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THE RUSSIA CONNECTION

The Law of Lying: Perjury, False Statements, and Obstruction

By **Helen Klein Murillo** Wednesday, March 22, 2017, 9:30 AM

Among the major topics of Monday's HPSCI hearing were Trump's unfounded claims that President Obama ordered wiretapping on then-candidate Trump at Trump Tower and the White House's accusation that British intelligence conducted the surveillance at Obama's behest.

There has been plenty of public discourse of the meaning of lying as of late. Trump and his White House and campaign staff seem to start or perpetuate new falsehoods almost daily. Notwithstanding his administration's own reputation for mendacity, President Trump routinely levies accusations of "fake news" against opponents and his staff defends "alternative facts."

While many have decried Trump's recent round of "wire tapping" charges—an accusation the White House is standing behind—as ill-advised, few have suggested these falsehoods are criminal.

But allegations of lies by Trump administration officials and campaign associates have frequently been coupled with claims that the false statements amount to criminal acts. After former National Security Advisor Michael Flynn's statements to the FBI that he didn't discuss sanctions with Kislyak, many noted that Flynn might have violated the criminal false statements law. When Jeff Sessions claimed to Senator Franken that he "did not have communications with the Russians," Franken and others accused Sessions of perjury. And when Reince Priebus apparently asked the FBI to deny reports that Trump campaign staff had "repeated contacts" with Russian intelligence during the campaign, some commentators suggested those contacts might constitute obstruction of justice.

Director Comey's confirmation of the existence of an investigation into Russian interference in the U.S. election and possible collusion or criminal conduct is likely to heighten the rhetoric. It will be all the more tempting for critics to assert that lies regarding the Russia Connection amount to criminal conduct. It is worthwhile, therefore, to take a step back and look at the laws that actually govern lying.

What follows is a brief examination of the three major criminal laws of lying that have pervaded public discourse on the Russia Connection. There are legitimate reasons why we criminalize lying but also perils in going too far. And as the critical investigation into Russia continues, Congress will need to carefully walk the line by laying the foundation for clear and legitimate enforcement of the criminal law if witnesses lie.

Perjury, False Statements, and Obstruction of Justice

- *Perjury*

Perjury, criminalized at 18 U.S.C. § 1621, is perhaps the most recognizable law against lying. The statute makes it a crime to "willfully and contrary to [an] oath state[] or subscribe[] any material matter which he does not believe to be true." It likewise criminalizes doing so in a written statement made under penalty of perjury, and it applies to statements made in federal court or other proceedings under oath, including congressional hearings.

Perjury is extremely difficult to prove. A prosecutor has to show not only that there was a *material* misstatement of fact, but also that it was done so *willfully*—that the person knew it was false when they said it. In *Bronston v. United States*, a unanimous Supreme Court held that a literally true but unresponsive answer could not form the basis of a perjury conviction even if the individual intended to mislead. In that case, a bankruptcy proceeding, the testimony went as follows:

Q: Do you have any bank accounts in Swiss banks, Mr. Bronston?

A: No, sir.

Q: Have you ever?

A. The company had an account there for about six months, in Zurich.

The questioning clearly implied personal bank accounts, but Mr. Bronston answered in regards to his company, implying that he personally never had Swiss bank accounts. It turns out Bronston had a personal bank account with a Swiss bank for a span of about five years. The government prosecuted him for perjury; a jury convicted, finding that his responses were intentionally misleading.

The Supreme Court overturned the conviction under the perjury statute, though the Court agreed that there was an implication in the second answer that Bronston never had personal bank accounts in Swiss banks, implied material falsity was insufficient. The Court wrote that while "in casual conversation this interpretation might reasonably be drawn," perjury does "not deal[] with casual conversation and the statute does not make it a criminal act for a witness to willfully state any material matter that *implies* any material matter that he does not believe to be true."

The Court made clear that the burden is on the questioner: "Under the pressures and tension of interrogation, it is not uncommon for the most earnest witnesses to give answers that are not entirely responsive. Sometimes the witness does not understand the question, or may in an excess of caution or apprehension read too much or too little into it . . . . It is the responsibility of the [questioner] to probe; testimonial interrogation, and cross-examination in particular, is a probing, prying, pressing form of inquiry."

Further, it didn't matter that the jury in *Bronston* found as a matter of fact that the witness's response was intentionally misleading because a "jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner."

