IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	**USCA Dkt. No. 12-0414/AR**
Private First Class (E-3) **DAVID G. SPICER, JR.** United States Army, Appellant	)	Crim. App. Dkt. No. 20090608

STEVE T. NAM
Captain, Judge Advocate
Appellate Government Counsel
Government Appellate Division
United States Army Legal
Services Agency
9275 Gunston Road, Room 2014
Fort Belvoir, VA 22060
(703) 693-0773
steve.t.nam.mil@mail.mil
U.S.C.A.A.F. Bar No. 35508

Lead Counsel for Appellee

AMBER J. ROACH
Lieutenant Colonel, Judge
Advocate
Acting Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 35244

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Granted Issue:

WHETHER THE EVIDENCE IS LEGALLY SUFFICIENT TO SUPPORT THE FINDINGS OF GUILTY OF MAKING FALSE OFFICIAL STATEMENTS UNDER CHARGE I.

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Granted Issue

WHETHER THE EVIDENCE IS LEGALLY SUFFICIENT TO SUPPORT THE FINDINGS OF GUILTY OF MAKING FALSE OFFICIAL STATEMENTS UNDER CHARGE I.

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice, 10 U.S.C. § 866 (2006) [hereinafter UCMJ]. This Court has jurisdiction under Article 67(a)(3), UCMJ.

Statement of the Case

A panel consisting of enlisted and officer members sitting as a general courts-martial convicted appellant, contrary to his pleas[1] (JA at 21-22), of two specifications of false official statement and two specifications of child endangerment by design, in violation of Articles 107 and 134, UCMJ. (JA at 18-19). The panel sentenced appellant to confinement for 10 years, reduction to the grade of E-1, forfeiture of all pay and

[1] Appellant entered a mixed plea, pleading not guilty to two specifications of Article 107, UCMJ, and pleading guilty by exception and substitution to child endangerment by culpable negligence pursuant to Article 134, UCMJ. The government went forward on the excepted language of "by design which resulted in grievous bodily harm. . .and some hearing loss" in Specification 1 of Charge I and "by design" in Specification 2 in Charge I.

allowances, and to be separated from the armed services with a dishonorable discharge. (JA at 2). The convening authority approved the adjudged sentence, but deferred the adjudged forfeitures until action at which time he waived them for a period of six months. *Id.*

On January 31, 2012, the Army Court affirmed the findings and sentence. (JA at 5-8). On May 18, 2012, this honorable court granted appellant's petition for review on one of two issues presented.

Statement of Facts

Those facts necessary for disposition of the granted issue are contained in the arguments below.

Summary of Argument

Appellant's statements to local police bear a clear and direct relationship to his official duties and status as a soldier and concern criminal conduct that subjected him to liability under the UCMJ. The military judge's instructions on the definition and scope of "official" under Article 107, UCMJ, accurately articulated the standard as outlined by this court. The military judge's definition of "official" under Article 107, UCMJ, also hews closely to the interpretation of the jurisdictional element of 18 U.S.C. § 1001 by federal courts.

Argument

A. Standard of Review

The standard of review for questions of legal sufficiency is de novo. *United States v. Harmon*, 68 M.J. 325, 327 (C.A.A.F 2010). "Evidence is legally sufficient if, viewed in the light most favorable to the Government, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Winckelmann*, 70 M.J. 403, 406 (C.A.A.F. 2011) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In resolving questions of legal sufficiency, this court is "not limited to appellant's narrow view of the record." *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996) (citing *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993)). To the contrary, this court must "draw every reasonable inference from the evidence of record in favor of the prosecution." *Winckelmann*, 70 M.J. at 406 (quoting *United States v. Bright*, 66 M.J. 359, 365 (C.A.A.F. 2008)).

