

Takeaways From 9th Circ. Nix Of Ex-GOP Rep.'s Conviction

By **Matthew Sloan, Khaled Abbas and Or-el Vaknin** (February 13, 2024, 4:02 PM EST)

In a closely watched criminal case, the U.S. Court of Appeals for the Ninth Circuit recently reversed a former U.S. representative's conviction for making false statements to federal agents under Title 18 of the U.S. Code, Section 1001, on the grounds that venue was improper in the U.S. District Court for the Central District of California.[1]

On Dec. 26, 2023, the Ninth Circuit held that prosecuting former Rep. Jeffrey Fortenberry, R-Neb., in California violated the constitutional requirement that trials be held "in the State where the said Crimes shall have been committed," because his false statements were made in Nebraska and Washington, D.C. — not in California.

The U.S. Department of Justice argued that venue was proper in California because Fortenberry's false statements affected a Los Angeles-based investigation into allegedly illegal contributions to his campaign that were made in the Central District of California.

The appeals court rejected that argument, holding that "[t]he Constitution plainly requires that a criminal defendant be tried in the place where the criminal conduct occurred," and rejecting the government's expansive effects-based test for venue.

While the decision is fairly limited in scope, it demonstrates that the Ninth Circuit will not hesitate to rein in aggressive attempts by the government to expand the reach of criminal prosecutions.

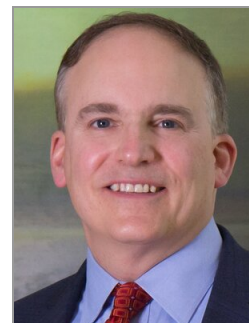
Fortenberry represented Nebraska's 1st District in the U.S. House of Representatives from 2005 until his conviction in 2022.

In 2015, the FBI in Los Angeles began an investigation into Gilbert Chagoury, a foreign national suspected of making illegal campaign contributions to several U.S. politicians, including Fortenberry.

About four years later, FBI agents investigating these contributions interviewed Rep. Fortenberry on two separate occasions: **first at his home** in Lincoln, Nebraska, and a second time at his lawyer's office in Washington, D.C. On both occasions, Fortenberry denied any knowledge of illegal contributions to his campaign.

In 2021, Fortenberry was **indicted** in the U.S. District Court for the Central District of California on one count of scheming to falsify and conceal material facts in violation of Title 18 of the U.S. Code, Section 1001(a)(1), and two counts of making false statements in violation of Title 18 of the U.S. Code, Section 1001(a)(2). However, he was not indicted for violations of any federal election laws.

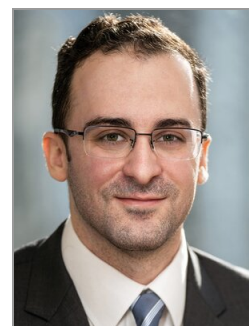
Fortenberry moved to **dismiss the case** for improper venue, but the district court rejected the challenge, concluding that a Section 1001 charge occurs in both the district where the false statement is originally made and in any district where the statement affects an investigation.



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Fortenberry was eventually **convicted** by a jury in Los Angeles of making false statements in both the Nebraska and Washington interviews. The trial court **sentenced him** to two years of probation, 320 hours of community service and a \$25,000 fine. Shortly after his conviction, Fortenberry resigned his seat in Congress.

On appeal, the Ninth Circuit overturned the district court's ruling and reversed Fortenberry's conviction without prejudice to the government's ability to charge him in any district in which proper venue lay.

The court first noted that Congress did not designate a venue for Section 1001 offenses, leaving the court to determine the locus delicti — the location of the crime — based on the nature of the crime alleged and the location of the acts constituting it. This requires looking at the "essential conduct elements of the offense."

The court decided that the question of venue in this case is answered by determining which of the statutory elements of a Section 1001 violation are the "essential conduct elements of the offense."

It derived this reasoning from the U.S. Constitution's venue clause, which requires trials to be held in the state where crimes are committed, as well as from the Sixth Amendment's vicinage clause, which "guarantees 'the right to ... to an impartial jury of the State and district where the crime ... [was] committed.'"

The court held that the essential conduct element of a Section 1001 violation is making a false statement. It rejected arguments that materiality was an essential conduct element, explaining that "[m]ateriality is not conduct because it does not require anything to actually happen."

