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Title IV - False Declarations

Jeffrey J. Greenbaum
University of Michigan Law School

TITLE IV—FALSE DECLARATIONS

I. PROVISIONS

Title IV was designed to facilitate the bringing of federal perjury prosecutions,[1] thereby strengthening the deterrent value of the perjury penalties and acting as a greater incentive for truthful testimony.[2] It establishes a new false declarations statute applicable to court and grand jury proceedings,[3] with maximum penalty slightly increased over that allowable under the previously controlling perjury statute.[4]

The rigorous common law requirements of proof necessary for a finding of falsity—the two witness rule and the direct evidence rule—have been made inapplicable to prosecutions under this section,[5] as they were thought to inhibit perjury prosecutions. Only proof that the statement was false beyond a reasonable doubt is required to sustain a false declarations conviction.[6] In addition, irreconcilably contradictory declarations may be alleged as evidence of a false declaration without imposing a burden upon the Government to prove which statement is false.[7] However, a defendant's belief that each statement was true at the time it was made will serve as a defense.[8] The statute also contains a recantation provision modeled on New York law[9] that will allow a witness to retract a false statement without subjecting himself to perjury prosecution.[10] Prosecution under this section will be bar-

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[1] H.R. REP. NO. 91-1541, 91st Cong., 2d Sess. 33 (1970) [hereinafter cited as HOUSE REPORT]. The offense created by this section makes it a crime to knowingly make a false material declaration, or make or use any other information knowing it to contain a false material declaration, while under oath in a proceeding before or ancillary to a court or grand jury of the United States. 18 U.S.C.A. § 1623(a) (Supp. 1971).

[2] S. REP. NO. 91-617, 91st Cong., 1st Sess. 59 (1969) [hereinafter cited as SENATE REPORT]. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 201-02 (1967) [hereinafter cited as PRESIDENT'S COMMISSION].

[3] SENATE REPORT 33; HOUSE REPORT 33.

[4] The previously controlling general perjury statute (18 U.S.C. § 1621 (1964)) which is still in effect, provides for a maximum imprisonment of five years and/or a maximum fine of two thousand dollars. The newly created false declarations statute (18 U.S.C.A. § 1623 (Supp. 1971)) retains the same maximum term of imprisonment but increases the maximum fine to ten thousand dollars. However, the latter penalty is identical to that under 18 U.S.C. § 1001 (1964), relating to false statements within the jurisdiction of any department or agency of the United States (statements not required to be given under oath).

[5] *See* HOUSE REPORT 33; SENATE REPORT 33.

[6] 18 U.S.C.A. § 1623(e) (Supp. 1971).

[7] *Id.* § 1623(c).

[8] *Id.*

[9] SENATE REPORT 150. *See* N.Y. PENAL LAW § 210.25 (McKinney 1967).

[10] 18 U.S.C.A. § 1623(d) (Supp. 1971).

red if the witness admits the falsity of a declaration previously made in the same continuous court or grand jury proceeding, if at the time of the admission, the declaration has not substantially affected the proceeding, or it has not yet become apparent that its falsity will be exposed.[11]

The general perjury statute that has previously defined the offense pertaining to a court or grand jury[12] has not been repealed, however, and will exist concurrently with the newly created section. Fear was expressed in the House Hearings that allowing these two statutes to coexist might result in perjury being considered a lesser included offense in a false declarations charge. Since perjury still requires proof according to the rigorous common law rules, concern was expressed that an offense carrying a lesser punishment might require a higher burden of proof.[13] Further discussion resolved this issue to the contrary and clarified that the previous perjury section would apply only to those proceedings not covered by the new false declaration section.[14]

II. ABOLITION OF COMMON LAW RULES OF PROOF

Still, even if the two statutes do not overlap, there does not appear to be any rational basis set forth for abolishing the specialized common law rules of proof for perjury before a court or grand jury, while retaining those rules for perjury committed before any other competent tribunal. As it has been applied in American practice, the "two-witness" rule states that in perjury prosecutions, "the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused . . . ."[15] The corollary to this rule, the direct evidence rule, requires that "there must be direct and positive evidence of the statement under oath, and the circumstantial evidence of such falsity, no matter how persuasive, [is] insufficient."[16] The purpose

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[11] *Id.*; HOUSE REPORT 47.

