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False Statements and Perjury: An 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.[1] One statute, 18 U.S.C. § 1001, proscribes false statements in matters within the jurisdiction of a federal agency or department.[2] A second, 18 U.S.C. § 1621, condemns perjury with respect to any matter in federal law given under oath or penalty of perjury.[3] 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.[4] 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 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.[5] It applies generally within the executive branch.[6] Within the judicial branch, it applies to all but presentations to the court by parties or their attorneys in judicial proceedings.[7] Within the legislative branch, it applies to administrative matters such as procurement,[8] 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."[9]

In outline form, § 1001(a) states:

I. "Except as otherwise provided in this section,"

[1] This report is available in abbreviated form—without the footnotes, quotations, or citations to authority—as CRS Report 98-807, *False Statements and Perjury: An Abridged Overview of Federal Criminal Law*, by Charles Doyle.

[2] *See generally* Isabel Wigley, Shannon Benson & David Lincoln, *False Statements and False Claim*s, 60 AM. CRIM. L. REV. 781 (2023).

[3] *See generally* Isabel Wigley, Charlotte Greaney & Abigail Van Buren, *Perjury*, 60 AM. CRIM. L. REV. 1127 (2023).

[4] 18 U.S.C. § 371.

[5] There are scores of more limited false statement statutes that relate to particular agencies or activities including: 8 U.S.C. § 1160(b)(7)(A) (applications for immigration status); 15 U.S.C. § 645 (Small Business Administration); 15 U.S.C. § 714m (Commodity Credit Corporation); 16 U.S.C. § 831t (TVA); 18 U.S.C. § 152 (bankruptcy); *id.* § 287 (false or fraudulent claims against the United States); *id.* § 288 (postal losses); *id.* § 289 (pensions); *id.* § 541 (entry of goods falsely classified); *id*. § 542 (entry of goods by means of false statements); *id*. § 550 (refund of duties); *id*. § 1003 (fraudulent claims against the United States); *id*. § 1011 (federal land bank mortgage transactions); *id*. § 1014 (loan or credit applications in which the United States has an interest); *id.* § 1015 (naturalization, citizenship or alien registry); *id*. § 1019 (false certification by consular officer); *id.* § 1542 (passport applications); *id.* § 1546 (fraud in connection with visas, permits and other documents); 22 U.S.C. § 1980 (compensation for loss of commercial fishing vessel or gear); *id*. § 4221 (American diplomatic personnel); 30 U.S.C. § 820(f) (mine safety documentation); 42 U.S.C. § 408 (old age claims); *id.* § 1320a-7b (Medicare); 49 U.S.C. § 47126 (aviation programs).

[6] 18 U.S.C. § 1001(a).

[7] *Id.* § 1001(b).

[8] *Id*. § 1001(c)(1) ("With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to - (1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch.").

[9] *Id*. § 1001(c)(2).

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."[10]

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 . . . ."[11] "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.[12] Corporations have been convicted for violating § 1001.[13]

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."[14]

"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

[10] *Id.* § 1001(a).

[11] 1 U.S.C. § 1 (emphasis added).

[12] Samantar v. Yousuf, 560 U.S. 305, 317 (2010); *In re* Kaiser Gypsum Co., Inc., 60 F.4th 73, 83 (4th Cir. 2023), rev'd on other grounds 602 U.S. ____, 144 S. Ct. 1414 (2024); Carroll v. Trump, 49 F.4th 759, 768 (2d Cir. 2022); *In re* Vill. Apothecary, Inc., 45 F.4th 940, 947 (6th Cir. 2022).

[13] United States v. Oceanic Illsabe Ltd., 889 F.3d 178, 183–84 (4th Cir. 2018); United States v. Automated Med. Labs., Inc., 770 F.2d 399, 406–08 (4th Cir. 1985).

[14] United States v. Rodgers, 466 U.S. 475, 479 (1984); United States v. Wellman, 26 F.4th 339, 350 (6th Cir. 2022); United States v. Barringer, 25 F.4th 239, 251 (4th Cir. 2022); United States v. Bazantes, 978 F.3d 1227, 1240 (11th Cir. 2020).

body."[15] Several courts have held that the phrase contemplates coverage of false statements made to state, local, or private entities relating to matters that involve federal funds or regulations.[16]

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.[17] The exception also includes false statements of indigency filed by a defendant seeking the appoint of counsel,[18] and perhaps a defendant's false statement in a probation officer's presentence report,[19] but not false statements made to his probation officer otherwise.[20]

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.[21] The other proscribes false statements in the course of congressional investigations and reviews,[22] but does not reach false statements made concurrent to such investigations or reviews.[23]

Knowingly and Willfully

Section 1001 requires the government to prove that the defendant acted "knowingly and willfully." It 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.[24] The phrase "knowingly and willfully" refers to the circumstances under which

[15] *Rodgers*, 466 U.S. at 479; United States v. Benton, 890 F.3d 697, 711 (8th Cir. 2018).

[16] United States v. Penson, 860 F.3d 152, 170–71 (4th Cir. 2017) (submission of false pay applications to a local housing agency that dispensed funds under a House and Urban Development grant); United States v. Rahman, 805 F.3d 822, 836–37 (7th Cir. 2015) (false statements to a state deputy fire marshal in the course a joint state-federal fire investigation); United States v. Clark, 787 F.3d 451, 459 (7th Cir. 2015) (false payroll reports submitted to state transportation agency in connection with a federally-funded highway project); United States v. Ford, 639 F.3d 718, 720 (6th Cir. 2011) ("Jurisdiction may exist when false statements were made to state or local government agencies receiving federal support or subject to federal regulation."); United States v. Starnes, 583 F.3d 196, 208 (3d Cir. 2009) ("Indeed, it is enough that the statement or representation pertain to a matter in which the executive branch has the power to exercise authority . . . HUD, an agency within the executive branch, provided the funding for the Donoe project to VIHA and had the power to exercise authority over the project, had it chosen to do so."); *but see* United States v. Blankenship, 382 F.3d 1110, 1139, 1141 (11th Cir. 2004) (emphasis in the original) ("The clear, indisputable holding of *Lowe* [v. *United States*, 141 F.2d 1005 (5th Cir. 1944)] is that a misrepresentation made to a private company concerning a project that is the subject of a contract between that company and the federal government does *not* constitute a misrepresentation about a matter within the jurisdiction of the federal government . . . Because neither *Lowe* not its central holding has ever been overruled . . . it remains good law.").

[17] United States v. Bankston, 820 F.3d 215, 222, 229–31 (6th Cir. 2016).

[18] United States v. McNeil, 362 F.3d 570, 573 n.2 (9th Cir. 2004) (but observing that "[s]ubmitting a false CJA-23 form may subject a defendant to criminal liability under other statutes, for example, under 18 U.S.C. § 1621, the general statute on perjury, or 18 U.S.C. § 1623, which punishes the making of a false material declaration in any proceeding, before, or ancillary to, any court").

[19] United States v. Horvath, 492 F.3d 1075, 1078–81 (9th Cir. 2007). *But see* United States v. Manning, 526 F.3d 611, 619–21 (10th Cir. 2008).

[20] United States v. Oliver, 41 F.4th 1093, 1096 (9th Cir. 2022); United States v. Vreeland, 684 F.3d 653, 664–65 (6th Cir. 2012).

[21] 18 U.S.C. § 1001(c)(1); United States v. Menendez, 137 F. Supp. 3d 688, 693 (D.N.J. 2015).

[22] 18 U.S.C. § 1001(c)(2); *e.g.*, United States v. Bowser, 964 F.3d 26, 32–33 (D.C. Cir. 2020); United States v. Stone, 394 F. Supp. 3d 1, 10 (D.D.C. 2019).

[23] United States v. Pickett, 353 F.3d 62, 69 (D.C. Cir. 2004) (false statement to a Capitol Police officer unrelated to the exercise of Congress's investigative or review authority).

