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False Statements: Prosecutors Reload a Familiar Weapon

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Many remember that home maven Martha Stewart was convicted after trial for her involvement in an insider trading scandal in the mid-2000s. What most do not know or remember is that she was not actually convicted on insider trading charges—she was convicted of making false statements to government investigators and obstruction of justice. That case illustrated, once again, that one of the most powerful weapons in the federal prosecutor's arsenal is the ability to charge witnesses in government investigations with making false statements to investigators and/or obstruction of justice. These charges carry significant penalties, and are always available if a witness knowingly and corruptly lies, covers up, or obstructs, regardless of whether there is, or ever will be, sufficient evidence to charge anyone with the underlying crime being investigated.

Today, more than 10 years later, Special Counsel Robert Mueller's probe into Russian interference in the 2016 U.S. elections provides the most recent and visible proof that the false statements and obstruction of justice weapon has been well maintained and remains fully loaded. Counsel for witnesses in government investigations would be wise to place greater emphasis on its significance when advising clients.

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This article provides an overview of 18 U.S.C. §1001—the federal statute prohibiting false statements to federal officials—before reviewing the Special Counsel's use of §1001 and exploring the future ramifications of its use.

Overview of Statute

In nearly any contact between an individual and the federal government—and especially in any government investigation—the federal false statements statute, 18 U.S.C. §1001, applies. Indeed, §1001 is implicated by any material statement to an official of any branch of the federal government on a matter they are investigating.

According to the text of the statute, §1001 makes it unlawful for an individual: "(a) … in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, [to] knowingly and willfully … (2) make any materially false, fictitious, or fraudulent statement or representation … ." Unlike the statute governing perjury, §1001 contains no requirement that the statement be under oath. Moreover, the language of the statute does not cabin "statement or representation" to strictly verbal ones; §1001 implicates written representations to the federal government as well (the statute can be seen in the fine print on many standard government forms).

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The Department of Justice's Justice Manual provides guidance to prosecutors on the intent and materiality requirements of §1001. On intent, the statute requires that the false statement be knowingly and willfully made. Put another way: "The statement must have been made with an intent to deceive, a design to induce belief in the falsity or to mislead, but §1001 does not require an intent to defraud—that is, the intent to deprive someone of something by means of deceit." Dep't of Justice, U.S. Attorneys' Manual: Criminal Resource Manual §910 (2012); *United States v. Lichenstein*, 610 F.2d 1272, 1276-77 (5th Cir.), cert. denied, 447 U.S. 907 (1980). In two briefs filed in the Supreme Court in 2014, DOJ articulated further guidance on the willful requirement by expressing its view that the maker of the statement must have known that his or her conduct was unlawful. Br. in Opp., *Ajoku v. United States*, No. 13-7264 (March 10, 2014) 2014 WL 1571930 at *10; Br. In Opp., *Russell v. United States*, No. 13-7357 (March 10, 2014), 2014 WL 1571932 at *6-17. As for materiality: "It is sufficient that the statement have the capacity or a natural tendency to influence the determination required to be made" at the relevant government agency. Moreover, the test for materiality under §1001 is "not whether the false statement actually influenced a government function, but whether it had the capacity to influence." Dep't of Justice, U.S. Attorneys' Manual: Criminal Resource Manual §911 (2012); *United States v. Lueben*, 838 F.2d 751, 754 (5th Cir. 1988).

Before turning to the Special Counsel's recent use of §1001, it is important to note that although a false statement under §1001 does not always rise to level of obstruction of justice, it can. Indeed, if a knowing and willful false statement of material fact is also made with an objective to corruptly influence, obstruct, or impede an investigation, the maker of the statement may find himself or herself charged with obstruction of justice (under §1505) in addition to a false statements charge under §1001. (Under 18 U.S.C. §1505, a felony offense is committed by anyone who "corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation in being had by either House, or any committee of either House or any joint committee of the Congress." The accompanying §1515(b) defines "corruptly" as "acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.")

Special Counsel's Use of §1001

Having led the Federal Bureau of Investigation, held senior positions in the Department of Justice, and defended individuals in white-collar investigations, Special Counsel Mueller is undoubtedly intimately familiar with §1001. He appears to be bringing that familiarity and experience to bear: to date, each of the seven Trump campaign associates charged in Mueller's investigation has been charged with violating §1001. These individuals are: Former Trump campaign foreign policy adviser George Papadopoulos; former White House National Security Adviser Michael Flynn; former Trump personal attorney Michael Cohen; former Trump campaign chairman Paul Manafort; former associates of Manafort—Alex van der Zwaan and Rick Gates; and informal presidential adviser Roger Stone. For almost half of those individuals (Papadopoulos, Flynn, and van der Zwaan), §1001 was their only charge.

