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False Statements and Perjury: An Abridged Overview of Federal Criminal Law

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Summary

Federal courts, Congress, and federal agencies rely upon truthful information in order to make informed decisions. Federal law therefore proscribes providing the federal courts, Congress, or federal agencies with false information. The prohibition takes four forms: false statements; perjury in judicial proceedings; perjury in other contexts; and subornation of perjury.

Section 1001 of Title 18 of the United States Code, the general false statement statute, outlaws material false statements in matters within the jurisdiction of a federal agency or department. It reaches false statements in federal courts and federal grand jury sessions as well as congressional hearings and administrative matters but not the statements of advocates or parties in court proceedings. Under § 1001, a statement is a crime if it is false, regardless of whether it is made under oath.

In contrast, an oath is the hallmark of the three perjury statutes in Title 18. The oldest, §1621, condemns presenting material false statements under oath in federal official proceedings. Section 1623 of the same title prohibits presenting material false statements under oath in federal court proceedings, although it lacks some of § 1621's traditional procedural features, such as a two-witness requirement. Subornation of perjury, barred in § 1622, consists of inducing another to commit perjury. All four sections carry a penalty of imprisonment for not more than five years, although § 1001 is punishable by imprisonment for not more than eight years when the offense involves terrorism or one of several federal sex offenses. The same five-year maximum penalty attends the separate crime of conspiracy to commit any of the four substantive offenses.

A defendant's false statements in the course of a federal criminal investigation or prosecution may also result in an enhanced sentence under the U.S. Sentencing Guidelines for the other offenses that were the subject of federal investigation or prosecution.

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Introduction

Federal criminal law features four general statutes that proscribe providing false information in matters relating to the federal government. One statute, 18 U.S.C. § 1001, proscribes false statement in matters within the jurisdiction of a federal agency or department. A second, 18 U.S.C. § 1621, condemns perjury with respect to any matter in federal law given under oath or penalty of perjury. The third, 18 U.S.C. § 1623, outlaws false declarations before federal grand juries or courts. The fourth, 18 U.S.C. § 1622, criminalizes inducing another to commit a federal perjury offense. Finally, conspiracy to commit any of these underlying crimes is a separate federal crime. Moreover, a defendant under investigation or on trial for some other federal offense may find upon conviction his sentence for the underlying offense enhanced as a consequence of a false statement he made during the course of the investigation or trial. This report provides an overview of these false statement and perjury provisions.

False Statements (18 U.S.C. § 1001)

The principal federal false statement statute, 18 U.S.C. § 1001, proscribes false statements, concealment, or false documentation in any matter within the jurisdiction of any of the three branches of the federal government. It applies generally within the executive branch. Within the judicial branch, it applies to all but presentations to the court by parties or their attorneys in judicial proceedings. Within the legislative branch, it applies to administrative matters such as procurement, as well as to "any investigations and reviews, conducted pursuant to the authority of any committee, subcommittee, commission, or office of the Congress consistent with applicable rules of the House or Senate."

Section 1001(a) states:"[I.] Except as otherwise provided in this section, [II.] whoever [III.] in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, [IV.] knowingly and willfully— [i] falsifies, conceals, or covers up by any trick, scheme, or device a material fact; [ii.] makes any materially false, fictitious, or fraudulent statement or representation; or [iii.] makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; [V.] shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A [sexual abuse], 109B [sex offender registration], 110 [sexual exploitation], or 117 [transportation for illicit sexual purposes], or section 1591 [sex trafficking], then the term of imprisonment imposed under this section shall be not more than 8 years."

Elements

Whoever: The Dictionary Act provides that "in determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the word[] . . . 'whoever' *include[s]* corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals . . . ." "Includes" is usually a "but-not-limited-to" word. As a general rule, use of the word "includes" means that the list that it introduces is illustrative rather than exclusive.

Within the Jurisdiction: A matter is within the jurisdiction of a federal entity when it involves a matter "confided to the authority of a federal agency or department. . . . A department or agency has jurisdiction, in this sense, when it has power to exercise authority in a particular situation."

"Understood in this way, the phrase 'within the jurisdiction' merely differentiates the official, authorized functions of an agency or department from matters peripheral to the business of that body."