[24] United States v. Boffil-Rivera, 607 F.3d 736, 741 (11th Cir. 2010) ("For purposes of the statute, the word 'false' (continued...)

the defendant made his statement, omitted a fact he was obliged to disclose, or included within his documentation, that is, "that the defendant knew that his statement was false when he made it or – which amounts in law to the same thing – consciously disregarded or averted his eyes from the likely falsity."[25] Although the offense can only be committed "knowingly and willfully," that is, with the knowledge that it was unlawful,[26] the prosecution need not prove that the defendant knew that his conduct involved a "matter within the jurisdiction" of a federal entity,[27] or that he intended to defraud a federal entity.[28]

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."[29] There is no need to show that the decision maker was in fact diverted or influenced.[30]

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

requires an intent to deceive or mislead."); United States v. Starnes, 583 F.3d 196, 210 (3d Cir. 2009) ("In general, 'knowingly' requires the government to prove that a criminal defendant had knowledge of the facts that constitute the offense ... willfully ... usually requires the government to prove that the defendant acted not merely voluntarily, but with a bad purpose, that is, with knowledge that his conduct was, in some general sense, unlawful.").

[25] United States v. Zhen Zhou Wu, 711 F.3d 1, 28 (1st Cir. 2013); United States v. Buselli, 106 F.4th 1273, 1282) (11th Cir. 2024) ("The word 'knowingly' means that an act was done voluntarily and intentionally and not because of a mistake or by accident. The word 'willfully' means that the act was committed voluntarily and purposely with the intent to do something the law forbids, that is, with a bad purpose to disobey or disregard the law.");United States v. Inman, 39 F.4th 357, 365 (6th Cir. 2022); United States v. Hsia, 176 F.3d 716, 721–22 (D.C. Cir. 1999); United States v. Hoover, 175 F.3d 564, 571 (7th Cir. 1999); *see also* United States v. Ricard, 922 F.3d 639, 655 (5th Cir. 2019) ("A deliberate ignorance instructions serves to inform the jury that it may consider evidence of the defendant's charade of ignorance or circumstantial proof of guilty knowledge. It guards against a defendant who chooses to remain ignorant so he can plead lack of positive knowledge in the event he should be caught. . . . [A] deliberate ignorance instruction should only be given when a defendant claims a lack of guilty knowledge and the proof at trial supports an inference of deliberate ignorance.") (internal quotations and citations omitted).

[26] United States v. Phillipos, 849 F.3d 464, 476 (1st Cir. 2017) ("The Supreme Court has made it clear that 'in order to establish a willful violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'") (quoting Bryan v. United States, 524 U.S. 184, 191–92 (1998)).

[27] United States v. Yermian, 468 U.S. 63, 75 (1984); United States v. Gonsalves, 435 F.3d 64, 72 (1st Cir. 2006).

[28] *Gonsalves*, 435 F.3d at 72; *Starnes*, 583 F.3d at 212 n.8.

[29] United States v. Gaudin, 515 U.S. 506, 509 (1995); United States v. Smith, 54 F.4th 755, 769 (4th Cir. 2022); United States v. Wellman, 26 F.4th 339, 350 (6th Cir. 2022); United States v. Johnson, 19 F.4th 248, 256 (3d Cir. 2021); United States v. Jabar, 19 F.4th 66, 84 (2d Cir. 2021);United States v. Wilson, 879 F.3d 795, 807 (7th Cir. 2018); Williams v. United States, 758 F.3d 708, 718 (1st Cir. 2017); United States v. Clay, 832 F.3d 1259, 1309 (11th Cir. 2016); United States v. Robinson, 809 F.3d 991, 999 (8th Cir. 2016); United States v. Litvak, 808 F.3d 160, 170 (2d Cir. 2015).

[30] *Clay*, 832 F.3d at 1309 ("A false statement can be material even if the decision maker actually knew or should have known that the statement was false or even if the decision maker did not actually rely on the statement."); *Smith*, 54 F.4th at 769; *Wellman*, 26 F.4th at 350; *Johnson*, 19 F.4th at 258; United States v. Chen, 998 F.3d 1, 10 (1st Cir. 2021); United States v. Stein, 985 F.3d 1254, 1270 (10th Cir. 2021).

of a duty or legal obligation not to conceal.[31] A federal employee's general ethical obligation to "disclose waste, fraud, abuse, and corruption to appropriate authorities," however, will "not support a conviction under § 1001(a)(1)."[32]

Subsection 1001(a)(2) (false statements) 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.[33] 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).[34]

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."[35] 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.[36]

Under an earlier version of § 1001, several lower federal courts recognized an "exculpatory no" doctrine under which § 1001 did not reach a defendant's simple false denial to a law enforcement officer's incriminating question.[37] The Supreme Court repudiated the doctrine "[b]ecause the plain language of [then] § 1001 admits of no exception for an 'exculpatory no'. . . ." Defendants have been largely unable to bring about recognition of an exculpatory no doctrine under § 1001's

[31] United States v. Barrow, 109 F.4th 521, 529 (D.C. Cir. 2024); United States v. Bowser, 964 F.3d 26, 32 (D.C. Cir. 2020); United States v. White Eagle, 721 F.3d 1108, 1116–18 (9th Cir. 2013) ("[A] conviction under § 1001(a)(1) is proper where a statute or government regulation requires the defendant to disclose specific information to a particular person or entity"); United States v. Safavian, 528 F.3d 957, 964 (D.C. Cir. 2008) ("As Safavian argues and as the government agrees, there must be a legal duty in order for there to be a concealment offense in violation of § 1001(a)(1)"); United States v. Stewart, 433 F.3d 273, 318–19 (2d Cir. 2006); United States v. Moore, 446 F.3d 671, 678–79 (7th Cir. 2006); United States v. Gibson, 409 F.3d 325, 333 (6th Cir. 2005); *cf.* United States v. Harra, 985 F.3d 196, 213 (3d Cir. 2021) ("Thus, a conviction for concealing material facts in violation of 18 U.S.C. § 1001(a)(1) . . . cannot stand absent fair notice of the legal duty to make the particular disclosure.").

[32] *White Eagle*, 721 F.3d at 1116–18 (quoting 5 C.F.R. § 2635.101(b)(11)) and citing *Safavian*, 529 F.3d at 964.

[33] United States v. Tao, 107 F.4th 1179, 1184 (10th Cir. 2024); United States v. Meyer, 63 F.4th 1024, 1039 (5th Cir. 2023); United States v. Smith, 54 F.4th 755, 766 (4th Cir. 2022); United States v. Stacks, 821 F.3d 1038, 1044 (8th Cir. 2016) ("To establish a violation of 18 U.S.C. § 1001[(a)(2)], the government must prove that "(1) the defendant made a statement; (2) the statement was false, fictitious, or fraudulent . . . A statement is 'false' if it contains 'factual misrepresentations.'"); United States v. Rahman, 805 F.3d 822, 836 (7th Cir. 2015); United States v. Castro, 704 F.3d 125, 139 (3d Cir. 2013).

[34] United States v. Burnette, 65 F.4th 591, 610 (11th Cir. 2023); United States v. Schulte, 741 F.3d 1141, 1150 (10th Cir. 2014) ("[A] fundamental ambiguity cannot be the basis for a false statement conviction because a person cannot knowingly give a false reply to a question that defies interpretation despite its context."); United States v. Hatch, 434 F.3d 1, 4–5 (1st Cir. 2006); United States v. Culliton, 328 F.3d 1074, 1078 (9th Cir. 2003); United States v. Good, 326 F.3d 589, 592 (4th Cir. 2003).

[35] United States v. Jabar, 19 F.4th 66, 84 (2d Cir. 2021); United States v. Stewart, 433 F.3d 273, 318 (2d Cir. 2006) (citing United States v. Sebaggala, 256 F.3d 59, 64 (1st Cir. 2001); United States v. Meuli, 8 F.3d 1481, 1484–87 (10th Cir. 1993); and United States v. Fern, 696 F.2d 1269, 1275 (11th Cir. 1983)).

[36] One court threw out a conviction under an earlier version of § 1001 on grounds of materiality, where the defendant attempted to correct his statement shortly after presenting it. United States v. Cowden, 677 F.2d 417, 420–21 (8th Cir. 1982).

