OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-346

TITLE UNITED STATES, Petitioner v. ESMAIL YERMIAN

PLACE Washington, D. C.

DATE March 27, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 83-620

ESMAIL YERMIAN :

- x

Washington, D.C.

Tuesday, March 27, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

CAROLYN CORWIN, ESQ., Washington, D.C.;
on behalf of Petitioner

STEPHEN J. HILLMAN, ESQ., Los Angeles, Cal.;
on behalf of Respondent.

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We'll hear arguments first this morning in United States against Yermian.

Ms. Corwin, you may proceed whenever you're ready.

ORAL ARGUMENT OF CAROLYN CORWIN, ESQ.,

ON BEHALF OF PETITIONER

MS. CORWIN: Thank you, Mr. Chief Justice, and may it please the Court:

This case raises the question of what elements the government must prove in order to establish a violation of 18 U.S.C. 1001, the federal false statements statute.

Respondent in this case filled out a form in connection with a security clearance process required by the Department of Defense. Respondent had been hired as an engineer by a company that was a defense contractor. In order to work on certain projects, it was necessary that he be investigated and that he receive a government security clearance.

For that purpose, Respondent's employer gave him a work sheet to fill out. On that work sheet, Respondent indicated that he had never been convicted of a crime and he listed the employers for whom he had worked in the past. Respondent's employer transcribed

that information onto another form entitled "Department of Defense personnel security questionnaire." Respondent signed that form and it was mailed to the Department of Defense.

Subsequently, the FBI discovered that in fact Respondent had been convicted of mail fraud and that two of the employers that he had listed on his form in fact had never employed Respondent. On the basis of those false statements, Respondent was indicted and convicted for violations of Section 1001. At trial Respondent's sole defense was that he had not realized that the false information he provided would be forwarded to the federal government.

Both sides in this case agree that the government must establish certain elements in order to make out a violation of Section 1001. The government must prove that the defendant's statements were false and that he knew it at the time. Respondent acknowledges here that his statements were false and that he knew that when he filled out and signed the form.

Both sides also agree that the government must establish that a defendant made his statement in a matter within federal agency jurisdiction. Respondent agrees with us that his false statements were made in

such a matter, since the government security clearance process is a matter within the jurisdiction of the Department of Defense.

QUESTION: May I ask right there, what about the work sheet? Was that a matter within the jurisdiction?

MS. CORWIN: Well, I think the matter within the jurisdiction was the entire security clearance process.

QUESTION: Sc the work sheet would be part of it?

MS. CORWIN: The work sheet was part of that process, and it was really a preparation for the final sheet that was typed up and sent in.

QUESTION: So you could have indicted him on the basis of the work sheet?

MS. CORWIN: Well, I think that depends on whether the security clearance process worked its way through. I suppose if the work sheet had been filled out and it had been decided never to proceed with the process that it wouldn't have been in a matter.

QUESTION: Well, suppose the employer had just forwarded the work sheet without having the supplemental document which had on its face the evidence about the security clearance?

MS. CORWIN: Well, I would note preliminarily that the work sheet did have some indications that it --

QUESTION: Well, suppose it had none.

MS. CORWIN: -- was a government document on it.

QUESTION: Suppose it had none, to get my hypothetical.

MS. CORWIN: Well, if it hadn't had anything on it, I think it would -- and it were forwarded, I think it would depend on whether the information initially had been requested in connection with the government security clearance.

QUESTION: Supposing it was. That's precisely the information the government wanted, and they just didn't disclose to the employee that they were making a security clearance.

MS. CORWIN: Well, I think if the employer had requested the information and requested that the work sheet be filled out for the purpose of forwarding it to the Department of Defense, it would be --

QUESTION: Without telling the employee?

MS. CORWIN: That's correct. It would be in a matter within federal jurisdiction, regardless of what was said.

QUESTION: So that the employee could be liable under the statute without having any knowledge of federal involvement?

MS. CORWIN: Yes, that is our position, that Congress did not intend that the government prove knowledge of federal involvement in a case like this. That is precisely the point on which the parties disagree in this case, whether the government must prove that the defendant knew that there was federal involvement when he makes a false statement.

