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Goodbye to Affidavits - Improving the Federal Affidavit Substitute Statute

Ira Shiflett

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Recommended Citation

Ira Shiflett, *Goodbye to Affidavits - Improving the Federal Affidavit Substitute Statute*, 54 Clev. St. L. Rev. 309 (2006)
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GOODBYE TO AFFIDAVITS? IMPROVING THE FEDERAL AFFIDAVIT SUBSTITUTE STATUTE

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I. INTRODUCTION

Perhaps the most common formality in law is the application of a notary stamp by one of America’s 4.5 million notaries public¹ to an affidavit or other legal document. Each stamp or seal represents a transaction cost; multiplied by millions

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¹ See Keith M. Jajko & Armando Aquirre, *The NNA 2002 Notary Census*, NAT’L NOTARY, May 2002, at 12, 15. For the history of notaries in America, see Michael L. Closen & G. Grant Dixon, *Notaries Public from the Time of the Roman Empire to the United States Today, and Tomorrow*, 68 N.D. L. REV. 873 (1992); see also John E. Seth, *Notaries in the American Colonies*, 32 J. MARSHALL L. REV. 863 (1999).

of documents a year, the annual expenditure in time and money may well be in the hundreds of millions of dollars.²

Thirty years ago, Congress recognized that the costs of notarization generally outweighed the benefits. In 1976, Congress enacted 28 U.S.C. § 1746,³ intending to limit the circumstances when a notary would be required. Section 1746 provides that whenever a document is required to be supported by a notarized statement other than a deposition, an oath of office, or an oath required to be taken before an official other than a notary, a declaration under penalty of perjury is a sufficient substitute.⁴ Congress recognized that it could be inconvenient to find a notary, especially on the weekends or for people who lived or traveled internationally.⁵ This section “has the advantage of avoiding the inconvenience, time and expense of the participation of a notary public.”⁶

Nevertheless, § 1746 has had much less impact than might have been expected. By regulation, statute, and court rule, hundreds of federal forms and documents still apparently require notarization.⁷ Thus, the law seems to continue to require the use of a notary public.

² Assuming conservatively that each of America’s 4.5 million notaries notarizes ten documents a year, that the process takes an average of five minutes for the signer and five minutes for the notary, and that all involved work forty hours per week, fifty weeks per year, the process of notarization costs 3750 person-years of work annually. Assuming an income of \$40,000 per annum, the cost is \$150 million annually. The fees paid by notaries for their licenses to the states may amount to \$28 million per year. Michael L. Closen, *To Swear . . . or Not to Swear Document Signers: The Default of Notaries Public and a Proposal to Abolish Oral Notarial Oaths*, 50 BUFF. L. REV. 613, 643 n.170 (2002).

³ 28 U.S.C. § 1746 (2000) (added Oct. 18, 1976 by Pub. L. No. 94-550, § 1(a), 90 Stat. 2534) provides:

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: “I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)”.

(2) If executed within the United States, its territories, possessions, or commonwealths: “I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)”.

⁴ *Id.*

⁵ H.R. REP. NO. 94-1616, at 1 (1976), as reprinted in 1976 U.S.C.C.A.N. 5644, 5645.

⁶ Closen, *supra* note 2, at 697.

⁷ See *infra* notes 59-137 and accompanying text.

Of course, the regulations or the government officials implementing them could be challenged as inconsistent with § 1746. Ultimately, a court might determine that something other than an affidavit is legally sufficient. However, there is little systematic incentive for someone to bring a lawsuit. Some users of notaries employ them quite rarely, annually or less. They are unlikely to file a lawsuit, which would cost them much more than they would gain. Regular users, by contrast, such as lawyers or other professionals, pass the costs along to clients. An individual client is unlikely to pay for a legal challenge. Accordingly, although in the aggregate the costs are quite high, they are so widely diffused that there is little or no systematic pressure for change.

In addition, court decisions have created a loophole for people who make false statements. Congress intended federal perjury laws to apply to statements made pursuant to § 1746. However, some arguably ambiguous language in the law has been read by some district and circuit courts to make the perjury provisions inapplicable to false statements made in § 1746 verifications.⁸

This article proposes that § 1746 be more systematically applied in federal law to achieve the savings Congress intended. In addition, the federal perjury statute should be amended to make clear that it applies to statements under § 1746.

II. THE PURPOSES OF NOTARIZATION AND THE MOVEMENT AWAY

A. *The Purposes of Notarization*

Notaries perform many millions of notarizations of signatures every year, perhaps as many as hundreds of thousands of notarizations of signatures daily.⁹ In theory, notaries administer oral oaths or affirmations prior to a signer signing a document. The oath or affirmation reminds the signer of the obligation to be truthful and subjects her to sanctions if the facts in the document are known to be false. In addition, the procedure serves to verify the identity of the signer.¹⁰ However, the purported benefits, in most cases, are actually rather limited.

1. Truth

A main purpose of requiring an oath with respect to a particular document is to promote truth-telling.¹¹ Of course, a notary makes no independent investigation of the facts; truth is promoted through the ceremony which underscores the importance of signing a document. The declarant must give some affirmative indication that he or she has taken the oath and will tell the truth.¹² “[A]dministering an oath is one of a Notary’s most important duties and one that carries a tradition of thousands of

⁸ See *infra* notes 139-93 and accompanying text.

⁹ Michael L. Closen, *Notarial Records and Preservation of the Expectation of Privacy*, 35 U.S.F. L. REV. 159, 161 (2001).

¹⁰ Closen, *supra* note 2, at 613.

¹¹ *Id.*

¹² *Id.* at 628-29.

years.”¹³ For example, the Nevada Notary Handbook instructs notaries to “‘first administer an oath by swearing in the document signer.’”¹⁴

Any value this ceremony might have requires that it actually be performed, but some research suggests that notaries routinely fail to administer the oral oaths.¹⁵ Most notaries affix their stamp or seal without actually administering the necessary oaths or affirmations.¹⁶ One study in 1989 found that 91.7% of New York notaries failed to administer an oath.¹⁷ Another study found that 75% of law students who had their signatures notarized once or more were never asked by the notaries to submit to an oath or affirmation.¹⁸

In addition, the premise itself is doubtful. Leaving aside the question of punishment which, as discussed below, is potentially available for sworn and unsworn falsehoods, very few people, probably, would be willing to sign a document containing a knowing lie, but would not do so if reminded of their obligation to tell the truth by an oath ceremony. That is, for honest people, a formal oath is unnecessary; for liars, it is no impediment.¹⁹

2. Punishment

An important feature of an oath is that it can make the taker subject to criminal sanctions for knowing lies.²⁰ While there are few prosecutions for perjury under the main federal statutes, 18 U.S.C. § 1621 and 18 U.S.C. § 1623, surely the penalty deters some.²¹ However, notarization offers no special advantage because even unsworn false statements can be, and indeed, have been made criminally

¹³ *Id.* at 652 (quoting David S. Thun, *In the Spirit of Truth*, NAT’L NOTARY, Nov. 2000, at 10).

¹⁴ *Id.* at 670 (quoting [NEVADA] NOTARY HANDBOOK 9 (1997)). “‘You (the notary) ask, “Do you swear that the statements in this document are true so help you God?’” The document signer then answers, “Yes.”” *Id.*

¹⁵ See ALFRED E. PIOMBINO, NOTARY PUBLIC HANDBOOK 71 (1996) (reporting that eighty to ninety percent of the time notaries do not administer required oath or affirmation).

¹⁶ Closen, *supra* note 2, at 653.

¹⁷ *Id.* at 653 (quoting PIOMBINO, *supra* note 15, at xxii).

¹⁸ Four hundred forty seven law students from three states who had used notaries were surveyed; 337 were never asked to submit to an oath. “Of the grand total of about 7604 notarizations performed, 6838 did not include the administration of an oath or affirmation: an even more disappointing ninety percent.” Closen, *supra* note 2, at 656.

¹⁹ See, e.g., Gabriel J. Chin & Saira Rao, *Pledging Allegiance to the Constitution: The First Amendment and Loyalty Oaths for Faculty at Private Universities*, 64 U. PITT. L. REV. 431, 477 (2003).

²⁰ Closen, *supra* note 2, at 628; cf. Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233 (1998) (discussing false statements in another judicial context). See generally Linda F. Harrison, *The Law of Lying: The Difficulty of Pursuing Perjury Under the Federal Perjury Statutes*, 35 U. TOL. L. REV. 397 (2003).

²¹ Federal Justice Statistics Resource Center, http://fjsrc.urban.org/noframe/wqs/q_intro.cfm (last visited Feb. 1, 2005). There were 304 cases in federal court in 2002. *Id.*

punishable.²² Accordingly, criminal deterrence of false statements can be achieved without the cost of notarization.

3. Identity

Notaries could also serve to verify the identity of the signers of documents. Notarization is usually recognized as independent proof of validity.²³ While of some value for this purpose, notaries do not offer a guarantee. First, a notary may fail to check the identity of the person signing the document. Second, the identity check is important only in cases of impostors. An impostor, presumably, would take the trouble to obtain a phony identification card. This would likely be sufficient to perpetrate a fraud because notaries generally do not independently verify the authenticity of proffered identification documents. In addition, recipients and users of notarized documents do not routinely check the identity and licensure of the notary public, so the perpetrator of a fraud could use a false notary stamp, readily available over the internet.²⁴ The real check on identity for notarized as well as non-notarized documents must come from the users of the documents, not from simple reliance on a notary stamp.

4. Witness

Notarization offers a benefit to the maker of a sworn document by creating a witness to the execution and establishing when the document was signed, which will often be of legal relevance. However, memorialization of a document's signing can be accomplished in other ways, such as with witnesses. Further, notarization is an issue because it is imposed by users of documents, such as government agencies and courts, on the makers of documents. If for some reason the signer of a document finds it useful to notarize it, there should be nothing stopping her.²⁵ But, that notarization might sometimes be useful to the maker, is no reason to require notarization in all cases, even where it is not useful.