[37] Brogan v. United States, 522 U.S. 398, 401 (1998) (listed examples).

current language, although the section's breadth occasionally seems to cause judicial discomfort[38] and Justice Department policy recognizes something akin to an exception.[39]

Subsection 1001(a)(3)(written false statements) 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.[40]

Consequences

Violations of § 1001 are punishable by imprisonment for not more than five years or not more than 8 years if violation involves international or domestic terrorism[41] or the matter relates to any

[38] United States v. Murry, 31 F.4th 1274, 1299 (10th Cir. 2022); United States v. Phillipos, 849 F.3d 464, 475 & n.2 (1st Cir. 2017) (footnote 2 of the court's opinion in brackets; underlining in the original) ("Phillipos develops no argument as to how some version of the 'exculpatory no' lives on in the current version of section 1001. [We note that the 'exculpatory no' doctrine was, in many circuits, based on an implied material requirement that we . . . read into the earlier version of section 1001. *Brogan* did away with the doctrine due to the absence of a textual basis for it in an earlier version of section 1001 . . . In 1996, however, Congress added the statute's current materiality requirement for the express purpose of resolving the 'conflict among circuit as to whether material is an element of the false statements prohibition . . . Several of our sister circuits have since held, albeit with little analysis, that *Brogan* precludes application of the 'exculpatory no' doctrine under the amended statute, notwithstanding that it contains an express materiality requirement. *See e.g.*, United States v. Watkins, 691 F.3d 841, 852 (6th Cir. 2012); United States v. Ali, 508 F.3d 136, 153 (3d Cir. 2007).]"); *see also* United States v. Binette, 945 F. Supp. 2d 223, 230 (D. Mass. 2013) ("The implications of the government's argument here chills the blood. Someone receives a call, with no prior warning, in the middle of the work day. During this unrecorded call, individuals who purport to be government officials pepper him with questions. The recipient of the call, unsure who these questioners really are, dodges and prevaricates. Without even the opportunity to argue that he did not trust the identity of his interrogators and therefore chose not be truthful, the recipient of the call faces a potential five-year prison sentence for making false statements. A conviction in these circumstances would disregard the requirement of 18 U.S.C. § 1001 that a defendant's conduct be knowing and willful. More fundamentally, it would ignore the bedrock proposition that an individual should not be punished when he has done nothing wrong.").

[39] U.S. Dep't of Just., Just. Manual § 9-42.160 (2020) ("It is the Department's policy not to charge a Section 1001 violation in situations in which a suspect, during an investigation, merely denies guilt in response to questioning by the government. This policy is to be narrowly construed, however; affirmative, discursive and voluntary statements to Federal criminal investigators would not fall within the policy. Further, certain responses to questions propounded for administrative purposes (e.g., statements to border or United States Immigration and Naturalization Service agents during routine inquiries) are also prosecutable, as are untruthful 'no's' when the defendant initiated contact with the government in order to obtain a benefit.").

[40] United States v. Clark, 787 F.3d 451, 459 (7th Cir. 2015); *Murry*, 31 F.4th at 1296; United States v. Blankenship, 382 F.3d 1110, 1131–32 (11th Cir. 2004); United States v. McGauley, 279 F.3d 62, 69 (1st Cir. 2002).

[41] 18 U.S.C. §§ 1001(a), 2331 ("(1) the term 'international terrorism' means activities that-(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended-(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum; . . . (5) the term 'domestic terrorism means activities that- (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended- (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States.").

of several federal sex offenses.[42] 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.[43] In limited circumstances, violations may lead to forfeiture if the victim is a financial institution.[44]

The federal Sentencing Guidelines govern the sentence a court may impose beneath any statutory maximums.[45] The Guideline for § 1001 offenses is U.S.S.G. § 2B1.1 (U.S.S.G. § 2J1.2 when the maximum penalty is eight years). The § 2B1.1 Guideline sentencing range may be adjusted either by virtue of the amount of loss associated with the offense or by application of a cross reference to another guideline.

When the actual or intended loss associated with the offense is more than $6,500, § 2B1.1(b)(1) calls for application of a sliding scale sentencing level increases up to the addition of thirty sentencing levels if the amount of the loss exceeds $550 million.[46] The Guidelines permit a court to use of amount of gain in lieu of the amount of loss only when the amount of the loss is otherwise undeterminable.[47]

Section 2B1.1(c)(3) provides for the application of a different Guideline when a defendant is convicted of violating § 1001 and "the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline."[48] The cross reference requires that the false statement *constitute* the offense covered by the referenced Guideline.[49] Section 2B1.1(c)(2), in contrast, calls for application by cross reference of the arson Guideline when the false statement "involves" rather than "establishes" arson.[50]

The § 2J1.2 Guideline applies a higher base offense level than the § 2B1.1 Guideline (fourteen v. six offense levels) and includes enhancements when the false statement relates to various sex or terrorism offenses.[51]

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[42] *E.g.*, *id.* ch. 109A (relating to sexual abuse); *id.* ch. 109B (relating to sex offender registration); *id.* ch. 110 (relating to sexual exploitation of children); *id.* ch. 117 (relating to transportation for illegal sexual activity); *id.* § 1591 (relating to sex trafficking).

[43] *Id.* § 3571.

[44] *Id.* § 981 ("(a)(1) The following property is subject to forfeiture to the United States: . . . (D) Any property, real or personal, which represents or is traceable to the gross receipts obtained, directly or indirectly, from a violation of- . . . (ii) section 1001 (relating to fraud and false statements) . . . if such violation relates to the sale of assets acquired or held by the the [1] [sic] Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution, or any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency or the National Credit Union Administration, as conservator or liquidating agent for a financial institution. (E) With respect to an offense listed in subsection (a)(1)(D) committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent statements, pretenses, representations or promises, the gross receipts of such an offense shall include all property, real or personal, tangible or intangible, which thereby is obtained, directly or indirectly.").

[45] *Id.* § 3553.

[46] Section 2B1.1 cmt. n.3(A) defines loss as the greater of the reasonably foreseeable actual loss or the intended loss. *E.g.*, United States v. De Nieto, 922 F.3d 669, 675 (5th Cir. 2019).

[47] U.S.S.G. § 2B1.1, cmt. 3(B); *E.g.*, United States v. Bazantes, 978 F.3d 1227, 1250 (11th Cir. 2020) (citing in accord United States v. Robie, 166 F.3d 444, 455 (2d Cir. 1999); United States v. Coscia, 866 F.3d 782, 801 (7th Cir. 2017)).

[48] U.S.S.G. § 2B1.1(c)(3).

[49] *Id.*; United States v. Nucera, 67 F.4th 146, 173–74 (3d Cir. 2023).

[50] U.S.S.G. § 2J1.2; United States v. Logsdon, 26 F.4th 854, 856 (10th Cir. 2022).

[51] *E.g.*, United States v. Legins, 34 F.4th 304, 312 (4th Cir. 2022).

Subject to statutory maximums, the Sentencing Guidelines provide a sliding scale of minimum and maximum fines for individual defendants and maximum fines for organizations, based on the offense level for the offense of conviction.[52]

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.[53] A second proscribes perjury before a court or grand jury.[54] A third proscribes subornation of perjury which consists of inducing someone else to commit perjury.[55]

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. a) "that he will"
    i. "testify,"
    ii. "declare,"
    iii. "depose, or"
    iv. "certify truly, or"
    b) "that any written"
    v. "testimony,"
    vi. "declaration,"
    vii. "deposition, or"
    viii. "certificate"
V. "by him subscribed, is true,"
VI. "willfully and contrary to such oath"
    i. "states or"
    ii. "subscribes as true 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."[56]

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

[52] U.S.S.G. §§ 5E1.2, 8C2.4.

[53] 18 U.S.C. § 1621.

[54] *Id.* § 1623.

[55] *Id.* § 1622.

[56] *Id.* § 1621.

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."[57]

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.[58] 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.[59] Corporations have been convicted for false statements under § 1001, as noted earlier,[60] 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."[61] Other courts have referred to willful perjury as acting with an "intent to deceive"[62] or as acting "intentionally."[63] In the case of a violation of § 1001, one court has pointed to the general statement from the Supreme Court that "willfully" means the defendant acted with the knowledge his conduct was unlawful.[64] Be that as it may, the prosecution must show that the defendant believed that his statement was not true in order to convict him of § 1621(1) perjury.[65]

[57] 507 U.S. 87, 94 (1993); United States v. Lewis, 62 F.4th 733, 747 (2d Cir. 2023); United States v. Fernandez-Barron, 950 F.3d 655, 657 (10th Cir. 2019); United States v. Petrovic, 701 F.3d 849, 859 (8th Cir. 2012); United States v. McKenna, 327 F.3d 830, 838 (9th Cir. 2003); United States v. Singh, 291 F.3d 756, 763 n.4 (11th Cir. 2002). *See also* United States v. Jabateh, 974 F.3d 281, 300 (3d Cir. 2020) ("Distilled to its elements, the Government must show that Jabateh 1) willfully 2) made a false statement 3) under oath 4) before a tribunal or officer 5) about a material matter.") (citing *Dunnigan*, 507 U.S. at 94); United States v. Dumeisi, 424 F.3d 566, 582 (7th Cir. 2005) ("the elements of perjury are (1) testimony under oath before a competent tribunal, (2) in a case in which United States law authorizes the administration of an oath, (3) false testimony, (4) concerning a material matter, (5) with the willful intent to provide false testimony.").