[12] 18 U.S.C. § 1621 (1964).

[13] *Hearings on S. 30, and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess., ser. 27, at 555 (1970) [hereinafter cited as *House Hearings*] (statement of the Section of Criminal Law of the ABA regarding S. 30).

[14] *House Hearings* 637. Section 1621 contains the language "except as otherwise expressly provided by law . . . ." The recognition of other such statutes is further elucidated in the Reviser's Note, following 18 U.S.C.A. § 1621 (1966).

[15] Hammer v. United States, 271 U.S. 620, 626 (1926) (prosecution for subordination of perjury in a bankruptcy proceeding); *see also* United States v. Edmondson, 410 F.2d 670, 674 (5th Cir.), *cert. denied*, 396 U.S. 966 (1969); Gebhard v. United States, 422 F.2d 281, 286 (9th Cir. 1970); United States v. Brandyberry, No. 25,474 (9th Cir. Feb. 11, 1971) (perjurous testimony before a grand jury).

[16] Radomsky v. United States, 180 F.2d 781, 782-83 (9th Cir. 1950); Vuckson v. United States, 354 F.2d 918, 920 (9th Cir.), *cert. denied*, 384 U.S. 991 (1966); United States v. Brandyberry, No. 25,474 (9th Cir. Feb. 11, 1971). *But see* United States v.

served by these rules has been clearly enunciated in *Weiler v. United States,*[17] where the Court upheld the continued vitality of the two-witness rule after attacks on its current relevance and its hindrance to perjury prosecutions:

> Lawsuits frequently engender in defeated litigants sharp resentments and hostilities against adverse witnesses . . . rules of law must be so fashioned as to protect honest witnesses from hasty and spiteful retaliation in the form of unfounded perjury prosecutions.
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> . . . Since equally honest witnesses may well have differing recollections of the same event, we cannot reject as wholly unreasonable the notion that a conviction for perjury ought not to rest entirely upon an 'oath against an oath.' The rule may originally have stemmed from quite different reasoning, but implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted.[18]

In the enactment of a new false declarations provision, Congress has rejected the concern of the court in *Weiler,*[19] and with it the "rigid common law rules of evidence"[20] that have hindered successful perjury prosecutions.[21] Congress has rejected these rules, however, only in false declaration prosecutions before court or grand jury proceedings[22] and has failed to conform the existing proof requirements applicable in other perjury situations to its new legislative finding.[23]

By allowing a prosecution to be based on contradictory state-

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Collins, 272 F.2d 650, 652 (2d Cir. 1959), *cert. denied,* 362 U.S. 911 (1960) (test should not be whether evidence is direct, but whether it is of quality to assure that a guilty verdict is solidly founded).

[17] 323 U.S. 606 (1945).

[18] *Id.* at 609.

[19] *See* SENATE REPORT 149-50.

[20] SENATE REPORT 59.

[21] *Cf.* These rules have also been criticized by Professor Wigmore. 7 J. WIGMORE, EVIDENCE §§ 2040-43 (3d ed. 1940).

[22] *Cf.* In false statement prosecutions under 18 U.S.C. § 1001, (*see* note 4 *supra*) courts have held the two-witness and direct evidence rules inapplicable. Stein v. United States, 363 F.2d 587, 589 (5th Cir.), *cert. denied,* 385 U.S. 934 (1966); United States v. Marchisio, 344 F.2d 653, 665 (2d Cir. 1965); Ogden v. United States, 303 F.2d 724, 744-45 (9th Cir. 1962), *cert. denied,* 376 U.S. 973 (1964). *But see* Gold v. United States, 237 F.2d 764, 766 (D.C. Cir. 1956) (Bazelon, dissenting) (lower court was affirmed by an equally divided court en banc), *rev'd on other grounds,* 352 U.S. 985 (1957).