Thus, it concluded that whether a statement was material to an investigation in the Central District of California is unrelated to conduct, while the locations where the statements were made are related to conduct and determinative of venue.

The government, relying on precedent in the U.S. Courts of Appeals for the Second, Fourth and Seventh Circuits, argued that the effects of the false statements were felt most in the Central District of California, where the investigation was ongoing.

The Ninth Circuit rejected this approach, holding that an effects-based test for venue has no support in the text of Section 1001, and that its prior holdings show that the offense occurs when the statement is made and before it has had any effects at all.

The court found that the effects-based test adopted by some of its sister circuits would lead to "highly problematic venue outcomes" that would be arbitrarily dictated by the location of the agents or agencies conducting the investigation, as opposed to the location where the false statements were made.

The court also pointed out that the U.S. Courts of Appeals for the Tenth and Eleventh Circuits rejected the effects-based test, providing the Ninth Circuit with support, while deepening a circuit split.

The government also raised an argument about "continuing offenses" as a backstop to its effects-based test. It claimed that communications are offenses that continue into the districts where they affect events, pointing to Title 18 of the U.S. Code, Section 3237, which allows prosecutions of offenses that begin in one district and are completed in another.

The Ninth Circuit rejected this theory as well, reasoning that Section 1001 lacks a similar venue provision, and that the offenses in question began and were completed in the district where the false statements were made.

The court also found that the government's reliance on the Ninth Circuit's 1997 decision in *U.S. v. Angotti*[2] was misplaced. In *Angotti*, the defendant faced a charge of making false statements under Title 18 of the U.S. Code, Section 1014. The Ninth Circuit pointed out that the text of Section 1014 explicitly prohibits making a false statement "for the purpose of influencing ... the action of a

federally insured [financial] institution."

The court thus found that "Agnotti [was] readily distinguishable from the circumstances here" because "Section 1014 expressly contemplates the effect of influencing the action of a financial institution. No such language is used in Section 1001."

By contrast, the court explained, Section 1001's materiality requirement focuses on the false statement's inherent potential to mislead, not its ultimate impact.

The court concluded by noting that its holding was in line with historical practices and traditions with respect to venue. The court explained that the history of the Constitution's venue and vicinages clauses demonstrated the founders' long-standing aversion to allowing the government to arbitrarily select a venue in criminal prosecutions, and their commitment to allowing a defendant to be tried by a jury of their peers.

The framers, the court said, had a deep awareness of "the unfairness and hardship to which trial in an environment alien to the accused exposes him."

Permitting an effects-based test for venue in Section 1001 cases, when Congress has not specified such a test, would allow an outcome that is in conflict with those historical principles and intentions.

Looking forward, prosecutors in the Ninth Circuit — as well as other circuits that have adopted Fortenberry's more restricted view of venue — will likely pay more careful attention to where they interview witnesses when they are conducting multidistrict investigations, so as to avoid the venue challenges faced by the government here.

To be sure, the government has requested an extension of time to file its petition for rehearing or rehearing en banc in the case, suggesting that Fortenberry's legal saga may not be at an end.

Unless and until the circuit split is resolved in the government's favor, however, prosecutors across the country would be wise to limit bringing false statement prosecutions to the districts in which the statements were actually made.

In practice, though, the circuit split will likely continue to lead to inconsistent results for defendants depending on where they are interviewed and where they are prosecuted.

In circuits that have adopted the expansive approach, like the Second, Fourth and Seventh Circuits, a defendant charged with Section 1001 violations may be subject to prosecution in multiple venues based on the origin of the investigation and investigators assigned to the case.

Meanwhile, circuits that have adopted the narrow approach, like the Ninth Circuit, will only allow prosecutions in the district where the allegedly false statements were actually made.

While the Fortenberry decision is fairly narrow in scope, it signals that the Ninth Circuit will continue to carefully scrutinize and rein in attempts by the government to broaden its prosecutorial reach through expansive interpretations of federal criminal law.

In particular, the court has made clear that when Congress has not included a specific venue provision in the text of the statute, it will only consider the essential conduct elements of an offense in determining venue, and will frown on attempts to creatively point to other elements unrelated to conduct to establish venue.

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[1] See [United States v. Fortenberry](#) (9th Cir. Dec. 26, 2023).

[2] [United States v. Angotti](#), 105 F.3d 539 (9th Cir. 1997).