[58] 1 U.S.C. § 1.

[59] United States v. Oceanic Illsabe Ltd., 889 F.3d 178, 183–84 (4th Cir. 2018); United States v. Agosto-Vega, 617 F.3d 541, 552–53 (1st Cir. 2010); United States v. Philip Morris USA, Inc., 566 F.3d 1095, 1118–19 (D.C. Cir. 2009); United States v. Singh, 518 F.3d 236, 249 (4th Cir. 2008).

[60] *Supra* note 13.

[61] United States v. Norris, 300 U.S. 564, 574 (1937) (emphasis added); *see also* United States v. Nagell, 911 F.3d 23, 30 (1st Cir. 2018) ("Sufficient materiality could suggest the willfulness of the false statement.").

[62] United States v. Rose, 215 F.2d 617, 622–23 (3d Cir. 1954).

[63] United States v. Friedman, 854 F.2d 535, 560 (2d Cir. 1988); United States v. Mounts, 35 F.3d 1208, 1219 (7th Cir. 1994).

[64] United States v. Phillipos, 849 F.3d 464, 476 (1st Cir. 2017) (citing Bryan v. United States, 524 U.S. 184, 191–92 (1998) and Ratzlaf v. United States, 510 U.S. 135, 137 (1994)).

[65] 18 U.S.C. § 1621(1) ("which he does not believe to be true."); United States v. Culliton, 328 F.3d 1074, 1080 (9th Cir. 2003) (quoting United States v. Lighte, 782 F.2d 367, 372 (2d Cir. 1986)) ("Perjury requires that a witness believe that the testimony he gives is false.").

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.[66]

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).[67] Bronston testified at a bankruptcy hearing at which he was asked if he had a Swiss bank account.[68] He truthfully answered that he did not.[69] Then, he was asked if he had ever had a Swiss bank account, which he had.[70] He answered that his company had had such an account at one time, which was true but not responsive to the question of had he ever had an account.[71] Yet, he was convicted for violating § 1621(1) on the basis of that answer.[72] The Supreme Court's final comment in the decision that threw out the conviction observed, "It may well be that [Bronston's] answers were not guileless but were shrewdly calculated to evade. Nevertheless, . . . any special problems arising from the literally true but unresponsive answer are to be remedied through the 'questioner's acuity' and not by a federal perjury prosecution."

The Court's comment suggests that § 1621(1) perjury may not[73] be grounded on an ambiguous question. The lower federal appellate courts have not always been willing to go that far. True, "when a line of questioning 'is so vague as to be fundamentally ambiguous, the answers associated with the questions posed may be insufficient as a matter of law to support a perjury conviction.'"[74] Yet, as one court stated, "our Court has 'eschewed a broad reading of *Bronston,*' noting instead that, 'as a general rule, the fact that there is some ambiguity in a falsely answered question will not shield the respondent from a perjury . . . prosecution.'"[75] Moreover, the line between permissible ambiguity and impermissible fundamental ambiguity is not easily drawn.

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[66] 18 U.S.C. § 1621(1); United States v. Dunnigan, 507 U.S. 87, 94 (1993) ("A witness testifying under oath or affirmation violates this section if . . ."); United States v. Thompson, 808 F.3d 190, 194 (2d Cir. 2015); United States v. Burge, 711 F.3d 803, 812 (7th Cir. 2013); United States v. Petrovic, 701 F.3d 849, 859 (8th Cir. 2012).

[67] Bronston v. United States, 409 U.S. 352, 362 (1972); United States v. McKenna, 327 F.3d 830, 841 (9th Cir. 2003); United States v. Shotts, 145 F.3d 1289, 1297 11th Cir. 1998) (listing cases from other circuits that have reversed convictions for perjury based on truthful answers); United States v. Dean, 55 F.3d 640, 662 (D.C. Cir. 1995).

[68] *Bronston*, 409 U.S. at 353–54.

[69] *Id.* at 354.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 356.

[73] *Id*. at 362.

[74] United States v. Brown, 843 F.3d 738, 743 (2d Cir. 2016); *see also* United States v. Strohm, 671 F.3d 1173, 1179 (10th Cir. 2011) ("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.") (quoting United States v. Richardson, 421 F.3d 17, 33 (1st Cir. 2005)); *cf*. United States v. Miller, 527 F.3d 54, 77 (3d Cir. 2008) ("[A] perjury conviction under 18 U.S.C. § 1623 cannot be predicated on a response to a 'fundamentally ambiguous' question.'").

[75] United States v. McGee, 763 F.3d 304, 320 (3d Cir. 2014) (quoting United States v. Reilly, 33 F.3d 1396, 1416 (3d Cir. 1994)); *see also* United States v. Culliton, 328 F.3d 1074, 1078 (9th Cir. 2003).

Some courts have concluded that "to precisely define the point at which a question becomes fundamentally ambiguous . . . is impossible."[76]

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."[77] 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."[78] 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.[79]

Materiality

"To be guilty of perjury under 18 U.S.C. § 1621(1), a defendant's false statement must be material."[80] 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."[81] A false statement is no less material because the decisionmaker was not taken in by the statement.[82]

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).[83]

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[76] *Strohm*, 671 F.3d 1173, 1179–80 10th Cir. 2011) (quoting United States v. Farmer, 137 F.3d 1265, 1269 (3d Cir. 1998)); *see also* United States v. Lighte, 782 F.2d 367, 372 (2d Cir. 1986) ("The phrase 'fundamental ambiguity' has itself proven to be fundamentally ambiguous.").

[77] Hammer v. United States, 271 U.S. 620, 626 (1926).

[78] Weiler v. United States, 323 U.S. 606, 607 (1945); United States v. McGee, 763 F.3d 304, 318 (3d Cir. 2014); United States v. Stewart, 433 F.3d 273, 315 (2d Cir. 2006); United States v. Chaplin, 25 F.3d 1373, 1377 (7th Cir. 1994).

[79] *Weiler*, 323 U.S. at 610; *McGee*, 763 F.3d at 318; *Stewart*, 433 F.3d at 315 ("The rule is satisfied by the direct testimony of a second witness or by other evidence of independent probative value, circumstantial or direct, which is of a quality to assure that a guilty verdict is solidly founded. The independent evidence must, by itself, be inconsistent with the innocence of the defendant. However, the corroborative evidence need not, in itself, be sufficient, if believed to support a conviction.").

[80] United States v. Burge, 711 F.3d 803, 812 (7th Cir. 2013) (quoting United States v. Dunnigan, 507 U.S. 87, 94 (1993), "'A witness testifying under oath or affirmation violations [§ 1621(1)] if she gives false testimony concerning a material matter with the willful intent to provide false testimony. . .'"); *see also* United States v. McKenna, 327 F.3d 830, 838 (9th Cir. 2003).

[81] United States v. Kantengwa, 781 F.3d 545, 553–54 (1st Cir. 2015); United States v. Fernandez-Barron, 950 F.3d 655, 658 (10th Cir. 2019); *Burge*, 711 U.S. at 812 (quoting Neder v. United States, 527 U.S. 1, 16 (1999) ("A false statement is material if it has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed.'"); *McKenna*, 327 F.3d at 839.

[82] *Kantengwa*, 781 F.3d at 554–55; *Burge*, 711 U.S. at 812 ("Materiality does not depend on the ultimate decision reached by the body to which the false statement is addressed."); United States v. DeZarn, 157 F.3d 1042, 1051 (6th Cir. 1998).