²² 18 U.S.C. § 1001(a), (2000) (current version at 18 U.S.C.S. § 1001 (Lexis Nexis 2006)), provides:

[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully --
 (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
 (2) makes any materially false, fictitious, or fraudulent statement or representation; or
 (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined [and/or imprisoned]

Note that 18 U.S.C. § 1001(b) provides that: "[s]ubsection (a) does not apply to a party to a judicial proceeding, or that party's counsel"

²³ Michael L. Closen, *The Public Official Role of the Notary*, 31 J. MARSHALL L. REV. 651, 683 (1998).

²⁴ Bruce Lambert, *What Happens If Process Server Doesn't Serve?*, N.Y. TIMES, Apr. 4, 1999, § 14LI, at 1. This was the technique of Intercounty Judicial Services of Long Island, which performed thousands of notarizations without a notary license. Many of the notary signatures were forged, and a fake notary stamp was used. Even though verifying that someone is a licensed notary in New York entails a single phone call (the number is (518) 474-4752), it took 18 years before anyone checked on Intercounty Judicial Services. *Id.*

²⁵ Closen, *supra* note 2, at 697-98.

B. Congressional Rejection of a Notarization Requirement

In 1976, Congress concluded that utilization of a notary was unnecessary in most cases and enacted 18 U.S.C. § 1746. According to the House Report, the primary goal of this legislation was to eliminate the inconvenience of finding a notary every time an affidavit needed to be signed by permitting the use of unsworn declarations under penalty of perjury in lieu of affidavits.²⁶ The legislation was endorsed by the American Bar Association and the Department of Justice.²⁷ The bill received bipartisan support in the Judiciary Committee and there was no reported opposition.²⁸ The bill made it out of the committee by a 30 to 0 vote.²⁹

Missouri Representative William L. Hungate reported to the House that the bill³⁰ would include unsworn declarations within the scope of the general federal perjury statute (18 U.S.C. § 1621).³¹ Even though 18 U.S.C. § 1623(a) allows for convictions for false declarations made pursuant to § 1746, he did not mention § 1623.³² The bill was introduced in the Senate and subsequently enacted.³³

More than twenty jurisdictions have adopted either a verbatim version of 28 U.S.C. § 1746, or a similar statute or rule, sometimes with a more limited scope. These jurisdictions include: Alaska,³⁴ Arizona,³⁵ California,³⁶ the District of Columbia,³⁷ Florida,³⁸ Guam,³⁹ Hawaii,⁴⁰ Illinois,⁴¹ Indiana,⁴² Iowa,⁴³ Kansas,⁴⁴

²⁶ H.R. REP. NO. 94-1616, at 1 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5644, 5644-45. For example, it is sometimes necessary for a document to be executed during non-business hours. Further, it can be inconvenient or even impossible for someone traveling internationally to find a notary. *Id.* at 5645.

²⁷ *Id.* at 5645; 122 CONG. REC. 32654 (1976).

²⁸ 122 CONG. REC. 32654 (Sept. 27, 1976).

²⁹ *Id.*

³⁰ H.R. 15531, 94th Cong. (1976) (enacted and codified at 18 U.S.C. § 1746).

³¹ 122 CONG. REC. 32654 (1976).

³² *Id.*

³³ 122 CONG. REC. 34447-48 (1976).

³⁴ ALASKA STAT. § 09.63.020 (2006).

³⁵ ARIZ. R. CIV. P. 80(I).

³⁶ CAL. CODE CIV. P. § 2015.5.

³⁷ D.C. CODE § 2-1831.13 (2006).

³⁸ FLA. STAT. § 92.525 (2006).

³⁹ GUAM CODE ANN. tit. 6, § 4308 (2006).

⁴⁰ HAW. R. CIR. CT. 7(g).

⁴¹ 735 ILL. COMP. STAT. 5/1-109 (2006).

⁴² IND. R. TRIAL P. 11(B).

⁴³ IOWA. CODE. § 622.1 (2005).

⁴⁴ KAN. STAT. ANN. § 53-601 (2006).

Massachusetts,⁴⁵ Minnesota,⁴⁶ New Jersey,⁴⁷ Nevada,⁴⁸ Oklahoma,⁴⁹ Oregon,⁵⁰ Pennsylvania,⁵¹ Virginia,⁵² Washington,⁵³ and West Virginia.⁵⁴ Maryland,⁵⁵ Michigan,⁵⁶ Missouri,⁵⁷ and New York⁵⁸ allow a declaration in place of an affidavit in more limited situations.

The virtue of these laws is that they let private actors do whatever they want. If a private employer or a bank for some reason wants applications notarized, or if a driver in a car accident chooses to notarize her memorialization of the event, nothing stands in the way. However, the number of government “gotcha’s,” instances where people forfeit rights or opportunities because they could not meet a deadline or satisfy a formal requirement for want of access to a handy notary public, the time to get a document notarized, or the funds to pay the required fee, will be reduced.

III. THE LIMITED FEDERAL RESPONSE TO § 1746

In some ways, § 1746 has worked precisely as anticipated. Federal courts have consistently understood § 1746 to permit admission of documents into evidence when the document is accompanied by a signed declaration instead of a notarized affidavit. Court rules to the contrary have been held invalid.⁵⁹

The statute has been flexibly construed. Following the language of the statute itself, substantial compliance, rather than strict compliance, is required. For example, the Ninth Circuit held that a signed declaration conformed with § 1746 when it stated “the facts stated in the ... complaint [are] true and correct as known to me.”⁶⁰ The critical fact was that the writing was verified under penalty of perjury.⁶¹

⁴⁵ MASS. GEN. LAWS ch. 268, § 1A (2006).

⁴⁶ MINN. STAT. § 524.1-310 (2005).

⁴⁷ N.J. COURT RULES, R. 1:4-4.

⁴⁸ NEV. REV. ST. § 53.045 (2006).

⁴⁹ OKLA. STAT. tit. 12, § 426 (2005).

⁵⁰ OR. R. CIV. P. 1(E).

⁵¹ 18 PA. CONS. STAT. § 4904 (2005); Pa. R. Civ. P. 76.

⁵² VA. CODE ANN. § 8.01-4.3 (2006).

⁵³ WASH. REV. CODE § 9A.72.085 (2006).

⁵⁴ W.VA. CODE § 39-1-10a (2006).

⁵⁵ See, e.g., MD. CODE ANN., CORPS. & ASS’NS § 1-302 (LexisNexis 2006); MD. CODE ANN. EST. & TRUSTS § 1-102 (LexisNexis 2006).

⁵⁶ See MICH. COMP. LAWS. § 600.852 (2006); see also MICH. COMP. LAWS. § 2.114(b)(2) (2006).

⁵⁷ See MO. REV. STAT. § 472.080 (2006) (probate court).

⁵⁸ N.Y. C.P.L.R. 2106 (Consol. 1962) (certain state-licensed professionals).

⁵⁹ Carter v. Clark, 616 F.2d 228 (5th Cir. 1980) (invalidating a local rule requiring a notary as inconsistent with § 1746); see also 28 U.S.C. § 2071 (2000) (requiring consistency between local court rules and federal statutes).

⁶⁰ Schroeder v. McDonald, 55 F.3d 454, 460 (9th Cir. 1995).

The Seventh Circuit held that declaring under penalty of perjury that a complaint is true, and signing it, makes the document a valid declaration under § 1746.⁶² In the Second Circuit, a declaration stating “[u]nder penalty of perjury, I make the statements contained herein,” substantially complied with § 1746.⁶³ In a case involving a declaration signed overseas, the Ninth Circuit upheld a declaration that stated, “I declare the foregoing to be true and correct under penalty of perjury under the laws of Hong Kong or any applicable jurisdiction.”⁶⁴ Here, the phrase “under the laws of ... any applicable jurisdiction” substantially complied with the language of § 1746.⁶⁵

The Federal Rules of Civil Procedure require certain documents to be executed under oath.⁶⁶ For example, Rule 33(b) provides that interrogatories “shall be answered separately and fully in writing under oath.” However, all circuits have found that a declaration, instead of a notarized affidavit pursuant to § 1746, is sufficient.⁶⁷

A. Federal Court Papers

Although the basic validity of § 1746 has been recognized, to some extent it has gone under the radar. In a Fifth Circuit reversal of the dismissal of an unnotarized habeas petition, the court dryly observed: “[a]pparently no one called to the attention of either the magistrate or the district court that an oath is not required when the petitioner declares under penalty of perjury that the matter contained therein is true.”⁶⁸ Other actors are equally unaware of § 1746, for example, many federal agencies require notarization of documents or forms.⁶⁹

Perhaps the most ironic example of inconsistency with § 1746 is in the context of the federal courts themselves. Many federal courts require notarization of applications for admission to the bar. There is no notarization requirement for application to the bar of the First⁷⁰ and Seventh Circuits.⁷¹ However, applications

⁶¹ *Id.*

⁶² *Ford v. Wilson*, 90 F.3d 245, 247 (7th Cir. 1996).

⁶³ *LeBoeuf, Lamb, Greene & MacRae, L.L.P. v. Worsham*, 185 F.3d 61, 65-66 (2d Cir. 1999).

⁶⁴ *Commodity Futures Trading Comm’n v. Topworth Int’l, Ltd.*, 205 F.3d 1107, 1112 (9th Cir. 1999).

⁶⁵ *Id.*

⁶⁶ *See, e.g.*, Fed. R. Civ. P. 33(b).

⁶⁷ Thomas W. Tobin, *The Execution “Under Oath” of U.S. Litigation Documents: Must Signatures Be Authenticated?*, 31 J. MARSHALL L. REV. 927, 932-33 (1998) (citing cases from each circuit where court papers were admitted pursuant to § 1746).

⁶⁸ *Dickinson v. Wainwright*, 626 F.2d 1184, 1185 (5th Cir. Unit B 1980) (per curiam).

⁶⁹ *See infra* notes 122 – 126.

⁷⁰ United States Court of Appeals for the First Circuit, Attorney Admission Application and Instructions, <http://www.ca1.uscourts.gov/files/forms/admission.pdf> (last visited Aug. 25, 2006).

