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## Obstruction of Justice Under Federal Law: A Review of Some of the Elements

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## **ABSTRACT**

This is a look at some of the elements and caselaw of the general federal obstruction of justice statutes, 18 U.S.C. 1503, 1505, 1512.

# Obstruction of Justice Under Federal Law: A Review of Some of the Elements

## Summary

This report focuses on selected aspects of the general obstruction of justice provisions found in 18 U.S.C. 1503, 1505, and 1512. 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.

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.

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.

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.

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# Obstruction of Justice Under Federal Law: A Review of Some of the Elements

## **Introduction**

Blackstone lists some of the conduct we now know as obstruction of justice among the "[m]isprisions . . . generally denominated contempts or high misdemeanor" and specifically notes that "to endeavour to dissuade a witness from giving evidence; to disclose an examination before the privy council; or, to advise a prisoner to stand

mute; (all of which are impediments of justice) are high misprisions, and contempts of the king's courts, and punishable by fine and imprisonment."<sup>1</sup>

Although in a given case the same misconduct may be punishable under other federal statutes — some like 18 U.S.C. 1001<sup>2</sup> equally broad and others like 18 U.S.C. 1516<sup>3</sup> 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.<sup>4</sup>

Section 1503 prohibits obstruction of pending federal judicial proceedings; section 1505 outlaws obstruction of pending federal 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 by means of any of four methods. Three explicitly address interfering with federal jurors or court officials;<sup>5</sup> the fourth, interference with the due administration of justice:

### I. Whoever

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<sup>1</sup> IV BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 121, 126 (1769)(transliteration supplied).

<sup>2</sup> 18 U.S.C. 1001 prohibits material false statements in any matter within the jurisdiction of an agency or department of the United States, which under some circumstances may include false statements within the jurisdiction of the judicial and legislative branches.

<sup>3</sup> 18 U.S.C. 1516 outlaws obstructing certain federal audits.

<sup>4</sup> The witness retaliation provisions of 18 U.S.C. 1513 are also beyond the scope of this report.

<sup>5</sup> "(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties . . . shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

"(b) The punishment for an offense under this section is — (1) in the case of a killing, the punishment provided in sections 1111 and 1112; (2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and (3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both," 18 U.S.C. 1503.

- II. A. corruptly or
    - B. by threats or force, or
    - C. by any threatening letter or communication,
  - III. A. influences,
    - B. obstructs, or
    - C. impedes, or
    - D. endeavors to
      - 1. influence,
      - 2. obstruct, or
      - 3. impede,
  - IV. the due administration of justice,
- shall be punished as provided in subsection (b), 18 U.S.C. 1503(a).

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."<sup>6</sup>

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."<sup>7</sup>

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.<sup>8</sup> The combination of this somewhat relaxed standard coupled with the fact that an offender need only "endeavor" to obstruct gives the clause a potential

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<sup>6</sup> *United States v. Monus*, 128 F.3d 376, 387 (6th Cir. 1997); *see also*, *United States v. Cueto*, 151 F.3d 620, 633 (7th Cir. 1998); *United States v. Brenson*, 104 F.3d 1267, 1275 (11th Cir. 1997); *United States v. Wood*, 6 F.3d 692, 695 (10th Cir. 1993).

<sup>7</sup> *United States v. Aguilar*, 515 U.S. 593, 599 (1995), quoting, *Pettibone v. United States*, 148 U.S. 197, 206 (1893).

<sup>8</sup> *United States v. Mullins*, 22 F.3d 1365, 1369 (6th Cir. 1994); *United States v. Littleton*, 76 F.3d 614, 619 (4th Cir. 1996); *United States v. Russo*, 104 F.3d 431, 435-36 (D.C.Cir. 1997)("Russo's actual point thus must be that, under §1503, his lying to a grand jury with intent to obstruct its investigation did not amount to a 'corrupt' obstruction of the due administration of justice. On the face of it, this is a surprising proposition. It supposes that 'corrupt' has nothing to do with honesty, that a witness whose aim is to impede a grand jury investigation by distorting the truth is not acting 'corruptly.' It also entails some odd consequences. For instance, how can it be that concealing or destroying documents requested by a grand jury subpoena duces tecum may violate §1503, while lying under oath about the location of the documents cannot? . . . Anyone who intentionally lies to a grand jury is on notice that he may be corruptly obstructing the grand jury's investigation")(Russo also found inapplicable to §1503 the *Poindexter* vagueness concern with respect to §1505 discussed below).

