statement that he did not intend to mislead McCain – and not to the falsity of the letter itself.[834] Babbitt stands by his denial of intending to mislead McCain. However, the text of the letter, the circumstances surrounding the drafting and issuance of the letter, and Babbitt's subsequent conduct concerning the letter provide circumstantial evidence that Babbitt intended to mislead McCain.[835]

1) The Text of Babbitt's Letter to McCain Shows He Misled McCain

A strong argument can be made that the letter is most naturally read as a flat denial by Babbitt that he had invoked Ickes's name in conversation with Eckstein.[836] Babbitt's letter directly addresses Eckstein's allegations, and "regretfully dispute[s]" Eckstein's "assertion that I told him that Mr. Ickes instructed me to issue a decision in this matter without delay." While those words literally deny only the precise statement that he told Eckstein that Ickes "instructed" him to make a decision "without delay," Babbitt's letter does nothing to signal that these

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[834]The allegedly false statement Babbitt made in the McCain letter could not be the subject of a prosecution for a violation of the federal false statements statute. Babbitt's letter to McCain was dated Aug. 30, 1996, which was after the Supreme Court of the United States held that 18 U.S.C. § 1001, the false statements statute, did not apply to statements made to the legislative branch. Congress amended the statute to make such statements subject to criminal liability on Oct. 11, 1996. *See* False Statements Accountability Act of 1996, Pub. L. No. 104-292, HR 3166.

[835]The evidence that supports this conclusion is, of course, circumstantial evidence because – absent admissions – circumstantial evidence is the only way in which the government can prove state of mind. Courts accordingly have held the two-witness rule inapplicable when the sole issue is the defendant's state of mind. *See, e.g.*, *Behrle v. United States*, 100 F.2d 714, 715-16 (D.C. Cir. 1938), *cited in United States v. DeZarn*, 157 F.3d 1042, 1053 (6th Cir. 1998); *United States v. Chapin*, 25 F.3d 1373, 1377 (7th Cir. 1994); *United States v. Nicoletti*, 310 F.2d 359, 363 (7th Cir. 1962), *cert. denied*, 372 U.S. 942 (1963).

[836]Sen. McCain believed that the letter could be read only as a flat denial of invocation of Ickes's name.