Perjury Under Federal Law: A Sketch of the Elements

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Summary

There are three general federal perjury laws. One, 18 U.S.C. 1621, outlaws presenting material false statements under oath in federal official proceedings. A second, 18 U.S.C. 1623, bars presenting material false statements under oath before or ancillary to federal court or grand jury proceedings. A third, 18 U.S.C. 1622 (subornation of perjury), prohibits inducing or procuring another to commit perjury in violation of either Section 1621 or Section 1623. A closely related fourth law, 18 U.S.C. 1001 proscribes material false statements in any matter within the jurisdiction of a federal agency or department. Moreover, regardless of the offense for which an individual is convicted, his sentence may be enhanced as a consequence of any obstruction of justice in the form of perjury or false statements for which he is responsible, if committed during the course of the investigation, prosecution, or sentencing for the offense of his conviction. The enhancement may result in an increase in his term of imprisonment by as much as four years. This report is an abbreviated version of CRS Report 98-808, *Perjury Under Federal Law: A Brief Overview*, by Charles Doyle, stripped of most footnotes, quotations, citations, and bibliography.

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Introduction

Although it now covers more than court proceedings, the definition of perjury has not changed a great deal otherwise since the framing of the Constitution. Blackstone described it as "a crime committed when a *lawful* oath is administered, in some *judicial* proceeding, to a person who swears *willfully, absolutely* and *falsely*, in a matter *material* to the issue or point in question."

Perjury Under 18 U.S.C. 1623

"Congress enacted §1623 as part of the 1970 Organized Crime Control Act to facilitate perjury prosecutions and thereby enhance the reliability of testimony before federal courts and grand juries." It nevertheless embodies most of the same basic perjury elements (stripped of some of the technical requirements) and carries the same penalties as the more traditional Section 1621. Parsed into elements, it declares that:

I. Whoever

II. a. under oath or

b. in any
i. declaration,
ii. certificate,
iii. verification, or
iv. statement
under penalty of perjury as permitted under Section 1746 of title 28, United States Code

III. in any proceeding before or ancillary to

a. any court or
b. grand jury of the United States

IV. knowingly

V. a. makes any false material declaration or
b. makes or uses any other information, including any
i. book,
ii. paper,
iii. document,
iv. record,
v. recording, or
vi. other material,
knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both, 18 U.S.C. 1623(a)(enumeration added).

In most cases, the courts abbreviate their description of the elements and state 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 of grand jury of the United States."

The forum for the allegedly perjurious declaration must be a "proceeding before or ancillary to any court or grand jury of the United States." An interview in an attorney's office in preparation for a judicial hearing cannot be considered such an ancillary proceeding, but the phrase "proceedings ancillary to" court or grand jury proceedings does cover proceedings to take depositions in connection with civil litigation, as well as a variety of pretrial proceedings in criminal cases, including bail hearings, venue hearings, or suppression hearings.

The Supreme Court's observation that a statement that is misleading but literally true cannot support a conviction under Section 1621 because it is not false, applies with equal force to perjury under Section 1623. Similarly, perjury cannot be the product of confusion, mistake, or faulty memory, but must be a statement that the defendant knows is false, although this requirement may be satisfied with evidence that the defendant was deliberately ignorant or willfully blind to the fact that the statement was false. On the other hand, a defendant cannot be guilty of perjury for a truthful answer to a reasonable interpretation of an ambiguous question.

Materiality is perhaps the most nettlesome of perjury's elements. It is usually said that a statement is material "if it has a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to whom it is addressed." This definition is not easily applied to false statements made in civil depositions. In such cases, one appellate court has recently described the lower federal courts as 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." In any event, a statement is no less material because it did not or could not divert the decisionmaker.

Subsection 1623(c) permits a perjury conviction simply on the basis of two necessarily inconsistent material declarations rather than a showing that one of the two statements is false.

Conviction does require showing, however, that the two statements were made under oath; it is not enough to show that one was made under oath and the other was made in the form of an affidavit signed under penalty of perjury. Moreover, the statements must be so inherently contradictory that one of them of necessity must be false.

Subsection 1623(e) permits a perjury conviction without compliance with the traditional two witness rule. 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." The two witness rule rests on a common law rather than a constitutional foundation and consequently can be abrogated by statute which Congress has done in subsection 1623(e) without offending constitutional principles.

In contrast to the other subsections of Section 1623, subsection 1623(d) offers a bar to prosecution of those accused of perjury under the section. 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," 18 U.S.C. 1623(d). Although phrased in different terms, the courts seem to agree that repudiation of the false testimony must be specific and thorough.

Perjury Under 18 U.S.C. 1621

Section 1621 was "enacted in an effort to keep the course of justice free from the pollution of perjury." When Congress passed Section 1623, it did not repeal Section 1621 either explicitly or by implication; where its proscriptions overlap with those of Section 1623, the government is free to choose under which it will prosecute. In many instances, it affords greater protection than Section 1623. It prohibits perjury before official proceedings—both judicial and nonjudicial. Separated into its elements, the section provides that:

(1)

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

i. testimony,
ii. declaration,
iii. deposition, or
iv. certificate

by him subscribed, is true,

V. willfully and contrary to such oath

VI. a. states or
b. subscribes
any material matter which he does not believe to be true; or

(2)

I. Whoever in any
a. declaration,
b. certificate,
c. verification, or
d. statement
under penalty of perjury as permitted under Section 1746 of title 28, United States Code,

II. willfully subscribes as true

III. any material matter

> IV. which he does not believe to be true
>
> 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 18 U.S.C. 1621 (enumeration added).

