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Obstruction of Justice: An Overview of Some of the Federal Statutes That Prohibit Interference with Judicial, Executive, or Legislative Activities

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Summary

Obstruction of justice is the impediment of governmental activities. There are a host of federal criminal laws that prohibit obstructions of justice. The six most general outlaw obstruction of judicial proceedings (18 U.S.C. 1503), witness tampering (18 U.S.C. 1512), witness retaliation (18 U.S.C. 1513), obstruction of congressional or administrative proceedings (18 U.S.C. 1505), conspiracy to defraud the United States (18 U.S.C. 371), and contempt (a creature of statute, rule and common law).

The laws that supplement, and sometimes mirror, the basic six tend to proscribe a particular means of obstruction. Some, like the perjury and false statement statutes, condemn obstruction by lies and deception. Others, like the bribery, mail fraud, and wire fraud statutes, prohibit obstruction by corruption of public employees or officials. Some outlaw the use of violence as a means of obstruction. Still others ban the destruction of evidence. A few simply punish “tipping off” those who are the targets of an investigation.

Many of these offenses may also provide the basis for racketeering and money laundering prosecutions, and each provides the basis for criminal prosecution of anyone who aids and abets in or conspires for their commission.

Moreover, regardless of the offense for which an individual is convicted, his sentence may be enhanced as a consequence of any obstruction of justice for which he is responsible, if committed during the course of the investigation, prosecution, or sentencing for the offense of his conviction. The enhancement may result in an increase in his term of imprisonment by as much as four years.

This report is available in abbreviated form—without footnotes, quotations, or citations—as CRS Report RS22783, *Obstruction of Justice: An Abridged Overview of Related Federal Criminal Laws*. Excerpted portions of this report are available as follows: CRS Report RL34304, *Obstruction of Congress: A Brief Overview of Federal Law Relating to Interference with Congressional Activities*; CRS Report RS22784, *Obstruction of Congress: An Abridged Overview of Federal Criminal Laws Relating to Interference with Congressional Activities*; CRS Report 98-808, *Perjury Under Federal Law: A Brief Overview*; and CRS Report 98-807, *Perjury Under Federal Law: A Sketch of the Elements*. All by Charles Doyle.

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Introduction

Obstruction of justice is the frustration of governmental purposes by violence, corruption, destruction of evidence, or deceit.¹ It is a federal crime. In fact, federal obstruction of justice laws are legion; too many for even passing reference to all of them in a single report.² This is a brief description of some of the more prominent.³

General Obstruction Prohibitions

The general federal obstruction of justice provisions are six: 18 U.S.C. 1512 (tampering with federal witnesses), 1513 (retaliating against federal witnesses), 1503 (obstruction of pending federal court proceedings), 1505 (obstruction of pending congressional or federal administrative proceedings), 371 (conspiracy), and contempt.⁴ In addition to these, there are a host of other statutes that penalize obstruction by violence, corruption, destruction of evidence, or deceit.

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

Section 1512 applies to the obstruction of federal proceedings—judicial, congressional, or executive.⁵ It consists of four somewhat overlapping crimes: use of force or the threat of the use of force to prevent the production of evidence (18 U.S.C. 1512(a)); use of deception or corruption or intimidation to prevent the production of evidence (18 U.S.C. 1512(b)); destruction or concealment of evidence or attempts to do so (18 U.S.C. 1512(c)); and witness harassment to prevent the production of evidence (18 U.S.C. 1512(d)). The offenses have similar, but not identical, objectives and distinctive elements of knowledge and intent. Section 1512 also contains free standing provisions that apply to one or more of the offenses within the section. These deal with: affirmative defenses (18 U.S.C. 1512(e)); jurisdictional issues (18 U.S.C. 1512(f),(g),(h)); venue (18 U.S.C. 1512(i)); sentencing (18 U.S.C. 1512(j)); and conspiracy (18 U.S.C. 1512(k)).

¹ *Black's* describes obstruction of justice simply as any “interference with the orderly administration of law and justice,” BLACK’S LAW DICTIONARY, 1183 (9th ed. 2009).

² For this reason, theft and embezzlement statutes are beyond the scope of this report, even though they are often designed to prevent the frustration of government programs.

³ Portions of this report draw upon two earlier documents, CRS Rept. 98-808, *Perjury Under Federal Law: A Brief Overview*, and CRS Rept. 98-832, *Obstruction of Justice Under Federal Law: A Review of Some of the Elements*.

⁴ Contempt is a creature of statute and common law described in, but not limited to, 18 U.S.C. 401, 402; 2 U.S.C. 192.

⁵ 18 U.S.C. 1515(a)(1) (“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 judge, 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 Court of Federal Claims, 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”). Federal prosecutions for obstructing state insurance proceedings appear to have been infrequent. For additional discussion of 18 U.S.C. 1512 see *Twenty-Eighth Survey of White Collar Crime: Obstruction of Justice*, 50 AMERICAN CRIMINAL LAW REVIEW 1299 (2013).

Obstruction by Violence (18 U.S.C. 1512(a))

Subsection 1512(a) has slightly different elements depending upon whether the offense involves a killing or attempted killing—18 U.S.C. 1512(a)(1)—or some other use of physical force or a threat—18 U.S.C. 1512(a)(2).⁶ In essence, they condemn the use of violence to prevent a witness from testifying, producing evidence for an investigation, or bringing a crime to the attention of authorities, and they set their penalties according to whether the obstructive violence used is a homicide, an assault, or a threat. In more exact terms, they declare:

1512(a)(1)	1512(a)(2)
I. Whoever	I. Whoever
II. a. kills or b. attempts to kill	II. a. uses physical force, b. attempts to use physical force, c. uses the threat of physical force, or d. attempts to use the threat of physical force
III. with the intent to a. prevent attendance or testimony at an official proceeding (i.e., a federal judicial, legislative or administrative proceeding) b. prevent the production of an item at an official proceeding c. prevent the communication to U.S. law enforcement authorities of a federal offense or a violation of probation, parole, or supervised release.	III. with the intent to a. influence, delay, or prevent testimony at an official proceeding b. cause or induce another to withhold testimony or an item at an official proceeding c. hinder, delay or prevent the communication to U.S. law enforcement authorities of a federal offense or a violation of probation, parole, or supervised release d. cause or induce another to alter, conceal or destroy an item with the intent to make unavailable e. cause or induce another to evade process f. cause or induce another to fail to comply with process
IV. shall be punished under §1512(a)(3)	IV. shall be punished under §1512(a)(3)

Unless countermanded by subsection 1512(j), subsection 1512(a)(3) provides the sanctions for both subsection 1512(a)(1) and (a)(2). Homicide is punished as provided in 18 U.S.C. 1111 and 1112, that is, murder in the first degree is punishable by death or imprisonment for life; murder in the second degree is punishable by imprisonment for any term of years or for life; voluntary manslaughter is punishable by imprisonment for not more than 15 years and involuntary manslaughter by imprisonment for not more than 8 years.⁷ Attempted murder, assault, and

⁶ Here and throughout this report the outline of the statute's elements uses the language of the statute wherever possible.

⁷ 18 U.S.C. 1512(a)(3)(A).

attempted assault are punishable by imprisonment for not more than 30 years;⁸ and a threat to assault punishable by imprisonment for not more than 20 years.⁹

Subsection 1512(j) provides that the maximum term of imprisonment for subsection 1512(a) offenses may be increased to match the maximum term of any offense involved in an obstructed criminal trial.¹⁰

To secure a conviction under the communication to a law enforcement officer offense, “the Government must prove (1) a killing or attempted killing, (2) committed with a particular intent, namely, an intent (a) to ‘prevent’ a ‘communication’ (b) about the ‘the commission or possible commission of a federal offense’ (c) to a federal ‘law enforcement officer or judge.’”¹¹ Attempt requires proof that the defendant intended to commit the killing and that he took a substantial step in furtherance of that intent.¹²

There are two statutory defenses to charges under §1512. One covers legitimate legal advice and related services, 18 U.S.C. 1515(c),¹³ and is intended for use in connection with the corrupt persuasion offenses proscribed elsewhere in §1512 rather than the violence offenses of subsection 1512(a). The other statutory defense is found in subsection 1512(e) and creates an affirmative defense when an individual engages only in conduct that is lawful in order to induce another to testify truthfully. The defense would appear to be of limited use in the face of a charge of the obstructing use or threat of physical force in violation of subsection 1512(a).¹⁴

Subsections 1512(f) and 1512(g) seek to foreclose a cramped construction of the various offenses proscribed in §1512. Subsection 1512(f) declares that the evidence that is the object of the obstruction need not be admissible and that the obstructed proceedings need not be either pending or imminent.¹⁵ Whether the defendant’s misconduct must be shown to have been taken in anticipation of such proceedings is a more difficult question.

⁸ 18 U.S.C. 1512(a)(3)(B).

⁹ 18 U.S.C. 1512(a)(3)(C). Other than the murder offenses, violations of subsection 1512(a) are also punishable by a fine of not more than \$250,000, 18 U.S.C. 1512(a)(3), 1111, 1112, 3571.

¹⁰ “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,” 18 U.S.C. 1512(j).

¹¹ *Fowler v. United States*, 131 S.Ct. 2045, 2049 (2011).

¹² *United States v. Irving*, 665 F.3d 1184, 1195 (10th Cir. 2011); see generally CRS Rept. R42001, *Attempt: An Overview of Federal Criminal Law*.

¹³ “This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding,” 18 U.S.C. 1512(c).

¹⁴ The Sarbanes-Oxley Act redesignated subsection 1512(d)(2000 ed.) as subsection 1512(e): “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,” 18 U.S.C. 1512(e). See *United States v. Lowery*, 135 F.3d 957, 960 (5th Cir. 1998)(reversing the defendant’s obstruction of justice conviction for the trial court’s failure to permit evidence substantiating the defense); *United States 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); *United States v. Arias*, 253 F.3d 453, 457 n.4 (9th Cir. 2001)(“This section was apparently intended to exempt judicial officers who lawfully remind witnesses or defendants of their oath to give true testimony, although the statutory language itself is not so limited. See *U.S. v. Johnson*, 968 F.2d 208, 213 (2d Cir. 1992)(quoting legislative history)”).

¹⁵ See also *United States v. Tyler*, 732 F.3d 241, 252 (3d Cir. 2013)(“Nevertheless, just as *Fowler* specifically noted (continued...)”).

The Supreme Court rejected the contention that language like that found in subsection 1512(f) (making §1512 applicable to obstructions committed before any official proceedings were convened) absolved the government of having to prove that the obstruction was committed with an eye to possible official proceedings.¹⁶ That case, the *Arthur Andersen* case, however, involved the construction of subsection 1512(b) which requires that the defendant be shown to have “knowingly” engaged in the obstructing conduct. Subsection 1512(a) has no such explicit “knowing” element. Yet, the government must still show that the offender’s violent act was committed with the intent to prevent testimony in a federal official proceeding.¹⁷

By virtue of subsection 1512(g), “where the defendant kills a person with an intent to prevent communication with law enforcement officers generally, that intent includes an intent to prevent communications with *federal* law enforcement officers only if it is reasonably likely under the circumstances that (in the absence of the killing) at least one of the relevant communications would have been made to a federal officer.”¹⁸

As a consequence of subsection 1512(h), murder, attempted murder, or the use or threat of physical force—committed overseas to prevent the appearance or testimony of a witness or the production of evidence in federal proceedings in this country or to prevent a witness from informing authorities of the commission of a federal offense or a federal parole, probation, supervised release violation—is a federal crime outlawed in subsection 1512(a) that may be prosecuted in this country.¹⁹

As a general rule, the courts will assume that Congress intends a statute to apply only within the United States and to be applied consistent with the principles of international law—unless a contrary intent is obvious.²⁰ Subsection 1512(h) supplies the obvious contrary intent. Since a

(...continued)

that §1512 reaches conduct that occurs before the victim had any communications with law enforcement officers, here, too, we emphasize that the government need not prove that a federal investigation was in progress at the time the defendant committed a witness-tampering offense”), citing, *Fowler v. United States*, 131 S.Ct. 2045, 2049(2011); and *United States v. Ramos-Cruz*, 667 F.3d 487, 498 (4th Cir. 2012).

¹⁶ *Arthur Anderson, LLP v. United States*, 544 U.S. 696, 707-8 (2005).

¹⁷ *United States v. Tyler*, 732 F.3d 241, 248, 249-50 (3d Cir. 2013)(internal citations omitted)(“The Supreme Court’s decision in *Arthur Andersen* required that for the government to satisfy the VWPA’s witness intimidation section’s ‘official proceeding’ requirement, §1512(b)(2)(A and (B), it must prove a ‘nexus’ between the defendant’s conduct and a foreseeable particular proceeding. Specifically, the government must prove that the defendant sought to interfere with evidence or a witness and acted in contemplation of a particular official proceeding. If the defendant lacks knowledge that his actions are likely to affect the official proceeding, then he lacks the requisite intent to obstruct. The ‘‘official proceeding’ language is also contained in §1512(a)(1)(A), (b)1), and (b), the provisions under which Tyler was convicted.... [I]n any prosecution brought under a §1512 provision charging obstruction of justice involving an ‘official proceeding,’ the government is required to prove a nexus between the defendant’s conduct and a particular official proceeding before a judge or court of the United States that the defendant contemplated. This holding is in line with our sister Circuits that have all concluded that the nexus requirement applies to other §1512 provisions qualified by an official proceeding”), citing, *United States v. Kaplan*, 490 F.3d 110, 126 (2d Cir. 2007)(§1512(b)(1)); *United States v. Matthews*, 505 F.3d 698, 707-708 (7th Cir. 2007)(§1512(c)(1)); *United States v. Bennett*, 664 F.3d 997, 1013 (5th Cir. 2011)(§1512(c)(2)); *United States v. Fiske*, 640 F.3d 1288, 1292 (11th Cir. 2011)(same); *United States v. Phillips*, 583 F.3d 1261, 1263-1264 (10th Cir. 2010)(same); and *United States v. Carson*, 560 F.3d 566, 584 (6th Cir. 2009)(same).

¹⁸ *Fowler v. United States*, 131 S.Ct. 2045, 2052 (2011); *United States v. Tyler*, 732 F.3d 241, 248 (3d Cir. 2013); *United States v. Smith*, 723 F.3d 510, 514 (4th Cir. 2013).

¹⁹ 18 U.S.C. 1512(h)(“There is extraterritorial Federal jurisdiction over an offense under this section”); see e.g., *United States v. Fisher*, 494 F.3d 5, 8-9 (1st Cir. 2007)(contemplated murder in Canada of a federal witness).

²⁰ *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)(“It is a long-standing principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the (continued...)”).

contrary intent may be shown from the nature of the offense, the result would likely be the same in the absence of subsection 1512(h). In the case of an overseas obstruction of federal proceedings, the courts could be expected to discern a congressional intent to confer extraterritorial jurisdiction²¹ and find such an application compatible with the principles of international law.²² The existence of extraterritorial jurisdiction is one thing; the exercise of such jurisdiction is another. Federal investigation and prosecution of any crime committed overseas generally presents a wide range of diplomatic, legal and practical challenges.²³

Subsection 1512(i) states that violations of §1512 or §1503 may be prosecuted in any district where the obstruction occurs or where the obstructed proceeding occurs or is to occur. In the case of obstructions committed in this country, the Constitution may limit the trial in the district of the obstructed proceedings to instances when a conduct element of the obstruction has occurred there.²⁴

Auxiliary Offenses and Liability

Subsection 1512(k) makes conspiracy to violate §1512 a separate offense subject to the same penalties as the underlying offense.²⁵ The section serves as an alternative to a prosecution under 18 U.S.C. 371 that outlaws conspiracy to violate any federal criminal statute.²⁶ Section 371 is

(...continued)

United States”); *Murray v. the Schooner Charming Betsy*, 2 Cranch 64, 118 (6 U.S. 34, 67)(1804)(“[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains”); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982).

²¹ *United States v. Bowman*, 260 U.S. 94, 98 (1922)(“But the same rule of interpretation [of purely domestic application] should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government’s jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated. . . . We cannot suppose that when Congress enacted the [fraud] statute or amended it, it did not have in mind that a wide field for such fraud upon the government was in private and public vessels of the United States on the high seas and in foreign ports and beyond the land jurisdiction of the United States, and therefore intend to include them in the section”); *Ford v. United States*, 273 U.S. 593, 623 (1927) (“a man who outside of a country willfully puts in motion a force to take effect in it is answerable at the place where the evil is done”).

²² Historically, the courts have found compatibility with international law where a case falls within one of the five principles upon which geographical jurisdiction may be predicated. Either of two such principles would appear to cover the overseas application of Section 1512. The territorial principle holds that a country may apply its laws to misconduct that has a substantial impact within its borders, *United States v. Neil*, 312 F.3d 419, 422 (9th Cir. 2002); the protective principle holds that a country may apply its laws to protect the integrity of governmental functions, *United States v. Yousef*, 327 F.3d 56, 121 (2d Cir. 2003). See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §402 & 402 cmt. f (1986).

²³ See generally CRS Rept. 94-166, *Extraterritorial Application of American Criminal Law*.

²⁴ The Constitution requires federal crimes committed within the United States to be tried in the states and districts in which they occur, U.S. Const. Art. III, §2, cl.3; Amend. VI. It permits Congress to determine where federal crimes committed outside the United States may be tried, U.S. Const. Art. III, §2, cl.3; see 18 U.S.C. 3238. This means a federal crime committed within the United States may be tried wherever one of its conduct elements is committed, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280 (1999). Although the Court left the question unaddressed, *id.* at 279 n.2, this seems to preclude trial within the district of the obstructed proceeding if the obstruction occurs elsewhere within the United States and there is no conduct element committed within the district of the obstructed proceeding, *United States v. Cabrales*, 524 U.S. 1, 5-6 (1998); *United States v. Bowens*, 224 F.3d 302, 314 (4th Cir. 2000); *United States v. Clenney*, 434 F.3d 780, 781-82 (5th Cir. 2005); *United States v. Strain*, 396 F.3d 689, 694 (5th Cir. 2005). For a more detailed discussion see, CRS Report RL33223, *Venue: A Legal Analysis of Where a Federal Crime May Be Tried*.

²⁵ See *e.g.*, *United States v. Bergin*, 682 F.3d 261, 264 n.2 (3d Cir. 2012).

²⁶ See generally CRS Report R41223, *Federal Conspiracy Law: A Brief Overview*.

punishable by imprisonment for not more than five years and conviction requires the government to prove the commission of an overt act in furtherance of the scheme by one of the conspirators.²⁷ Subsection 1512(k) has no specific overt act element, and the courts have generally declined to imply one under such circumstances.²⁸ Regardless of which section is invoked, conspirators are criminally liable as a general rule under the *Pinkerton* doctrine for any crime committed in the foreseeable furtherance of the conspiracy.²⁹

Accomplices to a violation of subsection 1512(a) may incur criminal liability by operation of 18 U.S.C. 2, 3, 4, or 373 as well.³⁰ Section 2 treats accomplices before the fact as principals. That is, it declares that those who command, procure or aid and abet in the commission of a federal crime by another, are to be sentenced as if they committed the offense themselves.³¹ As a general rule, “[i]n order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something he wishes to bring about, [and] that he seek by his action to make it succeed.”³² It is also necessary to prove that someone else committed the underlying offense.³³

Section 3 outlaws acting as an accessory after the fact,³⁴ which occurs when “one knowing that an offense has been committed, receives, relieves, comforts or assists the offender in order to hinder his or her apprehension, trial, or punishment.”³⁵ Prosecution requires the commission of an underlying federal crime by someone else.³⁶ An offender cannot be both a principal and an accessory after the fact to the same offense.³⁷ Offenders face sentences set at one half of the sentence attached to the underlying offense, or if the underlying offense is punishable by life

²⁷ 18 U.S.C. 371.

²⁸ *E.g.*, *Whitfield v. United States*, 543 U.S. 209, 214-15 (2004); *United States v. Shabani*, 513 U.S. 10, 17 (1994).

²⁹ *Pinkerton v. United States*, 328 U.S. 640, 646-48 (1946); *United States v. Grasso*, 724 F.3d 1077, 1089 (9th Cir. 2013); *United States v. Walker*, 721 F.3d 828, 836 (7th Cir. 2013); *United States v. Ali*, 718 F.3d 929, 941 (D.C. Cir. 2013).

³⁰ See *e.g.*, *United States v. Bergin*, 682 F.3d 261, 264 n.2 (3d Cir. 2012) (“... Count 13 charges that Bergin ‘knowingly and intentionally ... counsel[ed] and induced[d] others to kill’ Kemo with ‘malice aforethought and with intent to prevent’ his testimony in violation of 18 U.S.C. §1512(a)(1)(A)”).

³¹ 18 U.S.C. 2 (“(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”).

³² *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949); *United States v. Rufai*, 732 F.3d 1175, 1338 (10th Cir. 2013); *United States v. Davis*, 717 F.3d 28, 33 (1st Cir. 2013); see also *United States v. Wilson*, 160 F.3d 732, 739 (D.C. Cir. 1998)(aiding and abetting a subsection 1512(a) offenses)(“Aiding and abetting requires the government to prove: (1) the specific intent to facilitate the commission of a crime by another; (2) guilty knowledge; (3) that the other was committing an offense; and (4) assisting or participating in the commission of the offense”).

³³ *United States v. Rufai*, 732 F.3d at 1338; *United States v. Davis*, 717 F.3d at 33; *United States v. Cain*, 671 F.3d 271, 302 (2d Cir. 2012).

³⁴ 18 U.S.C. 3 (“Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact ...”).

³⁵ *United States v. Gerhard*, 615 F.3d 7, 23 (1st Cir. 2010); *United States v. Gianakos*, 415 F.3d 912, 920 n.4 (8th Cir. 2005); *United States v. DeLaRosa*, 171 F.3d 215, 221 (5th Cir. 1999); *United States v. Irwin*, 149 F.3d 565, 571 (7th Cir. 1998).

³⁶ *United States v. Boyd*, 640 F.3d 657, 668 (6th Cir. 2011); *United States v. Hill*, 279 F.3d 731, 741 (9th Cir. 2002); *United States v. DeLaRosa*, 171 F.3d 215, 221 (5th Cir. 1999); *United States v. Irwin*, 149 F.3d 565, 571 (7th Cir. 1998).

³⁷ *United States v. Taylor*, 322 F.3d 1209, 1211-212 (9th Cir. 2003).

imprisonment or death, by imprisonment for not more than 15 years (and a fine of not more than \$250,000).³⁸

Although at first glance §4's misprision prohibition may seem to be a failure-to-report offense, misprision of a felony under the section is in essence a concealment offense.³⁹ "The elements of misprision of a felony under 18 U.S.C. 4 are (1) the principal committed and completed the felony alleged; (2) the defendant had full knowledge of that fact; (3) the defendant failed to notify the authorities; and (4) defendant took steps to conceal the crime."⁴⁰ The offense is punishable by imprisonment for not more than three years and/or a fine of not more than \$250,000.⁴¹

Solicitation to commit an offense under subsection 1512(a), or any other crime of violence, is prohibited in 18 U.S.C. 373.⁴² "To establish solicitation under §373, the Government must demonstrate that the defendant (1) had the intent for another to commit a crime of violence and (2) solicited, commanded, induced or otherwise endeavored to persuade such other person to commit the crime of violence under circumstances that strongly corroborate evidence of that intent."⁴³ Section 373 provides an affirmative statutory defense for one who prevents the commission of the solicited offense.⁴⁴ Offenders face penalties set at one half of the sanctions for

³⁸ 18 U.S.C. 3 ("... Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by life imprisonment or death, the accessory shall be imprisoned not more than 15 years").

³⁹ 18 U.S.C. 4 ("Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both").

⁴⁰ *United States v. Gebbie*, 294 F.3d 540, 544 (3d Cir. 2002); *United States v. Cefalu*, 85 F.3d 964, 969 (2d Cir. 1996); *United States v. Vasquez-Chan*, 978 F.2d 546, 555(9th Cir. 1992); see also *Patel v. Mukasey*, 526 F.3d 800, 803 (5th Cir. 2008); see also *United States v. Boyd*, 640 F.3d 657, 668 (6th Cir. 2011)("To sustain a conviction for misprision of felony, the Government must prove beyond a reasonable doubt that principal committed the felony alleged").

⁴¹ 18 U.S.C. 4. Unless otherwise provided, all federal crimes with a maximum penalty of imprisonment of more than one year are subject to a fine of not more than \$250,000 for individual defendants and not more than \$500,000 for organizational defendants, 18 U.S.C. 3571.

⁴² 18 U.S.C. 373(a)("Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct, shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half of the maximum fine prescribed for the punishment of the crime solicited, or both; or if the crime solicited is punishable by life imprisonment or death, shall be imprisoned for not more than twenty years"). See e.g., *United States v. Fisher*, 494 F.3d 5, 7-8 (1st Cir. 2007)(uphold a conviction for "solicitation to commit a crime of violence, in violation of 18 U.S.C. 373. The particular crime of violence specified in the indictment was the murder of a cooperating federal witness. See 18 U.S.C. 1512(a)(1)(A)").

⁴³ *United States v. Caira*, 737 F.3d 455, 463 (7th Cir. 2013); *United States v. Hackley*, 662 F.3d 671, 682 (4th Cir. 2011); *United States v. Bunchan*, 626 F.3d 29, 33 (1st Cir. 2010).

⁴⁴ 18 U.S.C. 373(b), (c)("b) It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited. A renunciation is not "voluntary and complete" if it is motivated in whole or in part by a decision to postpone the commission of the crime until another time or to substitute another victim or another but similar objective. If the defendant raises the affirmative defense at trial, the defendant has the burden of proving the defense by a preponderance of the evidence. (c) It is not a defense to a prosecution under this section that the person solicited could not be convicted of the crime because he lacked the state of mind required for its commission, because he was incompetent or irresponsible, or because he is immune from prosecution or is not subject to prosecution").

the underlying offense, but imprisonment for not more than 20 years, if the solicited crime of violence is punishable by death or imprisonment for life.⁴⁵

A subsection 1512(a) violation opens up the prospect of prosecution for other crimes for which a violation of subsection 1512(a) may serve as an element or otherwise related. The racketeering statutes (RICO) outlaw acquiring or conducting the affairs of an interstate enterprise through a pattern of “racketeering activity.”⁴⁶ The commission of any of a series of state and federal crimes (predicate offenses) constitutes a racketeering activity.⁴⁷ Section 1512 offenses are RICO predicate offenses.⁴⁸ RICO violations are punishable by imprisonment for not more than 20 years (or imprisonment for life if the predicate offense carries such a penalty), a fine of not more than \$250,000 and the confiscation of related property.⁴⁹

The money laundering provisions, among other things, prohibit financial transactions involving the proceeds of a “specified unlawful activity,” that are intended to launder the proceeds or to promote further “specified unlawful activity.”⁵⁰ Any RICO predicate offense is by virtue of that fact a specified unlawful activity, that is, a money laundering predicate offense.⁵¹ Money laundering is punishable by imprisonment for not more than 20 years, a fine ranging from \$250,000 to \$500,000 depending upon the nature of the offenses, and the confiscation of related property.⁵²

A subsection 1512(a) offense is by definition a crime of violence.⁵³ Commission of a crime of violence is an element of, or a sentence enhancement factor for, several other federal crimes, for example:

- 18 U.S.C. 25 (use of a child to commit a crime of violence),⁵⁴
- 18 U.S.C. 521 (criminal street gang),⁵⁵
- 18 U.S.C. 924(c)(carrying a firearm during and in relation to a crime of violence),⁵⁶

⁴⁵ 18 U.S.C. 373.

⁴⁶ 18 U.S.C. 1961-1963.

⁴⁷ 18 U.S.C. 1961.

⁴⁸ *Id. E.g., Sotirion v. United States*, 617 F.3d 27, 29 (1st Cir. 2010); *United States v. Royer*, 599 F.3d 886, 889 (2d Cir. 2010).

⁴⁹ 18 U.S.C. 1963. For a general discussion of RICO see *Twenty-Eighth Survey of White Collar Crime: Racketeer Influenced and Corrupt Organizations*, 50 AMERICAN CRIMINAL LAW REVIEW 1423 (2013); and CRS Rept. 96-950, *RICO: A Brief Sketch*. See also 18 U.S.C. 1959 which outlaws violent crimes in aid of racketeering.

⁵⁰ 18 U.S.C. 1956.

⁵¹ 18 U.S.C. 1956(c)(7)(A). A second money laundering statute, 18 U.S.C. 1957, outlaws monetary transactions involving more than \$10,000 consisting of proceeds generated by any of the predicate offenses identified in Section 1956, 18 U.S.C. 1957(f).

⁵² 18 U.S.C. 1956, 981, 982. For a general discussion of the money laundering statutes see *Twenty-Eighth Survey of White Collar Crime: Money Laundering*, 50 AMERICAN CRIMINAL LAW REVIEW 1271 (2013); and CRS Report RL33315, *Money Laundering: An Overview of 18 U.S.C. 1956 and Related Federal Criminal Law*.

⁵³ 18 U.S.C. 16(a) (“The term ‘crime of violence’ means—(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another”).

⁵⁴ Offenders face a fine and term of imprisonment twice that of the offense committed by the child, 18 U.S.C. 25(b).

⁵⁵ Offenders face a term of imprisonment of not more than 10 years in addition to the penalty imposed for the crime of violence, 18 U.S.C. 521(b).

- 18 U.S.C. 929 (carrying a firearm with restricted ammunition during and in relation to a crime of violence),⁵⁷
- 18 U.S.C. 1028 (identity fraud in connection with a crime of violence).⁵⁸
- 18 U.S.C. 1959 (violence in aid of a RICO enterprise).⁵⁹

Obstruction by Intimidation, Threats, Persuasion, or Deception (18 U.S.C. 1512(b))

The second group of offenses within §1512 outlaws obstruction of federal congressional, judicial, or administrative activities by intimidation, threat, corrupt persuasion, or deception, 18 U.S.C. 1512(b). Parsed to its elements, subsection 1512(b) provides that:

- I. Whoever
- II. knowingly
 - A. uses intimidation
 - B. threatens, or
 - C. corruptly persuades another person, or
 - D. attempts to do so, or
 - E. 1. engages in misleading conduct⁶⁰
 - 2. toward another person,
- III. with intent to
 - A. 1. a. influence,
 - b. delay, or

(...continued)

⁵⁶ Offenders face a term of imprisonment ranging from imprisonment for not less than five years to imprisonment for life depending upon the circumstances of the offenses in addition to the penalty imposed for the underlying crime of violence, 18 U.S.C. 924(c)(1). In *United States v. Harris*, 498 F.3d 278 (4th Cir. 2007), the Fourth Circuit upheld a conviction for violating subsections 1512(a) and 924(c) in connection with the firebombing of a witness's home (for purposes of 924(c) a firearm includes explosive or incendiary devices, 18 U.S.C. 921(a)(3),(4)).

⁵⁷ Offenders face a term of imprisonment of not less than 5 years in addition to the penalty imposed for the underlying crime of violence, 18 U.S.C. 929(a)(1).

⁵⁸ Offenders face a term of imprisonment of not more than 20 years, 18 U.S.C. 1028(b)(3).

⁵⁹ Offenders face death or a term of imprisonment based upon the nature of the violence committed. Thus, for example, murder in violation of §1959 is punishable by death or life imprisonment; attempted murder by imprisonment for not more than 10 years, 18 U.S.C. 1959(a)(1), (a)(5). In *United States v. Ramos-Cruz*, 667 F.3d 487, 492, 494 (4th Cir. 2012), the Fourth Circuit upheld the conviction of a defendant convicted of RICO conspiracy (18 U.S.C. 1962); assault with a dangerous weapon in aid of racketeering (18 U.S.C. 1959(a)(3)); conspiracy to murder in aid of racketeering (18 U.S.C. 1959(a)(5)); murder in aid of racketeering (18 U.S.C. 1959(a)(1)); murderous witness-tampering (18 U.S.C. 1512(a)(1)(C)); carrying and using a firearm during a crime of violence (18 U.S.C. 924(c)); murder resulting from carrying and using a firearm during a crime of violence (18 U.S.C. 924(j)); and possession of a firearm by an illegal alien (18 U.S.C. 922(g)(5)(A), 924(a)(2)).

⁶⁰ “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).