B. Applicable Law and Analysis

A statement is official for purposes of Article 107, UCMJ, if it is "made in the line of duty." *United States v. Teffeau*, 58 M.J. 62, 68 (C.A.A.F. 2003) (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES [hereinafter MCM] pt. IV, ¶ 31c(1) (2002)). Official statements are not strictly limited, however, to those made in

the "line of duty" as that concept is more commonly defined in non-criminal contexts. *Id.* at 68 n.3. "The word 'official' used in Article 107 is the substantial equivalent of the phrase 'any matter within the jurisdiction of any department or agency of the United States' found in [18 U.S.C.] § 1001." *United States v. Jackson*, 26 M.J. 377, 378 (C.M.A. 1988) (quoting *United States v. Aronson*, 25 C.M.R. 29, 32 (C.M.A. 1957)).[2] Though this court has recognized 18 U.S.C. § 1001 as the "civilian counterpart" of Article 107, UCMJ, "the scope of Article 107 is more expansive . . . because '[t]he primary purpose of military criminal law—to maintain morale, good order, and discipline—has no parallel in civilian criminal law.'" *Teffeau*, 58 M.J. at 69 (quoting *United States v. Solis*, 46 M.J. 31, 34 (C.A.A.F. 1997)). *Accord United States v. Day*, 66 M.J. 172, 174 (C.A.A.F. 2008).

Accordingly, an appellant's off-duty status is not per se determinative of the issue, as "[t]here are any number of determinations made outside of a servicemember's particular

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[2] In 1996, Congress amended the "jurisdictional" element of 18 U.S.C. § 1001 to encompass "any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States." *See* False Statements Accountability Act of 1996, Pub. L. No. 104-292, 110 Stat. 3459 (codified as amended at 18 U.S.C. § 1001 (2006)). Case law addressing the issue of which subject matters fall within federal jurisdiction remains applicable since the amendment concerned only the types of federal entities encompassed by the statute. *See United States v. Atalig*, 502 F.3d 1063, 1067 (9th Cir. 2007).

duties that nonetheless implicate official military functions, and thus the proscription against false official statements." *Day*, 66 M.J. at 174. The more relevant analysis is whether the statements relate to subject matter that reflects a "substantial military interest" and falls within the jurisdiction of the courts-martial system. *See Teffeau*, 58 M.J. at 69 (citing *Solorio v. United States*, 483 U.S. 435 (1987)).

There is also no absolute rule that statements to civilian law enforcement officials can never be official within the meaning of Article 107, UCMJ. *Id.* (citing *United States v. Johnson*, 39 M.J. 1033 (A.C.M.R. 1994)). "[T]he critical distinction is not whether the recipient of a statement is civilian or military, but whether the statements relate to the official duties of either the speaker or the hearer, and whether those official duties fall within the scope of the UCMJ's reach." *Day*, 66 M.J. at 174. Where the statements are made to an off-post civilian whose official duties do not directly "fall within the scope of the UCMJ's reach," this court has indicated that a "predictable and necessary nexus to on-base persons performing *official* military functions on behalf of the command" could still implicate Article 107, UCMJ, depending on the facts of the case. *See id.* at 175 n.4 (emphasis in the original).

1. The statements bear a clear and direct relationship to appellant's official duties and status as a Soldier and concern criminal conduct that subjected him to liability under the UCMJ

A soldier's ability to fulfill his or her military duties and requirements is fundamentally predicated on his or her ability to care for family members and dependents. *See* U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 5-5a(1) (18 Mar. 2008 [hereinafter AR 600-20, included in JA at 102]. Army policy acknowledges that military duties will often conflict with parental obligations and requires soldiers to make necessary arrangements for the care of dependents using a family care plan (DA Form 5305). *Id.* paras. 5-5a(2), 5-5c (JA at 102, 103). Recognizing how critical the care of dependents is to a soldier's sustained ability to perform military duties, Army policy urges commanders to be aware of any "situations" that may affect a soldier's responsibilities to support dependents. *Id.* paras. 5-5g(13) (JA at 103). Commanders are also urged to consider initiating bars to reenlistment against soldiers who fail to "properly manage personal, marital, or [f]amily affairs" and involuntary separation proceedings against those "who fail to provide and maintain adequate [f]amily care plans." *Id.* paras. 5-5g(11), (12) (JA at 103).