Three Court of Appeals, the Fifth, the Sixth, and the Seventh Circuits, have held that such proof is not an element of a Section 1001 offense. The Ninth Circuit here held that the government is required to prove knowledge of federal involvement.

Now, this question is similar to one that many federal courts have confronted in the context of a number of different federal statutes. This Court considered just a question in United States versus Feola. That case involved a federal statute and the question raised was whether it was necessary for the government to prove that an assailant knew that his victim was a federal officer in order to make out a violation of the federal assault statute.

The Court analyzed Congress' purposes in

enacting the statute and it considered whether the element of knowledge was necessary as a matter of fairness, in order to prevent unfairness, and on the basis of that analysis it concluded that Congress in enacting the federal assault statute had intended -- had not intended to require the government to prove knowledge of federal involvement on top of all the other elements it was required to prove.

We suggest that in this case the Feola analysis and conclusions apply a fortiori in the case of Section 1001. We begin with the language, and here I think we have a stronger case than the Court was confronted with in Feola. There the federal assault statute on its face simply didn't say anything about the required intent.

Here we have a statute that talks about knowingly and willfully making a false statement, so we have words of intent. But I think it's quite clear from the face of the statute that those words apply to the making of a false statement and not to the separate phrase, "in any matter within federal agency jurisdiction."

QUESTION: Ms. Corwin, does the government agree that the shifting of the language in the 1948 revision was not intended to achieve any substantive

result?

MS. CORWIN: Yes, and indeed this Court has suggested it wasn't intended. In Bramblett the Court signified that it had not intended a substantive change.

QUESTION: Before '48 the language wasn't quite as favorable to this particular part of your argument as it is now.

MS. CORWIN: Well, I'm not sure that that is quite so, although I would not preliminarily that we ought to give some credit to the fact that in 1948 Congress thought it was clarifying an ambiguity; and to the extent that it was attempting to do that I think we ought to read today's statute rather than the older one.

But even if the language had never been shifted, I don't think that changes the fact that that "in any matter" phrase has always been somewhat set apart from the rest of the statute and has been phrased in terms that don't sound at all in any sort of intent or purpose.

I think that's significant on the face of the statute, whether ycu lcok at the old statute or the recodified version, and I think it's even more significant when you look at the language that had

existed prior to the amendment in 1934. There you had a phrase that, in addition to the knowingly and willfully language, said: "Whoever, with the purpose or the intent of cheating or swindling or defrauding the United States, knowingly and willfully makes a false statement". In 1934 Congress replaced that language with this "in any matter within federal agency jurisdiction" phrase, a phrase that doesn't sound at all in any sort of intent or purpose.

Now, the Court in Feola looked primarily to the legislative purpose and the legislative history to determine whether Congress would have intended that knowledge of federal involvement be an element of the crime. Under Section 1001, these factors appear to point at least as clearly as in Feola to the conclusion that knowledge of federal involvement is not something that Congress would have required the government to prove.

This Court has construed Section 1001 on several occasions -- in the Gilliland case, in the Bramblett case, and in the Bryson case -- and on each occasion the Court has noted the breadth of the statute and the Congressional purpose to afford protection tc all sorts of federal functions. The Court has concluded that it's inappropriate to read the statute

restrictively in light of that very broad Congressional purpose in amending the statute in 1934.

Now, the interest in protecting federal functions is one that exists regardless of the individual's knowledge of whether he is involved in a government matter. In this case, Respondent's false statement concerning his prior conviction and his prior employers had just as much potential to interfere with federal functions, whether or not he knew about whether there was this government security clearance process going on.

QUESTION: Do we have any cases in which a defendant has been held criminally liable without having any knowledge that what he was doing might be a crime? I'm thinking of a case, Mike Royko had a column in the Chicago Tribune about lying to people when they come out in the exit polls.

Supposing an FBI agent were investigating election frauds and didn't tell the people he questioned coming out of the polls that he was doing that, and somebody lied to him. Under your view it would violate the statute?