⁷¹ United States Court of Appeals for the Seventh Circuit, Application for Admission to Practice, <http://www.ca7.uscourts.gov/forms/applctn.pdf> (last visited Aug. 25, 2006).

require notarization in the Supreme Court,⁷² the District of Columbia,⁷³ Second,⁷⁴ Third,⁷⁵ Fourth,⁷⁶ Fifth,⁷⁷ Sixth,⁷⁸ Eighth,⁷⁹ Eleventh,⁸⁰ and Federal⁸¹ Circuits. Many trial courts also require notarization of bar applications, including U.S. District Courts in Arkansas,⁸² Colorado,⁸³ Missouri,⁸⁴ New York,⁸⁵ New Jersey,⁸⁶ New

⁷² Supreme Court of the United States, Application for Admission to Practice,, <http://www.supremecourtus.gov/bar/barapplication.pdf> (last visited Aug. 25, 2006) (oath of admission).

⁷³ United States Court of Appeals for the District of Columbia Circuit, Application for Admission to Practice, <http://www.cadc.uscourts.gov/internet/internet.nsf> (follow “Forms” hyperlink; then follow “Forms for Attorneys Practicing Before the Court” hyperlink; then follow “Attorney Admission to Practice and Bar Membership Form” hyperlink; then follow “Application for Admission to Practice Form” hyperlink; then follow “ATTYADM3.pdf” hyperlink) (last visited Aug. 25, 2006) (oath of admission).

⁷⁴ United States Court of Appeals for the Second Circuit, Attorney Admission Application, <http://www.ca2.uscourts.gov/Docs/AttAdm/Adm Appl.pdf> (last visited Aug. 25, 2006) (sponsor’s affidavit).

⁷⁵ United States Court of Appeals for the Third Circuit, Instructions and Application for Admission to Practice, <http://www.ca3.uscourts.gov/admissio.htm> (follow “Application for Admission to the Bar of the Third Circuit with Instructions” hyperlink) (last visited Aug. 25, 2006) (admission oath).

⁷⁶ United States Court of Appeals for the Fourth Circuit, Application for Admission to the Bar, <http://www.ca4.uscourts.gov/pdf/AttyAdm.pdf> (last visited Aug. 25, 2006) (admission oath).

⁷⁷ United States Court of Appeals for the Fifth Circuit, Application and Oath for Admission, <http://www.ca5.uscourts.gov/documents/dkt-5b.pdf> (last visited Aug. 25, 2006) (admission oath and truth of statements).

⁷⁸ United States Court of Appeals for the Sixth Circuit Application for Admission to the Bar, http://www.ca6.uscourts.gov/internet/forms/attorney_admissions/application.pdf (last visited Aug. 25, 2006) (admission oath).

⁷⁹ United States Court of Appeals for the Eighth Circuit, Admission Form, <http://www.ca8.uscourts.gov/newcoa/forms/admission.pdf> (last visited Aug. 21, 2006) (admission oath).

⁸⁰ United States Court of Appeals for the Eleventh Circuit, Application for Admission to the Bar, <http://www.ca11.uscourts.gov/documents/pdfs/appadmbar.pdf> (last visited Aug. 21, 2006) (admission oath and truth of statements).

⁸¹ United States Court of Appeals for the Federal Circuit, Form 21: Application for Admission to the Bar, http://fedcir.gov/pdf/form21_2005.pdf (last visited Aug. 21, 2006) (oath of admission).

⁸² United States District Court for the Eastern District of Arkansas, In-State Attorney Enrollment Information, http://www.are.uscourts.gov/pdfforms/attorney_in_state.pdf (last visited Aug. 21, 2006). In Arkansas, both in the Eastern and Western District, an attorney’s application to practice law in the federal court must be notarized. *Id.*

⁸³ United States District Court for the District of Colorado, Application for Admission to the Bar of the Court, http://www.co.uscourts.gov/forms/bar_app_new.pdf (last visited Aug. 21, 2006). In Colorado, an application for admission to the U.S. District Court must be notarized. *Id.*

Mexico,⁸⁷ North Dakota,⁸⁸ Pennsylvania,⁸⁹ South Carolina,⁹⁰ Texas,⁹¹ Utah,⁹² Washington,⁹³ the Tax Court,⁹⁴ and the Court of International Trade.⁹⁵

Most of the aforementioned courts require notarization of the oath printed on the application form. This practice could be defended at first blush under the “oath of office” exception of § 1746. However, this seems at least questionable in light of the Supreme Court’s decision in *In re Griffiths*⁹⁶ that an attorney, as important as he might be, is “not an ‘officer’ within the ordinary meaning of that term.”⁹⁷

⁸⁴ United States District Court for the Eastern District of Missouri, Application for Admission to Practice Law, <http://www.moed.uscourts.gov/forms/ApplicationForAdmissionToPracticeLaw.pdf> (last visited Aug. 19, 2006).

⁸⁵ United States District Court for the Southern District of New York, Attorney Admission Forms, <http://www.nysd.uscourts.gov/forms/adm.pdf> (last visited Aug. 31, 2006).

⁸⁶ United States District Court for the District of New Jersey, U.S. District Court for the District of New Jersey Home Page, <http://pacer.njd.uscourts.gov> (follow “Attorney Services” hyperlink; then follow “Attorney Admissions” hyperlink) (last visited Aug. 19, 2006).

⁸⁷ United States District Court for the District of New Mexico, Petition for Admission to Practice, <http://www.nmcourt.fed.us/web/DCDOCS/dcindex.html> (follow “Admission Form and Process” hyperlink; then follow “Form” hyperlink; then follow “Application for Admission to Practice in the USDC, DNM PDF” hyperlink) (last visited Aug. 21, 2006).

⁸⁸ United States District Court for the District of North Dakota, Out of State Counsel Admission Information, <http://www.ndd.uscourts.gov/OutState.pdf> (last visited Aug. 21, 2006).

⁸⁹ United States District Court for the Eastern District of Pennsylvania, Attorney Admission Application (Pro Hac Vice), http://www.paed.uscourts.gov/documents/handbook/forms/app_x.pdf (last visited Aug. 21, 2006) (oath and sponsor’s motion).

⁹⁰ United States District Court for the District of South Carolina, Application for Admission to Practice, <http://www.scd.uscourts.gov/DOCS/admprac.pdf> (last visited Aug. 21, 2006).

⁹¹ United States District Court for the Eastern District of Texas, Application for Admission to Practice, <http://www.txed.uscourts.gov> (follow “Attorney Admission Fee” hyperlink; then follow “Attorney Admissions Application” hyperlink) (last visited Aug. 21, 2006) (oath of admission).

⁹² United States District Court for the District of Utah, Application for Admission of Non-Resident Attorney, http://www.utd.uscourts.gov/forms/nonres_atty_pkg.pdf (last visited Aug. 28, 2006).

⁹³ United States District Court for the Eastern District of Washington, Petition for Admission to Practice, <http://www.waed.uscourts.gov/attorney/petition.pdf> (last visited Aug. 21, 2006).

⁹⁴ United States District Court for the United States Tax Court, Application for Admission to Practice, http://www.ustaxcourt.gov/forms/Admission_Attorney.pdf (last visited Aug. 31, 2006).

⁹⁵ United States Court of International Trade, Application for Admission to Practice, <http://www.cit.uscourts.gov/Forms/PDF/form-new10.pdf> (last visited Aug. 21, 2006).

⁹⁶ *In re Griffiths*, 413 U.S. 717 (1973).

⁹⁷ *Id.* at 728. The Court explained:

Some oath requirements would seem to be permissible based on the § 1746 exception for “an oath required to be taken before a specified official other than a notary public.” The Eastern District of Michigan requires applicants to be sworn before a U.S. District, Magistrate, or Bankruptcy Judge.⁹⁸ Applicants in Vermont⁹⁹ and Delaware¹⁰⁰ must be sworn by a Deputy Clerk. Part of the application in Nebraska must be completed by a clerk.¹⁰¹

However, some federal bar applications require notarization of matters other than an oath. These practices are clearly in tension with § 1746. In the Second Circuit, the only part of the form that must be notarized is the sponsor’s affidavit.¹⁰² The application to the Eastern and Western Districts of Arkansas requires attorneys to sign an admissions form that says, “I certify that I have read and understand the local rules of this Court and that I agree to attend all conferences set by the Court or I shall associate local counsel to attend in my absence.”¹⁰³ In New York, notarization is required for identity and truthfulness;¹⁰⁴ in Washington the petition is notarized for

‘Certainly nothing . . . in any . . . case decided by this Court places attorneys in the same category as marshals, bailiffs, court clerks or judges. Unlike these officials a lawyer is engaged in a private profession, important though it be to our system of justice. . . . The word ‘officer’ as it has always been applied to lawyers conveys quite a different meaning from the word ‘officer’ as applied to people serving as officers within the conventional meaning of that term.’

. . . [T]hey are not officials of government by virtue of being lawyers. Nor does the status of holding a license to practice law place one so close to the core of the political process as to make him a formulator of government policy.

Id. at 728-29 (quoting *Cammer v. United States*, 350 U.S. 399, 405 (1956)).

⁹⁸ United States District Court for the Eastern District of Michigan, Attorney Information, http://www.mied.uscourts.gov/_attyadm/attyinfo.htm#admission (last visited Aug. 21, 2006).

⁹⁹ United States District Court for the District of Vermont, Application for Admission, <http://www.vtd.uscourts.gov/AttorneyAd.htm> (follow “Admissions Application (PDF)” hyperlink) (last visited Aug. 21, 2006).

¹⁰⁰ United States District Court for the District of Delaware, Attorney Admission Application, <http://www.ded.uscourts.gov/CLKmain.htm> (follow “Forms” hyperlink; then follow “Attorney Admission Application (with instructions)” hyperlink) (last visited Aug. 21, 2006).

¹⁰¹ United States District Court for the District of Nebraska, Application for Admission to Practice, <http://www.ned.uscourts.gov/fpo/forms/attyadm.pdf> (last visited Aug. 21, 2006).

¹⁰² United States Court of Appeals for the Second Circuit, Attorney Admissions Application, <http://www.ca2.uscourts.gov/Docs/AttAdm/AdmAppl.pdf> (follow “2d Cir. Handbook”) (last visited Aug. 21, 2006).