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."<sup>9</sup> There is no requirement, however, that the defendant's endeavors succeed<sup>10</sup> or even that they were capable of succeeding (as long as the accused was unaware of the futility of his efforts to obstruct).<sup>11</sup>

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.<sup>12</sup> The other circuits, to the extent they have addressed the issue, disagree.<sup>13</sup>

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<sup>14</sup>
- destruction of documentary evidence<sup>15</sup>

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<sup>9</sup> *United States v. Collis*, 128 F.3d 313, 318 (6th Cir. 1997) ("The action taken by the accused must be with an intent to influence judicial or grand jury proceedings . . . Some courts have phrased this showing as a 'nexus' requirement — that the act must have the 'natural and probable effect' of interfering with the due administration of justice"), quoting *United States v. Aguilar*, 515 U.S. at 599; see also, *United States v. Furkin*, 119 F.3d 1276, 1281 (7th Cir. 1997).

<sup>10</sup> *United States v. Aguilar*, 515 U.S. at 599, 600; *United States v. Muhammad*, 120 F.3d 688, 695 (7th Cir. 1997); *United States v. Muhammad*, 125 F.3d 608, 620 (8th Cir. 1997).

<sup>11</sup> *United States v. Tackett*, 113 F.3d 603, 611 (6th Cir. 1997) ("Although the omnibus clause of §1503 requires that a defendant's actions were intended to obstruct an actual judicial proceeding, the government need not prove that the actions had their intended effect. Furthermore, an endeavor to obstruct justice violates the law even if, unbeknownst to the defendant, the plan is doomed to failure from the start"), citing, *United States v. Osborn*, 385 U.S. 323, 333 (1966).

<sup>12</sup> *United States v. Masterpol*, 940 F.2d 760, 762 (2d Cir. 1991).

<sup>13</sup> *United States v. Tackett*, 113 F.3d at 607 ("The Second Circuit has held that the enactment of new witness protection laws in 1982 and 1988 means that the government must prosecute witness tampering under the new law, 18 U.S.C. §1512, rather than under §1503. The other circuits that have addressed the issue have reached the opposite conclusion. See *United States v. Malone*, 71 F.3d 645, 659 (7th Cir. 1995) (noting that Fourth, Ninth and Eleventh Circuits have held that the omnibus clause of §1503 continues to cover witness tampering; *United States v. Kenny*, 973 F.2d 339, 342-43 (4th Cir. 1992) (same for First, Fifth, Eighth and Ninth Circuits"); see also *United States v. Ladum*, 141 F.3d 1328, 1337-338 (9th Cir. 1998).

<sup>14</sup> *United States v. Chihak*, 137 F.3d 252 (5th Cir. 1998).

<sup>15</sup> *United States v. Monus*, 128 F.3d 376 (6th Cir. 1997).

- submission of a forged letter during a probation revocation hearing<sup>16</sup>
- instructing a subordinate to conceal evidence<sup>17</sup>
- a civil trial juror's solicitation of a bribe<sup>18</sup>
- pressuring bar owners to backdate video machine leases to conceal gambling income<sup>19</sup>
- encouraging grand jury witnesses to falsify records and commit perjury<sup>20</sup>
- promising to bribe a trial judge (even absent an intent to offer the bribe)<sup>21</sup>
- grand juror's disclosing matters occurring before the grand jury<sup>22</sup>
- backdating a contract to be submitted to the grand jury<sup>23</sup>
- instructing others to alter records in anticipation of a grand jury subpoena<sup>24</sup>
- informant's providing defense attorney with a false statement that might be used to impeach the informant's contrary testimony at trial.<sup>25</sup>

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<sup>16</sup> *United States v. Collis*, 128 F.3d 313 (6th Cir. 1997).

