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What Recent Special Counsel Prosecutions Can Tell Us About False Statements Prosecutions

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Criminal investigations and prosecutions in Washington, D.C. are not just a matter of routine law enforcement. They have now become a regular part of political life in our capitol. A manifestation of this development is the frequency of Section 1001 charges: the prosecution of individuals for alleged false or misleading statements made to investigators or government agencies.

The most prominent of these cases in recent years was the prosecution of Michael Flynn, President Donald J. Trump's first National Security Advisor, which resulted ultimately in dismissal of Section 1001 charges.

After giving a very brief description of Section 1001, including the chief issue in the *Flynn* case (materiality), we turn to two false statement cases brought in 2021 by Special Counsel John Durham—*United States v. Sussman,* No. 21-CR-582 (CRC) (D. D.C.) and *United States v. Danchenko,* No. 21-CR-245(AJT) (E.D. Va.). The *Sussman* case involved a lawyer in private practice in Washington, D.C., and the *Danchenko* case involved an employee of a D.C.-based think tank. Each case led to an acquittal after a jury trial. While Section 1001 may be a powerful tool of federal prosecutors, and can cause great harm to defendants, the results of given cases can vary greatly and are far from certain.

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The Basics

Under 18 U.S.C. Section 1001, it is a crime to make a false statement or representation—knowingly and willfully—"in any matter within the jurisdiction of the executive, legislative, or judicial branch" of the United States government. A wide range of false or misleading statements are subject to prosecution under Section 1001. Courts have described Section 1001 as a "catch-all" that reaches "false representations that might 'substantially impair the basic functions entrusted by law to [the particular] agency,' but which are not prohibited by other

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statutes." See *United States v. Kappes,* 936 F.2d 227, 231-32 (6th Cir. 1991). Section 1001 reaches beyond specific false statements. The statute has been held to prohibit the concealment of material facts when an individual is under a duty to disclose and knowingly and willfully fails to do so. See *United States v. Safavian*, 528 F.3d 957, 964 (D.C. Cir. 2008). At one time, courts were uncertain whether the law applied to the legislative and judicial branches as well as the executive. That question was answered in a 1996 amendment to the law. Section 1001 applies to all three branches of the federal government. However, to "avoid any chilling effect upon the adversarial process," see H.R. Rep. No. 104-680, at 2 (1996), it exempts representations made by a party or a party's counsel to a judge in a judicial proceeding; and it applies in the legislative branch only to administrative matters (e.g., a claim for payment) and authorized investigations. 18 U.S.C. Section 1001(b) and (c).

While Section 1001 may be a powerful tool of federal prosecutors, and can cause great harm to defendants, the results of given cases can vary greatly and are far from certain.

"Materiality" received considerable attention in the *Flynn* case. In 2017, Flynn pleaded guilty to violating Section 1001 for lying to FBI agents about conversations he had with the Russian ambassador to the United States prior to Trump's inauguration. Flynn later sought to withdraw his guilty plea and moved to dismiss the criminal information. See *United States v. Flynn*, No. 17-232 (EGS) (D. D.C.), ECF No. 162.

Under new leadership in Main Justice, the government also moved to dismiss, arguing, among other things, that Flynn's statements to the FBI were not "material" to any FBI investigation. The government's argument was based on a narrow formulation of materiality—namely, that "the false statement must have 'probative weight' and be 'reasonably likely to influence the tribunal in making a determination required to be made.'" See *United States v. Flynn*, 507 F. Supp. 3d 116, 131 (D. D.C. 2020) (emphasis in original). The government contended the FBI had no "legitimate investigative basis" for interviewing Flynn and Flynn's statements could not have deceived the agents, who had transcripts of Flynn's calls with the ambassador. See ECF No. 198 at 2, 17.

The district court rejected the government's "perplexing" formulation of materiality, concluding that Section 1001 does not require actual reliance on a false statement. Ultimately, the case was dismissed as moot after Flynn was pardoned by Trump.

The *Flynn* case does not appear to have led to a change in the standard of materiality. The issue turns on whether a false statement has the capacity or tendency to affect a particular decision, not on whether the government relied on the statement.

The Durham Prosecutions

In October 2020, Attorney General William Barr appointed John Durham, then-U.S. Attorney for the District of Connecticut, to serve as Special Counsel to investigate the FBI's and Justice Department's probes into links between the Trump campaign in 2016 and the Russian government. The investigation led to the false statement conviction of an FBI lawyer—Kevin Clinesmith—who pleaded guilty to falsifying an email in connection with a Foreign Intelligence Surveillance Act (FISA) warrant.

The Durham team also pursued criminal charges against Brookings Institute researcher Igor Danchenko, who was the primary source for the "Steele Dossier," and Washington lobbyist and national security lawyer Michael Sussman. Both trials ended in acquittals. See *U.S. v. Sussman.* Sussman was indicted in September 2021 for making a single false statement to the FBI. The indictment alleged that on Sept. 19, 2016, Sussman met with the FBI general counsel James Baker to provide information

about a purported secret channel of communication between Trump's campaign and a Russian bank. Sussman allegedly told Baker, falsely, that "he was not acting on behalf of any client." See Indictment, No. 21-cR-582-CRC (D. D.C.), ECF No. 1 at ¶ 27(a).