[83] United States v. Norris, 300 U.S. 564, 574 (1934); United States v. McAfee, 8 F.3d 1010, 1017 (5th Cir. 1993).

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.[84]

Section 1621(2) states:

I. "Whoever"
II. "in any"
    i. "declaration,"
    ii. "certificate,
    iii. "verification, or"
    iv. "statement"
III. "under penalty of perjury as permitted under [§] 1746 of title 28, United States Code,"
IV. "willfully subscribes as true"
IV. "any material matter"
V. "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."[85]

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) 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

[84] H.R. REP. NO. 94-1616, at 1 (1976); Act of Oct. 18, 1976, P.L. 94-550, 90 STAT. 2534, 2534–35.

[85] *E.g.*, United States v. Teganya, 997 F.3d 424, 428 (1st Cir. 2021); Ho Sang Yim v. Barr, 972 F.3d 1069, 1081 (9th Cir. 2020). Section 1621(2) provides that a person is guilty of perjury if he 'willfully subscribes as true any material matter which he does not believe to be true' 'in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code.") (quoting 18 U.S.C. § 1621(2)). 28 U.S.C. § 1746 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)".

under oath.[86] 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.[87]

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").[88]

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."[89] Unlike § 1621, § 1623 permits a conviction in the case of two mutually inconsistent declarations without requiring proof that one of them is false.[90] It recognizes a limited recantation defense.[91] It dispenses with the so-called two-witness rule.[92] And, it employs a "knowing" mens rea standard rather than the more demanding "willfully" standard used in § 1621.[93]

Parsed into elements, § 1623 declares that:

I. "Whoever"

II. a) "under oath or"
   a. "in any"
   b. "declaration,"
   c. "certificate,"
   d. "verification, or"
   e. "statement"

III. "under penalty of perjury as permitted under [§] 1746 of title 28, United States Code"[94]

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[86] 18 U.S.C. § 1621(2); 28 U.S.C. § 1746. *See e.g.*, United States v. Roberts, 308 F.3d 1147, 1150 (11th Cir. 2002) (prisoner's unsworn petition for federal habeas corpus relief); United States v. Holland, 22 F.3d 1040, 1043 (11th Cir. 1994) (petition to waive fees *in forma pauperis*).

[87] Summers v. U.S. Dep't of Just., 999 F.2d 570, 572 (D.C. Cir. 1993).

[88] United States v. Roberts, 308 F.3d 1147, 1155 (11th Cir. 2002) (statement in a prisoner's habeas petition, that the petition was not a second and subsequent petition, was material because it "fooled the clerk of the court into accepting the 'writ' for filing, and led the magistrate judge to consider its merits until she discovered that the 'writ' was a successive § 2255 motion in disguise.").

[89] Dunn v. United States, 442 U.S. 100, 107 (1979) (citing S. REP. NO. 91-617, at 58–59 (1969) (internal citations omitted)).

[90] 18 U.S.C. § 1623(c).

[91] *Id.* § 1623(d).

[92] *Id.* § 1623(e).

[93] *Id.* § 1623(a).

[94] "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).

(continued...)

IV. "in any proceeding before or ancillary to"
    a. "any court or"
    b. "grand jury of the United States"
V. "knowingly"
    a. "makes any false material declaration or"
    b. "makes or uses any other information, including any"
        i. "book,"
        ii. "paper,"
        iii. "document,"
    c. "record,"
    d. "recording, or"
    e. "other material,"
VI. "knowing the same to contain any false material declaration,"
VII. "shall be fined under this title or imprisoned not more than five years, or both."[95]

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."[96]

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.[97] 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

(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)'."

[95] 18 U.S.C. § 1623(a). *E,g,*, United States v. Scott, 70 F.4th 846, 855 (5th Cir. 2023); United States v. Hird, 913 F.3d 332, 346 (3d Cir. 2019).

[96] United States v. Brugnara, 856 F.3d 1198, 1209 (9th Cir. 2017); *see also* United States v. Spirito, 36 F.4th 191, 207 (4th Cir. 2022); United States v. Dudley, 804 F.3d 506, 520 (1st Cir. 2015) ("A statement under oath constitutes perjury if is [1] false, [2] known to be so and [3] material to the proceeding."); United States v. Wen Chyu Liu, 716 F.3d 159, 173 (5th Cir. 2013) ("To obtain a perjury conviction, the Government must prove (1) that the defendant's statements were material; (2) false; and (3) at the time the statements were made the defendant did not believe them to be true."); United States v. Strohm, 671 F.3d 1173, 1177 (10th Cir. 2011) ("To prove perjury under §1623(a), the government must demonstrate (1) the defendant made a declaration under oath before a [court]; (2) such declaration was false; (3) the defendant knew the declaration was false and (4) the false declaration was material to the [court's] inquiry.") (brackets in the original); United States v. Ramirez, 635 F.3d 249, 260 (6th Cir. 2011) ("A conviction under §1623(a) requires proof that the defendant (1) knowingly made, (2) a materially false declaration (3) under oath (4) before a federal grand jury."); United States v. Gorman, 613 F.3d 711, 715–16 (7th Cir. 2010) ("To support a conviction for perjury beyond a reasonable doubt, the government had the burden of proving that (1) the defendant, while under oath, testified falsely before the grand jury; (2) his testimony related to some material matter; and (3) he knew that testimony was false.").

[97] 1 U.S.C. § 1.

for the benefit of the corporation.[98] Corporations have been convicted for false statements under § 1001, as mentioned earlier,[99] 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.[100] The allegedly perjurious statement must be presented in a "proceeding before or ancillary to any court or grand jury of the United States."[101] An interview in an attorney's office in preparation for a judicial hearing cannot be considered such an ancillary proceeding,[102] but the phrase "proceedings ancillary to" court or grand jury proceedings does cover proceedings to take depositions in connection with civil litigation,[103] as well as a variety of proceedings in criminal cases,[104] including habeas proceedings,[105] bail hearings,[106] venue hearings,[107] supervised release revocation hearings,[108] and suppression hearings.[109]

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[110] applies with equal force to perjury under § 1623.[111] Similarly, perjury cannot be the product of confusion, mistake, or faulty memory, but must be a statement that the defendant knows is false,[112] 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.[113] 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

[98] United States v. Agosto-Vega, 617 F.3d 541, 552–53 (1st Cir. 2010); United States v. Philip Morris USA, Inc., 566 F.3d 1095, 1118–19 (D.C. Cir. 2009); United States v. Singh, 518 F.3d 236, 249 (4th Cir. 2008).

[99] United States v. Automated Med. Labs., Inc., 770 F.2d 399, 406–408 (4th Cir. 1985); United States v. Richmond, 700 F.2d 1183, 1195 n.7 (8th Cir. 1983); United States v. Ionia Mgmt. S.A., 526 F. Supp. 2d 319, 327 (D. Conn. 2007).

[100] 18 U.S.C. § 1623(a).

[101] *Id.*

[102] Dunn v. United States, 442 U.S. 100, 111–12 (1979).

[103] *Id.*; United States v. Wen Chyu Liu, 716 F.3d 159, 173 (5th Cir. 2013); United States v. Wilkinson, 137 F.3d 214, 225 (4th Cir. 1998); United States v. Holland, 22 F.3d 1040, 1047–48 (11th Cir. 1994); United States v. McAfee, 8 F.3d 1010, 1013–14 (5th Cir. 1993).

[104] United States v. Farmer, 137 F.3d 1265 (11th Cir. 1998).

[105] United States v. Johnson, 325 F.3d 205, 209 (4th Cir. 2003).

[106] United States v. Greene, 591 F.2d 471 (8th Cir. 1979).

[107] United States v. Durham, 139 F.3d 1325 (10th Cir. 1998).

[108] United States v. Brugnara, 856 F.3d 1198, 1209 (9th Cir. 2017).

[109] United States v. Dudley, 804 F.3d 506, 520 (1st Cir. 2015); United States v. Renteria, 138 F.3d 1328 (10th Cir. 1998).

[110] Bronston v. United States, 409 U.S. 352, 358–59 (1973).

[111] United States v. Hird, 913 F.3d 332, 346 (3d Cir. 2019); United States v. Gorman, 613 F.3d 711, 716 (7th Cir. 2010); United States v. Thomas, 612 F.3d 1107, 1114–15 (9th Cir. 2010); United States v. Richardson, 421 F.3d 17, 32–3 (1st Cir. 2005); United States v. Shotts, 145 F.3d 1289, 1297 (11th Cir. 1998); United States v. Hairston, 46 F.3d 361, 375 (4th Cir. 1996).

