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1985]

CRIMINAL LAW—FALSE PERSONATION STATUTE—ALLEGATION OF  
FRAUDULENT INTENT IS UNNECESSARY TO CHARGE DEFENDANT  
WITH FALSELY PERSONATING EMPLOYEE OF THE  
UNITED STATES

*United States v. Wilkes* (1984)

In 1884, Congress passed the Federal False Personation Act,<sup>1</sup> which was intended to protect innocent persons from loss by their reliance on false assumptions of governmental authority, and to protect the prestige and importance of federal office.<sup>2</sup> In its original form, the false personation statute expressly prohibited one “with intent to defraud” from falsely pretending to be a government employee or officer, “and [1] act[ing] as such, or [2] in such pretended character demand[ing] or obtain[ing] . . . any money, paper, document, or other valuable thing.”<sup>3</sup>

As a result of a 1943 Supreme Court decision<sup>4</sup> and a subsequent

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1. Act of Apr. 18, 1884, ch. 26, 23 Stat. 11 (1884) (current version at 18 U.S.C. § 912 (1982)).

2. See *United States v. Barnow*, 239 U.S. 74, 80 (1915) (dual purpose is to protect persons from loss through reliance upon false assumptions of federal authority and to maintain the dignity and reputation of federal office). See also *United States v. Guthrie*, 387 F.2d 569, 571 (4th Cir. 1967) (purpose of false personation statute is to protect the dignity and prestige of federal office), *cert. denied*, 392 U.S. 927 (1968); *Honea v. United States*, 344 F.2d 798, 802 (5th Cir. 1965) (“the statute seeks to protect . . . the dignity, prestige and importance of federal office”)(citing *United States v. Barnow*, 239 U.S. 74, 78 (1915)). For a discussion of *Guthrie*, see *infra* notes 26-29 and accompanying text. For a discussion of *Honea*, see *infra* note 24.

3. Act of April 18, 1884, ch. 26, 23 stat. 11, 11-12 (1884) (current version at 18 U.S.C. § 912 (1982)). For a further discussion of the development of the statutory language of § 912, see *infra* note 5 and accompanying text.

To avoid confusion regarding the two offenses described in § 912, they will hereinafter be referred to as clause [1] and clause [2] of § 912.

4. See *United States v. Lepowitch*, 318 U.S. 702 (1943). In *Lepowitch*, the defendants were indicted under the false personation statute for masquerading as Federal Bureau of Investigation agents in order to obtain information about another individual. *Id.* at 703. The trial court sustained a demurrer to the indictment, holding that the conduct of the defendants was “reprehensible” but that it did not come within the terms of the statute since asking for information was not “taking upon themselves to act as [FBI] agents nor was the information demanded . . . a valuable thing.” *Id.* at 703 (quoting *United States v. Lepowitch*, 48 F. Supp. 846, 847 (1942)). The Supreme Court reversed and held that fraudulent intent for the purposes of clause [1] requires only that the “defendants have, by artifice and deceit, sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct.” *Id.* at 704. In expressly limiting its definition of fraudulent intent to clause [1], the Supreme Court stated:

[T]he first clause of this statute, the only one under consideration here, defines one offense; the second clause defines another. While more than mere deceitful attempt[s] to affect the course of action of another

(997)

revision of the statutory language,<sup>5</sup> contemporary courts are divided as to whether an express allegation of an "intent to defraud" is required in an indictment pursuant to section 912.<sup>6</sup> In *United States v. Wilkes*,<sup>7</sup> the Third Circuit adopted the view held by the majority of the United States

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is required under the second clause of the statute, which speaks of an intent to obtain a valuable thing, the very absence of these words of limitation in the first portion of the act persuades us that, under it, a person may be defrauded although he parts with something of no measurable value at all.

*Id.* at 704-05.

5. See 18 U.S.C. § 912 (1982). In 1948, Congress revised the false personation statute by increasing its penalty from \$500 to \$1000 and from two years to three years in prison, and by deleting the words "with intent to defraud the United States or any person." 18 U.S.C. § 912 (revision note) (1982). The only explanation in the revision note for the deletion of the words "intent to defraud" was that the words were "omitted as meaningless in view of U.S. v. Lapowitch [sic]." *Id.* The statute was first enacted in 1884, Act of Apr. 18, 1884, ch. 26, 23 Stat. 11 (1884), and has been revised three times. In March, 1909, a uniform penal code was adopted and the statute was clarified and condensed. See Act of Mar. 4, 1909, ch. 321, §§ 32, 66, 35 Stat. 1095, 1100 (1909). Prior to the latest revision in 1948, the statute was revised in 1938. See Act of Feb. 28, 1938, ch. 37, 52 Stat. 82 (1938).

As revised, the false personation statute now provides:

Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and [1] acts as such, or [2] in such pretended character demands or obtains any money, paper, document or thing of value, shall be fined not more than \$1,000 or imprisoned not more than three years, or both.

18 U.S.C. § 912 (1982) (brackets added). For a further discussion of the original form of the false impersonation statute, see *supra* note 3 and accompanying text.

