

The Power of the FBI

Martha Stewart went to jail, and Michael Flynn is dangling on the hook thanks to 18 United States Code Section 1001(a), which permits a person to be criminally charged for concealing or covering up a material fact or making any materially false representation or making or using a false writing or document containing materially false, fictitious or fraudulent statement or entry. This is not the same as perjury. Perjury, in order to be punishable, must be under oath. This is not the same as lying to a grand jury, where the witness is always under oath. This is about an FBI interview, where the government learns, often after the fact, that there may be more to the story than what they were told. This nebulous statute, the outgrowth of the False Claim Act passed during the Civil War, is a marvelous sledgehammer for prosecutors. Some would say that it is more of a tire iron, but the effect is the same.

I had a client one time who was interviewed by the FBI. She was a bookkeeper in a used car business. The feds were investigating whether her boss was money laundering, by selling expensive cars for cash. My client was new to the job. Two FBI agents who I knew well showed up at my office and interviewed the woman. The one was kind and encouraging, while the other was threatening. It became clear to me that if you did not tell the FBI what they wanted to hear, they would find in their later investigation that there was some juicy item which the interviewee allegedly did not tell the FBI agents. At that point I terminated the interview, kicked the FBI agents out of my office and told them to call my client before the grand jury. At least at the grand jury she would be sworn and I could sit outside the grand jury room in case the witness had any questions. That is precisely what occurred. My client was called before the grand jury, and never charged with anything.

In these days of Trump and wild, unverified Twitter wars, the FBI is newly empowered. Anyone who is interviewed by the Federal Bureau of Investigation, who thinks that they are giving the best information they can, can later be confronted with information showing that they lied or failed to tell the full story, and voila, you get it, they are under the hammer of a federal indictment unless they give the feds the information that the government wants. Is this right? Like the Patriot Act, which has resulted in the National Security Agency monitoring virtually every computer keystroke, have we gone too far in law enforcement?

There are those who believe that in order to safeguard our nation and crack down on crime, we can never go too far. A shocking number of people do not believe in the Bill of Rights, regardless of what they say when publicly polled. The Fifth Amendment, which guarantees the right to protection from self-incrimination, has been found by the

courts not to apply in civil cases. A person can take the Fifth Amendment, and in a civil case for money damages the jury can and will be told that the witness refused to testify, by taking advantage of the protections afforded by the Fifth Amendment.

Nobody is arguing that Martha Stewart, Michael Flynn, or the others caught in the web of an overbroad federal statute are pure as the driven snow. No doubt, all of these people, during the FBI interviews, had dark, dirty little secrets that they were not interested in sharing with Big Brother. The real issue is whether a person who is not under oath, and is not required to talk to the FBI, should be punished for an interview which, with hindsight, turned out to be less than completely forthcoming? This is a matter of public policy and should not be taken lightly.

The chief purpose of the statute is not to catch or punish criminals, but rather to put pressure on people to cooperate with the government so that other targets can be prosecuted and jailed. Those who have been prosecuted for not being forthcoming during FBI interviews have received no warnings of any kind. They were not trying to cheat the government out of money. In fact, the government may not even have been misled or harmed by the claimed falsehood.

The statute is a lever. It is the fulcrum by which criminal prosecutions against other targets are pursued.

It has been written that “conspiracy” is the greatest engine of injustice ever invented. Many an able prosecutor has used conspiracy laws to create a net into which marginally involved fish may be brought. To be part of a conspiracy requires pitifully little evidence, but the mere threat of the prosecution is often enough to help DA’s and United States Attorneys to get their big fish. No one is arguing that we should cripple our law enforcement capabilities. Far to the contrary. We simply must be alert to the fact that the public at large has less interest in constitutional protections and more energy for punishment than is always healthy for a free society.

Whether a marginally involved co-conspirator or someone who gives incomplete information to the FBI in a private interview should be subject to criminal penalties unless they give the prosecutor the story sought by the government is a matter of some importance. We love to say that “freedom is not free.” That absolutely is true, and sometimes even the guilty will go free when the constable stumbles, as the United States Supreme Court has so eloquently said.

It is provocative to think of all kinds of knaves, liars and crooks escaping justice because of the mere formality that they have never been warned by the government or because they are not under oath. Even more disturbing is the extent to which insignificant players can be manipulated to satisfy prosecutorial discretion. This leaves the big fish swimming around the hook while the minnows get swept up into the net.

*Clifford A. Rieders, Esquire
Rieders, Travis, Humphrey,
Waters & Dohrmann
161 West Third Street
Williamsport, PA 17701
(570) 323-8711 (telephone)
(570) 323-4192 (facsimile)*

Cliff Rieders is a Board Certified Trial Advocate in Williamsport, is Past President of the Pennsylvania Trial Lawyers Association and a past member of the Pennsylvania Patient Safety Authority. None of the opinions expressed necessarily represent the views of these organizations.