Appellant's willful failure to fulfill his duties as a father and as a soldier to abide by his family care plan over a period of thirty-eight days drove him to concoct two fantastical

stories to local police in an effort to deflect responsibility and avoid punishment for the grave physical injuries inflicted on his infant son. (JA at 86). "The circumstances leading up to and surrounding the statements made to [local] police bear a clear and direct relationship to [a]ppellant's duties" and responsibilities as a soldier and "reflect a substantial military interest in the investigation" as it pertained to conduct that subjected appellant to criminal liability under the UCMJ. *See Teffeau*, 58 M.J. at 69 (holding that a recruiter's statements to civilian police regarding off-duty drinking with female recruits were "official" under Article 107, UCMJ).

Appellant's childcare arrangements and his ability to care for his sons were matters of command concern that became acute after appellant's wife deployed in April 2008 and which culminated with the hospitalization of appellant's infant son on 24 July 2008. (SJA at 55-58). At the time of the false official statements and the child endangerment that precipitated the statements, appellant was required by regulation to maintain and utilize a family care plan. (SJA at 55). A significant factor in appellant's decision to remove his children from on-post daycare on 16 June 2008 was the fact that any future reports of inadequate care would be reported to his chain of command. (JA at 86; SJA at 68-70). Moreover, in his defense appellant repeatedly referred to his wife's deployment and an

Article 15 action he received in early June 2008 for being late to formation which resulted in three weeks of extra duty punishment as stressors that strained his ability to "juggle everything while taking care of my children." (JA at 86; SJA at 1, 63-65, 71, 72-75). The statements given to local police thus relate to appellant's official duties by reason of Army policy and because appellant's actions towards his sons were deeply intertwined with his military duties and driven by his fear of the consequences for failing to fulfill those duties. *See United States v. Caballero*, 37 M.J. 422, 425 (C.M.A. 1993) (affirming the lower court's holding that "statements related directly to [appellant's] availability to perform his duties" were official).

The closely interrelated nature of appellant's military and parental duties and his prolonged failure to fulfill those duties distinguish the facts of this case from those of *Day*. In *Day*, the appellant tucked his infant son under a blanket with a bottle propped in the baby's mouth and then went back to sleep. 66 M.J. at 173. About five hours later, the appellant woke to find his son on his back lifeless under the quilt, but told a civilian off-post 911 dispatcher and civilian on-post firemen that the baby was lying face down. *Id.* These statements concerned a momentary and isolated failure to exercise the level of care expected of any parent. In the instant case, the

statements concerned a willful and sustained refusal to provide fundamental parental care as explicitly required under a command-directed family care plan arrangement. An airman's decision to cover his child on any given evening with a blanket bears no clear and direct relationship to his military duties nor does it reflect any serious command interests.[3] The same cannot be said for appellant's decision to disregard his family care plan by leaving an infant and a toddler home alone in on-post housing for entire duty days or longer over a thirty-eight day period in an attempt to avoid scrutiny from his command for failure to balance military and parental duties.

Appellant's actions toward his sons shirked his command-imposed military and parental duties and his lies to cover up his crimes were squarely within the scope of Article 107, UCMJ. The Army court properly found, as articulated in Judge Krauss' concurring opinion, that appellant's statements were official for purposes of Article 107, UCMJ, because they "bore a clear and direct relationship to his duties as a soldier." (JA at 3).

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[3] The analysis in *Day* examines only whether the statements relate to the official duties of the firemen and 911 dispatcher and "whether those duties fall within the scope of the UCMJ's reach," but omits any discussion of the appellant's official duties. 66 M.J. at 175. The obvious implication is that this court did not find in *Day* a sufficiently clear and direct relationship to the appellant's official duties as an airman.

2. The military judge's instructions on the definition and scope of "official" under Article 107, UCMJ, accurately articulated the standard as outlined by this court.

The military judge provided the following instruction to the panel:

> For a statement to be regarded as official, it must relate to the official duties of either the speaker or the hearer, and those duties must fall within the scope of the UCMJ's reach. In making this determination, you should consider, in addition to the evidence in this case on this issue as you recall it, whether there was a predictable and necessary nexus between the accused's statements and on-post personnel performing official military functions on behalf of the command.

