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“Collusion” and the Criminal Law

BY ROBERT SANGER

Most readers, even those who are not full-time criminal defense lawyers, may remember their law school introduction to inchoate crimes, to theories of criminal liability, and to the concepts of mens rea and actus reus. However, with the journalistic use of the term “collusion” in the air, it might be a good time for a refresher. So, this month’s Criminal Justice column will make an effort to cover the general framework of federal crimes in which a potential target (i.e., a would-be defendant if a case were filed) had a guilty mind but did not directly do the ultimate act; looked upon from the “collusion” perspective, did something with others in which some illegal result was attempted or accomplished by some or all.

Broadly construed, inchoate crimes would include attempts, conspiracy, aiding and abetting, soliciting, and accessory after the fact. There are some other theories of criminal liability that do not require the intent to do the criminal act. Criminal negligence, reckless indifference to human life, and transferred intent all involve a criminal mindset, a mens rea, which could be called a guilty mind but does not involve the intent to do the ultimate harmful act. In addition, strict liability offenses, although rare, do not require an intent to do the harmful act, but do involve assuming a role that involves control over an inherently-dangerous activity. Finally, there is a difference between a willful act and an act with knowledge, or scienter.

In current politics, the word “collusion” is being used both by journalists and politicians. It is used as both an allegation and a defense. This article intends to go through the federal criminal law on horseback without making or defending any factual allegations. It should not be read as either supporting one side or the other in the various arguments about collusion or lack of collusion that are being made publicly. It is just a discussion of the law that applies to both sides.

What is the Federal Criminal Law?

As has been remarked upon previously in this column – and which has been the bane of both progressives and conservatives – there are thousands of potential crimes under the United States Code and hundreds of thousands of regulations that are subject to federal criminal enforcement. The federal common law of crimes was purportedly codified in 1948. Title 18, titled “Crimes and Procedures,” contains a few hundred substantive crimes, but that is the tip of the iceberg. Crimes have proliferated in the other 56 Titles,¹ such that no one has been able to accurately count the number of substantive crimes. The best guess is that there are more than 5,000 separate crimes alleged by statute. In addition, however, the Code of Federal Regulations (“CFRs”) contains, viewing conservatively, 200,000 to 300,000 substantive regulations promulgated by the administrative agencies of the federal government which are also enforced as substantive crimes. In all of this, there is no specific federal crime of “collusion.”²

Even a multi-volume treatise on federal criminal law cannot begin to chronicle all of the statutes and regulations that might apply. Instead they usually break down the most popular criminal allegations into broad categories. The Federal Sentencing Guidelines (“the Guidelines”), issued by the United States Sentencing Commission, lists over 1,800 substantive sections of the United States Code as a non-exhaustive list that does not include the regulations in the CFRs. The Commission then groups those code sections into 19 “Parts,” including: Offenses Against the Person; Economic Offenses; Offenses Involving Public Officials and Federal Election Campaign Laws; Drugs and Narcoterrorism; Criminal Enterprises and Racketeering; Sex Offenses and Obscenity; Offenses Involving Individual Rights; Offenses Involving the Administration of Justice; Public Safety; Immigration, Naturalization and Passports; National Defense and Weapons of Mass Destruction; Food, Drugs, Agricultural Products, Consumer Products, and Odometer Laws; Offenses Involving Prisons and Correctional Facilities; Offenses Involving the Environment; Antitrust Offenses; Money Laundering and Monetary Transaction Reporting; Taxation; and Other Offenses. Nowhere on the list or within the 650-page text of the Guidelines is the word collusion used.

To compound matters, some of the most common crimes to be alleged by prosecutors are Mail Fraud, Wire Fraud,
Honest Services Fraud, Money Laundering, RICO and, yes, Conspiracy. All of those, and many of the other less-alleged crimes, can import diverse facts, usually alleged in a section called “The Scheme” in the Indictment, which can include a wide range of conduct that may or may not be intrinsically odious and might be allegations of more-or-less-routine business practices or other regulated behavior. Finally, of course, none of this involves the potential violation of state criminal statutes, which may cover similar – or identical – behavior. To the extent that any public officials are involved who might be subject to impeachment, high crimes and misdemeanors can be based on all of this. While the term “collusion” is sometimes used loosely in the law, it is not employed in criminal statutes and may cover both too much and too little in any discussion of legal consequences.

