayer] the greatest leeway to explain the source of his income." United States v. Johnson, 530 F.2d 52, 55 (5th Cir.), cert. denied, 429 U.S. 833 (1976).

A falsehood to cover up a past fraud is as material as a false statement to commit a fraud. See United States v. Voorhees, 593 F.2d 346, 350 (8th Cir.), cert. denied, 441 U.S. 936 (1979).

Materiality depends on context. In the 1956 Weinstock case, 231 F.2d 699, the D.C. Circuit held that a particular falsehood in isolation might have been material, but that in the midst of an affidavit it was not. The case involved the Attorney General's demand that the United May Day Committee register as a Communist front. Weinstock, on whom the petition was served, said in an affidavit that ad hoc May Day committees had been formed every year for a few weeks and then had disbanded; that they had operated under various names; and that no such committee remained in existence, so registration was impossible. Id. at 700-701. In the course of an eleven-paragraph affidavit,

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Weinstock made the false statement for which he was indicted: "There has been no committee or organization known as or having the name United May Day Committee since May, 1948." Id. at 700. The court held that the name of the committee, in the context of Weinstock's other assertions, was not material. Id. at 702-703. The official concern was whether the committee still existed, not what names it had borne; Weinstock's answer thus was "wholly without weight or influence in any decision." Id. at 702.

Weinstock might be read to stand for the proposition that where a witness lies about the ultimate focus of the inquiry (the May Day Committee's existence) as well as lesser facts (the committee's name), the indictment should focus on the ultimate fact. The court did not mention the possibility that a lesser fact might have helped investigators unearth additional witnesses or evidence, which has been an element of materiality in several cases (see point 4, below).

The D.C. Circuit also found materiality fatally lacking in several other cases. In Pyle v. United States, 156 F.2d 852 (D.C. Cir. 1946), a witness at a trial repeated the relevant substance of an earlier written statement, but she testified falsely that FBI agents had forced her to sign the statement. The D.C. Circuit held that the voluntariness of the statement, in and of itself, had no bearing on the guilt of the man on trial. See id. at 856. Because the false statement occurred at trial, the argument that it might have impeded an investigation was less tenable. In Freidus v. United States, 223 F.2d 598, 602 (D.C. Cir. 1955), the court held that falsehoods on a balance sheet submitted to the Reconstruction Finance Corporation were not material because they did not "misrepresent[] [the corporation's] ability to repay a loan by misstating profitability, assets, or liabilities."

3. Reliance

The government need not prove that it relied on the false statement, only that the statement was capable of influencing the outcome. United States v. Dale, 991 F.2d 819, 834 n.27 (D.C. Cir.), cert. denied, 114 S. Ct. 286 (1993); United States v. Jones, 464 F.2d 1118, 1122 (8th Cir. 1972), cert. denied, 409 U.S. 1111 (1973).

4. Materiality and investigations

The materiality inquiry often entails a degree of speculation as to whether a truthful answer would have affected the course of official actions, such as by provoking or rechanneling an investigation that in turn might have altered the final agency action. Both the Supreme Court and the D.C. Circuit

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have said that the government need not show such a consequence to have been likelier than not. The Supreme Court suggested that a fact can be material if its revelation would have had only a 30 percent likelihood of sparking an investigation, which in turn would have had only a 30 percent likelihood of changing the official decision. Kungys, 485 U.S. at 771. Writing for the Court, Justice Scalia said: "It has never been the test of materiality that the misrepresentation or concealment would more likely than not have produced an erroneous decision, or even that it would more likely than not have triggered an investigation." Id. Then-Judge Scalia similarly cautioned that "[a]pplication of § 1001 does not require judges to function as amateur sleuths, inquiring whether information specifically requested and unquestionably relevant to the department's or agency's charge would really be enough to alert a reasonably clever investigator that wrongdoing was afoot." United States v. Hansen, 772 F.2d 940, 950 (D.C. Cir. 1985), cert. denied, 475 U.S. 1045 (1986); see United States v. Parten, 462 F.2d 430, 432 (5th Cir.) (finding false names given to customs inspectors to be material and dismissing "conjectural possibility" that inspectors would have had no reason to check true names against database of fugitives and suspects), cert. denied, 409 U.S. 983 (1972).