6. A majority of the United States courts of appeals have held that an express allegation of fraudulent intent is not necessary in an indictment under either clause of § 912. See, e.g., *United States v. Cord*, 654 F.2d 490 (7th Cir. 1981) (clause [2] violation); *United States v. Robbins*, 613 F.2d 688 (8th Cir. 1979) (clause [2] violation); *United States v. Rosser*, 528 F.2d 652 (D.C. Cir. 1976) (clause [1] violation); *United States v. Rose*, 500 F.2d 12 (2d Cir. 1975) (clause [2] violation), *vacated on other grounds*, 422 U.S. 1031 (1975); *United States v. Mitman*, 459 F.2d 451 (9th Cir.) (clause [2] violation), *cert. denied*, 409 U.S. 863 (1972); *United States v. Guthrie*, 387 F.2d 569 (4th Cir. 1967), *cert. denied*, 392 U.S. 927 (1968) (clause [1] violation). For a discussion of *Cord*, see *infra* note 39. For a discussion of *Rosser*, see *infra* notes 31-36 and accompanying text. For a discussion of *Rose*, see *infra* note 40. For a discussion of *Guthrie*, see *infra* notes 26-29 and accompanying text.

The Fifth Circuit, however, has concluded that fraudulent intent is an essential element for an offense under either clause of section 912 and therefore must be alleged in an indictment. See, e.g., *United States v. Cohen*, 631 F.2d 1223 (5th Cir. 1980) (clause [1] violation); *United States v. Randolph*, 460 F.2d 367 (5th Cir. 1972) (clause [1] violation); *Honea v. United States*, 344 F.2d 798 (5th Cir. 1965) (clause [2] violation). For a discussion of *Randolph*, see *infra* note 24. For a discussion of *Honea*, see *infra* note 24.

7. 732 F.2d 1154 (3d Cir. 1984). The case was argued before Judges Aldisert, Higginbotham and Sloviter. Judge Higginbotham wrote for a unanimous court. *Id.* at 1154.

courts of appeals<sup>8</sup> that a specific allegation of fraudulent intent is not required in an indictment charging a violation of section 912.<sup>9</sup>

In *Wilkes*, the defendant, Warren A. Wilkes, impersonated a Social Security Administration employee in order to collect money from a sixty-two year old disabled veteran, Raymond Bender.<sup>10</sup> On several occasions, Wilkes telephoned Bender and informed him that he had received overpayments of his disability benefits that Bender would have to repay in order to remain eligible for future benefits.<sup>11</sup> Later, Wilkes arrived at Bender's residence and collected the alleged overpayments.<sup>12</sup> Eventually, Bender's brother became suspicious of Wilkes and contacted the Federal Bureau of Investigation, which investigated the defendant and subsequently arrested him.<sup>13</sup> Wilkes was charged with violating both clauses of section 912.<sup>14</sup> The charging indictment mirrored the language of the statute, but it did not specifically allege that Wilkes had an intent to defraud.<sup>15</sup> A district court convicted Wilkes and sentenced him to eighteen months imprisonment.<sup>16</sup> Wilkes appealed.<sup>17</sup>

On appeal, Wilkes asserted that a specific intent to defraud was a

8. For a discussion of the majority view, see *infra* notes 24-36 and accompanying text.

9. 732 F.2d at 1155. The court held that fraudulent intent is "present for a section 912 [1] offense whenever the element 'acting as such' is proven and [that such intent] need not be specifically alleged." *Id.* at 1159. Similarly, the Third Circuit held that an intent to defraud is present for purposes of a § 912, clause [2] offense "whenever one demands or receives money or a thing of value in 'pretended character,' acting under the authority of the United States." *Id.* at 1159. For a further discussion of the Third Circuit's holding in *Wilkes*, see *infra* notes 36-44 and accompanying text.

10. 732 F.2d at 1155.

11. *Id.* The defendant first telephoned Bender on September 7, 1982, and identified himself as Jake Williams, an employee of the Social Security Administration, calling on behalf of Warren A. Wilkes. *Id.* The defendant informed Bender that Bender had received \$160 in overpayments. *Id.* The indictment charged that the defendant repeated this scheme on 10 separate occasions between September and December of 1982. *Id.* at 1160 n.5.

12. *Id.* at 1155.

13. *Id.* The FBI recorded a phone conversation between Wilkes and Bender during which Wilkes told Bender that he had to repay \$50. *Id.* The FBI arrested Wilkes when he came to collect the money on the following day. *Id.*

14. *Id.* For the text of the false personation statute, see *supra* note 5.

15. 732 F.2d at 1155. The indictment alleged that the defendant pretended to be an employee of the United States and acted under its authority, that the defendant acted as such, and that in such pretended character demanded and obtained money from Raymond Bender. *Id.* For the text of the indictment, see *infra* note 45.