- c. prevent
- 2. the testimony of any person
- 3. in an official proceeding,⁶¹ 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, or
 - 2. a. i. alter,
 - ii. destroy,
 - iii. mutilate, or
 - iv. conceal
 - b. an object
 - c. with intent to impair
 - d. the object's
 - i. integrity or
 - ii. availability for use
 - e. in an official proceeding, or
 - 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,
 - 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

⁶¹ “(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).

- a. federal judge or
- b. federal law enforcement officer⁶²
- 3. of information relating to the
 - a. commission or
 - b. possible commission of a
- 4. a. federal offense or
 - b. [a] violation of conditions of
 - i. probation,
 - ii. supervisor release,
 - iii. parole, or
 - iv. release pending judicial proceedings;

shall be fined under this title or imprisoned not more than 20 years, or both.⁶³

In more general terms, subsection 1512(b) bans (1) knowingly, (2) using one of the prohibited forms of persuasion (intimidation, threat, misleading or corrupt persuasion), (3)(a) with the intent to prevent a witness's testimony or physical evidence from being truthfully presented at official federal proceedings or (b) with the intent to prevent a witness from cooperating with authorities in a matter relating to a federal offense.⁶⁴

It also bans any attempt to so intimidate, threaten, or corruptly persuade.⁶⁵ The term “corruptly” in the phrase “corruptly persuades” as it appears in subsection 1512(b) has been found to refer to the manner of persuasion,⁶⁶ the motive for persuasion,⁶⁷ and the manner of obstruction.⁶⁸

⁶² “(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).

⁶³ 18 U.S.C. 1512(b). “Shall be fined under this title” refers to the fact that as a general rule in the case of felonies 18 U.S.C. 3571 calls for fines of not more than the greater of \$250,000 for individuals (\$500,000 for organizations) or of twice the amount of the gain or loss associated with the offense.

As in the case of subsection 1512(a), if a subsection 1512(b) obstruction is committed in connection with the trial of a criminal charge which is more severely punishable, the higher penalty applies to the subsection 1512(b) violation as well, 18 U.S.C. 1512(j).

⁶⁴ See e.g., *United States v. Victor*, 973 F.2d 975, 978 (1st Cir. 1992); *United States v. Thompson*, 76 F.3d 442, 452-53 (2d Cir. 1996); *United States v. Holt*, 460 F.3d 934, 938 (7th Cir. 2006); *United States v. Gurr*, 471 F.3d 144, 154 (D.C. Cir. 2007); *United States v. Tampas*, 493 F.3d 1291, 1300 (11th Cir. 2007); *United States v. Carson*, 560 F.3d 566, 580 (6th Cir. 2009); *United States v. Eads*, 729 F.3d 769, 779 (7th Cir. 2013).

⁶⁵ 18 U.S.C. 1512(b).

⁶⁶ *United States v. LaShay*, 417 F.3d 715, 718 (7th Cir. 2005) (“corrupt persuasion occurs where a defendant tells a potential witness a false story as if the story were true, intending that the witness believe the story and testify to it”) (very much like the offenses elsewhere in subsection 1512(b) of “knowingly ... engag[ing] in misconduct toward another person” with obstructive intent); *United States v. Farrell*, 126 F.3d 484, 488 (3d Cir. 1997) (emphasis in the original) (“Thus, we are confident that both attempting to *bribe* someone to *withhold* information and attempting to *persuade* someone to provide *false* information to federal investigators constitute ‘corrupt persuasion’ under §1512(b)”).

⁶⁷ *United States v. Gotti*, 459 F.3d 296, 343 (2d Cir. 2006) (“This Circuit has defined ‘corrupt persuasion’ as persuasion that is ‘motivated by an improper purpose.’ *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996). We have also specifically stated that the Obstruction of Justice Act can be violated by corruptly influencing a witness to invoke the Fifth Amendment privilege in his grand jury testimony. See *United States v. Cioffi*, 493 F.2d 111, 1118 (2d Cir. 1974)”; *United States v. Khatami*, 280 F.3d 907, 911-12 (9th Cir. 2002) (“Synthesizing these various definitions of ‘corrupt’ and ‘persuade,’ we note the statute strongly suggests that one who attempts to ‘corruptly persuade’ another is, given the pejorative plain meaning of the root adjective ‘corrupt,’ motivated by an inappropriate or improper (continued...)”).

Prosecution for obstructing official proceedings under subsection 1512(b)(2) will require proof that the defendant intended to obstruct a particular proceeding.⁶⁹ Prosecution for obstructing the flow of information to law enforcement officials under subsection 1512(b)(3), on the other hand, apparently requires no such nexus.⁷⁰ A subsection 1512(b)(3) investigation obstruction offense prosecution, however, does require proof that the defendant believed it reasonably likely that the witness, absent tampering, might communicate with federal authorities.⁷¹ The defendant's belief

(...continued)

purpose to convince another to engage in a course of behavior—such as impeding an ongoing criminal investigation”); *United States v. Shotts*, 145 F.3d 1289, 1301 (11th Cir. 1998)(“It is reasonable to attribute to the ‘corruptly persuade’ language in Section 1512(b), the same well-established meaning already attributed by the courts to the comparable language in Section 1503(a), i.e., motivated by an improper purpose”).

⁶⁸ *United States v. Baldrige*, 559 F.3d 1126, 1143 (10th Cir. 2009)(“[T]he ‘corruptly persuades’ element requires the government to prove a defendant’s action was done voluntarily and intentionally to bring about false or misleading testimony or to prevent testimony with the hope or expectation of some benefit to the defendant or another person”); *United States v. Hull*, 456 F.3d 133, 142 (3d Cir. 2006)(“[T]here was ample evidence from which the jury could conclude that Hull knowingly attempted to corruptly persuade Rusch, with the intent to change her testimony. See *United States v. Farrell*, 126 F.3d 484, 488 (3d Cir. 1997)(holding that ‘corrupt persuasion’ includes ‘attempting to persuade someone to provide false information to federal investigators’”); *United States v. Cruzado-Laureano*, 404 F.3d 470, 487 (1st Cir. 2005)(“Trying to persuade a witness to give false testimony counts as ‘corruptly persuading’ under §1512(b)”); *United States v. Burns*, 298 F.3d 523, 540 (6th Cir. 2002)(“Burns attempted to ‘corruptly persuade’ Walker by urging him to lie about the basis of their relationship, to deny that Walker knew Burns as a drug dealer, and to disclaim that Burns was Walter’s source of crack cocaine”); *United States v. Pennington*, 168 F.3d 1060, 1066 (8th Cir. 1999)(“After carefully examining this amendment and its legislative history, the Third Circuit concluded that the ambiguous term ‘corruptly persuades’ includes ‘attempting to persuade someone to provide false information to federal investigators.’ *United States v. Farrell*, 126 F.3d 484, 488 (3d Cir. 1997) (emphasis in the original). We agree”).

⁶⁹ Even though the statute, 18 U.S.C. 1512(f), provides that the obstructed proceedings need be neither ongoing nor pending at the time of the obstruction, it is “one thing to say that a proceeding need not be pending or about to be instituted at the time of the offense, and quite another to say a proceeding need not even be foreseen. A knowingly ... corrupt persuader cannot be someone who persuades others to shred documents under a comment retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material,” *Arthur Andersen LLP v. United States*, 544 U.S. 696, 707-8 (2005); *United States v. Tyler*, 732 F.3d 241, 248 (3d Cir. 2013)(“[T]he government must prove that the defendant sought to interfere with evidence or a witness and acted in contemplation of a particular official proceeding. If the defendant lacks knowledge that his actions are likely to affect the official proceeding, then he lacks the requisite intent to obstruct”); *United States v. Mislal-Aldarondo*, 478 F.3d 52, 69 (1st Cir. 2007).

⁷⁰ *United States v. Carson*, 560 F.3d 566, 580 (6th Cir. 2009)(“For violation of §1512(b)(3), it is sufficient if the misleading information is likely to be transferred to a federal agent”); *United States v. Ronda*, 455 F.3d 1273, 1288 (11th Cir. 2006)(“*Arthur Andersen* interpreted and applied only §1512(b)(2), which explicitly requires that the acts of obstruction relate to an official proceeding. Unlike §1512(b)(2), §1512(b)(3) makes no mention of an official proceeding and does not require that a defendant’s misleading conduct relate in any way either to an official proceeding or even to a particular ongoing investigation.... There is simply no reason to believe that the Supreme Court’s holding in *Arthur Andersen* requires that we graft onto §1512(b)(3) an official proceeding requirement based on statutory language in §1512(b)(2) that does not appear in §1512(b)(3). As we already noted in [*United States v. Veal*, 153 F.3d 1233 (11th Cir. 1998)], the federal nexus required under §1512(b)(2) is distinct from that required under §1512(b)(3). Unlike the stricter an official proceeding requirement that appears in §1512(b)(2), §1512(b)(3) requires only that a defendant intended to hinder, delay, or prevent communication to any law enforcement officer or judge of the United States. *Id.* at 1248. This distinction was critical to our decision in *Veal* that §1512(b)(3) requires only the possible existence of a federal crime and a defendant’s intention to thwart an inquiry into that crime. *Veal*, 153 F.3d at 11250. As we explained in *Veal*, §1512(b)(3) criminalizes the transfer of misleading information which actually relates to a potential federal offense ... *Veal*, 153 F.3d at 1252 (emphasis in the original)”); *cf.*, *United States v. Byrne*, 435 F.3d 16, 25 (1st Cir. 2006)(“If the defendant’s contention is that the government must prove the possible existence of a federal crime and a defendant’s intention to thwart an inquiry into that crime by officials who happen to be federal, we continue to agree. If the defendant suggests that *Arthur Andersen* requires a heightened showing of a nexus in a §1512(b)(3) prosecution, between the intent to hinder communications and a particular law enforcement agency, we express our doubts but defer any final judgment for a future case that requires resolution of that issue”).

⁷¹ *United States v. Williams*, 825 F.Supp.2d 128, 134-38 (D.C.Cir. 2011); *cf.*, *United States v. Tyler*, 732 F.3d 241, (continued...)

that a witness is reasonably likely to confer with federal authorities can be inferred from the nature of the offense and “additional appropriate evidence.”⁷²

The attributes common to §1512 as a whole, apply to subsection 1512(b); some of which may fit more comfortably in a subsection 1512(b) corrupt persuasion setting than they do in a 1512(a) violence prosecution. The affirmative defenses in subsections 1512(e) and 1515(d) are prime examples. Subsection 1512(e) removes by way of an affirmative defense good faith encouragements of a witness to speak or testify truthfully, although it does not excuse urging a witness to present fabrications as the truth.⁷³ Subsection 1515(d) makes it clear that bona fide legal advice and related services cannot be used to provide the basis for subsection 1512(b) corrupt persuasion prosecution.⁷⁴ Conversely, charges of soliciting a crime of violence—18 U.S.C. 373—or of using a child to commit a crime of violence—18 U.S.C. 25—are more likely to be prosecutorial companions of a charge under subsection 1512(a) than under subsection 1512(b).

On the other hand, the extraterritorial and venue statements of subsections 1512(h) and 1512(i) are as readily applicable to subsection 1512(b) persuasion prosecutions as they are to a subsection 1512(a) violent obstruction case. The same can be said of aiding and abetting, accessories after the fact, misprision, and predicate offense status under RICO or the money laundering statutes.⁷⁵ And, it is likewise a separate offense to conspire to violate subsection 1512(b) under either §371 or subsection 1512(k).

Obstruction by Destruction of Evidence (18 U.S.C. 1512(c))

The obstruction by destruction of evidence offense found in subsection 1512(c) is the creation of the Sarbanes-Oxley Act,⁷⁶ and proscribes obstruction of federal administrative, judicial, or congressional proceedings by destruction of evidence.⁷⁷

More specifically, subsection 1512(c) provides that:

- I. Whoever
- II. corruptly
- III. A.1.alters,

(...continued)

249-52 (3d Cir. 2013).

⁷² *United States v. Guadalupe*, 402 F.3d 409, 412 (3d Cir. 2005)(This last element may be inferred from the fact the offense was federal in nature, plus ‘additional appropriate evidence.’ An example of this ‘additional appropriate evidence’ is that the defendant had actual knowledge of the federal nature of the offense”); *cf.*, *United States v. Lopez*, 372 F.3d 86, 91-92 (2d Cir. 2004)(citing examples of additional appropriate evidence necessary in law enforcement obstruction element in the context of a subsection 1512(a) prosecution (obstruction through murder or physical force)).

⁷³ *United States v. Eads*, 729 F.3d 769, 780 (7th Cir. 2013); *United States v. Cruzado-Laureano*, 404 F.3d 470 (1st Cir. 2005)(“Cruzado did ask that they tell the truth; however, his version of ‘the truth’ that he urged upon them was anything but the truth”).

⁷⁴ *E.g.*, *United States v. Kellington*, 217 F.3d 1084, 1098-1100 (9th Cir. 2000).

⁷⁵ *E.g.*, *United States v. Gotti*, 459 F.3d 296, 301 (2d Cir. 2006)(18 U.S.C. 1512(b) as a RICO predicate offense); *Sepulveda v. United States*, 330 F.3d 55, 58 (1st Cir. 2003)(same).

⁷⁶ P.L. 107-204, 116 Stat, 807 (2000).

⁷⁷ 18 U.S.C. 1512(c); 1515(a)(1).

- 2. destroys,
 - 3. mutilates, or
 - 4. conceals
 - B. 1. a record,
 - 2. document, or
 - 3. other object, or
 - C. attempts to do so,
 - D. with the intent to impair the object's
 - 1. integrity, or
 - 2. availability for use
 - E. in an official proceeding, or
- IV. otherwise
- A. 1. obstructs,
 - 2. influences, or
 - 3. impedes
 - B. an official proceeding, or
 - C. attempts to do so

shall be fined under this title or imprisoned not more than 20 years, or both.⁷⁸

Section 1512(c) covers only obstructions committed or attempted with “corrupt” intent. Here, the courts have said that “corruptly” means “acting with an improper purpose and to engage in conduct knowingly and dishonestly with the specific intent to subvert, impede, or obstruct the proceeding;”⁷⁹ that it means “acting with consciousness of wrongdoing.”⁸⁰ It does not mean that the obstruction must be done with wicked or evil intent.⁸¹

The courts appear divided over whether an FBI investigation may constitute “official proceeding;”⁸² a fact that may flow from their ambivalence over whether the evidence the defendant sought to deny need be material. Some have declared that there must be a nexus between the defendant’s destructive conduct and the proceedings he sought to obstruct: “the defendant’s conduct must ‘have a relationship in time, causation, or logic with the [official] ... proceedings’; in other words, ‘the endeavor must have the natural and probable effect of interfering with the due administration of justice.’”⁸³ Others have said that there is no materiality

⁷⁸ 18 U.S.C. 1512(c); e.g., *United States v. Freeman*, 741 F.3d 426, 437-38 (4th Cir. 2014).

⁷⁹ *United States v. Gordon*, 710 F.3d 1124, 1151 (10th Cir. 2013).

⁸⁰ *United States v. Mann*, 701 F.3d 274, 305-306 (8th Cir. 2012).

⁸¹ *United States v. Watters*, 717 F.3d 733, 734-36 (9th Cir. 2013)(finding it unnecessary to decide what “corruptly” means, but suggesting that “consciousness of wrongdoing”—the *Arthur Anderson* interpretation of “knowingly corruptly”—places too heavy a burden on the government).

⁸² *United States v. Ermonian*, 727 F.3d 894, 898-902 (9th Cir. 2013)(holding that such investigations do not constitute official proceedings but acknowledging contrary authority in the Fifth (*United States v. Ramos*, 537 F.3d 439 (5th Cir. 2008)) and Second (*United States v. Gonzalez*, 922 F.2d 1044 (2d Cir. 1991)) Circuits); see also *United States v. Burge*, 711 F.3d 803, 808-10 (7th Cir. 2013)(rejecting the argument that taking a deposition in conjunction with federal civil litigation rested beyond the reach of §1512(c)).

⁸³ *United States v. Carson*, 560 F.3d 566, 584 (6th Cir. 2009); *United States v. Simpson*, 741 F.3d 539, 552 (5th Cir. 2014)(internal citations omitted)(“‘Though a proceeding need not be actually pending at the time of the obstructive act, an obstruction of justice conviction requires some nexus between the obstructive act and some official government proceeding. A proceeding must at least be foreseen, such that the defendant has in contemplation some particular official proceeding in which the destroyed evidence might be material’”); *United States v. Desposito*, 704 F.3d 221, (continued...)

requirement (i.e., that the obstruction is not confined to evidence that has the natural tendency to influence the proceeding).⁸⁴

As is generally true of attempts to commit a federal offense, attempt to violate subsection 1512(c) requires an intent to violate the subsection and a substantial step toward the accomplishment of that goal.⁸⁵ Like subsection 1512(a) and 1512(b) offenses, subsection 1512(c) offenses are RICO and money laundering predicate offenses,⁸⁶ and may provide the foundation for criminal liability as a principal, accessory after the fact, conspirator, or one guilty of misprision.⁸⁷ If the federal judicial, administrative or congressional proceedings are obstructed, prosecution may be had in the United States even if the destruction occurs overseas,⁸⁸ the proceedings are yet pending,⁸⁹ or the offender is unaware of their federal character.⁹⁰

Obstruction by Harassment (18 U.S.C. 1512(d))

The obstruction by harassment prohibition in subsection 1512(d) existed as subsection 1512(c) until redesignated by Sarbanes-Oxley in 2002.⁹¹ Subsection 1512(d) declares:

- I. Whoever,
- II. intentionally,
- III. harasses another person, and thereby
- IV. A. hinders,
 - B. delays,
 - C. prevents, or
 - D. dissuades,
- V. any person from
 - A. 1. attending or
 - 2. testifying in
 - 3. an official proceeding, or

(...continued)

230-31 (2d Cir. 2013); *United States v. Ahrensfield*, 698 F.3d 1310, 1324 (10th Cir. 2012); see also *United States v. Townsend*, 630 F.3d 1003, 1015 n. 8 (11th Cir. 2011)(observing without comment that the trial court’s instruction to the jury that, “the defendant can be found guilty of that offense only if all the following facts are proved beyond a reasonable doubt ... Four that the natural and probable effect of the defendant’s conduct would be the interference with the due administration of justice”).

⁸⁴ *United States v. Burge*, 711 F.3d 803, 812 n.4 (7th Cir. 2013).

⁸⁵ *United States v. Lucas*, 499 F.3d 769, 781 (8th Cir. 2007); *United States v. Gordon*, 710 F.3d 1124, 1150 (10th Cir. 2013)(“Thus, [for attempt] the government was required to prove beyond a reasonable doubt (1) that Mr. Gordon intended to ‘corruptly’ obstruct an official proceeding ... and (2) that he committed a substantial step toward the commission of the intended obstruction”).

⁸⁶ 18 U.S.C. 1961, 1956(c)(7)(A).

⁸⁷ 18 U.S.C. 2, 3, 371, 1512(k), 4; see e.g., *United States v. Mann*, 685 F.3d 714, 722 (8th Cir. 2012)(conspiracy and aiding and abetting).

⁸⁸ 18 U.S.C. 1512(h).

⁸⁹ 18 U.S.C. 1512(f); *United States v. Ahrensfield*, 698 F.3d 1310, 1324 (10th Cir. 2012).

⁹⁰ 18 U.S.C. 1512(g); *United States v. Ahrensfield*, 698 F.3d at 1324.

⁹¹ Section 1102, P.L. 107-204, 116 Stat. 807 (2002).

- B. reporting
 - 1. a. to a law enforcement officer, or
 - b. judge
 - c. of the United States,
 - 2. a. the commission, or
 - b. possible commission, of
 - 3. a. a federal offense, or
 - b. a violation of the conditions of
 - i. probation,
 - ii. supervised release,
 - iii. parole, or
 - iv. release pending judicial proceedings, or
 - C. 1. arresting, or
 - 2. seeking to arrest
 - 3. another person
 - 4. in connection with a federal offense, or
 - D. causing
 - 1. a. a criminal prosecution, or
 - b. a parole revocation proceeding, or
 - c. a probation revocation proceeding
 - 2. a. to be sought, or
 - b. instituted, or
 - 3. assisting in such prosecution or proceeding, or
- VI. attempts to do so

shall be fined under this title or imprisoned not more than 3 years, or both.⁹²

The fine for crimes punishable by imprisonment for not more than 3 years is not more than \$250,000 (not more than \$500,000 for organizations).⁹³ The subsection does not apply to obstructing a private individual who seeks information of criminal activity in order to report it to federal authorities.⁹⁴

Subsection 1512(d) harassment offenses are RICO and money laundering predicate offenses.⁹⁵ The provisions of law relating to principals, accessories after the fact, misprision, and conspiracy apply with equal force to offenses under subsection 1512(d),⁹⁶ as do the provisions elsewhere in §1512 relating to extraterritorial application,⁹⁷ and abolition of the need to show pendency or knowledge of the federal character of the obstructed proceedings or investigation.⁹⁸

⁹² 18 U.S.C. 1512(d).

⁹³ 18 U.S.C. 3571, 3581.

⁹⁴ *Camelio v. American Federation*, 137 F.3d 666, 671-72 (1st Cir. 1998).

⁹⁵ 18 U.S.C. 1961, 1956(c)(7)(A).

⁹⁶ 18 U.S.C. 2, 3, 4, 371, 1512(k).

⁹⁷ 18 U.S.C. 1512(h).

⁹⁸ 18 U.S.C. 1512(f), (g).

Obstructing Federal Courts (18 U.S.C. 1503)

The Omnibus Provision

Unlike §1512, §1503 does not apply to the obstruction of congressional or administrative proceedings.⁹⁹ Nor, in most circuits at least, does it apply to obstruction of judicial proceedings unless the impeded proceedings are pending.¹⁰⁰ Nevertheless, it condemns obstructing pending judicial proceedings by means of any of four methods. Three explicitly address interfering with federal jurors or court officials; the fourth, the so-called omnibus provision, speaks to interfering with the “due administration of justice.” The omnibus provision states:

- I. Whoever
 - 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).¹⁰¹

Subsection (b) calls for murder and manslaughter to be punished as those crimes are punished when committed in violation of §§1111 and 1112,¹⁰² attempted murder, attempted manslaughter, or any violation involving a juror called to hear a case relating to a class A or B felony is

⁹⁹ Both sections are discussed in *Twenty-Eighth Survey of White Collar Crime: Obstruction of Justice*, 50 AMERICAN CRIMINAL LAW REVIEW 1299 (2013).

¹⁰⁰ *United States v. Aguilar*, 515 U.S. 593, 599 (1995), citing *Pettibone v. United States*, 148 U.S. 197, 207 (1893); but see conflicted lower appellate court opinions cited *infra* footnote 111.

¹⁰¹ 18 U.S.C. 1503(a).

¹⁰² 18 U.S.C. 1503(b). 18 U.S.C. 1111 outlaws murder within the special maritime and territorial jurisdiction of the United States. First degree murder under §1111 is punishable by death or life imprisonment; second degree by imprisonment for any term of years or for life, 18 U.S.C. 1111(b). 18 U.S.C. 1112 outlaws manslaughter within the special maritime and territorial jurisdiction of the United States. Voluntary manslaughter under §1112 is punishable by imprisonment for not more than 10 years and a fine of not more than \$250,000; involuntary manslaughter by imprisonment for not more than six years and a fine of not more than \$250,000.

punishable by imprisonment for not more than 20 years;¹⁰³ and all other offenses by imprisonment for not more than 10 years.¹⁰⁴

The courts often observe that to convict under this omnibus or “catchall” provision 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.”¹⁰⁵ Some also assert that the obstruction must also be material to the matters before the judicial proceeding.¹⁰⁶

As to 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.”¹⁰⁷ There is no requirement that the defendant’s endeavors succeed¹⁰⁸ or even that they were capable of succeeding (as long as the accused was unaware of the futility of his efforts to obstruct).¹⁰⁹

In order to “corruptly endeavor” to obstruct the due administration of justice, “[t]he 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 a relationship in time, causation, or logic with the judicial proceedings. In other words, the endeavor must have the natural and probable effect of interfering with the due administration of justice.”¹¹⁰ The Supreme

¹⁰³ 18 U.S.C. 1503(b)(2). Class A felonies are those punishable by imprisonment for any term of years or by life imprisonment; Class B felonies are those punishable by a maximum term of imprisonment greater than 20 years, 18 U.S.C. 3581. All felonies are punishable by a fine of not more than \$250,000 (\$500,000 for organizations), 18 U.S.C. 3571.

¹⁰⁴ 18 U.S.C. 1503(b)(3).

¹⁰⁵ *United States v. Monus*, 128 F.3d 376, 387 (6th Cir. 1997); see also *United States v. Erickson*, 561 F.3d 1150, 1159 (10th Cir. 2009); *United States v. Macari*, 545 F.3d 517, 522-23 (7th Cir. 2008); *United States v. Richardson*, 676 F.3d 491, 502 (5th Cir. 2012); *United States v. Brenson*, 104 F.3d 1267, 1275 (11th Cir. 1997).

¹⁰⁶ *United States v. Sussman*, 709 F.3d 155, 168 (3d Cir. 2013) (“Under 18 U.S.C. §1503(a), the elements of a prima facie case of obstruction of justice are: (1) the existence of a judicial proceeding; (2) knowledge or notice of the pending proceeding; (3) acting corruptly with the intent of influencing, obstructing, or impeding the proceeding in the due administration of justice; and (4) the action had the natural and probable effect of interfering with the due administration of justice”); *United States v. Thomas*, 612 F.3d 1107, 1128-129 (9th Cir. 2010).

¹⁰⁷ *United States v. Aguilar*, 515 U.S. 593, 599 (1995), quoting *Pettibone v. United States*, 148 U.S. 197, 206 (1893).

¹⁰⁸ *United States v. Aguilar*, 515 U.S. at 599, 600; *United States v. Richardson*, 676 F.3d 491, 503 (5th Cir. 2012); *United States v. Blair*, 661 F.3d 755, 766 (4th Cir. 2011); *United States v. Macari*, 453 F.3d 926, 939 (7th Cir. 2006); *United States v. Quattrone*, 441 F.3d 153, 170 (2d Cir. 2006); *United States v. McBride*, 362 F.3d 360, 372 (6th Cir. 2004); *United States v. Muhammad*, 125 F.3d 608, 620 (8th Cir. 1997). Perhaps since an endeavoring-to-obstruct charge covers both successful and unsuccessful endeavors and therefore eliminates the need to prove success, prosecutors ordinarily charge an endeavor to obstruct or impede, even if there is evidence of success and a charge of simple obstruction might have been brought.

¹⁰⁹ *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).

¹¹⁰ *United States v. Aguilar*, 515 U.S. 593, 599 (1995), citing *United States v. Wood*, 6 F.3d 692, 696 (10th Cir. 1993), and *United States v. Walasek*, 527 F.2d 676, 679 (3d Cir. 1975); see also *United States v. Bonds*, 730 F.3d 890, 897 (9th Cir. 2013); *United States v. Ashqar*, 582 F.3d 819, 823 (7th Cir. 2009); *United States v. Johnson*, 485 F.3d 1264, 1270 (11th Cir. 2007); *United States v. Quattrone*, 441 F.3d 153, 170-71 (2d Cir. 2006); *United States v. Joiner*, 418 F.3d 863, 868 (8th Cir. 2005).

Court's observations, notwithstanding, the courts are somewhat divided over whether the obstructed judicial proceedings must actually be pending.¹¹¹

The courts may be at odds as well over whether the due administration of justice in §1503 may be obstructed by corrupting a witness before a federal judicial proceeding or any other obstruction covered by 18 U.S.C. 1512 or 1513. The Second Circuit held in 1991 that when Congress enacted the more specific witness tampering and witness retaliation provisions of §§512 and 1513 it intended to remove those crimes from the omnibus clause's inventory of proscriptions.¹¹² The other circuits, to the extent they have later addressed the issue, disagree.¹¹³ Notwithstanding opportunities to reconsider,¹¹⁴ the Second Circuit has apparently found it unnecessary to do so thus far.

The specific kinds of misconduct which will provide the basis for a prosecution under the omnibus clause of §1503 vary considerably.¹¹⁵ Subsection 1515(c), however, makes it clear that

¹¹¹ *United States v. Quattrone*, 441 F.3d 153, 170 (2d Cir. 2006)(emphasis added)("In order to convict for obstruction of justice under the omnibus clause of Section 1503, the government must establish (1) that there is a *pending* judicial or grand jury proceeding constituting the administration of justice ..."); accord *United States v. Erickson*, 561 F.3d 1150, 1159 (10th Cir. 2009); *United States v. Weber*, 320 F.3d 1047, 1050 (9th Cir. 2003); *United States v. Fassnacht*, 332 F.3d 440, 447 (7th Cir. 2003); *United States v. Steele*, 241 F.3d 302, 304-5 (3d Cir. 2001); *United States v. Sharpe*, 193 F.3d 852, 864 (5th Cir. 1999); *United States v. Layne*, 192 F.3d 556, 572 (6th Cir. 1999); *United States v. Frankhauser*, 80 F.3d 641, 650-51 (1st Cir. 1996); *United States v. Littleton*, 76 F.3d 614, 618-19 (4th Cir. 1996); contra *United States v. Novak*, 217 F.3d 566, 571-72 (8th Cir. 2000); see also *United States v. Vaghela*, 169 F.3d 729, 732-34 (11th Cir. 1999)(pendency not necessarily required in cases of conspiracy to violate Section 1503); *United States v. Bruno*, 383 F.3d 65, 87 (2d Cir. 2004)(proceedings need not be pending but there must be evidence from which to infer that they were anticipated in the case of a conspiracy to violate Section 1503).

¹¹² *United States v. Masterpol*, 940 F.2d 760, 762 (2d Cir. 1991).

¹¹³ *United States v. Tackett*, 113 F.3d 603, 607 (6th Cir. 1997) ("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)(noting the same for First, Fifth, Eighth and Ninth Circuits)"); see also *United States v. Ladum*, 141 F.3d 1328, 1337-338 (9th Cir. 1998); *United States v. LeMoire*, 474 F.3d 37, 40-41 (1st Cir. 2007).

¹¹⁴ *United States v. Kumar*, 617 F.3d 612, 622 n. 9 (2d Cir. 2010)(internal citations omitted)("The government may have charged Richards with violating §1512(c)(2) instead of §1503(a) due to its concern that a §1503(a) charge would raise a 'Masterpol issue.' In *Masterpol*, we held that witness tampering is prohibited only by §1512, and is not covered by §1503's omnibus clause. The government's concern with respect to Richards's obstruction charge was misplaced. While *Masterpol* might have presented an obstacle for indicting Kumar, who attempted to bribe a witness, as previously noted, Kumar is not appealing his obstruction of justice conviction. Unlike Kumar, Richards did not engage in witness tampering. Thus, *Masterpol* is not implicated here"); *United States v. Bruno*, 383 F.3d 65, 87 n.16 (2d Cir. 2004)("Because the defendants were prosecuted for lying to federal investigators instead of federal grand jury witnesses, we had no occasion to address the issue discussed above regarding our conclusion in *Masterpol* that charges of lying to, or trying to influence grand jury witnesses should be prosecuted under §1512"); *United States v. Genao*, 343 F.3d 578, 585 (2d Cir. 2003)("We hold that the indictment in the instant case does not set forth a sufficient nexus between Genao's false statements and a federal judicial proceeding so as to establish a violation of §1503"); *United States v. Schwarz*, 283 F.3d 76, 110 (2d Cir. 2002); *United States v. Quattrone*, 441 F.3d 153, 169-73 (2d Cir. 2006)(finding evidence sufficient to establish a nexus between the defendant's destruction of documents and the grand jury proceedings for which they had been subpoenaed).