(JA at 85). The first sentence of this definition quotes the standard for "official" from *Day*, which reinforced the analysis in *Teffeau*. *See* 66 M.J. at 174 (citing *Teffeau*, 58 M.J. at 69). By adding the second sentence of the instruction, the military judge merely provided an additional consideration in applying the *Day* standard, quoting this court's explanatory language. (JA at 60, 68) (noting that the dicta in footnote 4 of *Day* is this court's guidance to the field).[4]

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[4] The language in footnote 4 of *Day*, though dicta, is still relevant and persuasive upon this court in deciding this case insofar as it is consistent with relevant statutory text and case law. *See United States v. Nerad*, 69 M.J. 138, 144 (C.A.A.F. 2010) (finding unpersuasive any dicta that is "both contrary to statutory text and has been eroded by subsequent decisions").

Appellant asserts that "[i]n *Day*, there is no indication that this honorable court intended for footnote four to serve as the basis for instructions on the law relative to 911 calls and false official statements." (Appellant's Br. 6). A review of military cases, however, shows that footnote 4 in *Day* is consistent with this court's previous decisions in cases involving statements made to off-post civilians.

Prior to *Teffeau*, this court had never directly addressed what would constitute a sufficient "nexus" in cases where the relation to the speaker's official duties is more attenuated and the recipient is an off-post civilian.[5] Two cases in the service courts did address such a situation, using language and

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[5] In *United States v. Ragins*, this court held that the appellant's falsification of commissary receipts for bread shipments from a private company fell within the scope of Article 107. 11 M.J. 42, 46 (C.M.A. 1981). Two cases decided by this court in the years between *Ragins* and *Teffeau* reiterated that a statement need not be directed at or actually result in any pecuniary loss to the military to violate Article 107. *See United States v. Smith*, 44 M.J. 369, 373 (C.A.A.F. 1996) (concluding that "the official character of the false statement can be based on its issuing authority rather than on the person receiving it or the purpose for which it is made") (citations omitted); *United States v. Hagee*, 37 M.J. 484, 485 (C.M.A. 1993) ("Nothing in the plan language of this statute limits its scope to deceptions in which the United States is the intended or actual direct victim") (citation omitted). *Ragins*, *Hagee*, and *Smith* all involved falsified documents, as opposed to verbal statements, submitted for nonmilitary purposes, where the court found a strong connection between the documents and the military. *See* Lieutenant Colonel Colby C. Vokey, *Article 107, UCMJ: Do False Statements Really Have to be Official?*, 180 MIL. L. REV. 1, 37-41 (2004) (criticizing this court's "inconsistent" application of military and federal case law in such cases).

reasoning later reflected in footnote 4 of *Day*.[6] In *United States v. Lauderdale*, 19 M.J. 582 (N.M.C.M.R. 1984), the Navy-Marine Court adopted a "nexus" requirement to limit the scope of Article 107 in cases where the "the character and governmental status of the using activity are not objectively obvious." *See* 19 M.J. at 585 (looking at "what degree of nexus can be discerned between the using activity and essential and integral functions of a United States government department or agency"). Ten years later, in *United States v. Johnson*, 39 M.J. 1033 (A.C.M.R. 1994), the Army Court noted in dicta remarkably similar to *Day*, "We can envision situations where servicemembers may be prosecuted for making false statements to state or nonmilitary federal officials acting on behalf of the armed forces." *Id.* at 1035 n.3.[7]

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[6] In one post-*Day* case, the Air Force court applied the test in footnote 4 to facts somewhat similar to the case at bar and found the statement to be official. *See United v. Cofer*, 67 M.J. 555, 558 (A.F. Ct. Crim. App. 2008), *review denied by* 68 M.J. 87 (C.A.A.F. 2009).