<sup>17</sup> *United States v. Lefkowitz*, 125 F.3d 608 (8th Cir. 1997).

<sup>18</sup> *United States v. Muhammad*, 120 F.3d 688 (7th Cir. 1997).

<sup>19</sup> *United States v. Furkin*, 119 F.3d 1276 (7th Cir. 1997).

<sup>20</sup> *United States v. Tackett*, 113 F.3d 603 (6th Cir. 1997).

<sup>21</sup> *United States v. Atkin*, 107 F.3d 1213 (6th Cir. 1997).

<sup>22</sup> *United States v. Brenson*, 104 F.3d 1267 (11th Cir. 1997).

<sup>23</sup> *United States v. Jespersen*, 65 F.3d 993 (2d Cir. 1995).

<sup>24</sup> *United States v. Mullins*, 22 F.3d 1365 (6th Cir. 1994).

<sup>25</sup> *United States v. Barfield*, 999 F.2d 1520 (11th Cir. 1993).

## **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,<sup>26</sup> but deals primarily with obstructing Congressional and federal administrative proceedings:

- I. Whoever
- II. A. corruptly, or
  - B. by threats or
  - C. force, or
  - D. by any threatening letter or communication
- III. A. influences,
  - B. obstructs, or
  - C. impedes or
  - D. endeavors to
    - 1. influence,
    - 2. obstruct, or
    - 3. impede
- IV. A. 1. the due and proper administration of the law under which
  - 2. any pending proceeding is being had
  - 3. before any department or agency of the United States, or
 B. 1. the due and proper exercise of the power of inquiry under which
  - 2. any inquiry or investigation is being had
  - 3. by
    - a. either House, or
    - b. any committee of either House or
    - c. any joint committee of the Congress

Shall be fined under this title or imprisoned not more than five years, or both, 18 U.S.C. 1505.

Prosecutions under section 1505 are relatively few, and most of these arise as obstructions 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."<sup>27</sup>

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<sup>26</sup> "Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so . . . Shall be fined under this title or imprisoned not more than five years, or both," 18 U.S.C. 1505.

<sup>27</sup> *United States v. Price*, 951 F.2d 1028, 1031 (9th Cir. 1991), citing, *United States v. Sutton*, 732 F.2d 1483, 1490 (10th Cir. 1984) and *United States v. Laurins*, 857 F.2d 529, 536-37 (9th Cir. 1988).

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 qualify as 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."<sup>28</sup> 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.<sup>29</sup> 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).<sup>30</sup>

In the case of either Congressional or administrative proceedings, section 1505 condemns only that misconduct which is intended to obstruct the administrative

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<sup>28</sup> *United States v. Kelley*, 36 F.3d 1118, 1127 (D.C. Cir. 1994). The court also observed that "other courts have held that agency investigative activities are proceedings within the scope of [section] 1505. In those cases, the investigations typically have involved agencies with some adjudicative power, or with the power to enhance their investigations through the issuance of subpoenas or warrants," *id.*