So when Al Franken asked Jeff Sessions "what he [would] do" if "there is any evidence that anyone affiliated with the Trump campaign communicated with the Russian government in the course of this campaign," and Jeff Sessions responded "I have been called a surrogate at a time or two in that campaign and I didn't have—did not have communications with the Russians," that's very likely not perjury under the *Bronston* standard. Sessions later said he understood the question to be about campaign-related contacts and claims he didn't have specifically campaign-related contacts. Without more, his answer was at worst misleading. Franken's questioning and Sessions's answer simply were not sufficiently unambiguous. What might seem like a falsehood or intentionally misleading "in casual conversation" doesn't rise to perjury.

What's key here is that in congressional investigatory hearings on Russia, congresspersons should probe and pry, recognizing attempts to obfuscate and demanding clear answers to very clear questions. That's how you get to the whole truth, and it's how you set up a clear perjury offense if someone lies.

- *The Speech and Debate Clause?*

An issue specifically related to the Jeff Sessions perjury accusation calls for a brief detour here. In the wake of revelations of Jeff Sessions's meetings with Kislyak, some suggested that perhaps as a sitting senator, his confirmation testimony was protected by the Speech and Debate Clause.

The Constitution protects congresspersons from questioning and prosecution "for any Speech or Debate in either House." Effectively, this immunizes lying by congresspersons—but only in their legislative capacity. The notion that a senator is immunized by the Clause when testifying as a presidential nominee doesn't accord with the function of the Speech and Debate Clause, is undercut by Supreme Court precedent, and would lead to anomalous results.

In *Hutchinson v. Proxmire*, a defamation suit against a senator for statements distributed in the senator's newsletter, the Supreme Court held that the senator was not protected by the Speech and Debate Clause. The Court wrote that the objective of the Clause is "protecting only legislative activities," and that "[c]laims under the Clause going beyond what is needed to protect legislative independence are to be closely scrutinized."

Sessions at his confirmation hearing was speaking as a nominee, *not* as a senator. The Clause was not meant to provide an absolute immunity to congresspersons, and the Supreme Court has not treated it as such. Its protection is functional: it depends on whether the speaker was acting in a legislative capacity, broadly construed. And the anomalous result that Senator Sessions would be protected, while Betsy DeVos wouldn't, confirms the functional approach.

- *False Statements*

By far the broadest federal statute criminalizing lying is 18 U.S.C. § 1001, which makes it a crime to "knowingly and willfully . . . make[] any materially false, fictitious, or fraudulent statement or representation" in the course of "any matter within the jurisdiction of the executive, legislative, or judicial branch" of the federal government. There's no requirement that the statement be under oath.

The statute's history reveals creeping expansion over time: Section 1001 traces back to 1863, initially applying to servicemember claims against the government. It was amended in 1934 to apply more broadly to any person and covered "any matter within the jurisdiction of any department or agency of the United States." In *United States v. Bramblett*, the Supreme Court held that "any department or agency" included the Disbursing Office of the House of Representatives. (Congressman Bramblett lied to the House Disbursing Office in order to collect a salary for a nonexistent employee.)

In the Iran-Contra prosecutions, several federal district judges assumed, based on *Bramblett*, that executive branch officers could be held to have violated § 1001 when they lied in unsworn statements to Congress, even on matters unrelated to collecting federal benefits. Though the Iran-Contra indictments largely centered on perjury and withholding evidence, this was an analytically significant

expansion—to cover *interbranch* unsworn lying. The first practical use of § 1001 came shortly thereafter, forming the basis for the independent counsel investigation of Ted Olson that would give rise to *Morrison v. Olson*, in which the Supreme Court upheld the constitutionality of the independent counsel statute.

In 1996, § 1001 was revised to explicitly apply to "any matter within the jurisdiction of the executive, legislative, or judicial branch."

The statement must be "material" but materiality means only that the statement is "predictably capable of affecting . . . [an] official decision." This same definition of materiality applies to perjury. In *United States v. Gaudin,* the Supreme Court held that the issue of materiality is to be determined by juries.

In its present form, § 1001 sweeps incredibly broadly: just about any material statement to an official of any branch of the federal government on a matter they are investigating. It implicates many written representations to the federal government as well. In yesterday's hearing, Representative Adam Schiff requested that Director Comey provide the committee with a copy of former National Security Adviser Michael Flynn's SF-86, presumably to see if Flynn disclosed foreign contacts and payments. In three separate locations on the form, the SF-86 warns of criminal penalties under § 1001. It even requires an affirmative acknowledgment that the preparer understands that withholding, falsifying, or misrepresenting information on the form is "subject to the penalties for inaccurate or false statement (per U.S. Criminal Code, Title 18, section 1001)."