In addition to interview statements made to federal officials in the course of the investigation, the Special Counsel is likely also probing federal forms filed by those associated with the Trump campaign, including Form SF-86, the Questionnaire for National Security Positions. (In a March 21, 2017 Hearing of the House Intelligence Committee, Ranking Member Adam Schiff requested that Director Comey provide a copy of former National Security Adviser Michael Flynn's SF-86.) Form SF-86 includes questions seeking information on the preparer's interactions and/or paid work on behalf of foreign governments, entities, or individuals. Relevant to the present discussion, the

questionnaire section of Form SF-86 begins with the following attestation: "I have read the instructions and I understand that if I withhold, misrepresent, or falsify information on this form, I am subject to the penalties for inaccurate or false statement (per U. S. Criminal Code, Title 18, [S]ection 1001) …." Form SF-86, the Questionnaire for National Security Positions.

Observations

To the casual observer of the Russia investigation, Special Counsel Mueller's heavy use of—and apparent reliance on—§1001 may seem like a poor substitute for charges of substantive crimes for the underlying conduct at issue. Key allies of President Trump have derided such charges as merely "process crimes." (After Michael Cohen pleaded guilty on Nov. 29, 2018 to lying to Congress, Sen. Lindsey Graham called it a "process crime." See Garrett Haake, et al., *Democrats Pounce After Cohen Admits He Lied to Congress about Trump Tower Project in Russia*, NBC News, Nov. 29, 2018. Rush Limbaugh similarly stated that "every one of Mueller's indictments is a process crime." See Rush Limbaugh, Facebook (Nov. 29, 2018).) Even Supreme Court Justice Ruth Bader Ginsburg has cautioned that §1001 provides prosecutors "extraordinary authority" to "manufacture crimes." *Brogan v. United States*, 522 U.S. 398, 408 (1998) (J. Ginsburg, concurring) ("I write separately, however, to call attention to the extraordinary authority Congress, perhaps unwittingly, has conferred on prosecutors to manufacture crimes.")

Yet, §1001 remains one of the federal prosecutor's most reliable and often-used tools. By catching the target, subject, or even mere witness in a lie to a federal official, a prosecutor gains leverage over that individual. In the blocking and tackling of a federal investigation, a prosecutor will then use that leverage to persuade the individual to plead guilty, or, better yet, to "flip" and cooperate against others, ideally those who are more culpable. Indeed, many have speculated that the Special Counsel has used §1001 to do just that.

The lessons that can be gleaned from Special Counsel Mueller's recent use of §1001 apply to all individuals who may be involved—however seemingly tangentially—in a government investigation.

Outside of the Mueller probe, high-profile examples of prosecutions in which §1001 featured prominently include those of Congressman Christopher Collins (charged with insider trading and making false statements); former Governor of Illinois Rod Blagojevich (found guilty of making false statements and corruption charges); and, as noted above, Martha Stewart (found guilty of conspiracy, making false statements, and obstruction of justice, but acquitted of securities fraud).

The lessons that can be gleaned from Special Counsel Mueller's recent use of §1001 apply to all individuals who may be involved—however seemingly tangentially—in a government investigation. For instance, such individuals should be reminded to refrain from speaking with federal agents without counsel present, especially when the agents have paid a surprise home visit in the early-morning or late-night hours hoping to catch the witness off guard. The witness often makes the mistake of providing off-the-cuff answers to deflect the federal officials, but those tactics rarely work because the questioning officials usually have the advantage of examining documents and speaking to others about the issues before approaching the witness. As evidenced by certain of the charges arising out of the Mueller probe, false statements can also be used as "consciousness of guilt," which is an inference that when a witness makes a false statement that can be easily disproved, the witness is trying to conceal involvement in the conduct under investigation. Prosecutors often point to such false statements to bolster their proof of the underlying substantive crime. Such lies underscore the old maxim that the "cover up is worse than the crime." Finally, individuals who make a false statement with the purpose of confounding investigators may find themselves facing charges of §1505 (obstruction of justice) as well as §1001. Time will tell what comes out of the Special Counsel's Russia investigation and the other ongoing investigations, but recent events have served to illustrate, yet again, the significance of §1001 and its prominence in the federal prosecutor's arsenal.