16. 732 F.2d at 1155. Although the defendant had earlier moved to dismiss the indictment for failure to charge "intent to defraud" in any of the eleven counts, the trial court denied the motion. *Id.* The trial court reasoned that the indictment was sufficient since it charged in the exact terminology of the statute. The trial court concluded that the prosecution need not specifically allege an intent to defraud in the indictment. *Id.*

17. *Id.* at 1156.

necessary element for a section 912 offense that must be expressly alleged in an indictment.<sup>18</sup> The Third Circuit began its analysis of the question by reviewing the legislative history of the false personation statute.<sup>19</sup> Noting that the revision note to the 1948 change to section 912 stated that the words “intent to defraud” were stricken in light of the Supreme Court’s decision in *United States v. Lepowitch*,<sup>20</sup> the Third Circuit examined that decision in order to determine why Congress viewed *Lepowitch* as rendering the phrase “intent to defraud” meaningless.<sup>21</sup> The *Wilkes* court concluded that because the Supreme Court had decided “intent to defraud” for purposes of the false personation statute merely required a deceitful attempt to “cause the deceived person to follow some course he would not have pursued but for the deceitful conduct,” the phrase was rendered meaningless in the minds of the revisers of section 912.<sup>22</sup>

After reviewing the statute’s legislative history and *Lepowitch*, the Third Circuit addressed the central issue presented in *Wilkes*: whether an express allegation of fraudulent intent was required to charge a person with a violation of section 912.<sup>23</sup> The Third Circuit acknowledged that the Fifth Circuit was the only circuit court of appeals that still required intent to defraud to be specifically pleaded in an indictment charging a violation of clause [1] or clause [2] of section 912.<sup>24</sup> The

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18. *Id.* *Wilkes* based his argument on the fact that the false personation statute in its original form expressly required proof of an “intent to defraud.” *Id.* For the relevant text of the original statute, see *supra* text accompanying note 3.

19. 732 F.2d at 1156. For a discussion of the legislative history of § 912, see *supra* note 5.

20. 318 U.S. 702 (1943). For a discussion of *Lepowitch*, see *supra* note 4.

21. 732 F.2d at 1156-57.

22. *Id.* at 1157 (quoting *Lepowitch*, 318 U.S. at 704).

23. *Id.* at 1157.

24. *Id.* (citing *United States v. Cohen*, 631 F.2d 1223 (5th Cir. 1980) (clause [1] violation); *United States v. Randolph*, 460 F.2d 367 (5th Cir. 1972) (clause [1] violation); *Honea v. United States*, 344 F.2d 798 (5th Cir. 1965) (clause [2] violation)).

In *Honea*, the defendant was convicted of violating clause [2] after defrauding a young widow of \$14,000 by impersonating a retired colonel and an agent of the Central Intelligence Agency. The Fifth Circuit reversed, holding that the prosecution’s failure to allege fraudulent intent fatally flawed the indictment. *Id.* at 804. The court reasoned that fraudulent intent remained an essential element of § 912 since Congress only intended to streamline the wording of the statute when it revised the statute in 1948, not to effectuate substantive changes in the federal criminal law. *Id.* at 801. The court based its reasoning, in part, on the comments of Judge Holtzoff of the United States District Court for the District of Columbia, who assisted in the revision of the federal criminal code. See Holtzoff, *Preface to Title 18, USCA*, 18 U.S.C.A. at xv (1969). Judge Holtzoff stated that “[i]n general, with few exceptions, the Code does not attempt to change existing law. Every provision has been brought down to date. The law has been rearranged and greatly simplified and modernized in phraseology.” *Id.* The Fifth Circuit also examined the legislative history of § 912, noting that fraudulent intent under the statute as originally enacted was an explicit ele-

Third Circuit then proceeded to examine the opposing majority position and the divergent rationales supporting that position.<sup>25</sup>

The court addressed the Fourth Circuit's rationale in *United States v. Guthrie*,<sup>26</sup> which interpreted the congressional revision of section 912 as entirely excluding fraudulent intent as an essential element of a clause [1] offense.<sup>27</sup> The Third Circuit noted that in *Guthrie* the Fourth Circuit did not consider the legislative change as an inadvertent result of congressional misinterpretation of *Lepowitch*.<sup>28</sup> Rather, the *Guthrie* court relied on the "accepted canon of statutory construction that where Congress has advertently changed the legislative language the change

ment of both clauses of § 912 because the phrase "intent to defraud" pertained to both clause [1] and clause [2]. 344 F.2d at 801. The *Honea* court asserted that the revisers did not intend to delete an essential element of the crime of falsely personating a government official or employee, but rather viewed the definition of fraudulent intent in *Lepowitch* (a "deceitful attempt to affect the course of action of another") as making the inclusion of the phrase "intent to defraud" in § 912 unnecessary. *Id.* at 802-03. The Fifth Circuit concluded that the revisers intended to "make the statutory wording conform to authoritative judicial construction, and to carry forward, by . . . streamlined wording . . . , the *Lepowitch* statement of what facts would make out a violation of the offense involved in that case." *Id.* at 802.

Thus deciding that fraudulent intent was essential to either § 912 offense, the *Honea* court held that fraudulent intent as defined in *Lepowitch* only applied to § 912, clause [1], violations, whereas fraudulent intent for § 912, clause [2], violations required more: an intent to wrongfully deprive another of property. *Id.* at 803. Therefore, failure to adequately allege fraudulent intent as an element of the charged clause [2] offense in *Honea* rendered the indictment defective. Accordingly, the court set *Honea*'s conviction aside. *Id.* at 804.

In *Randolph*, the defendant was convicted of violating clause [1] of § 912. 460 F.2d at 368. The defendant in *Randolph* impersonated a United States Army officer and wrote a letter to his (the defendant's) son advising that he had been killed in action. *Id.* at 368-69. The Fifth Circuit reversed the defendant's conviction, holding that fraudulent intent as defined by the Supreme Court in *Lepowitch* remained an essential element of clause [1] of § 912. *Id.* at 368. The *Randolph* court reasoned that the *Lepowitch* Court did not "hold that an allegation of intent to defraud was unnecessary, but instead defined the nature of the 'fraud' required." *Id.* at 370 (emphasis added). The Fifth Circuit concluded that the revisers of § 912 did not intend to broaden the scope of § 912 "so as to make . . . foolish bravado without any intent to deceive a federal felony." *Id.*

25. 732 F.2d at 1157.

