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*OBSTRUCTION OF JUSTICE UNDER FEDERAL LAW:
AN ABBREVIATED SKETCH*

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Obstruction of Justice Under Federal Law: An Abbreviated Sketch

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Summary

Although in a given case the same misconduct may be punishable under other federal statutes — some like 18 U.S.C. 1001 equally broad and others like 18 U.S.C. 1516 more narrowly drawn, this report focuses on selected aspects of the general obstruction of justice provisions found in 18 U.S.C. 1503, 1505, and 1512. It is essentially a replica, without footnotes or citations, of CRS Report 98-832, *Obstruction of Justice Under Federal Law: A Review of Some of the Elements*.

Section 1503 prohibits obstruction of pending federal judicial proceedings; section 1505 outlaws obstruction of pending administrative and Congressional proceedings; and section 1512 bans witness tampering with the intent to obstruct federal judicial, administrative, or Congressional proceedings.

Obstruction of Federal Courts (18 U.S.C. 1503)

Section 1503 condemns obstructing pending judicial proceedings under any of four kinds of interference. Three explicitly address interfering with federal jurors or court officials; the fourth, interference with the due administration of justice.

The courts often observe that to convict under this omnibus clause the government must prove beyond a reasonable doubt: (1) that there was a pending judicial proceeding, (2) that the defendant knew this proceeding was pending, and (3) that the defendant then corruptly endeavored to influence, obstruct, or impede the due administration of justice.

There is little dispute over the demands of the first two elements. The Supreme Court has maintained for over a century that a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court.

Marking the outer boundaries of “corruptly endeavoring to influence, obstruct or impede” has proven more challenging. Several circuits have held that to act “corruptly” within the meaning of the omnibus clause requires that the defendant have acted with the intent to influence, obstruct, or impede the proceeding in question. The combination of this somewhat relaxed standard coupled with the fact that an offender need only “endeavor” to obstruct gives the clause a potential sweep that the courts have sought to confine by requiring a demonstration of clear nexus between the obstructing conduct and the target proceedings. The nexus requirement is alternatively and more regularly cast as a requirement that the misconduct have the natural and probable effect of interfering with the due administration of justice. There is no requirement, however, that the defendant’s endeavors succeed or even that they were capable of succeeding (as long as the accused was unaware of the futility of his efforts to obstruct).

The courts are at odds over whether the due administration of justice in section 1503 may be obstructed by corrupting a witness before a federal judicial proceeding. The Second Circuit believes that when Congress enacted the more specific witness tampering and witness retaliation provisions of 18 U.S.C. 1512 and 1513 it intended to remove those crimes from the omnibus clause’s inventory of proscriptions. The other circuits, to the extent they have addressed the issue, disagree.

The specific kinds of misconduct which under the appropriate circumstances may provide the basis for a prosecution under the omnibus clause include:

- creation of false documents to be presented in evidence
- destruction of documentary evidence
- submission of a forged letter during a probation revocation hearing
- instructing a subordinate to conceal evidence
- a civil trial juror’s solicitation of a bribe
- pressuring bar owners to backdate video machine leases to conceal gambling income
- encouraging grand jury witnesses to falsify records and commit perjury
- promising to bribe a trial judge (even absent an intent to offer the bribe)
- grand juror’s disclosing matters occurring before the grand jury
- backdating a contract to be submitted to the grand jury
- instructing others to alter records in anticipation of a grand jury subpoena
- informant’s providing defense attorney with a false statement that might be used to impeach the informant’s contrary testimony at trial.

Obstruction of Congressional and Administrative Proceedings (18 U.S.C. 1505)

Section 1505 outlaws interfering with Justice Department civil investigative demands issued in antitrust cases, but deals primarily with obstructing Congressional and federal administrative proceedings.

Prosecutions under section 1505 are relatively few, and most of these arise as obstruction of administrative proceedings. The crime of obstruction of such proceedings has three essential elements. First, there must be a proceeding pending before a

department or agency of the United States. Second, the defendant must be aware of the pending proceeding. Third, the defendant must have intentionally endeavored corruptly to influence, obstruct or impede the pending proceeding.

Perhaps due to the breadth of judicial construction, the question of what constitutes a pending proceeding has arisen most often. Taken as a whole, the cases suggest that a “proceeding” describes virtually any manner in which an administrative agency proceeds to do its business. The District of Columbia Circuit, for example, has held that an investigation by the Inspector General of the Agency for International Development may constitute a “proceeding” for purposes of section 1505. In doing so, it rejected the notion that section 1505 applies only to adjudicatory or rule-making activities, and does not apply to wholly investigatory activity. Furthermore, proximity to an agency’s adjudicatory or rule-making activities, such as auditors working under the direction of an officer with adjudicatory authority, has been used to support a claim that an obstructed agency activity constitutes a proceeding. The courts seem to see comparable breadth in the Congressional equivalent (obstructing the due and proper exercise of the power of inquiry by Congress and its committees).

