

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)
)
v.)
)
THEODORE F. STEVENS,)
)
Defendant.)

Crim. No. 08-231 (EGS)

MOTION TO DISMISS THE INDICTMENT AS UNCONSTITUTIONALLY VAGUE
(SENATOR STEVENS’S PRE-TRIAL MOTION NO. 6)

For the reasons set forth in the accompanying Memorandum, defendant Theodore F. Stevens, through undersigned counsel, moves this Court, pursuant to Federal Rule of Criminal Procedure 12(b), to dismiss the indictment of July 29, 2008 because it is unconstitutionally vague. A proposed order is attached.

Dated: August 14, 2008

Respectfully submitted,

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By: /s/ Robert M. Cary
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Attorneys for Defendant Theodore F. Stevens

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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Defendant.)
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ORDER

Upon consideration of the Defendant’s Motion to Dismiss the Indictment As Unconstitutionally Vague, and the Court having heard the arguments of counsel, and good cause having been shown, it is

ORDERED that the motion is GRANTED; and it is

FURTHER ORDERED that the indictment is hereby dismissed.

Emmet G. Sullivan
United States District Judge

Dated: _____

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FOR THE DISTRICT OF COLUMBIA**

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**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE INDICTMENT AS
UNCONSTITUTIONALLY VAGUE
(SENATOR STEVENS'S PRE-TRIAL MOTION NO. 6)**

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August 14, 2008

INTRODUCTION

Senator Stevens stands indicted under 18 U.S.C. § 1001 for making false statements to, and concealing material facts from, the government by failing to disclose the receipt of certain “things of value.” Yet the indictment does not describe the alleged falsity or concealment with any degree of specificity. It does not state, for example, what “things of value” should have been disclosed on each of his Senate Financial Disclosure Forms; or the specific party from whom Senator Stevens allegedly received each of these things; or why each of the things of value met the criteria for disclosure on the Financial Disclosure Forms; or whether the things of value were “gifts” or “liabilities,” which determines the monetary threshold over which their disclosure would be required. Because the indictment therefore does not give Senator Stevens fair notice of the false statements he is alleged to have made, it is unconstitutionally vague in violation of the Fifth and Sixth Amendments to the United States Constitution and should be dismissed.¹

ARGUMENT

The Notice Clause of the Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation.” U.S. Const. amend. VI. To meet this constitutional standard, an indictment must “sufficiently apprise[] the defendant of what he must be prepared to meet.” *Russell v. United States*, 369 U.S. 749, 763 (1962) (quotation marks omitted); accord *O’Connor v. United States*, 240 F.2d 404, 405 (D.C. Cir. 1956) (“The Sixth Amendment to the Constitution provides that in

¹ While Senator Stevens believes the vagueness of the indictment requires its dismissal, in the alternative he is also filing a separate motion for a bill of particulars requesting that the government supply further detail regarding the alleged false statements. See Senator Stevens’s Pre-trial Mot. No. 7 (filed Aug. 14, 2008). A bill of particulars is insufficient to remedy an indictment that is unconstitutionally vague. *Russell*, 369 U.S. at 770 (“[I]t is a settled rule that a bill of particulars cannot save an invalid indictment.”).

all criminal prosecutions the accused shall be informed of the nature and cause of the accusation.”).

A vague indictment contravenes not only the Fair Notice Clause of the Sixth Amendment, but also the Grand Jury Clause of the Fifth Amendment, which provides that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.” U.S. Const. amend. V. An indictment therefore must be factually particular enough to “ensure that the prosecution will not fill in elements of its case with facts other than those considered by the grand jury.” *United States v. Upton*, 856 F. Supp. 727, 738 (E.D.N.Y. 1994) (quoting *United States v. Abrams*, 539 F. Supp. 378, 384 (S.D.N.Y. 1982)). “A cryptic form of indictment” is unconstitutional because it “requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture.” *Russell*, 369 U.S. at 766. See also Fed. R. Crim. P. 7(c); *United States v. Nance*, 533 F.2d 699 (D.C. Cir. 1976).

In a case in which the government has alleged a false statement, courts have consistently required that the indictment specifically allege what was supposedly false and cannot rely on general or unspecific assertions of falsity. As one court has explained:

In the false statement case the inquiry is threefold: Did the defendant say what the indictment charges him with saying? If he did, does it depart from the truth? Was it material? The starting point for everything is the statement. Once the defendant is informed [of] what it is he is claimed to have said, then he can marshal his evidence tending to show that he did not make the utterance charged, or that it is true, or that it was not material. If the threshold information given is not correct, the defendant is hampered in defending on all three grounds, since the starting point for the latter two is the content of his alleged statement.