[7] The Navy-Marine court in *Lauderdale* found no "material, statutorily-mandated government function involved in, or related to, the use of [the falsified form]." 19 M.J. at 586. *Contra United States v. Simms*, 35 M.J. 902, 904 (A.C.M.R. 1992) (holding that falsification on Army Emergency Relief loan application was "official"). The Army court in *Johnson* held that the statement was not official because, in part, the police detective "was not enforcing military law." *Id.* at 1035. Notably, the Navy-Marine court's decision in *Teffeau* commented that the holding in *Johnson*, and presumably also *Lauderdale*, which is not mentioned in the decision, did not reflect "the more expansive view currently held by our superior court" that there is no "rigid rule" that the recipient of the statement be

As seen in the development of this limited line of cases, the "predictable and necessary nexus" language in *Day* further clarifies the reasonable limits of the jurisdictional reach of Article 107, UCMJ, which nonetheless is to be "construed broadly." *See Jackson*, 26 M.J. at 379 (interpreting Article 107 in a manner consistent with the interpretation of 18 U.S.C. § 1001 in *United States v. Rodgers*, 466 U.S. 475 (1984)). Moreover, footnote 4 in *Day* is fully consistent with this court's reasoning elsewhere in the *Day* opinion discussing "any number of determinations made outside of a servicemember's particular duties that nonetheless *implicate official military functions*, and thus the proscription against false official statements." *See* 66 M.J. at 174 (emphasis added). The "nexus" dicta is also consistent with the reasoning in *Teffeau* where this court noted that "[t]he subject matter of the [local] police investigation was of *interest* to the military and within the jurisdiction of the courts-martial system." *See* 58 M.J. at 69 (emphasis added). Dispositive to the analysis in both *Day* and *Teffeau* is the extent to which the "subject matter" of the statements obviously implicates official military functions, subjects the speaker to criminal liability under the UCMJ, and

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a federal or military entity. *See* 55 M.J. 756, 759 (N-M. Ct. Crim. App. 2001) (citing *Smith*, 44 M.J. at 373, and *Hagee*, 37 M.J. at 485), *rev'd on other grounds by* 58 M.J. 62 (C.A.A.F. 2003).

is therefore of interest to the military. *See Day*, 66 M.J. at 174; *Teffeau*, 58 M.J. at 69.

Read together, *Day* and *Teffeau* provide the full contours of what "subject matter" can be considered official for purposes of Article 107, UCMJ. Admittedly, the language in *Day*, where it states that the official duties of the hearer "must fall within the scope of the UCMJ's reach," could be read, on its face, as excluding statements made to *any* civilians, to whom the UCMJ would never reach except in extremely limited situations.[8] This reading, however, directly conflicts with the holding in *Day* as to the statements made to the on-post firemen as well as the analysis in *Teffeau* addressing statements made to civilian law enforcement. *See* 58 M.J. at 69 ("We reject any absolute rule that statements to civilian law enforcement officials can never be official within the meaning of Article 107") (citing *United States v. Johnson*, 39 M.J. 1033 (A.C.M.R. 1994)).

Considering the evolution of this court's Article 107 case law leading up to *Day*, the "nexus" dicta is part and parcel of the reasoning and holding in that case, which concluded that the official duties of the on-post firemen fell "within the scope of the UCMJ's reach" because they "were charged with performing an

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[8] The Government notes that this court's recent holding in *United States v. Ali*, 71 M.J. 256 (C.A.A.F. 2012), finding UCMJ jurisdiction over a civilian contractor "serving with" or "accompanying the force" in a "contingency operation" is wholly inapplicable to this case.

on-base military function . . . pursuant to the commander's interest in and responsibility for the health and welfare of dependents residing in base housing over which he exercised command responsibility." 66 M.J. at 175.

3. The military judge's definition of "official" under Article 107, UCMJ, hews closely to the interpretation of the jurisdictional element of 18 U.S.C. § 1001 by federal courts.

As this court noted in *Jackson*, the language of § 1001, and consequently Article 107, UCMJ, "covers all matters confided to the authority of an agency or department" and that "the term 'jurisdiction' should not be given a narrow or technical meaning.'" 26 M.J. at 379 (quoting *Rodgers*, 466 U.S. at 479). A broad interpretation is necessary to further the purposes of both statutes, which "were intended 'to protect the authorized functions of government at departments and agencies from the perversion which *might* result from the deceptive practices described.'" *Id.* at 378 (quoting *United States v. Hutchins*, 18 C.M.R. 46, 50 (C.M.A. 1955)) (emphasis added). *Accord United States v. Alvarez*, 132 S. Ct. 2537, 2562 (2012) (quoting *United States v. Gilliland*, 312 U.S. 86, 93 (1941)).