<sup>29</sup> *United States v. Leo*, 941 F.2d 181, 198-99 (3d Cir. 1991) ("the government . . . argues that the agency that Badolatte obstructed acted under the direction of the Army's contracting officer, who had the authority to make adjudications on behalf of the Defense Department. . . . Other courts of appeals have broadly construed the term 'proceeding' as that term is used in §1505. The Sixth Circuit, in *United States v. Fruchtman*, 421 F.2d 1019, 1021 (6th Cir. 1970) rejected the 'contention that the word "proceedings" refers only to those steps before a federal agency that are judicial or administrative in nature.' The Tenth Circuit, in *United States v. Browning, Inc.*, 572 F.2d 720, 724 (10th Cir. 1978), wrote: 'In sum, the term "proceeding" is not . . . limited to something in the nature of a trial. The growth and expansion of agency activities have resulted in a meaning being given to "proceeding" which is more inclusive and which no longer limits itself to formal activities in a court of law. Rather, the investigation or search for the true facts . . . is not to be ruled as a non-proceeding simply because it is preliminary to indictment and trial.' See also . . . *Rice v. United States*, 356 F.2d 709, 712 (8th Cir. 1966) ('Proceedings before a governmental department or agency simply mean proceeding in the manner and form prescribed for conducting business before the department or agency. . . ' Given the broad meaning of the word "proceeding" and the Defense Contract Audit Agency's particular mission, we agree with the government that when Badolatte obstructed Stern's search for the true purchase order dates, Badolatte obstructed a proceeding within the meaning of §1505").

<sup>30</sup> *United States v. Mitchell*, 877 F.2d 294, 300-301 (4th Cir. 1989) ("The question of whether a given congressional investigation is a 'due and proper exercise of the power of inquiry' for purposes of [section] 1505 can not be answered by a myopic focus on formality. Rather, it is properly answered by a careful examination of all the surrounding circumstances. If it is apparent that the investigation is a legitimate exercise of investigative authority by a congressional committee in an area within the committee's purview, it should be protected by [section] 1505. While formal authorization is certainly a factor that weighs heavily in this determination, its presence or absence is not dispositive. To give [section 1505] the protective force it was intended, corrupt endeavors to influence congressional investigations must be proscribed even when they occur prior to formal committee authorization").

proceedings or the due and proper exercise of the power of inquiry.<sup>31</sup> In order to overcome judicially-identified uncertainty as to the intent required,<sup>32</sup> 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 U.S. AID Inspector General's Office investigators<sup>33</sup>
- using threats to avoid an interview with IRS officials<sup>34</sup>
- making false statements to a Defense Department auditor<sup>35</sup>
- lying to Customs Service officials<sup>36</sup>
- endeavoring to use family relationship to obstruct a Congressional investigation<sup>37</sup>
- submitting false documentation in response to an IRS subpoena<sup>38</sup>
- instructing a subordinate to destroy records sought under a DOE subpoena<sup>39</sup>
- lying to a Customs Service inspector<sup>40</sup>
- "blatant evasiveness and feigned forgetfulness" of a witness during testimony before an SEC investigative hearing.<sup>41</sup>

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<sup>31</sup> *United States v. Leo*, 941 F.2d at 199; *United States v. Mitchell*, 877 at 299; *United States v. Laurins*, 857 F.2d 529, 536-37 (9th Cir. 1988).

<sup>32</sup> *United States v. Poindexter*, 951 F.2d 369 (D.C.Cir. 1991)(holding that ambiguity of the term "corruptly" in the context of 1505 rendered it unconstitutionally vague at least when applied to false statements made directly to Congress).

<sup>33</sup> *United States v. Kelley*, 36 F.3d 1118 (D.C.Cir. 1994).

<sup>34</sup> *United States v. Price*, 951 F.2d 1028 (9th Cir. 1991).

<sup>35</sup> *United States v. Leo*, 941 F.2d 181 (3d Cir. 1991).

<sup>36</sup> *United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991).

<sup>37</sup> *United States v. Mitchell*, 877 F.2d 294 (4th Cir. 1989).

<sup>38</sup> *United States v. Laurins*, 857 F.2d 529 (9th Cir. 1988).

<sup>39</sup> *United States v. Sutton*, 732 F.2d 1483 (10th Cir. 1984).

<sup>40</sup> *United States v. Browning*, 630 F.2d 694 (10th Cir. 1980).

<sup>41</sup> *United State v. Alo*, 439 F.2d 751 (2d Cir. 1971).