United States v. Lambert, 501 F.2d 943, 948 (5th Cir. 1974) (en banc) (footnote omitted), *overruled in part on other grounds*, *United States v. Rodriguez-Rios*, 14 F.3d 1040 (5th Cir. 1994). *See also, e.g., Nance*, 533 F.2d at 701 (“[A]bsent any allegation whatsoever in the indictment as to what the false pretenses were, the United States Attorney would have a free hand to insert the vital part of the indictment without reference to the grand jury.”); *United States v. Pickett*, 353 F.3d 62, 67 (D.C. Cir. 2004) (it is a fundamental “protection[] which an indictment is intended to guarantee,” that the indictment “contain[] the elements of the offense intended to be charged and sufficiently apprise the defendant of what he must be prepared to meet.” (alterations in original) (*quoting Russell*, 369 U.S. at 763)).

Courts have dismissed indictments under 18 U.S.C. § 1001 that fail to specify the allegedly false statements or omissions. For example, in *United States v. Fried*, 450 F. Supp. 90 (S.D.N.Y. 1978), the court dismissed 16 counts of an indictment charging § 1001 violations because the indictment failed to “state precisely what in the allegedly felonious paper is claimed to [be] false.” *Id.* at 93. Relying upon the Supreme Court’s holding in *Russell*, the court cautioned that a § 1001 indictment that fails to identify the purported false statement with specificity “renders impossible any acceptable degree of confidence that the grand jury genuinely knew what it was doing” when it returned the indictment. *Id.* at 94; *see also United States v. Weinberger*, No. 92-235, 1992 U.S. Dist. LEXIS 14534, at *12 (D.D.C. Sept. 29, 1992) (“Under § 1001, the indictment has to provide adequate notice of the wording of the statements alleged to be false.”); *United States v. Tonelli*, 577 F.2d 194, 200 (3d Cir. 1978) (vacating false statement conviction for perjury because the indictment “did not set forth the precise falsehoods alleged” and noting that “[t]o hold otherwise would permit the trial jury to inject its inferences into the grand jury’s indictment” (alteration and quotation marks omitted)).

As discussed below, the indictment in this case should be dismissed because it suffers from similar infirmities.

I. COUNT I OF THE INDICTMENT SHOULD BE DISMISSED.

Count I alleges that Senator Stevens violated 18 U.S.C. § 1001(a)(1), which criminalizes the conduct of one who “falsifies, conceals, or covers up by any trick, scheme, or device a material fact” from the government. 18 U.S.C. § 1001(a)(1) (2000). The charging paragraphs of this Count, ¶¶ 45-46, allege that Senator Stevens sought to “conceal and cover up his receipt of things of value by filing Financial Disclosure Forms that contained false statements and omissions concerning [his] receipt of these things of value.” Indictment ¶ 46. Presumably the referenced “things of value” are those described in paragraphs 18-36 of Count I. Those paragraphs describe certain improvements to Senator Stevens’s residence over a six-year period and an exchange of automobiles in 1999.

These allegations are insufficient, as a matter of law, to provide Senator Stevens with fair notice of the charges against him or to ensure that the grand jury properly returned an indictment in this matter. Count I fails to allege precisely what was said or omitted in the multiple forms referenced in the charging paragraphs. It fails to state which of the alleged things of value were required to be disclosed on the Financial Disclosure Forms, and if so why. Senator Stevens should not be faced with the task of parsing every possible eventuality in Count I and attempting to determine what, exactly, the government has alleged and must prove. Instead, he is constitutionally owed a statement of the *specific charges against him*, a requirement not satisfied by a recitation of facts followed by general allegations.

Such cryptic indictments are impermissible because they fail to provide proper notice to a defendant and because they provide no comfort that the grand jury process was not compromised. Without the specific identification of the false statements or omissions in

question, the government, at trial, will have freedom to “roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal.” *Russell*, 369 U.S. at 768. Such patent vagueness is impermissible and unconstitutional, and requires the dismissal of Count I

II. COUNTS II THROUGH VII OF THE INDICTMENT SHOULD BE DISMISSED.

Counts II through VII of the indictment allege violations of 18 U.S.C.