The "nexus" dicta in footnote 4 of *Day* thus reiterates what the Supreme Court has long recognized as the primary purpose of the jurisdictional requirement in 18 U.S.C. § 1001, which "is to identify the factor that makes the false statement an

appropriate subject for federal concern." *United States v. Yermian*, 468 U.S. 63, 68 (1984). By adopting the "predictable and necessary" standard, footnote 4 of *Day* further conforms to the restriction on the reach of 18 U.S.C. § 1001 imposed by the Supreme Court in *Rodgers*. *See* 466 U.S. at 479 ("the phrase 'within the jurisdiction' merely differentiates the official, authorized functions of an agency or department from matters peripheral to the business of that body"). *See also United States v. St. Michael's Credit Union*, 880 F.2d 579, 591 (1st Cir. 1989) ("The government, however, must prove a nexus, a 'necessary link,' between the deception of the nonfederal agency and the function of a federal agency . . . The link may be established by showing that the concealments or 'false statements . . . result in the perversion of the authorized functions of a federal department or agency.'") (citation omitted).

Contrary to appellant's assertion that the military judge's instruction "lowered the standard to prove guilt" (Appellant's Br. 6), the "predictable and necessary nexus" standard reflects a more restrictive "direct relation" standard adopted by a minority of the federal circuits. *See, e.g., United States v. Facchini*, 874 F.2d 638, 642 (9th Cir. 1989) ("To establish jurisdiction, the information received must be directly related to an authorized function of the federal agency") (en banc).

Under this standard, a general federal interest or mere "statutory basis" for authority over the subject matter is insufficient if the agency does not have "the power to exercise authority in a particular situation." *See United States v. House*, No. 10-15912, 2012 WL 2343665, at *21 (11th Cir. June 20, 2012) (quoting *Rodgers*, 466 U.S. at 479); *United States v. Ford*, 639 F.3d 718, 720-21 (6th Cir. 2011) (same); *Facchini*, 874 F.2d at 641 (same). *See also United States v. Popow*, 821 F.2d 483, 486 (8th Cir. 1987) ("it is only necessary that the statement relate to a matter in which a federal agency has the power to act") (citations omitted).[9]

The majority of federal circuits, however, require only that there be a "statutory basis" for the agency's request for information alleged to be false, or that the statement relate to an "authorized function" of the federal agency, even where the statements are made to a state agency in a matter over which the federal agency retains "supervisory authority." *See United States v. Starnes*, 583 F.3d 196, 208 (3d Cir. 2009) (citing

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[9] This does not appear to be a per se rule, but rather a fact-dependent analysis that assesses the strength of the federal interest at stake. *See Facchini*, 874 F.2d at 642 (noting that the federal interest in false statements by an applicant for state unemployment benefits, in which the Secretary of Labor has no authority to act, is "indirect and *de minimis*") (italics in original). One federal circuit has explicitly questioned whether *Facchini* is good law. *United States v. Milton*, 8 F.3d 39, 46 n.8 (D.C. Cir. 1993) (citation omitted), *cert. denied*, 513 U.S. 919 (1994).

United States v. Petullo, 709 F.2d 1178, 1180 (7th Cir. 1983)); *United States v. Davis*, 8 F.3d 923, 929 (2d Cir. 1993) (same); *United States v. Milton*, 8 F.3d 39, 46 (D.C. Cir. 1993) (citing *Rodgers*, 466 U.S. at 481).[10] *See also United States v. Jackson*, 608 F.3d 193, 198 (4th Cir. 2010) ("the executive branch's authority to safeguard federal funds is a sufficient jurisdictional nexus on its own"); *United States v. Ross*, 77 F.3d 1525, 1544-45 (7th Cir. 1996) ("the jurisdictional nexus between the agency and [non-federal] entity for purposes of § 1001 stems from the agency's ultimate duty to safeguard the proper spending of federal funds") (citations omitted).[11]

4. Appellant's statements were official under this court's *Day/Teffeau* standard as well as the strictest interpretation of 18 U.S.C. § 1001.