[112] *Hird*, 913 F.3d at 346; United States v. Fawley, 137 F.3d 458, 466 (7th Cir. 1998); United States v. Reveron Martinez, 836 F.2d 684, 689 (1st Cir. 1988); *cf.* United States v. Dunnigan, 507 U.S. 87, 94 (1993).

[113] *Fawley*, 137 F.3d at 466–67.

never be said that one intended to answer such a question untruthfully."[114] Yet ambiguity will be of no avail if the defendant understands the question and answers falsely nevertheless.[115]

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.[116] 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.[117] Moreover, the statements must be so inherently contradictory that one of them of necessity must be false.[118]

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."[119] 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.[120] Subsection 1623(e) permits a perjury conviction without compliance with this traditional two-witness rule.[121]

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

[114] *Richardson*, 421 F.3d at 33; *see also* United States v. Strohm, 671 F.3d 1173, 1179–81 (10th Cir. 2011) ("An answer is not a knowing false statement if the witness responds to an ambiguous question with what he or she believes to be a truthful answer. . . . The case law has divided linguistic ambiguity into one of two flavors—fundamental or arguable. . . . A question is fundamentally ambiguous in narrow circumstances. To qualify, . . . the question itself is excessively vague, making it impossible to know – without guessing – the meaning of the question and whether a witness intended to make a false response . . . But fundamental ambiguity is the exception, not the rule. . . . A question is arguably ambiguous where more than one reasonable interpretation of a question exists."); United States v. DeZarn, 157 F.3d 1042, 1049 (6th Cir. 1998); *see also* United States v. Turner, 500 F.3d 685, 689 (8th Cir. 2007) ("If, however, a question is fundamentally vague or ambiguous, then an answer to that question cannot sustain a perjury conviction.").

[115] *Strohm*, 671 F.3d at 1178 ("Simply plumbing a question for post hoc ambiguity will not defeat a perjury conviction where the evidence demonstrates the defendant understood the question in context and gave a knowingly false answer."); United States v. McKenna, 327 F.3d 830, 841 (9th Cir. 2003) ("A question leading to a statement supporting a perjury conviction is not fundamentally ambiguous where the jury could conclude beyond a reasonable doubt that the defendant understood the question as did the government and that so understood, the defendant's answer was false."); United States v. Brown, 459 F.3d 509, 529 (5th Cir. 2006); *Turner*, 500 F.3d at 690; United States v. Gorman, 613 F.3d 711, 716 (7th Cir. 2010).

[116] 18 U.S.C. § 1623(c).

[117] United States v. Jaramillo, 69 F.3d 388, 390 (9th Cir. 1995).

[118] United States v. McAfee, 8 F.3d 1010, 1014–15 (5th Cir. 1993) ("The Government must show that the statements are so irreconcilable that one of the statements is 'necessarily false.' We find the Fourth Circuit's explanation of

§ 1623(c) instructive and adopt the standard set forth in United States v. Flowers, 813 F.2d 1320 (4th Cir. 1987). In *Flowers*, the court concluded that subsection 1623(c) 'requires a variance in testimony that extends beyond mere vagueness, uncertainty, or equivocality. Even though two declarations may differ from one another, the §1623(c) standard is not met unless taking them into context, they are so different that if one is true there is no way the other can also be true.'"); *see also* United States v. Porter, 994 F.2d 470 (8th Cir. 1993)).

[119] Weiler v. United States, 323 U.S. 606, 607 (1945).

[120] United States v. Ruggiero, 472 F.2d 599, 606 (2d Cir. 1973); United States v. Diggs, 560 F.2d 266, 269 (7th Cir. 1977) (citing cases in accord).

[121] 18 U.S.C. § 1623(e) ("Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence"). *See also* United States v. Kemp, 500 F.3d 257, 294 (3d Cir. 2007); United States v. Hasan, 609 F.3d 1121, 1139 (10th Cir. 2010).

the decisionmaking body to whom it is addressed."[122] 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."[123]

In the case of perjury before the grand jury, rather than articulate a single standard, the courts have described several circumstances under which false testimony may be considered material.[124] In any event, a statement is no less material because it did not or could not divert the decisionmaker.[125]

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.[126] Under such circumstances it is said the tribunal has no valid purpose to which a perjurious statement could be considered material.[127] 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.[128]

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[122] United States. v. Brugnara, 856 F.3d 1198, 1209 (9th Cir. 2017); United States v. Spirito, 36 F.4th 191, 207 (4th Cir. 2022); United States v. Macedo-Flores, 788 F.3d 181, 189 (5th Cir. 2015); United States v. Strohm, 671 F.3d 1173, 1186 (10th Cir. 2011); United States v. McKenna, 327 F.3d 830, 839 (9th Cir. 2003); United States v. Lee, 359 F.3d 412, 417 (6th Cir. 2003); United States v. Durham, 139 F.3d 1325, 1329 (10th Cir. 1998).

[123] United States v. Wilkinson, 137 F.3d 214, 225 (4th Cir. 1998) (comparing United States v. Kross, 14 F.3d 751, 754 (2d Cir. 1994) and United States v. Holley, 942 F.2d 916, 924 (5th Cir. 1991) with United States v. Adams, 870 F.2d 1140, 1146–48 (6th Cir. 1989) and United States v. Clark, 918 F.2d 843, 846 (9th Cir.1990), *overruled on other grounds by* United States v. Keys, 133 F.3d 1282, 1286 (9th Cir. 1998)). *See also McKenna*, 327 F.3d at 839–40 (acknowledging the division and continuing to adhere to the view expressed in *Clark*); *Spirito*, 36 F.4th at 207–09 (noting the division but finding it unnecessary to stake out a position).

[124] *E.g.*, *Macedo-Flores*, 788 F.3d at 189 ("[T]he statement need not be material to any particular issue but may be material to any proper matter of inquiry."); United States v. Silveira, 426 F.3d 514, 518 (1st Cir. 2005) ("A statement of witness to a grand jury is material if the statement is capable of influencing the grand jury as to any proper matter pertaining to its inquiry or which might have influenced the grand jury or impeded its inquiry. To be material, the statement need not directly concern an element of the crime being investigated, nor need it actually influence the jury."); United States v. Burke, 425 F.3d 400, 414 (7th Cir. 2005) ("Even potential interference with a line of inquiry can establish materiality"); United States v. Plumley, 207 F.3d 1086, 1095–96 (8th Cir. 2000) ("Although it is true that this particular question did not address the 'ultimate issue' . . . at the time . . . it is not thereby rendered immaterial" (citing cases in which a statement before the grand jury was found to be material when a "truthful answer would have raised questions about the role of others . . . when [the] witness obscures [his] whereabouts or involvement in the offense . . . [and] about peripheral matters [that] can become material when considered in context.").

[125] United States v. Burfoot, 899 F.3d 326, 339 (4th Cir. 2018); *Macedo-Flores*, 788 F.3d at 189; *Strohm*, 671 F.3d 1173, 1186: *Silveira*, 426 F.3d at 518; United States v. Lee, 359 F.3d 412, 416 (6th Cir. 2004); *McKenna*, 327 F.3d at 839.

[126] Brown v. United States, 245 F.2d 549, 555 (8th Cir. 1957) (quoting United States v. Icardi, 140 F. Supp. 383, 384–88 (D.D.C. 1956)); not all circuits accept the "perjury trade" doctrine, United States v. Burke, 425 F.3d 400, 408 (7th Cir. 2005) ("We have not embraced this doctrine, however, and do not see any reason to adopt it now.") (internal citations omitted); United States v. Reid, 477 F. Supp. 3d 1174, 1183 (W.D. Wash. 2020) ("The Ninth Circuit has never recognized the 'perjury trap' doctrine." (citing United States v. Chen, 933 F.2d 793, 797 (9th Cir. 1991)).

[127] *McKenna*, 327 F.3. at 837 ("The perjury trap doctrine has been applied in other jurisdictions only where the government used 'its investigative powers to secure a perjury indictment on matters which are neither material or germane to a legitimate ongoing investigation of the grand jury.'") (quoting *Chen*, 933 F.2d at 796).