¹¹⁵ *United States v. Richardson*, 676 F.3d 491, 502 (5th Cir. 2012)(internal citations omitted)(The omnibus clause was "drafted with an eye to the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined"); see e.g., *United States v. Bonds*, 730 F.3d 890, 894-95 (9th Cir. 2013)(evasive and misleading testimony before the grand jury); *United States v. Sussman*, 709 F.3d 155, 168 (3d Cir. 2013)(violation of court order freezing assets); *United States v. Macari*, 453 F.3d 926, 936 (7th Cir. 2006)(directing a witness to lie before the grand jury); *United States v. Quattrone*, 441 F.3d 153, 169-73 (2d Cir. 2006)(destruction of documents sought under a grand jury subpoena); *United States v. Joiner*, 418 F.3d 863, 865-(continued...)

bona fide legal advice will not provide the basis for a prosecution under the omnibus clause of §1503 nor under any other obstruction of justice prohibition found in the same chapter for that matter.¹¹⁶

Interfering with Jurors or Judicial Officials (18 U.S.C. 1503)

Bribery and other forms of jury corruption fall within the proscriptions of the omnibus clause of §1503,¹¹⁷ but are more explicitly condemned in the remainder of the section.¹¹⁸ On its face, the section covers both tampering with (and retaliation against) federal grand jurors, petite jurors, magistrates, and other judicial officials. The conduct it outlaws may take the form of threats, force, threatening letters or other communication, corruption (*e.g.*, bribery), or in retaliation, personal injury or property damage. Yet the offense is only complete if the misconduct is perpetrated in an endeavor to influence, intimidate or impede a juror or judicial official or on account of the performance of the duties of such a position.¹¹⁹

Before 1962, bribing a federal judge or juror might be prosecuted either under section 1503 or under the bribery statute, 18 U.S.C. 206 (1958 ed.).¹²⁰ Then in 1962 the corresponding provision

(...continued)

66 (8th Cir. 2005) (retaliatory economic harassment of federal judge and prosecutors responsible for the defendant's earlier conviction); *United States v. Weber*, 320 F.3d 1047, 1051 (9th Cir. 2003) (threatening to kill the judge presiding over the defendant's supervised release revocation hearing); *United States v. Novak*, 217 F.3d 566, 569-72 (8th Cir. 2000) (submission of false financial reports in violation of court order governing supervised release); *United States v. Fleming*, 215 F.3d 930, 933-34 (9th Cir. 2000) (filing false liens against the property of a federal judge in an effort to influence the judge's handling of a civil action); *United States v. Layne*, 192 F.3d 556, 572 (6th Cir. 1999) (attempt to influence the testimony of a criminal trial witness); *United States v. Muhammad*, 120 F.3d 688 (7th Cir. 1997) (civil trial juror's solicitation of a bribe); *United States v. Atkin*, 107 F.3d 1213 (6th Cir. 1997) (promising to bribe a trial judge).

¹¹⁶ "This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding." 18 U.S.C. 1515(c).

¹¹⁷ *United States v. Bashaw*, 982 F.2d 168 (6th Cir. 1992) ("He contends that the 'omnibus clause' of subsection 1503, prohibiting attempts corruptly to influence the due administration of justice, does not apply to conduct directed toward jurors. . . . This argument is without merit"); see also *United States v. Muhammad*, 120 F.3d 688, 693-95 (7th Cir. 1997) (juror's solicitation of a bribe comes within the omnibus provision).

¹¹⁸ "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," 18 U.S.C. 1503(a).

¹¹⁹ *United States v. Beale*, 620 F.3d 856, 865 (8th Cir. 2010) (internal quotation marks and citations omitted) ("In order to convict for obstruction of justice, the government must show that each defendant intended to interfere with the due administration of justice. A conviction under §1512(a) requires proof of a sufficient nexus between each defendant's actions and an intent to impede judicial proceedings. According to the nexus analysis, the act must have a relationship in time, causation, or logic with the judicial proceedings") (defendants issued a series of "liens" and "arrest warrants" to intimidate or disable a federal judge scheduled to preside over the criminal trial of one of the defendants).

¹²⁰ *United States v. Margoles*, 294 F.2d 371, 371 (7th Cir. 1961) (defendant charged with jury tampering under sections 206 and 1503); *United States v. Benallo*, 216 F.2d 891, 895 (10th Cir. 1954) (upholding convictions for jury tampering in violation of sections 206 and 1503); *United States v. Zullo*, 151 F.2d 560, 560-62 (3d Cir. 1945) (upholding jury (continued...))

in §206 disappeared when Congress revised federal bribery statutes and merged a number of individual sections into the general proscriptions now found in 18 U.S.C. 201. That §201 applies to bribery involving judges and certainly to bribery involving jurors seems clear from its language,¹²¹ its history,¹²² and the limited available case law.¹²³ Since 1962, however, such cases appear to have been prosecuted in most instances under §1503 alone.¹²⁴

A separate section, 18 U.S.C. 373, outlaws conspiracies to obstruct jurors and other judicial officers in the performance of their duties by force, intimidation or threat.¹²⁵

Section 1503 carries a general maximum penalty of imprisonment for not more than 10 years and, with one unusual exception, an escalating penalty structure for more serious violations.¹²⁶ Thus, the offense is punishable by imprisonment for not more than 20 years, if it involves either an attempted killing or is committed against a juror in a case involving a class A or B felony, *i.e.* a

(...continued)

tampering convictions under earlier versions of sections 206 and 1503); *Slade v. United States*, 85 F.2d 786 (10th Cir. 1936).

¹²¹ “[T]he term ‘public official’ means ... person acting for or on behalf of the United States, or any department, agency or branch of Government thereof ... in any official function, under or by authority of any such department, agency, or branch of Government, or a juror ... (b) Whoever—(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—(A) to influence any official act ... (2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for: (A) being influenced in the performance of any official act ... shall be imprisoned for not more than fifteen years ... ” 18 U.S.C. 201(a)(1),(b)(1),(2).

¹²² “Sections 201 through 213 of present title 18 of the United States Code comprise nine general bribery sections and four subsections prohibiting bribery in special cases. ... The bill combines into a single section (201) and renders uniform the disparate provisions of the nine general bribery sections (... secs. 206, 207, and 208, judges and judicial officers including jurors ...),” H.Rept. 87-748, at 15 (1961).

¹²³ *United States v. DeAlesandro*, 361 F.2d 694, 699-700 (2d Cir. 1966)(“Defendant contends that she was charged in two different counts for what amounted to the same crime. One count referred to 18 U.S.C. 201. ... The second charged violation of 18 U.S.C. 1503. ... It is true that the two counts charged essentially the same acts. ... The fatal defect in the argument is that Congress has explicitly made defendant’s conduct criminal in separate statutes, and has indicated that the two are not to be regarded as defining the same offense. ... [Their] history makes clear the congressional intent to create two separate offenses, separately indictable and separately punishable”); *United States v. Henley*, 238 F.3d 1111, 1122-123 n.19 (9th Cir. 2001)(“We note that only one court of appeals appears to have addressed the question of whether a defendant who is involved in jury tampering may obtain a new trial on that ground. ... (Under 18 U.S.C. 201, a defendant faces imprisonment of up to 15 years for bribery of a juror.) Here, there is no allegation that Henley participated in the tampering incident, only that he was aware of it”).

¹²⁴ *United States v. DeLaRosa*, 171 F.3d 215, 217-18 (5th Cir. 1999); *United States v. Borders*, 693 F.2d 1318, 1319 (11th Cir. 1982); *United States v. Neiswender*, 590 F.2d 1269, 1270 (4th Cir. 1979); *United States v. Quinn*, 543 F.2d 640, 642-43 (8th Cir. 1976); *United States v. Osborn*, 350 F.2d 497, 498 (6th Cir. 1965), *aff’d*, 385 U.S. 323 (1966); *United States v. Hoffa*, 349 F.2d 20, 26 (6th Cir. 1965), *aff’d*, 385 U.S. 293 (1966); but see *United States v. Muhammad*, 120 F.3d 688, 693-95 (7th Cir. 1997); *United States v. DeAlesandro*, 361 F.2d 694, 699-700 (2d Cir. 1966).

¹²⁵ *United States v. Beale*, 620 F.3d 856, 864 (8th Cir. 2010)(“[I]n order to sustain a conviction, the government must submit sufficient evidence to prove that (1) a conspiracy existed, (2) the appellants voluntarily entered into the conspiracy, and (3) the members of the conspiracy conspired to prevent by force, intimidation or threat, an officer of the United States from discharging her duties”).

¹²⁶ 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(b).

felony punishable by death, life imprisonment or a maximum term of imprisonment of at least twenty-five years.¹²⁷ If the offense involves a murder, it is punishable in the same manner as an offense under 18 U.S.C. 1111, that is, by death or imprisonment for any term of years or for life. In something of a curiosity, if the offense involves manslaughter it is punishable in the same manner as an offense under 18 U.S.C. 1112, that is, by imprisonment for not more than 10 years in the case of voluntary manslaughter and not more than 6 years in the case of involuntary manslaughter. As a consequence, the penalty for a violation of §1503 that involves voluntary manslaughter is no more severe than for a violation that does not involve a killing (10 years) and less severe (6 years) if the killing is involuntary manslaughter. Each of the offenses other than murder is also subject to a fine of not more than \$250,000 (not more than \$500,000 for an organization).¹²⁸

A conspiracy in violation of §372 is punishable by imprisonment for not more than 6 years and a fine of \$250,000 (or \$500,000 if the defendant is an organization).¹²⁹

Auxiliary Offenses and Liability

Conspiracy to violate §1503 can also be prosecuted under the general conspiracy statute, 18 U.S.C. 371.¹³⁰ Section 1503 offenses are RICO predicate offenses and consequently are money laundering predicate offenses.¹³¹ Those who aid and abet a §1503 offense are liable as principals and are punishable as if they committed the offense themselves.¹³² An individual who knows that another has committed a §1503 offense and nevertheless assists the offender in order to hinder his capture, trial or punishment is in turn punishable as an accessory after the fact.¹³³ And an individual who affirmatively conceals the commission of a §1503 offense by another is guilty of misprision.¹³⁴

Section 1503 contains no explicit statement of extraterritorial application. Nevertheless, the courts seem likely to conclude that overseas misconduct in violation of §1503 may be prosecuted in this country.¹³⁵

¹²⁷ 18 U.S.C. 3559.

¹²⁸ 18 U.S.C. 1503(b), 1111, 1112, 3571.

¹²⁹ 18 U.S.C. 372.

¹³⁰ *E.g.*, *United States v. Bruno*, 383 F.3d 65, 87-88 (2d Cir. 2004).

¹³¹ 18 U.S.C. 1961, 1956(c)(7)(A). *E.g.*, *United States v. Connolly*, 341 F.3d 16, 19 (1st Cir. 2003)(Section 1503 offenses as RICO predicates).

¹³² 18 U.S.C. 2.

¹³³ 18 U.S.C. 3.

¹³⁴ 18 U.S.C. 4.

¹³⁵ *Cf.*, *United States v. Bowman*, 260 U.S. 94, 98 (1922) (“But the same rule of interpretation [of purely domestic application] should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government’s jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated. . . . We cannot suppose that when Congress enacted the [fraud] statute or amended it, it did not have in mind that a wide field for such fraud upon the government was in private and public vessels of the United States on the high seas and in foreign ports and beyond the land jurisdiction of the United States, and therefore intend to include them in the subsection”); *Ford v. United States*, 273 U.S. 593, 623 (1927) (“a man who outside of a country willfully puts in motion a force to take effect in it is answerable at the place where the evil is done”).

Subsection 1512(i) establishes venue for prosecution under §1512 or §1503 in any district where the obstruction occurs or where the obstructed proceeding occurs or is to occur. The subsection was enacted to resolve a conflict among the circuits on the question of whether venue for a prosecution of either of the two sections was proper in the district of the obstructed proceeding.¹³⁶ Thereafter, the Supreme Court clarified venue’s constitutional boundaries when it declared that venue is ordinarily only proper where a conduct element of the offense occurs,¹³⁷ but left for another day the question of whether venue might be proper in a district where the effect of the offense is felt.¹³⁸ The limited subsequent case law on the question has arisen under other statutes and generally holds that the “effects” basis for venue remains valid “only when Congress had defined the essential conduct elements in terms of those effects.”¹³⁹

Obstructing Congressional or Administrative Proceedings (18 U.S.C. 1505)

Section 1505 outlaws interfering with Justice Department civil investigative demands issued in antitrust cases.¹⁴⁰ However, it deals primarily with obstructing congressional or federal administrative proceedings, condemning:

I. Whoever

II. A. corruptly, or
B. by threats or

¹³⁶ *United States v. Gonzalez*, 922 F.2d 1044, 1054 (2d Cir. 1991); *United States v. Allen*, 24 F.3d 1180, 1183 (10th Cir. 1994).

¹³⁷ *United States v. Cabrales*, 524 U.S. 1, 7-8 (1998); *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280 (1999).

¹³⁸ *United States v. Rodriguez-Moreno*, 526 U.S. at 279 n.2.

¹³⁹ *United States v. Clenney*, 434 F.3d 780, 781-82 (5th Cir. 2005) (“The government argues that venue exists under the terms of the [parental kidnapping] statute because ‘the intent to obstruct the lawful exercise of parental rights’ is an element of the offense, and Carmichael’s parental rights were violated in the Northern District. We disagree, because this element merely speaks to the offender’s *mens rea* as he commits the conduct essential to the crime; it is plainly not an ‘essential conduct element’ as required by *Rodriguez-Moreno*”); *United States v. Bowens*, 224 F.3d 302, 314 (4th Cir. 2000); *United States v. Kim*, 246 F.3d 186, 193 (2001); *United States v. Bin Laden*, 146 F.Supp.2d 373, 379-80 (S.D.N.Y. 2001).

The courts do not agree on whether the materiality element in §1001 constitutes a conduct element sufficient to make venue proper in the place where the false statement has an impact, *United States v. Oceanpro Industries, Ltd.*, 674 F.3d 323, 329-30 (4th Cir. 2012) (“Congress ... defined the effects in §1001 to include the element of materiality ... *United States v. Ringer*, 300 F.3d 788, 792 (7th Cir. 2002) (“Since the halting of the investigation against Ringers’ friends in the Southern District of Indiana was evidence of the materiality of Ringer’s statements, venue was proper in the Southern District of Indiana”); *United States v. Salinas*, 373 F.3d 161, 167 (1st Cir. 2004)”; but see *United States v. Smith*, 641 F.3d 1200, 1208 (10th Cir. 2011) (“Mr. Smith made his allegedly false statement in Minnesota.... [T]he only connection between Oklahoma [where the government sought venue] and Mr. Smith’s statements is that the subject-matter of the allegedly false statements relayed events that occurred in Oklahoma, and at the time there was an investigation in Oklahoma”).

¹⁴⁰ “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, imprisoned not more than five years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both,” 18 U.S.C. 1505.

- 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 5 years (not more than 8 years if the offense involves domestic or international terrorism), or both.¹⁴¹

Prosecutions under §1505 have been relatively few, at least until recently, and most of these arise as obstructions of administrative proceedings.¹⁴² “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.”¹⁴³

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 §1505. In doing so, it rejected the notion “that §1505 applies only to adjudicatory or rule-making activities, and does not apply to wholly investigatory activity.”¹⁴⁴ Moreover, proximity to an

¹⁴¹ 18 U.S.C. 1505. Under 18 U.S.C. 3571, felonies are punishable by a fine of not more than \$250,000 (not more than \$500,000 if the offender is an organization).

¹⁴² E.g., *United States v. Safavian*, 528 F.3d 957, 967-68 (D.C. Cir. 2008); *United States v. Kay*, 513 F.3d 432, 454 (5th Cir. 2007); *United States v. Blackwell*, 459 F.3d 739, 761 (6th Cir. 2006); *United States v. Quattrone*, 441 F.3d 153, 174 (2d Cir. 2006); *United States v. Bhagat*, 436 F.3d 1140, 1146 (9th Cir. 2006).

¹⁴³ *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); see also *United States v. Warshak*, 631, F.3d 266, 325 (6th Cir. 2010); *United States v. Blackwell*, 459 F.3d 739, 761-62 (6th Cir. 2006); *United States v. Quattrone*, 441 F.3d 153, 174 (2d Cir. 2006); *United States v. Bhagat*, 436 F.3d 1140, 1147 (9th Cir. 2006); *United States v. Kay*, 513 F.3d 432, 454 (5th Cir. 2007).

¹⁴⁴ *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 (continued...)”

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.¹⁴⁵ 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).¹⁴⁶

In the case of either congressional or administrative proceedings, §1505 condemns only that misconduct which is intended to obstruct the administrative proceedings or the due and proper exercise of the power of inquiry.¹⁴⁷ In order to overcome judicially-identified uncertainty as to the intent required,¹⁴⁸ Congress added a definition of “corruptly” in 1996: “As used in §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 have been found obstructive vary.¹⁴⁹

(...continued)

typically have involved agencies with some adjudicative power, or with the power to enhance their investigations through the issuance of subpoenas or warrants,” *id.*

¹⁴⁵ *United States v. Quattrone*, 441 F.3d 153, 175 (2d Cir. 2006) (“Quattrone’s Brief could be read as raising a distinction between the informal and formal stages of the SEC investigation and whether criminal liability for obstructing an agency ‘proceeding’ can only arise in the context of the latter. In our view, that argument comes up short”); *United States v. Technic Services, Inc.*, 314 F.3d 1031, 1044 (9th Cir. 2002) (“However, the record shows that TSI’s conduct, while removing the asbestos at the pulp mill, was under investigation by the EPA at the relevant time ... An investigation into a possible violation of the Clean Air Act or Clean Water Act, which could lead to a civil or criminal proceedings is a kind of proceeding”); *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. Fruchtmann*, 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”).

¹⁴⁶ *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 cannot 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”).

¹⁴⁷ *United States v. Leo*, 941 F.2d 181, 199 (3d Cir. 1991); *United States v. Mitchell*, 877 F.2d at 299; *United States v. Laurins*, 857 F.2d 529, 536-37 (9th Cir. 1988).

¹⁴⁸ *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).

¹⁴⁹ *United States v. Blackwell*, 459 F.3d 739, 761 (6th Cir. 2006) (submission of inaccurate information pursuant to an Securities and Exchange Commission subpoena); *United States v. Bhagat*, 436 F.3d 1140, 1149 (9th Cir. 2006) (false (continued...))

Section 1505 offenses are not RICO or money laundering predicate offenses.¹⁵⁰ Section 1505 has neither separate conspiracy provision nor an explicit extraterritorial jurisdiction provision. However, conspiracy to obstruct administrative or congressional proceedings may be prosecuted under 18 U.S.C. 371,¹⁵¹ and the courts would likely find that overseas violations of §1505 may be tried in this country.¹⁵² Moreover, the general aiding and abetting, accessory after the fact, and misprision statutes are likely to apply with equal force in the case of obstruction of an administrative or congressional proceeding.¹⁵³

Retaliating Against Federal Witnesses (18 U.S.C. 1513)

Congress outlawed retaliation against federal witnesses under §1513 at the same time it outlawed witness tampering under §1512.¹⁵⁴ Although somewhat more streamlined, §1513 shares a number of attributes with §1512. The definitions in §1515 apply to both sections.¹⁵⁵ Consequently, the prohibitions apply to witnesses in judicial, congressional, and administrative proceedings.¹⁵⁶ There is extraterritorial jurisdiction over both offenses.¹⁵⁷ In slightly different terms, both protect witnesses against murder and physical abuse—committed, attempted, conspired, or threatened. Offenses under the two are comparably punished.

(...continued)

statements to SEC investigators); *United States v. Technic Services, Inc.*, 314 F.3d 1031, 1044 (9th Cir. 2002) (tampering with air monitoring devices during an Environmental Protection Agency investigation); *United States v. Kelley*, 36 F.3d 1118, 1127-128 (D.C.Cir. 1994)(enlisting others to lie to AID Inspector General’s Office investigators); *United States v. Price*, 951 F.2d 1028, 1031 (9th Cir. 1991)(using threats to avoid an interview with IRS officials); *United States v. Leo*, 941 F.2d 181, 198 (3d Cir. 1991)(making false statements to a Defense Department auditor); *United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991)(lying to Customs Service officials); *United States v. Mitchell*, 877 F.2d 294, 299-300 (4th Cir. 1989)(endeavoring to use family relationship to obstruct a congressional investigation); *United States v. Laurins*, 857 F.2d 529, 536-37 (9th Cir. 1988)(submitting false documentation in response to an IRS subpoena).

¹⁵⁰ 18 U.S.C. 1961(1), 1956(c)(7).

¹⁵¹ *E.g.*, *United States v. Warshak*, 631 F.3d 266, 325 (6th Cir. 2010); *United States v. Blackwell*, 459 F.3d 739, 748 (6th Cir. 2006).

¹⁵² *Cf.*, *United States v. Bowman*, 260 U.S. 94, 98 (1922)(“We cannot suppose that when Congress enacted the [fraud] statute or amended it, it did not have in mind that a wide field for such fraud upon the government was in private and public vessels of the United States on the high seas and in foreign ports and beyond the land jurisdiction of the United States, and therefore intend to include them in the section”); *Ford v. United States*, 273 U.S. 593, 623 (1927) (“a man who outside of a country willfully puts in motion a force to take effect in it is answerable at the place where the evil is done”).

¹⁵³ 18 U.S.C. 2, 3, 4. *E.g.*, *United States v. Leo*, 941 F.2d 181, 184 (3d Cir. 1991).

¹⁵⁴ P.L. 97-291, 96 Stat. 1249, 1250 (1982).

¹⁵⁵ 18 U.S.C. 1515(a).

¹⁵⁶ 18 U.S.C. 1515(a)(1)(“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”).

¹⁵⁷ 18 U.S.C. 1512(h), 1513(d).

Section 1513 prohibits witness or informant retaliation in the form of killing, attempting to kill,¹⁵⁸ inflicting or threatening to inflict bodily injury, damaging or threatening to damage property,¹⁵⁹ and conspiracies to do so.¹⁶⁰

“The elements of an offense under 18 U.S.C. §1513 are (1) knowing engagement in conduct; (2) either causing, or threatening to cause, bodily injury to another person; and (3) the intent to retaliate for, *inter alia*, the attendance or testimony of a witness at an official proceeding.”¹⁶¹

It also prohibits economic retaliation against federal witnesses, but only witnesses in court proceedings and only on criminal cases.¹⁶² It does not reach economic retaliation against witnesses on the basis of information relating to the violations of supervised release, bail, parole, or probation conditions.

To satisfy the assault prong of §1513, the government must prove that the defendant bodily injured another in retaliation for the victim’s testimony or service as a federal informant.¹⁶³ The

¹⁵⁸ “(a) Whoever kills or attempts to kill another person with intent to retaliate against any person for—(A) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or (B) providing to a law enforcement officer any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation supervised release, 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 a killing, the punishment provided in sections 1111 and 1112; and (B) in the case of an attempt, imprisonment for not more than 30 years.... (c) If the retaliation occurred because of attendance at or testimony in a criminal case, the maximum term of imprisonment which may be imposed for the offense under this section 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,” 18 U.S.C. 1513(a),(c).

¹⁵⁹ “(b) Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for—(1) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or (2) any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings given by a person to a law enforcement officer; or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both. (c) If the retaliation occurred because of attendance at or testimony in a criminal case, the maximum term of imprisonment which may be imposed for the offense under this section 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,” 18 U.S.C. 1513(b),(c).

¹⁶⁰ “Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy,” 18 U.S.C. 1513(f). Conspiracy to violate §1513 may be prosecuted alternatively under 18 U.S.C. 371, *e.g.*, *United States v. Templeman*, 481 F.3d 1263, 1264 (10th Cir. 2007). In either case, a conspirator is liable for a violation of §1513 committed by a co-conspirator in foreseeable furtherance of their common scheme, *United States v. Wardell*, 591 F.3d 1279, 1291 (10th Cir. 2009).

¹⁶¹ *United States v. Henderson*, 626 F.3d 326, 342 (6th Cir. 2010), quoting, *United States v. Cofield*, 11 F.3d 413, 419 (4th Cir. 1993); see also *United States v. Wardell*, 591 F.3d 1279, 1291 (10th Cir. 2009).

¹⁶² “(e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both,” 18 U.S.C. 1513(e). The placement of subsection 1513(c)—after violent proscriptions of subsections 1513(a) and 1513(b), but before the economic retaliation proscription of subsection 1513(e)—may raise some question over whether subsection(c) provides an alternative sentencing provision for subsection 1513(f). Subsection 1513(c) states, “If the retaliation occurred because of attendance at or testimony in a criminal case, the maximum term of imprisonment which may be imposed for the offense under this section 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.”

¹⁶³ *United States v. Draper*, 553 F.3d 174, 180 (2d Cir. 2009)(“[T]o sustain a witness retaliation charge, the government must establish three elements: One, the defendant engaged in conduct that caused or threatened a witness with bodily (continued...)”).

extent of the injuries need not be extensive,¹⁶⁴ nor in the case of a threat even carried out.¹⁶⁵ In fact, in the case of a threat, all that is required is the intent to communicate a retaliatory threat, it matters not that the defendant neither planned nor had the ability to carry out the threat.¹⁶⁶ As a general rule, the intent to retaliate need not have been the sole motivation for the attack.¹⁶⁷

Section 1513 offenses are RICO predicate offenses and consequently money laundering predicate offenses.¹⁶⁸ They are also violent offenses and therefore may result in the application of those statutes in which the commission of a violent crime is an element or sentencing factor.¹⁶⁹ Those who aid and abet a §1513 offense are liable as principals and are punishable as if they committed the offense themselves.¹⁷⁰ An individual who knows another has committed a §1513 offense and nevertheless assists the offender in order to hinder his capture, trial or punishment is in turn punishable as an accessory after the fact.¹⁷¹ And an individual who affirmatively conceals the commission of a §1513 by another is guilty of misprision.¹⁷²

Conspiracy to Obstruct (18 U.S.C. 371)

If two or more persons conspire either to commit any offense against the United States or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.¹⁷³

Conspiracy to Defraud

Section 371 contains both a general conspiracy prohibition and a specific obstruction conspiracy prohibition in the form of a conspiracy to defraud proscription. The elements of conspiracy to

(...continued)

injury; two, the defendant acted knowingly, with the specific intent to retaliate against the witness for information the witness divulged to law enforcement authorities about a federal offense; and three, the officials to which the witness divulged information were federal agents"); *United States v. Tapia*, 59 F.3d 1137, 1140 (11th Cir. 1995); *United States v. Bolen*, 45 F.3d 140, 142 (7th Cir. 1995); *United States v. Cofield*, 11 F.3d 413, 419 (4th Cir. 1994); *United States v. Beliveau*, 802 F.2d 553, 562 (1st Cir. 1986).

¹⁶⁴ *United States v. Cunningham*, 54 F.3d 295, 299 (7th Cir. 1995).

¹⁶⁵ *United States v. Maggitt*, 794 F.2d 590, 593-94 (5th Cir. 1986).

¹⁶⁶ *United States v. Stoker*, 706 F.3d 643, 646-49 (5th Cir. 2013).

¹⁶⁷ *United States v. Molina*, 407 F.3d 511, 529-30 (1st Cir. 2005) ("there is nothing in section 1513 that requires retaliation to be the sole motive for a murder. As long as there is sufficient evidence from which the jury can infer that retaliation was a substantial motivating factor behind the killing it does not matter that defendant may have had other motives").

¹⁶⁸ 18 U.S.C. 1961(1), 1956(c)(7)(A).

¹⁶⁹ *E.g.*, *United States v. Caldwell*, 433 F.3d 378, 384 (4th Cir. 2005) (conviction for violation of 18 U.S.C. 1513, 373 (solicitation to commit a crime of violence), and 1114 (attempted murder of an individual assisting federal officers or employees)).

¹⁷⁰ 18 U.S.C. 2. *E.g.*, *United States v. Wardell*, 591 F.3d 1279, 1292 (10th Cir. 2009).

¹⁷¹ 18 U.S.C. 3.

¹⁷² 18 U.S.C. 4.

¹⁷³ 18 U.S.C. 371. For addition discussion see *Twenty-Eighth Survey of White Collar Crime: Federal Criminal Conspiracy*, 50 AMERICAN CRIMINAL LAW REVIEW 989 (2013); CRS Report R41223, *Federal Conspiracy Law: A Brief Overview*.

defraud the United States are: (1) an agreement of two more individuals; (2) to defraud the United States; and (3) an overt act by one of the conspirators in furtherance of the scheme.¹⁷⁴ The “fraud covered by the statute ‘reaches any conspiracy for the purpose of impairing, obstructing or defeating the lawful functions of any department of Government’”¹⁷⁵ by “deceit, craft or trickery, or at least by means that are dishonest.”¹⁷⁶ The scheme may be designed to deprive the United States of money or property, but it need not be so; a plot calculated to frustrate the functions of a governmental entity will suffice.¹⁷⁷

Conspiracy to Commit a Substantive Offense

The elements of conspiracy to commit a substantive federal offense are: “(1) an agreement to engage in criminal activity, (2) one or more overt acts taken to implement the agreement, and (3) the requisite intent to commit the substantive crime.”¹⁷⁸ Conspirators must be shown to have exhibited the same level of intent as required for the underlying substantive offense.¹⁷⁹ The overt

¹⁷⁴ *United States v. Mubayyid*, 658 F.3d 35, 52 (1st Cir. 2011)(internal citations omitted)(“Pursuant to [the defraud] provision, the government was required to prove three elements: an agreement, the unlawful objective of the agreement, and an overt act in furtherance of the agreement. The objective of the agreement is unlawful if it is for the purpose of impairing, obstructing or defeating the lawful function of any department of the government ... through deceit, craft, trickery, and dishonest means”); *United States v. World Wide Moving*, 411 F.3d 502, 516 (4th Cir. 2005); *United States v. Ballistrea*, 101 F.3d 827, 832 (2d Cir. 1996). Although it seems at odds with the text of the statute and the Supreme Court’s construction of the conspiracy to defraud prong of the statute, some appellate courts have suggested that conviction requires an underlying substantive offense, see e.g., *United States v. Durham*, 645 F.3d 883, 893 (7th Cir. 2011)(“One element of a charge of conspiracy to defraud the United States, in violation of §371, is intent to commit the substantive offense”).

¹⁷⁵ *Tanner v. United States*, 483 U.S. 107, 128 (1987), citing *Dennis v. United States*, 384 U.S. 855, 861 (1966); *Glasser v. United States*, 315 U.S. 60, 66 (1942); *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924); and *Haas v. Henkel*, 216 U.S. 462, 479 (1910).

¹⁷⁶ *Hammerschmidt v. United States*, 265 U.S. at 188 (“To conspire to defraud the United States means primarily to cheat the Government out of property or money, but also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest”); *Glasser v. United States*, 315 U.S. at 66 (“The indictment charges that the United States was defrauded by depriving it of its lawful governmental functions by dishonest means; it is settled that this is a ‘defrauding ... ’”); *United States v. Coplan*, 703 F.3d 46, 61 (2d Cir. 2013)(To prove conspiracy to defraud, “the Government must show (1) that the defendant entered into an agreement (2) to obstruct a lawful function of the Government (3) by deceitful or dishonest means and (4) at least one overt act in furtherance of the conspiracy”); *United States v. Meredith*, 685 F.3d 814, 822 (9th Cir. 2012).

¹⁷⁷ *Hammerschmidt v. United States*, 265 U.S. at 188 (“It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation ... ”); *United States v. Whiteford*, 676 F.3d 348, 356 (3d Cir. 2012); *United States v. World Wide Moving*, 411 F.3d 502, 516 (4th Cir. 2005); *United States v. Goldberg*, 105 F.3d 770, 773 (1st Cir. 1997); *United States v. Ballistrea*, 101 F.3d 827, 832 (2d Cir. 1996) (internal citations omitted) (This “provision ‘not only reaches schemes which deprive the government of money or property, but also is designed to protect the integrity of the United States and its agencies’”); *United States v. Dean*, 55 F.3d 640, 647 (D.C. Cir. 1995)(internal citations omitted)(If “the government’s evidence showed that Dean conspired to impair the functioning of the department of the Housing and Urban Development, ‘no other form of injury to the Federal Government need be established for the conspiracy to fall under §371’”).

¹⁷⁸ *United States v. Grasso*, 724 F.3d 1077, 1086 (9th Cir. 2013); see also *United States v. Mathis*, 738 F.3d 719, 735 (6th Cir. 2013); *United States v. McDonough*, 727 F.3d 143, 156 (1st Cir. 2013); *United States v. Read*, 710 F.3d 219, 226 (5th Cir. 2012); *United States v. McNair*, 605 F.3d 1152, 1195 (11th Cir. 2010); *United States v. Mohamed*, 600 F.3d 1000, 1007 (8th Cir. 2010); *United States v. Wardell*, 591 F.3d 1279, 1287 (10th Cir. 2009).