26. 387 F.2d 569 (4th Cir. 1967), cert. denied, 392 U.S. 927 (1969). In *Guthrie*, the defendants appealed from a judgment convicting them of violating clause [1] of § 912 by attempting to defraud a bank customer out of his savings account by posing as federal bank examiners. *Id.* at 570. The Fourth Circuit rejected the defendants' argument that the indictment failed since it did not allege fraudulent intent, and held that fraudulent intent no longer remained an essential element of an offense under clause [1] of section 912. *Id.* at 571. For a discussion of the Fourth Circuit's interpretation of § 912 and its requirements, see NOTE, FALSE PERSONATION: ACTS SUFFICIENT TO CONVICT UNDER 18 U.S.C. SECTION 912, 41 WASH. & LEE L. REV. 654 (1984).

27. 732 F.2d at 1157 (discussing *Guthrie*, 387 F.2d at 571).

28. *Id.* at 1157.

must be given effect.”<sup>29</sup> The Third Circuit, in *Wilkes*, noted that the common thread in the decisions following *Guthrie* was “that the analysis of *Lepowitch* and the subsequent legislative revision in 1948 were directly contrary to the Fifth Circuit’s approach.”<sup>30</sup>

After reviewing the Fourth Circuit’s approach in *Guthrie*, the *Wilkes* court addressed the District of Columbia Circuit’s decision in *United States v. Rosser*,<sup>31</sup> which attempted to reconcile the divergent rationales of the Fourth and Fifth Circuits. The Third Circuit noted that the *Rosser* court agreed with the Fifth Circuit’s finding that Congress did not intend to broaden the scope of section 912 when it adopted the 1948 revision of the statute.<sup>32</sup> The *Rosser* court also agreed with the Fourth Circuit’s conclusion that courts should be “hesitant to read back into the statutory definition of a crime words specifically excised by Congress.”<sup>33</sup> The Third Circuit also pointed out that the *Rosser* court concluded that when a person pretended to be an officer or employee of the United States and “acted as such” under clause [1],<sup>34</sup> then the *Lepowitch* definition of intent to defraud was satisfied.<sup>35</sup> The Third Circuit in *Wilkes* fol-

29. *Id.* (quoting *Guthrie*, 387 F.2d at 571). Under its approach in *Guthrie*, the Fourth Circuit expressly rejected the Fifth Circuit’s position in *Honea* that Congress did not intend to change the substantive meaning of the statute. 387 F.2d at 571. The Fourth Circuit stated that while “[i]n general, with few exceptions, the Code does not attempt to change existing law, the Revisers’ note compels the conclusion that this alteration of § 912 constitutes one of the ‘few exceptions.’” *Id.* (citing Holtzoff, *supra* note 24, at xvi) (emphasis added). The Fourth Circuit further justified the elimination of fraudulent intent as an essential element to be charged under clause [1] of § 912 by reasoning that “injury to the federal government is occasioned by masquerading and acting as a government official regardless of fraudulent intent.” 387 F.2d at 571. For a discussion of *Honea*, see *supra* note 24.

30. 732 F.2d at 1157. See, e.g., *United States v. Parker*, 699 F.2d 177 (4th Cir.) (reaffirming deletion of fraudulent intent as element of § 912 offense), *cert. denied*, 104 S. Ct. 122 (1983); *United States v. Cord*, 654 F.2d 490 (7th Cir. 1981) (no allegation of fraudulent intent required for clause [2] violation); *United States v. Robbins*, 613 F.2d 688 (8th Cir. 1979) (questioning wisdom of requiring fraudulent intent in light of legislative change); *United States v. Rose*, 500 F.2d 12 (2d Cir.) (requirement of clause [2] that a thing of value be demanded or received adequately insures presence of fraudulent intent), *vacated on other grounds*, 422 U.S. 1031 (1975); *United States v. Mitman*, 459 F.2d 451 (9th Cir. 1972), *cert. denied*, 409 U.S. 863 (1972). For a discussion of *Cord*, see *infra* note 39. For a discussion of *Rose*, see *infra* note 40.

31. 528 F.2d 652 (D.C. Cir. 1976). In *Rosser*, the defendant masqueraded as an employee of the Internal Revenue Service and took control of a gas station during the gasoline shortage in 1974. 528 F.2d at 653. The defendant was convicted under clause [1] of § 912, despite his defense that the indictment was defective because it failed to allege fraudulent intent. *Id.* at 653, 658.

32. 732 F.2d at 1158 (quoting *Rosser*, 528 F.2d at 656). For a discussion of the Fifth Circuit’s analysis, see *supra* note 24 and accompanying text.

33. 732 F.2d at 1158 (quoting *Rosser*, 528 F.2d at 656).

34. See 18 U.S.C. § 912 (1982). Section 912, clause [1], requires that a defendant impersonating a federal officer “act as such.” For the text of clause [1] of § 912, see *supra* note 5.