§ 1001(a)(2), which criminalizes the making of “false, fictitious or fraudulent statements or representations” to the government. Each of these counts is unconstitutionally vague because it fails to allege specifically the manner in which the statements made by Senator Stevens were false. First, each these counts alleges that Senator Stevens responded falsely to two separate questions on an annual Financial Disclosure Form without identifying which of the two questions Senator Stevens allegedly answered falsely. Second, each of these counts alleges Senator Stevens’s receipt of things of value from several persons and entities without specifying *which* thing of value led to the precise false statement upon which the grand jury’s indictment was predicated, or *why* his receipt of the thing of value made the statement false.

Count II, for example, alleges that Senator Stevens answered the following two questions in the negative on his Financial Disclosure Form for the calendar year 2001:

Did you, your spouse, or dependent child receive any reportable gift in the reporting period (i.e., aggregating more than \$260 and not otherwise exempt)? If yes, Complete and Attach PART V; and

Did you, your spouse, or dependent child have any reportable liability (more than \$10,000) in the reporting period? If yes, Complete and attach PART VII.

Indictment ¶¶ 50-51. Based on those negative responses, Count II alleges that Senator Stevens made “false, fictitious, and fraudulent statements and representations” on his 2001 Financial Disclosure Form because “STEVENS knew that his transactions with, including his receipt of

things of value from, ALLEN, VECO, PERSON A and PERSON B were required to be reported either as gifts or liabilities on his 2001 Financial Disclosure Form.” Indictment ¶ 52 (emphases added).

Which of these two questions did Senator Stevens allegedly answer falsely? Who exactly gave Senator Stevens the thing of value that allegedly had to be disclosed? Was it a gift or liability? Why did this alleged gift or liability qualify as such under the applicable rules for completing the form in question?² Notably, the monetary disclosure thresholds are vastly different for gifts and liabilities: during the relevant period a gift had to be disclosed if it exceeded an amount between \$260 and \$305, while a liability had to be disclosed only if it exceeded \$10,000. *See* Indictment ¶¶ 13-14. Count II answers none of these questions explicitly.

The background paragraphs incorporated into Count II from Count I do nothing to cure the vagueness. A charge of false statements requires the government to disclose the precise false statement and why it was false. While the incorporated paragraphs describe certain things of value allegedly received by Senator Stevens, they do not explain which things of value needed to be disclosed on any particular Financial Disclosure Form, or precisely who gave them to him, or why they needed to be disclosed, or whether they were gifts or liabilities.

² Wholly absent from the indictment is any allegation by the government about why the things of value at issue qualified as a “gift” or “liability” as those terms are described on the face of the Financial Disclosure Form. These words, in the context of the completion of that form, are terms of art and cannot be interpreted colloquially or cavalierly. *See* Senate Financial Disclosure Report, dated 3/08, pp. 14-17, *available at* <http://ethics.senate.gov/downloads/pdf/cover1.pdf> (instructions for “Gifts” and “Liabilities” sections) (relevant pages attached as Exh. 1). The indictment’s failure to mention these instructions or to allege the manner in which the things of value allegedly meet the operative definitions, calls the grand jury process itself into question in this matter by suggesting that the grand jury was not properly informed of the meaning of these terms—terms central to a determination that Senator Stevens’s answers were inaccurate.

Each of Counts III-VII suffers from the same infirmities as Count II and, therefore, all of these counts should be dismissed as unconstitutionally vague. Indeed, Count IV may be the most deficient of all of them. Count IV alleges material falsities in Senator Stevens's Financial Disclosure Form for the year 2003 (filed in May 2004), including the receipt of things of value from Allen and VECO in that year. Indictment ¶ 64. The background paragraphs of Count I do not allege the receipt of a single thing of value by Senator Stevens during 2003, even in general terms. Nor do the allegations of Count IV itself specify a particular thing of value received from Allen or VECO during 2003. *See* Indictment ¶ 64(2).³

The indictment's fundamental failure to specifically allege the false representations in Counts II-VII is not a mere technical flaw. Rather, it is fatal to the indictment. By failing to specify the nature and source of the things Senator Stevens allegedly failed to disclose, the indictment does not give Senator Stevens fair notice of his alleged offenses, in violation of the Sixth Amendment; and it is entirely possible that different segments of the grand jury indicted on entirely different theories, in violation of the Fifth Amendment. Accordingly, Counts II-VII should be dismissed as unconstitutionally vague.

CONCLUSION

For the reasons set forth above, this Court should dismiss the indictment for unconstitutional vagueness.

³ Count IV also refers cryptically to a 2003 gift from the Fishing Association which allegedly actually was given by Person B. *See* Indictment ¶ 54(1). The indictment does not identify the nature of this gift or explain why it was not given by the Fishing Association.

Dated: August 14, 2008

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