MS. CORWIN: I think that something such as the hypothetical you're suggesting may well not violate the statute, although I don't want to take a position on

that particular Mike Royko incident. But I think it's important to recall that the government has to prove a number of things in order to make out a violation of Section 1001 quite apart from the issue we have here.

One of those things it has to prove is that a statement was made willfully. I think that in such a case as you posit --

QUESTION: It's a deliberate lie, I'm assuming, a deliberate misstatement of how a person voted. Or maybe an FBI agent comes up to somebody at the bar without telling him he's an FBI agent, he engages him in a conversation, the man lies to him.

MS. CORWIN: Well, I would suggest that the element of willfulness which is on the face of the statute requires some sort of conscious wrongdoing, and I think the individual who engages in the sort of private conversation or perhaps a conversation in which he doesn't expect that anyone is going to rely in any meaningful way on what he says --

QUESTION: But the real question, does it require knowledge of anything other than willful falsity?

MS. CORWIN: Well, I think not. I mean, in order to make out the violation you have to know that you've made a false statement.

QUESTION: Right.

MS. CORWIN: And you also -- the government also must prove it's in a matter within federal agency jurisdiction, as well as being in many cases material to the functions of the government.

QUESTION: Correct.

MS. CORWIN: And I suggest that maybe some of those elements are going to exclude the sort of hypotheticals that you've suggested, and particularly the sort of hypotheticals that Respondent has posed.

QUESTION: Well, I assume FBI agents frequently interrogate people without disclosing their identity, and they're engaged in very important federal work.

MS. CORWIN: Well, that's indeed true, and I suggest that perhaps in a different setting, if the FBI agent were working undercover in a business perhaps, you might have a situation in which you would have something you could call willful conduct, something that would very likely violate the state criminal statute of, say, false pretenses, and there you might have coverage because the conduct was willful.

But I don't think, for example in the hypotheticals that Respondent has put forward, which are quite far from his own case --

QUESTION: I agree with those hypotheticals, with your view on those hypotheticals. But if the neighbor were actually an FBI agent in each of those cases, then you'd be committing a crime without having any knowledge that you were engaged in criminal activity.

MS. CORWIN: Well, I'm just not sure that's true. If I were a federal prosecutor who knew I had to make out the elements of knowing falsity and willfulness, I think I would hesitate before I would indict somebody like that.

QUESTION: Well, what is willfulness other than knowing falsity? That's the only willfulness requirement I understand you to contend there is.

MS. CORWIN: Well, of course, the statute says "knowingly and willfully," and I think that the element of conscious wrongdoing is something that may well exclude this private casual conversation between neighbors, in which you never anticipate that anyone's going to --

QUESTION: How about an application for employment form without knowing -- assume the government required all employment application forms to be screened for security purposes at some defense plant or something, without telling the people. Would every

person who filled out, made a false statement on an application form be committing a crime? I think he would.

MS. CORWIN: I think that if one could prove all the other elements of the statute that, yes, that would be a crime. But I would point out that you have a situation that is not that different from what you had in Feola, in that you have federal functions that are significant that ycu're prctecting by this coverage cf the statute.

QUESTION: But Ms. Corwin, doesn't everyone know that assaulting someone is going to be a criminal offense? And I suppose not everyone knows that lying about his age, for instance, might be a federal offense.

MS. CORWIN: Well, that may be, but I think that in many cases people who make false statements, particularly in a context such as that of Respondent, they are certainly going to know that their conduct is wrongful. And I suppose it depends on the context, when you suggest the lying about age; and I remind you again that there are things the gcvernment has to prove in terms of, for example, materiality, and it may be that a statement like that wouldn't be material.

But I think that a false statement,

particularly in the sort of context you have here, in the employment context, is not only going to be something someone knows is wrongful, but is either going to come quite close or arguably falls within the state false pretenses statute, in which you may intend to deceive your employer, and that is something that falls within the state criminal statute.

I think when you consider the sort of broad purposes, the protection of federal functions, that Congress had in mind when it enacted the statute in 1934, you are -- it's very difficult to conceive that Congress would have intended to somehow carve out the particular sort of conduct in which Respondent acts in this case.