A D.C. trial court has said that a statement is material if it would have caused investigators to make additional inquiries, even if it would not have affected the agency's ultimate decision. The court found defendants' false answers in a security clearance application material because truthful responses would have prompted investigators to make further inquiries. Whether the clearance would still have been granted was irrelevant, the court said: "Materiality . . . is not concerned with whether the alleged omission would have affected the ultimate agency determination." United States v. Dale, 782 F. Supp. 615, 625-26 (D.D.C. 1991). The court may have reasoned that an on-going investigation can constitute the agency action by which materiality is gauged, with no need to consider the decision for which the investigation is gathering information-- i.e., in the Kungys Court's formulation, materiality exists if a statement would have had a 100 percent likelihood of affecting an investigation, which in turn would have had a 0 percent likelihood of changing the agency outcome.

While not going that far, two cases are similar. The Seventh Circuit held that a statement is material if it influences the agency's decision to investigate or the agency's conclusion as to whether it has jurisdiction; "the false statements . . . were capable of influencing these essential agency decisions," and so they were material. United States v. Di Fonzo, 603 F.2d 1260, 1266 (7th Cir. 1979), cert. denied, 444 U.S. 1018 (1980). The Ninth Circuit held that a false statement to a customs inspector was material because a truthful answer-- that defendant's travels had originated abroad, not in Canada--

would have led to a more rigorous inspection. The court said nothing about the likelihood that the inspection would have discovered defendant's contraband. United States v. Rose, 570 F.2d 1358, 1364 (9th Cir. 1978).

Information is material if it would help investigators locate other witnesses whose testimony would be directly pertinent. In a Prohibition case, a grand jury witness falsely denied that a particular woman had been present at a party where liquor allegedly had been served. Convicted of perjury, he contended on appeal that the falsehood was not material. The Second Circuit affirmed the conviction: "A false statement as to the woman tended to mislead the grand jury, and to deprive them of knowledge as to who she was, so that she might not be obtained as a witness." Carroll v. United States, 16 F.2d 951, 954 (2d Cir.), cert. denied, 273 U.S. 763 (1927); see United States v. Gribben, 984 F.2d 47, 52 (2d Cir. 1993) (false statements impeded investigation because "they covered up the fact that additional witnesses . . . should also have been interviewed").

Several courts have said that where an agency is statutorily charged with obtaining a category of information for generating statistics or for other reporting purposes, false statements within that category are material. See United States v. Malsom, 779 F.2d 1228, 1235 (7th Cir. 1985); United States v. Lichenstein, 610 F.2d 1272, 1279 (5th Cir.), cert. denied, 447 U.S. 907 (1980). The same issue sometimes arises in a different form: whether an agency that merely gathers data possesses the "jurisdiction" required by Section 1001. See point 7, below.

5. Inconsistency with prior statement

One can conceive a shortcut to materiality when an individual is questioned about a matter for the second time. A truthful response would produce an inconsistency with the prior falsehood, which frequently would alert investigators to take additional steps--even if the topic is relatively trivial. Three Justices have specifically disapproved of this mode of analysis, two have approved of it, and the Second Circuit has applied it.

In Kungys, three Justices said that the materiality inquiry focuses on the falsehood itself, not on its inconsistency with the declarant's prior statements. The Justices said that false responses as to birthdate and birthplace do not become material merely because a truthful answer would have conflicted with the applicant's previous assertions. "What must have a natural tendency to influence the official decision is the misrepresentation itself, not the failure to create an inconsistency with an earlier misrepresentation; the failure to state the truth, not the failure to state what had been stated

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earlier." Kungys, 485 U.S. at 776 (Scalia, J., joined by Rehnquist, C.J., and Brennan, J.).

Justices White and O'Connor disagreed. They contended that the materiality inquiry should consider not just the possible effect of truthful replies, but also the possible effect of the discrepancy between earlier falsehoods and subsequent truthful replies. See id. at 809-10 (White, J., dissenting); id. at 801 (O'Connor, J., concurring in part and dissenting in part) (agreeing with this portion of Justice White's opinion).

Although no other Justice addressed the issue, three others agreed with the Scalia plurality that the applicant's false statements were not material. Id. at 784-801 (Stevens, J., joined by Blackmun and Marshall, JJ., concurring in the judgment). That conclusion implies that, in the view of those three Justices, an immaterial assertion does not become material simply because it is repeated a second time. Most likely, then, a majority of the Court frowns on this shortcut to materiality.