In the case of either administrative or Congressional proceedings, section 1505 condemns only that misconduct which is intended to obstruct the administrative proceedings or the due and proper exercise of the power of inquiry. In order to overcome judicially-identified uncertainty as to the intent required, Congress added a definition of “corruptly” in 1996: “As used in section 1505, the term ‘corruptly’ means 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,” 18 U.S.C. 1515(b).

Examples of the type of conduct that has been found obstructive include:

- enlisting others to lie to AID Inspector General’s Office investigators
- using threats to avoid an interview with IRS officials
- making false statements to a Defense Department auditor
- lying to Customs Service officials and inspectors
- endeavoring to use family relationship to obstruct Congressional committee investigation
- submitting false documentation in response to an IRS subpoena
- instructing a subordinate to destroy records sought under a DOE subpoena
- “blatant evasiveness and feigned forgetfulness” of a witness during testimony before an SEC investigative hearing.

Witness Tampering (18 U.S.C. 1512)

Section 1512 forbids murdering (18 U.S.C. 1512(a)), harassing (18 U.S.C. 1512(c)), or otherwise tampering (18 U.S.C. 1512(b)) with federal witnesses in order to prevent them from reporting misconduct to federal authorities, appearing as witnesses in federal proceedings, or producing evidence at federal proceedings. Although the murder and harassment subsections are not insignificant, the heart of the section is the omnibus subsection, subsection 1512(b). It outlaws (1) knowingly, (2) using one of the prohibited forms of persuasion, (3) with the intent to prevent a witness’s testimony or physical

evidence from being presented at official federal proceedings or with the intent to prevent a witness from reporting evidence of a crime to federal authorities.

Obstruction under section 1503 can only be committed during the pendency of federal proceedings. Congress expressly disclaimed any intention to impose a similar requirement for obstruction prosecutions under section 1512. Consequently, conviction under section 1512 does not require the government to show that the defendant was aware of any pending or contemplated federal proceedings or investigations. Congress likewise eliminated any requirement that the government prove that the defendant knew of the federal character of the proceedings or investigations he intended to obstruct. In a case charging that the defendant acted with the intent to obstruct the reporting of a federal crime to federal authorities, the government need not show that the accused knew the crime was federal or knew that the authorities were federal authorities, but the government must still prove the existence of the federal nexus in fact. As a practical matter, evidence that establishes the requisite intent will ordinarily prove guilty knowledge as well.

Corrupt persuasion seems to be both the most commonly charged and the most perplexing of the means used in violation of section 1512 to obstruct federal proceedings and criminal investigations. There is no consensus among the circuits as to its exact demands. The Second and Eleventh Circuits have held the element requires no more than that the government prove that the defendant's attempts to persuade were motivated by an improper purpose. The Third Circuit appears to have adopted an "improper purpose plus" standard, having suggested that under the facts of a given case an accused who — with the improper intent to obstruct — attempted to persuade a witness to testify falsely would be guilty of a violation of "corruptly persuading." The District of Columbia Circuit seems to be similarly inclined, for when it addressed a *Poindexter*-based, vagueness challenge it found the element satisfied by evidence that the defendant had attempted to persuade a witness to violate her legal duty to testify truthfully in court.

When the defendant's misconduct takes the form of deceiving a potential witness with the intent the witness later repeat the deception either at federal proceedings or to federal authorities, the government need prove neither that the potential witness was in fact deceived nor that there was any particular likelihood that the potential witness would in fact ever be called upon to testify or report.

Conviction under the omnibus provisions of 1512(b) can only follow upon evidence proving beyond a reasonable doubt that the defendant intended by his prohibited misconduct to obstruct a proceeding or the reporting of a crime that was in fact federal. The federal proceedings protected by obstruction under section 1512 are defined broadly by statute to cover executive, judicial and legislative branch proceedings. Just as the statute does not insist upon pending proceedings, so it is complete upon the commission of the prohibited misconduct committed with qualifying intent.

The defendant's guilty motive need not be exclusive; the demands of subsection 1512(b) are satisfied as long as the misconduct of the accused was motivated at least in part by a qualifying intent to obstruct.

Subsection 1512(d) creates an affirmative defense available to any defendant who can establish by a preponderance of the evidence that his conduct was not otherwise criminal and was committed for the sole purpose of producing truthful evidence.

In addition, no violation of section 1512 occurs when an individual, whether an attorney or not, advises a potential witness to assert an available Fifth Amendment privilege against self-incrimination.