¹⁷⁹ *United States v. Feola*, 420 U.S. 671, 686 (1975); *United States v. Cairra*, 737 F.3d 455, 463-64 (7th Cir. 2013); *United States v. Njoku*, 737, F.3d 55, 68 (5th Cir. 2013); *United States v. Deffenbaugh*, 709 F.3d 266, 272 (4th Cir. 2013); *United States v. Rodriguez-Adorno*, 695 F.3d 32, 41-2 (1st Cir. 2012); *United States v. Weeks*, 653 F.3d 1188, 1202 (10th Cir. 2011).

act need only be furtherance of the scheme; it need not be the underlying substance offense or even a crime at all.¹⁸⁰ Conspirators are liable for the underlying offense should it be accomplished and for any reasonably foreseeable offense committed by a coconspirator in furtherance of the common plot.¹⁸¹

As noted earlier, a number of federal statutes, §§1512 and 1513 among them, include within their proscriptions a separate conspiracy feature that outlaws plots to violate the section's substantive provisions.¹⁸² The advantage for prosecutors of these individual conspiracy provisions is that they carry the same penalties as the underlying substantive offense and that they ordinarily do not require proof of an overt act.¹⁸³ Although §§1512 and 1513 provide an alternative means of prosecuting a charge of conspiracy to violate their underlying prohibitions, the government may elect to proceed under general conspiracy statute, 18 U.S.C. 371.

Contempt

Contempt of Court

The oldest of the general obstruction provisions is contempt. The crime of contempt of court comes to us from antiquity. Blackstone speaks of the power to punish disturbances in the presence of the king's courts that existed before the Conquest,¹⁸⁴ and he notes that the common law classified as contempt the failing to heed the writs or summons of the king or his courts of justice.¹⁸⁵ The first Congress empowered the federal courts "to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing."¹⁸⁶

Contemporary federal contempt is derived from statute, rule, and inherent or auxiliary authority. Section 401 of title 18 of the United States Code notes the power of a federal court to punish by fine or imprisonment misconduct committed in the presence of the court or by its officers and disobedience of its orders.¹⁸⁷ Rule 42 of the Federal Rules of Criminal Procedure supplies

¹⁸⁰ *United States v. Read*, 710 F.3d 219, 226 (5th Cir. 2012); *United States v. Soy*, 454 F.3d 766, 768 (7th Cir. 2006); *United States v. May*, 359 F.3d 683, 694 n.18 (4th Cir. 2004); *United States v. Lukens*, 114 F.3d 1220, 1222 (D.C. Cir. 1997); *cf.*, *Braverman v. United States*, 317 U.S. 49, 53 (1942).

¹⁸¹ *Pinkerton v. United States*, 328 U.S. 640, 646-48 (1946); *United States v. Alaniz*, 726 F.3d 586, 614 (5th Cir. 2013); *United States v. Grosso*, 724 F.3d 1077, 1089 (9th Cir. 2013); *United States v. Ali*, 718 F.3d 929, 941 (D.C. Cir. 2013).

¹⁸² *E.g.*, 18 U.S.C. 1512(k) ("Whoever conspires to commit any offense under this subsection shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy"). Subsection 1513(e) is similarly worded.

¹⁸³ Where Congress enacts a conspiracy provision without an explicit overt act requirement as in the Sherman Act, conviction may be had without proof of an overt act, *Whitfield v. United States*, 543 U.S. 209, 212-14 (2005) (construing 18 U.S.C. 1956(h)); *United States v. Shabani*, 513 U.S. 10, 14 (1994) (construing 21 U.S.C. 846).

¹⁸⁴ IV BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND 124 (1769).

¹⁸⁵ *Id.* at 122 ("Contempts against the prerogative may also be ... by disobeying the king's lawful commands; whether by writs issuing out of his courts of justice, or by a summons to attend his privy council, or by letters from the king to a subject commanding him to return from beyond the seas. ... Disobedience of any of these commands is a high misprision and contempt").

¹⁸⁶ 1 Stat. 83 (1789).

¹⁸⁷ "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; (2) Misbehavior of any of its officers in their official transactions; (3) Disobedience or (continued...)

procedures to be followed in such cases, other than those dealt with summarily. Section 402 provides for a jury trial when the allegations of criminal contempt also constitute separate federal or state criminal offenses.¹⁸⁸

Criminal Contempt

Contempt may be civil or criminal. Civil contempt is coercive and remedial, calculated to compel the recalcitrant to obey the orders of the court or to compensate an opponent aggrieved by the failure to do so.¹⁸⁹ Criminal contempt is punitive.¹⁹⁰

A wide variety of obstructions of justice are punishable as criminal contempt of court. They include:

(...continued)

resistance to its lawful writ, process, order, rule, decree, or command,” 18 U.S.C. 401.

¹⁸⁸ “Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title [relating to jury trials in criminal contempt cases] and shall be punished by a fine under this title or imprisonment, or both. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of \$1,000, nor shall such imprisonment exceed the term of six months. This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law. For purposes of this section, the term “State” includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States,” 18 U.S.C. 402.

¹⁸⁹ *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 827-28 (1994); *F.T.C. v. Trudeau*, 579 F.3d 754, 769 (7th Cir. 2009)(internal citations omitted)(“Generally, civil contempt is remedial and for the benefit of the complainant, while criminal contempt is punitive, to vindicate the authority of the court. In terms of monetary sanctions, civil sanctions fall in two categories. They can compensate the complainant for his losses caused by the contemptuous conduct. Or they can coerce the contemnor’s compliance with a court order. A coercive sanction must afford the contemnor the opportunity to purge, meaning the contemnor can avoid punishment by complying with the court order”); see also *Ahearn v. International Longshore and Warehouse Union, Locals 21 and 4*, 721 F.3d 1122, 1128-129 (9th Cir. 2013).

Civil contempt and other noncriminal judicial sanctions are beyond the scope of this report. A partial list of such sanctions would include 28 U.S.C. 1927 (award cost expenses, attorney’s fees against attorneys who multiply proceedings); 28 U.S.C. 1826 (recalcitrant witnesses); F.R.Civ.P. 11 (sanction a party or the party’s attorney for filing groundless pleadings, motions or other papers); F.R.Civ.P. 16(f) (sanction a party or party’s attorney for failure to abide by a pretrial order); F.R.Civ.P. 26(g) (sanction a party or party’s attorney for baseless discovery requests or objections); F.R.Civ.P. 30(g) (award expenses caused by failure to attend a deposition or to serve a subpoena on a party to be deposed); F.R.Civ.P. 37(d), (g) (award expenses when a party fails to respond to discovery requests or fails to participate in the framing of a discovery plan); F.R.Civ.P. 41(b) (dismiss an action or claim of a party that fails to prosecute, to comply with the Federal Rules or to obey an order of the court); F.R.Civ.P. 56(g) (award expenses or contempt damages when a party presents an affidavit in a summary judgment motion in bad faith or for the purpose of delay); F.R.App. P. 38 (power to award damages and costs for frivolous appeal).

¹⁹⁰ *In re Bradley*, 588 F.3d 254, 263 (5th Cir. 2009)(“Imprisonment is an appropriate remedy for either civil or criminal contempt, depending on how it is assessed, if the prison term is conditional and coercive, the character of the contempt is civil; if it is backward-looking and unconditional it is criminal.... Similarly, a fine that punishes past conduct is criminal, while a fine that accrues on an ongoing basis in response to noncompliance is civil”); see also *Ahearn v. International Longshore and Warehouse Union, Locals 21 and 4*, 721 F.3d 1122, 1128-129 (9th Cir. 2013).

- disobedience of a court order to provide handwriting exemplars,¹⁹¹
- violation of a temporary restraining order entered in unfair trade practices action,¹⁹²
- unlawful disclosure by grand jurors of their vote or deliberations,¹⁹³
- asset transfer in violation of a bankruptcy court's asset freeze order,¹⁹⁴
- refusing to testify before the grand jury,¹⁹⁵
- false statement to a probation officer,¹⁹⁶
- vulgar insults addressed to court,¹⁹⁷
- violation of a condition of supervised release,¹⁹⁸
- fraudulently sold business opportunities in violation of court-ordered Federal Trade Commission consent decree,¹⁹⁹
- refusing to testify at trial,²⁰⁰
- violation of restraining order prohibiting harassment of the bankruptcy court,²⁰¹
- violation of the court's witness sequestration order,²⁰²
- failure to appear at the supervised release revocation hearing,²⁰³
- attorney's repeated failure to follow court's instructions relating to the conduct of the trial,²⁰⁴
- threatening jurors,²⁰⁵
- retaliating against a witness in violation of the court's restraining order,²⁰⁶
- defendant's contacting witnesses in violation of the court's order.²⁰⁷

¹⁹¹ *In re Solomon*, 465 F.3d 114 (3d Cir. 2006).

¹⁹² *United States v. Love*, 449 F.3d 1154 (11th Cir. 2006).

¹⁹³ *United States v. Navarro-Vargas*, 408 F.3d 1184 (9th Cir. 2005).

¹⁹⁴ *United States v. Brennan*, 395 F.3d 59 (2d Cir. 2005).

¹⁹⁵ *Alwan v. Ashcroft*, 388 F.3d 507 (5th Cir. 2004).

¹⁹⁶ *United States v. Loudon*, 385 F.3d 795 (2d Cir. 2004).

¹⁹⁷ *United States v. Marshall*, 371 F.3d 42 (2d Cir. 2004).

¹⁹⁸ *United States v. Smith*, 344 F.3d 479 (6th Cir. 2003).

¹⁹⁹ *United States v. Ferrara*, 334 F.3d 774 (2003).

²⁰⁰ *United States v. Kimble*, 305 F.3d 480 (6th Cir. 2002).

²⁰¹ *United States v. Mourad*, 289 F.3d 174 (1st Cir. 2002).

²⁰² *F.J. Hanshaw Enterprises, Inc. v. Emerald River Development, Inc.*, 244 F.3d 1128 (9th Cir. 2001).

²⁰³ *United States v. Bernardine*, 237 F.3d 1279 (11th Cir. 2001).

²⁰⁴ *United States v. Galin*, 222 F.3d 1123 (9th Cir. 2000).

²⁰⁵ *United States v. Rrapi*, 175 F.3d 742 (9th Cir. 1999).

²⁰⁶ *United States v. Rapone*, 131 F.3d 188 (D.C. Cir. 1997).

²⁰⁷ *United States v. Grisanti*, 116 F.3d 984 (2d Cir. 1997).

Criminal contempt comes in two forms, direct and indirect. Direct contempt involves misconduct in the presence of the court and is punished to ensure the decorum of the court and the dignity of the bench.²⁰⁸ Indirect contempt consists of those obstructions committed outside the presence of the court.²⁰⁹ Direct contempt may be summarily punished; indirect contempt may not.²¹⁰

Summary contempt. A court may summarily punish as direct criminal contempt under subsection 401(1) and Rule 42(b) of the Federal Rules of Criminal Procedure, “[m]isbehavior of any person in its presence or so near thereto as to obstruct the administration of justice.”²¹¹ a witness who in the presence of the court refuses to testify at trial may be summarily punished for contempt,²¹² as may an individual who urinates on the courtroom floor in the presence of the court,²¹³ or who addresses the court or the jury in vulgar and insulting terms.²¹⁴ The range of misbehavior proscribed is narrow, however, because the procedural protections afforded the offender are few. There is no indictment, no right to counsel, no trial, no hearing, no right to present exculpatory evidence.²¹⁵ There is only the intentional act or omission by the offender and the pronouncement of punishment by the court.

The proximity of misconduct occurring “so near ... as to obstruct the administration of justice” is a matter of physical proximity not proximity to the subject matter of the proceedings. Thus, the misbehavior that may summarily be punished does not include misconduct occurring elsewhere that has an adverse impact or potentially adverse impact on the judicial proceedings, such as the

²⁰⁸ *United States v. Rangolan*, 464 F.3d 321, 324 (2d Cir. 2006), citing *International Union, United Mineworkers v. Bagwell*, 512 U.S. 821, 832 (1994); *In re Troutt*, 460 F.3d 887, 893 (7th Cir. 2006).

²⁰⁹ *United States v. Rangolan*, 464 F.3d 321, 325 (2d Cir. 2006).

²¹⁰ *International Union, United Mineworkers v. Bagwell*, 512 U.S. 821, 832, 827 n.2 (1994); *United States v. Britton*, 731 F.3d 745, 749 (7th Cir. 2013).

²¹¹ 18 U.S.C. 401(1). Rule 42(b) supplies the minimal procedural requirements, *i.e.*, “Notwithstanding any other provision of these rules, the court (other than a magistrate judge) may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies; a magistrate judge may summarily punish a person as provided in 28 U.S.C. § 636(e). The contempt order must recite the facts, be signed by the judge, and be filed with the clerk.” *United States v. Moncier*, 571 F.3d 593, 598 (6th Cir. 2009) (“The elements of criminal contempt are (1) the defendant engaged in misbehavior, (2) that the misbehavior obstructed the administration of justice, (3) that the misbehavior occurred in the presence of the court, and (4) that defendant acted with intent to obstruct”).

²¹² *United States v. Wilson*, 421 U.S. 309, 314-15 (1975); *Brown v. United States*, 356 U.S. 148, 154-55 (1958). By the same token, false statements cannot be punished as contempt unless they are so patently false that without reference to any other evidence they constitute a clear refusal to testify rather than to deceive, *United States v. Arredondo*, 349 F.3d 310, 318 (6th Cir. 2003).

²¹³ *United States v. Perry*, 116 F.3d 952, 956 (1st Cir. 1997).

²¹⁴ *In re Sealed Case*, 627 F.3d 1235, 1237-238 (D.C.Cir. 2010); *United States v. Marshall*, 371 F.3d 42, 46 (2d Cir. 2004); *United States v. Seale*, 461 F.2d 345, 370 (7th Cir. 1972); *United States v. Murphy*, 326 F.3d 501, 504 (4th Cir. 2003); *United States v. Browne*, 318 F.3d 261, 266 (1st Cir. 2003); *United States v. Rrapi*, 175 F.3d 742, 753-54 (9th Cir. 1999) (obscene outburst directed at jurors before they were polled). The court in each of these cases felt obliged to explain how the misconduct at issue constituted an obstruction in the administration of justice.

²¹⁵ *United States v. Rangolan*, 464 F.3d 321, 324 (2d Cir. 2006) (“Because the summary contempt sanction is not subject to the usual requirements of a jury trial or notice and opportunity to be heard, summary contempt is a rule of necessity, reserved for exception circumstances and a narrow category of contempt”), citing *Harris v. United States*, 382 U.S. 162, 164-65 (1965), and *United States v. Marshall*, 371 F.3d 42, 45 (2d Cir. 2004); see also *United States v. Arredondo*, 349 F.3d 310, 317 (6th Cir. 2003); *United States v. Oberhellmann*, 946 F.2d 50, 53 (7th Cir. 1991). The Sixth Amendment right to a jury trial limits the term of imprisonment which a court may summarily impose to a maximum of six months, *United States v. Browne*, 318 F.3d 261, 265 (1st Cir. 2003), citing *Codispoti v. Pennsylvania*, 318 F.3d 506, 511-12 (1974); *United States v. Marshall*, 371 F.3d 42, 48-9 (2d Cir. 2004); *United States v. Linney*, 134 F.3d 274, 280 (4th Cir. 1998).

tardy arrival of an attorney at court,²¹⁶ or a lawyer's failure to present the court with a doctor's affidavit justifying his client's absence,²¹⁷ or a party's efforts to influence a juror during breakfast several floors removed from the courtroom,²¹⁸ or a party's failure to appear for depositions,²¹⁹ or encourage others to flood the court with e-mails.²²⁰ Each of these might be punished as criminal contempt, but not summarily.

If not punished summarily, a person charged with criminal contempt is entitled under Rule 42(a) to a statement of the essential facts underlying the charge, a reasonable opportunity to prepare a defense, and notice of the time and place where the hearing is to occur.²²¹ A person so charged is also entitled to the assistance of counsel; to be prosecuted by a disinterested prosecutor; to subpoena witnesses; to examine and cross-examine witnesses; to present a defense; to the benefit of the privilege against self-incrimination and of the double jeopardy bar; and, if the contempt is to be punished by a term of imprisonment of more than six months, to a jury trial.²²² The right to be prosecuted by the United States Attorney or some other neutral prosecutor is reinforced by the Rule,²²³ but may be waived by the person charged.²²⁴ In the trial of criminal contempt in violation of §401(1) that may not be punished summarily “the Government must establish beyond a reasonable doubt: (1) misbehavior of a person, (2) which is in or near the presence of the Court, (3) which obstructs the administration of justice, and (4) which is committed with the required degree of criminal intent.”²²⁵

Misbehavior by court officers. Subsection 401(2) is cited most often for the proposition that attorneys are not officers of the court for purposes of the subsection.²²⁶ Otherwise, it is seldom prosecuted or cited.²²⁷

Violation of a court order. A court may punish as criminal contempt under subsection 401(3) and the procedures outlined in Rule 42(a) of the Federal Rules of Criminal Procedure, “[d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command.”²²⁸ The conviction for

²¹⁶ *In re Smothers*, 322 F.3d 438, 440 (6th Cir. 2003); *In re Gates*, 600 F.3d 333, 339 (4th Cir. 2010); *United States v. Peoples*, 698 F.3d 185, 192 (4th Cir. 2012).

²¹⁷ *United States v. Cooper*, 353 F.3d 161, 163-64 (2d Cir. 2003).

²¹⁸ *United States v. Rangolan*, 464 F.3d 321, 327-28 (2d Cir. 2006).

²¹⁹ *Smith v. Smith*, 145 F.3d 335, 342 (5th Cir. 1998).

²²⁰ *F.T.C. v. Trudeau*, 606 F.3d 382, 390 (7th Cir. 2010).

²²¹ F.R.Crim.P. 42(a)(1).

²²² *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 826-27 (1994); *United States v. Dixon*, 509 U.S. 688, 696 (1993); *United States v. Glass*, 361 F.3d 580, 590 n.13 (9th Cir. 2004); *S.E.C. v. First Choice Management Services, Inc.*, 678 F.3d 538, 544 (2012).

²²³ F.R.Crim.P. 42(a)(2) (“The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt”).

²²⁴ *In re Reed*, 161 F.3d 1311, 1317 (11th Cir. 1998).

²²⁵ *United States v. Peoples*, 698 F.3d 185, 189 (4th Cir. 2012).

²²⁶ *E.g.*, *Cammer v. United States*, 350 U.S. 399, 407-8 (1956); *F.J. Hanshaw Enterprises, Inc. v. Emerald River Development Inc.*, 244 F.3d 1128, 1136 n.5 (9th Cir. 2001); *United States v. Griffin*, 84 F.3d 820, 832 n.8 (7th Cir. 1996).

²²⁷ But see *United States v. Arredondo*, 349 F.3d 310, 318-19 (6th Cir. 2003) (noting in passing that jurors and veniremen are officers of the court for purposes of subsection 401(2)).

²²⁸ 18 U.S.C. 401(3). *United States v. Allen*, 587 F.3d 246, 255 (5th Cir. 2009) (“[T]he elements of criminal contempt under 18 U.S.C. §401(3) are: (1) a reasonably specific order; (2) violation of the order; and (3) the willful intent to violate the order”); see also *United States v. Hernandez*, 600 F.3d 333, 338-39 (4th Cir. 2010).

criminal contempt in a violation of subsection 401(3) requires the government to prove beyond a reasonable doubt that the defendant willfully violated a reasonable specific court order.²²⁹ Obstruction of justice is not an element of the offense,²³⁰ but a willful intent is, which means that the defendant must have known of the order and have deliberately or recklessly violated it.²³¹ Mere negligence is not enough.²³² A person may not be found in criminal contempt of an unclear order of the court,²³³ but disobedience of an invalid order is nonetheless punishable as criminal contempt.²³⁴

Although the double jeopardy bar applies to criminal contempt,²³⁵ it does not preclude the use of civil contempt against an individual who has been convicted of criminal contempt of the same recalcitrance nor prosecution of a criminal contempt charge after civil contempt has been imposed.²³⁶ Moreover, the double jeopardy prohibition does not bar sequential prosecution of criminal contempt and substantive offenses arising out the same events.²³⁷

Unless summarily punished, sentencing for contempt begins with the Sentencing Guidelines.²³⁸ The guideline for contempt, however, is not always easily discerned. The Guidelines assign a

²²⁹ *Romero v. Drummond Co., Inc.*, 480 F.3d 1234, 1242 (11th Cir. 2007); *United States v. Mourad*, 289 F.3d 174, 180 (1st Cir. 2002); *United States v. Ortlieb*, 274 F.3d 871, 874 (5th Cir. 2001); *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 295 (4th Cir. 2000); *United States v. Vezina*, 165 F.3d 176, 178 (2d Cir. 1999); *United States v. Rapone*, 131 F.3d 188, 192 (D.C. Cir. 1997); *United States v. Doe*, 125 F.3d 1249, 1254 (9th Cir. 1997).

²³⁰ *United States v. Britton*, 731 F.3d 745, 749 (7th Cir. 2013); *United States v. Galin*, 222 F.3d 1123, 1127 (9th Cir. 2000).

²³¹ *United States v. Allen*, 587 F.3d 246, 255 (5th Cir. 2009) (“For a criminal contempt conviction to stand, the evidence ... must show both a contemptuous act and a willful, contumacious, or reckless state of mind.... ‘[W]illfulness’ in the context of the criminal contempt statute at a minimum requires a finding of recklessness, which requires more than a finding that an individual ‘reasonably should have known’ that the relevant conduct was prohibited”); see also *In re Kendall*, 712 F.3d 814, 830-31 (3d Cir. 2013); *United States v. Ortlieb*, 274 F.3d 871, 875 (5th Cir. 2001); *United States v. Marquardo*, 149 F.3d 36, 43 n.4 (1st Cir. 1998); *United States v. Themy-Kotronakis*, 140 F.3d 858, 864 (10th Cir. 1998); *United States v. Rapone*, 131 F.3d 188, 195 (D.C. Cir. 1997).

²³² *United States v. Mottweiler*, 82 F.3d 769, 772 (7th Cir. 1996).

²³³ *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 299 (4th Cir. 2000).

²³⁴ *Maness v. Meyers*, 419 U.S. 449, 458 (1975); *In re Criminal Contempt Proceedings Against Crawford*, 329 F.3d 131, 138 (2d Cir. 2003); *United States v. Mourad*, 289 F.3d 174, 177-78 (1st Cir. 2002).

²³⁵ *United States v. Dixon*, 509 U.S. 688, 696 (1993). As a general matter the Constitution directs that no person shall “be subject for the same offense to be twice put in jeopardy of the life or limb,” U.S. Const. Amend. V.

²³⁶ *United States v. Lippitt*, 180 F.3d 873, 879 (7th Cir. 1999); *United States v. Marquardo*, 149 F.3d 36, 41 (1st Cir. 1998).

²³⁷ *United States v. Forman*, 180 F.3d 766, 768-69 (6th Cir. 1999); *United States v. Landerman*, 109 F.3d 1053, 1068 (5th Cir. 1997). Of course, the same events may lead to prosecution under both section 401 and other obstruction offenses, e.g., *United States v. Henry*, 519 F.3d 68, 71-74 (1st Cir. 2008); *United States v. Senffner*, 280 F.3d 755, 758 (7th Cir. 2002) (upholding convictions under 18 U.S.C. 401 and 1503 for transferring assets in violation of a court-ordered asset freeze); *United States v. Novak*, 217 F.3d 566 (8th Cir. 2000) (upholding convictions under 18 U.S.C. 401 and 1503 for submitted false statements to the probation service).

²³⁸ In *United States v. Booker*, 543 U.S. 220, 245 (2005), the Supreme Court held unconstitutional but severable the statutory provision that made the Sentencing Guidelines binding on federal courts. The results recommended by application of the Guidelines remain one of several statutory factors which federal sentencing courts must consider, 18 U.S.C. 3553. In part because the other factors are very general while the Guidelines are very fact-specific, the Guidelines continue to carry great weight, cf., *Gall v. United States*, 552 U.S. 38, 49-50 (2007) (“[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark. The Guidelines are not the only consideration, however. Accordingly, after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the §3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume (continued...)”).

specific guideline for most federal offenses. It assigns contempt to an obstruction of justice guideline, U.S.S.G. §2J1.1. But §2J1.1 states in its entirety, “apply §2X5.1 (Other Offenses).” The accompanying commentary does explain that the Sentencing Commission decided not to draft a specific guideline for contempt because of the variety of misconduct that can constitute the offense.²³⁹ It goes on to say that in some instances the general obstruction of justice guideline or the theft guideline may be most analogous for violations of §401.²⁴⁰ Section 2X5.1 declares “[i]f the offense is a felony for which no guideline expressly has been promulgated, apply the most analogous offense guideline.” Federal appellate court decisions indicate that this “most analogous” standard has been used to mirror the misconduct underlying the contempt conviction, although with seemingly conflicting results in some instances.²⁴¹

The Guidelines ordinarily operate beneath the maximum penalties established by statute. Section 401, however, speaks of neither a maximum term of imprisonment nor a maximum fine level. It simply states that criminal contempt may be punished by imprisonment or by a fine or both. This approach has implications for things like probation, special assessments, and terms of supervised release that turn upon the maximum term of imprisonment associated with a particular offense. Probation, for example, is unavailable to those charged with a Class A or B felony,²⁴² special assessments range from \$5 to \$100 depending on the classification of the offense for which an individual is convicted,²⁴³ and the maximum permissible term of supervised release, if any, is determined in many instances by whether the offender has been convicted of a Class A, B, C, D, or E felony or a misdemeanor other than a petty offense.²⁴⁴

(...continued)

that the Guidelines range is reasonable. He must make an individualized assessment based on the facts presented. If he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one. After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing”); *United States v. Miner*, 544 F.3d 930, 932-33 (8th Cir. 2008)(affirming a sentence for contempt which calculated the sentencing range under the Guidelines and then considered the other factors listed in §3553(a)).

²³⁹ U.S.S.G §2J1.1, *Commentary: Application Note 1*.

²⁴⁰ *Id.*

²⁴¹ *E.g.*, *United States v. Brennan*, 395 F.3d 59, 72-4 (2d Cir. 2005)(application of the larceny guideline for violation of a bankruptcy court’s asset freeze order “amounted to stealing money ... that should have gone to his victims or creditors”); *United States v. Ferrara*, 334 F.3d 774, 777-78 (8th Cir. 2003)(application of the fraud guideline for violation of court-ordered consent decree prohibiting activities relating to Federal Trade Commission Act offenses); *United States v. Kimble*, 305 F.3d 480, 485-86 (6th Cir. 2002)(application of the accessory after the fact guideline for a witness’s refusal to testify at a homicide trial); *United States v. Jones*, 278 F.3d 711, 716 (7th Cir. 2002)(application of the failure of a material witness to appear for a witness’s refusal to testify before the grand jury and at trial); *United States v. Brady*, 168 F.3d 574, 577-79 (1st Cir. 1999)(application of the obstruction of justice guideline for a witness’s refusal to testify before the grand jury); *United States v. Fisher*, 137 F.3d 1158, 1167 (9th Cir. 1998)(application of the failure to appear for judicial proceedings guideline to a violation of bail condition requiring attendance at judicial proceedings); *United States v. Versaglio*, 85 F.3d 943, 949 (2d Cir. 1996)(application of the obstruction of justice guideline to a witness’s refusal to testify at trial).

²⁴² 18 U.S.C. 3561(a)(1). A class A felony is an offense for which the maximum penalty is death or the maximum term of imprisonment is life; a class B felony is an offense for which the maximum term of imprisonment is 25 years or more, 18 U.S.C. 3559(a)(1), (2).

²⁴³ 18 U.S.C. 3013.

²⁴⁴ 18 U.S.C. 3583(b). Petty offenses are those misdemeanors and infractions other than class A misdemeanors, 18 U.S.C. 19; class A misdemeanors are those offenses for the maximum term of imprisonment is one year or less but more than 6 months, 18 U.S.C. 3559(a)(6).

When the question has been raised, prosecutors have sometimes argued that criminal contempt under §401 should be considered a class A felony, since it is punishable by any term of imprisonment up to and including life imprisonment.²⁴⁵ Defendants have argued alternatively that criminal contempt under §401 should be (1) considered neither felony nor misdemeanor nor petty offense, or (2) classified according to the sentence imposed or the sentencing maximum the court agrees to accept, as is done when the question is whether a contempt case must be tried before a jury.²⁴⁶ The Ninth Circuit chose something of a middle ground and classified criminal contempt according to the maximum sentence for the most analogous offense.²⁴⁷ The Eleventh Circuit, on the other hand, concluded that contempt is *sui generis* and cannot accurately be classified as either a felony or misdemeanor of any stripe.²⁴⁸

Civil Contempt

Civil contempt is coercive and compensatory rather than punitive.²⁴⁹ A court may hold an individual or entity in civil contempt upon a showing that “(1) the alleged contemnor had notice of the order, (2) the order was clear and unambiguous, (3) the alleged contemnor had the ability to comply with the order, and (4) the alleged contemnor violated the order.”²⁵⁰ Coercive imprisonment or daily fines must end when the contemnor complies or becomes unable to do so.²⁵¹ Compensatory contempt in the form of money judgment or other form of relief must be related to the losses suffered as a consequence of violation of the order.²⁵²

²⁴⁵ *United States v. Love*, 449 F.3d 1154, 1158 (11th Cir. 2006); *United States v. Carpenter*, 91 F.3d 1282, 1284 (9th Cir. 1996); see also *United States v. Broussard*, 611 F.3d 1069, 1071 (9th Cir. 2010) and *United States v. Cohn*, 586 F.3d 844, 846 (11th Cir. 2009)(each noting that the lower court had classed a contempt conviction as a Class A felony because it had no statutory maximum penalty).

²⁴⁶ *Id.*

²⁴⁷ *United States v. Broussard*, 611 F.3d 1069, 1072 (9th Cir. 2010).

²⁴⁸ *United States v. Cohn*, 586 F.3d 844, 848 (11th Cir. 2009). The Eleventh Circuit found it unnecessary to decide the question since any error committed when the lower court sentenced the defendant to incarceration for 45 days and a five-year term of supervised release had been induced by the defendant, *United States v. Love*, 449 F.3d 1154, 1157 (11th Cir. 2006).

²⁴⁹ *Ahearn v. International Longshore and Warehouse Union*, 721 F.3d 1122, 1128 (9th Cir. 2013); *F.T.C. v. Leshin*, 719 F.3d 1227, 1231 (11th Cir. 2013); *Hawkins v. Dept. of Health and Human Services for the State of New Hampshire*, 665 F.3d 25, 32 (1st Cir. 2012); *Southern New England Tele. Co. v. Global NAPs Inc.*, 624 F.3d 123, 146 (2d Cir. 2010).

²⁵⁰ *Hawkins v. Dept. of Health and Human Services for the State of New Hampshire*, 665 F.3d 25, 31 (1st Cir. 2012); *F.T.C. v. Leshin*, 618 F.3d 1221, 1232 (11th Cir. 2010)(“A finding of civil contempt must be supported by clear and convincing evidence that the allegedly violated order was valid and lawful; the order was clear and unambiguous; and the alleged violator had the ability to comply with the order. Once this *prima facie* showing of a violation is made, the burden then shifts to the alleged contemnor to produce evidence explaining his noncompliance at a show cause hearing”).

²⁵¹ *Turner v. Rogers*, 131 S.Ct. 2507, 2516 (2011)(internal citations omitted)(“Civil contempt differs from criminal contempt in that it seeks only to coerce the defendant to do what a court had previously ordered him to do. A court may not impose punishment in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order. And once a civil contemnor complies with the underlying order, he is purged of the contempt and is free (he carries the keys of his prison in his own pockets”); *F.T.C. v. Leshin*, 719 F.3d 1227, 1231 (11th Cir. 2013).

²⁵² *S.E.C. v. First Choice Management Services, Inc.*, 709 F.3d 685, 688 (7th Cir. 2013); *Hawkins v. Dept. of Health and Human Services for the State of New Hampshire*, 665 F.3d 25, 32 n.10 (1st Cir. 2012); cf., *F.T.C. v. Leshin*, 719 F.3d 1227, 1234 (11th Cir. 2013).