[128] *Id.* ("Here, the government did not use its investigatory powers to question McKenna before a grand jury. Rather, it (continued...)

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. The defense is stated in fairly straightforward terms, "[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."[129] Although phrased in different terms, the courts seem to agree that repudiation of the false testimony must be specific and thorough.[130] There is some disagreement whether a recanting defendant must be denied the defense if both the substantial impact and imminent exposure conditions have been met or if the defense must be denied if either condition exists. Most courts have concluded that the presence of either condition dooms the defense.[131]

Early construction required that a defendant establish both that his false statement had not substantially affected the proceeding before his recantation *and* that it had not become manifest that his false statement would be exposed.[132] One more recent appellate decision, however, concluded that the defense should be available to a witness who could show a want of *either* an intervening adverse impact *or* of likely exposure of his false statement.[133] Even without the operation of § 1623(d), relatively contemporaneous corrections of earlier statements may negate any inference that the witness is knowingly presenting false testimony and thus preclude conviction for perjury.[134]

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

merely questioned McKenna in its role as a defendant during the pendency of a civil action in which she was the plaintiff. The perjury trap doctrine is inapplicable to McKenna's case for this reason."); United States v. Regan, 103 F.3d 1073, 1079 (2d Cir. 1997) ("[W]e have noted that the existence of a legitimate basis for an investigation and for particular questions answered falsely precludes any application of the perjury trap doctrine.); *Chen*, 933 F.2d at 797 ("[W]hen testimony is elicited before a grand jury that is attempting to obtain useful information in furtherance of its investigation or conducting a legitimate investigation into crimes which had in fact taken place within its jurisdiction, the perjury trap doctrine is, by definition, inapplicable.") (quoting United States v. Devitt, 499 F.2d 135, 140 (7th Cir. 1974) and United States v. Chevoor, 526 F.2d 178, 185 (1st Cir. 1975)).

[129] 18 U.S.C. § 1623(d); *cf.* United States v. DeLeon, 603 F.3d 397, 404–05 (7th Cir. 2010).

[130] United States v. Wiggan, 700 F.3d 1204, 1216 (9th Cir. 2012) (internal citations and quotation marks omitted) ("Recantation requires a defendant to renounce and withdraw the prior statement. And the defendant must unequivocally repudiate his prior testimony to satisfy §1623(d). It is not enough if the defendant merely attempted to explain his inconsistent statements, but never really admitted to the facts in question."); United States v. Tobias, 863 F.2d 685, 689 (9th Cir. 1988) (unequivocal repudiation); United States v. Scivola, 766 F.2d 37, 45 (1st Cir. 1985) (implicit recantation is insufficient); United States v. Goguen, 723 F.2d 1012, 1017 (1st Cir. 1983) (outright retraction and repudiation).

[131] United States v. Sherman, 150 F.3d 306, 313-18 (3d Cir. 1998); United States v. Fornaro, 894 F.2d 508, 510–11 (2d Cir. 1990); *Scivola*, 766 F.2d at 45; United States v. Denison, 663 F.2d 611, 615 (5th Cir. 1981); United States v. Moore, 613 F.2d 1029, 1043 (D.C. Cir. 1979); *contra* United States v. Smith, 35 F.3d 344, 345–47 (8th Cir. 1994).

[132] *Moore*, 613 F.2d at 1043–44; United States v. Srimgeour, 636 F.2d 1019, 1021 (5th Cir. 1980); *Scivola*, 766 F.2d at 45; *Fornaro*, 894 F.2d at 510–11.

[133] *Smith*, 35 F.3d at 345.

[134] United States v. McAfee, 8 F.3d 1010, 1014 (5th Cir. 1993).

title or imprisoned for not more than five years, or both." [135] The crime consists of two elements – (1) an act of perjury committed by another (2) induced or procured by the defendant.[136] Perjury under either §§ 1621 or 1623 will support a conviction for subornation under § 1622,[137] but proof of the commission of an act of perjury is a necessary element of subornation.[138] Nevertheless, the perjury two-witness rule does not apply in a case of subornation.[139] 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.[140] 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[141] which, unlike § 1622, do not insist upon suborner success as a prerequisite to prosecution.[142]

Consequences

Sections 1621, 1622, and 1623 are each punishable by imprisonment for not more than five years and a fine of the greater of not more than $250,000 (not more than $500,000 for an organization) or twice the loss or gain associated with the offense.[143] The applicable Guideline is U.S.S.G. § 2J1.3 which calls for the application of the greater of sentencing under its provisions or those of the cross-referenced Guideline. The Section provides a base offense level of fourteen with enhancements for a substantial interference with the administration of justice and in the case of subornation for causing or threatening physical injury or property damage.[144] In the alternative, sentencing is governed by Guideline by cross reference to the Guidelines for accessories after the

[135] 18 U.S.C. § 1622.

[136] United States v. Pabey, 664 F.3d 1084, 1095 (7th Cir. 2011).

[137] United States v. Endo, 635 F.2d 321, 322 (4th Cir. 1980).

[138] United States v. Hairston, 46 F.3d 361, 376 (4th Cir. 1995) (if the underlying perjury conviction is reversed for insufficient evidence, the subornation conviction must likewise be reversed); *see also* United States v. LeMoure, 474 F.3d 37, 44 (1st Cir. 2007) ("Section 1622 requires proof of actual perjury . . ."); United States v. Silverman, 745 F.2d 1386, 1394 (11th Cir. 1984).

[139] United States v. Davis, 380 F.3d 183, 195 (4th Cir. 2004).

[140] United States v. Bradberry, 466 F.3d 1249, 1254 (11th Cir. 2006); Rosen v. N.L.R.B., 735 F.2d 564, 575 n.19 (D.C. Cir. 1980) ("[I]t is true that a necessary predicate of the charge of subornation of perjury is the suborner's belief that the testimony sought is in fact false"); Petite v. United States, 262 F.2d 788, 794 (4th Cir. 1959) ("It is essential to subornation of perjury that the suborner should have known or believed or have had good reason to believe that the testimony given would be false, that he should have known or believed that the witness would testify willfully and corruptly, and with knowledge of the falsity; and that he should have knowingly and willfully induced or procured the witness to give such false testimony") (*Petite* only refers to § 1621 because it was decided prior to the enactment of § 1623); *see also* United States v. Pasha, 797 F.3d 1122, 1132 (D.C. Cir. 2015) ("Daum also challenges his two subornation of perjury convictions on the basis that the District Court omitted a required element of 'willfulness.' . . . Daum argues that the statute incorporates a willfulness requirement. . . . Among findings relevant to this Count (Count VI) was that Daum 'instructed Christopher White to perjure himself and say that he took the photos.' Given Daum's experience and role as a criminal defense attorney, this suffices—particularly under the plain error standard—to support a conclusion that Daum meant for White to break the law.").

[141] United States v. Miller, 161 F.3d 977, 982–84 (6th Cir. 1998).

[142] 18 U.S.C. § 1503 ("Whoever . . . *endeavors* to influence, obstruct, or impede the due administration of justice . . . ") (emphasis added); § 1512 (b) ("Whoever . . . corruptly persuades another person, or *attempts* to do so . . . with intent to influence . . . the testimony of any person in an official proceeding . . . ") (emphasis added).

[143] 18 U.S.C. §§ 1621, 1622, 1623, 3571.

[144] U.S.S.G. §§ 2J1.3(a), (b)(1), (b)(2).

fact (U.S.S.G. § 2X3.1) which is pegged at six offense levels below that the offense of complicity up to thirty offense levels.[145]

The amount of permissible fines are governed by the Guidelines for individual and organizational fines applicable to the final offense level.[146]

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 . . . ."[147] 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,"[148] 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."[149] Conspiracy under § 371 is punishable by imprisonment for not more than five years.[150] 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.[151]

Accomplices

Section 2 of Title 18 of the United States Code visits principal liability upon anyone who induces, commands, or aids and abets a federal offense committed by another.[152] So it is with § 1001.[153] Inducing another to commit perjury in violation of either §§ 1621 or 1623 is subornation.[154]

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.[155] They are also punishable by a fine of not more than $250,000 (not more

[145] *Id.* §§ 2J1.3(c), 2X3.,1(a). *See e.g.*, United States v. Scott, 70 F.4th 846, 861 (5th Cir. 2023); United States v. Myles, 962 F.3d 384, 389 (8th Cir. 2020).