And I think it's unlikely that Congress would have intended to impose, in addition to all the other elements that the government has to prove, that additional burden of proving that an individual actually knew that he was acting in a matter within federal agency jurisdiction.

QUESTION: Well, Ms. Corwin, in this particular case I suppose that the evidence available here, the document in question which was signed by the Respondent here, is evidence of knowledge, and so if knowledge is required presumably the government could go

to trial with the same proof it had.

We're here because of an instruction, are we not, where the court said having reason to know was enough? But there was actually evidence that I would assume would take you to the jury on actual knowledge, isn't there?

MS. CORWIN: Well, I think that's right, and it is certainly conceivable that on a remand that we would prevail in this case on the basis of that sort of evidence. I don't know that that's necessarily going to be the case every time this comes up, and I think it may well be that -- I mean, Respondent here believes, at least has some idea, that he can prevail on this sort of standard, and I think it is not certain that the government is going to prevail in every case like Respondent's with the sort of simply evidence of knowledge that's circumstantial that you suggest.

Now, I think in terms of the legislative history in 1934, Respondent has tried to suggest that Congress was trying to accomplish something very narrow. I think that that simply is not so when you look at the face of the legislative history.

As I referred to when I spoke to Justice Rehnquist's question, the substitution of the phrase -- the old phrase, "with the intent or purpose of

defrauding the United States," was replaced by this new phrase, "in any matter within federal agency jurisdiction." I think that's the key point that happened in 1934.

But when you look at some of the other material in the legislative history, I don't think it supports Respondent's construction of the statute. There was no mention of attempting to correct the U.S. versus Cohn case. That's surely something that Congress had in mind, but I think they were aiming at a somewhat broader problem.

They had some difficulties that had arisen in some of these federal programs. They were confronted with false statements that were causing things like the hot oil program and the public works program to break down, and they were attempting to find a comprehensive solution that would apply to a number of federal agencies and a range of federal functions.

Now, the Court in Fecla also turned to the question of whether it was unfair to convict an individual without that element of knowledge of federal involvement, and that's a relevant question, I suppose, because it tells us something about what Congress must have had in mind when it acted at the time here in 1934, and indeed, I read Respondent to be centering his

argument on this point.

But I think as I noted in answering Justice O'Connor's question, I think it is frequently that one is going to have conduct that meets all the elements of Section 1001, even without knowledge, that conduct is going to be wrongful.

Now, Respondent here acknowledges that his conduct was wrongful. He says no question about that, he intended to deceive his employer. He just didn't know that he was also deceiving the United States. And he poses some hypotheticals that involve, as I've suggested to Justice Stevens, a casual private conversation.

Those would not be covered under Section 1001. The government would not have been able to prove that they were in a matter within federal agency jurisdiction, in all probability, and would not have been able to prove they were willful.

I suggest that frequently conduct that falls within Section 1001 is going to be either within or close to the line of a state criminal statute and is clearly going to be the sort of conscious wrongdoing that we really don't hesitate to impose criminal penalties on.

QUESTION: Well, there's another example you

suggested on page 30 of your brief, on the information gathering function in connection with the NRA in the hot oil cases, where you mention that people might send information in to the central information gatherer, who in turn would forward it to the government, and they would not know it was going to be used for a government purpose.

Isn't it entirely possible in those situations that members of the trade associations, not wanting to be entirely candid to their competitors, might misstate facts, which could constitute a violation without any knowledge that they were running that risk?

MS. CORWIN: Well, I'm not sure that's precisely right in the hot oil context. What people were doing in the hot oil context was certifying that they had not exceeded state law production limits, and that is the sort of information --

QUESTION: Well, in that particular case that's right. But as you point out in your brief, there are situations where false statements to such private groups can be made without realizing the ultimate purpose. And trade associations, of course, are a classic example.

MS. CORWIN: Well, I think that's right, but I think Congress had in mind that sort of interference

with federal functions.

QUESTION: Even though the businessman had no knowledge that there would be any federal use of the information?