35. 732 F.2d at 1158 (explaining *Rosser*, 528 F.2d at 656).

lowed the *Rosser* rationale and held that attempting to exercise pretended authority by "acting as such" was sufficient proof that a person has sought "to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct."<sup>36</sup>

Having considered the minority position, the divergent rationales underlying the majority position, and the *Lepowitch* definition of fraudulent intent under clause [1] of section 912, the Third Circuit explained what allegations were required to charge an offense under clause [2].<sup>37</sup> The court noted that the *Lepowitch* Court had indicated in a dictum that more than a mere exertion of pretended authority was required to prove a clause [2] violation.<sup>38</sup> The Third Circuit, however, employed the analysis used by the Seventh Circuit<sup>39</sup> and by the Second Circuit<sup>40</sup> in con-

36. *Id.* at 1158-59 (quoting *Lepowitch*, 318 U.S. at 704). The *Rosser* court reasoned that Congress correctly eliminated the fraudulent intent language from § 912 because proof of fraudulent intent was present whenever the elements (1) falsely impersonating an employee of the federal government and (2) acting as such, were proved. *Rosser*, 528 F.2d at 656. The District of Columbia Circuit concluded that because the words "intent to defraud" added nothing to the statute, they were mere surplusage. *Id. Accord* United States v. Robbins, 613 F.2d 688, 690-92 (8th Cir. 1979). The District of Columbia Circuit concluded that alleging the two elements of clause [1], impersonation and acting as such, implicitly satisfied the *Lepowitch* definition of fraudulent intent. 528 F.2d at 656. The *Rosser* court stated, therefore, that "elimination of intent to defraud as an element of the crime defined by § 912 [1] does not 'overrule *Lepowitch* by re-legislation or . . . modify the substance of the provision.'" *Id.* (quoting and refuting *Honea*, 344 F.2d at 802).

37. 732 F.2d at 1158.

38. *Id.* (citing *Lepowitch*, 318 U.S. at 705). For the text of clauses [1] and [2] of § 912, see *supra* note 5.

39. 732 F.2d at 1158 (following United States v. Cord, 654 F.2d 490 (7th Cir. 1981)). In *Cord*, the defendant defrauded a woman of \$6,000 by posing as an FBI agent investigating unauthorized withdrawals from a bank account. 654 F.2d at 490-91. The defendant appealed his conviction for violating clause [2] of § 912 on the ground that the indictment was defective because it failed to allege fraudulent intent. *Id.* at 490.

The Seventh Circuit, in affirming the defendant's conviction, reasoned that "since the second part of the statute clearly requires that money, paper, documents or other things of value be gotten *because of the pretense*, it is logical to assume that the victim has been deceived into giving them." 654 F.2d at 492 (emphasis in original). The court, therefore, concluded that since the deceived person would not have given up something of value but for the deceitful conduct, allegations of acts sufficient to violate clause [2] satisfy the *Lepowitch* definition of an intent to defraud. *Id.* at 492. For a discussion of the *Lepowitch* standard, see *supra* note 4.

40. 732 F.2d at 1159 (following United States v. Rose, 500 F.2d 12 (2d Cir. 1974)). In *Rose*, the defendant was convicted of violating clause [2] of § 912 for posing as a secret detective with the Immigration and Naturalization Service and obtaining money from a Costa Rican immigrant for the defendant's assistance in obtaining a passport. 500 F.2d at 13. Rejecting the defendant's argument that the indictment was defective for failing to allege fraudulent intent, the Second Circuit reasoned that "[t]he requirement of § 912 that the monetary or thing of value be demanded or received in pretended character adequately covers the possibility raised by the *Lepowitch* definition that the impersonation did not affect

cluding that no allegation of fraudulent intent was needed pursuant to clause [2] because proof that a person demanded a thing of value while acting under pretended authority satisfied the *Lepowitch* definition of fraudulent intent.<sup>41</sup>

Thus, the Third Circuit embraced the approach advocated by the majority of the United States courts of appeals<sup>42</sup> and concluded that intent to defraud, as defined by the *Lepowitch* court, was present whenever the elements retained in either clause [1] or clause [2] of section 912 were proved.<sup>43</sup> The *Wilkes* court accordingly held that an intent to defraud need not be specifically alleged in an indictment charging a violation of either clause.<sup>44</sup>

After determining the requirements of an indictment charging a violation pursuant to section 912, the *Wilkes* court reviewed the defendant's indictment<sup>45</sup> and concluded that since the indictment mirrored the statutory language, it sufficiently alleged violations of both clauses of the false personation statute.<sup>46</sup>

In *Wilkes*, the Third Circuit, unlike the Fourth Circuit,<sup>47</sup> concluded that an intent to defraud was still an element for the crime of falsely

the actions of the person deceived." *Id.* at 16. Thus the court held that the indictment sufficiently stated an offense under clause [2] of § 912. *Id.* at 17.

41. 732 F.2d at 1158, 1159 (citing *Cord*, 654 F.2d at 492). The Third Circuit also rested its interpretation of § 912 on the rule of judicial construction that "courts should be extremely hesitant to read back into the statutory definition of a crime words specifically excised by Congress." *Id.* at 1159 (quoting *United States v. Rosser*, 528 F.2d 652, 656 (D.C. Cir. 1976)).