[23] THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT: A PROPOSED NEW FEDERAL CRIMINAL CODE TITLE 18, UNITED STATES CODE) (1971), has recognized a need for uniformity in its proposed perjury statute. It sets forth, in the alternative, both the corroboration requirements of § 1621, and the proof requirement of the newly enacted § 1623. *See* proposed § 1351(2), *id.* 128. There is substantial support in the Commission for the view that a special corroboration requirement for perjury is outmoded. *See* Comment after Proposed § 1351, *id.* 129.

ments without requiring the Government to prove which statement is false, this provision has also departed from previous law. Under the general perjury statute a prosecution cannot be based on inconsistent statements alone without proof of which statement is false.[24] Thus, an indictment is sufficient under this new section if it sets forth, without specifying which is false, two or more declarations which are inconsistent to the degree that one is necessarily false. Furthermore, each declaration must have been knowingly made under oath, material to the point in question, and within the period of the statute of limitations.[25] The last requirement was designed to prevent a defendant from being indirectly punished for a false statement with which he otherwise could not have been charged, because of the running of the statute of limitations.[26] The fact that the defendant believed each statement to be true at the time each declaration was made will be an affirmative defense to an indictment under this subsection.[27] The falsity of a declaration may be *established* by proving that the defendant, while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury.[28]

It is important to note that the above discussion of the common law rules of proof—the two-witness, direct evidence and inconsistent statement rules—is relevant only to the proof of the element of falsity. For a successful perjury prosecution under this statute, knowledge, falsity and materiality are each distinct elements that must be proved, whether the prosecution is based on a single false statement or contradictory statements.[29] Clarifying the element of knowledge has been the subject of much of the discussion on title IV in the House Hearings.[30] The Bar Association of the City of New York suggested that willfulness be more clearly established as an element, especially where falsity is established by inconsistent statements.[31] The Senate version was also criticized by the American Bar Association as being ambiguous as

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[24] *See, e.g.*, United States v. Nessanbaum, 205 F.2d 93, 96 (3d Cir. 1953); McWhorter v. United States, 193 F.2d 982, 983-84 (5th Cir. 1952).

[25] 18 U.S.C.A. § 1623 (c) (Supp. 1971). The statute of limitations provision was derived from a New York statute. *House Hearings* 673 (letter from Dep't of Justice). *See* N.Y. PENAL LAW § 210.20 (McKinney 1967).

[26] HOUSE REPORT 47.

[27] 18 U.S.C.A. § 1623 (c) (Supp. 1971); HOUSE REPORT 47.

[28] 18 U.S.C.A. § 1623(c) (Supp. 1971).

[29] HOUSE REPORT 47.

[30] *See, e.g., House Hearings* 310 (statement of ABCNY); *id.* 585-86 (discussion with Edward L. Wright & Samule Dash of the ABA); *id.* 635-37 (letter from Dep't of Justice).

[31] *House Hearings* 311.

to whether an intent to deceive must be shown.[32] The ABA recommended that language from the Model Act on Perjury[33] be adopted to clarify this intent.[34] The specific language of the Model Act was not adopted, however, although clarifying amendments were made regarding the element of knowledge.[35]

[32] *Id.* 542 (statement of Edward L. Wright, President-Elect of the ABA); *See also House Hearings* 585-86.

[33] The Model Act was drafted by the National Conference of Commissioners on Uniform State Laws. It is reprinted with comments in *House Hearings* 579-85.

[34] *See* note 32 *supra.*

[35] *Compare* proposed § 1623, reprinted in SENATE REPORT 12, *and* Commentary at 149-50, *with* § 1623 as enacted, *and* Commentary, HOUSE REPORT 47.