Section 1001(b) creates an exception, a safe harbor for statements, omissions, or documentation presented to the court by a party in judicial proceedings. The exception covers false statements made to the court even if they result in the expenditure of executive branch efforts. The exception also includes false statements of indigency filed by a defendant seeking the appoint of counsel, and perhaps a defendant's false statement in a probation officer's presentence report, but not false statements made to his probation officer otherwise.

Section 1001's application to matters within the jurisdiction of the legislative branch is confined to two categories of false statements. One proscribes false statements in matters of legislative branch administration and reaches false statements made in financial disclosure statements. The other proscribes false statements in the course of congressional investigations and reviews, but does not reach false statements made concurrent to such investigations or reviews.

Knowingly and Willfully: Section 1001 requires the government to show the defendant knew or elected not to know that the statement, omission, or documentation was false and that the defendant presented it with the intent to deceive.

Materiality: Prosecution for a violation of § 1001 requires proof of materiality, as does conviction for perjury, and the standard is the same: the statement must have a "natural tendency to influence, or be capable of influencing the decision[-]making body to which it is addressed." There is no need to show that the decision maker was in fact diverted or influenced.

Concealment, False Statements and False Writings: Section 1001's false statement element is in fact three alternative elements that encompass concealment, false statements and false writings.

Subsection 1001(a)(1) (concealment) applies to anyone who "falsifies, conceals, or covers up by any trick, scheme, or device a material fact." Although the requirement does not appear on the face of the statute, prosecutions under § 1001(a)(1) for concealment must also prove the existence of a duty or legal obligation not to conceal.

Subsection 1001(a)(2) applies to anyone who "makes any material false, fictitious, or fraudulent statement or representation." Conviction requires that the defendant knew that his statement or documentation was false, that is, it was not true. It follows that a defendant's response to a question that is fundamentally ambiguous cannot provide the basis for a conviction under § 1001(a)(2).

Subsection 1001(a)(2) recognizes few defenses other than the government's failure to prove one or more of its elements. For instance, "there is no safe harbor for recantation or correction of a prior false statement that violates [§] 1001." Nevertheless, momentary corrections and perhaps longer lapses of time between the statement and correction may undermine proof of the materiality (natural tendency to influence a decision-maker) necessary for conviction.

Subsection 1001(a)(3) covers written false statements and applies to anyone who "makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry." To establish a violation of § 1001(a)(3), the government must prove the defendant "rendered a statement that: (1) is false, (2) is material, (3) is knowingly and willfully made, and (4) concerns a matter within the jurisdiction of a federal" entity.

Consequences: Violations of § 1001 are punishable by imprisonment for not more than five years or not more than eight years if violation involves international or domestic terrorism or the matter relates to any of several federal sex offenses. In any event, violations are also punishable by the

greater of a fine of not more than $250,000 (not more than $500,000 for organizational defendants) or twice the gain or loss associated with the offense. In limited circumstances, violations may lead to forfeiture if the victim is a financial institution.

Perjury Generally (18 U.S.C. § 1621)

Testimonial Perjury Generally (18 U.S.C. § 1621(1))

There are three primary federal perjury statutes. Each involves a statement or writing offered under oath or its equivalent. One proscribes two forms of perjury generally. A second proscribes perjury before a court or grand jury. A third proscribes subornation of perjury which consists of inducing someone else to commit perjury.

Section 1621 is the first of these and consists of two offenses, one for testimony and the other written statements. The testimonial proscription provides: "[I.] Whoever having taken an oath [II.] before a competent tribunal, officer, or person, [III.] in any case in which a law of the United States authorizes an oath to be administered, [IV.] [i.] that he will testify, declare, depose, or certify truly, or [ii.] that any written testimony, declaration, deposition, or certificate by him subscribed, is true, [V.] willfully and contrary to such oath [VI.] states or subscribes any material matter which he does not believe to be true; [VII.] "is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States."

The courts generally favor an abbreviated encapsulation such as the one the Supreme Court provided in *United States v. Dunnigan*: "A witness testifying under oath or affirmation violates this section if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory."