¹⁰³ In-State Attorney Enrollment Information, http://www.are.uscourts.gov/pdf/forms/attorney_in_state.pdf (last visited Aug. 21, 2006).

¹⁰⁴ United States District Court for the Southern District of New York, Attorney Admission Forms, <http://www.nysd.uscourts.gov/forms/adm.pdf> (last visited Aug. 31, 2006) (“_____ being duly sworn, deposes and says that he/she is the petitioner in the above captioned matter, that he/she read the foregoing petition and knows the contents thereof and that the same is true to his/her knowledge.”).

truthfulness.¹⁰⁵ Procedural forms in the Districts of Puerto Rico,¹⁰⁶ Rhode Island,¹⁰⁷ and Colorado¹⁰⁸ also seem to require notarization.

In addition to official court forms, the pervasiveness of the use of notaries in federal litigation, in spite of § 1746, is suggested by privately published form pleadings. Often these forms include a place for a notary seal in spite of § 1746.¹⁰⁹

B. Notarization Requirements in the U.S. Code and the Code of Federal Regulations

Hundreds of provisions in the U.S. Code and Code of Federal Regulations refer to notaries public or notarized documents. Some of the provisions found in the U.S. Code include the following: any person who believes a violation of Federal election campaign funding has occurred must have the complaint notarized,¹¹⁰ a military power of attorney must be notarized,¹¹¹ and many banking transactions may not be completed until the transaction is acknowledged before a notary public.¹¹² For example, a banking association may not increase its capital stock without the use of a notary.¹¹³ Also, a bank's organization certificate must be acknowledged by either a judge or a notary.¹¹⁴ A banker may not issue preferred stock until an acknowledgement is made before a notary.¹¹⁵ When a director of a bank is appointed

¹⁰⁵ United States District Court for the Eastern District of Washington, Petition for Admission to Practice, <http://www.waed.uscourts.gov/attorney/petition.pdf> (last visited Aug. 31, 2006) ("_____, Petitioner herein, being first duly sworn, deposes and says that he/she has read the foregoing Petition and the facts stated therein are true to the best of his/her knowledge.").

¹⁰⁶ United States District Court for the District of Puerto Rico, District Court Forms for Attorneys, http://www.prd.uscourts.gov/usdcpr/a_forms.htm ((follow "Form F-Affidavit of Service (Foreclosure of Mortgage)" hyperlink); (follow "Form J-Affidavit" hyperlink); (follow "Form K-Affidavit (Foreclosure of Mortgage)" hyperlink)) (last visited Aug. 31, 2006).

¹⁰⁷ Local Rules of The United States District Court For The District Of Rhode Island, Appendix A, Form 5A (petition under 28 U.S.C. § 2254) (on file with author).

¹⁰⁸ United States District Court for the District of Colorado, Guide for Filing a Civil Suit, Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. § 1915, http://www.co.uscourts.gov/forms/f_gen_guide_new.pdf (last visited Sept. 5, 2006) (moving for appointment of counsel under 28 U.S.C. § 1915 in the District of Colorado requires a notary).

¹⁰⁹ 5 FEDERAL PROCEDURAL FORMS § 10:299 (2006) (affidavit of plaintiff's attorney); 12 FEDERAL PROCEDURAL FORMS § 45:156 (2006) (attorney's fees); 14 FEDERAL PROCEDURAL FORMS § 58:59 (2006) (removal petition).

¹¹⁰ 2 U.S.C. § 437(g)(a)(1) (2000).

¹¹¹ 10 U.S.C. § 1044b (2000).

¹¹² See *infra* notes 111 – 114.

¹¹³ 12 U.S.C. § 57 (2000).

¹¹⁴ 12 U.S.C. § 23 (2000).

¹¹⁵ 12 U.S.C. § 51a (2000).

or elected, she must take an oath before a notary public.¹¹⁶ Many provisions of the Code of Federal Regulations also require notarization.¹¹⁷

Many parts of the code that refer to a notary do not make any reference to § 1746, leading a user of the code to believe that a notary is required.¹¹⁸ On the other hand, some parts of the code have been updated to include § 1746. Still, other parts of the code are ambiguous as to whether they require a notary. For example, reclamation waivers of mining claims under the general mining laws require that an application must be “certified and/or notarized,” but there is no explanation of what certified means.¹¹⁹ Also, for a valid power of attorney agreement within the treasury department “[a] power of attorney must be executed in the presence of a notary public or a certifying individual.”¹²⁰ Conceivably, the signer of a declaration could be a certifying individual, but it is not clear. Other parts of the code are arguably ambiguous. Under the Department of Parks, Forests and Public Property, the proceedings for pleadings and motions require complaints and answers to be “by affidavit or ... notarized.”¹²¹

Some sections of the Code of Federal Regulations refer to § 1746. For example, Title 29 on labor has been updated to include § 1746.¹²² Title 47 on the Federal Communications Commission has a section on unsworn declarations in lieu of affidavits. For FCC filings, the regulations provide that anytime a document needs to be verified, a declaration may be substituted for an affidavit.¹²³ Notwithstanding that provision, other parts of the code regarding the FCC require a notary. This could cause confusion for someone filing a document with the FCC. For example,

¹¹⁶ 12 U.S.C. § 73 (2000).

¹¹⁷ See, e.g., 30 U.S.C. § 1232(c) (2000) (stating that the operator of a coalmine must include a notarized document together with payment of the required reclamation fee to the Department of the Interior); 30 U.S.C. § 1238(a) (2000) (stating that appraisal of land that was formally used for mining and has been restored must be notarized). Also, insurance companies that provide Medicare supplemental policies must be certified to comply with minimum federal requirements. Once certified, the insurance company must file a notarized statement stating that the policy continues to meet such standards. 42 U.S.C. § 1395ss(a)(1) (2000).

¹¹⁸ See *infra* App.

¹¹⁹ 43 C.F.R. § 3835.11(c) (2005).

¹²⁰ 31 C.F.R. § 357.28(g) (2005). See also 31 C.F.R. § 360.40(d)(1) (2005) (power of attorney must be “properly certified or notarized”); 32 C.F.R. § 239.4 (under the Homeowners Assistance Program, applicants must submit evidence of homeownership that “should be notarized or certified”).

¹²¹ 36 C.F.R. § 1150.48(b)–(c) (2005).

¹²² See 29 C.F.R. §§ 101.2, .17, .26, 102.11, .60, .83, 1501.3 (2005). But see 29 C.F.R. §§ 1611.4(d), 4902.3(c)(1) (requests for records by mail must be notarized). Also, if a non-attorney is given power of attorney for representation during administrative review of pension agency decisions, that person must provide a notarized power of attorney statement. 29 C.F.R. § 4003.6 (2005).

¹²³ 47 C.F.R. § 1.16 (2005). Title 49 on Transportation also provides that affirmations or declarations under penalty of perjury in accordance with perjury provisions are acceptable in lieu of an oath. 49 C.F.R. § 1104.5(b) (2005).

any party receiving confidential information from the FCC must sign a notarized statement saying they understand the rules of confidentiality.¹²⁴ There are other FCC procedures that require notarization. For example, requests to modify international settlement arrangements must be notarized.¹²⁵ Payphone compensation procedures must also be notarized.¹²⁶

Some statutes do not absolutely require a notary, but still do not comply with § 1746. For example, requests for records through Title 11 of the Federal Elections Act must either be notarized or witnessed by at least two people.¹²⁷

Some parts of the code require notarization to be obtained internationally.¹²⁸ Ships exporting goods to countries the United States boycotts, that also do business with the United States, must provide a notarized certificate regarding the goods exported.¹²⁹ This can be especially difficult because international notaries are not always available and can be expensive.

There is also a lack of uniformity with respect to records requests. Notwithstanding a decision of the U.S. Court of Appeals for the District of Columbia Circuit holding that § 1746 declarations are sufficient to make a request under FOIA,¹³⁰ some agencies do not comply. Under the CFR, each department within the government has a different procedure for obtaining records that pertain to individuals under the Freedom of Information Act. All departments try to verify the identity of the requestor. Some departments will only verify an individual's identity with a notarized document,¹³¹ while other departments will allow either a notarized

¹²⁴ 47 C.F.R. §§ 1.731(c), 76.9(e) (2005).

¹²⁵ 47 C.F.R. § 64.1001(c) (2005).

¹²⁶ 47 C.F.R. § 64.1310(f)(1) (2005).

¹²⁷ 11 C.F.R. §§ 1.4, .10(a) (2005).

¹²⁸ See, e.g., 15 C.F.R. pt. 760, supp. 1 (2005).

¹²⁹ *Id.*

¹³⁰ *Summers v. U.S. Dep't of Justice*, 999 F.2d 570 (D.C. Cir. 1993), *aff'd* 776 F. Supp. 575 (D.D.C. 1991).