In the government's view, this statement led the FBI to believe that Sussman was "a good citizen merely passing along information, not a paid advocate or political operative" when, in fact, he was acting on behalf of clients. At the time of the meeting, Sussman represented a technology executive and the Clinton campaign in connection with researching and advancing allegations of a connection between a Trump campaign computer server and a Russian bank. The government contended that Sussman's false statement "misled [the FBI] concerning the political nature of his work and deprived the FBI of information that might have permitted it more fully to assess and uncover the origins of the relevant data and technical analysis, including the identities and motivations of Sussman's clients."

At the two-week trial in May 2022, the government focused on Sussman's billing records. He had billed the Clinton campaign for preparation of the white paper that he provided to the FBI and for flash drives for "secure sharing of files." Baker testified on direct examination that Sussman had texted him four days before the meeting that he had a sensitive matter to discuss and was "coming on my own—not on behalf of a client or company." Baker also testified that he was "100% confident" that Sussman repeated at the Sept. 19 meeting that he was not appearing on behalf of a particular client. The government offered notes of two FBI officials, written on the day of or shortly after the meeting, to the effect that Sussman had said "not doing this for any client" and "no specific client" at the meeting in question. The government argued that this evidence established that Sussman was acting on behalf of clients, and that he had lied about it when he met with Baker.

The defense accused the government of fabricating a "giant political conspiracy theory." In the defense's telling, Sussman was giving FBI a "heads up" and "did not ask for anything on behalf of anybody." The defense argued that the government did not prove that Sussman repeated at the meeting what he had written Baker in a text message on Sept. 15: "I'm coming on my own—not on behalf of a client or company." Notably, Baker's recollection was not memorialized in a memorandum, and Baker acknowledged that he had previously testified that Sussman told him the tip came from cyber experts who were his clients.

Russian analyst **Igor Danchenko** walks to the Albert V. Bryan U.S. Courthouse during a break in his trial on October 11, 2022, in Alexandria, Va. A jury acquitted Danchenko of charges that he lied to the FBI about his role in the creation of a discredited dossier about former President Donald Trump.

The defense also argued that the statement "I'm coming on my own" was true because Sussman was not asked or authorized by clients to provide information to the FBI. In addition to testimony from Sussman's clients, the defense relied on Sussman's billing records which showed that he did not bill for attending the Sept. 19 meeting. The defense also argued

that the allegedly false statement was not material because the FBI agent who evaluated the tip from Sussman testified that he would not have acted differently had he known it was from a political source, and because Sussman's connection to the Democratic party and Clinton campaign was well-known to everyone involved. The defense's arguments echoed the government's position in Flynn that the question of reliance is relevant to determining materiality under Section 1001.

U.S. v. Danchenko

Igor Danchenko was indicted for lying to the FBI about the infamous "Steele Dossier," an opposition research report compiled in 2016, and later largely discredited, which alleged collusion between the Trump campaign and Russian officials. Danchenko was a Russian national and Brookings researcher who was a primary source of raw intelligence and conducted some of the analysis for the Steele Dossier.

The indictment charged Danchenko with lying to FBI agents on five occasions about his sources for the dossier. See Indictment, No. 21-CR-00245-AJT (E.D. Va.), ECF No. 1. The first charge alleged that Danchenko lied about communicating with Charles Dolan, a Democratic Party operative, by telling an FBI agent that he never "talked" to Dolan about information that appeared in the Steele Dossier. The other four charges involved Danchenko's assertions that an unidentified caller in July 2017 probably was Sergei Millian, a former president of the RussianAmerican Chamber of Commerce, whereas, according to the government, Danchenko knew that Millian had not called him. Danchenko also allegedly falsely stated that the caller shared information that demonstrated cooperation between the Trump campaign and Russian officials.

Before trial in October 2022, the district court rejected Danchenko's motion to dismiss all charges but said it was a "close call." At trial, the court also excluded evidence offered by the government, including salacious information from the Steele Dossier that had "low probative value." Before giving the case to the jury, the district court acquitted Danchenko of the count charging that he had lied about whether he "talked" to Dolan. The court found the statement to be "literally true" because Danchenko had communicated with Dolan by email. With respect to the remaining charges, the government argued that telephone records and emails proved that Millian never called Danchenko. The defense countered in closing arguments that Danchenko had not said that he was certain who called him and that the call could have taken place via an Internet app, a possibility that Danchenko mentioned during a meeting with the FBI. Defense counsel argued that the investigation "focused on proving crimes at any cost, as opposed to investigating whether any occurred."

Conclusion

Section 1001 is subject to abuse, particularly in the highly charged state of politics today. After all, in Washington, statements—some not entirely accurate—are regularly made to government investigators and agencies. The potential for abuse was eloquently expressed in Justice Ruth Bader Ginsburg's concurrence in *Brogan v. United States*, 522 U.S. 398, 408 (1998), which rejected the "exculpatory no" doctrine. Ginsburg highlighted "the extraordinary authority Congress, perhaps unwittingly, has conferred on prosecutors to manufacture crimes." Yet she ultimately concluded that "Congress alone" could clarify the reach of Section 1001. In the meantime, the results in the *Danchenko* and *Sussman* cases suggest that defendants are hardly defenseless when they challenge false statement charges, notwithstanding the breadth of Section 1001.

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