Contempt of Congress

Statutory Contempt of Congress

Contempt of Congress is punishable by statute and under the inherent powers of Congress.²⁵³ Congress has not exercised its inherent contempt power for some time.²⁵⁴ The statutory contempt of Congress provision, 2 U.S.C. 192, has been employed only slightly more often and rarely in recent years. Much of what we know of the offense comes from Cold War period court decisions. Parsed to its elements, §192 states that:

- I. Every person
- II. summoned as a witness
- III. by the authority of either House of Congress
- IV. to
 - A. give testimony, or
 - B. to produce papers
- V. upon any matter under inquiry
- VI. before
 - A. either House,
 - B. any joint committee,
 - C. any committee of either House
- VII. who willfully
 - A. makes default, or
 - B. refuses
 - 1. to answer any question
 - 2. pertinent to the matter under inquiry

shall be guilty of a misdemeanor, punishable by a fine of not more than \$1,000 or less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.²⁵⁵

The Dictionary Act states that, unless the context suggests otherwise when the term “person” appears in the United States Code, it includes organizations as well.²⁵⁶ Nevertheless, prosecution appears to have been limited to individuals, although the custodians of organizational documents have been charged. The term “summoned,” on the other hand, has been read broadly, so as to extend to those who have been served with a testimonial subpoena, to those who have been

²⁵³ 2 U.S.C. 192-196; *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821); *McGrain v. Daugherty*, 273 U.S. 135 (1927).

²⁵⁴ For a more extensive discussion of contempt of Congress see CRS Report RL34097, *Congress’s Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure*.

²⁵⁵ 2 U.S.C. 192. By operation of 18 U.S.C. 3571 the maximum fine is \$100,000 (\$200,000 for organizations).

²⁵⁶ 1 U.S.C. 1 (“In determining the meaning of any Act of Congress, unless the context indicates otherwise ... the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals ...”).

served with a subpoena to produce documents or other items (subpoena duces tecum), and to those who have appeared without the benefit of subpoena.²⁵⁷

Section 192 applies only to those who have been summoned by the “authority of either House of Congress.” As a consequence, the body which issues the subpoena must enjoy the authority of either the House or Senate to do so, both to conduct the inquiry and to issue the subpoena.²⁵⁸ Authority may be vested by resolution, rule, or statute. Section 192 speaks only of the Houses of Congress and their committees, but there seems little question that the authority may be conferred upon subcommittees.²⁵⁹

The testimony or documents sought by the subpoena or other summons must be sought for “a matter under inquiry” and in the case of an unanswered question, the question must be “pertinent to the question under inquiry.”²⁶⁰ The statute outlaws “refusal” to answer pertinent questions, but the courts have yet to say whether the proscription includes instances where the refusal takes the form of false or deceptive testimony: There is no word on whether the section outlaws any refusal to answer honestly or only unequivocal obstinacy. On at least two occasions, however, the courts have reportedly accepted nolo contendere pleas under §192 based upon a false statement predicate.²⁶¹

Section 192 bans only “willful” recalcitrance. Thus, when a summoned witness interposes an objection either to an appearance in response to the summons or in response to a particular question, the objection must be considered, and if found wanting, the witness must be advised that the objection has been overruled before he or she may be successfully prosecuted.²⁶² The

²⁵⁷ *Sinclair v. United States*, 279 U.S. 263, 296 (1929).

²⁵⁸ *Gojack v. United States*, 384 U.S. 702, 713 (1966); *Sinclair v. United States*, 279 U.S. 263, 296 (1929).

²⁵⁹ *Gojack v. United States*, 384 U.S. 702, 714 (1966) (“We do not question the authority of the Committee appropriately to delegate functions to a subcommittee of its members, nor do we doubt the availability of §192 for punishment of contempt before such a subcommittee in proper cases”).

²⁶⁰ *Russell v. United States*, 369 U.S. 749, 755-56 (1962), citing *Sinclair v. United States*, 279 U.S. 263, 273 (1929); *United States v. Resendiz-Ponce*, 549 U.S. 102, 109 (2007) (“[A] valid indictment for such refusal to testify must go beyond the words of §192 and allege the subject of the congressional hearing in order to determine whether the defendant’s refusal was ‘pertinent.’”).

²⁶¹ Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 NEW YORK UNIVERSITY LAW REVIEW 563, 571 n.45 (1991) (“Richard Helms (former Director of the CIA) and Richard Kleindienst (former Attorney General) were indicted for giving false testimony before Congress. Ultimately, each pleaded nolo contendere to violations of 2 U.S.C. §192 ... See *United States v. Helms*, CR. No. 650 (D.D.C. 1977); *United States v. Kleindienst*, CR No. 256 (D.D.C. 1974); Wash. Post, Nov. 1, 1977, at A4”); a former Counsel to the Clerk of the House described the two cases in much the same way in House Judiciary Committee hearings, *Prosecution of Contempt of Congress: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. at 29 (1983)(prepared statement of Stanley Brand).

²⁶² *Flaxer v. United States*, 358 U.S. 147, 151 (1958) (“In the Quinn case the witness was ‘never confronted with a clear-cut choice between compliance and noncompliance, between answering the question and risking prosecution for contempt.’ The rulings were so imprecise as to leave the witness to ‘guess whether or not the committee had accepted his objection.’ ... We repeat what we said in the Quinn case: Giving a witness a fair appraisal of the committee’s ruling on an objection recognizes the legitimate interests of both the witness and the committee.”), quoting, *Quinn v. United States*, 349 U.S. 155, 166 (1955); *Deutch v. United States*, 367 U.S. 456, 468 (1961) (“‘Unless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto’”), quoting, *Watkins v. United States*, 354 U.S. 178, 214-15 (1957).

grounds for a valid objection may be found in rule, statute, or the Constitution, and they may be lost if the witness fails to raise them in a timely manner.²⁶³

The Fifth Amendment protects witnesses against self-incrimination.²⁶⁴ The protection reaches wherever incriminating testimonial communication is compelled whether in criminal proceedings or elsewhere.²⁶⁵ It covers communications that are either directly or indirectly incriminating, but only those that are “testimonial.”²⁶⁶ Organizations enjoy no Fifth Amendment privilege from self-incrimination,²⁶⁷ nor in most cases do the custodians of an organization’s documents unless their act of producing the subpoenaed documents is itself an incriminating testimonial communication.²⁶⁸ An individual’s voluntarily created papers and records are by definition not compelled communications and thus ordinarily fall outside the privilege as well.²⁶⁹ Moreover, the protection may be waived if not invoked,²⁷⁰ and the protection may be supplanted by a grant of immunity which promises that the truthful testimony the witness provides or is compelled to provide will not be used directly or derivatively in his or her subsequent prosecution.²⁷¹

Aside from the Fifth Amendment, the status of constitutionally-based objections to a congressional summons or question is somewhat more amorphous. The First Amendment affords a qualified immunity from subpoena or interrogation, whose availability is assessed by balancing competing individual and congressional interests.²⁷² Although a subpoena or question clearly in furtherance of a legislative purpose ordinarily carries dispositive weight, the balance may shift to individual interests when the nexus between Congress’s legitimate purpose and the challenged

²⁶³ *McPhaul v. United States*, 364 U.S. 372, 379 (1960); *United States v. Bryan*, 339 U.S. 323, 332-33 (1950).

²⁶⁴ U.S. Const. Amend. V (“No person ... shall be compelled in any criminal case to be a witness against himself ...”).

²⁶⁵ *Watkins v. United States*, 354 U.S. 178, 195-96 (1957) (“It was during this period that the Fifth Amendment privilege against self-incrimination was frequently invoked and recognized as legal limit upon the authority of a committee to require that a witness answer its questions. Some early doubts as to the applicability of that privilege before a legislative committee never matured. When the matter reached this Court, the Government did not challenge in any way that the Fifth Amendment protection was available to the witness, and such a challenge could not have prevailed”).

²⁶⁶ *Ohio v. Reiner*, 532 U.S. 17, 19 (2001) (“the privilege against self-incrimination applies where a witness’ answers ‘could reasonably furnish a link in the chain of evidence’ against him”), quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *United States v. Hubbell*, 530 U.S. 27, 34 (2000) (“The word ‘witness’ in the constitutional text limits the relevant category of compelled incriminating communications to those that are ‘testimonial’ in character”); *Hibel v. Sixth Judicial District Court*, 542 U.S. 177, 189 (2004).

²⁶⁷ *Braswell v. United States*, 487 U.S. 99, 107-108 (1988).

²⁶⁸ Under the act of production doctrine, a custodian’s testimonial act of turning over documents in response to a subpoena is entitled to Fifth Amendment protection if his action—by confirming the existence of the documents, or his control of them, or his belief that they came within the description of the documents sought in the subpoena—would incriminate him or provide a link in the chain leading to his incrimination, *United States v. Hubbell*, 530 U.S. 27, 36-38 (2000).

²⁶⁹ *Fisher v. United States*, 425 U.S. 391, 409-10 (1976); *United States v. Doe*, 465 U.S. 605, 611-12 (1984).

²⁷⁰ *Hutcheson v. United States*, 369 U.S. 599, 608-609 (1962); *Emspak v. United States*, 349 U.S. 190, 195-96 (1955).

²⁷¹ 18 U.S.C. 6001-6005 (immunity generally), particularly 18 U.S.C. 6005 (immunity in congressional proceedings); *Kastigar v. United States*, 406 U.S. 441, 462 (1972) (upholding the constitutionality of the immunity statute).

²⁷² *Barenblatt v. United States*, 360 U.S. 109, 126 (1959) (balancing the governmental interest in investigating Communist activities in the United States against the witness’ interest in the confidentiality of his associations and concluding “that the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and that therefore the provisions of the First Amendment have not been offended”);

subpoena or question is vague or nonexistent.²⁷³ In cases of such imprecision, the government's assertion of the pertinence necessary for conviction of statutory contempt may become suspect.²⁷⁴

The Fourth Amendment may also supply the basis for a witness to disregard a congressional subpoena or question. The Amendment condemns unreasonable governmental searches and seizures.²⁷⁵ The Supreme Court in *Watkins* confirmed that witnesses in congressional proceedings are entitled to Fourth Amendment protection, but did not explain what such protection entails.²⁷⁶ In fact, the courts have addressed only infrequently the circumstances under which the Fourth Amendment cabins the authority of Congress to compel a witnesses to produce papers or response to questions.

When dealing with the subpoenas of administrative agencies, the Court noted some time ago that the Fourth Amendment “at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be ‘particularly described,’ if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.”²⁷⁷ At the same time, it pointed out that as in the case of a grand jury inquiry probable cause is not a prerequisite for a reasonable subpoena.²⁷⁸ In later years, it explained that where a grand jury subpoena is challenged on relevancy grounds, “the motion to quash must be denied unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury’s investigation.”²⁷⁹ The administrative subpoena standard has been cited on those infrequent occasions when the validity of a congressional subpoena has been challenged on Fourth Amendment grounds.²⁸⁰ Contempt convictions have been overturned, however, when a Fourth Amendment violation taints the underlying subpoena or question.²⁸¹

²⁷³ *Watkins v. United States*, 354 U.S. 178, 196-206 (1957).

²⁷⁴ *United States v. Rumely*, 345 U.S. 41, 46-8 (1953); *Watkins v. United States*, 354 U.S. 178, 207-16 (1957).

²⁷⁵ U.S. Const. Amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...”).

²⁷⁶ *Watkins v. United States*, 354 U.S. 178, 188 (1957)(Witnesses “cannot be subjected to unreasonable searches and seizures”).

²⁷⁷ *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208 (1946).

²⁷⁸ “The result therefore sustains the Administrator’s position that his investigative function, in searching out violations with a view to securing enforcement of the Act, is essentially the same as the grand jury’s or the courts in issuing other pretrial orders for discovery of evidence, and is governed by the same limitations. These are that he shall not act arbitrarily or in excess of his statutory authority, but this does not mean that his inquiry must be limited by forecasts of the probable result of the investigation,” *Id.* at 216 (internal quotation marks omitted); see also *United States v. Powell*, 379 U.S. 48, 57 (1964).

²⁷⁹ *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 301 (1991). Strictly speaking, *R. Enterprises* involves the prohibition against “unreasonable or oppressive” subpoenas found in Rule 17(c) of the Federal Rules of Criminal Procedure, a proscription no less demanding than the Fourth Amendment.

²⁸⁰ *McPhaul v. United States*, 364 U.S. 372, 381-82 (1960)(“It thus appears that the records called for by the subpoena were not ‘plainly incompetent or irrelevant to any lawful purpose (of the Subcommittee) in the discharge of (its) duties,’ but, on the contrary were reasonably ‘relevant to the inquiry.’ Finally, petitioner contends that the subpoena was so broad as to constitute an unreasonable search and seizure in violation of the Fourth Amendment of the Constitution. ‘(A)dequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry. The Subcommittee’s inquiry here was a relatively broad one ... and the permissible scope of materials that could reasonably be sought was necessarily equally broad”), citing the Fourth Amendment standard for administrative searches from *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 209 (1946). See also *Packwood v. Senate Select Committee on Ethics*, 510 U.S. 1319, 1320 (1994)(“As we stated in *Oklahoma Press Publishing Co. v. Walling* determining whether a subpoena is overly broad ‘cannot be reduced to formula; for (continued...)”).

Perhaps most unsettled of all is the question the extent to which, if any, the separation of powers doctrine limits the subpoena power of Congress over members and former members of the other branches of government. As a practical matter, however, the other branches of government ultimately control the prosecution and punishment for statutory contempt of Congress, at least under the current state of the law. Section 194 states that the United States Attorney to whom Congress refers a violation of §192 has a duty to submit the matter to the grand jury.²⁸² Should a grand jury indictment be forthcoming further prosecution is at the discretion of the Executive Branch in proceedings presided over by the Judicial Branch.²⁸³

The rules governing the congressional hearing may also afford a witness the basis to object to a congressional summons or interrogation and to defend against a subsequent prosecution for violation of §192. No successful prosecution is possible if the congressional tribunal in question has failed to follow its own rules to the witness's detriment.²⁸⁴ Among other things those rules may identify evidentiary privileges available to a witness. The evidentiary rules that control judicial proceedings do not govern legislative proceedings,²⁸⁵ unless and to the extent they are constitutionally required or have been made applicable by congressional rule and decision of the tribunal. To the extent the rules or body issuing the subpoena afford a witness an attorney-client or attorney work product protection or any other evidentiary privilege, the privilege provides a valid basis to object and defend.

(...continued)

relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope the inquiry”)(Ch. J. Rehnquist denying the application for a stay pending appeal to the Court of Appeals of a District Court order enforcing a congressional subpoena duces tecum)(internal citations omitted).

²⁸¹ *United States v. McSurely*, 473 F.2d 1178, 1194 (D.C. Cir. 1972).

²⁸² “Whenever a witness summoned as mentioned in Section 192 of this title fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action,” 2 U.S.C. 194.

Dicta in two District of Columbia District Court cases indicate that the United States Attorney was required to present the matter to the grand jury, *United States v. House of Representatives*, 556 F.Supp. 150, 151 (D.D.C. 1983); *Ex parte Frankfeld*, 32 F.Supp. 915, 916 (D.D.C. 1940). Between the two, however, the Court of Appeals for the District of Columbia held to be discretionary the similar worded duty of the Speaker, when the House is not in session, to refer a contempt citation to the United States Attorney, *Wilson v. United States*, 369 F.2d 198, 201-205 (D.C. Cir. 1966). It may be argued that similarly worded duties should be similarly construed and that therefore the United States Attorney’s duty to refer the case to the grand jury is likewise discretionary.

²⁸³ Rule 7(c)(1) of the Federal Rules of Criminal Procedure requires that indictments be signed by an attorney for the government as a demonstration of the assent of the government to go forward without which a prosecution may not be had, *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965); *United States v. Wright*, 365 F.2d 135, 137 (7th Cir. 1966). See also *Wayte v. United States*, 470 U.S. 598, 607 (1985) (“So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion”).

²⁸⁴ *Yellin v. United States*, 374 U.S. 109, 123-24 (1963).

²⁸⁵ The Constitution gives each House the authority to “determine the rules of its proceedings,” U.S. Const. Art. I, §5, cl.2. The Federal Rules of Evidence as such apply only to certain judicial proceedings, F.R.Evid. 1101.

Section 192 states that violations are punishable by imprisonment for not less than one month nor more than twelve months and a fine of not less than \$100 nor more than \$1,000.²⁸⁶ By virtue of generally applicable amendments enacted after the section, class A misdemeanors (crimes punishable by imprisonment for not more than one year) are subject to a fine of not more than \$100,000 for individuals and not more than \$200,000 for organizations.²⁸⁷

Inherent Contempt of Congress

Congress's exercise of its inherent power to punish for contempt of its authority predates the 1857 enactment of the original version of its statutory contempt provisions.²⁸⁸ The statute has always been recognized as a supplement rather than a replacement of the inherent power.²⁸⁹ In fact for the first half of the statute's existence, Congress continued to rely upon its inherent power notwithstanding the presence of a statutory alternative. Thereafter, Congress began to resort to the statutory alternatives more regularly.²⁹⁰ The inherent power lay dormant and appears have been last invoked nearly a century ago.²⁹¹

Contempt of Court at Congressional Behest

There are two statutory provisions available to permit Congress to call upon the courts to overcome the resistance of witnesses in congressional proceedings. One covers immunity orders where the witness has claimed his Fifth Amendment privilege against self-incrimination.²⁹² Continued recalcitrance after the grant of immunity is punishable under the court's civil and criminal contempt powers.²⁹³ The second permits the court enforcement of a Senate subpoena but apparently only to the extent of the court's civil contempt powers.²⁹⁴

²⁸⁶ "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers ... willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months," 2 U.S.C. 192.

²⁸⁷ In 1984, Congress established a uniform fine schedule which amends individual statutory maximum fine provisions like those of §192 sub silentio, 18 U.S.C. 3571. Under the schedule, class A misdemeanors (crimes punishable by imprisonment for not more than one year, 18 U.S.C. 3559) are punishable by a fine of not more than \$100,000 for individuals and not more than \$200,000 for organizations, 18 U.S.C. 3571(b), (c).

²⁸⁸ *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821). The original version of 2 U.S.C. 192 appears in 11 Stat. 155 (1857).

²⁸⁹ *Jurney v. MacCracken*, 294 U.S. 125, 151 (1935); *In re Chapman*, 166 U.S. 661, 671-72 (1897).

²⁹⁰ In addition to §192, some of the misconduct that might have been punished under Congress's inherent contempt power may be prosecuted under 18 U.S.C. 1001 (false statements), 1621 (perjury), 1505 (obstruction of justice before congressional committees), or 1512 (obstruction of justice).

²⁹¹ Congress does not appear to have called upon its inherent power of contempt since the mid-1930s, 4 DESCHLER'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, ch. 15, §17 n.7 (1974); Beck, CONTEMPT OF CONGRESS, App.A, at 213 (1959).

²⁹² 18 U.S.C. 6001-6005.

²⁹³ 18 U.S.C. 401, 402; *United States v. Quinn*, 728 F.3d 243, 253 (3d Cir. 2013), citing *Kastigar v. United States*, 406 U.S. 441, 453 (1972); *United States v. North*, 920 F.2d 940, 943 (D.C.Cir. 1990).

²⁹⁴ 28 U.S.C. 1365.

Obstruction of Justice by Violence or Threat

In addition to the basic federal crimes of obstruction of justice, federal law features a host of criminal statutes that proscribe various obstructions according to the obstructive means used, be it physical violence, bribery, property destruction, or deception. Thus, quite aside from the general obstruction provisions of §§ 1512, 1513, 1505, and 1503, several federal statutes outlaw use of threats or violence for the purpose of obstructing federal government activities.

Violence and Threats Against Officials, Former Officials, and Their Families (18 U.S.C. 115)

Section 115 prohibits certain acts of violence against judges, jurors, officials, former officials, and their families in order to impede or to retaliate for the performance of their duties. The section consists of three related offenses. One is designed to protect the families of judges and officials against threats and acts of violence;²⁹⁵ another to protect judges and officials from threats;²⁹⁶ and a third to protect former judges, former officials and their families from retaliatory threats and acts of violence.²⁹⁷ In more precise terms, they declare:

(1)(Families)

I. Whoever

II. A. assaults

- B. kidnaps,
- C. murders,
- D. attempts to assault, kidnap, or murder,
- E. conspires to assault, kidnap, or murder, or
- F. threatens to assault, kidnap, or murder

III. a member of the immediate family of

- A. a federal judge,
- B. a Member of Congress,
- C. the President and any other federal officer or employee

IV. with the intent

- A. either to
 - 1. a. impede,
 - b. intimidate, or
 - c. interfere with
 - 2. a. a federal judge,
 - b. a Member of Congress,
 - c. the President and any other federal officer or employee
 - 3. in the performance of official duties;

²⁹⁵ 18 U.S.C. 115(a)(1)(A).

²⁹⁶ 18 U.S.C. 115(a)(1)(B).

²⁹⁷ 18 U.S.C. 115(a)(2).

- B. or to
 - 1. retaliate against
 - 2. a. a federal judge,
 - b. a Member of Congress,
 - c. the President and any other federal officer or employee
 - 3. for the performance of official duties
- shall be punished as provided in subsection (b).²⁹⁸

Subsection 115(a)(1)(A) only condemns violence against the families of federal officials, not violence committed against the officials themselves.²⁹⁹ Subsection 115(b) makes kidnaping, murder, and attempts and conspiracies to commit such offenses in violation of the section subject to penalties imposed for those crimes when committed against the officials themselves under other sections of the Code, i.e., 18 U.S.C. 1201, 1111, 1113, and 1117.³⁰⁰ The penalties for assault are calibrated according the seriousness of the assault. Simple assault carries a maximum penalty of imprisonment for one year; assault involving physical contact or intent to commit another felony, not more than 10 years; assault result in bodily injury, not more than 20 years; and assault resulting in serious bodily injury or involving the use of dangerous weapon, not more than 30 years.³⁰¹ Except in the case of simple assault or murder, the offenses are subject to a fine of not more than \$250,000; simple assault carries a fine of not more than \$100,000.³⁰²

(2)(Threats)

- I. Whoever
- II. threatens to
 - A. assault
 - B. kidnap, or
 - C. murder
- III.A. a federal judge,
 - B. a Member of Congress,
 - C. the President and any other federal officer or employee
- IV. with the intent
 - A. either to
 - 1. a. impede,
 - b. intimidate, or
 - c. interfere with
 - 2. a. a federal judge,
 - b. a Member of Congress,
 - c. the President and any other federal officer or employee
 - 3. in the performance of official duties;
 - B. or to

²⁹⁸ 18 U.S.C. 115(a)(1)(A).

²⁹⁹ *United States v. Bennett*, 368 F.3d 1343, 1352-354 (11th Cir. 2004), *vac'd on other grounds*, 543 U.S. 1110 (2005).

³⁰⁰ 18 U.S.C. 115(b)(2), (3).

³⁰¹ 18 U.S.C. 115(b)(1).

³⁰² 18 U.S.C. 115(b)(1), (2), (3), 1201, 1111, 1113, 1117, 3571.

1. retaliate against
2. a. a federal judge,
b. a Member of Congress,
c. the President and any other federal officer or employee
3. for the performance of official duties

shall be punished as noted earlier by imprisonment for not more than 6 years in the case of a threatened assault and not more than 10 years in the case of all other threats outlawed in the section.³⁰³

Subsection 115(a)(1)(B) protects, among others, “an officials whose killing would be a crime under [section 1114].” Section 1114, in turn, outlaws killing any “officer or employee of the United States,” which has lead one court to conclude that subsection 115(a)(1)(B) protects any federal officer or employee.³⁰⁴

The circuits are divided over the question of whether a violation of subsection 115(a)(1)(B) is a specific intent offense. The Eleventh Circuit has held that it is not and as a consequence the government need not show that the defendant knew that his victim was a federal official.³⁰⁵ The Sixth Circuit, on the other hand, held that it is a specific intent offense and as a consequence a defendant is entitled to present a defense of intoxication or diminished capacity.³⁰⁶

They appear likewise divided over whether the threat proscribed in the section is one that would instill fear in a reasonable person to whom it was communicated or one a reasonable defendant would understand would convey a sense of fear.³⁰⁷ The Ninth Circuit at one point suggested that the Supreme Court might have resolved the split when it defined those “true threats” that lie beyond the protection of the First Amendment’s free speech clause as “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”³⁰⁸ That hope appears forlorn.³⁰⁹

(3)(Former Officials)

³⁰³ 18 U.S.C. 115(a)(1)(B), (b)(4).

³⁰⁴ *United States v. Bankoff*, 613 F.3d 358, 372 (3d Cir. 2010).

³⁰⁵ *United States v. Berki*, 936 F.2d 529, 532-34 (11th Cir. 1991).

³⁰⁶ *United States v. Veach*, 455 F.3d 628, 632-34 (6th Cir. 2006).

³⁰⁷ *United States v. Saunders*, 166 F.3d 907, 913 n.6 (7th Cir. 1999)(“Those cases holding that the test should be an objective speaker-based one include *United States v. Schiefen*, 139 F.3d 638, 639 (8th Cir. 1998) ... *United States v. Fulmer*, 108 F.3d 1486, 1491-92 (1st Cir. 1997) ... *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990) ... and *United States v. Welch*, 745 F.2d 614, 619 (10th Cir. 1984) ... Those cases treating the objective test as recipient-based include *United States v. Malik*, 16 F.3d 345, 348 (2d Cir. 1994); and *United States v. Maisonier*, 484 F.2d 1356, 1358 (4th Cir. 1973)”).

³⁰⁸ *United States v. Stewart*, 403 F.3d 1007, 1016-19 (9th Cir. 2005), quoting, *Virginia v. Black*, 538 U.S. 343, 349-50 (2003).

³⁰⁹ *United States v. Turner*, 720 F.3d 411, 420 (2d Cir. 2013)(“This Circuit’s test for whether conduct amounts to a true threat is an objective one—namely, whether an ordinary, reasonable recipient who is familiar with the context of the communication would interpret it as a threat of injury”); *United States v. Armel*, 585 F.3d 182, 185 (4th Cir. 2009)(“Statements constitute a ‘true threat’ if an ordinary reasonable recipient who is familiar with their context would interpret those statements as a threat to injury”); but see *United States v. Stefanik*, 674 F.3d 71, 75 (1st Cir. 2012)(“A person may be convicted for making a threat if he should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it is made”).

I. Whoever

II. A. assaults

- B. kidnaps,
- C. murders,
- D. attempts to assault, kidnap, or murder, or
- E. conspires to assault, kidnap, or murder, or

III. A. a former federal judge,

- B. a former Member of Congress,
- C. the former President and any other former federal officer or employee, or
- D. a member of the immediate family of such former judge, Member or individual

IV. on account of the performance of their former official duties

shall be punished as provided in subsection (b) as described above with respect to assaults, kidnappings, and murders of members of the families of federal officials.³¹⁰

Violence and Threats Against Federal Officials on Account of the Performance of Their Duties

Section 1114 of title 18 of the United States Codes outlaws murder, manslaughter, and attempted murder and manslaughter when committed against federal officers and employees as well as those assisting them during or on account of the performance of their duties.³¹¹ The section's coverage extends to government witnesses.³¹² Other provisions outlaw kidnaping or assault committed against federal officers and employees during or on account of the performance of their duties, but their coverage of those assisting them is less clear.³¹³

³¹⁰ 18 U.S.C. 115(a)(2).

³¹¹ 18 U.S.C. 1114 (“Whoever kills or attempts to kill any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance, shall be punished—(1) in the case of murder, as provided under Section 1111; (2) in the case of manslaughter, as provided under Section 1112; or (3) in the case of attempted murder or manslaughter, as provided in Section 1113”).

³¹² See *United States v. Caldwell*, 433 F.3d 378, 384 (2005) (affirming the conviction a defendant who solicited the murder of a government witness on charges of violating 18 U.S.C. 373 (solicitation of murder), 1114 (attempted murder), 1512(a) (witness tampering), 1513 (witness retaliation), 371 (conspiracy to murder a government witness)).

³¹³ 18 U.S.C. 1201(a) (emphasis added) (“Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when ... (5) the person is among *those officers and employees described in Section 1114* of this title and any such act against the person is done while the person is engaged in, or on account of, the performance of official duties ... the sentence under this section for such offense shall include imprisonment for not less than 20 years”); 111 (emphasis added) (“Whoever— (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in Section 1114 of this title while engaged in or on account of the performance of official duties; or (2) forcibly assaults or intimidates any person who formerly served as *a person designated in Section 1114 on account of the performance of official duties during such person’s term of service*, shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and in all other cases, be fined under this title or imprisoned not more than 8 years [not more than 20 years if bodily injury is inflicted or dangerous weapons used], or both”).

Beyond these general prohibitions, federal law proscribes the murder, kidnaping, or assault of Members of Congress, Supreme Court Justices, or the Cabinet Secretaries;³¹⁴ and a number of statutes outlaw assaults on federal officers and employees responsible for the enforcement of particular federal statutes and programs.³¹⁵

Obstruction of Justice by Bribery

Section 1512(b) outlaws witness tampering by corrupt persuasion. Several other federal statutes outlaw bribery in one form or another. The main federal bribery statutes are 18 U.S.C. 201, which prohibits bribes involving federal officials, employees, jurors and witnesses, and 18 U.S.C. 666, which prohibits bribes involving the recipients of federal funding. Although it makes no mention of bribery, the honest services component of the mail and wire fraud statutes, 18 U.S.C. 1341, 1343, 1346, in some circumstances may afford prosecutors of public corruption greater latitude and more severe penalties than §201. The Hobbs Act, 18 U.S.C. 1951, condemns public officials who use their position for extortion. A few other statutes, noted in the margin, outlaw bribery to obstruct specific activities.³¹⁶

Bribery of Jurors, Public Officers and Witnesses (18 U.S.C. 201)

Section 201 outlaws offering or soliciting bribes or illegal gratuities in connection with judicial, congressional and administrative proceedings.³¹⁷ Bribery is a *quid pro quo* offense. In simple

³¹⁴ 18 U.S.C. 351.

³¹⁵ *E.g.*, 7 U.S.C.60 (assault designed to influence administration of federal cotton standards program), 87b (assault designed to influence administration of federal grain standards program), 473c-1 (assaults on cotton samplers to influence administration of federal cotton standards program), 511i (assaults on designed officials to influence administration of federal tobacco inspection program), 2146 (assault of United States animal transportation inspectors); 15 U.S.C.1825(a)(2)(C) (assaults on those enforcing the Horse Protection Act); 16 U.S.C.773e (assaults on officials responsible for enforcing the Northern Pacific Halibut Act), 973c (assaults on officials responsible for enforcing the South Pacific tuna convention provisions), 1417 (assaults on officials conducting searches or inspections with respect to the global moratorium on tuna harvesting practices), 1436 (assaults on officials conducting searches or inspections with respect to the marine sanctuaries), 1857, 1859 (assaults on officials conducting searches or inspections with respect to the federal fisheries management and conservation program), 2403, 2408 (assaults on federal officials conducting searches or inspections on vessels subject to the jurisdiction of the United States with respect to Antarctic conservation), 2435 (assaults on federal officials conducting searches or inspections on vessels subject to the jurisdiction of the United States in enforcement of the Antarctic Marine Living Resources Convention), 3637 (assaults on federal officials conducting searches or inspections on vessels subject to the jurisdiction of the United States with respect to Pacific salmon conservation), 5009 (assaults on federal officials conducting searches or inspections on vessels subject to the jurisdiction of the United States with respect to North Pacific anadromous stock conservation), 5505 (assaults on federal officials conducting searches or inspections on vessels subject to the jurisdiction of the United States with respect to high seas fishing compliance), 5606 (assaults on federal officials conducting searches or inspections on vessels subject to the jurisdiction of the United States with respect to Northwest Atlantic Fisheries Convention compliance); 18 U.S.C.1501 (assault on a server of federal process), 1502 (assaulting a federal extradition agent); 21 U.S.C.461(c) (assaulting federal poultry inspectors), 21 U.S.C.675 (assaulting federal meat inspectors), 21 U.S.C.1041(c) (assaulting federal egg inspector); 30 U.S.C.1461 (assaults on officials conducting searches or inspections with respect to the Deep Seabed Hard Mineral Resources Act); 42 U.S.C.2000e-13 (assaulting EEOC personnel), 2283 (assaulting federal nuclear inspectors).