Whoever: The term "whoever" ordinarily encompasses individuals as well as entities, such as corporations, unless the context of the statute in which the term is used suggests a contrary congressional intent. As a general rule, a corporation is liable for the crimes of its employees, officers, or agents committed within the scope of their authority and at least in part for the benefit of the corporation. Corporations have been convicted for false statements under § 1001, as noted earlier, but rarely if ever under § 1621(1).

Willfully: Conviction under § 1621(1) requires not only that the defendant knew his statement was false ("which he does not believe to be true"), but that his false statement is "willfully" presented. There is but scant authority on precisely what "willful" means in this context. The Supreme Court in dicta has indicated that willful perjury consists of "*deliberate* material falsification under oath."

Having Taken an Oath: Section 1621(1), in so many words ("whoever having taken an oath"), reaches sworn written or oral testimony presented to a federal tribunal, officer, or person.

False – Truth and Ambiguity: Perjury under § 1621(1) condemns testimony that is false. The Supreme Court in *Bronston v. United States* explained that testimony that is literally true, even if deceptively so, cannot be considered perjury for purposes of a prosecution under § 1621(1). The Court's comments suggest that § 1621(1) perjury may not be grounded on an ambiguous question.

Two-Witness Rule: Section 1621(1) requires compliance with the common law "two-witness rule" to establish that a statement is false. Under the rule, "the uncorroborated oath of one witness is not sufficient to establish the falsity of the testimony of the accused as set forth in the indictment as perjury." Thus, conviction under § 1621(1) compels the government to "establish the falsity of

the statement alleged to have been made by the defendant under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances." If the rule is to be satisfied with corroborative evidence, the evidence must be trustworthy and support the account of the single witness upon which the perjury prosecution is based.

Materiality: "To be guilty of perjury under 18 U.S.C. § 1621(1), a defendant's false statement must be material." A false statement is "material in a criminal prosecution for perjury under § 1621(a) if it is material to any proper matter of the decisionmaker's inquiry," that is, "if it is capable of influencing the tribunal on the issue before it." A false statement is no less material because the decisionmaker was not taken in by the statement.

Defenses: Although a contemporaneous correction of a false statement may demonstrate the absence of the necessary willful intent to commit perjury, the crime is completed when the false statement is presented to the tribunal. Without a statute such as that found in § 1623, recantation is no defense nor does it bar prosecution under § 1621(1).

False Writings as Perjury Generally (18 U.S.C. § 1621(2))

Congress added § 1621(2) to the general perjury statute in 1976 in order to dispense with the necessity of an oath for various certifications and declarations. Section 1621(2) operates as an enforcement mechanism for § 1746, which affords an under-penalty-of-perjury option wherever a federal statute or regulation requires a written statement under oath. Section 1746 is available regardless of whether the triggering statute or regulation seeks to ensure the validity of a written statement or the identity of its author.

Section 1621(2) states: "[I.] Whoever [II.] in any declaration, certificate, verification, or statement [III.] under penalty of perjury as permitted under [§] 1746 of title 28, United States Code, [IV.] willfully subscribes as true [V.] any material matter which he does not believe to be true [VI.] is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

As in the case of violations under § 1621(1), § 1621(2) proscriptions apply in theory with equal force to corporations and other entities as well as to individuals, but in practice prosecutions appear to be confined to individuals. Section 1621(2) only proscribes *material* false statements in unsworn writings (i.e., a statement "capable of influencing or misleading a tribunal on any proper matter of inquiry").

Perjury in a Judicial Context (18 U.S.C. § 1623)

Congress enacted § 1623 to avoid some of the common law technicalities embodied in the more comprehensive perjury provisions found in § 1621 and thus "to facilitate perjury prosecutions and thereby enhance the reliability of testimony before federal courts and grand juries." Unlike § 1621, § 1623 permits a conviction in the case of two mutually inconsistent declarations without requiring proof that one of them is false. It recognizes a limited recantation defense. It dispenses with the so-called two-witness rule. And, it employs a "knowing" mens rea standard rather than the more demanding "willfully" standard used in § 1621.

Section 1623 declares that: "[I.] Whoever [II.] under oath or [III.] in any declaration, certificate, verification, or statement under penalty of perjury as permitted under [§] 1746 of title 28, United States Code" [IV.] in any proceeding before or ancillary to any court or grand jury of the United States [V.] knowingly [VI.] makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, [VII.]

knowing the same to contain any false material declaration, [VIII.] shall be fined under this title or imprisoned not more than five years, or both."