What is “Collusion?”

Without criticizing journalists or public officials who use the term “collusion,” suffice it to say that it is not a criminal law term. For the most part, collusion is used in a procedural context. It is used, for instance, in the context of two parties attempting to invoke jurisdiction of the court by colluding. For instance, 28 U.S.C. Section 1359 states, as a procedural but not criminal rule, that, “[a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.” There is a limited use of the term collusion in regulations pertaining to antitrust in which two or more people might collude about prices of goods or services or in banking matters where two or more people might collude about terms of financial arrangements. In general, collusion, as used in the law, involves two or more people entering into an agreement to get around a procedural law or gain some advantage, but it is not an element of a criminal offense.

The word “collude” is derived from the Latin root word “ludere,” which means “to play.” The same root is found in “prelude” which, in performance art or literature, is the piece that precedes the main theme. Here “co” is a Latin prefix for “with” or “together.” Hence, “collude” would be something like “play together.” In English usage, since the Fifteenth Century, the term has had a slightly-more-sinister implication, that is, playing together to deceive or trick another for advantage. Except for recent usage, it was seldom invoked as a synonym for a criminal conspiracy in the broader sense. It was to show that two or more people were trying to “play” the system. This is consistent with the current usage in the law, which generally relates to two or more parties “colluding” to obtain jurisdiction of the court or “colluding” to fix prices.

Of course, as philological studies and linguistic philosophy have taught us, ordinary language is dynamic, that is, definitions change with time and usage. There is no correct definition of a word in society; it changes with the way it is used, and “collusion” has changed with the recent usage. For the most part, it has retained some of its earlier meaning. “Collusion” in the present usage still has its connotation of two or more parties “playing together” and using “deceit or trickery” to gain advantage over another. It is perhaps a more ominous “playing together” when used to allege or deny playing with a foreign power to subvert American elections. It is also the sort of “playing together” that could involve myriad of federal statutes and regulations leading to criminal liability.

Still, colluding is not a substantive federal crime. As we know, federal criminal law is based on the interpretation of statutes, starting with a plain interpretation of the words used. The United States Supreme Court, in Sessions v. Dimaya, emphasized that words used in criminal statutes must have clear and fixed meanings, or they will be unconstitutionally vague. Therefore, the statutes that seek to impose criminal liability do not use the word “collude,” but use other, time-honored terms whose meanings can be discerned from precedent, preferably venerable precedent, or statute. That does not mean that the concepts conveyed by the current common usage of “collusion” do not describe criminal behavior. It just means that the behavior, to be criminal, must meet specific elements, described in clear terms, with fixed legal meanings.

What Legal Terms Apply to the Behavior Described by the Ordinary Language Term “Collusion?”

Criminal statutes generally involve elements that establish some sort of “blameworthiness.” That generally means that there must be an element involving a guilty mind, a mens rea. It could be an intent to do a bad deed, or the intent to embark on a course of action that is criminally
negligent or involves a reckless disregard for human life or is the undertaking of an inherently dangerous activity. To be guilty in these offenses, it is not necessary that there was an intent to harm a particular victim, just a mental state that involves creating a risk of harm. Ignorance of the law is not a defense, although scienter may be required in some circumstances. Also, an attempt to commit a crime, even if not successful, is a crime.

With that in mind, how does someone “collude” with another in a way that it is a crime? The simplest way is for two or more people to actually do things together with the intent (mens rea, as described above) to do the illegal act. When two or more people rob a bank, one holding the bag and the other pointing the gun, they are both guilty of bank robbery. The same is true if two or more people actually do things together to illegally affect the outcome of a federal election, say one illegally obtains documents and the other uses those documents to influence the election. Again, one or both could do so with criminal negligence or reckless disregard. They would not have to know, for instance, that the other actually and illegally obtained the documents if a reasonable person would have known. They cannot, in the terms of an old case, “turn a blind eye or a deaf ear” and claim they did not have knowledge.