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

Testimony that is literally true , even if deceptively so, cannot be considered false for purposes of a prosecution under Section 1621. On the other hand, under either Section 1621 or Section 1623 the false statement may consist of testimony that the witness does not remember or does not know when the evidence clearly demonstrates that he does.

The test for materiality under Section 1621 is the same as it is under Section 1623—"whether the false statement has a natural tendency to influence or [is] capable of influencing the decision required to be made."

Conviction under Section 1621 requires not only that the defendant knew his statement was false ("which he does not believe to 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." Other courts have referred to it as acting with an "intent to deceive" or as acting "intentionally."

Subornation of Perjury

Section 1622 outlaws procuring or inducing another to commit perjury: "Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned for not more than five years, or both," 18 U.S.C. 1622. The crime consists of two elements—(1) an act of perjury committed by another (2) induced or procured by the defendant. Perjury under either Section 1621 or 1623 will support a conviction for subornation under Section 1622, but commission of an act of perjury is a necessary element of subornation. Although the authorities are exceptionally sparse, it appears that to suborn one must know that the induced statement is false and that at least to suborn under Section 1621 one must also knowingly and willfully induce.

False Statements (18 U.S.C. 1001)

The general false statement statute, 18 U.S.C. 1001, outlaws false statements, concealment, or false documentation in any matter within the jurisdiction of any of the three branches of the federal government, although it limits application in the case of Congress and the courts. More specifically it states:

I. Except as otherwise provided in this section,

II. whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States,

III. knowingly and willfully—

IV. a. falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
b. makes any materially false, fictitious, or fraudulent statement or representation; or

c. makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years or, imprisoned not more than 8 years if the offense involves international or domestic terrorism (as defined in section 2331) or 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).

The courts' description of the elements will ordinarily be limited to whichever of the forms of misconduct—false statement, concealment, or false documentation—is implicated in the particular case. In addition, Section 1001 imposes a limitation upon an offense that involves matters within the jurisdiction of either the judicial or legislative branch:

> (b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.
>
> (c) 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; or (2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate. 18 U.S.C. 1001(b),(c).

A matter is within the jurisdiction of a federal entity when it involves a matter "confided to the authority of a federal agency or department ... A department or agency has jurisdiction, in this sense, when it has power to exercise authority in a particular situation. Understood in this way, the phrase 'within the jurisdiction' merely differentiates the official, authorized functions of a agency or department from matters peripheral to the business of that body." Several courts have held that the phrase contemplates coverage of false statements made to state, local, or private entities but relating to matters that involve federal funds or regulations. Subsection 1001(b) precludes application of prohibitions in Section 1001(a) to the statements, omissions, or documentation presented to the court by a party in judicial proceedings. This includes statements of indigency filed by a defendant seeking the appoint of counsel, or by a defendant for a probation officer's presentence report; but not statements made by one on supervised release to a parole officer.

Although the offense can only be committed "knowingly and willfully," the prosecution need not prove that the defendant knew that his conduct involved a "matter within the jurisdiction" of a federal entity nor that he intended to defraud a federal entity. Instead, the phrase "knowingly and willfully" refers to the circumstances under which the defendant made his statement, omitted a

fact he was obliged to disclose, or included with his false documentation, i.e., "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." Prosecution for a violation of Section 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 decisionmaking body to which it is addressed." There is no need to show that the decision maker was in fact diverted or influenced.

Conviction for false statements or false documentation under Section 1001 also requires that the statements or documentation be false, that they not be true. And the same can be said of the response to a question that is so fundamentally ambiguous that the defendant's answer cannot be said to be knowingly false. On the other hand, unlike the perjury provision of Section 1623, "there is no safe harbor for recantation or correction of a prior false statement that violates Section 1001." Prosecutions under subsection 1001(a)(1) for concealment, rather than false statement or false documentation, must also prove the existence of duty or legal obligation not to conceal.

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

Regardless of the offense for which an individual is convicted, his sentence may be enhanced as a consequence of any obstruction of justice in the form of perjury or false statements for which he is responsible, if committed during the course of the investigation, prosecution, or sentencing for the offense of his conviction. The enhancement may result in an increase in his term of imprisonment by as much as four years. The enhancement is the product of the influence of §3C1.1 of the United States Sentencing Guidelines.

Section 3C1.1 instructs sentencing courts to add 2 offense levels in the case of an obstruction of justice:

> If (A) 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 (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels. U.S.S.G. §3C1.1.

The accompanying commentary explains that the section "is not intended to punish a defendant for the exercise of a constitutional right." 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." Early on, the Supreme Court made it clear that an individual's sentence might be enhanced under U.S.S.G §3C1.1, if he committed perjury during the course of his trial. 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 courts have concluded that an enhancement under the section is appropriate, for instance, when a defendant has (1) given preposterous, perjurious testimony during his own trial; (2) given perjurious testimony at his suppression hearing; (3) given perjurious, exculpatory testimony at the separate trial of his girl friend; (4) made false statements in connection with a probation officer's

bail report; (5) made false statements to the court in an attempt to change his guilty plea; (6) made false statements to federal investigators; and (7) made false statements to state investigators relating to conduct for which the defendant was ultimately conviction.

When perjury provides the basis for an enhancement under the section, the court must find that the defendant willfully testified falsely with respect to a material matter. When based upon a false statement not under oath, the statement must still be material, that is, it must tend to influence or affect the issue under determination. Even then, false identification at the time of arrest only warrants a sentencing enhancement under the section when the deception significantly hinders the investigation or prosecution.

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