Regardless of the position this court could choose to adopt concerning the interpretation of the jurisdictional element of 18 U.S.C. § 1001 as it pertains to the scope of Article 107,

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[10] The First Circuit, adopting the most liberal position of any circuit, has declared "section 1001 *in and of itself* constitutes a blanket proscription against the making of false statements to federal agencies . . . whether or not legally required") (emphasis in the original). *United States v. Arcadipane*, 41 F.3d 1, 5 (1st Cir. 1994). Under this standard, "the government does not need to show that it had some particular extrinsic authority to request information falsely provided." *Id.*

[11] The Fourth Circuit has reasoned, in language that seems to reach across the circuit split, that the executive branch has the "substantial power to act" because it "has the authority (if not the duty) not to pay a false invoice." *Jackson*, 608 F.3d at 197 (citing *Ross*, 77 F.3d at 1543).

UCMJ, the outcome in the instant case remains unchanged. Under the combined standard of *Day* and *Teffeau* as well as the "direct relation/power to act" analysis for 18 U.S.C. § 1001 adopted by a minority of the federal circuits, appellant's statements were "official." The statements directly related to and necessarily implicated critical duties and functions of Fort Carson's garrison officials and commanders, the primary authority to investigate the underlying and falsely alleged crimes rested with military law enforcement, and the primary and ultimate authority to prosecute appellant's underlying crimes remained with the chain of command.

Appellant's first statement involved a fictitious babysitter named Jessica Landing who kidnapped appellant's infant son from his on-post home and who also resided on Fort Carson. (SJA at 6).[12] At the time the statement was given, the detective who interviewed appellant knew he was in the military and noted that his first sergeant was at the hospital in uniform. (SJA at 8, 14, 32-33). From the beginning of the ensuing investigation, local police worked jointly with Fort Carson Criminal Investigation Division (CID) agents out of

[12] The record shows that appellant went to an off-post location with the intent to call Fort Carson military police, but his call was transferred to a Colorado Springs 911 dispatcher because only local police would be able to send officers to appellant's location. (SJA at 3-5). This shows that appellant clearly intended his statements to be directed at military officials on Fort Carson, not the Colorado Springs police.

necessity. (SJA at 9, 16, 40, 48, 52-53). Although local detectives had an ongoing interest in investigating an alleged kidnapping that was first reported to them (SJA at 13), the fact that the entirety of the alleged crime occurred on Fort Carson meant that significant military police involvement was "predictable and necessary" to further the initial local police investigation. (SJA at 41, 49-51).

Appellant's second statement involved a fictitious drug dealer and presented essentially the same situation for local police. Appellant claimed he witnessed a drug deal at a motor pool on Fort Carson. (SJA at 17). The drug dealer then allegedly followed appellant into his home and first threatened then later kidnapped his infant son to ensure appellant's silence about the drug deal. (SJA at 18-20). After this second interview, the detectives conferred with a CID agent to obtain a search warrant for appellant's home on Fort Carson. (SJA at 25, 32). The circumstances of the second statement further reveal the extent to which military investigators were already involved as a necessary part of the investigation.

In the follow-up joint investigation on Fort Carson, local police and CID provided necessary mutual assistance with the search for Jessica Landing, the search of appellant's home and surrounding area, and the questioning of nearby residents. (SJA at 26-32, 41-47). A week after appellant first spoke with local

police, his chain of command sent him to CID to be interviewed by an agent. (SJA at 34). Appellant admitted he made up the stories to local police "because I didn't know how to get care for my children." (SJA at 36). By this point in the investigation, the record indicates that the primary, if not exclusive, responsibility for completing the investigation fell to CID and that appellant's command was contemplating UCMJ action. Considering how the investigation immediately implicated the official duties of military police, on-post childcare providers and garrison activities, and appellant's command, this case presents an even stronger "nexus to on-base persons performing *official* military functions on behalf of the command" than *Teffeau* or *Day*. 66 M.J. at 175 n.4.[13]

Once the fraud had been discovered, the military had the authority and the duty to act and so the kind of nexus required to establish jurisdiction under 18 U.S.C. § 1001 was undeniably established. *See Ford*, 639 F.3d at 721 (noting the critical