A person could also solicit another to participate in a crime or use another as an agent. A conspiracy to commit a crime is a crime under 18 U.S.C. Section 371 and under other sections that describe conspiracies to commit particular crimes. For instance, two or more people could agree to commit a bank robbery and one or more of them engage in overt acts toward committing the actual robbery. Similarly, two or more people could agree to violate campaign finance laws and, one or more parties could commit overt acts taken toward the violation of the laws. They could all be guilty of conspiracy. On the other hand, conspiracy is a more difficult crime to prove because it requires proof of both the specific intent to agree and the specific intent to commit the unlawful act. This is difficult because intent often can only be shown by circumstantial evidence. Of course, where a target makes oral statements or makes written communications by letters, emails, or social media regarding his or her state of mind, it can make a prosecutor’s job a lot easier.

In addition, a person can be guilty of a crime by aiding and abetting. The statute on “Principals,” 18 U.S.C. Section 2, says, “(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.” In a bank robbery, it is not just the people who show up with the bag and the gun who have committed a crime, but, under federal law, it is also the buddy who stayed home who “counseled and encouraged” the friends to rob the bank. For instance, a person could be a felon as a principal if she or he encouraged other people to hack into private mail accounts under 18 U.S.C. Section 1037. And, of course, if the person only offered comfort or hindered the perpetrator’s apprehension, trial, or punishment, the person could be guilty of accessory after the fact under 18 U.S.C. Section 3.

Other Offenses

The foregoing criminal provisions can be coupled with myriad of substantive crimes from among the thousands of statutes and hundreds of thousands of regulations referred to in the beginning of this article. In addition, however, there are some statutes that allege general substantive crimes. For instance, felony violations can be alleged where there is a direct or indirect act or “collusion” (in the legal sense addressed above) to commit obstruction of justice. Obstruction of Justice under 18 U.S.C. Sections 1503 or 1504 can be influencing officers, or jurors, for instance, by making proclamations about evidence during a trial using the authority of public office. But obstruction can be of proceedings before other governmental departments, agencies, or committees under Section 1505. Section 1510 specifically pertains to obstructing criminal investigations, Section 1511 to state or local law enforcement, Section 1512 to witness tampering, and Section 1513 to retaliating against witnesses or informants. There are also specific statutes about interfering with an audit or examination of a financial institution (1516 and 1517) and with destruction, alteration, and falsification of records (1519). These are all in addition to many specific crimes relating to elections, financing, bank fraud, tax fraud, and criminalized regulatory offenses.

Also, in addition to those specific statutory or regulatory crimes are more general statutes relating to Mail Fraud under 18 U.S.C. Section 1341, Wire Fraud under 18 U.S.C. Section 1343, Honest Services Fraud (with a quid pro quo) under 18 U.S.C. 1346, Money Laundering 18 U.S.C. Section 1956, RICO under 18 U.S.C. Section 1961, and Bribery of a Public Official under 18 U.S.C. Section 201. All of these could be alleged based on a more general statement of the Scheme. For instance, if there is a fraudulent scheme, the use of the wires is a given these days since it only takes one email, one social media post, or one wire transfer in

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furtherance of the scheme to establish jurisdiction. Money laundering just requires the transfer of funds derived from a laundry list of offenses. RICO requires that there be movement of proceeds of illegal activity by an individual or organization to another entity when two predicate illegal acts have occurred in the last ten years. Again, all these statutes establishing general crimes can be committed or attempted directly, indirectly, or accomplished by some sort of solicitation, conspiracy, aiding and abetting, or accessory after the fact.

Conclusion

To frame the debate, the fact is that claims of collusion or lack of collusion both cover too much and too little when compared to actual legal liability. There could be some sort of collusion that was not sufficient to constitute federal criminal liability, even under the laws of solicitation, conspiracy, aiding and abetting, or accessory. On the other hand, there could be no collusion and yet one or more of many federal crimes could still have been committed either directly or through solicitation, conspiracy, aiding and abetting or accessory. So, the focus on claims or denials of “collusion,” rather than whether or not there is evidence of specific or general statutory violations, does not answer the question of whether there is federal criminal liability for anyone for collusion and whether, if one or more of the actors is subject to impeachment, high crimes or misdemeanors have been committed.

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ENDNOTES
1 The United States Code is divided into 54 Titles, four of which have Appendices, with Title 53 “Reserved,” hence, there are 57 total, all of which have some form of criminal enforcement.
2 Sessions v. Dimaya, ___ U.S. ___, 138 S.Ct. 1204 (April 17, 2018)