³¹⁶ *E.g.*, 18 U.S.C. 152 (bribery in bankruptcy), 224 (bribery in sporting contests), 226 (bribery affecting port security); 16 U.S.C. 6906 (bribery relating to the Western and Central Pacific Fisheries Convention); 21 U.S.C. 331(y)(3), 333 (Federal Food, Drug & Cosmetic Act bribery); 42 U.S.C. 1320a-7b(b)(1)(bribery relating to social security health care).

³¹⁷ The difference between bribes and gratuities under section 201 is that “for bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange*” for testimony or a vote in the jury room. “An illegal (continued...)”

terms, bribery under “§201(b)(1) as to the giver, and §201(b)(2) as to the recipient ... require[] a showing that something of value was corruptly given, offered, or promised to a public official (as to the giver) or corruptly demanded, sought, received, accepted, or agreed to be received or accepted by a public official (as to the recipient) with intent ... to influence any official act (giver) or in return for being influenced in the performance of any official act (recipient).”³¹⁸

In the case of witnesses, subsection 201(b)(3) as to the giver and subsection 201(b)(4) as to the recipient require a showing that something of value was corruptly offered or sought with the intent to influence or be influenced with respect to testimony before, or flight from, a federal judicial, congressional committee, or administrative trial, hearing or proceeding.³¹⁹

The subsections condemn invitations and solicitations to corruption, but the entreaties need not be successful³²⁰ nor does it matter that corruption was unnecessary.³²¹ The intent required for bribery,

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gratuity, on the other hand, may constitute merely a reward for some” past or future testimony or jury service, *United States v. Sun-Diamond Growers*, 526 U.S. 398, 404-405 (1999); *United States v. Heard*, 709 F.3d 413, 419-20 (5th Cir. 2013). Section 201 outlaws both but punishes bribery more severely. For additional discussion of Section 1512 see *Twenty-Eighth Survey of White Collar Crime: Public Corruption*, 50 AMERICAN CRIMINAL LAW REVIEW 1371 (2013).

³¹⁸ *United States v. Sun-Diamond Growers*, 526 U.S. at 404. See also *United States v. White Eagle*, 721 F.3d 1108, 1115(9th Cir. 2013)(“The government was required to prove that: (1) White Eagle was a public official; (2) she received something of value in return for being induced to do or omit to do an act in violation of her official duty; and (3) she acted corruptly—that is, with the intent to be influenced to perform an act that violated her official duty”); *United States v. Peleti*, 576 F.3d 377, 383 (7th Cir. 2009); *United States v. Valle*, 538 F.3d 341, 345-47 (5th Cir. 2008).

The Court’s opinion in *Sun-Diamond* refers to public officials rather than jurors. Section 201 defines public officials to include jurors, 18 U.S.C. 201(a)(1). Subsections 201(b)(1),(2) provide that “Whoever—(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—(A) to influence any official act; or (B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or (C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person; (2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for: (A) being influenced in the performance of any official act; (B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or (C) being induced to do or omit to do any act in violation of the official duty of such official or person ... shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.”

³¹⁹ That is, “Whoever ... (3) directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom; [or] (4) directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for being influenced in testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absents himself therefrom; shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States,” 18 U.S.C. 203(b)(3), (4).

³²⁰ *United States v. Muhammad*, 120 F.3d 688, 693 (7th Cir. 1997), citing *United States v. Gallo*, 863 F.2d 185, 189 (2d Cir. 1988); *United States v. Ozelik*, 527 F.3d 88, 95 (3d Cir. 2008); *United States v. White Eagle*, 721 F.3d 1108, 1115 (9th Cir. 2013); *United States v. Ring*, 706 F.3d 460, 467 (D.C.Cir. 2013).

³²¹ *United States v. Orenuga*, 430 F.3d 1158, 1165-166 (D.C. Cir. 2005)(finding no fault with a jury instruction which (continued...))

and the difference between the bribery and illegal gratuity offenses, is the intent to deliberately offer or accept something of value in exchange for the performance or omission of an official act.³²² Section 201 defines the public officials covered broadly to envelope jurors in federal and District of Columbia courts, federal and D.C. officers and employees, as well as those acting on their behalf.³²³ This includes anyone who “occupies a position of public trust with official federal responsibilities.”³²⁴ Although there is a statutory definition of “official act,”³²⁵ it has been a matter of some dispute, perhaps because of its sweeping language.³²⁶ The question becomes particularly difficult when the bribery charge alleges that a bribe was provided in exchange for some unspecified official act or acts or for some general course of conduct.³²⁷ The application

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stated, “It is not a defense to the crime of bribery that had there been no bribe, the public official might have lawfully and properly performed the same act”); *United States v. Quinn*, 359 F.3d 666, 675 (4th Cir. 2004)(“it does not matter whether the government official would have to change his or her conduct to satisfy the payor’s expectations”); *United States v. Alfisi*, 308 F.3d 144, 150-51(2d Cir. 2002)(rejecting the defendant’s contention that the money given the public official was to ensure an honest and accurate inspection).

³²² *United States v. Sun-Diamond Growers*, 526 U.S. 398, 404-405 (1999); *United States v. Heard*, 709 F.3d 413, 419-20 (5th Cir. 2013); *United States v. Ring*, 706 F.3d 460,470 (D.C.Cir. 2013); *United States v. McNair*, 605 F.3d 1152, 1190-191 (11th Cir. 2010).

³²³ 18 U.S.C. 201(a)(1)(“the term ‘public official’ means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror”).

³²⁴ *Dixson v. United States*, 465 U.S. 482, 496 (1984)(officials of a private organization, contracted by the city, to administer a federal program under which the city received funds); *United States v. Whiteford*, 676 F.3d 348, 358 (3d Cir. 2012)(Army reservists deployed to Iraq); *United States v. Baymon*, 312 F.3d 725, 728-29 (5th Cir. 2002)(cook at a federal prison); *United States v. Kenney*, 185 F.3d 1217, 1222 (11th Cir. 1999)(defense contractor employee who assisted Air Force to procure material and equipment).

³²⁵ 18 U.S.C. 201(a)(3)(“the term ‘official act’ means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit”); *United States v. Jefferson*, 674 F.3d 332, 357 (4th Cir. 2012)(the term encompasses not only those acts prescribed by rule and statute but those “clearly established by settled practice as part of a public official’s position” as long as “they pertain to a pending question, matter, or cause ... before him”); *United States v. Ring*, 706 F.3d 460,470 (D.C.Cir. 2013)(“‘official acts’ include acts that have been established as part of an official’s position by virtue of past practice or custom”).

³²⁶ The judges of the District of Columbia Circuit recently had great difficulty agreeing on whether a police officer had been rewarded for an “official act,” in violation of section 201’s illegal gratuity prohibition, when he checked police department databases for motor vehicle and outstanding arrest warrant information unrelated in any police investigation. Six members of the court held that the term “official act” does not include everything a public official is authorized to do and reversed the officer’s conviction, *Valdes v. United States*, 475 F.3d 1319, 1323-326 (D.C. Cir. 2007). Five members dissented, *id.* at 1333. See also *United States v. Dixon*, 525 F.3d 1033, 1041 (11th Cir. 2008) (citing the *Valdes* dissent and precedent under an earlier version of §201).

³²⁷ *United States v. Jennings*, 160 F.3d 1006, 1013, 1014 (4th Cir. 1998)(“A good will gift to an official to foster a favorable business climate, given simply with the generalized hope or expectation of ultimate benefit on the part of the donor does not constitute a bribe.” But, “It is not necessary for the government to prove that the payor intended to induce the official to perform a set number of official acts in return for the payments ... For example, payments may be made with the intent to retain the official’s services on an as needed basis, so that whenever the opportunity presents itself the official will take specific action on the payor’s behalf”); *United States v. Kemp*, 500 F.3d 257, 282 (3d Cir. 2007)(emphasis of the court) (“Moreover, we agree with the government that the District Court’s instruction to the jury that it could convict upon finding a ‘stream of benefits’ was legally correct. The key to whether a gift constitutes a bribe is whether the parties intended for the benefit to be made in exchange for some official action; the government need not prove that each gift was provided with the intent to prompt a specific official act. See *United States v. Jennings*, 160 F.3d 1006, 1014 (4th Cir.1998). Rather, “[t]he quid pro quo requirement is satisfied so long as the evidence shows a course of conduct of favors and gifts flowing to a public official *in exchange for* a pattern of official actions favorable to the donor.’ *Id.* Thus, ‘payments may be made with the intent to retain the official’s services on an as needed basis, so that whenever the opportunity presents itself the official will take specific action on the payor’s

(continued...)

difficulties seem to have been exemplified by one appellate panel which held that governmental plea bargain practices fell within the reach of §201's prohibitions.³²⁸ No such difficulties seem to attend the provisions of subsection 201(d) which make it clear that prohibitions do not preclude the payment of witness fees, travel costs or other reasonable witness expenses.³²⁹

The penalty structure for illegal gratuities under §201 is typical. Illegal gratuities, that is, offering or soliciting a gift as a reward for an official act, is punishable by imprisonment for not more than two years and/or a fine of not more than \$250,000.³³⁰ The penalty structure for bribery, however, is fairly distinctive: imprisonment for not more than 15 years; a fine of the greater of three times the amount of the bribe or \$250,000; and disqualification from holding any federal position of honor or trust thereafter.³³¹

Section 201 offenses are RICO and money laundering predicate offenses.³³² Federal law governing principals, accessories after the fact, misprision, conspiracy and extraterritorial jurisdiction apply with equal force to bribery and illegal gratuities under §201.³³³

Obstruction by Bribery Relating to Federally Funded Programs (18 U.S.C. 666)

Section 666 embodies two offenses: embezzlement from federally funded programs or bribery relating to transactions involving such programs.³³⁴ Congress enacted §666 out of concern in part

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behalf.' *Id.*; see also *United States v. Sawyer*, 85 F.3d 713, 730 (1st Cir.1996) (stating that 'a person with continuing and long-term interests before an official might engage in a pattern of repeated, intentional gratuity offenses in order to coax ongoing favorable official action in derogation of the public's right to impartial official services'). While the form and number of gifts may vary, the gifts still constitute a bribe as long as the essential intent-a specific intent to give or receive something of value *in exchange* for an official act-exists").

³²⁸ *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998), vac'd for rehearing en banc, 144 F.3d 1361 (10th Cir. 1998). The decision was overturned en banc and its view uniformly rejected by other federal appellate courts, *United States v. Singleton*, 165 F.3d 1297, 1298 (10th Cir. 1998); *United States v. Ihmatenko*, 482 F.3d 1097, 1099-110 (9th Cir. 2007)(citing cases in the accord from the First, Fourth, Fifth, and Eighth Circuits); *United States v. Souffront*, 338 F.3d 809, 827 (7th Cir. 2003).

³²⁹ 18 U.S.C. 201(d)("Paragraphs (3) and (4) of subsection (b) and paragraphs (2) and (3) of subsection (c)[relating to bribery and receipt of illegal gratuities involving witnesses] shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying").

³³⁰ 18 U.S.C. 201(c).

³³¹ 18 U.S.C. 201(b).

³³² 18 U.S.C. 1961(1), 1956(c)(7)(A).

³³³ 18 U.S.C. 2, 3, 4, 371; *United States v. Bowman*, 260 U.S. 94, 98 (1922); *Ford v. United States*, 273 U.S. 593, 623 (1927). See e.g., *United States v. White Eagle*, 721 F.3d 1108, 1119-120 (9th Cir. 2013)(misprision); *United States v. Ring*, 706 F.3d 460, 464-65 (D.C.Cir. 2013)(conspiracy).

³³⁴ 18 U.S.C. 666(a) and (b) provide: "(a) Whoever, if the circumstance described in subsection (b) of this section exists- (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof ... (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$5,000 or more; or (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of (continued...)

that federal program bribery involving state or local officials would otherwise lie beyond the reach of federal criminal law.³³⁵ The Supreme Court has observed that it constitutes a valid exercise of Congress’s legislative authority under the Constitution’s Spending and Necessary and Proper Clauses.³³⁶

The bribery offense applies when (1) any agent of a recipient of more than \$10,000 a year in federal program funds, (2) corruptly, (3) solicits or accepts, or is offered or given, (3) anything of value, (4) in order to influence or reward the agent, (5) with respect to a transaction involving the recipient and valued at \$5,000 or more.

Section 666(d)(1) defines “agent” to include any employee, officer, or representative authorized to act on behalf of the recipient.³³⁷ The absence of a direct connection between the bribe and any federal funds is no bar to prosecution.³³⁸ Thus, an agent need not have authority to act with respect to the funds the entity receives from the United States. Whether he must have authority to act with respect to the recipient’s funds in some manner is more uncertain.³³⁹ The section reaches agents of any governmental or non-governmental entity that receives \$10,000 or more in federal

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an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$5,000 or more; shall be fined under this title, imprisoned not more than 10 years, or both.

“(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of \$10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.”

³³⁵ *Salinas v. United States*, 522 U.S. 52, 58 (1997) (“Before §666 was enacted, the federal criminal code contained a single, general bribery provision codified at 18 U.S.C. 201.... The Courts of Appeals divided over whether state and local employees could be considered public officials’ under §201(a).... Congress enacted §666 and made it clear that federal law applies to bribes of the kind offered to the state and local officials ... ”); *Sabri v. United States*, 541 U.S. 600, 606 (2004).

³³⁶ *Sabri v. United States*, 541 U.S. 600, 602 (2004).

³³⁷ 18 U.S.C. 666(d)(1) (“the term ‘agent’ means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative”).

³³⁸ *Salinas v. United States*, 522 U.S. 52, 60-1 (1997) (“The text of §666(a)(1)(B) is unambiguous on the point under consideration here, and it does not require the Government to prove federal funds were involved in the bribery transaction”); *United States v. Reagan*, 725 F.3d 471, 483 (5th Cir. 2013).

³³⁹ Compare *United States v. Whitfield*, 590 F.3d 325, 344 (5th Cir. 2009) (“[W]e [have] held that for an individual to be an ‘agent’ for the purposes of section 666, he must be authorized to act on behalf of the agency with respect to its funds”), with *United States v. Keen*, 676 F.3d 891, 989-90 (11th Cir. 2012) (“The statute defines an ‘agent’ as ‘a person authorized to act on behalf of [a recipient].’ ... Nowhere does the statutory text either mention or imply an additional qualifying requirement that the person be authorized to act specifically with respect to the entity’s funds”); see also *United States v. Fernandez*, 722 F.3d 1, 10 (1st Cir. 2013); *United States v. Andrews*, 681 F.3d 509, 530 (3d Cir. 2012) (“Harris, who qualified as an ‘agent’ under §666, did not have to possess actual authority over the business, transaction, or series of transactions that Andrews sought to influence”).

funds “in any one year period.”³⁴⁰ It extends to corrupt offers and solicitations whether they occur before or after federal funds have arrived.³⁴¹

Section 666 does not say what constitutes “corruptly” giving or accepting a thing of value. It does exempt salaries and other ordinary business expenses.³⁴² The lower courts have yet to endorse a single definition of the term, finding that the term means either a breach of public or private duty or finding alternatively that it means committing an unlawful act or committing a lawful act illegally.³⁴³

As for the offer-or-solicit element, bribery is ordinarily a this-for-that (*quid pro quo*) offense.³⁴⁴ Nevertheless, several federal appellate courts have concluded that §666 demands no more than an offer or request with the intent to influence a business, transaction, or series of transactions; proof of a *specific* act in exchange for a thing of value, that is, proof of a specific *quid pro quo*, is unnecessary.³⁴⁵

³⁴⁰ Section 666 protects any organization as well as any state, local, or tribal government, plus any agency of such a governmental entity, 18 U.S.C. 666(a)(1)(B), (a)(2). Section 666(d)(2) defines the protected governmental agencies as any “subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program,” 18 U.S.C. 666(d)(2); e.g., *United States v. Robinson*, 663 F.3d 265, 270 n.2 (7th Cir. 2011)(the Chicago Police Department qualifies as governmental agencies for purposes of §666).

³⁴¹ 18 U.S.C. 666(d)(5)(“the term ‘in any one-year period’ means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense”); *United States v. Keen*, 676 F.3d 981, 989 n.2 (11th Cir. 2012).

³⁴² 18 U.S.C. 666(c)(“This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business”).

³⁴³ See e.g., *United States v. Rosen*, 716 F.3d 691, 700 (2d Cir. 2013)(“To establish the corrupt intent necessary to a bribery conviction, the Government must prove that the defendant had a specific intent to give ... something of value in exchange for an official act”); *United States v. Garrido*, 713 F.3d 985, 1002 (9th Cir. 2013)(internal citations omitted)(“[T]he Eleventh Circuit has interpreted the word ‘corruptly’ to mean ‘dishonestly seeking an illegal goal or a legal goal illegally.’ We agree with the Eleventh Circuit that the requirement of a corrupt intent in §666 narrow[s] the conduct that violates §666 but does not impose a specific *quid pro quo* requirement”); *United States v. Bahel*, 662 F.3d 610, 638 (2d Cir. 2011)(“In *United States v. Rooney*, 37 F.3d 847 (2d Cir. 1994), we considered the meaning of the term ‘corrupt’ as used in Section 666, concluding that a ‘fundamental component of a ‘corrupt’ act is a breach of some official duty owed to the government or the public at large”); *United States v. McNair*, 605 F.3d 1152, 1188 (11th Cir. 2010)(“In all the trials consolidated in this appeal, the district court’s jury charge, with slight variations, defined ‘corrupt’ as follows: ‘An act is done corruptly if it is performed voluntarily, deliberately and dishonestly for the purpose of either accomplishing an unlawful end or result or of accomplishing some otherwise lawful end or lawful result by any unlawful methods or means.’ It is acting ‘corruptly’—dishonestly seeking an illegal goal or a legal goal illegally—that separates permissible form criminal. The addition of a corrupt *mens rea* avoids prosecution for acceptable business practices”).

³⁴⁴ *United States v. Garrido*, 713 F.3d 985, 996-96 (9th Cir. 2013)(emphasis in the original), quoting *United States v. Sun Diamond Growers of California*, 526 U.S. 398, 405-405 (1999)(“A *quid pro quo* in bribery is the ‘specific intent to give or receive something of value in exchange for an official act’”).

³⁴⁵ *United States v. Garrido*, 713 F.3d 985, 996-97 (9th Cir. 2013)(“§666 does not require a jury to find a specific *quid pro quo*”); *United States v. Boender*, 649 F.3d 650, 654 (7th Cir. 2011)(unnecessary to prove specific *quid pro quo* with respect to either §666 (a)(1)(B)(asks for a bribe) or §666 (a)(2)(offers a bribe); *United States v. McNair*, 605 F.3d 1152, 1188 (11th Cir. 2010)(“To be sure, many §666 bribery cases will involve an identifiable and particularized official act, but that is not required to convict. Simply put, the government is not required to tie or directly link a benefit or payment to a specific official act.... The intent that must be proven is an intent to corruptly influence or to be influenced ‘in connection with any business’ or ‘transaction,’ not an intent to engage in any specific *quid pro quo*”); *United States v. Abbey*, 560 F.3d 513, 520 (6th Cir. 2009); but see *United States v. Hamilton*, 701 F.3d 404, 409 (4th Cir. 2012)(emphasis added)(“To establish the corrupt intent necessary for the convictions [under 18 U.S.C. 666 and 1951] (continued...)”).

The “thing of value” element “encompasses all transfers of personal property or other valuable consideration, in exchange for the influence or reward.”³⁴⁶ The placement of the \$5,000 threshold makes it difficult to determine whether the section is referring to the value of the bribe or the value of the targeted transaction: “Whoever ... corruptly gives ... anything of value ... with intent to influence ... an agent ... in connection with any ... transaction ... involving anything of value of \$5,000 or more....”³⁴⁷ Some courts use the value of the thing offered; others, the value of the transaction with which it is associated.³⁴⁸

Section 666 speaks of influencing and rewarding. This suggests an intention to outlaw both bribery as well as gratuities, that is, bribery as well as rewards for things past done. Some courts agree; others do not.³⁴⁹

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at issue here, the Government had to present evidence of ‘an exchange of money (or gifts) for *specific* official action.’ *United States v. Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998”); *United States v. Rosen*, 716 F.3d 691, 700 (2d Cir. 2013)(internal citations omitted)(“We have made it crystal clear that the federal bribery and honest services fraud statutes under that Rosen was convicted of violating [18 U.S.C. 666 and 1346] criminalize schemes involving payments at regular intervals in exchange for specific official acts as the opportunities to commit those acts arise, even if the opportunity to undertake the requested act has not arisen, and even if the payment is exchanged for a particular act but given with the expectation that the official will exercise particular kinds of influence. Once the *quid pro quo* has been established, the specific transactions comprising the illegal scheme need not match up this for that”); *United States v. Bryant*, 655 F.3d 242, 246 n.16 (3d Cir. 2011)(“The Government argues that §666 does not require proof of a *quid pro quo* in any event. Because we believe that the instruction did require the jury to find an exchange, we need not decide that question today”).

³⁴⁶ *Salinas v. United States*, 522 U.S. 52, 57 (1997).

³⁴⁷ 18 U.S.C. 666(a)(s). The language in 18 U.S.C. 666(a)(1)(B) is comparable.

³⁴⁸ *United States v. Fernandez*, 722 F.3d 1, 12 (1st Cir. 2013)(“In determining how to calculate the \$5,000 requirements, some courts have suggested that court should look to the value of the bribe actually offered or paid. See *United States v. Abbey*, 560 F.3d 513, 521 (6th Cir. 2009) ... *United States v. Spano*, 401 F.3d 837, 893 (7th Cir. 2005) ... *United States v. LaHue*, 170 F.3d 1026, 1028 (10th Cir. 1999)... Other courts, however, have held that the \$5,000 requirement ‘refers to the value of the business, transaction, or series of transactions, not the value of the bribe.’ *United States v. McNair*, 605 F.3d 1152, 1185 n.38 (11th Cir. 2010); see also *United States v. Duvall*, 846 F.2d 966, 976 (5th Cir. 1988)... In our view, the statutory language is unambiguous and plainly requires the latter reading”); *United States v. Owens*, 697 F.3d 657, 659 (7th Cir. 2012)(“The subject matter of the bribe must be valued at \$5,000 or more; the bribe itself need only be anything of value”). As a practical matter, if the amount of the bribe is more than \$5,000, the value of the targeted transaction is likely to be considerably more, *United States v. Robinson*, 663 F.3d 265, 275 (7th Cir. 2011)(“When the bribe is aimed at the intangible business or transactions of a federally funded entity, what kind of evidence will suffice to prove that the business or transaction at issue was worth at least \$5,000.... Without excluding other possible methods of valuation, we agree that the amount of the bribe may suffice as proxy for value; at least it provides a floor for the valuation question”).

³⁴⁹ *United States v. Fernandez*, 722 F.3d 1, 23, 25-6 (1st Cir. 2013)(parenthetical case summaries omitted)(“The word ‘reward’ in §666 is open to (at least) two different interpretations. Under the first interpretation, when a payor intends to influence an official’s future actions, the payment constitutes a bribe; when a payor intends to reward the official’s past conduct (or future conduct the official is already committed to taking), the payment constitutes a gratuity. *United States v. Anderson*, 517 F.3d 953, 961 (7th Cir. 2008). Several circuits have adopted this reading of the language. *Id.*; *United States v. Ganim*, 510 F.3d 134, 150 (2d Cir. 1007); *United States v. Zimmerman*, 509 F.3d 920, 927 (8th Cir. 2007); *United States v. Agostino*, 132 F.3d 1183, 1195 (7th Cir. 1997). Under the second interpretation, the word ‘reward’ does not create a separate gratuity offense in §666, but rather serves a more modest purpose: it merely clarifies ‘that a bribe can be promised before, but paid after, the official’s action on the payor’s behalf.’ *United States v. Jennings*, 160 F.3d 1006, 1015 n.3 (4th Cir. 1998)... Other than the ambiguous use of the word ‘rewarded,’ the text of §666, as well as its legislative history and purpose, do not support the argument that Congress intended the statute to reach gratuities.... We ... hold that gratuities are not criminalized under §666”); see also *United States v. Bahel*, 662 F.3d 610, 636-38 (2d Cir. 2011)(Section “666 extends to both bribes—where the thing of value is part of a *quid pro quo*—and gratuities—where the thing of value is a reward rather than a bargained for exchange”).

Finally, the section's reach is not confined to commercial transactions. The term "business, transaction, or series of transactions" encompasses any of the recipient entity's activities.³⁵⁰

Section 666 makes violations punishable by imprisonment for not more than 10 years and a fine of not more than \$250,000.³⁵¹ Section 666 does not appear on either the RICO or money laundering predicate lists.³⁵² Violations, however, may constitute RICO and consequently money laundering predicates to the extent that they constitute violations of both §666 and the bribery felony under the law of the state where the bribery occurs.³⁵³ Federal law governing principals, accessories after the fact, misprision, and conspiracy applies to §666 as well.³⁵⁴

Obstruction by Mail or Wire Fraud (18 U.S.C. 1341, 1343, 1346)

The mail fraud and wire fraud statutes have been written and constructed with such sweep that they cover among other things, obstruction of government activities by corruption. They reach any scheme to obstruct the lawful functioning in the judicial, legislative or executive branch of government that involves (1) the deprivation of money, property or honest services, and (2) the use of the mail or wire communications as an integral part of scheme.³⁵⁵

The elements of the two offenses are similar. Mail fraud is the federal crime of scheming to defraud when use of the mail furthers the scheme, 18 U.S.C. 1341.³⁵⁶ Wire fraud is the federal crime of scheming to defraud when use of wire communications furthers the scheme, 18 U.S.C.

³⁵⁰ *United States v. Robinson*, 663 F.3d 265, 274 (7th Cir. 2011) ("The 'business' of a federally funded 'organization, government, or agency' is not commonly 'business' in the commercial sense of the word. An interpretation that narrowly limits the scope of the transaction element to business or transactions that are commercial in nature would have the effect of excluding bribes paid to influence agents of state and local governments. This contradicts the express statutory text"), quoted with approval in *United States v. Fernandez*, 722 F.3d 1, 14 (1st Cir. 2013).

³⁵¹ 18 U.S.C. 666(a).

³⁵² 18 U.S.C. 1961(1), 1956(c)(7)(A).

³⁵³ 18 U.S.C. 1961(1) ("'racketeering activity' means (A) any act ... involving ... bribery ... which is chargeable under State law and punishable by imprisonment for more than one year"), 1956(c)(7)(A).

³⁵⁴ *E.g.*, *United States v. Reagan*, 725 F.3d 471, 482-83 (5th Cir. 2013) (aiding and abetting); *United States v. Rosen*, 716 F.3d 691, 698 n.3 (2d Cir. 2013) (conspiracy); *United States v. Newell*, 658 F.3d 1, 18-9 (1st Cir. 2011) (co-conspirator liability).

³⁵⁵ For addition discussion of 18 U.S.C. 1341, 1343, and 1346 see *Twenty-Eighth Survey of White Collar Crime: Mail and Wire Fraud*, 50 AMERICAN CRIMINAL LAW REVIEW 1245 (2013).

³⁵⁶ *United States v. Simpson*, 741 F.3d 539, 548 (5th Cir. 2014) ("The elements of mail fraud under 18 U.S.C. 1341 are: (1) a scheme to defraud; (2) use of the mails to execute the scheme; and (3) the specific intent to defraud"); *United States v. Vilar*, 729 F.3d 62, 91 n.26 (2d Cir. 2013); *United States v. Jirak*, 728 F.3d 806, 812 n.5 (8th Cir. 2013).

18 U.S.C. 1341 ("Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both").

1343.³⁵⁷ The courts have construed their common elements in the same manner.³⁵⁸ Thus, what constitutes a scheme to defraud is the same in both instances: any act or omission that “wrong[s] one in his property rights by dishonest methods or schemes and usually signif[ies] the deprivation of something of value by trick, deceit, chicanery or overreaching.”³⁵⁹ The deception that is part of the scheme, however, must be material;³⁶⁰ that is, it must have a natural tendency to induce reliance in the victim to his detriment or the offender’s benefit.³⁶¹ Both crimes require a specific intent to defraud,³⁶² and they are punishable regardless of whether the scheme succeeds.³⁶³ As for the jurisdictional element, the “statute doesn’t require that a defendant be able to anticipate every technical detail of a wire [or postal] transmission, before she may be held liable for causing it. It’s enough if she ‘sets forces in motion which foreseeably would involve’ use of the wires.”³⁶⁴ And so it is with mail fraud.³⁶⁵

³⁵⁷ *United States v. Simpson*, 741 F.3d 539, 547-48 (5th Cir. 2014); *United States v. Rodriguez*, 732 F.3d 1299, 1303 (11th Cir. 2013) (“[I]n order to support a conviction for wire fraud, the evidence at trial must show that the defendant (1) intentionally participated in a scheme or artifice to defraud another of money or property, and (2) used or caused the use of wires for the purpose of executing the scheme or artifice”); *United States v. Appolon*, 715 F.3d 361, 367 (1st Cir. 2013).

18 U.S.C. 1343 (“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both”).

³⁵⁸ *Pasquantino v. United States*, 544 U.S. 349, 355 n.2 (2005) (“we have construed identical language in the wire and mail fraud statutes *in pari materia*”), citing *Neder v. United States*, 527 U.S. 1, 20 (1999) and *Carpenter v. United States*, 484 U.S. 19, 25 and n.6 (1987); see also *United States v. Helton*, 737 F.3d 1121, 1129 n.4 (7th Cir. 2013) (“Though we are discussing wire fraud, we may draw upon reasoning from mail fraud cases, as cases construing the mail fraud statute are applicable to the wire fraud statute”); *United States v. Cole*, 721 F.3d 1016, 1021 (8th Cir. 2013).

³⁵⁹ *McNally v. United States*, 483 U.S. 350, 358 (1987); see also *United States v. Wynn*, 684 F.3d 473, 890 (4th Cir. 2012); *United States v. Barrington*, 648 F.3d 1178, 1191 (11th Cir. 2011); *United States v. Faulkenberry*, 614 F.3d 573, 581 (6th Cir. 2010).

³⁶⁰ *Neder v. United States*, 527 U.S. 1, 20-26 (1999); see also *United States v. Rodriguez*, 732 F.3d 1299, 1303 (11th Cir. 2013); *United States v. Read*, 710 F.3d 219, 227 (5th Cir. 2012); *United States v. Gillion*, 704 F.3d 284, 296 (4th Cir. 2013).

³⁶¹ *Neder v. United States*, 527 U.S. at 22 n. 5 (“The Restatement instructs that a matter is material if ‘(a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.’” Restatement (Second) of Torts §538 (1977)”) 1, 20-6 (1999); *United States v. Wynn*, 684 F.3d 473, 479-80 (4th Cir. 2012); *United States v. Bryant*, 606 F.3d 912, 917 (8th Cir. 2010); *United States v. Maxwell*, 579 F.3d 1282, 1922 (11th Cir. 2009); *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1122 (D.C. Cir. 2009).

³⁶² *United States v. Phipps*, 595 F.3d 243, 245-46 (5th Cir. 2010) (“Mail and wire fraud are both specific intent crimes that require the Government to prove that a defendant knew the scheme involved false representations”); *United States v. Imo*, 739 F.3d 226, 236 (5th Cir. 2014); *United States v. White*, 737 F.3d 1121, 1130 (7th Cir. 2013); *United States v. Jinian*, 725 F.3d 954, 960 (9th Cir. 2013).

³⁶³ *United States v. Aslan*, 644 F.3d 526, 545 (7th Cir. 2011) (“The fraud is therefore complete once a defendant with the requisite intent has used the wires in furtherance of a scheme to defraud, whether or not the defendant actually collects any money or property from the victim of the scheme”); *United States v. Bradley*, 644 F.3d 1213, 1239 (11th Cir. 2011); *United States v. Schuler*, 458 F.3d 1148, 1153 (10th Cir. 2006); *United States v. Reifler*, 446 F.3d 65, 96 (2d Cir. 2006).

