

US V. Craig And The Criminalization Of Nondisclosure

By **Eric Nitz and Emily Damrau** (August 12, 2019)

Known in criminal defense circles simply as “1001,” the false statements statute, 18 U.S.C. Section 1001, is a frequently charged and oft-used arrow in the federal prosecutor’s quiver. Most frequently, the statute is charged to punish an affirmative statement that was false and material. But another prong of the statute, Section 1001(a)(1), the concealment prong, criminalizes the nondisclosure of certain facts. Under that provision, silence can be criminal.

In the recently decided case of *United States v. Craig*, the U.S. District Court for the District of Columbia denied former Skadden Arps Slate Meagher & Flom LLP partner Gregory Craig’s motion to dismiss a concealment charge brought under Section 1001. In doing so, the court placed an important gloss on previous decisions interpreting the statute and emphasized that criminal liability for concealment required a clear legal duty to disclose the concealed facts.

Section 1001 and Its Concealment Prong

At its simplest, Section 1001 criminalizes knowing lies that are material to a matter within the jurisdiction of the U.S. government. Section 1001(a)(1), however, also criminalizes an individual’s efforts to conceal facts that are material to such a matter. Concerned about the breath of a statute criminalizing the failure to act, courts have read certain limitations into the concealment prong.

Most significantly, courts have held that the concealment prong only criminalizes nondisclosure when the law imposes a legal duty to disclose the facts that have allegedly been concealed. *United States v. Safavian* is one of those cases. In *Safavian*, the defendant was charged with offenses related to the Jack Abramoff corruption scandal. At the time, *Safavian* was the chief of staff at the U.S. General Services Administration and had requested an ethics opinion from GSA’s general counsel concerning a golf trip to Scotland and London that Abramoff took him on. Among other things, *Safavian* was charged with a Section 1001 violation arising from his failure to disclose certain facts to the GSA general counsel, including that around the time of the trip, *Safavian* aided Abramoff with business before GSA.

The U.S. Court of Appeals for the District of Columbia Circuit overturned *Safavian*’s conviction on the concealment count, concluding that the law imposed no duty to disclose the information that he stood accused of concealing. The court noted that the ethics opinion *Safavian* sought was discretionary; *Safavian* was required neither to request nor follow the ethics opinion. And the D.C. Circuit saw no way in which that voluntary system “imposes a duty on those seeking ethical advice to disclose” all relevant information. And the government, in attempting to identify a binding legal duty, could point to nothing more than “vague standards of conduct for government employees.” Those standards did not set forth the requisite “specific requirements for disclosure of specific information.” As a result, the D.C. Circuit reversed the conviction. (*Safavian* was subsequently retried and convicted on a superseding indictment.)



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Following the decision in *Safavian*, courts have continued to refine the standard for what qualifies as a specific requirement for disclosure of specific information such that a duty to disclose exists. For instance, the U.S. Court of Appeals for the Ninth Circuit in *United States v. White Eagle* reversed a similar conviction under Section 1001's concealment prong. That case involved a government employee's failure to disclose a fraudulent scheme of which she had become aware. The government identified only a generic regulation generally requiring employees to report "waste, fraud, or abuse." It did not provide "specifics on what kind of information should be reported or to whom." The Ninth Circuit concluded that those circumstances could not justify a conviction under Section 1001.

Craig's Indictment and Motion to Dismiss

The indictment against Craig alleges that he intentionally misled Foreign Agents Registration Act officials in the U.S. Department of Justice by lying to and withholding information from them in order to avoid having to register as a "foreign agent" under FARA. That statute requires, among other things, that individuals who engage in certain public relations activity on behalf of a foreign agent register with the DOJ, and disclose information about the nature of the activity and the compensation received for performing that work.

Relevant here is Craig's work for the Ukrainian Ministry of Justice. Craig and his then-firm Skadden had been retained to conduct an investigation and draft a report on the question of whether, under Western standards of justice, former Ukrainian Prime Minister Yulia Tymoshenko had received a fair trial for alleged abuses of official powers while in office. At Craig's direction, Skadden attorneys looked into the question of whether their work would require registration under FARA and ultimately concluded it would not. Skadden thus did not register as a foreign agent under FARA.

Skadden and Craig completed their review and prepared a draft report in August 2012. The indictment alleges that, prior to the report's public release in December 2012, Craig communicated with several reporters about the report. After the report's release, the DOJ's FARA unit sent Skadden a letter advising the firm that its work on behalf of Ukraine may require it to register as a foreign agent. Craig responded to the letter, describing the terms of Skadden's engagement with Ukraine. In response to additional inquiries from the FARA unit, Craig detailed his interactions with reporters, characterizing the communications as efforts to correct misstatements and misinformation about the report.