In most cases, the courts abbreviate their description of the elements and state in one form or another that to prove perjury the government must establish that "the defendant (1) knowingly made a (2) false (3) material declaration (4) under oath (5) in a proceeding before or ancillary to any court or grand jury of the United States."

Whoever: Again, the Dictionary Act defines the term "whoever" to encompass individuals as well as entities, such as corporations, unless the context of the statute in which the term is used suggests a contrary congressional intent. A corporation, as a general matter, is liable for the crimes of its employees, officers, or agents committed within the scope of their authority and at least in part for the benefit of the corporation. Corporations have been convicted for false statements under § 1001, as mentioned earlier, but rarely if ever under § 1623.

Under Oath or its Equivalent- Court or Grand Jury: Section 1623 reaches both false statements under oath and those offered "under penalty of perjury" by operation of 28 U.S.C. § 1746. The allegedly perjurious statement must be presented in a "proceeding before or ancillary to any court or grand jury of the United States." The phrase "proceedings ancillary to" court or grand jury proceedings covers proceedings to take depositions in connection with civil litigation, as well as a variety of proceedings in criminal cases, including habeas proceedings, bail hearings, venue hearings, supervised release revocation hearings, and suppression hearings.

False or Inconsistent: The Supreme Court's observation that a statement that is misleading but literally true cannot support a conviction under § 1621 because it is not false applies with equal force to perjury under § 1623. Similarly, perjury cannot be the product of confusion, mistake, or faulty memory, but must be a statement that the defendant knows is false, although this requirement may be satisfied with evidence that the defendant was deliberately ignorant or willfully blind to the fact that the statement was false. On the other hand, "[a] question that is truly ambiguous or which affirmatively misleads the testifier can never provide a basis for a finding of perjury, as it could never be said that one intended to answer such a question untruthfully." Yet ambiguity will be of no avail if the defendant understands the question and answers falsely nevertheless.

Subsection 1623(c) permits a perjury conviction simply on the basis of two necessarily inconsistent material declarations rather than a showing that one of the two statements is false. Conviction does require a showing, however, that the two statements were made under oath; it is not enough to show that one was made under oath and the other was made in the form of an affidavit signed under penalty of perjury. Moreover, the statements must be so inherently contradictory that one of them of necessity must be false.

Some years ago, the Supreme Court declined to reverse an earlier ruling that "[t]he general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment." Because the two-witness rule rests on the common law rather than on a constitutional foundation, it may be abrogated by statute without offending constitutional principles. Subsection 1623(e) permits a perjury conviction without compliance with this traditional two-witness rule.

Materiality: Materiality is perhaps the most nettlesome of perjury's elements. It is usually said that a statement is material "if it has a natural tendency to influence, or is capable of influencing, the decision of the decision-making body to whom it is addressed." This definition is not easily applied when the precise nature of the underlying inquiry remains somewhat undefined such as in grand jury proceedings or in depositions at the discovery stage of a civil suit. On the civil side, the lower federal courts appear divided between the view (1) that a statement in a deposition is

material if a "truthful answer might reasonably be calculated to lead to the discovery of evidence admissible at the trial of the underlying suit" and (2) that a statement is material "if the topic of the statement is discoverable and the false statement itself had a tendency to affect the outcome of the underlying civil suit for which the deposition was taken."

The courts seem to have had less difficulty dealing with a materiality issue characterized as the "perjury trap" doctrine. The doctrine arises where a witness is called before the grand jury for the sole purpose of eliciting perjurious testimony from him. Under such circumstances it is said the tribunal has no valid purpose to which a perjurious statement could be considered material. The doctrine poses no bar to prosecution in most cases, however, because the government is usually able to identify some valid reason for the grand jury's inquiries.

Defenses: Most of the other subsections of § 1623 are designed to overcome obstacles that the common law placed in the path of a successful perjury prosecution. Subsection 1623(d), in contrast, offers a defense unrecognized at common law: "[w]here in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed." Although phrased in different terms, the courts seem to agree that repudiation of the false testimony must be specific and thorough.