In a case subsequent to Kungys, though, the Second Circuit found a police officer's falsehoods about an arrest material because (among other reasons) they conflicted with the officer's prior written statements. The court said: "Second, Gribben's alleged false statements to the grand jury and federal officials influenced their decision-making because the truth would have alerted them to the inconsistency between Gribben's testimony and the written reports he filed on the day of Calhoun's arrest. This inconsistency would have affected the decisionmakers because they relied on Gribben's credibility as to his significant allegations in reaching various determinations." United States v. Gribben, 984 F.2d 47, 52 (2d Cir. 1993).

Although the D.C. Circuit has not addressed the issue, one early case notes that a falsehood qualifies as material if it "gives weight to or detracts from testimony as to the material facts in issue," which could be read to embrace prior inconsistent statements. Pyle v. United States, 156 F.2d 852, 856 (D.C. Cir. 1946).

6. Inconsistency with another witness's statement

Similarly, an inconsistency between two witness's accounts, even on a relatively minor issue, might instigate or affect an investigation. The Second Circuit in Gribben also approved of this analysis: "Perhaps most importantly, [codefendant] Maldonado's comments corroborated Gribben's story, while the truth would have called Gribben's credibility into question and perhaps changed the government's decision to prosecute Calhoun." 984 F.2d at 52. But cf. Kungys, 485 U.S. at 776 (Scalia

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plurality) (materiality considers "the failure to state the truth, not the failure to state what had been stated earlier").

7. Agency jurisdiction (false statement statute)

In focusing on the possible relationship between the falsehood and the official action of the agency, materiality overlaps with a separate issue under Section 1001, whether a matter lies "within the jurisdiction of" a department or agency. The counterpart in the perjury statute, whether the statement was made before "a competent tribunal," will be discussed below.

The statutory term jurisdiction "should not be given a narrow or technical meaning." United States v. Rodgers, 466 U.S. 475, 480 (1984) (internal quotation marks and citation omitted). The requirement is satisfied whenever there is statutory basis for an agency's request for information. United States v. Milton, 8 F.3d 39, 46 (D.C. Cir. 1993), cert. denied, 115 S. Ct. 299 (1994); cf. United States v. Di Fonzo, 603 F.2d 1260, 1265-66 (7th Cir. 1979) (false statements can violate Section 1001 even if agency ultimately turns out to lack jurisdiction), cert. denied, 444 U.S. 1018 (1980). An agency has jurisdiction for Section 1001 purposes "when it has the power to exercise authority in a particular situation" such that it is engaging in "official, authorized functions," but not when undertaking "matters peripheral to the business of that body." Rodgers, 466 U.S. at 479. "[T]here is jurisdiction, within the meaning of § 1001, if the false statement is made in some intended relationship to a matter that is within the jurisdiction of a federal agency." United States v. Popow, 821 F.2d 483, 486 (8th Cir. 1987).

Jurisdiction includes the authority to conduct an inquiry even if the agency can take no final, binding action. See Rodgers, 466 U.S. at 479-484 (reversing Eighth Circuit ruling that Section 1001 does not apply to FBI); United States v. Hansen, 772 F.2d 940, 943-44 (D.C. Cir. 1985) (affirming former Congressman's conviction for falsehoods on financial disclosure forms, even though committee that received forms had no power beyond investigating and making recommendations to full House), cert. denied, 475 U.S. 1045 (1986); Romney v. United States, 167 F.2d 521, 524-25 (D.C. Cir.) (affirming House Sergeant at Arms' conviction for submitting false accounting information to GAO, which was statutorily obligated to certify accounts of House bank), cert. denied, 334 U.S. 847 (1948); see also United States v. Barber, 881 F.2d 345, 350-351 (7th Cir. 1989) (affirming conviction for sending forged letters regarding pending sentencing to U.S. Attorney's office; though court would impose sentence, it might be influenced by U.S. Attorney's recommendation), cert. denied, 495 U.S. 922 (1990).

