

# Ninth Circuit on Whether a Federal False Statement Prosecution Can Be Brought Where the Effects of the Statement Are Felt

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In December 2023, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) announced a decision in which it reversed a criminal conviction for making false statements to federal officers under [18 U.S.C. § 1001\(a\)\(2\)](#), on grounds of improper venue. The decision, *United States v. Fortenberry*, reflects a division among the federal courts of appeals over an issue that the [Supreme Court](#) has yet to resolve: whether a federal false statement prosecution may be brought where the effects of the false statement are felt.

In 2015, the [FBI began](#) an investigation of a foreign national suspected of making illegal contributions to several U.S. political campaigns. The investigation was run by the FBI's Los Angeles field office, in the Central District of California. Through the investigation, the FBI began to suspect that the foreign national had made contributions to the campaign of Jeffrey Fortenberry, who was then a Member of Congress. The FBI had a cooperating witness call the Member and tell him that a foreign national had probably made a substantial contribution to his campaign. Los Angeles-based agents then interviewed Representative Fortenberry at his home in Nebraska and at his lawyer's office in the District of Columbia. On both occasions, Representative Fortenberry stated that he was unaware of any illegal contributions to his campaign.

A federal grand jury in the Central District of California subsequently indicted Representative Fortenberry under 18 U.S.C. § 1001(a)(2) for making false statements to the FBI, a jury convicted him, and he relinquished his seat in Congress.

The [Ninth Circuit reversed](#) the defendant's conviction, holding that venue in the Central District of California was improper but leaving open the possibility of retrial in a proper venue. The decision began with the observation that under the [Constitution](#), federal crimes must be tried where they were committed. The [Supreme Court has explained](#) that federal crimes are considered to have been committed wherever one of their "conduct" elements was committed.

Under 18 U.S.C. § 1001(a)(2), a false statement conviction requires proof that the false statement was material—that is, that it had the propensity to influence an official decision. Thus, the question for the

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Ninth Circuit in the *Fortenberry* case was whether this materiality requirement could be considered “conduct” justifying venue not only where the false statement being prosecuted was made, but where its effects were felt (i.e., the location of government action that the statement could potentially influence). The Ninth Circuit acknowledged a lack of consensus among the federal circuit courts as to whether materiality carries with it the proposition that false statements may be prosecuted wherever their effects are felt. For instance, the Fourth Circuit has held that venue is proper under Section 1001(a)(2) “wherever the relevant investigation or official proceeding is located,” while the Tenth Circuit has said that the commission of the crime occurs for venue purposes “where the defendant makes the false statement.” Ultimately, the Ninth Circuit concluded materiality is not a conduct element, because “it does not require anything to actually happen.” As the court explained, a false statement offense is “complete when the statement is made” and “does not depend on subsequent events or circumstances, or whether the recipient of the false statement was in fact affected by it in any way.”

The Ninth Circuit also rejected the suggestion that venue might be proper in California by operation of 18 U.S.C. § 3237, which allows for venue when an offense begins in one district and is completed in another or is “committed in more than one district.” In the Ninth Circuit’s view, application of Section 3237 would “merely invite[] the next step of determining” the conduct of a Section 1001 crime for venue purposes, begging the same question the court had already answered.

In the course of its opinion, the Ninth Circuit observed that “Congress is well equipped to identify the circumstances in which an effects-based venue rule is appropriate.” Accordingly, if Congress disagreed with the venue ruling in *Fortenberry*, it could consider enacting such an effects-based venue provision for Section 1001 prosecutions, subject to constitutional limitations.

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