MS. CORWIN: Well, I think that's correct. I think you could have a situation, as you suggested, like the one Respondent is involved in here, in which someone within the petroleum, the oil company, passes on information to someone else, who then forwards it to the federal government.

Maybe the defense is: Well, all I was certifying was there was no excess over the state quota, so I thought I was deceiving the state government, or I thought I was deceiving my employer. But you still have the same sort of harm to the hot oil program.

I would just mention in passing that another regulation under that program in 1933 was actually affidavits going between private parties.

QUESTION: Oh, I agree with you in that particular program that people should have been aware they were violating some state rules, if not the federal rule. But what I'm suggesting to you is that there are information gathering programs where you use trade associations to gather the information, and the individual supplier of the information may not have any

knowledge that the federal government might use it and might intend to deceive his competitors, because he's not living up to some price-fixing agreement or something of that kind. He'd be a criminal.

MS. CORWIN: Well, I suppose that's possible. I'm not sure that that's necessarily not wrongful conduct, although if you could prove that somehow the motive was a justifiable one, was one that just doesn't fall within that willful conduct category, that you still may not get all the way under your Section 1001, your other elements you have to prove.

I think you just have to keep in mind that the federal government has to prove a lot of things under this statute, and the question is whether Congress intended to impose this additional burden in a case like the one we have before us.

QUESTION: Well, they have to prove two things: federal involvement and knowledge of falsity. Those are the two elements.

MS. CORWIN: Well, many courts have -- well, the willfulness is separate. I think that there is an element of willfulness that is not necessarily encompassed within a knowingly false statement.

Many courts have also read the concept of materiality into the statute, and I think there you wipe

out a lot of these sort of trivial examples in which somebody just, you know, says something very minor, they're a day off on their age or something like that.

I think that, as in Feola, you simply do not have the sort of unfairness or any other reason to depart from what appears to be the clear import of the statutory language and the broad legislative purpose and the legislative history from 1934. There is simply no reason to assume that Congress meant to carve out a special category that would cover Respondent's conduct in its protection of federal functions or to impose the additional burden of proof that Respondent urges here.

I'd like to reserve the remainder of my time if there are no further questions.

CHIEF JUSTICE BURGER: Mr. Hillman.

ORAL ARGUMENT OF STEPHEN J. HILLMAN, ESQ.

ON BEHALF OF RESPONDENT

MR. HILLMAN: Mr. Chief Justice and may it please the Court:

I'd like to first address myself to two points that Justice Stevens raised. I also thought of the Mike Royko example as I was on the plane to Washington, and I think that if a federal elections official, perhaps, who was present in Chicago ensuring the integrity of a local election approached a person who was exiting the polls

and did not make his identity known to that person, and that person lied about who he voted for, I believe that under the government's interpretation that person could be charged under 1001.

QUESTION: Well, isn't there an answer to that, that it's none of the government's business how a person votes, and it washes out all of Mr. Royko's concerns? How could it conceivably be any of the government's business under any circumstances how a person voted?

MR. HILLMAN: I think that such a question could arise during the questioning by a federal election official who was there to ensure the integrity of the voting process. He might ask the person some other question that would not --

QUESTION: What would that do to our traditional secrecy of the ballot?

MR. HILLMAN: Well, supposing the federal official was acting improperly. It is a far-fetched example, but I did want to address Justice Stevens' concerns.

I think that Justice Stevens also raised a better hypothetical --

QUESTION: Wouldn't the defendant be protected in your example by the requirement of materiality?

MR. HILLMAN: The requirement of materiality may not be enough. I think that there has to also be, there has tc be a knowledge requirement, there has tc be intending to do something that the law forbids. There has to be something willfully done.

Justice Stevens raised a hypothetical that really places -- is really better than our hypothetical, and that is where the neighbor is an FBI agent and nct just a private party. A neighbor who is an FBI agent, who may be, his actual job may be to inquire into a matter of federal jurisdiction to the person we call X in our brief, might be unknown to the neighbor. And I think that under the government's interpretation 1001 could apply to that as well.

Justice O'Connor correctly stated that one of the main reasons we're here is because of an incorrect jury instruction. The instruction actually did not say that the Defendant should have -- would have reason to know or that the jury would have to find reason to know.