## 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<sup>42</sup> are not insignificant, the heart of the section is the omnibus subsection, subsection 1512(b). It outlaws obstructing the path to federal proceedings or authorities in any of four ways: (1) the use or attempted use of force or intimidation, (2) the use or attempted use of threats, (3) the use or attempted use of corrupt persuasion, or (4) by misleading someone else. More precisely, it declares that:

- I. Whoever
- II. A. knowingly
  - 1. uses
    - a. intimidation or
    - b. physical force,
  - 2. threatens, or
  - 3. corruptly persuades another person, or
  - 4. attempts to do so, or
  - 5. a. engages in misleading conduct, i.e., the use of
    - i. false statements
    - ii. omissions to mislead
    - iii. false documents
    - iv. misleading samples and the like, or

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<sup>42</sup> "(a)(1) Whoever kills or attempts to kill another person, with intent to — (A) prevent the attendance or testimony of any person in an official proceeding; (B) prevent the production of a record, document, or other object, in an official proceeding; or (C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings; shall be punished as provided in paragraph (2).

"(2) The punishment for an offense under this subsection is — (A) in the case of murder (as defined in section 1111), the death penalty or imprisonment for life, and in the case of any other killing, the punishment provided in section 1112; and (B) in the case of an attempt, imprisonment for not more than twenty years.

\* \* \*

"(c) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from — (1) attending or testifying in an official proceeding; (2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings; (3) arresting or seeking the arrest of another person in connection with a Federal offense; or (4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding; or attempts to do so, shall be fined under this title or imprisoned not more than one year, or both", 18 U.S.C. 1512(a),(c).

The courts have applied the same construction to provisions common to the murder, harassment and omnibus subsections, *see e.g., United States v. Gabriel*, 125 F.3d 89, 103 (2d Cir. 1997); *United States v. Cooper*, 121 F.3d 130, 134 (3d Cir. 1997).

- v. any other trick, scheme or misleading device<sup>43</sup>
  - b.toward another person,
- III. with intent to
  - A. 1. a. influence,
    - b. delay, or
    - c. prevent
  - 2. the testimony of any person
  - 3. in an official proceeding, i.e., a
    - a. federal court proceeding,
    - b. federal grand jury proceeding,
    - c. Congressional proceeding,
    - d. federal agency proceeding, or
    - e. proceeding involving the insurance business;<sup>44</sup> or
- B. cause or induce any person to
  - 1. a. i. withhold testimony, or
    - ii. withhold a
      - (I) record,
      - (II) document, or
      - (III) other object,
    - b. from an official proceeding, i.e., a
      - i. federal court proceeding,
      - ii. federal grand jury proceeding,
      - iii. Congressional proceeding,
      - iv. federal agency proceeding, or
      - v. proceeding involving the insurance business; or
  - 2. a. i. alter,
    - ii. destroy,
    - iii. mutilate, or
    - iv. conceal
  - b. an object

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<sup>43</sup> "As used in sections 1512 and 1513 of this title and in this section . . . (3) the term 'misleading conduct' means — (A) knowingly making a false statement; (B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement; (C) with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity; (D) with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or (E) knowingly using a trick, scheme, or device with intent to mislead," 18 U.S.C. 1515(a)(3).

<sup>44</sup> "(a) As used in sections 1512 and 1513 of this title and in this section — (1) the term 'official proceeding' means — (A) a proceeding before a judge or court of the United States, a United States magistrate, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Claims Court, or a Federal grand jury; (B) a proceeding before the Congress; (C) a proceeding before a Federal Government agency which is authorized by law; or (D) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce," 18 U.S.C. 1515(a)(1).