³⁶⁴ *United States v. White*, 737 F.3d 1121, 1129 (7th Cir. 2013) (internal citations omitted) (“There is no requirement that Ford personally cause the use of the wire. Rather, the third element of wire fraud is met if the use of a wire ‘will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended’”), quoting *Pereira v. United States*, 347 U.S. 1, 8-9 (1954); *United States v. Appolon*, 715 F.3d 362, 370 (1st Cir. 2013); (continued...)

Both statutes refer to a “scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses ...” The extent to which that phrase encompasses intangibles has not always been clear. In spite of a generous interpretation by many of the lower federal appellate courts that encompassed frustration of governmental functions in many forms, the Supreme Court in *McNally* declared that the mail fraud statute did not proscribe schemes to defraud the public of the honest and impartial services of its public employees or officials.³⁶⁶

Lest *McNally* be read to limit the mail and wire fraud statutes exclusively to tangible money or property, the Court explained in *Carpenter*, soon thereafter, that the “property” of which the mail and wire fraud statutes speak includes recognized intangible property rights. There, it upheld application of the mail fraud statute to a scheme to deny a newspaper its pre-publication property right to its confidential information.³⁶⁷ The Court later confirmed that the wire fraud statute could be used against a smuggling scheme that deprived a governmental entity of its intangible right to collect tax revenues.³⁶⁸

In the wake of *McNally*, Congress expanded the scope of the mail and wire fraud statutes with the passage of 18 U.S.C. 1346, which defines the “scheme to defraud” element in the fraud statutes to include a scheme “to deprive another of the intangible right of honest services.” Section 1346 extends mail and wire fraud to prohibit the deprivation of the intangible right to honest services of both public and private officers and employees.

Until construed more narrowly by the Supreme Court in *Skilling*, some of the lower courts understood it to proscribe bribery, kickbacks as well as various forms of self-dealing committed to the detriment of those to whom the offender owed a fiduciary duty of some kind.³⁶⁹ In the public sector, it was thought to condemn dishonesty in public officers and employees, although the exact scope of that proscription remained largely undefined. Some lower courts said that honest services fraud in the public sector “typically occurs in either of two situations: (1) bribery, where a public official was paid for a particular decision or action; or (2) failure to disclose a conflict of interest resulting in personal gain.”³⁷⁰ The bribery examples caused little pause; more perplexing were the issues of how broadly the conflict-of-interest provision might reach and what atypical situations might come within the honest services fraud prohibition. The uncertainty led

(...continued)

United States v. Andrews, 681 F.3d 509, 528-29 (3d Cir. 2012).

³⁶⁵ *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989) (“To be part of the execution of the fraud, however, the use of the mails need not be an essential element of the scheme. It is sufficient for the mailing to be incident to an essential part of the scheme or a step in the plot”); *United States v. Read*, 710 F.3d 219, 227 (5th Cir. 2012); *United States v. Gillion*, 704 F.3d 284, 297 (4th Cir. 2012).

³⁶⁶ *United States v. McNally*, 483 U.S. 350, 361, 355 n.4 (1987).

³⁶⁷ *Carpenter v. United States*, 484 U.S. 19, 26-27 (1987).

³⁶⁸ *Pasquantino v. United States*, 544 U.S. 349, 357 (2005).

³⁶⁹ *United States v. Brown*, 459 F.3d 509, 521 (5th Cir. 2006); *United States v. Rybicki*, 354 F.3d 124, 139-44 (2d Cir. 2003).

³⁷⁰ *United States v. Kemp*, 500 F.3d 257, 279 (3d Cir. 2007); see also *United States v. Walker*, 490 F.3d 1282, 1297 (11th Cir. 2007) (“Public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public’s best interest. If an official instead secretly makes his decisions based on his own personal interests—as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest—the official has deprived the public of his honest services”) (emphasis added); *United States v. Sawyer*, 239 F.3d 31, 40 (2001) (“[W]e noted two of the ways that a public official can steal his honest services from his public employer: (1) the official can be influenced or otherwise improperly affected in the performance of his official duties; or (2) the official can fail to disclose a conflict of interest resulting in personal gain”).

the Supreme Court to conclude that Congress intended the honest services provision to apply to bribery and kickbacks,³⁷¹ but that “[i]nterpreted to encompass *only* bribery and kickbacks, [it] was not unconstitutionally vague.”³⁷²

Prosecutors may favor a mail or wire fraud charge over or in addition to a bribery charge if for no other reason than that under both fraud sections offenders face imprisonment for not more than 20 years rather than the 15-year maximum found in §201.³⁷³

Mail fraud and wire fraud are both RICO and money laundering predicate offenses.³⁷⁴ The legal precepts relating to principals, accessories after the fact, misprision, and conspiracy apply to mail fraud and wire fraud as well. However, the courts are unlikely to conclude that either applies to misconduct occurring entirely overseas, since their jurisdictional elements (United States mails and interstate and foreign commerce of the United States) are clearly domestic.

Obstruction by Extortion Under Color of Official Right (18 U.S.C. 1951)

The Hobbs Act speaks of the obstruction of commerce, but it is mentioned here because bribery and extortion under color of official right corrupt the due administration of justice in similar ways. The Hobbs Act outlaws the obstruction of interstate or foreign commerce by means of robbery or extortion.³⁷⁵ Extortion under the act comes in two forms: extortion induced by fear and extortion under color of official right.³⁷⁶ Extortion under color of official right occurs when a federal, state, or local public official receives a payment to which he is not entitled, knowing it is being provided in exchange for the performance of an official act.³⁷⁷ Liability may be incurred by public officers and employees, those in the process of becoming public officers or employees, their coconspirators, or those who aid and abet public officers or employees in extortion under

³⁷¹ *Skilling v. United States*, 130 S.Ct. 2896, 2931 n. 43 (2010) (“Apprised that a broader reading of §1346 could render the statute impermissibly vague, Congress, we believe, would have drawn the honest-services line, as we do now, at bribery and kickback schemes”)

³⁷² *Id.* at 2933 (emphasis added).

³⁷³ 18 U.S.C. 1341, 1343. Although not ordinarily relevant in an obstruction of governmental functions context, mail and wire fraud offenders face imprisonment for not more than 30 years and a fine of not more than \$1 million when a financial institution is the victim of the fraud, *id.*

³⁷⁴ 18 U.S.C. 1961(1), 1956(c)(7)(A).

³⁷⁵ 18 U.S.C. 1951 (“(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both. (b) As used in this section ... (2) The term ‘extortion’ means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. (3) The term ‘commerce’ means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction....”).

³⁷⁶ 18 U.S.C. 1951(b)(2).

³⁷⁷ *Evans v. United States*, 504 U.S. 255, 268 (1992); *United States v. McDonough*, 727 F.3d 143, 155 (1st Cir. 2013); *United States v. Siegelman*, 640 F.3d 1159, 1171 (11th Cir. 2011); *United States v. Manzo*, 636 F.3d 56, 60 (3d Cir. 2011); *United States v. Kincaid-Chauncey*, 556 F.3d 923, 936 (9th Cir. 2009); *United States v. Vigil*, 523 F.3d 1258, 1266 (10th Cir. 2008).

color or official right.³⁷⁸ The payment need not have been solicited,³⁷⁹ nor need the official act for which it is exchanged have been committed.³⁸⁰ The prosecution must establish that the extortion obstructed, delayed, or affected interstate or foreign commerce, but proof of a potential impact, even one that is not particularly severe, may be sufficient.³⁸¹

Hobbs Act violations are punishable by imprisonment for not more than 20 years and a fine of not more than \$250,000.³⁸² Hobbs Act offenses are RICO and money laundering predicates.³⁸³ It is a crime to attempt to commit a Hobbs Act offense.³⁸⁴ Moreover, the act has a separate conspiracy component,³⁸⁵ but recourse to prosecution of conspiracy under 18 U.S.C. 371 is an alternative.³⁸⁶ An offender may incur criminal liability under the misprision statute or as a principal or accessory before the fact to a violation of the Hobbs Act by another.³⁸⁷

Obstruction of Investigations by Bribery (18 U.S.C. 1510(a))

Before Congress rewrote federal obstruction of justice law in 1982, §1510 covered the obstruction of federal criminal investigations by “misrepresentation, intimidation, or force or threats thereof” as well as by bribery.³⁸⁸ All that remains of the original proscription is the prohibition on obstruction by bribery:

Whoever willfully endeavors by means of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United

³⁷⁸ *United States v. Regan*, 725 F.3d 471, 484 (5th Cir. 2013)(internal citations and quotation marks omitted)(“[P]rivate individuals can be convicted for extortion under color of official right when they conspire with corrupt public officials, masquerade as public officials or speak for a public official”); *United States v. Kelley*, 461 F.3d 817, 827 (6th Cir. 2006); *United States v. Rubio*, 321 F.3d 517, 521 (5th Cir. 2003); *United States v. Hairston*, 46 F.3d 361, 366 (4th Cir. 1995); *United States v. Freeman*, 6 F.3d 586, 593 (9th Cir. 1993); but see *United States v. Manzo*, 636 F.3d 56, 68-69 (3d Cir. 2011)(“A Hobbs Act inchoate offense prohibits a person acting under color of official right from attempting or conspiring to use his or her public office in exchange for payments. It does not prohibit a private person who is a candidate from attempting or conspiring to use a future public office to extort money at a future date”).

³⁷⁹ *United States v. Abbas*, 560 F.3d 660, 663 (7th Cir. 2009); *United States v. Abbey*, 560 F.3d 513, 517 (6th Cir. 2009); *United States v. Foster*, 443 F.3d 978, 984 (8th Cir. 2006)(the color of official right “element does not require an affirmative act of inducement by the official”).

³⁸⁰ *Evans v. United States*, 504 U.S. 255, 268 (1992)(“the offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the *quid pro quo* is not an element of the offense”); *United States v. McDonough*, 727 F.3d 143, 155 (1st Cir. 2013); *United States v. Thompson*, 647 F.3d 180, 187 (5th Cir. 2011); *United States v. Abbey*, 560 F.3d 513, 517 (6th Cir. 2009).

³⁸¹ *United States v. Kincaid-Chauncey*, 556 F.3d 923, 936 (9th Cir. 2009)(“[T]he government was required to prove ... at least a *de minimis* effect on commerce”); *United States v. Rutland*, 705 F.3d 1238, 1245 (10th Cir. 2013); *United States v. Mann*, 701 F.3d 274-295-96 (8th Cir. 2011); *United States v. Powell*, 693 F.3d 398, 405 (3d Cir. 2012).

³⁸² 18 U.S.C. 1510(a), 3571.

³⁸³ 18 U.S.C. 1961(1), 1956(c)(7)(A).

³⁸⁴ 18 U.S.C. 1510(a).

³⁸⁵ 18 U.S.C. 1510(a); e.g., *United States v. Needham*, 604 F.3d 673, 680 (2d Cir. 2010); *United States v. Merlino*, 592 F.3d 22, 25 (1st Cir. 2010); *United States v. Mausali*, 590 F.3d 1077, 1079 (9th Cir. 2009).

³⁸⁶ E.g., *Louisiana v. Guidry*, 489 F.3d 692, 695 (5th Cir. 2007)(“Guidry successfully negotiated a plea agreement under which he pleaded guilty in federal court to one count of conspiracy to commit extortion in violation of 18 U.S.C. §§371 and 1951 ... ”); *United States v. Bornscheuer*, 563 F.3d 1228, 1233-234 (11th Cir. 2009); *United States v. Vazquez-Botet*, 532 F.3d 37, 44 (1st Cir. 2008).

³⁸⁷ 18 U.S.C. 4, 2, 3.

³⁸⁸ 18 U.S.C. 1510 (1976 ed.).

States by any person to a criminal investigator shall be fined under this title, or imprisoned not more than five years, or both.³⁸⁹

Prosecutions under subsection 1510(a) have been more infrequent since the enactment of 1512 in 1982, perhaps because §1512 governs the obstruction of federal criminal investigations not only by corrupt persuasion such as bribery but also by intimidation, threat, deception, or physical force.³⁹⁰ Moreover, §1510 defines the federal investigators within its protection³⁹¹ more narrowly than does the definition that applies to §1512 coverage.³⁹² In addition, §1512 outlaws impeding communications relating to a violation of bail, parole, probation or supervised release conditions, which §1510 does not. Like §1512 offenses, however, §1510 offenses are RICO and money laundering predicate offenses.³⁹³

Obstruction of Justice by Destruction of Evidence

Other than subsection 1512(c), three federal statutes expressly outlaw the destruction of evidence in order to obstruct justice: 18 U.S.C. 1519 prohibits destruction of evidence in connection with federal investigation or bankruptcy proceedings; 18 U.S.C. 1520 prohibits destruction of corporate audit records; and 18 U.S.C. 2232(a) prohibits the destruction of property to prevent the government from searching or seizing it.

None of the three are RICO or money laundering predicate offenses.³⁹⁴ There are no explicit statements of extraterritorial jurisdiction for any of them, but the courts are likely to conclude that overseas violation of their provisions is subject to prosecution in this country. None of them feature an individual conspiracy component, but all of them are subject to general federal law governing conspiracy, principals, accessories after the fact, and misprision.³⁹⁵

Obstruction of Investigations by Destruction of Evidence (18 U.S.C. 1519)

Where subsection 1512(c) condemns obstruction of federal *proceedings* by destruction of evidence, §1519 outlaws obstruction of federal *investigations* or bankruptcy proceedings by such means. It declares:

³⁸⁹ 18 U.S.C. 1510. Section 1510 now also contains tip-off offenses, 18 U.S.C. 1510(b), (d), discussed later in this report.

³⁹⁰ 18 U.S.C. 1512(b)(3), (a)(1)(C), (a)(2)(C).

³⁹¹ “As used in this section, the term ‘criminal investigator’ means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations of or prosecutions for violations of the criminal laws of the United States,” 18 U.S.C. 1510(c).

³⁹² “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).

³⁹³ 18 U.S.C. 1961(1), 1956(c)(7)(A).

³⁹⁴ 18 U.S.C. 1961(1), 1956(c)(7).

³⁹⁵ 18 U.S.C. 371, 2, 3, 4.

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

Although its “relation to or contemplation of” clause may admit to more than one construction, the section’s elements might be displayed as follows:

I. Whoever

II. knowingly

III. A. alters,
B. destroys,
C. mutilates,
D. conceals,
E. covers up,
F. falsifies, or
G. makes a false entry in

IV. any

A. record,
B. document, or
C. tangible item

V. with the intent to

A. impede,
B. obstruct, or
C. influence

VI. A. the investigation

1. of any matter within the jurisdiction of any department or agency of the United States, or

2. of any case filed under title 11 (relating to bankruptcy), or

B. the proper administration

1. of any matter within the jurisdiction of any department or agency of the United States, or

2. of any case filed under title 11 (relating to bankruptcy), or

C. 1.a. in relation to or

b. in contemplation of

2. any such

a. matter or

b. case

shall be fined under this title, imprisoned not more than 20 years, or both.³⁹⁶

³⁹⁶ 18 U.S.C. 1519; *United States v. Powell*, 680 F.3d 350, 355-56 (4th Cir. 2012)(“A plain reading of the pertinent language of §1519 requires the government to prove the following elements: (1) the defendant made a false entry in a record, document, or tangible object; (2) the defendant did so knowingly; and (3) the defendant intended to impede, (continued...)”)

Conviction does not require the government to prove that the defendant knew that he was obstructing a matter within the jurisdiction of a federal department or agency.³⁹⁷ It is fairly clear that the tangible item destroyed or disposed of in order to frustrate an investigation need not be a record or document or anything like either of them.³⁹⁸

The legislative history of §1519 evidences a strong inclination to “close the loopholes” in federal obstruction law, but is not quite so clear on the issue of whether the offense would have an element of specific intent under all circumstances.³⁹⁹ Section 1519 was passed with an eye to the prosecution of the Arthur Andersen accounting firm,⁴⁰⁰ yet without the benefit the Supreme Court’s later decision in the case.⁴⁰¹ Characterized as the “anti-shredding” provision of the

(...continued)

obstruct, or influence the investigation ...”).

³⁹⁷ *United States v. McQueen*, 727 F.3d 1144, 1151-152 (11th Cir. 2013)(“Section 1519’s language requires only that criminal defendant ‘knowingly’ alter, destroy mutilate, conceal, cover up, falsify, or make a false entry. There is nothing in the language that suggests the defendant must also know that any possible investigation is federal in nature.... [A]s we see it, ‘any matter within the jurisdiction’ is merely a jurisdictional element, for which no mens rea is required.... Every court of appeals that has addressed this issue has reached the same conclusion”), citing in accord, *United States v. Moyer*, 674 F.3d 192, 208 (3d Cir. 2012); *United States v. Yielding*, 657 F.3d 688, 710 (8th Cir. 2011); *United States v. Gray*, 642 F.3d 371, 378 (2d Cir. 2011); *United States v. Kernell*, 667 F.3d 746, 752-56 (6th Cir. 2012).

³⁹⁸ *E.g.*, *United States v. Yates*, 733 F.3d 1059, 1064 (11th Cir. 2013)(fish thrown overboard to frustrate the investigation of illegal fishing); *United States v. McRae*, 702 F.3d 806, 833-34 (5th Cir. 2012)(burning a car with a dead body in it).

³⁹⁹ “Section 1519 is meant to apply broadly to any acts to destroy or fabricate physical evidence so long as they are done with the intent to obstruct, impede or influence the investigation or proper administration of any matter, and such matter is within the jurisdiction of an agency of the United States, or such acts [are] done either in relation to or in contemplation of such a matter or investigation. This statute is specifically meant not to include any technical requirements, which some courts have read into other obstruction of justice statutes, to tie the obstructive conduct to a pending or imminent proceeding or matter. It is also sufficient that the act is done ‘in contemplation’ of or in relation to a matter or investigation. It is also meant to do away with the distinctions, which some courts have read into obstruction statutes, between court proceedings, investigations, regulatory or administrative proceedings (whether formal or not) and less formal government inquiries, regardless of their title. Destroying or falsifying documents to obstruct any of these types of matters or investigations, which in fact are proved to be within the jurisdiction of any federal agency are covered by this statute. See 18 U.S.C. 1001. *Questions of criminal intent are, as in all cases, appropriately decided by a jury on a case-by-case basis.* It also extends to acts done in contemplation of such federal matters, so that the time of the act in relation to the beginning of the matter or investigation is also not a bar to prosecution. The intent of the provision is simple; people should not be destroying, altering, or falsifying documents offline to obstruct any government function. Finally, this section could also be used to prosecute a person who actually destroys the records himself in addition to one who persuades another to do so, ending yet another technical distinction which burdens successful prosecution of wrongdoers. See 18 U.S.C. 1512(b),” S.Rept. 107-146, at 14-5 (2002)(emphasis added; citations to sections 1001 and 1512(b) appear in footnotes 15 and 16 respectively in the report).

⁴⁰⁰ *Id.* at 7 (“Indeed, even in the current Andersen case, prosecutors have been forced to use the witness tampering statute, 18 U.S.C. 1512, and to proceed under the legal fiction that the defendants are being prosecuted for telling other people to shred documents, not simply for destroying evidence themselves. Although prosecutors have been able to bring charges thus far in the case, in a case with a single person doing the shredding, this legal hurdle might present an insurmountable bar to a successful prosecution. When a person destroys evidence with the intent of obstructing any type of investigation, and the matter is within the jurisdiction of a federal agency, overly technical legal distinctions should neither hinder nor prevent prosecution and punishment”).

⁴⁰¹ *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

Sarbanes-Oxley Act,⁴⁰² the section clearly reaches the destruction of evidence, but it is used with at least equal frequency to prosecute the falsification of evidence.⁴⁰³

It seems clear that the conduct which §1519 proscribes is not limited to conduct that impedes a *pending investigation*; the obstructed official consideration need be neither pending (“in contemplation of”) nor take the form of an investigation (“investigation ... or proper administration of any matter”).⁴⁰⁴

Section 1519’s language might suggest that it only reaches executive branch investigations and does not extend to congressional investigations or judicial investigations such as those conducted by a federal grand jury. The question whether §1519 applies to congressional and grand jury investigations might be the subject of some disagreement.

At one time, the general federal false statement statute forbid false statements in “any matter within the jurisdiction of any department or agency of the United States,” 18 U.S.C. 1001 (1994 ed.). There, the phrase “any department or agency of the United States” referred only to executive branch entities, the Supreme Court said; it did not refer to judicial entities nor by implication to congressional entities.⁴⁰⁵ Congress then amended §1001 to cover false statements “in any matter within the jurisdiction of the executive, legislative, or judicial branches of the Government of the United States,” a turn of phrase Congress elected not to use in §1519.

Beyond the bankruptcy matters to which the section explicitly refers,⁴⁰⁶ however, the case law suggests that, as long as a matter is within the investigative purview of a federal executive branch agency, the section extends to the obstruction of other judicial branch investigations such as those of the grand jury.⁴⁰⁷ The same logic might be used to bring destruction of evidence sought by Congress within the section’s purview.

⁴⁰² *United States v. Lessner*, 498 F.3d 185, 196 (3d Cir. 2007); *Anticipatory Obstruction of Justice: Pre-Emptive Document Destruction under the Sarbanes-Oxley Anti-Shredding Statute*, 18 U.S.C. §1519, 89 CORNELL LAW REVIEW 1519 (2004).

⁴⁰³ *E.g.*, *United States v. Moore*, 708 F.3d 639, 648-49 (5th Cir. 2013); *United States v. Fontenot*, 611 F.3d 734, 735-36 (11th Cir. 2010); *United States v. Holden*, 557 F.3d 698, 700 (6th Cir. 2009).

⁴⁰⁴ See *e.g.*, *United States v. Lanham*, 617 F.3d 873, 887 (6th Cir. 2010) (“Lanham also argues that there had to be an ongoing or imminent federal investigation at the time reports were written to meet the requirements of the statute. The language in 18 U.S.C. §1519 clearly states that the falsification could be done ‘in relation to or contemplation of any’ investigation or matter within United States jurisdiction. The conspiracy to harm J.S. was within the jurisdiction of the United States, and the falsification was presumably done in contemplation of an investigation that might occur”); *United States v. McRae*, 702 F.3d 806, 837 (5th Cir. 2012) (“Other circuits ... have construed the statute as criminalizing three circumstances involving a matter within the jurisdiction of a federal agency and a defendant acting with an obstructive intent: (1) when a defendant acts directly with respect to the investigation or proper administration of any matter, that is, a pending matter, (2) when a defendant acts in contemplation of any such matter, and (3) when a defendant acts in relation to any such matter”).

⁴⁰⁵ *Hubbard v. United States*, 514 U.S. 695, 715 (1995), overruling, *United States v. Bramblett*, 348 U.S. 503 (1955). The Court in *Bramblett* had held that the word “department” as used in Section 1001 “was meant to describe the executive, legislative and judicial branches of the government,” 348 U.S. at 509.

⁴⁰⁶ *E.g.*, *United States v. Holstein*, 618 F.3d 610 (7th Cir. 2010).

⁴⁰⁷ *United States v. Hoffman-Vaile*, 568 F.3d 1335, 1343 (11th Cir. 2009) (“Because the Department of Health and Human Services, which is a ‘department or agency of the United States,’ conducted the investigation of Dr. Hoffman-Vaile and the grand jury subpoenaed the missing records ‘in relation to or in contemplation of this investigation, her failure to produce the records with the photographs intact is obstructive conduct under section 1519”); *cf.*, *In re Grand Jury Investigation*, 445 F.3d 266, 275-76 & n.3 (3d Cir. 2006). The case involved the application of the crime fraud exception to the attorney-client privilege and the court concluded, “we agree that there was sufficient evidence to (continued...)”

Destruction of Corporate Audit Records (18 U.S.C. 1520)

The Sarbanes-Oxley Act augmented §1519 with a very explicit prohibition on the destruction of corporate audit records in §1520.⁴⁰⁸ Section 1520 requires those who audit the issuers of securities to keep their records and work papers for 5 years. The penalty for violation of §1520 is imprisonment for not more than 10 years and/or a fine of not more than \$250,000.⁴⁰⁹

Destruction of Property to Prevent Seizure (18 U.S.C. 2232(a))

Section 2232(a) mentions neither proceedings nor investigations; it simply outlaws destruction of property in order to prevent the government from seizing it. The offense has three elements: (1) a person “authorized to search for or seize certain property;” (2) “the accused knowingly destroys or removes or attempts to destroy or remove the property subject to the authorized search or seizure;” and (3) “the destruction or removal of the property [is] for the purpose of preventing its seizure.”⁴¹⁰ Prosecution is apparently limited to those instances where the property is subject to seizure either with, or because of exigent or other circumstances without, a warrant at the time of its removal, destruction or attempted destruction or removal.⁴¹¹ On the other hand, the section reaches both seizure for purposes of investigation and seizure for purposes of forfeiture.⁴¹² Section 2232(a) is closely related to 18 U.S.C. 1519, and individuals who destroy property to prevent its seizure by federal law enforcement officials may also find themselves charged or convicted with obstructing a federal investigation under §1519 based on the same misconduct.⁴¹³

(...continued)

support the District Court’s finding that Jane Doe could be found to have engaged in the ongoing crime of obstruction of justice. [The government apparently relies on 18 U.S.C. 1519, which provides ... There are other provisions arguably applicable and we do not limit our analysis to Section 1519],” *id.* (pertinent portions of footnote 3 of the court’s opinion in brackets).

⁴⁰⁸ “(a)(1) Any accountant who conducts an audit of an issuer of securities to which Section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(a)) applies, shall maintain all audit or review workpapers for a period of five years from the end of the fiscal period in which the audit or review was concluded. (2) The Securities and Exchange Commission shall promulgate, within 180 days, after adequate notice and an opportunity for comment, such rules and regulations, as are reasonably necessary, relating to the retention of relevant records such as workpapers, documents that form the basis of an audit or review, memoranda, correspondence, communications, other documents, and records (including electronic records) which are created, sent, or received in connection with an audit or review and contain conclusions, opinions, analyses, or financial data relating to such an audit or review, which is conducted by any accountant who conducts an audit of an issuer of securities to which Section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(a)) applies. The Commission may, from time to time, amend or supplement the rules and regulations that it is required to promulgate under this section, after adequate notice and an opportunity for comment, in order to ensure that such rules and regulations adequately comport with the purposes of this section.

“(b) Whoever knowingly and willfully violates subsection (a)(1), or any rule or regulation promulgated by the Securities and Exchange Commission under subsection (a)(2), shall be fined under this title, imprisoned not more than 10 years, or both.

“(c) Nothing in this section shall be deemed to diminish or relieve any person of any other duty or obligation imposed by Federal or State law or regulation to maintain, or refrain from destroying, any document,” 18 U.S.C. 1520. Other audit obstruction offenses include 18 U.S.C. 1516 (obstructing a federal audit), 1517 (obstructing a bank examination).

⁴⁰⁹ 18 U.S.C. 1520(b), 3571.

⁴¹⁰ *United States v. Plavcak*, 411 F.3d 655, 660 (6th Cir. 2005).

⁴¹¹ *Id.* at 661; *cf.*, *United States v. Lessner*, 498 F.3d 185, 198 (3d Cir. 2007).

⁴¹² *E.g.*, *United States v. Keele*, 742 F.3d 192, 194 (5th Cir. 2014).

⁴¹³ *E.g.*, *United States v. Yates*, 733 F.3d 1059, 1061 (11th Cir. 2013); *United States v. Rappe*, 614 F.3d 332, 332 (7th Cir. 2010); *United States v. Vosburgh*, 602 F.3d 512, 521 (3d Cir. 2010).

Section 2232(a) violations are punishable by imprisonment for not more than five years and/or a fine of not more than \$250,000.⁴¹⁴

Obstruction of Justice by Deception

In addition to the obstruction of justice provisions of 18 U.S.C. 1503 and 1512, four other general statutes outlaw obstructing the government's business by deception. Three involve perjury: 18 U.S.C. 1623 which outlaws false swearing before federal courts and grand juries; 18 U.S.C. 1621 the older and more general prohibition that proscribes false swearing in federal official matters (judicial, legislative, or administrative); and 18 U.S.C. 1622 which condemns subornation, that is, inducing another to commit perjury. The fourth, 18 U.S.C. 1001, proscribes material false statements concerning any matter within the jurisdiction of a federal executive branch agency, and to a somewhat more limited extent within the jurisdiction of the federal courts or a congressional entity.

None of the four are RICO predicate offenses or money laundering predicate offenses.⁴¹⁵ The laws relating to aiding and abetting, accessories after the fact, misprision, and conspiracy,⁴¹⁶ however, apply to all four.⁴¹⁷ Sections 1621 and 1623 state that their prohibitions apply regardless of whether the perjurious conduct occurs overseas or within this country.⁴¹⁸ Section 1001 has no such explicit declaration, but has been held to have extraterritorial application nonetheless.⁴¹⁹

Perjury in a Judicial Context (18 U.S.C. 1623)

Congress enacted Section 1623 to avoid in relation to judicial proceedings some of the common law technicalities embodied in the more comprehensive perjury provisions found in Section 1621 and thus “to facilitate perjury prosecutions and thereby enhance the reliability of testimony before federal courts and grand juries.”⁴²⁰ Unlike Section 1621, Section 1623 permits a conviction in the case of two mutually inconsistent declarations without requiring proof that one of them is false.⁴²¹ It recognizes a limited recantation defense.⁴²² It dispenses with the so-called two-witness rule.⁴²³

⁴¹⁴ 18 U.S.C. 2232(a), 3571.

⁴¹⁵ 18 U.S.C. 1961(1), 1956(c)(7).

⁴¹⁶ 18 U.S.C. 2, 3, 4, 371.

⁴¹⁷ *E.g.*, *United States v. Atalig*, 502 F.3d 1063, 1065 (9th Cir. 2007)(conspiracy to violate 18 U.S.C. 1001); *cf.*, *United States v. Dunne*, 324 F.3d 1158, 1162-163 (10th Cir. 2003).

⁴¹⁸ 18 U.S.C. 1621 (“This section is applicable whether the statement or subscription is made within or without the United States”); 18 U.S.C. 1623 (“This section is applicable whether the conduct occurred within or without the United States”).

⁴¹⁹ *United States v. Walczak*, 783 F.2d 852, 854-55 (9th Cir. 1986).

⁴²⁰ *Dunn v. United States*, 442 U.S. 100, 107 (1979), citing, S.REP.NO. 91-617, at 58-9 (1969)(internal citations omitted).

⁴²¹ 18 U.S.C. 1623(c).

⁴²² 18 U.S.C. 1623(d).

⁴²³ 18 U.S.C. 1623(e).

And, it employs a “knowing” mens rea standard rather than the more demanding “willfully” standard used in Section 1621.⁴²⁴

Parsed into elements, Section 1623 declares that:

I. Whoever

II. a. under oath or

b. in any

i. declaration,

ii. certificate,

iii. verification, or

iv. statement

under penalty of perjury as permitted under [Section]1746 of title 28, United States Code⁴²⁵

III. in any proceeding before or ancillary to

a. any court or

b. grand jury of the United States

IV. knowingly

V. a. makes any false material declaration or

b. makes or uses any other information, including any

i. book,

ii. paper,

iii. document,

iv. record,

v. recording, or

vi. other material,

knowing the same to contain any false material declaration,

shall be fined under this title or imprisoned not more than five years, or both.⁴²⁶

In most cases, the courts abbreviate their description of the elements and state in one form or another that to prove perjury the government must establish that the defendant (1) knowingly

⁴²⁴ 18 U.S.C. 1623(a).

⁴²⁵ “Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

“(1) If executed without the United States: ‘I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature).’

“(2) If executed within the United States, its territories, possessions, or commonwealths: ‘I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature).’”