But the jury instruction actually said that the Defendant knew or should have known that the information was to be submitted to a government agency. And we believe that that instruction is entirely inappropriate and ambiguous, because it would allow the

jury to convict believing that the person should have morally known that his statement was going to --

QUESTION: Mr. Hillman, the government's cert petition does not raise a question about the form of the instruction as I read it. The only question is whether there's any need for federal involvement, as I read the -- the only question presented by the cert petition.

MR. HILLMAN: The government does argue, Your Honor, that even if our position is correct, that the jury instruction cured any error, and we believe that that is incorrect because it was an ambiguously worded --

QUESTION: Yes, but they didn't preserve that question, is all I'm saying.

MR. HILLMAN: All right.

QUESTION: And they're seeking reversal.

QUESTION: The history of the statute is convoluted, but there is a clear thread woven into the statute from its original antecedent through the 1948 recodification, and that thread is the requirement that a person know of federal involvement.

Since the 1948 amendment itself was non-substantive, as the Court has recognized, it is necessary to focus on the 1934 legislative process and intent of Congress in 1934. Significantly, the first

bill that was submitted to Congress in 1934 contained language of specific intent to defraud the government. That first bill, of course, was vetoed, but it was vetoed because it failed to reach further than the existing 1918 statute and to reach the concerns expressed by the Court in United States versus Cohn. Contrary to the government's position, the first bill was not vetoed because it contained language of specific intent to defraud.

In the second bill, the one that was finally enacted, the "in any matter" language first appears. The government well understands that the vetoed bill required the specific intent to defraud, but nevertheless the government argues that the new language, the "in any matter" language, was intended to be in essence a radical and substantive broadening from the first bill, and indeed from the entire statutory history all the way back to 1863.

It is our position that there is nothing in the veto language, nor in the remarks of Congress, nor in the experience of Congress as of 1934 that would have led Congress to abandon the long-standing knowledge requirement. On the contrary, it appears from the sparse legislative history that Congress finally recognized the problem created in the Cohn type

situation and the problem inherent in the 1918 statute and that Congress therefore inserted the new phrase to encompass non-monetary deceptions of newly created federal programs.

It's interesting to note, I think, that in 1948 what had been Section 35 of the Criminal Code was brought within the penumbra of the 1000 section of Title 18, and it was in 1948 that Section 35 became Section 1001. And in doing so, Congress incorporated our statute into the broader statutory scheme which was contained in 1001 through 1016.

I think it's noteworthy that in this broad scheme all of the other false statement statutes either on their face require a specific intent to defraud, such as 1005, which prohibits false entries in bank books with the intent to defraud -- that is the specific language -- or in 1004 or 1011, the status, the very status or position of the covered personnel, such as a bank officer or a mortgagee, gives adequate notice to the person that he is dealing with the government.

If the government's interpretation of 1001 is accepted, it would appear that there would be no need for these specific statutes, because the government could always resort to Section 1001 and thereby circumvent the specific statutes which either require

specific intent on their face or give notice to the defendant by his very status that he is dealing with the government.

The government goes on to argue that the social and political context of the new deal, the background as they call it, indicate that Congress must have intended to delete the long-standing requirement of jurisdictional knowledge from the 1934 statute.

First of all, there is no record of such concerns in the legislative history. There is no mention whatsoever of this concern in President Roosevelt's veto language.

And I would contend that if those had been the concerns of Congress they would have been -- they would have shown up in the first bill. That is, if these had been the concerns of Congress, the first bill would not have contained the specific language that it did, the language of intent to defraud.

Although Congress concededly was concerned about the integrity of all federal programs and the newly created federal programs, Congress in our view had no reason to address a person such as that of Respondent who had no knowledge of federal jurisdiction. I think what shows that is that the vast majority of the intermediary cases, statements made to an intermediary

where there is knowledge of the federal destination of the statement, the vast majority of those cases cited in both briefs arose in the 1960's and '70's, as the government delegated more responsibility to the states and to private industry. There simply is no indication that Congress was even aware of such a problem in 1934.