¹³¹ See, e.g., 7 C.F.R. § 1.113(e) (2006) (Department of Agriculture); 8 C.F.R. §§ 103.10, .21 (2006) (Immigration records from the Department of Homeland Security); 14 C.F.R. § 1212.202 (2006) (NASA records); 15 C.F.R. §§ 4.23–.24 (including requests for census data), 80.1 (2006) (Office of the Secretary of Commerce); 16 C.F.R. §§ 1014.3–.4 (2006) (Consumer Product Safety Commission); 18 C.F.R. §§ 701.304, .310 (2006) (Department of Conservation of Power and Water Resources); 18 C.F.R. § 1301.14 (2006) (Tennessee Valley Authority); 20 C.F.R. § 401.45 (2006) (Social Security Administration); 22 C.F.R. § 215.4 (2006) (Agency for International Development); 22 C.F.R. § 308.15 (2006) (Peace Corps); 22 C.F.R. § 505.5 (2006) (Broadcasting Board of Governors); 22 C.F.R. § 1101.6 (2006) (International Boundary and Water Commission); 22 C.F.R. § 1507.6 (2006) (African Development Foundation); 23 C.F.R. §§ 1327.5–.6 (2006) (National Highway Traffic Safety Administration); 25 C.F.R. §§ 515.3, .8 (2006) (National Indian Gaming Commission); 28 C.F.R. § 700.11 (2006) (Office of Independent Counsel); 32 C.F.R. § 295.7 (2006) (Office of the Inspector General); 32 C.F.R. §§ 321.4–.5 (2006) (Defense Security Service); 37 C.F.R. §§ 102.23–.24 (2006) (United States Patent and Trademark Office); 45 C.F.R. §§ 1115.4, 1159.9 (2006) (National Foundation on the Arts and the Humanities); 46 C.F.R. § 503.63, .65 (2006) (Federal Maritime Commission); 49 C.F.R. § 802.7 (2006) (National Transportation Safety Board); 50 C.F.R. § 501.4 (2006) (Marine Mammal Commission); While requests for records

document or a declaration under § 1746.¹³² Some parts of the code give government employees the discretion to require notarization for records pertaining to an individual.¹³³ If the employee determines the records are embarrassing or harmful, the records will not be released without a notary.¹³⁴

In a certain way, the hundreds of statutes, regulations, rules and forms seemingly requiring notarization are completely consistent with § 1746, which, after all, does not prohibit notarization requirements. Section 1746 merely states that a non-notarized statement can satisfy that requirement. By leaving notarization requirements in the law and permitting the creation of new ones, millions of litigants and others dealing with the government, must make a choice, “Do I do it the easy way, spend twenty minutes and \$3.00 to get the thing notarized, or do I take a chance by sending in a § 1746 declaration even though they ask for notarization? If a document gets sent back because it has a declaration instead of a notary stamp, do I then challenge the government at great personal cost, or take the path of least resistance and just get the document notarized?” The easy way is very attractive

from the Office of Banks and Banking must be notarized, 12 C.F.R. §§ 404.14, 1102.102 (2006), requests under the Privacy Act to the Office of Banks and Banking allow an individual to substitute an affidavit for a notarized statement. 12 C.F.R. § 913.3 (2006). To receive records on individuals from the Office of the Secretary of the Treasury, the request by mail must include a copy of a driver’s license, or alternatively, a notarized statement affirming the individual’s identity. 31 C.F.R. pt. 1, subpt.C, apps. A-L, N (2006). National Driver Register records requests must be made using a proper NDR form, or by way of a notarized letter. 46 C.F.R. §§ 10.201, 12.02–.04. Other records requests also require either a driver’s license or a notarized statement. *See*, 12 C.F.R. § 261a.5 (2006) (Department of Banks and Banking); 36 C.F.R. § 903.3 (2006) (Pennsylvania Avenue Development Corporation); 45 C.F.R. § 705.4 (2006) (Commission on Civil Rights).

¹³² This includes records from the Department of Defense. 32 C.F.R. § 286.22 (2006). *See also* 6 C.F.R. § 5.21(d) (2006) (Department of Homeland Security); 19 C.F.R. § 201.25 (2006) (United States International Trade Commission); 22 C.F.R. §§ 171.12, 171.32 (2006) (Department of State); 32 C.F.R. § 298.4 (2006) (Defense Investigative Service); 32 C.F.R. § 311.6 (2006) (Office of the Secretary of Defense); 32 C.F.R. § 318.6 (2006) (Defense Threat Reduction Program); 32 C.F.R. §§ 320.4–.5 (2006) (National Geospatial Agency); 32 C.F.R. § 322.5 (2006) (National Security Agency); 32 C.F.R. §§ 326.6.8 (2006) (National Reconnaissance Office); 32 C.F.R. § 701.8 (2006) (Department of the Navy); 32 C.F.R. § 806b.13 (2006) (Air Force); 32 C.F.R. § 1801.13 (2006) (National Counterintelligence Center); 32 C.F.R. § 1901.13 (2006) (Central Intelligence Agency); 34 C.F.R. § 5b.5 (2006) (Department of Education); 40 C.F.R. § 1602.2 (2006) (Chemical Safety and Hazard Board); 45 C.F.R. § 5b.5 (2006) (Department of Health and Human Services); 45 C.F.R. § 613.2 (2006) (National Science Foundation).

¹³³ For example, records from the Defense Information Systems Agency “may require” a notarized statement “if the sensitivity of the data warrants.” 32 C.F.R. § 316.6 (2006). *See also* 5 C.F.R. §§ 1205.13, 1302.2 (2006) (Administrative Personnel); 10 C.F.R. § 1008.4 (2006) (Department of Energy); 17 C.F.R. § 146.4 (2006) (Commodity Futures Trading Commission); 18 C.F.R. § 3b.222 (2006) (Federal Energy Regulatory Commission); 32 C.F.R. § 1665.2. (2006) (Selective Service); 40 C.F.R. § 16.4 (2006) (Environmental Protection Agency); 41 C.F.R. § 51-9.302 (2006) (Department of Public Contracts and Property Management); 45 C.F.R. § 2508.14 (2006) (Corporation for National and Community Service).

¹³⁴ *Id.*

here; it is not surprising that, for example, no new lawyer has sued the Supreme Court or the Circuits to force them to accept an unnotarized application, or to test the “oath of office” exception’s applicability to attorneys.

Cases testing the scope of § 1746 in novel areas are rare. Yet, a lack of knowledge about § 1746 on the part of litigants means that the scope and validity of § 1746 is frequently questioned in routine cases where it is clearly applicable. A stream of appellate cases deals with the effectiveness of § 1746 declarations in the face of litigants and sometimes judges unfamiliar with the law.¹³⁵

The lack of an incentive for litigants to test the law coupled with a general lack of knowledge about § 1746 cries out for a positive law solution. The simplest solution would be to remind the government and litigants of § 1746 by positive law. Every title of the Code of Federal Regulations should have a definition of “affidavit” and “notarization” consistent with § 1746,¹³⁶ so, too, should the Federal Rules of Procedure.¹³⁷

IV. APPLICATION OF THE FEDERAL PERJURY STATUTES

In addition to the underutilization of the statute, when it is utilized, the criminal provisions punishing false statements have gaps. The affidavit substitute of § 1746

¹³⁵ See, e.g., *United States v. Thomas*, 128 F.App’x 986, 992 (4th Cir. 2005) (“[The document] does not appear to have been re-notarized. However, § 1746 does not require a notarized statement.”); *Vineyard v. Dretke*, 125 F.App’x 551, 553 (5th Cir. 2005) (“Vineyard’s unsworn declaration under penalty of perjury was competent sworn testimony under 28 U.S.C. § 1746, and it carried the same ‘force and effect’ as an affidavit.”); *United States v. Bueno-Vargas*, 383 F.3d 1104 (9th Cir. 2004) (questioning whether § 1746 declaration counts for purposes of “oath or affirmation” required for search warrant); *Hartsfield v. Colburn*, 371 F.3d 454, 456 (8th Cir. 2004) (“We agree with Hartsfield that the allegations made in his verified complaints satisfy affidavit requirements [in] 28 U.S.C. § 1746.”); *Hart v. Lutz*, 102 F.App’x 10, 13 (6th Cir. 2004) (“Plaintiff’s complaint was not verified, and two ‘affidavits’ submitted by him were not sworn or otherwise subscribed pursuant to 28 U.S.C. § 1746.”); *Lyons-Bey v. Pennell*, 93 F.App’x 732, 733-34 (6th Cir. 2004) (“[L]yons-Bey explicitly states that ‘under the penalty of perjury the foregoing is true and correct, under 28 U.S.C. § 1746.’ Lyons-Bey’s statement satisfies § 1746 as he even referenced the statute in his declaration of service of process.”); *Betouche v. Ashcroft*, 357 F.3d 147, 150 n.5 (1st Cir. 2004) (“Moreover, the Betouche letter failed to comply with 28 U.S.C. § 1746, which arguably may have permitted, in lieu of an affidavit, an ‘unsworn declaration . . . in writing of such. . . .’”); *Sterling China Co. v. Glass, Molders, Pottery, Plastics & Allied Workers Local 24*, 357 F.3d 546, 557 n.1 (6th Cir. 2004) (Nelson, J., concurring) (“The district court questioned whether ‘declarations’ can be given any consideration in summary judgment proceedings, since Rule 56(c) . . . authorizes consideration of ‘affidavits,’ not declarations. Under 28 U.S.C. § 1746, however, an unsworn declaration has the same force and effect as an affidavit if it recites . . . that it was executed ‘under penalty of perjury.’”); *Hart v. Hairston*, 343 F.3d 762, 764 n.1 (5th Cir. 2003) (“[A] declaration [u]nder 28 U.S.C. § 1746 . . . is competent sworn testimony for summary-judgment purposes.”); *Fenlon v. Thomas*, 69 F.App’x 659, 659 (5th Cir. 2003) (“[T]he affidavit Fenlon submitted in opposition to Thomas’s summary judgment motion was competent summary judgment evidence under 28 U.S.C. § 1746. . . .”).

¹³⁶ See *supra* note 3 and accompanying text.

¹³⁷ See FED. R. BANKR. P. 1008 (“All petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U.S.C. § 1746.”).

is intended to save the cost of notarization, not to let declarants lie with impunity. The required statement itself recognizes that false statements are intended to be subject to penalty of perjury. Yet, a series of court decisions make it more difficult to convict people who make false statements under § 1746 than in a notarized affidavit.

18 U.S.C. § 1621(2) defines the federal crime of perjury to include false declarations under § 1746. It provides:

Whoever . . . in any declaration certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true . . . is guilty of perjury.¹³⁸

In addition, declarations under § 1746 are covered by the judicial perjury statute, 18 U.S.C. § 1623(a), which states:

Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration [may be convicted of perjury].¹³⁹

Although the parenthetical language was added when § 1746 was enacted in 1976,¹⁴⁰ some federal courts have construed § 1623 in such a way as to make it virtually inapplicable to § 1746 statements.

A. “Context Less Formal Than A Deposition”

Based on *Dunn v. United States*,¹⁴¹ a Supreme Court case apparently requiring a high level of formality to trigger § 1623, some courts hold that § 1746 statements do not count because they are informally executed. Typically they are signed at home or in a business office, rather than in court.