Subornation of Perjury (18 U.S.C. § 1622)

Section 1622 outlaws procuring or inducing another to commit perjury: "Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned for not more than five years, or both." The crime consists of two elements – (1) an act of perjury committed by another (2) induced or procured by the defendant. Perjury under either §§ 1621 or 1623 will support a conviction for subornation under § 1622, but proof of the commission of an act of perjury is a necessary element of subornation. Nevertheless, the perjury two-witness rule does not apply in a case of subornation. Although the authorities are exceptionally sparse, it appears that to suborn one must know that the induced statement is false and that at least to suborn under § 1621 one must also knowingly and willfully induce. Subornation is only infrequently prosecuted as such perhaps because of the ease with which it can now be prosecuted as an obstruction of justice under either 18 U.S.C. §§ 1503 or 1512 which, unlike § 1622, do not insist upon suborner success as a prerequisite to prosecution.

Conspiracy (18 U.S.C. § 371)

Section 371 reaches conspiracies "either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner . . . ." Consequently, conspiracy and perjury/false statements intersect twice. Once, where § 371 proscribes any collusion to violate §§ 1001, 1621, 1622, or 1623. And again where § 371 condemns a scheme to defraud the United States, that is to frustrate the functions of government by "deceit, craft or trickery," for example by perjury or false statements.

In either case, the government must prove: "(1) agreement between two or more persons to achieve an unlawful objective; (2) knowing and voluntary participation in that agreement by the defendant; and (3) an overt act in furtherance of the agreement." Conspiracy under § 371 is punishable by imprisonment for not more than five years. Conspiracy is a separate crime, and

offenders may be punished for conspiracy, as well as for the commission of the crime that is the object of the offense, and for any crime committed in the foreseeable furtherance of the plot.

Perjury as a Sentencing Factor (U.S.S.G. § 3C1.1)

Perjury, subornation of perjury, and false statements are each punishable by imprisonment for not more than five years. They are also punishable by a fine of not more than $250,000 (not more than $500,000 if the defendant is an organization). When the defendant is convicted of a crime other than perjury or false statements, however, perjury or false statements during the investigation, prosecution, or sentencing of the defendant for the underlying offense will often be treated as the basis for enhancing his sentence by operation of the obstruction of justice guideline of the U.S. Sentencing Guidelines (U.S.S.G. § 3C1.1).

Federal sentencing begins with, and is greatly influenced by, the calculation of the applicable sentencing range under the Sentencing Guidelines. The Guidelines assign federal felony offenses a base offense level to which they add levels for various aggravating factors. Obstruction of justice is one of those factors. Each of the final forty-three offense levels is assigned to one of six sentencing ranges, depending on the extent of the defendant's past crime history. For example, a final offense level of fifteen means a sentencing range of from eighteen to twenty-four months in prison for a first-time offender (criminal history category I) and from forty-one to fifty-one months for a defendant with a very extensive criminal record (criminal history category VI). Two levels higher, at a final offense level of seventeen, the range for first time offenders is twenty-four to thirty months; and fifty-one to sixty-three months for the defendant with a very extensive prior record. Depending on the final offense level otherwise applicable to a particular crime, the impact of a two-level increase spans from no impact at the lowest final offense levels to a difference of an additional sixty-eight months at the highest levels.

Section 3C1.1 instructs sentencing courts to add two offense levels in the case of an obstruction of justice. The accompanying commentary explains that the section "is not intended to punish a defendant for the exercise of a constitutional right." If a sentencing court seeks to impose the enhancement for perjury it must find "by a preponderance of the evidence that the defendant 1) willfully 2) and materially 3) committed perjury, which is (a) the intentional (b) giving false testimony (c) as to a material matter." When perjury provides the basis for a sentencing enhancement under the section, the court must find that the defendant willfully testified falsely with respect to a material matter. Thus, the court must find that "the defendant consciously act[ed] with the purpose of obstructing justice." When based upon a false statement not under oath, the statement must still be material, that is, it must "tend to influence or affect the issue under determination." Even then, false identification at the time of arrest only warrants a sentencing enhancement under the section when the deception significantly hinders the investigation or prosecution.

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