Not long thereafter, the FARA unit made a determination that Skadden was required to register as Ukraine's agent. Following that determination, Craig persisted in his efforts to convince the FARA officials that his and the firm's work on behalf of Ukraine did not require registration. The FARA unit ultimately reversed its determination.

Earlier this year, in a two-count indictment, the government charged Craig with willfully falsifying and concealing material facts from the DOJ's FARA unit. Count 1 charged him with violating Section 1001, while count 2 charged him with violating the rarely invoked false statement provision of the FARA statute.

Craig moved to dismiss both counts. As to the concealment offense under Section 1001, Craig argued he was under no specific obligation to disclose information to the FARA officials. Craig's argument heavily relied on the D.C. Circuit's decision in *Safavian*. Because Craig's communications with the FARA unit were voluntary, he argued, he had no duty to respond let alone to volunteer all relevant facts. In his motion to dismiss the FARA false statement charge, Craig argued the statute addresses only false statements and omissions in statutorily required submissions by FARA registrants, not Craig's voluntary letters to the

FARA unit about potential registration.

The government opposed the motions. Among other things, it defended the concealment charge by arguing that Safavian was inapplicable because Craig had a specific legal duty to disclose. The government asserted that the FARA statute itself imposed a duty of truthful disclosure in response to an inquiry by the DOJ's FARA unit. Two provisions of the FARA statute, Sections 611 and 681(a)(2), imposed a duty on Craig, the government asserted. The government argued that Craig's duty to disclose came not only from the statute and regulations but the inquiry flowing from those rules as well.

The Court's Decision

In a lengthy decision, the court granted Craig a partial victory, dismissing count 2 — the FARA false statement violation — after invoking the rule of lenity. The district court determined that the concealment charge in count 1, however, could proceed.

The court agreed with Craig that a legal duty was necessary for prosecution under Section 1001(a)(1) but held such a legal duty existed in this instance. The disclosure obligations underlying the alleged scheme, the court concluded, arise directly out of the FARA statute and are referenced in the FARA registration form itself.

The court cited to specific provisions of the FARA statute that required disclosure of information Craig allegedly omitted, including his alleged involvement in the public relations efforts surrounding the Ukraine report. The court also highlighted the FARA registration form's specific questions about whether the registrant was disseminating information and the manner in which that information was disseminated. Those clear provisions, the court held, differentiated Craig's case from Safavian.

Whereas the government in Safavian pointed only to ill-defined ethical standards, FARA was a disclosure statute designed to require individuals to reveal when they are engaged in political or public relations activities on behalf of a foreign client. That is precisely what Craig is alleged to have concealed, the court concluded. Moreover, the court held that once Craig engaged with the FARA unit in an effort to convince it that registration was unnecessary, he was bound to be truthful and not omit facts material to the determination.

Implications

The court's decision in Craig illustrates a number of important points about the contours of a concealment charge under Section 1001. First, the decision makes clear that the facts concealed by the scheme must be the same facts that the defendant had a legal duty to disclose. Thus, the court found it significant that the purpose of the scheme, as alleged in the indictment, was to "avoid registration as an agent of the Ukraine," which would have required Craig to disclose, among other things, that he was involved in a public relations effort associated with the report. It was those activities that, the court concluded, FARA required Craig to disclose. And all of Craig's alleged omissions, the court further explained, related to his alleged participation in the public relations effort and thus flowed directly from his disclosure obligations under FARA.

The Craig decision also demonstrates the limits of decisions like Safavian and White Eagle. Although "vague, ill-defined" duties are insufficient to establish criminality for nondisclosure, a statute like FARA will suffice because it defined the disclosure obligations with sufficient specificity. As the court explained, FARA "specifically requires people to reveal when they are engaged in political or public relations activities on behalf of foreign clients," and it

defined the meaning of those terms.

Finally, and perhaps most significantly, the Craig decision indicates that “deliberate engagement” with a governmental unit can itself impose a duty to disclose. After the FARA unit had determined that Craig should have registered as a foreign agent, Craig engaged with the unit in an effort to convince it otherwise. The FARA unit had informed Craig that it was engaged in a specific inquiry related to whether Craig and his firm were required to register under FARA, and Craig’s alleged communications were made with the purpose of influencing the FARA unit’s determination on that question. That was not a passive failure to volunteer information, the court held, but rather a misleading omission in the context of an underlying legal duty to disclose.

Craig’s trial began on Monday, Aug. 12. Watch for Craig to raise these issues in a Rule 29 motion for judgment of acquittal after the government rests. The court’s decision on that likely forthcoming motion — which will rest on a more developed, and perhaps more nuanced, factual record — could provide additional gloss on the scope of Section 1001’s concealment prong.

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