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The Ninth Circuit requires "a direct relationship . . . between the false statement and an authorized function of a federal agency." United States v. Facchini, 874 F.2d 638, 641 (9th Cir. 1989) (en banc) (emphasis added) (holding that U.S. Department of Labor lacked jurisdiction for Section 1001 purposes over state's unemployment insurance program, where Department had access to information about claimants but no authority to act on it). The D.C. Circuit has noted, without adopting or rejecting, the Ninth Circuit's formulation. United States v. Milton, 8 F.3d 39, 46 n.8 (D.C. Cir. 1993), cert. denied, 115 S. Ct. 299 (1994).

8. Tribunal competence (perjury statutes)

In several perjury cases, to be discussed further below, convictions have been voided on the ground that the investigative body was operating beyond its lawful authority. See Brown v. United States, 245 F.2d 549 (8th Cir. 1957) (grand jury); United States v. Cross, 170 F. Supp. 303 (D.D.C. 1959) (congressional committee); United States v. Icardi, 140 F. Supp. 383 (D.D.C. 1956) (same). The Supreme Court has noted the line of cases without addressing its validity. United States v. Mandujano, 425 U.S. 564, 583 n.8 (1976).

9. Tribunal competence: congressional committees

Congressional committees have broad but not limitless authority, which includes the power to undertake "surveys of defects in our social, economic or political system for the purpose of enabling Congress to remedy them" as well as "probes into departments of the Federal Government to expose corruption, inefficiency or waste," but not "[i]nvestigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated." Watkins v. United States, 354 U.S. 178, 187 (1957); see United States v. Levine, 860 F. Supp. 880, 885 (D.D.C. 1994) ("Quite clearly the U.S. Congress has the power to probe corruption and illegal activities in the industries it regulates, and the issue of whether other officials of [pharmaceutical companies] were 'knowingly involved' in unlawful conduct goes to the extent and pervasiveness of that corruption."), rev'd on other grounds, 72 F.3d 920 (D.C. Cir. 1995).

Although Congress can investigate widely, whether a particular committee constitutes a competent tribunal depends on the charter under which it is operating. In a perjury prosecution, for example, the defendant contended that his nationality lay outside the scope of a Senate committee's investigation of organized crime. (He argued materiality rather than tribunal competence, but the analysis is the same.) The D.C. Circuit disagreed: "The identity, as citizens or aliens, of

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persons engaged in organized crime is on its face material to a legislative inquiry into the subject, the essential objective of which is to determine whether legislation is needed and, if so, what sort of legislation." Doto v. United States, 223 F.2d 309, 310 (D.C. Cir.), cert. denied, 350 U.S. 847 (1955).

In two 1950s perjury cases concerning testimony before Congress, the same D.C. trial judge directed verdicts of acquittal on the ground that the committees had exceeded their authority. In United States v. Icardi, 140 F. Supp. 383, 388-389 (D.D.C. 1956), the court held that the subcommittee, having already completed its report, was not pursuing a "bona fide legislative purpose" and thus was not a "competent tribunal" when it questioned the defendant; and, in the alternative, that the questions were not material to the subcommittee's inquiry. In United States v. Cross, 170 F. Supp. 303, 308-310 (D.D.C. 1959), the court held that a Senate committee had no valid legislative purpose for recalling a witness for a second round of questioning about the same incident.

10. Tribunal competence: grand jury

Finally, information can be material to a grand jury that would not be material to a more tightly focused inquiry. See United States v. Paxson, 861 F.2d 730, 733 (D.C. Cir. 1988) (in finding false statements before grand jury material, saying: "Many cases have recognized that hindsight is not the proper perspective for discerning the limits of a grand jury's investigative power. It must pursue its leads before it can know its final decisions."); LaRocca v. United States, 337 F.2d 39, 43 (8th Cir. 1964). This disparity may argue in favor of treating the OIC interviews as adjuncts to the grand jury under Section 1623 rather than as executive-branch sessions under Section 1001.

The Eighth Circuit voided a perjury conviction on the ground that the grand jury had wandered astray in Brown v. United States, 245 F.2d 549 (8th Cir. 1957). "If the grand jury of Nebraska was without authority to inquire into offenses committed in Missouri, then the answers of defendant, even if false, would not amount to perjury." Id. at 552. Despite several defendants' efforts, the Eighth Circuit has not voided any convictions under Brown in the years since.