In *Dunn*, the Court found § 1623(a) inapplicable to statements made under oath, but not associated with any specific federal judicial proceeding.¹⁴² Dunn testified before a grand jury investigating one Musgrave.¹⁴³ Months later, before a stenographer and after being sworn by a notary public, he made statements inconsistent with his grand jury testimony in the office of Musgrave’s private defense attorney.¹⁴⁴ There was no particular indication that the statements would be presented as evidence in any court proceeding.¹⁴⁵ However, a transcript of the

¹³⁸ 18 U.S.C. § 1621(2) (2000).

¹³⁹ 18 U.S.C. § 1623(a) (2000).

¹⁴⁰ H.R. REP. NO. 94-1616, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5644, 5646.

¹⁴¹ 442 U.S. 100 (1979).

¹⁴² *Id.* at 113.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 112.

statement was later submitted in support of Musgrave's motion to dismiss the indictment.¹⁴⁶ Subsequently, Dunn was indicted for perjury under § 1623.¹⁴⁷

The government argued that § 1623(a) covered all affidavits,¹⁴⁸ but a unanimous Court disagreed, holding that a false affidavit drafted in an attorneys office on behalf of a third party could not be prosecuted under that section.¹⁴⁹ The outcome in *Dunn* was undoubtedly correct; a false affidavit submitted in connection with, say, a high school disciplinary proceeding or a state workers' compensation action, could well wind up, at some future time or place, as evidence before a federal court. Yet, it is clear that such a person has not made a false statement in a federal court proceeding, the conduct Congress meant to define as perjury under § 1623(a).

If a statement under oath with a transcriptionist present is "less formal than a deposition" then it is likely that the circumstances surrounding *any* out-of-court signing of a declaration would be even less formal. Thus, under such a reading of *Dunn*, § 1746 declarations could never be the basis of a prosecution under § 1623. On this logic, several courts have held that a statement which, like that in *Dunn* was made out of court, but unlike that in *Dunn*, was intended to be introduced in court, was not subject to § 1623.¹⁵⁰

For example, in *United States v. Lamplugh*,¹⁵¹ the U.S. District Court for the Middle District of Pennsylvania dismissed a perjury indictment based on a false declaration in support of the return of property.¹⁵² The court concluded that a declaration for the return of property could never rise to the level of formality required of an ancillary proceeding to give rise to a prosecution under § 1623.¹⁵³

Similarly, in *United States v. Savoy*,¹⁵⁴ the defendant was charged with perjury after it became apparent that he lied in a declaration filed in connection with a civil lawsuit.¹⁵⁵ The court cited *Dunn*, and concluded that § 1623 did not apply to "statements made in contexts less formal than a deposition."¹⁵⁶ An affidavit for civil litigation is, admittedly, less formal than a deposition.¹⁵⁷

¹⁴⁶ *Id.* at 103.

¹⁴⁷ *Dunn*, 442 US at 103.

¹⁴⁸ *Id.* at 110.

¹⁴⁹ *Id.* at 111-112. "We cannot conclude here that Congress in fact intended or clearly expressed an intent that § 1623 should encompass statements made in contexts less formal than a deposition. Accordingly, we hold that petitioner's [out of court] declarations were not given in a proceeding ancillary to a court or grand jury within the meaning of the statute." *Id.* at 113.

¹⁵⁰ See, e.g., *United States v. Lamplugh*, 17 F. Supp. 2d 354 (M.D. Pa. 1998).

¹⁵¹ 17 F. Supp. 2d 354 (M.D. Pa. 1998).

¹⁵² *Id.* at 355.

¹⁵³ *Id.* at 357.

¹⁵⁴ 38 F. Supp. 2d 406 (D. Md. 1998).

¹⁵⁵ *Id.* at 409.

¹⁵⁶ *Id.* at 411 (quoting *Dunn*, 442 U.S. at 113 (1979)).

¹⁵⁷ *Id.* at 412.

Finally, the U.S. District Court for the Northern District of Illinois followed this approach in *United States v. Benevolence International Foundation*,¹⁵⁸ holding § 1623 inapplicable to unsworn declarations submitted in connection with an application for a preliminary injunction.¹⁵⁹ “In this case, defendants are being prosecuted for out-of-court declarations made by [a defendant], signed under penalty of perjury, and attached to memoranda filed . . . in support of a motion for a preliminary injunction in a civil case. *Dunn* makes clear that this was not a context as formal as a deposition. . . . Accordingly, the indictment is dismissed.”¹⁶⁰

The simultaneous existence of a unanimous opinion in *Dunn* and a specific reference to § 1746 in § 1623(a) creates a conundrum: *Dunn* requires a certain level of formality to sustain a prosecution under § 1623(a) and § 1746 is designed to be executed informally and yet is specifically included in § 1623(a). *Dunn*, § 1746, and § 1623(a) can be reconciled by interpreting the “less formal than a deposition” language from *Dunn* as not referring to the pomp and circumstance surrounding the taking of the particular statement, but rather to the statement’s connection to a formal proceeding. After all, while admirable advocacy and not affirmatively illegal, no law, regulation, or rule allows a private attorney to take *ex parte* testimony of a potential witness; the interview was not formally connected to any federal case.

The Fourth Circuit followed this logic, distinguishing *Dunn* in a case involving a § 1746 declaration because the statement was clearly headed to court.¹⁶¹ In *United States v. Johnson*,¹⁶² the defendant filed a § 2254 petition which was alleged to contain false statements.¹⁶³ The court rejected Johnson’s argument that his petition did not rise to the level of a “proceeding” before the court, concluding that if it followed Johnson’s reasoning it would be contrary to the plain meaning of § 1623 and would also render much of the statute meaningless.¹⁶⁴

The *Johnson* court found *Dunn* inapplicable because filing a habeas corpus petition was not an “ancillary proceeding.”¹⁶⁵ Instead, Johnson’s petition directly triggered the formalities of the judicial process, and therefore § 1623 applied.¹⁶⁶ *Dunn* was concerned with “the scope of the term ancillary proceeding in § 1623,”¹⁶⁷ where perjury convictions could be obtained for “any statements made under oath for submission to a court, whether given in an attorney’s office or in a local bar and grill,

¹⁵⁸ No. 02 CR 414, 2002 WL 31050156 (N.D. Ill. Sept. 13, 2002).

¹⁵⁹ *Id.* at *8.

¹⁶⁰ *Id.*

¹⁶¹ *United States v. Johnson*, 325 F.3d 205 (4th Cir. 2003).

¹⁶² *Id.*

¹⁶³ *Id.* at 206-207. Defendant lied about the date he filed a habeas corpus petition to get around the Antiterrorism and Effective Death Penalty Act’s time bar. Defendant alleged his petition was dated March, 1997, but the finder of fact found it was dated March 2000. *Id.*

¹⁶⁴ *Id.* at 209.

¹⁶⁵ *Id.* at 210.

¹⁶⁶ *Id.* at 209.

¹⁶⁷ *Johnson*, 325 F.3d at 210 (citing *Dunn*, 442 U.S. at 102).

fell within the ambit of § 1623.”¹⁶⁸ Johnson’s case did not implicate the “ancillary proceeding” part of § 1623 because his false material statements were made directly to the court.¹⁶⁹ Thus, in the Fourth Circuit, a habeas corpus petition satisfies the formality requirements underscored in *Dunn*.¹⁷⁰

Johnson offers, by some length, the more persuasive analysis. If the *Savoy/Lamplugh/Benevolence* interpretation of *Dunn* is correct, then false declarations can never be the basis of a § 1623 prosecution, in spite of express statutory language saying they can. In addition, *Dunn* did not involve a § 1746 statement, so courts should hesitate to read it as banning, *sub silentio*, without briefing or argument, a body of prosecutions contemplated by the statute’s plain terms. All that being said, the Court’s language in *Dunn* is strong enough that three reasonable courts interpreted it as imposing a limitation. Given the judicial division, a legislative fix would be appropriate.

B. “Under Oath”

Notwithstanding the existence of § 1621, covering false statements in all declarations under § 1746, § 1623 liability remains important because of the special procedural provisions of the latter statute. Perjury convictions are difficult to obtain.¹⁷¹ Under § 1621, the prosecutor must prove both falsity and criminal intent.¹⁷² In § 1623, Congress eased the burden of proving falsity in cases where two sworn statements were flatly inconsistent.¹⁷³ Section 1623(c) merely required that the government prove that one statement is inconsistent with another statement; it need not prove which is false.¹⁷⁴ However, by its terms, § 1623(c) applies only to statements made “under oath.” Unlike some other provisions of the perjury laws, § 1623(c) does not mention § 1746.

Using a plain language analysis, the Ninth Circuit, in *United States v. Jaramillo*,¹⁷⁵ held that perjury under § 1623(c) could not be established unless the relevant statements were made “under oath.”¹⁷⁶ In *Jaramillo*, two inconsistent statements were shown.¹⁷⁷ The first was made out of court, signed by Jaramillo under penalty of perjury.¹⁷⁸ Although the statement was notarized, there was no

¹⁶⁸ *Id.* (citing *Dunn*, 442 U.S. at 107).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* Cf. *United States v. Gomez-Vigil*, 929 F.2d 254, 257 (6th Cir. 1991) (affirming conviction under § 1621 based on § 1746 declaration without addressing *Dunn* question).

¹⁷¹ See generally Harrison, *supra* note 20.

¹⁷² 18 U.S.C. § 1621 (2000); cf. *United States v. Porter*, 994 F.2d 470, 473 n.5 (8th Cir. 1993). Section 1621, unlike § 1623, requires proof by two witnesses. Harrison, *supra* note 20, at 408-09.

¹⁷³ 18 U.S.C. § 1623 (2000); S. REP. NO. 91-617, at 59 (1969).