42. For a discussion of the majority approach, see *supra* notes 25-41 and accompanying text.

43. 732 F.2d at 1159. The court explained that under clause [1] of § 912, an intent to defraud as defined in *Lepowitch* is present whenever the defendant impersonating a federal officer or employee "acts as such." *Id.* Under clause [2] of § 912 an intent to defraud is present whenever someone demands money or a thing of value in "pretended character," falsely acting under the authority of the United States. *Id.*

44. *Id.*

45. *Id.* at 1159-60. Count I of the indictment charged that the defendant "did falsely pretend and assume to be an officer and employee of the United States acting under the authority thereof . . . and did falsely take upon himself to act as such." *Id.* at 1159. The court concluded that these allegations sufficiently alleged violations of both clause [1] and clause [2] of § 912. *Id.* at 1160. Counts II through XI charged that the defendant "did falsely pretend to be an officer and employee of the United States acting under the authority thereof, that is an employee of the Social Security Administration, and in such pretended character did obtain the sum of \$60.00, [\$100.00, \$100.00, \$100.00, \$60.00, \$125.00, \$64.00, \$64.00, \$50.00 and \$50.00] from Raymond Bender." *Id.* at 1159-60.

46. 732 F.2d at 1159. For the text and history of § 912, see *supra* note 5.

47. See *United States v. Parker*, 699 F.2d 177 (4th Cir.) (reaffirming position that intent to defraud is not an element of § 912), *cert. denied*, 104 S. Ct. 122 (1983); *United States v. Guthrie*, 387 F.2d 569 (4th Cir. 1967) (court held fraudulent intent is no longer an element of § 912), *cert. denied*, 392 U.S. 927 (1968). For an indepth analysis of *Parker*, see Note, *supra* note 26. For a discussion of *Guthrie*, see *supra* notes 26-29 and accompanying text.

personating a government official.<sup>48</sup> The *Wilkes* court, however, refused to follow the Fifth Circuit, which requires that an intent to defraud be specifically charged in an indictment alleging a violation of section 912.<sup>49</sup> It is submitted that the Third Circuit was correct in holding that an intent to defraud, as defined in *Lepowitch*, need not be alleged because it is present whenever the elements retained in clause [1] are proved.<sup>50</sup> In *Lepowitch*, the Supreme Court held that fraudulent intent for purposes of a clause [1] violation simply involved a “deceitful attempt to affect the course of action of another,”<sup>51</sup> and that there was no requirement that the deceived person give up something of value.<sup>52</sup> It is submitted that such fraudulent intent is necessarily present when a person is shown to have (1) pretended to be an officer or employee of the federal government, and (2) acted as such, “if acting as such is understood to mean performing an overt act that asserts . . . authority that the impersonator claims to have by virtue of the office he pretends to hold.”<sup>53</sup> It is difficult to imagine a situation in which such an overt assertion of authority would not be construed as attempting to affect another’s course of action. Thus, the Third Circuit in *Wilkes* accurately interpreted the *Lepowitch* Court’s specialized definition of fraudulent intent.<sup>54</sup>

Contrary to the Fourth Circuit’s view, it is submitted that Congress intended only to streamline section 912 when it revised the false personation statute in 1948.<sup>55</sup> That Congress did not intend to eliminate an intent to defraud as an element of the crime seems clear for two reasons. First, the authors of the 1948 revisions of the federal criminal law, and by imputation, Congress, indicated that the revisions were not intended to enlarge the substantive definitions of any crimes.<sup>56</sup> Second, since the revisers considered *Lepowitch* as having rendered the original statute’s

48. 732 F.2d at 1159.

49. *Id.* For a discussion of the Fifth Circuit’s approach, see *supra* notes 26-29 and accompanying text.

50. For a discussion of *Lepowitch*, see *supra* note 4 and accompanying text.

51. 318 U.S. at 705. The Court held that within the context of the false personation statute, the words “intent to defraud” require no more than a person having, “by artifice and deceit, sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct.” *Id.* at 704. For a discussion of the Court’s holding in *Lepowitch*, see *supra* note 4.

52. *Id.* at 705.

53. *United States v. Rosser*, 528 F.2d 652, 658 (D.C. Cir. 1976).

54. For a discussion of the Third Circuit’s treatment of *Lepowitch* in *Wilkes*, see *supra* notes 21-22 and accompanying text.

55. For a discussion of the 1948 revision to the false personation statute, see *supra* note 5 and accompanying text. For a discussion of the revisers’ intent to merely simplify existing federal criminal law, see *supra* note 24.

56. For a discussion of the revisers’ intent, see *supra* note 24 (discussing Judge Holtzoff’s explanation of the 1948 revisions). See also H.R. REP. NO. 304, 80th Cong., 1st Sess. 2 (1947) (revisers intended to correct awkward language, reconcile conflicting laws, and consolidate similar laws).

words, "intent to defraud," as meaningless,<sup>57</sup> it is submitted that they contemplated that *Lepowitch's* specialized definition of fraudulent intent was to be retained in the remaining elements of clause [1]: impersonating and acting as such. Thus the revisers' elimination of "intent to defraud" did not "overrule *Lepowitch* by re-legislation or modify the substance of the provision."<sup>58</sup> In light of Congress' intent not to change substantive law when it revised section 912, it is submitted that the Third Circuit acted consistently with Congress' intent not to make substantive changes in the Federal Criminal Code by retaining fraudulent intent as an element of an offense under clause [1].<sup>59</sup>

It is submitted that although the Third Circuit in *Wilkes* correctly interpreted the Supreme Court's definition of fraudulent intent as set forth in *Lepowitch*, the definition itself is too broad. Since fraudulent intent was defined as attempting to change the course of conduct of another person while impersonating a federal officer or employee, virtually any behavior while in such guise could be construed as an attempt to change another's course of action.<sup>60</sup> The import of the definition is to equate "acting as" a federal officer or employee with a culpable mental state. Anyone who impersonates an officer of the United States, and

57. For a discussion of the revisers' explanation for omitting the words, "intent to defraud" from § 912, see *supra* note 5.