The Fifth Circuit voided convictions of perjury defendants in United States v. Brumley, 560 F.2d 1268 (5th Cir. 1977). As one ground for its holding, the court said that a grand jury investigating fraud in a 1970 election had wandered afield; because a 1972 discussion of murder was not relevant to that election fraud, the convictions based on perjury about that discussion could not stand. Id. at 1277-79.

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December 2, 1991

SECTION: POINTS OF VIEW; Opinion And Commentary; Pg. 25

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HEADLINE: Poindexter and the Truth About Lying

BYLINE: BY RALPH DRURY MARTIN; Ralph Drury Martin, a partner in D.C.'s Storch & Brenner, was a senior trial attorney with the Justice Department's Public Integrity Section from 1982 to 1990.

BODY:

In reversing the criminal convictions of retired Rear Adm. John Poindexter on Nov. 15, the U.S. Court of Appeals for the D.C. Circuit not only expanded the prohibition on the use of immunized testimony established in the Oliver North case, but also took the unprecedented, activist, and completely unnecessary step of overturning years of jurisprudence on obstruction of justice. By its ruling, the majority on the three-judge panel has made it easier to lie to Congress and to the courts.

What Judge Douglas Ginsburg did, joined by Judge David Sentelle (Chief Judge Abner Mikva vigorously dissented), was to gut an important part of the obstruction-of-justice statutes, *18 U.S.C. § 1503* (judicial proceedings) and § 1805 (administrative and congressional proceedings). Offhandedly brushing aside well-established case law, these two Reagan appointees held that the statutes' language punishing anyone who "corruptly endeavors" to influence a judicial or congressional proceeding is unconstitutionally vague. This language failed, they said, to give notice to Poindexter that it was criminal deliberately to lie or present false and misleading evidence in order to obstruct or influence such proceedings.

As Judge Mikva pointed out, his fellow judges used strange semantic gyrations to reach the astonishing conclusion that "Congress intended to punish those who induce others to lie under oath, but did not intend to punish those who lie of their own initiative."

Curious About 'Corrupt'

Judge Ginsburg's observation that the few prior judicial decisions he mentioned did not provide any real guidance concerning the meaning of "corruptly" is also curious. The meaning of "corruptly" has been so settled that it is routinely defined in the court manuals setting out the boilerplate law read to juries in federal criminal trials.

While precise formulations vary, these guides -- and the many judicial decisions from which they were drawn -- have long defined "corruptly" to mean this: acting with the specific intent to interfere improperly with the operation of a judicial or legislative body conducting a lawful proceeding. Since the

early 1970s the federal courts, through decisions written by judges of all philosophical stripes, have consistently made clear that lying -- whenever it is specifically intended to interfere with the proper and legitimate operation of such proceedings -- is a "corrupt" activity. This has been so whether or not the false statements are made under oath.

Liars' Gallery

A look at the cases in which this principle has been applied illustrates the radical nature of Judge Ginsburg's approach. Among the malefactors who have been punished by a number of federal appeals and trial courts for lying on their own initiative are:

* a union official who lied about corruption among government and labor officials,

* an expert witness who presented a false report to a U.S. attorney investigating election fraud,

* a smuggler of illegal aliens who lied to her probation officer,

* an organized-crime figure who lied about money laundering and loan sharking,

* a con man who bilked institutional investors of millions of dollars and then told a grand jury that corrupt payments were "loans,"

* a state legislator who falsified records to conceal payoffs,

* an attorney for a savings-and-loan association who lied about the control of accounts maintained in fictitious names, and

* a federal judge who lied to agents of the Federal Bureau of Investigation who were probing his alleged leaking of secret wiretap information to an organized-crime figure.

Washington scandal buffs will recall that former Deputy Secretary of Defense W. Paul Thayer was sentenced to four years in prison for obstruction of justice committed by lying to investigators for the Securities and Exchange Commission during an insider-trading probe.

In addition, although Judge Ginsburg failed to discuss it, his own court upheld the obstruction-of-justice conviction and jailing of Rita Lavelle, a high-ranking official at the Environmental Protection Agency, for sending a false statement to members of a House oversight subcommittee. Indeed, another panel of the D.C. Circuit (including Judge Sentelle), while disagreeing on exactly how the jury instruction defining "corruptly" should read in cases involving lying to legislative bodies, had no problem with the constitutionality of the same statute when it analyzed North's convictions last year.