- c. with intent to impair
- d. the object's
  - i. integrity or
  - ii. availability for use
- e. in an official proceeding, i.e., a
  - i. federal court proceeding,
  - ii. federal grand jury proceeding,
  - iii. Congressional proceeding,
  - iv. federal agency proceeding, or
  - v. proceeding involving the insurance business;
- 3. a. evade
  - b. legal process
  - c. summoning that person
    - i. to appear as a witness, or
    - ii. to produce a
      - (I) record,
      - (II) document, or
      - (III) other object,
    - iii. in an official proceeding, i.e., a
      - (I) federal court proceeding,
      - (II) federal grand jury proceeding,
      - (III) Congressional proceeding,
      - (IV) federal agency proceeding, or
      - (V) proceeding involving the insurance business; or
- 4. a. be absent
  - b. from an official proceeding, i.e., a
    - i. federal court proceeding,
    - ii. federal grand jury proceeding,
    - iii. Congressional proceeding,
    - iv. federal agency proceeding, or
    - v. proceeding involving the insurance business
  - c. to which such person has been summoned by legal process; or
- C. 1. a. hinder,
- b. delay, or
- c. prevent
- 2. the communication to a
  - a. federal judge or
  - b. federal law enforcement officer, i.e..
    - i. a federal investigator,
    - ii. a federal prosecutor, or
    - iii. a federal probation officer<sup>45</sup>
- 3. of information relating to the

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<sup>45</sup> "(a) As used in sections 1512 and 1513 of this title and in this section . . . (4) the term "law enforcement officer" means an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant — (A) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or (B) serving as a probation or pretrial services officer under this title," 18 U.S.C. 1515(a)(4).

- a. commission or
- b. possible commission of a
- 4. a. Federal offense or
- b. [a] violation of conditions of
  - i. probation,
  - ii. parole, or
  - iii. release pending judicial proceedings;

shall be fined under this title or imprisoned not more than ten years, or both, 18 U.S.C. 1512(b).<sup>46</sup>

In more general terms, subsection 1512(b) bans (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."<sup>47</sup>

**Knowingly.** 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.<sup>48</sup> Consequently, conviction under section 1512 does not require the government to show that the defendant was aware of any pending or contemplated federal proceedings<sup>49</sup> or investigations.<sup>50</sup> 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.<sup>51</sup> In a case charging that the

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<sup>46</sup> If the proceeding involves a crime punishable by a higher maximum term of imprisonment than the term prescribed for obstruction, then the maximum penalty for obstruction is increased to match the higher maximum of the underlying offense, 18 U.S.C. 1512(i) ("If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case").

<sup>47</sup> See e.g., *United States v. Thompson*, 76 F.3d 442, 452-53 (2d Cir. 1996); *United States v. Victor*, 973 F.2d 975, 978 (1st Cir. 1992).

<sup>48</sup> 18 U.S.C. 1512(e) ("For the purposes of this section — (1) an official proceeding need not be pending or about to be instituted at the time of the offense; and (2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege").

<sup>49</sup> *United States v. Kelley*, 36 F.3d 1118, 1128 (D.C.Cir. 1994).

<sup>50</sup> *United States v. Romero*, 54 F.3d 56, 62 (2d Cir. 1995).

<sup>51</sup> "(f) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance — (1) that the official proceeding before a judge, court, magistrate, grand jury, or government agency is before a judge or court of the United States, a United States magistrate, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or (2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant," 18 U.S.C. 1512(f); *United States v. Davis*, 932 F.2d 752, 761 (9th Cir. 1991) ("Under §1512, the United States was not required to prove the defendant knew he was tampering with a federal proceeding"); *United States v. Stanfield*,

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.<sup>52</sup> As a practical matter, evidence that establishes the requisite intent will ordinarily prove guilty knowledge as well.

**Corrupt Persuasion.** 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."<sup>53</sup> 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."<sup>54</sup> 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."<sup>55</sup>

When the defendant's misconduct takes the form of deceiving a potential witness with the intent that the witness later repeat the deception either in 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 potential witness would in fact ever be called upon to testify or report.<sup>56</sup>

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101 F.3d 909, 918 (3d Cir. 1996).

<sup>52</sup> *United States v. Bell*, 113 F.3d 1345, 1349 (3d Cir. 1997)("the government must prove that at least one of the law-enforcement-officer communications which the defendant sought to prevent would have been with a federal officer, but that the government is not obligated to prove that the defendant knew or intended anything with respect to this federal involvement . . . the government may carry this burden by showing that the conduct which the defendant believed would be discussed in these communications constitutes a federal offense . . ."); *United States v. Frankhauser*, 80 F.3d 641, 652 (1st Cir. 1996).