Turning to the Feola case, we contend that Section 1001 is fundamentally different from Section 1011, the federal assault statute. If the government is correct, then 1001 could be used to punish persons who make private statements, statement which, unlike assault, no state law may proscribe, which are not fraudulent -- and which are not fraudulent by any stretch of the imagination.

The government does not acknowledge that there are situations where the making of a private false statement and federal agency jurisdiction are contemporaneous.

QUESTION: Could I -- could you tell me where you made the -- you requested the instruction that you think should have been given in this case?

MR. HILLMAN: Yes, Your Honor.

QUESTION: Is it in the joint appendix?

MR. HILLMAN: Yes, it is, on page 49.

QUESTION: 39?

MR. HILLMAN: 49, Your Honor.

QUESTION: 49.

And you think it's enough, you think it's enough for the government to prove that the statement is made in connection with something that has a federal invclvement?

MR. HILLMAN: Knowledge of federal involvement.

QUESTION: What does that mean?

MR. HILLMAN: Knowledge that the statement is within federal jurisdiction, that it is destined for a federal agency, that there is some material legitimate concern on behalf of a federal agency.

QUESTION: Sc do you agree that if you have a knock on your door at home and the gentleman there identifies himself as an FBI agent, saying he's investigating a murder in the neighborhood or something -- does it violate 1001 for you to lie to him?

MR. HILLMAN: Of course. Of course, because he would have knowledge face tc face that he was dealing with a federal agency.

QUESTION: That's all you really need as far as you're concerned, is just some knowledge that that statement is relevant to some official business of the government?

MR. HILLMAN: Yes, Your Honor. In fact, we don't need any --

QUESTION: Mr. Hillman, you don't want to concede any other people's cases, do you?

(Laughter.)

MR. HILLMAN: No, sir.

QUESTION: But you don't -- didn't you request an instruction that the government had to prove an intent to defraud the government?

MR. HILLMAN: I'm sorry?

QUESTION: Didn't you request an instruction that --

MR. HILLMAN: No. We only requested the instruction on page 49 of the joint appendix, Your Honor.

Your Honor's hypothetical of the FBI agent coming to the door is certainly an appropriate one. We would concede that you certainly don't need face to face, you don't have to have a face to face transaction in order to come within the ambit of 1001. All of the intermediary cases are dealing with people who are making statements solely to state agencies or private employers, but they have, from the facts it is clear that they have, knowledge of the final destination of the statement.

I believe that the experience of the lower courts tells us that when a defense of no knowlede is raised, that the facts will usually overwhelmingly rebut a defendant's claim of no knowledge if it is a sham. I would ask the Court to compare the operation and the usefulness of perhaps the mail fraud statute, Section 1341. The usefulness of that statute to the government is certainly not impaired, even though this Court has held that the defendant must know that the use of the mails is reasonably foreseeable. A defense of lack of reasonable foreseeability of the use of the mails in my experience is rarely raised, and even far less to be successful. And I certainly do not hear the government complaining that the requirement of reasonable foreseeability of the use of the mails obstructs the usefulness of the statute.

Similarly, I think we could look at Title 21, the statutes which prohibit knowing importation of narcotics. The standard there is, of course, that the person must know that he is importing contraband. He need not know the specific narcotic that he is carrying, but he must know that he is carrying a controlled substance.

Day after day we have people entering this country with narcotics --

QUESTION: Well, this man knew he was lying, didn't he?

MR. HILLMAN: Yes, he did.

QUESTION: Well, I don't know what this argument's going to help him.

MR. HILLMAN: I'm sorry, Your Honor?

QUESTION: I don't see how this argument helps that point.

MR. HILLMAN: My point, Your Honor, is simply --

QUESTION: I thought it's admitted he deliberately lied and meant to do it.

MR. HILLMAN: Yes, and he was subject to state --

QUESTION: Is that not the case?

MR. HILLMAN: He was subject to state penalties. But I believe that, with the drug importation analogy, the government is not heard to complain that they are put to proof by proving knowledge that the person was importing a controlled substance.