Every one of the convictions mentioned above would have been impossible if the courts had followed Judge Ginsburg in voiding the well-understood notion that it is a corrupt act deliberately to submit false and misleading information to a judicial or legislative body with the intent to pervert the lawful

functioning of that body. Because the Poindexter decision is constitutionally based, acceptance of its reasoning could well lead to the retroactive dismissal of some of those convictions.

Ginsburg's Motives

Ignoring the principles of judicial restraint, the D.C. Circuit panel reached out to decide this constitutional issue after it had already reversed Poindexter's convictions on other grounds. This stretch, and the lack of analysis of much of the prior law, makes one wonder whether Judge Ginsburg may have been more concerned with safeguarding Poindexter's reputation -- or, as some have suggested, in giving Independent Counsel Lawrence Walsh his comeuppance -- than in mounting a crusade against the obstruction-of-justice statute. Or perhaps he saw a change to sound off and dampen the increased criminal prosecution of political and personal peccadillos that many rightly believe has become overzealous.

Nevertheless, it would have been more responsible to remember that such judicial kindness or hectoring can have far-reaching consequences. As a white-collar criminal-defense lawyer, I know this decision may benefit a few of my future clients. But I fear the instinctual and casual approach to seemingly settled issues. This court -- usually pro-government -- may just as casually restrict defendants' rights in the future.

GRAPHIC: Picture, no caption, TIM FOLEY

LANGUAGE: ENGLISH

To: Brett Kavanaugh 2/21/96

From: Stephen Bates

re: 18 U.S.C. § 1512(b)(2)(A)

You asked me whether misleading one's lawyer, as he prepares answers for an official inquiry, violates 18 U.S.C. § 1512(b)(2)(A), which proscribes "misleading conduct" intended to cause a person to withhold testimony or objects from an official proceeding.

I found no cases directly on point, but some that offer indirect support. Three cases indicate that misleading a witness, and intending that the witness will convey the misinformation to an official proceeding, violates Section 1512. The Ninth Circuit upheld a 1512 conviction where the defendant had misled the future witness about the destination of particular funds. The witness then repeated the falsehood to the FBI, which, the court said, could reasonably have been the defendant's intention from the outset. See United States v. Bordallo, 857 F.2d 519, 525 (9th Cir. 1988) (alternate holding), amended on rehearing, 872 F.2d 334 (9th Cir.), cert. denied, 493 U.S. 818 (1989). The Second Circuit has said: "The most obvious example of a section 1512 violation may be the situation where a defendant tells a potential witness a false story as if the story were true, intending that the witness believe the story and testify to it before the grand jury." United States v. Rodolitz, 786 F.2d 77, 81 (2d Cir.) (dictum), cert. denied, 479 U.S. 826 (1986). Finally, the Eighth Circuit held that a defendant committed "misleading conduct" in violation of section 1512 by assuring a subpoenaed witness that their earlier conversation about a contract killing had been a joke. See United States v. Risken, 788 F.2d 1361, 1365, 1369 (8th Cir. 1986), cert. denied, 479 U.S. 923 (1986).

Still, one might distinguish these precedents. In contrast to the misinformed witnesses in the precedents, an attorney may be operating as the individual's agent in preparing responses. Whether a response violates Section 1512 presumably doesn't hinge on whether the individual typed it himself v. dictated it to a stenographer, or whether he testified directly v. through an interpreter. Though an attorney may shape responses more than a stenographer or an interpreter does, doesn't he still function principally as the courier of the client's information? I found no 1512 case law along these lines; let me know if you'd like me to look elsewhere.

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re: 18 U.S.C. § 1512(b)(2)(A)

You asked me whether misleading one's lawyer, as he prepares answers for an official inquiry, violates 18 U.S.C. § 1512(b)(2)(A), which proscribes "misleading conduct" intended to cause a person to withhold testimony or objects from an official proceeding.