58. *Honea v. United States*, 344 F.2d 798, 802 (5th Cir. 1965).

59. The distinction between entirely eliminating fraudulent intent as an element of § 912 (the Fourth Circuit's approach) and holding that fraudulent intent need not be alleged because it is implicitly present whenever the elements retained in § 912 are present (the Third Circuit's approach) is noteworthy. The latter position is by far more consistent with Congress' intent not to change substantive law.

60. Technically, the act of asking someone for a match is an "attempt to change the course of action of another." If the person asking for a match is, at the time impersonating a federal official, he has manifested the requisite fraudulent intent to be convicted under the clause [1] of § 912. While this argument might be dismissed as ridiculous, consider that the defendants in *Lepowitch* merely asked a person "the whereabouts of Abe Zaidman" while pretending to be FBI agents. *United States v. Lepowitch*, 48 F. Supp. 846, 847 (1942). The district court judge granted a demurrer to the indictment, reasoning that asking for information was "not . . . taking upon themselves to act as Federal Bureau of Investigation agents." *Id.* at 847. The Supreme Court never addressed the issue of whether the defendants "acted as such" within the meaning of clause [1] of § 912. 318 U.S. at 703. Rather, the Supreme Court assumed that the basis of the lower court's ruling was that the indictment failed to allege an intent to defraud. *Id.* Thus, it is submitted that, in defining intent to defraud for the purposes of § 912, the Supreme Court not only addressed an issue which was not necessary to consider, it also made virtually any act, while in the guise of a federal officer, a federal offense. While asking for a match might not be considered "acting as such," and therefore not applicable to this discussion, there is some confusion as to what behavior constitutes "acting as such." Compare *United States v. Barnow*, 239 U.S. 74, 77 (1915) ("acting as such" means no more than to assume to act in pretended character) with *United States v. Rosser*, 528 F.2d 652, 657 (D.C. Cir. 1976) (acting as such "must be something more than merely an act in keeping with the falsely assumed character").

“acts as such,” for whatever reason, is deemed to have fraudulent intent as defined in *Lepowitch* for the purposes of clause [1] of section 912. Even if a person does not cause another person to act contrary to his normal conduct, he may be criminally liable if he acts in a pretended character.<sup>61</sup> The statute, therefore, as interpreted by *Lepowitch*, can be employed to punish non-culpable as well as culpable behavior.<sup>62</sup>

Given the broad *Lepowitch* definition of a fraudulent intent, and the Supreme Court’s explicit limitation of that definition to clause [1], it is further submitted that the Third Circuit’s application of the *Lepowitch* definition to clause [2] incorrectly expands the scope of clause [2] beyond that which the Supreme Court and Congress intended.<sup>63</sup> Applying

61. For example, if *A*, impersonating an FBI agent, asked *B* the whereabouts of *C*, and *B* was naturally inclined to tell *A* where *C* was, despite *A*’s deceit, *A* would have the fraudulent intent required under clause [1] of § 912 since *A* impersonated a federal official and “acted as such.” As *B* would not have said anything to *A* but for the deceitful conduct of *A* (asking the whereabouts of *C* while posing as an FBI agent), the *Lepowitch* definition of intent to defraud would be fulfilled. For a discussion of *Lepowitch*, see *supra* note 4.

62. It is submitted that certain behavior, which would come within the conduct prohibited by clause [1], is non-culpable behavior. For example, if a purse snatcher stopped running from a private citizen because the citizen falsely identified himself as federal officer, the citizen could be guilty of violating clause [1] of section 912. Having impersonated an officer and “acted as such,” fraudulent intent as defined by *Lepowitch* would be present since the citizen attempted to change the thief’s “course of conduct.” Similarly, if a person falsely assumed the identity of a librarian at the Library of Congress and asked someone to stop talking, that person could be deemed guilty of violating clause [1] since the person falsely assumed to be a federal employee, and “acted as such.” Since the actor attempted to change another’s course of action by requesting silence, the actor had the requisite fraudulent intent as defined by *Lepowitch*. Thus, it is submitted that more than a mere attempt to change another’s course of conduct should be required before an impersonator is deemed to have “intent to defraud.”

63. The rationale for expanding the *Lepowitch* definition of fraudulent intent to clause [2] is logical; if a person demands money or a valuable thing, he attempts to change the course of action of another person. While this rationale may be logical, it does little more than state the obvious. It is submitted that applying the *Lepowitch* definition of intent to defraud to clause [2] incorrectly extends this definition beyond the Supreme Court’s express limitation of its fraudulent intent definition in *Lepowitch*, where the Court stated that “more than mere deceitful attempt to affect the course of action of another is required under the second clause of the statute.” 318 U.S. at 705.

