

## 923. 18 U.S.C. § 371—CONSPIRACY TO DEFRAUD THE UNITED STATES

The general conspiracy statute, 18 U.S.C. § 371, creates an offense "[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose. (emphasis added). See Project, *Tenth Annual Survey of White Collar Crime*, 32 Am. Crim. L. Rev. 137, 379-406 (1995)(generally discussing § 371).

The operative language is the so-called "defraud clause," that prohibits conspiracies to defraud the United States. This clause creates a separate offense from the "offense clause" in Section 371. Both offenses require the traditional elements of Section 371 conspiracy, including an illegal agreement, criminal intent, and proof of an overt act.

Although this language is very broad, cases rely heavily on the definition of "defraud" provided by the Supreme Court in two early cases, *Hass v. Henkel*, 216 U.S. 462 (1910), and *Hammerschmidt v. United States*, 265 U.S. 182 (1924). In *Hass* the Court stated:

The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government . . . (A)ny conspiracy which is calculated to obstruct or impair its efficiency and destroy the value of its operation and reports as fair, impartial and reasonably accurate, would be to defraud the United States by depriving it of its lawful right and duty of promulgating or diffusing the information so officially acquired in the way and at the time required by law or departmental regulation.

*Hass*, 216 U.S. at 479-480. In *Hammerschmidt*, Chief Justice Taft, defined "defraud" as follows:

To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention.

*Hammerschmidt*, 265 U.S. at 188.

The general purpose of this part of the statute is to protect governmental functions from frustration and distortion through deceptive practices. Section 371 reaches "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government." *Tanner v. United States*, 483 U.S. 107, 128 (1987); see *Dennis v. United States*, 384 U.S. 855 (1966). The "defraud part of section 371 criminalizes any willful impairment of a legitimate function of government, whether or not the improper acts or objective are criminal under another statute." *United States v. Tuohey*, 867 F.2d 534, 537 (9th Cir. 1989).

The word "defraud" in Section 371 not only reaches financial or property loss through use of a scheme or artifice to defraud but also is designed and intended to protect the integrity of the United States and its agencies, programs and policies. *United States v. Burgin*, 621 F.2d 1352, 1356 (5th Cir.), cert. denied, 449 U.S. 1015 (1980); see *United States v. Herron*, 825 F.2d 50, 57-58 (5th Cir.); *United States v. Winkle*, 587 F.2d 705, 708 (5th Cir. 1979), cert. denied, 444 U.S. 827 (1979). Thus, proof that the United States has been defrauded under this statute does not require any showing of monetary or proprietary loss. *United States v. Conover*, 772 F.2d 765 (11th Cir. 1985), aff'd, sub. nom. *Tanner v. United States*, 483 U.S. 107 (1987); *United States v. Del Toro*, 513 F.2d 656 (2d Cir.), cert. denied, 423 U.S. 826 (1975); *United States v. Jacobs*, 475 F.2d 270 (2d Cir.), cert. denied, 414 U.S. 821 (1973).

Thus, if the defendant and others have engaged in dishonest practices in connection with a program administered by an agency of the Government, it constitutes a fraud on the United States under Section 371. *United States v. Gallup*, 812 F.2d 1271, 1276 (10th Cir. 1987); *Conover*, 772 F.2d at 771. In *United States v. Hopkins*, 916 F.2d 207 (5th Cir. 1990), the defendants' actions in disguising contributions were designed to evade the Federal Election Commission's reporting requirements and constituted fraud on the agency under Section 371.

The intent required for a conspiracy to defraud the government is that the defendant possessed the intent (a) to defraud, (b) to make false statements or representations to the government or its agencies in order to obtain property of the government, or that the defendant performed acts or made statements that he/she knew to be false, fraudulent or deceitful to a government agency, which disrupted the functions of the agency or of the government. It is sufficient for the government to prove that the defendant knew the statements were false or fraudulent when made. The government is not required to prove the statements ultimately resulted in any actual loss to the government of any property or funds, only that the defendant's activities impeded or interfered with legitimate governmental functions. See *United States v. Puerto*, 730 F.2d 627 (11th Cir.), cert. denied, 469 U.S. 847 (1984); *United States v. Tuohey*, 867 F.2d 534 (9th Cir. 1989); *United States v. Sprecher*, 783 F. Supp. 133, 156 (S.D.N.Y. 1992) ("it is sufficient that the defendant engaged in acts that interfered with or obstructed a lawful governmental function by deceit, craft, trickery or by means that were dishonest"), modified on other grounds, 988 F.2d 318 (2d Cir. 1993).

In *United States v. Madeoy*, 912 F.2d 1486 (D.C. Cir. 1990), cert. denied, 498 U.S. 1105 (1991), the defendants were convicted of conspiracy to defraud the government and other offenses in connection with a scheme to fraudulently obtain loan commitments from the Federal Housing Administration (FHA) or Veterans Administration (VA). The court held that the district court had properly instructed the jury that:

the Government must prove beyond a reasonable doubt the existence of a scheme or artifice to defraud, with the objective either of defrauding the FHA or the VA of their lawful right to conduct their business and affairs free from deceit, fraud or misrepresentation, or of obtaining money and property from the FHA by means of false and fraudulent representations and promises which the defendant knew to be false.

*Madeoy*, 912 F.2d at 1492.

Prosecutors considering charges under the defraud prong of Section 371, and the offense prong of Section 371 should be aware of *United States v. Minarik*, 875 F.2d 1186 (6th Cir. 1989) holding limited, 985 F.2d 962 (1993), and related cases. See *United States v. Arch Trading Company*, 987 F.2d 1087 (4th Cir. 1993). In *Minarik*, the prosecution was found to have "used the defraud clause in a way that created great confusion about the conduct claimed to be illegal," and the conviction was reversed. 875 F.2d at 1196. After *Minarik*, defendants have frequently challenged indictments charging violations of both clauses, although many United States Courts of Appeals have found it permissible to invoke both clauses of Section 371. *Arch Trading Company*, 987 F.2d at 1092 (collecting cases); see also *United States v. Licciardi*, 30 F.3d 1127, 1132-33 (9th Cir. 1994) (even though the defendant may have impaired a government agency's functions, as part of a scheme to defraud another party, the government offered no evidence that the defendant intended to defraud the United States and a conspiracy to violate an agency regulatory scheme could not lie on such facts).

In summary, those activities which courts have held defraud the United States under 18 U.S.C. § 371 affect the government in at least one of three ways:

[cited in [JM 9-42.001](#)]

1. They cheat the government out of money or property;
2. They interfere or obstruct legitimate Government activity; or
3. They make wrongful use of a governmental instrumentality.

◀ [922. Elements of 18 U.S.C. § 287](#)

[up](#)

[924. Defrauding the Government of Money or Property](#) ▶