I found no cases directly on point, but some that offer indirect support. Three cases indicate that misleading a witness, and intending that the witness will convey the misinformation to an official proceeding, violates Section 1512. The Ninth Circuit upheld a 1512 conviction where the defendant had misled the future witness about the destination of particular funds. The witness then repeated the falsehood to the FBI, which, the court said, could reasonably have been the defendant's intention from the outset. See United States v. Bordallo, 857 F.2d 519, 525 (9th Cir. 1988) (alternate holding), amended on rehearing, 872 F.2d 334 (9th Cir.), cert. denied, 493 U.S. 818 (1989). The Second Circuit has said: "The most obvious example of a section 1512 violation may be the situation where a defendant tells a potential witness a false story as if the story were true, intending that the witness believe the story and testify to it before the grand jury." United States v. Rodolitz, 786 F.2d 77, 81 (2d Cir.) (dictum), cert. denied, 479 U.S. 826 (1986). Finally, the Eighth Circuit held that a defendant committed "misleading conduct" in violation of section 1512 by assuring a subpoenaed witness that their earlier conversation about a contract killing had been a joke. See United States v. Risken, 788 F.2d 1361, 1365, 1369 (8th Cir. 1986), cert. denied, 479 U.S. 923 (1986).

Still, one might distinguish these precedents. In contrast to the misinformed witnesses in the precedents, an attorney may be operating as the individual's agent in preparing responses. Whether a response violates Section 1512 presumably doesn't hinge on whether the individual typed it himself v. dictated it to a stenographer, or whether he testified directly v. through an interpreter. Though an attorney may shape responses more than a stenographer or an interpreter does, doesn't he still function principally as the courier of the client's information? I found no 1512 case law along these lines; let me know if you'd like me to look elsewhere.

To: Brett Kavanaugh 2/25/96

From: Stephen Bates

re: Poindexter's scope

You asked me several questions about the scope and impact of United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991), cert. denied, 506 U.S. 1021 (1992).

(1) Does the Poindexter interpretation of 18 U.S.C. § 1505 apply to § 1503 as well?

Not necessarily, at least in the D.C. Circuit. The court in Poindexter took pains to distinguish § 1503, noting that "the language of § 1505 is materially different from that of § 1503, and has been different from the beginning." 951 F.2d at 405. With this distinction in mind, a D.C. trial court has declined to apply Poindexter to § 1503, concluding that the omnibus clause of § 1503 is subject to a "non-transitive reading" in contrast to the Poindexter court's "transitive reading" of § 1505. United States v. Watt, __ F. Supp. ___, 1995 WL 739875 at *5-6 (D.D.C. Dec. 4, 1995) (holding that false statements before grand jury can violate § 1503).

Other courts, however, have construed §§ 1503 and 1505 in tandem. In a pre-Poindexter case, the Fourth Circuit applied § 1503 precedents to § 1505, observing: "We agree with our sister circuits that the identity of purpose among these provisions makes case law interpreting any one of these provisions strongly persuasive authority in interpreting the others." United States v. Mitchell, 877 F.2d 294, 299 n.4 (4th Cir. 1989). The Ninth Circuit found Poindexter's construal of § 1505 "most helpful" in construing § 1503. United States v. Aguilar, 21 F.3d 1475, 1486 n.8 (9th Cir. 1994), aff'd in part, 115 S. Ct. 2357 (1995).

(2) How have other courts construed Poindexter?

In addition to the above: The Fourth Circuit has declined to apply Poindexter to 26 U.S.C. § 7212(a) (obstruction of administration of the tax code), applying instead "the well-established rule that the omnibus clause of the federal obstruction statutes should be broadly construed." United States v. Mitchell, 985 F.2d 1275, 1277-78 (4th Cir. 1993) (internal quotation marks and citation omitted). A trial court reached the same conclusion in United States v. Brennick, 908 F. Supp. 1004, 1011-13 (D. Mass. 1995).

(3) Any good law review articles?

Not that I've found so far; I'll keep looking. Here's a short critique of the decision from Legal Times (12/2/91).

(4) Any further interpretation of Poindexter by the D.C. Circuit or D.C. district courts?

Not much beyond the above. The D.C. Circuit stood by the Poindexter reading of "corruptly" and affirmed a § 1505 conviction in United States v. Kelley, 36 F.3d 1118, 1127-28 (D.C. Cir. 1994). In unpublished decisions, two trial courts applied Poindexter to dismiss § 1505 counts. See United States v. George, 1992 WL 121381 at *1-2 (D.D.C. May 18, 1992) (charge of lying to members of Congress); United States v. Weinberger, 1992 WL 294877 at *1-3 (D.D.C. Sept. 29, 1992) (charge of withholding documents from Congress).

Let me know if you need anything more.

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