¹⁷⁴ *Id.*

¹⁷⁵ 69 F.3d 388 (9th Cir. 1995).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 389.

evidence that the statement was made under oath.¹⁷⁹ The statement was made to assist the Drug Enforcement Administration's investigation of a drug trafficker, and Jaramillo knew it was going to be presented to a grand jury.¹⁸⁰ Jaramillo's subsequent trial testimony contradicted his out-of-court statement.¹⁸¹ The court concluded that § 1623(c) applied only if the two declarations were made "under oath."¹⁸² Since Jaramillo's first statement was not, he could not be convicted of perjury using § 1623(c).¹⁸³

In *United States v. Moriel*,¹⁸⁴ the U.S. District Court for the Southern District of Iowa disagreed, finding that a statement by a defendant did not have to be made under oath to sustain a conviction for perjury under § 1623(c).¹⁸⁵ Moriel was convicted of perjury based on statements made in a bankruptcy petition where she failed to list all of the businesses she owned.¹⁸⁶ The petition was inconsistent with her subsequent grand jury testimony, where she testified she owned businesses not listed on the bankruptcy petition.¹⁸⁷

The court denied a motion to dismiss a perjury indictment, finding that a bankruptcy petition submitted under penalty of perjury triggered § 1623(c).¹⁸⁸ The petition could be used to prove a perjury conviction because of the formal context under which the document was submitted: the defendant herself had submitted the petition directly to the court with the assistance of her attorney.¹⁸⁹ Moreover, it was reasonable to believe that submission of a perjured affidavit could lead to prosecution for perjury.¹⁹⁰ Although the decision is persuasive as a matter of policy, it did not explain how the language in § 1623(c) "under oath" could be interpreted to mean "under oath or not under oath."¹⁹¹

Jaramillo's outcome is supported by a powerful plain language argument, but the language is probably an oversight rather than a congressional judgment. Perhaps Congress wanted false statements to be covered by § 1623(a), but, because of their relative informality, not to be subject to the special rule of § 1623(c). Much more likely is that Congress meant § 1623(c) to apply to § 1746 declarations, but did not

¹⁷⁹ *Id.* at 391.

¹⁸⁰ *Id.* at 389.

¹⁸¹ *Id.*

¹⁸² *Jaramillo*, 69 F3d at 389.

¹⁸³ *Id.* at 392.

¹⁸⁴ 201 F. Supp. 2d 952 (S.D. Iowa 2002).

¹⁸⁵ *Id.* at 955.

¹⁸⁶ *Id.* at 953.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 955-956.

¹⁸⁹ *Id.*

¹⁹⁰ *Moriel*, 201 F.Supp.2d at 956.

¹⁹¹ *Id.*

write it in. Even in terms of ceremonial formality, there is no real difference between signing under penalty of perjury and having a notary stamp the page.

C. Legislative Repair

Section 1623(a) should be amended to make clear that the decision in *Johnson*¹⁹² should be applied elsewhere. This could be done by adding the language: “This section applies to any pleading, motion, petition, affidavit or other document that the signer knows will be filed presented as evidence in court or to a grand jury.”

In addition, § 1623(c) should be amended to make it clear that it applies to § 1746 declarations. On its face, § 1623(a) covers false statements in § 1746 declarations,¹⁹³ and § 1623(c) is just a method of proving a violation of § 1623(a). Amending § 1623(c) by adding the parenthetical language of § 1623(a) would make it clear that § 1623(c) applies. This is what § 1623(c) would look like:

in any proceedings before any court the defendant under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28 United States Code) has knowingly made two or more declarations which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false.

V. CONCLUSION

Congress attempted to limit the need to use notaries and to make unsworn statements the equivalent of statements made under oath. Despite the merit of the idea, § 1746 has not worked as anticipated. The changes proposed in this article would save consumers money while making it easier to prosecute people who lie to the court.

¹⁹² *Johnson*, 325 F.3d 205.

¹⁹³ See 18 U.S.C. § 1623(a) (2000) (mentioning § 1746 and talking about books and papers).

APPENDIX

Sections of the Code of Federal Regulations Requiring Notarization

1. In the Federal Employees Retirement System, a married employee may not elect a self-only annuity without first obtaining notarized spousal consent. 5 C.F.R. § 842.606(a) (2006). Here, spousal consent is required to certify the spouse gave consent, signed and acknowledged the absence of any coercion. 5 C.F.R. § 842.606(c) (2006).
2. Other forms involving election of retirement benefits require notarization. 5 C.F.R. §§ 842.704(a), 1690.12(b) (2006).
3. A parent or legal guardian may not request information pertaining to their minor child without furnishing “a certified or authenticated (e.g. notarized) . . . document establishing parentage” 4 C.F.R. §83.12(c)(1) (2006).
4. Any pleadings or statements under Title 7 on Agriculture must first be notarized, together with an exactly worded verification form 7 C.F.R. § 47.20(h) (2006).
5. When parties go to arbitration relating to the sale of milk or its products, the parties in arbitration must submit a notarized document to the Agriculture Administer of the proceeding. 7 C.F.R. § 900.113(a)(2) (2006).
6. Additionally, the arbitrator must sign the award in the presence of a notary public. 7 C.F.R. § 900.116(a)(4) (2006).
7. A farmer must apply for federal rental assistance with a notarized affidavit. 7 C.F.R. § 1944.682 (2006).
8. In order for a boat to transport livestock, a notarized statement from an engineer is required “to certify to the rate of air exchange in each compartment.” 9 C.F.R. § 91.19 (2006).
9. In order to import pet birds, the owner of the birds must submit a notarized declaration under oath or affirmation (witnessed by a department inspector) stating the bird has not been in contact with other birds. 9 C.F.R. § 93.101(c)(2)(ii)(E)(1) (2006).
10. Certain kinds of certification for power plant operators must be notarized. This would include a certification that “a new power plant will have the ‘capability to use alternate fuel’” 10 C.F.R. § 500.2 (2006).
11. Any person who files a complaint with the Federal Election Commission alleging a violation of a statute of regulation, must have the complaint notarized. 11 C.F.R. § 111.4; *see also* 2 U.S.C.A. § 437g (a)(1) (2006).
12. If a bank increases its permanent capital, it must send a notarized notification to the OCC. 12 C.F.R. § 5.46(i)(3) (2006).
13. Under Title 14 on Aeronautics and Space, applications for permits to Foreign Air Carriers must be notarized. 14 C.F.R. § 211.11 (2006).
14. An application to receive an allocation of Tariff Rate imported Worsted Wool Fabric must be notarized. 15 C.F.R. § 335.3(d)(4) (2006).
15. A request to modify the amount of worsted wool fabric stated in the application must also be notarized. 15 C.F.R. § 335.5 (2006).
16. Applications for integrated licenses through Federal Energy Regulatory Commission must be notarized. 18 C.F.R. § 5.18(a)(4)(i) (2006).

17. A consumer harmed by identity theft may not be able to obtain relief without providing a notarized Commission Identity Theft Affidavit. 16 C.F.R. § 603.3(c)(3) (2006).
18. Documents electronically filed with the Securities and Exchange Commission by individuals who do not have a Central Index Key Code must be notarized and then faxed. 17 C.F.R. § 232.10(b)(2) (2006).
19. All documents that must be verified under Title 18 – Conservation of Power and Water Resources must also be notarized. 18 C.F.R. §§ 12.13, 131.20 (2006).
20. A subpoena for records from the Tennessee Valley Authority must be notarized. 18 C.F.R. § 1308.53 (2006).
21. Power of Attorney acceptance of cash deposits or obligations of the United States in lieu of sureties on bonds must be notarized. 19 C.F.R. § 113.40(b) (2006).
22. Any time an airplane is required to give advance notice of landing, it must first file a notarized request to land the aircraft. 19 C.F.R. § 122.25(b)(2006).
23. A representative appearing at administrative hearings involving the Drug Enforcement Agency may be required to produce a notarized Power of Attorney. 21 C.F.R. § 1316.50 (2006).
24. An immigrant visa applicant relying on an offer of prearranged employment must provide confirmation of the relevant information that is sworn by a notary or an authorized employee of the employer. 22 C.F.R. § 40.41(e) (2006).
25. A person who runs an exchange visitor program must provide a notarized certificate. 22 C.F.R. pt. 62, app. A-B (2006).
26. A married person may not join the Peace Corp unaccompanied by his or her spouse unless a notarized letter is produced acknowledging that he or she is aware of the applicant spouse's intention to serve as a peace corps volunteer. 22 C.F.R. § 305.2 (2006).
27. A developer working with the Interstate Land Sales Registration Program must sign a notarized annual report of activity. 24 C.F.R. § 1710.310 (2006).
28. Under the Bureau of Indian Affairs a non-Indian probable heir or beneficiary may give up his or her interest in a trust or restricted lands by submitting a notarized statement renouncing interest in the estate. 25 C.F.R. § 15.109 (2006).
29. Petitions involving tribal government must be notarized. 25 C.F.R. § 82.7 (2006).
30. Other Indian affairs provisions require notarization. 25 C.F.R. §§ 115.407, .409 (2006) (involving emancipated minors changing their address).
31. In order to access Indian trust funds, applicants must verify their identity by signing in front of a notary or in front of a Department of Interior employee. 25 C.F.R. § 115.429 (2006).
32. The Bureau of Indian affairs may restrict access to an IIM account if it receives from a third party a notarized contract with the account holder where the IIM funds are being used as security or collateral for a transaction. 25 C.F.R. § 115.601 (2006).