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[13] *Teffeau* involved a local police investigation into a car accident that occurred off-post after the appellant, a Marine recruiter, and a recruit had been drinking alcohol together to celebrate the recruit's impending departure for boot camp. 58 M.J. at 64, 67. *Day* involved an off-post 911 dispatcher and on-base firemen who responded to the appellant's emergency call for medical assistance at his home for his unresponsive infant son. 66 M.J. at 173. Whereas in *Teffeau* the local authorities likely had primary jurisdiction to investigative and prosecute the off-post accident, in *Day* and this case, local authorities would have had little, if any, interest in and jurisdiction over the investigation and prosecution of the underlying crimes that occurred on post.

fact in the holding of *United States v. Holmes*, 111 F.3d 463 (6th Cir. 1997), finding no jurisdiction). To the extent that local police retained any interest and significant role in the investigation, it is clear from the record that they were "serving precisely the same federal interest" that military investigators would serve in investigating a reported kidnapping on Fort Carson. *See United States v. Salman*, 189 F. Supp. 2d 360, 365 (E.D. Va. 2002) (finding jurisdiction over false statement made to local sheriff's deputy responsible for housing and guarding federal inmates). Although there is no evidence in the record of a formalized agreement between local police and Fort Carson, as in *Salman*, the facts of this case make it abundantly clear that military authorities were necessary to facilitate the initial investigation of the crime scene on Fort Carson. (SJA at 50-51). As a basic jurisdictional and regulatory reality, local police would not have been in a position to fully investigate either the underlying child endangerment or the alleged kidnappings without significant military cooperation and involvement, given the broad powers vested in an Army installation's senior and garrison commanders. See AR 600-20, para. 2-5 (SJA at 78).

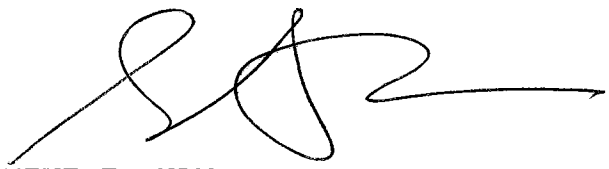
When the real circumstances of this case became apparent to both local and military law enforcement, the overarching interests implicated by appellant's actions were those of his

chain of command and Fort Carson garrison officials. After the local police notified CID, the military had the ultimate "power to act" on the investigation as well as the power to prosecute appellant. Ultimately, appellant's fictitious stories triggered significant military investigative efforts and compromised "the integrity of official [military] inquiries" into both the underlying child endangerment and the falsified reports of kidnapping. *See Rodgers*, 466 U.S. at 481 (noting that a false report of kidnapping to the FBI resulting in "over 100 agent hours" of investigation amounted to a "perversion of [its] authorized functions"). Whether or not appellant may also have been liable under Colorado state law for falsely reporting kidnappings on Fort Carson to local police ultimately became a secondary matter compared to the superseding interest of the military in ensuring Soldier readiness and the safety and well-being of military dependents residing on its installations.

Appellant's statements therefore fall within even the strictest interpretation of the scope of 18 U.S.C. § 1001, the narrower "civilian counterpart" of Article 107, UCMJ. As the law was correctly applied to the facts of this case, the evidence is legally sufficient to support the findings of guilty under Charge I.

Conclusion

WHEREFORE, the Government respectfully requests that this honorable court affirm the decision of the Army court and uphold the findings and sentence.



STEVE T. NAM
Captain, JA
Appellate Government Counsel
U.S.C.A.A.F. Bar No. 35508

AMBER J. ROACH
Lieutenant Colonel, JA
Acting Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 35224

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STEVE T. NAM
Captain, Judge Advocate
Attorney for Appellee
August 3, 2012

CERTIFICATE OF SERVICE AND FILING

I hereby certify that the original was electronically filed to efiling@armfor.uscourts.gov and Ms. Robyn Henry on 6 August 2012, and delivered to defense appellate counsel by hand on August 6, 2012.

Angela Riddick

ANGELA R. RIDDICK
Paralegal Specialist
Office of The Judge Advocate General, United States Army
Appellate Government Counsel
9275 Gunston Road, Room 1209
Fort Belvoir, VA 22060