Because the lie need not occur in an official proceeding under oath, the existence of an ongoing investigation raises the likelihood that § 1001 would be relevant: it will sweep up almost all misrepresentations made to government officials in the course of that investigation. To the extent any leak investigations proceed, § 1001 is commonly the basis for charges in those cases as well. As Susan and I wrote in February:

> This provision is used far more frequently than [substantive antileak laws], in part because of the aggravating nature of lying to law enforcement and in part because the offense is easier to prove.

- *Obstruction of Justice*

Another major crime echoing in the public discourse around the Russia Connection is obstruction of justice. 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."

An accompanying code section, 18 U.S.C. § 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" (emphasis added). This is where obstruction of justice intersects with the false statements law. If you knowingly and willfully make a false statement of material fact in a federal government proceeding, you've potentially violated § 1001, and when you add an objective to influence, obstruct, or impede an investigation, you've now possibly violated § 1505 as well. Perjury can intersect with obstruction of justice in the same way.

Under the statute, a "proceeding" can be an investigation. Section 1503 criminalizes the same conduct in judicial proceedings. So obstruction during an investigation might violate § 1503, while if that same investigation leads to a criminal prosecution, obstruction during the prosecution itself would violate § 1505. The individual also has to know that a proceeding is happening in order to violate the statute, and must have the intent to obstruct—that is, act with the purpose of obstructing, even if they don't succeed.

Relatedly, 18 U.S.C. § 1512 makes it a crime to lie to a witness in an attempt to induce that witness to lie before Congress or a judicial hearing. So if a Trump campaign official lies to a witness that's about to go before Congress to testify hoping that witness will pass the lie along, that's a federal offense. Under § 1512(e), it is an affirmative defense if the conduct was otherwise lawful and was merely an effort to persuade the witness to testify truthfully, but the burden to prove that is on the defendant.

- *Other Statutes*

A lie might implicate an array of other statutes. For instance, perjury in particular matters sometimes constitute separate crimes: § 1516 criminalizes obstruction of a federal audit, § 1517 deals with obstruction of a federal examination of a financial institution, and § 1518, criminal investigations of health care offenses. And if you make an agreement to lie, that might be criminal conspiracy under 18 U.S.C. § 371.

Cover Ups and Crimes

There are numerous justifications for criminalizing lying: lies frustrate investigations, waste time and resources, and threatened incorrect results. But lies by government actors threaten even greater harms: they interfere with democratic self-governance by concealing relevant information from the voting public, undermine faith in institutions, and may implicate areas with informational imbalances, making uncovering lies particularly difficult.

There is a reason "It's not the crime, it's the cover-up" is a truism of investigations into politicians. Oftentimes the lie is worse than the original offense.

Yet, despite the values that might be promoted by strictly enforcing criminal laws against lying, there are dangers in over-criminalizing lying as well.

Sometimes the cover-up is worse than the crime; sometimes it is just easier to prove. That's often the case in leak prosecutions. But there's good reason to want to force the government to prove substantive offenses: where individual liberty is on the line, we don't want the government to be able to skirt burdens of proof with stand-in offenses.

Indeed, we can probe many of our own reactions to some of the alleged lies in the Russia story to find this tendency. We might ask whether we jump to "the lie is a crime!" because we are convinced of and outraged by some other *underlying* offense, or whether we've carefully considered whether the particular instance justifies criminal enforcement. We should ask ourselves this because the statutes described above are incredibly broad and simply cannot and will not be enforced uniformly across every instance of lying.

Further, perhaps special problems of chilled speech arise in criminalizing interbranch lying in particular. We want the executive branch, and the White House in particular, to share information with Congress, not just on subpoena but freely and on an ongoing basis.

Ultimately, however, the Russia Connection investigation goes to the very heart of our institutions, faith in our government, and protection of our democracy. Lying in these investigations shouldn't be tolerated. But Congress has the opportunity to hunt down lies and provide a strong basis for enforcement.

Because perjury is concrete and difficult-to-prove and prosecuting perjury rather than § 1001 lessens the problems of chilling interbranch speech and of uneven enforcement, its enforcement may seem more legitimate. But it can be enforced only if Congress asks sufficiently clear, detailed, and probing questions and refuses to accept anything but completely unambiguous answers.

Correction: This post previously and incorrectly stated that the question of materiality is left to judges rather than juries. While materiality was at one point a legal question for the court, it has been an issue for the jury as of the Supreme Court's 1995 decision in United States v. Gaudin.

Topics: The Russia Connection

Tags: Perjury, False statements, Obstruction of justice

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