This express limitation of the specialized definition of “intent to defraud” is in accordance with the Supreme Court’s decision in *United States v. Barnow*, 239 U.S. 74 (1915), where the Court implied that fraudulent intent in clause [2] meant an intent to obtain something unlawfully, not an attempt to change the course of another’s conduct. In *Barnow*, the defendant falsely pretended to be an employee of the United States and sold a set of books in that guise to an unnamed citizen. *Id.* at 75. The defendant was indicted for violating both clauses of the false personation statute, but the district court held that since the federal employee that the defendant allegedly had impersonated was fictional, no “false personation of a supposititious individual who never existed” could be committed. *Id.* at 76. The Supreme Court reversed, and held that the district court’s interpretation of the statute was too narrow. *Id.* The court found erro-

the broad *Lepowitch* definition of fraudulent intent to clause [2] will have the same potential of punishing non-culpable conduct as applying it to clause [1].<sup>64</sup> The *Lepowitch* definition allows fraudulent intent to be proved indirectly; the effect of its application to clause [2] is to lower the burden of proof required under that clause, since it permits an impersonating defendant's mental state to be determined by his act of demanding or obtaining money or a valuable thing.<sup>65</sup> According to *Wilkes*,

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neous the district court's conclusion that the victim was not criminally deprived of property by the defendant within the meaning of the statute since the victim received a set of books in exchange for money. *Id.* at 79. The Court held that the purpose of the statute was not merely to "protect innocent persons from actual loss . . . but to maintain the general good repute and dignity" of the government. *Id.* at 80. The Court reasoned therefore that it was inconsistent with the statute's purpose "to make the question whether one who has parted with his property upon the strength of a fraudulent representation of Federal employment, has received an adequate *quid pro quo* in value, determinative." *Id.* at 80. The Court then stated that the value of the objects exchanged during the deceitful scheme should be taken into consideration as "circumstantial evidence upon the *question of intent*." *Id.* (emphasis added). Thus, it is submitted that for purposes of clause [2], fraudulent intent had to do with an intent to obtain something unlawfully, rather than merely attempting to change the course of conduct of another. Accordingly, it is submitted that the Third Circuit incorrectly interpreted the definition of fraudulent intent for purposes of clause [2].

It is submitted that the Third Circuit's extension of the *Lepowitch* definition of fraudulent intent to clause [2] incorrectly changes substantive criminal law in direct contravention of Congress' stated purpose in enacting the 1948 revisions. For a discussion of the 1948 revisions, see *supra* note 5. It is further submitted that the Fifth Circuit correctly refused to extend the *Lepowitch* definition to clause [2] in *Honea* where the court equated an intent to defraud for purposes of clause [2] with an intent to wrongfully deprive another of property. 344 F.2d 798, 803 (5th Cir. 1965). The *Honea* court reasoned that "[t]o hold otherwise would be to attribute to Congress an intent to greatly expand the scope of the statute so as to include . . . a broad range of possible conduct which, while blameworthy, would not ordinarily be regarded as having the major governmental significance of actions violating part [1]." *Id.*

64. See *Honea*, 344 F.2d 798. The court in *Honea* was concerned that applying the clause [1] definition of an intent to defraud to clause [2] would punish non-culpable behavior. The *Honea* court posited the following example and rationale:

[A]n ex-Marine, FBI man, PX clerk, Revenue Officer, or law clerk desires to cash a check for which there are funds in the bank, but not being known to the cashier, he flashes his expired Government ID card. Literally, he has falsely assum[ed] to be a federal 'officer or employee,' and 'in such pretended character' has 'obtain[ed] \* \* \* money \* \* \*.' Certainly Congress could conclude that this should be a federal crime. But we do not believe that Congress in its preoccupation with offense [1] intended purposefully to eliminate the fraudulent intent element as to offense [2] and thereby wreak a change of major significance, both in the moral qualities of the substantive offense and in the punishment. The law frequently has read into a statute this very requirement of fraudulent intent. (Citations omitted) How much more is it justified when it was once formally a part of the statute and its omission occurred in a structural recodification.

*Id.* at 803.

65. If a defendant demands information by impersonation, the Supreme

the act of demanding or obtaining a valuable thing implicitly carries with it fraudulent intent, regardless of the impersonating defendant's actual motive or mental state.<sup>66</sup>

It is therefore submitted that although the Third Circuit correctly followed precedent in applying the *Lepowitch* definition of fraudulent intent to a charge pursuant to clause [1], the court should not have followed the majority of circuits in extending the *Lepowitch* definition of fraudulent intent to clause [2] of section 912.<sup>67</sup> As the Supreme Court has not fashioned a specific definition for purposes of clause [2], the Third Circuit was free to develop a definition of its own. It is submitted that the Third Circuit should have required specific allegations of an intent to defraud for clause [2] offenses, more in keeping with the Supreme Court's expression of the limited applicability of the *Lepowitch* definition, and with Congress' intent not to change the substantive law of section 912.<sup>68</sup>

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Court has held that clause [2] of § 912 applies even if the information is "wholly valueless." *Lepowitch*, 318 U.S. at 704.

66. For an example of non-culpable behavior that could violate the elements in clause [2], see *supra* note 64.

67. For a discussion of cases applying the *Lepowitch* definition of intent to defraud to a clause [2] offense, see *supra* notes 39-44 and accompanying text.

68. See *supra* note 63 and accompanying text.