<sup>53</sup> *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996); *United States v. Shotts*, 145 F.3d 1289, 1300-301 (11th Cir. 1998); *United States v. Kulczyk*, 931 F.2d 542, 546 n.7 (9th Cir. 1991).

<sup>54</sup> *United States v. Farrell*, 126 F.3d 484, 489-91 (3d Cir. 1997).

<sup>55</sup> *United States v. Morrison*, 98 F.3d 619, 630 (D.C. Cir. 1996)("we disagree with Morrison's claim that his conduct could not still fall under the statutory ban. We note, in that regard, that the *Poindexter* court expressly approved of an interpretation of 1505 which outlawed conduct `corrupting another person by influencing him to *violate his legal duty*,' [*United States v. Poindexter*, 951 F.2d 369, 379 (D.C. Cir. 1992)]. Morrison tried to `corrupt' Doris Holmes by exhorting her to violate her legal duty to testify truthfully in court"(italics in the original).

<sup>56</sup> *United States v. Gabriel*, 125 F.3d 89, 102-3 (2d Cir. 1997). *Gabriel* also holds that in a 1512 prosecution the government need not meet the natural-tendency-to-influence demand imposed on the omnibus clause of section 1503 in *United States v. Aguilar*, 515 U.S. 593 (1995).

**Guilty Intent.** 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 report of a crime that was in fact either a federal proceeding or federal crime. Proof, that the accused intended to obstruct proceedings or the report of crimes that were simple state proceedings or state crimes, will not do.<sup>57</sup> The federal proceedings protected by obstruction under section 1512 are defined broadly by statute to cover executive, judicial and legislative branch proceedings.<sup>58</sup> Just as the statute does not insist upon pending proceedings,<sup>59</sup> so it is complete upon the commission of the prohibited misconduct committed with qualifying intent.<sup>60</sup>

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."<sup>61</sup>

**Defenses.** 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.<sup>62</sup>

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<sup>57</sup> *Puckett v. Tennessee Eastman Co.*, 889 F.2d 1481, 1489-90 (6th Cir. 1989); *United States v. Cooper*, 121 F.3d 130, 133-36 (3d Cir. 1997).

<sup>58</sup> "(a) As used in sections 1512 and 1513 of this title and in this section — (1) the term 'official proceeding' means — (A) a proceeding before a judge or court of the United States, a United States magistrate, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Claims Court, or a Federal grand jury; (B) a proceeding before the Congress; (C) a proceeding before a Federal Government agency which is authorized by law; or (D) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce," 18 U.S.C. 1515(a)(1).

<sup>59</sup> 18 U.S.C. 1512(e) ("For the purposes of this section — (1) an official proceeding need not be pending or about to be instituted at the time of the offense; and (2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege").

<sup>60</sup> *United States v. Kelley*, 36 F.3d 1118, 1128 (D.C.Cir. 1994) ("The statute only requires that the jury be able reasonably to infer from the circumstances that Kelley, fearing that a grand jury proceeding had been or might be instituted, corruptly persuaded persons with the intent to influence their possible testimony at such a proceeding").

<sup>61</sup> *United States v. Jefferson*, 149 F.3d 444, 446 (6th Cir. 1998); *United States v. Johnson*, 968 F.2d 208 (6th Cir. 1992).

<sup>62</sup> 18 U.S.C. 1512(d) ("In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully"); *United State v. Thompson*, 76 F.2d 442 (2d Cir. 1996) (upholding the constitutionality of the defense in the face of a challenge that it unconstitutionally shifted the burden of proof to the accused).

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.<sup>63</sup>

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<sup>63</sup> *United States v. Farrell*, 126 F.3d 484, 488-89 (3d Cir. 1997).

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