[146] U.S.S.G. §§ 5E1.2 (sliding scale of minimum and maximum fines for individuals by offense level), 8C2.1(b) (organizations).

[147] 18 U.S.C. § 371.

[148] Hammerschmidt v. United States, 265 U.S. 182, 188 (1924); Glasser v. United States, 315 U.S. 60, 66 (1942).

[149] United States v. Estepa, 998 F.3d 898, 908–09 (11th Cir. 2021); United States v. Green, 47 F.4th 279, 289 (5th Cir. 2022); United Stated v. Golding, 972 F.3d 1002, 1005 (8th Cir. 2020); United States v. Hernández-Román, 981 F.3d 138, 143 (1st Cir. 2020); United States v. Wells, 873 F.3d 1241, 1257 (10th Cir. 2017).

[150] 18 U.S.C. § 371.

[151] Pinkerton v. United States, 328 U.S. 640, 647 (1946); United States v. Murry, 31 F.4th 1274, 1297 (10th Cir. 2022); United States v. Hills, 27 F.4th 1155, 1182 (6th Cir. 2022).

[152] 18 U.S.C. § 2.

[153] *Id.* § 1001(a). *E.g.*, United States v. Wellman, 26 F.4th 339, 349 (6th Cir. 2022).

[154] 18 U.S.C. § 1622.

[155] 18 U.S.C. §§ 1001, 1621, 1622, 1623. Section 1001, the principal false statement statute, sets a maximum term of eight years if the offense also involves a federal crime of terrorism or one of the designated federal sex offenses.

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.[156] 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).[157] 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.[158] 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.[159]

Section 3C1.1 instructs sentencing courts to add two offense levels in the case of an obstruction of justice:

> If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by 2 levels.[160]

[156] Gall v. United States, 552 U.S. 38, 49–51 (2007) ("[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range ... [A]fter giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the [18 U.S.C] § 3553(a) factors to determine whether they support the sentence requested by a party . . . If he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one. After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing. . . . Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range. Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance").

[157] U.S.S.G. ch. 5, pt. A (Sentencing Table).

[158] *Id.*

[159] *Id.*

[160] *Id.* § 3C1.1.

The accompanying commentary explains that the section "is not intended to punish a defendant for the exercise of a constitutional right."[161] More specifically, a "defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision."[162] Early on, the Supreme Court made it clear that an individual's sentence might be enhanced under § 3C1.1, if he committed perjury during the course of his trial.[163] Moreover, the examples provided elsewhere in the section's commentary and the cases applying the section confirm that it reaches perjurious statements in a number of judicial contexts and to false statements in a number of others. The examples in the section's commentary cover conduct:

> (A) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;[164]
>
> (B) committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding if such perjury pertains to conduct that forms the basis of the offense of conviction;
>
> (C) producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;
>
> (D) destroying or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding . . . however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substances) it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it results in a material hinderance to the official investigation or prosecution of the instant offense or the sentencing of the offender;[165]
>
> (E) escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;[166]
>
> (F) providing materially false information to a judge or magistrate;[167]
>
> (G) providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;
>
> (H) providing materially false information to a probation officer in respect to a presentence or other investigation for the court; [and]
>
> (I) other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (*e.g.*, 18 U.S.C. §§1510, 1511);[168]
>
> (J) failing to comply with a restraining order or injunction issued pursuant to 21 U.S.C. § 853(e) or with an order to repatriate property issued pursuant to 21 U.S.C. § 8543(p) [each relating to forfeiture];[169]

[161] *Id.*, cmt. app. n.2. *E.g.*, United States v. Iossifov, 45 F.4th 899, 922–24 (6th Cir. 2022).

[162] U.S.S.G. § 3C1.1, cmt. app. n.2.

[163] United States v. Dunnigan, 507 U.S. 87, 97–8 (1993).

[164] *E.g.*, United States v. Sykes, 65 F.4th 867, 889 (6th Cir. 2023); United States v. Baker, 58 F.4th 1109, 1126 (9th Cir. 2023); United States v. Griggs, 54 F.4th 531, 537 (8th Cir. 2022).

[165] *E.g.*, United States v. Mikulski, 35 F.4th 1074, 1078 (7th Cir. 2022).

[166] *E.g.*, United States v. Rivera-Nazario, 68 F.4th 653, 660–61 (1st Cir. 2023); United States v. Ozomaro, 44 F.4th 538, 547 (6th Cir. 2022).

[167] *E.g.*, United States v. Mosley, 53 F.4th 947, 960–61 (6th Cir. 2022).

[168] U.S.S.G. § 3C1.1, cmt. app. n.4(a).

[169] *E.g.*, United States v. Wells, 38 F.4th 1246, 1267–68 (10th Cir. 2022).

> (K) threatening the victim of the offense in an attempt to prevent the victim from reporting the conduct constituting the offense of conviction.

The commentary provides a corresponding list of examples of where the enhancement does not apply:

> (A) providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense;
>
> (B) making false statements, not under oath, to law enforcement officers, unless Application Note 4(G) above applies;
>
> (C) providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation;
>
> (D) avoiding or fleeing from arrest (see, however, § 3C1.2 (Reckless Endangerment During Flight));[170]
>
> (E) lying to a probation or pretrial services officer about defendant's drug use while on pre-trial release, although such conduct may be a factor in determining whether to reduce the defendant's sentence under § 3E1.1 (Acceptance of Responsibility).

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."[171]

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.[172] Thus, the court must find that "the defendant consciously act[ed] with the purpose of obstructing justice."[173] 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."[174] 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.[175]

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[170] *E.g.*, United States v. Mendoza-Gomez, 69 F.4th 273, 278 (5th Cir. 2023).

[171] United States v. Lewis, 62 F.4th 733, 747 (2d Cir. 2023). *See also* United States v. Ayayi, 64 F.4th 243, 251 (5th Cir. 2023) ("But a § 3C1.1 enhancement survives review when a trial court makes a single finding that 'encompasses all of the factual predicates for a finding of perjury'") (citing United States v. Dunnigan, 507 U.S. 87, 95 (1993) where the Supreme Court declared: "if a defendant objects to a sentence enhancement [under § 3C1.1] resulting from her trial testimony, a district court must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same, under the perjury definition we have set out.")).

[172] United States v. Price, 28 F.4th 739, 756 (7th Cir. 2022); United States v. Johnson, 880 F.3d 226, 233 (5th Cir. 2018); United States v. Brown, 857 F.3d 334, 342 (6th Cir. 2017) ("Brown's statements do not establish obstruction of justice for two reasons. The first is that Brown did not lie. … The second reason is that the email did not 'hurt or retard [the] investigation.") (quoting United States v. Williams, 952 F.2d 1504, 1516 (6th Cir. 1991) and United States v. Herrera-Rivera, 832 F.3d 1166, 1174 (9th Cir. 2016).

[173] United States v. Manning, 704 F.3d 584, 585 (9th Cir. 2012). *See also* United States v. Jones, 872 F.3d 483, 493 (7th Cir. 2017); United States v. Young, 811 F.3d 592, 604 (2d Cir. 2016).

[174] U.S.S.G. § 3C1.1, cmt. app. n.6; United States v. Strange, 65 F.4th 86, 90 (2d Cir. 2023); United States v. Iverson, 874 F.3d 855, 859 n.2 (5th Cir. 2017); United States v. King, 854 F.3d 433, 446 (8th Cir. 2017); United States v. Rash, 840 F.3d 462, 464 (7th Cir. 2016).

[175] U.S.S.G. § 3C1.1, cmt. app. n.5(a); United States v. Williams, 709 F.3d 1183, 1186 (6th Cir. 2013) (enhancement could not be imposed for want of materiality when the defendant's use of an alias had no impact on the decision to appoint counsel on his behalf (he was indigent under either name) or to find probable cause of his misconduct (the evidence was same under either name); United States v. Sandoval, 747 F.3d 464, 468 (7th Cir. 2014) (affirming imposition of the enhancement where the defendant's use of an alias when his real name would have revealed a criminal record and illegal immigration status and likely influenced magistrate's bail decision).

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