The government does justifiably raise some concerns that our interpretation could lead to a serious situation, such as perhaps a knowingly defective part being placed in a nuclear reactor without someone knowing that it was going to be within a matter of

federal jurisdiction.

That is an appropriate concern. I believe, however, that such an action is inherently dangerous and gives notice to the wrongdoer of the danger, and I think that the action could be proscribed under the reasoning of this Court in United States versus Freed.

For situations which are not inherently dangerous, Congress could if it chose draft a statute which prohibited the submissions of false statements which affect a federal agency, and could if it chose eliminate a jurisdictional knowledge requirement.

For the very small class of persons whose actions are not fraudulent, we contend that our interpretation is a justifiable and necessary protection.

If there are no other questions, thank you.

CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Ms. Corwin?

REBUTTAL ARGUMENT OF CAROLYN CORWIN, ESQ.,
ON BEHALF OF PETITIONER

MS. CORWIN: Just a brief response. Thank you, Mr. Chief Justice.

I want to point out again that in this case we have a Respondent who acknowledges that his conduct was fraudulent. Some of the rather marginal examples that

have been discussed up here, I just want to remind the Court that I think it is quite unlikely that you're going to find those either being prosecuted or being prosecutable, because there is this requirement of willfulness.

This is a separate requirement from the knowledge requirement under Section 1001, and I think it involves someone's sense of whether someone else is going to rely to their detriment on the statements he is making. I think that --

QUESTION: Well, ordinarily that isn't the case, Ms. Corwin. Willfulness goes to the state of mind of the person, and the element of reliance in your civil fraud action is quite different than the element of willfulness.

MS. CORWIN: Well, but I'm suggesting that in this context of false statements a person's state of mind would be affected by whether he expected that the context in which he was speaking would induce someone else to rely to their detriment or to give him a benefit based on what he was saying.

I think the conversation with a neighbor is one that you wash out with the willfulness requirement. I would not that you would also wipe it out with the "knew or should have known" expression, with that

instruction as well.

And I would suggest to Justice Stevens that I think the question we presented in the petition, it would be our position that that would be broad enough to encompass that particular concern.

QUESTION: Let's just look at the question. It says: "Whether, in a prosecution, the government must prove that the defendant knew that the statement was made in a federal matter." How does that raise the instruction question?

MS. CORWIN: Well, I simply suggest that perhaps in looking at what "knew" means in that question, it may be appropriate to stop short of actual knowledge if the Court concludes that our initial position is incorrect. I don't want to dwell on that, but I think it is simply our position that that would be broad enough to raise it.

Respondent has noted the veto of the bill in 1934. I think that's significant. The veto was on the ground, President Roosevelt said you haven't done anything more in your attempted amendment here than is on the books now, and besides, you've reduced the penalties. Congress went back to the drawing board and, I think, looked pretty carefully at the language it was using when it then enacted the bill that became law.

And I would note again that there is -- while Congress was clearly interested in reaching the problem that was presented by the Cohn decision, the discussion on thefloor does not have -- or in committee, does not relate, does not mention Cohn, and does not even frame things in terms of monetary versus non-monetary interest of the government.

The discussion was in terms of affording broad protection to some pretty expansive programs and to closing all the loopholes that had been creating these practical problems for the government.

Respondent suggests that intermediary cases are a new thing. I don't think that's so. I think even if you look at the New Deal programs, they were using state governments under the public works program to administer some of those programs. And of course, you always have the situation that was discussed earlier, in which an employee forwards information to another employee within the organization.

But the state cases call to mind the problems that have arisen in the other cases that have raised this issue, and that is the programs like Medicaid, in which individuals make statements to state agencies that are then forwarded to federal agencies and are the purpose -- are the basis for providing federal funding.

It is not always easy to prove, in response to Justice O'Connor's point, it is not always easy to prove in that sort of program administered by states, that an individual knew about the federal involvement.

Thank you.

CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

(Whereupon, at 10:47 a.m., argument in the above-entitled case was submitted.)

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CERTIFICATION

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#83-346-UNITED STATES, Petitioner v. ESMAIL YERMIAN

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