33. Corporations provide a notarized statement in order to conduct mineral development on Indian land. 25 C.F.R. §§ 211.23, 225.29 (2006).
34. Grazing permits issued by the office of the Navajo and Hopi Relocation Department may be assigned for transfer through a notarized document. 25 C.F.R. § 700.715 (2006).
35. The IRS requires some elections to be notarized. Treas. Reg. § 1.42-8 (as amended in 2004); Treas. Reg. § 1.1042-1T (1986).
36. Notarization is required of translated statements under the Foreign Agents Registration Act of 1938. 28 C.F.R. § 5.206 (2006).
37. Notarization is required for registration of people having knowledge of foreign espionage, counterespionage, or sabotage matters under the Act of August 1, 1956. 28 C.F.R. § 12.24 (2006).
38. Petitions to the Department of Interior regarding areas unsuitable for mining must be notarized. 30 C.F.R. § 764.13 (2006).
39. Title 30 requires a notarized statement in other specific situations as well. *See* 30 C.F.R. § 800.40 (2006).
40. Some kinds of appraisals under Title 30 on Mineral Resources require notarization. 30 C.F.R. §§ 882.12-.13 (2006).
41. A legal representative for an incompetent person who is authorized to receive awards from the foreign claims settlement act must have a notarized statement. 31 C.F.R. § 250.4 (2006).
42. A power of attorney form from the treasury department must be notarized. 31 C.F.R. § 224.4 (2006).
43. Requests for disinterment from the Arlington National Cemetery or any other National Cemetery must be notarized. 32 C.F.R. § 553.19 (2006) and 38 C.F.R. § 38.621 (2006).
44. Individuals desiring to purchase National Match Grade M1 service rifles must submit a notarized application. 32 C.F.R. § 621.2 (2006).
45. Applications for loans of army material must be notarized. 32 C.F.R. pt. 623, apps. E-F (2006).
46. A civilian attorney may become qualified to represent defendant at military commissions. The application may be notarized, or include an affidavit. 32 C.F.R. § 14.3 (2006). But, the attorney must be able to furnish a notarized statement to defendants attesting to their qualification. 32 C.F.R. pt. 14, app. B (2006).
47. The application for compensation of Certain Former Operatives Incarcerated by the Democratic Republic of Vietnam must be notarized. 32 C.F.R. §§ 270.2, 270.7, pt. 270, app. A (2006).
48. A dependent traveling with someone else in the Department of Defense in a military capacity must have a notarized waiver of liability. 32 C.F.R. pt. 625, app. A (2006).
49. Anyone in the military applying for a substitution of an administrative form or discharge for a punitive discharge or dismissal must include at least three notarized character affidavits. 32 C.F.R. § 719.155 (2006).
50. Application for a license to enter deepwater ports in the United States must be notarized. 33 C.F.R. § 148.105 (2006).
51. Individual and Fleet Certificates for vessels and barges that show financial responsibility for water pollution must be notarized if they are copies of the original. 33 C.F.R. §§ 138.90, .110, .120 (2006).

52. A scholarship recipient under the Teacher Quality Enhancement Grants Program must provide a notarized statement explaining whether the recipient is employed along with contact information. 34 C.F.R. §§ 611.46-.47 (2006).
53. An individual may apply for a commercial fishing lifetime access permit at the Glacier Bay National Park and Preserve only with a notarized affidavit. 36 C.F.R. § 13.65 (2006).
54. Private property owners who wish to object to nominations of their land for the state Historic Preservation programs must have their objection notarized. 36 C.F.R. §§ 60.6, .9-.10, 62.4, 65.5 (2006).
55. Export of wood product certificates signed by the Chief Executive Officer of a lumber company must be notarized. 36 C.F.R. § 223.187 (2006).
56. Under the Forest Resources Conservation and Shortage Relief Act Program of 1990, an application for a historic export quota exemption must be notarized. 36 C.F.R. § 223.189-.190 (2006).
57. A lumber company the exports unprocessed timber must have a notarized certification. 36 C.F.R. § 223.191-.192 (2006).
58. An application to be exempted from the prohibition against indirect lumber substitution must be notarized. 36 C.F.R. § 223.203(b)(3) (2006).
59. The Department of Veterans Affairs will accept a signature by a mark or thumbprint if it is certified by a notary public, but not if it is accompanied by a declaration. 38 C.F.R. § 3.2130 (2006).
60. Certification to the execution of demand for payment forms issued under the World War Adjusted Compensation Act is required. Certification is accepted by way of an official seal of the United States postmaster, notary, an executive of a trust company or other person authorized to administer oaths. 38 C.F.R. § 10.20 (2006).
61. A notary is required for redemption under the World War Adjusted Compensation Act. 38 C.F.R. § 11.85 (2006).
62. Under Postal Service Regulations, notice of intent to establish operations under suspension of private express statutes must be notarized. 39 C.F.R. § 320.3 (2006).
63. A trust agreement to pay financial responsibility of hazardous waste injection wells must be notarized. 40 C.F.R. § 114.70 (2006).
64. A trust agreement for owners and operators of hazardous waste treatment must be notarized. 40 C.F.R. § 264.151(a)(2) (2006).
65. A person who possesses rights to exclusive use or compensation under FIFRA may transfer their rights, but the submitter must also include a notarized statement. 40 C.F.R. § 152.98(b) (2006).
66. Transfer of pesticide registration of a product to another person is only allowed if it is accompanied by a notarized statement. 40 C.F.R. § 152.135(c) (2006).
67. A guarantee of financial responsibility of the owner of an underground storage tank must contain a notarized statement. 40 C.F.R. §§ 280.96, .111 (2006).
68. An owner of an underground storage tank must establish a standby trust fund that is notarized. 40 C.F.R. § 280.103 (2006).
69. Transfer of ownership of an incinerator must be accompanied by a notarized statement. 40 C.F.R. § 761.70(d)(8) (2006).

70. Transfer of ownership of a chemical waste landfill must be accompanied by a notarized statement. 40 C.F.R. § 761.75(c)(7) (2006).
71. An election made by a Medicare beneficiary must be notarized. 42 C.F.R. § 403.724
72. Under the Department of Land Resource Management, “[a]pplications for preference rights under the Act of February 14, 1920” must be notarized. 43 C.F.R. § 2613.2 (2006).
73. An application for unit agreement under the section on Onshore Oil and Gas Unit Agreements must have been either notarized or witnessed. 43 C.F.R. § 3181.3 (2006).
74. In order to acquire a delinquent co-claimant’s interest in a mining claim, an individual must submit a notarized affidavit explaining how and when he or she delivered the written notice to the delinquent co-claimant. 43 C.F.R. § 3837.24(a) (2006).
75. In order to establish paternity for all cases referred to the IV-D agency, if paternity is voluntarily acknowledged by both parents, the parents’ signatures must be authenticated by a notary or a witness. 45 C.F.R. § 303.5 (2006).
76. An applicant for legal assistance from the legal services corporation who is unable to verify citizenship may submit a notarized statement signed by a third party. 45 C.F.R. § 1626.6 (2006). Presumably, a declaration would not be accepted.
77. An oath for Qualification of a Corporation as a Citizen of the United States under the Act of September 2, 1958 must be notarized. 46 C.F.R. pt. 68, subpt. 68.01, apps. A–B.
78. An oath for Qualification of a Not-For-Profit Oil Spill Response Co-Operative must be notarized. 46 C.F.R. pt. 68, subpt. 68.05, apps. A–B (2006).
79. Affidavits required to make personal flotation device components must be notarized. 46 C.F.R. § 164.019-11 (2006).
80. Many different forms involving shipping must be notarized. For example, subsidy vouchers must be notarized. 46 C.F.R. §§ 252.41, 282.31 (2006).
81. Proof of loss for war risk insurance must also be notarized. 46 C.F.R. § 309.204 (2006).
82. A corporation may prove its United States citizenship with a notarized Affidavit of U.S. Citizenship. 46 C.F.R. § 355.2 (2006).
83. A sample qualified trade affidavit must be notarized. 46 C.F.R. pt. 390, app. V (2006).
84. For purposes of litigation, the complaint form and information checklist before a federal maritime commission must be notarized. 46 C.F.R. pt. 502, subpt. E, exh. 1 (2006).
85. An Application for Refund of or Waiver for Freight Charges Due to Tariff Error must be notarized. 46 C.F.R. pt. 502, subpt. F, exh. 1 (2006).
86. Special docket application for permission to refund or waive freight charges must be notarized. 46 C.F.R. § 502.271 (2006).
87. Application for Refund or Waiver of Freight Charges Due to Tariff or Quoting Error must be notarized. 46 C.F.R. pt. 502, subpt. F, exh. 1 (2006).
88. The Small Claim Form for Informal Adjudication and Information Checklist must be notarized. 46 C.F.R. pt. 502, subpt. S, exh. 1 (2006).

89. Respondents Consent Form for Informal Adjudication must be notarized. 46 C.F.R. pt. 502, subpt. S, exh. 2 (2006).
90. Installation of other than “fully protected” system premises wiring that serves more than four subscriber access lines requires notarized affidavit. 47 C.F.R. § 68.215(e) (2006).
91. Payments to subcontractors under the Federal Acquisition Regulations System involving a cash equivalent security must include a signed notarized statement by the contractor. 48 C.F.R. § 28.106-8 (2006).
92. Acceptance of real property under the Federal Acquisition Regulations System must be notarized. 48 C.F.R. § 28.203-3(d) (2006).
93. A release of lien must also be notarized. 48 C.F.R. § 28.203-5(a) (2006).
94. Assignments by an individual under the Federal Acquisition Regulations System must be notarized. 48 C.F.R. §§ 32.805(a)(3), 227.7010(b) (2006).
95. Proof of service for a subpoena under the Federal Acquisition Regulations System requires a notary if service is made by someone other than a U.S. Marshal or a deputy. 48 C.F.R. § 6101.20(f) (2006).
96. The form for determining minority business enterprise eligibility for a disadvantaged business enterprise in an airport, concessions, or other department of transportation financial assistance programs must be notarized. 49 C.F.R. pt. 23, sch. A-B (2004); 49 C.F.R. §§ 26.61, .63, .67 (2006).
97. A railroad company’s Railroad and Illness Summary must be notarized. 49 C.F.R. § 225.37 (2006). A person seeking to become a certified locomotive engineer must sign a notarized National Driver Register Request. 49 C.F.R. pt. 240, app. C (2006).
98. A Power of Attorney Agreement under the National Highway Traffic Safety Administration must be notarized. 49 C.F.R. pt. 591, app. C (2006).
99. Any person wishing to register as an importer of motor vehicles not originally manufactured to conform to all applicable federal motor vehicle safety standards must file a notarized application. 49 C.F.R. § 592.5(a)(12) (2006).
100. Demands for arbitration under the Department of Transportation must include a notarized verification. 49 C.F.R. § 1108.7(a) (2006).
101. Under the Department of Transportation, some documents submitted regarding securities, security interests, and financial structures must be notarized. 49 C.F.R. § 1177.3 (2006). The Department of Wildlife and Fisheries requires some documentation involving boats to be notarized. 50 C.F.R. §§ 622.4, 679.40-41 (2006).