⁴²⁶ 18 U.S.C. 1623(a).

made a (2) false (3) material declaration (4) under oath (5) in a proceeding before or ancillary to any court or grand jury of the United States.⁴²⁷

The allegedly perjurious declaration must be presented in a “proceeding before or ancillary to any court or grand jury of the United States.” An interview in an attorney’s office in preparation for a judicial hearing cannot be considered such an ancillary proceeding,⁴²⁸ but the phrase “proceedings ancillary to” court or grand jury proceedings does cover proceedings to take depositions in connection with civil litigation,⁴²⁹ as well as a variety of pretrial proceedings in criminal cases,⁴³⁰ including habeas proceedings,⁴³¹ bail hearings,⁴³² venue hearings,⁴³³ or suppression hearings.⁴³⁴

The Supreme Court’s observation that a statement that is misleading but literally true cannot support a conviction under Section 1621 because it is not false⁴³⁵ applies with equal force to perjury under Section 1623.⁴³⁶ Similarly, perjury cannot be the product of confusion, mistake, or faulty memory, but must be a statement that the defendant knows is false,⁴³⁷ although this requirement may be satisfied with evidence that the defendant was deliberately ignorant or willfully blind to the fact that the statement was false.⁴³⁸ On the other hand, “[a] question that is truly ambiguous or which affirmatively misleads the testifier can never provide a basis for a finding of perjury, as it could never be said that one intended to answer such a question untruthfully.”⁴³⁹ Yet ambiguity will be of no avail if the defendant understands the question and answers falsely nevertheless.⁴⁴⁰

⁴²⁷ *United States v. Strohm*, 671 F.3d 1173, 1178 (10th Cir. 2011)(brackets in the original)(“To prove perjury under §1623(a), the government must demonstrate (1) the defendant made a declaration under oath before a [court]; (2) such declaration was false; (3) the defendant knew the declaration was false and (4) the false declaration was material to the [court’s] inquiry”); *United States v. Ramirez*, 635 F.3d 249, 260 (6th Cir. 2011)(“A conviction under §1623(a) requires proof that the defendant (1) knowingly made, (2) a materially false declaration (3) under oath (4) before a federal grand jury”); *United States v. Gorman*, 613 F.3d 711, 715-16 (7th Cir. 2010)(“To support a conviction for perjury beyond a reasonable doubt, the government had the burden of proving that (1) the defendant, while under oath, testified falsely before the grand jury; (2) his testimony related to some material matter; and (3) he knew that testimony was false”); see also *United States v. Wu*, 716 F.3d 159, 173 (5th Cir. 2013)(“To obtain a perjury conviction, the Government must prove (1) that the defendant’s statements were material; (2) false; and (3) at the time the statements were made the defendant did not believe them to be true”).

⁴²⁸ *Dunn v. United States*, 442 U.S. 100, 111-12 (1979).

⁴²⁹ *Id.*; *United States v. Wu*, 716 F.3d 159, 173 (5th Cir. 2013); *United States v. Wilkinson*, 137 F.3d 214, 225 (4th Cir. 1998); *United States v. Holland*, 22 F.3d 1040, 1047-48 (11th Cir. 1994); *United States v. McAfee*, 8 F.3d 1010, 1013-14 (5th Cir. 1993).

⁴³⁰ *United States v. Farmer*, 137 F.3d 1265 (11th Cir. 1998).

⁴³¹ *United States v. Johnson*, 325 F.3d 205, 209 (4th Cir. 2003).

⁴³² *United States v. Greene*, 591 F.2d 471 (8th Cir. 1979).

⁴³³ *United States v. Durham*, 139 F.3d 1325 (10th Cir. 1998).

⁴³⁴ *United States v. Renteria*, 138 F.3d 1328 (10th Cir. 1998).

⁴³⁵ *Bronston v. United States*, 409 U.S. 352, 358-59 (1973).

⁴³⁶ *United States v. Gorman*, 613 F.3d 711, 716 (7th Cir. 2010); *United States v. Thomas*, 612 F.3d 1107, 1114-115 (9th Cir. 2010); *United States v. Richardson*, 421 F.3d 17, 32-3 (1st Cir. 2005); *United States v. Shotts*, 145 F.3d 1289, 1297 (11th Cir. 1998); *United States v. Hairston*, 46 F.3d 361, 375 (4th Cir. 1996).

⁴³⁷ *United States v. Fawley*, 137 F.3d 458, 466 (7th Cir. 1998); *United States v. Reveron Martinez*, 836 F.2d 684, 689 (1st Cir. 1988); *cf.*, *United States v. Dunnigan*, 507 U.S. 87, 94 (1993).

⁴³⁸ *United States v. Fawley*, 137 F.3d 458, 466-67 (7th Cir. 1998).

⁴³⁹ *United States v. Richardson*, 421 F.3d 17, 33 (1st Cir. 2005); see also *United States v. Strohm*, 671 F.3d 1173, 1179-1181 (10th Cir. 2011)(“An answer is not a knowing false statement if the witness responds to an ambiguous question with what he or she believes to be a truthful answer.... The case law has divided linguistic ambiguity into one of two (continued...)”).

Materiality is perhaps the most nettlesome of perjury's elements. It is usually said that a statement is material "if it has a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to whom it is addressed."⁴⁴¹ This definition is not easily applied when the precise nature of the underlying inquiry remains somewhat undefined such as in grand jury proceedings or in depositions at the discovery stage of a civil suit. On the civil side, the lower federal courts appear divided between the view (1) that a statement in a deposition is material if a "truthful answer might reasonably be calculated to lead to the discovery of evidence admissible at the trial of the underlying suit" and (2) that a statement is material "if the topic of the statement is discoverable and the false statement itself had a tendency to affect the outcome of the underlying civil suit for which the deposition was taken."⁴⁴²

In the case of perjury before the grand jury, rather than articulate a single standard the courts have described several circumstances under which false testimony may be considered material.⁴⁴³ In

(...continued)

flavors—fundamental or arguable.... A question is fundamentally ambiguous in narrow circumstances. To qualify,.... the question itself is excessively vague, making it impossible to know—without guessing—the meaning of the question and whether a witness intended to make a false response ... But fundamental ambiguity is the exception, not the rule.... A question is arguably ambiguous where more than one reasonable interpretation of a question exists"; *United States v. DeZarn*, 157 F.3d 1042, 1049 (6th Cir. 1998); see also *United States v. Turner*, 500 F.3d 685, 689 (8th Cir. 2007) ("If, however, a question is fundamentally vague or ambiguous, then an answer to that question cannot sustain a perjury conviction").

⁴⁴⁰ *United States v. Strohm*, 671 F.3d 1173, 1178 (10th Cir. 2011) ("Simply plumbing a question for *post hoc* ambiguity will not defeat a perjury conviction where the evidence demonstrates the defendant understood the question in context and gave a knowingly false answer"); *United States v. McKenna*, 327 F.3d 830, 841 (9th Cir. 2003) ("A question leading to a statement supporting a perjury conviction is not fundamentally ambiguous where the jury could conclude beyond a reasonable doubt that the defendant understood the question as did the government and that so understood, the defendant's answer was false"); *United States v. Brown*, 459 F.3d 509, 529 (5th Cir. 2006); *United States v. Turner*, 500 F.3d 685, 690 (8th Cir. 2007); *United States v. Gorman*, 613 F.3d 711, 716 (7th Cir. 2010).

⁴⁴¹ *United States v. Brown*, 459 F.3d 509, 529 (5th Cir. 2006), citing, *United States v. Gaudin*, 515 U.S. 506, 509 (1995), and *Kungys v. United States*, 485 U.S. 759, 770 (1988); see also *United States v. Strohm*, 671 F.3d 1173, 1186 (10th Cir. 2011); *United States v. Benkahla*, 530 F.3d 300, 310 (4th Cir. 2008); *United States v. McKenna*, 327 F.3d 830, 839 (9th Cir. 2003); *United States v. Lee*, 359 F.3d 412, 417 (6th Cir. 2003); *United States v. Durham*, 139 F.3d 1325, 1329 (10th Cir. 1998).

⁴⁴² *United States v. Wilkinson*, 137 F.3d 214, 225 (4th Cir. 1998), comparing, *United States v. Kross*, 14 F.3d 751, 754 (2d Cir. 1994), and *United States v. Holley*, 942 F.2d 916, 924 (5th Cir. 1991), with, *United States v. Adams*, 870 F.2d 1140, 1146-148 (6th Cir. 1989) and *United States v. Clark*, 918 F.2d 843, 846 (9th Cir. 1990), overruled on other grounds, *United States v. Keys*, 133 F.3d 1282, 1286 (9th Cir., 1998); see also *United States v. McKenna*, 327 F.3d 830, 839-40 (9th Cir. 2003) (acknowledging the division and continuing to adhere to the view expressed in *Clark*).

⁴⁴³ *E.g.*, *United States v. Brown*, 459 F.3d 509, 530 n.18 (5th Cir. 2006) ("The materiality requirement of §1623 has been satisfied in cases where the false testimony was relevant to any subsidiary issue or was capable of supplying a link to the main issue under consideration"); *United States v. Silveira*, 426 F.3d 514, 518 (1st Cir. 2005) ("A statement of witness to a grand jury is material if the statement is capable of influencing the grand jury as to any proper matter pertaining to its inquiry or which might have influenced the grand jury or impeded its inquiry. To be material, the statement need not directly concern an element of the crime being investigated, nor need it actually influence the jury"); *United States v. Burke*, 425 F.3d 400, 414 (7th Cir. 2005) ("Even potential interference with a line of inquiry can establish materiality"); *United States v. Blanton*, 281 F.3d 771, 775 (8th Cir. 2002) ("The statements need not be material to any particular issue, but may be material to any proper matter of inquiry"); *United States v. Plumley*, 207 F.3d 1086, 1095-96 (8th Cir. 2000) ("Although it is true that this particular question did not address the ultimate issue. . . at the time ... it is not thereby rendered immaterial" (citing cases in which a statement before the grand jury was found to be material when a "truthful answer would have raised questions about the role of others ... when [the] witness obscures [his] whereabouts or involvement in offense ... [and] about peripheral matters [that] can become material when considered in context").

any event, a statement is no less material because it did not or could not divert the decision maker.⁴⁴⁴

The courts seem to have had less difficulty dealing with a materiality issue characterized as the perjury trap doctrine. The doctrine arises where a witness is called for the sole purpose of eliciting perjurious testimony from him.⁴⁴⁵ Under such circumstances it is said the tribunal has no valid purpose to which a perjurious statement could be considered material. The doctrine poses no bar to prosecution in most cases, however, since the government is usually able to identify some valid reason for the grand jury's inquiries.⁴⁴⁶

Subsection 1623(c) permits a perjury conviction simply on the basis of two necessarily inconsistent material declarations rather than a showing that one of the two statements is false.⁴⁴⁷ Conviction does require a showing, however, that the two statements were made under oath; it is not enough to show that one was made under oath and the other was made in the form of an affidavit signed under penalty of perjury.⁴⁴⁸ Moreover, the statements must be so inherently contradictory that one of them of necessity must be false.⁴⁴⁹

⁴⁴⁴ *United States v. Strohm*, 671 F.3d 1173, 1186 (10th Cir. 2011); *United States v. Silveira*, 426 F.3d 514, 518 (1st Cir. 2005); *United States v. Lee*, 359 F.3d 412, 416 (6th Cir. 2004); *United States v. McKenna*, 327 F.3d 830, 839 (9th Cir. 2003).

⁴⁴⁵ *Brown v. United States*, 245 F.2d 549, 555 (8th Cir. 1957), quoting *United States v. Icardi*, 140 F.Supp. 383, 384-88 (D.D.C. 1956); but see *United States v. Burke*, 425 F.3d 400, 408 (7th Cir. 2005) (“We have not embraced this doctrine, however, and do not see any reason to adopt it now”)(internal citations omitted).

⁴⁴⁶ *United States v. McKenna*, 327 F.3d 830, 837 (9th Cir. 2003) (“Here, the government did not use its investigatory powers to question McKenna before a grand jury. Rather, it merely questioned McKenna in its role as a defendant during the pendency of a civil action in which she was the plaintiff. The perjury trap doctrine is inapplicable to McKenna’s case for this reason”); *United States v. Regan*, 103 F.3d 1073, 1079 (2d Cir. 1997) (“[w]e have noted that the existence of a legitimate basis for an investigation and for particular questions answered falsely precludes any application of the perjury trap doctrine”); *United States v. Chen*, 933 F.2d 793, 797 (9th Cir. 1991) (“[w]hen testimony is elicited before a grand jury that is attempting to obtain useful information in furtherance of its investigation or conducting a legitimate investigation into crimes which had in fact taken place within its jurisdiction, the perjury trap doctrine is, by definition, inapplicable”), quoting *United States v. Devitt*, 499 F.2d 135, 140 (7th Cir. 1974) and *United States v. Chevoor*, 526 F.2d 178, 185 (1st Cir. 1975).

⁴⁴⁷ 18 U.S.C. 1623(c) (“An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—(1) each declaration was material to the point in question, and (2) each declaration was made within the period of the statute of limitations for the offense charged under this section. In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof 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. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true”); *United States v. Dunn*, 442 U.S. 100, 108 (1979) (“By relieving the government of the burden of proving which of two or more inconsistent declarations was false, see §1623(c), Congress sought to afford greater assurance that testimony obtained in grand jury and court proceedings will aid the cause of truth”).

⁴⁴⁸ *United States v. Jaramillo*, 69 F.3d 388, 390 (9th Cir. 1995).

⁴⁴⁹ *United States v. McAfee*, 8 F.3d 1010, 1014-15 (5th Cir. 1993) (“The Government must show that the statements are so irreconcilable that one of the statements is ‘necessarily false.’ We find the Fourth Circuit’s explanation of §1623(c) instructive and adopt the standard set forth in *United States v. Flowers*, 813 F.2d 1320 (4th Cir. 1987). In *Flowers*, the court concluded that subsection 1623(c) ‘requires a variance in testimony that extends beyond mere vagueness, uncertainty, or equivocality. Even though two declarations may differ from one another, the §1623(c) standard is not met unless taking them into context, they are so different that if one is true there is no way the other can also be true.’” *Id.* at 1324; see also *United States v. Porter*, 994 F.2d 470 (8th Cir. 1993)).

Some years ago, the Supreme Court declined to reverse an earlier ruling that “[t]he general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment.”⁴⁵⁰ Since the two witness rule rests on the common law rather than on a constitutional foundation, it may be abrogated by statute without offending constitutional principles.⁴⁵¹ Subsection 1623(e) permits a perjury conviction without compliance with this traditional two witness rule.⁴⁵²

Most of the other subsections of Section 1623 are designed to overcome obstacles which the common law placed in the path of a successful perjury prosecution. Subsection 1623(d), in contrast, offers a defense unrecognized at common law. The defense is stated in fairly straightforward terms, “[w]here in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.”⁴⁵³ Although phrased in different terms, the courts seem to agree that repudiation of the false testimony must be specific and thorough.⁴⁵⁴ There is some disagreement whether a recanting defendant must be denied the defense if both the substantial impact and manifest exposure conditions have been met or if the defense must be denied if either condition exists. Most courts have concluded that the presence of either condition dooms the defense.⁴⁵⁵

Early construction required that a defendant establish both that his false statement had not substantially affected the proceeding before his recantation *and* that it had not become manifest that his false statement would be exposed.⁴⁵⁶ One more recent appellate case, however, decided that the defense should be available to a witness who could show a want of *either* an intervening adverse impact *or* of likely exposure of his false statement.⁴⁵⁷ Even without the operation of subsection 1623(d), relatively contemporaneous corrections of earlier statements may negate any

⁴⁵⁰ *Weiler v. United States*, 323 U.S. 606, 607 (1945).

⁴⁵¹ *United States v. Ruggiero*, 472 F.2d 599, 606 (2d Cir. 1973); *United States v. Diggs*, 560 F.2d 266, 269 (7th Cir. 1977)(citing cases in accord).

⁴⁵² 18 U.S.C. 1623(e)(“Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence”). See also *United States v. Kemp*, 500 F.3d 257, 294 (3d Cir. 2007); *United States v. Hasan*, 609 F.3d 1121, 1139 (10th Cir. 2010).

⁴⁵³ 18 U.S.C. 1623(d); cf., *United States v. DeLeon*, 603 F.3d 397, 404-405 (7th Cir. 2010).

⁴⁵⁴ *United States v. Wiggan*, 700 F.3d 1204, 1216 (9th Cir. 2012)(internal citations and quotation marks omitted) (“Recantation requires a defendant to renounce and withdraw the prior statement. And the defendant must unequivocally repudiate his prior testimony to satisfy §1623(d). It is not enough if the defendant merely attempted to explain his inconsistent statements, but never really admitted to the facts in question”); *United States v. Tobias*, 863 F.2d 685, 689 (9th Cir. 1988)(unequivocal repudiation); *United States v. Scivola*, 766 F.2d 37, 45 (1st Cir. 1985)(implicit recantation is insufficient); *United States v. Goguen*, 723 F.2d 1012, 1017 (1st Cir. 1983)(outright retraction and repudiation).

⁴⁵⁵ *United States v. Sherman*, 150 F.3d 306, 313-18 (3d Cir. 1998); *United States v. Fornaro*, 894 F.2d 508, 510-11 (2d Cir. 1990); *United States v. Scivola*, 766 F.2d 37, 45 (1st Cir. 1985); *United States v. Denison*, 663 F.2d 611, 615 (5th Cir. 1981); *United States v. Moore*, 613 F.2d 1029, 1043 (D.C.Cir. 1979); *contra*, *United States v. Smith*, 35 F.3d 344, 345-47 (8th Cir. 1994).

⁴⁵⁶ *United States v. Moore*, 613 F.2d 1029, 1043-44 (D.C. Cir. 1979); *United States v. Srimgeour*, 636 F.2d 1019, 1021 (5th Cir. 1980); *United States v. Scivola*, 766 F.2d 37, 45 (1st Cir. 1985); *United States v. Fornaro*, 894 F.2d 508, 510-11 (2d Cir. 1990).

⁴⁵⁷ *United States v. Smith*, 35 F.3d 344, 345 (8th Cir. 1994).

inference that the witness is knowingly presenting false testimony and thus preclude conviction for perjury.⁴⁵⁸

Perjury Generally (18 U.S.C. 1621)

When Congress passed Section 1623, it did not repeal Section 1621 either explicitly or by implication; where its proscriptions overlap with those of Section 1623, the government is free to choose under which it will prosecute.⁴⁵⁹ Since Section 1623 frees prosecutors from many of the common law requirements of Section 1621, it is perhaps not surprising that they ordinarily elect to prosecute under Section 1623. Section 1623 does outlaw perjury under a wider range of circumstances than Section 1621; it prohibits perjury before official proceedings generally—both judicial and nonjudicial. Separated into its elements, the section provides that:

(1)

- I. Whoever having taken an oath
 - II. before a competent tribunal, officer, or person,
 - III. in any case in which a law of the United States authorizes an oath to be administered,
 - IV. a. that he will
 - i. testify,
 - ii. declare,
 - iii. depose, or
 - iv. certify truly, or
 - b. that any written
 - i. testimony,
 - ii. declaration,
 - iii. deposition, or
 - iv. certificate
 - by him subscribed, is true,
 - V. willfully and contrary to such oath
 - VI. a. states or
 - b. subscribes
- any material matter which he does not believe to be true; or

(2)

- I. Whoever in any
 - a. declaration,
 - b. certificate,
 - c. verification, or
 - d. statement
- under penalty of perjury as permitted under [Section]1746 of title 28, United States Code,

⁴⁵⁸ *United States v. McAfee*, 8 F.3d 1010, 1014 (5th Cir. 1993).

⁴⁵⁹ *United States v. Sherman*, 150 F.3d 306, 312-13 (3d Cir. 1998); *United States v. Ruggiero*, 472 F.2d 599, 606 (2d Cir. 1973).

II. willfully subscribes as true

III. any material matter

IV. which he does not believe to be true

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.⁴⁶⁰

The courts generally favor an abbreviated encapsulation such as the one found in *United States v. Dunnigan*: “A witness testifying under oath or affirmation violates this section if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.”⁴⁶¹

Perjury is only that testimony which is false. Thus, testimony that is literally true, even if deceptively so, cannot be considered perjury for purposes of a prosecution under Section 1621.⁴⁶² Moreover, Section 1621 requires compliance with “the two witness rule” to establish that a statement is false. Under the rule, “the uncorroborated oath of one witness is not sufficient to establish the falsity of the testimony of the accused as set forth in the indictment as perjury.”⁴⁶³ Thus, conviction under Section 1621 requires that the government “establish the falsity of the statement alleged to have been made by the defendant under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances.”⁴⁶⁴ If the rule is to be satisfied with corroborative evidence, the evidence must be trustworthy and support the account of the single witness upon which the perjury prosecution is based.⁴⁶⁵

The test for materiality under Section 1621 is whether the false statement “has a natural tendency to influence or [is] capable of influencing the decision-making body to which it [is] addressed.”⁴⁶⁶

⁴⁶⁰ 18 U.S.C. 1621.

⁴⁶¹ *United States v. Dunnigan*, 507 U.S. 87, 94 (1993); *United States v. McKenna*, 327 F.3d 830, 838 (9th Cir. 2003); *United States v. Singh*, 291 F.3d 756, 763 n.4 (11th Cir. 2002); *United States v. Nash*, 175 F.3d 429, 438 (6th Cir. 1999); see also *United States v. Dumeisi*, 424 F.3d 566, 582 (7th Cir. 2005) (“the elements of perjury are (1) testimony under oath before a competent tribunal, (2) in a case in which United States law authorizes the administration of an oath, (3) false testimony, (4) concerning a material matter, (5) with the willful intent to provide false testimony”).

⁴⁶² *Bronston v. United States*, 409 U.S. 352, 362 (1972) (“It may well be that petitioner’s answers were not guileless but were shrewdly calculated to evade. Nevertheless ... any special problems arising from the literally true but unresponsive answer are to be remedied through the questioner’s acuity and not by a federal perjury prosecution”); see also *United States v. McKenna*, 327 F.3d 830, 841 (9th Cir. 2003); *United States v. Roberts*, 308 F.3d 1147, 1152 (11th Cir. 2002); *United States v. DeZarn*, 157 F.3d 1042, 1047-48 (6th Cir. 1998).

⁴⁶³ *Hammer v. United States*, 271 U.S. 620, 626 (1926).

⁴⁶⁴ *Weiler v. United States*, 323 U.S. 606, 607 (1945); *United States v. Stewart*, 433 F.3d 273, 315 (2d Cir. 2006); *United States v. Chaplin*, 25 F.3d 1373, 1377 (7th Cir. 1994).

⁴⁶⁵ *Weiler v. United States*, 323 U.S. 606, 610 (1945); *United States v. Stewart*, 433 F.3d 273, 315 (2d Cir. 2006) (internal citations omitted) (“The rule is satisfied by the direct testimony of a second witness or by other evidence of independent probative value, circumstantial or direct, which is of a quality to assure that a guilty verdict is solidly founded. The independent evidence must, by itself, be inconsistent with the innocence of the defendant. However, the corroborative evidence need not, it itself, be sufficient, if believed to support a conviction”).

⁴⁶⁶ *United States v. McKenna*, 327 F.3d 830, 839 (9th Cir. 2003); *United States v. Roberts*, 308 F.3d 1147, 1155 (11th Cir. 2002); *United States v. Allen*, 892 F.2d 66, 67 (10th Cir. 1989); *United States v. Mareno Morales*, 815 F.2d 725, 747 (1st Cir. 1987); see also *United States v. Wallace*, 597 F.3d 794, 801 (6th Cir. 2010) (“A false declaration satisfies (continued...)”).

Conviction under Section 1621 requires not only that the defendant knew his statement was false (“which he does not believe to be true”), but that his false statement is “willfully” presented. There is but scant authority on precisely what “willful” means in this context. The Supreme Court in dicta has indicated that willful perjury consists of “*deliberate* material falsification under oath.”⁴⁶⁷ Other courts have referred to it as acting with an “intent to deceive”⁴⁶⁸ or as acting “intentionally.”⁴⁶⁹

Although a contemporaneous correction of a false statement may demonstrate the absence of the necessary willful intent to commit perjury, the crime is completed when the false statement is presented to the tribunal; without a statute such as that found in Section 1623, recantation is no defense, nor does it bar prosecution.⁴⁷⁰

Subornation of Perjury (18 U.S.C. 1622)

Section 1622 outlaws procuring or inducing another to commit perjury: “Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned for not more than five years, or both,” 18 U.S.C. 1622. The crime consists of two elements—(1) an act of perjury committed by another (2) induced or procured by the defendant. Perjury under either Section 1621 or Section 1623 will support a conviction for subornation under Section 1622,⁴⁷¹ but proof of the commission of an act of perjury is a necessary element of subornation.⁴⁷² Although the authorities are exceptionally sparse, it appears that to suborn one must know that the induced statement is false and that at least to suborn under Section 1621 one must also knowingly and willfully induce.⁴⁷³ Subornation is only infrequently prosecuted as such perhaps because of the ease with which it can now be prosecuted as an obstruction of justice under either 18 U.S.C. 1503 or 1512⁴⁷⁴ which unlike Section 1622 do not insist upon suborner success as a prerequisite to prosecution.⁴⁷⁵

(...continued)

the materiality requirement if a truthful statement might have assisted or influenced the jury in its investigation”).

⁴⁶⁷ *United States v. Norris*, 300 U.S. 564, 574 (1937)(emphasis added).

⁴⁶⁸ *United States v. Rose*, 215 F.2d 617, 622-23 (3d Cir. 1954).

⁴⁶⁹ *United States v. Friedman*, 854 F.2d 535, 560 (2d Cir. 1988); *United States v. Mounts*, 35 F.3d 1208, 1219 (7th Cir. 1994).

⁴⁷⁰ *United States v. Norris*, 300 U.S. 564, 574 (1934); *United States v. McAfee*, 8 F.3d 1010, 1017 (5th Cir. 1993).

⁴⁷¹ *United States v. Endo*, 635 F.2d 321, 322 (4th Cir. 1980).

⁴⁷² *United States v. Hairston*, 46 F.3d 361, 376 (4th Cir. 1995)(if the underlying perjury conviction is reversed for insufficient evidence, the subornation conviction must likewise be reversed); see also *United States v. Silverman*, 745 F.2d 1386, 1394 (11th Cir. 1984).

⁴⁷³ *Rosen v. N.L.R.B.*, 735 F.2d 564, 575 n.19 (4th Cir. 1980)(“it is true that a necessary predicate of the charge of subornation of perjury is the suborner’s belief that the testimony sought is in fact false”); *Petite v. United States*, 262 F.2d 788, 794 (4th Cir. 1959)(“[i]t is essential to subornation of perjury that the suborner should have known or believed or have had good reason to believe that the testimony given would be false, that he should have known or believed that the witness would testify willfully and corruptly, and with knowledge of the falsity; and that he should have knowingly and willfully induced or procured the witness to give such false testimony”)(*Petite* only refers to Section 1621 since it was decided prior to the enactment of Section 1623).

⁴⁷⁴ *United States v. Miller*, 161 F.3d 977, 982-84 (6th Cir. 1998).

⁴⁷⁵ 18U.S.C. 1503 (emphasis added) (“Whoever ... endeavors to influence, obstruct, or impede the due administration of justice ... ”); 1512 (b) (emphasis added) (“Whoever ... corruptly persuades another person, or attempts to do so ... with intent to influence ... the testimony of any person in an official proceeding ... ”).

False Statements (18 U.S.C. 1001)

The general false statement statute, 18 U.S.C. 1001, outlaws false statements, concealment, or false documentation in any matter within the jurisdiction of any of the three branches of the federal government, although it limits application in the case of Congress and the courts.⁴⁷⁶ More specifically it states:

- I. Except as otherwise provided in this section,
- II. whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States,
- III. knowingly and willfully—
- IV. a. falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
 - b. makes any materially false, fictitious, or fraudulent statement or representation; or
 - c. makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A [sexual abuse], 109B [sex offender registration], 110 [sexual exploitation], or 117 [transportation for illicit sexual purposes], or section 1591 [sex trafficking], then the term of imprisonment imposed under this section shall be not more than 8 years.⁴⁷⁷

The courts' description of the elements will sometimes be couched in terms of the form of deception at hand—false statement,⁴⁷⁸ concealment,⁴⁷⁹ or false documentation.⁴⁸⁰ On other

⁴⁷⁶ There are scores of more limited false statement statutes that relate to particular agencies or activities and include 8 U.S.C. 1160(b)(7)(A) (applications for immigration status); 15 U.S.C. 158 (China Trade Act corporate personnel); 15 U.S.C. 645 (Small Business Administration); 15 U.S.C. 714m (Commodity Credit Corporation); 16 U.S.C. 831t (TVA); 18 U.S.C. 152 (bankruptcy); 18 U.S.C. 287 (false or fraudulent claims against the United States); 18 U.S.C. 288 (postal losses); 18 U.S.C. 289 (pensions); 18 U.S.C. 541 (entry of goods falsely classified); 18 U.S.C. 542 (entry of goods by means of false statements); 18 U.S.C. 550 (refund of duties); 18 U.S.C. 1003 (fraudulent claims against the United States); 18 U.S.C. 1007 (FDIC transactions); 18 U.S.C. 1011 (federal land bank mortgage transactions); 18 U.S.C. 1014 (loan or credit applications in which the United States has an interest); 18 U.S.C. 1015 (naturalization, citizenship or alien registry); 18 U.S.C. 1019 (false certification by consular officer); 18 U.S.C. 1020 (highway projects); 18 U.S.C. 1022 (false certification concerning material for the military); 18 U.S.C. 1027 (ERISA); 18 U.S.C. 1542 (passport applications); 18 U.S.C. 1546 (fraud in connection with visas, permits and other documents); 22 U.S.C. 1980 (compensation for loss of commercial fishing vessel or gear); 22 U.S.C. 4221 (American diplomatic personnel); 22 U.S.C. 4222 (presentation of forged documents to United States foreign service personnel); 42 U.S.C. 408 (old age claims); 42 U.S.C. 1320a-7b (Medicare).

⁴⁷⁷ 18 U.S.C. 1001(a).

⁴⁷⁸ *United States v. Castro*, 704 F.3d 125, 139 (3d Cir. 2013) (“To establish a violation of §1001, the government is required to prove each of the following five elements: (1) that the accused made a statement or representation; (2) that the statement or representation was false; (3) that the false statement was made knowingly and willfully; (4) that the statement or representation was material; and (5) that the statement or representation was made in a matter within the jurisdiction of the federal government”); *United States v. Hamilton*, 699 F.3d 356, 362 (4th Cir. 2012); *United States v. Abraham*, 678 F.3d 370, 373 (5th Cir. 2012); *United States v. Geisen*, 612 F.3d 471, 489 (6th Cir. 2010); *United States v. Dinga*, 609 F.3d 904, 907 (7th Cir. 2010).

⁴⁷⁹ *United States v. White Eagle*, 721 F.3d 1108, 1116 (9th Cir. 2013) (“[A] conviction under 18 U.S.C. §1001(a)(2) requires that (1) the defendant had a duty to disclose material information, (2) the defendant falsified, concealed, or (continued...)”).

occasions the courts will simply treat concealment or false documentation as a form of false statement.⁴⁸¹

Section 1001 also imposes a limitation upon an offense that involves matters within the jurisdiction of either the judicial or legislative branch:

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or (2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate. 18 U.S.C. 1001(b),(c).

The defendant must establish his right to the benefits of Section 1001(b)'s judicial limitation exception.⁴⁸² Section 1001(c) establishes additional elements for a false statement offense in a legislative context,⁴⁸³ which the government must establish.

A matter is within the jurisdiction of a federal entity when it involves a matter “confided to the authority of a federal agency or department ... A department or agency has jurisdiction, in this sense, when it has power to exercise authority in a particular situation. Understood in this way, the phrase ‘within the jurisdiction’ merely differentiates the official, authorized functions of an

(...continued)

covered up such a fact by trick, scheme, or fraud, (3) the falsified, concealed, or covered up fact was material, (4) the falsification and/or concealment was knowing and willful, and (5) the material fact was within the jurisdiction of the Executive Branch”); *United States v. Moore*, 446 F.3d 671, 677 (7th Cir. 2006).

⁴⁸⁰ *United States v. McGauley*, 279 F.3d 62, 69 (1st Cir. 2002) (“To establish a violation of 18 U.S.C. 1001, the government must prove that the defendant knowingly and willfully made or used a false writing or document, in relation to a matter with the jurisdiction of the United States government with knowledge of its falsity”); *United States v. Blankenship*, 382 F.3d 1110, 1131-132 (11th Cir. 2004).

⁴⁸¹ *United States v. Boffil-Rivera*, 607 F.3d 736, 740 (11th Cir. 2010) (“To sustain a conviction for violation of 18 U.S.C. section 1001, the government must prove (1) that a statement was made; (2) that it was false; (3) that it was material; (4) that it was made with specific intent; and (5) that it was within the jurisdiction of an agency of the United States.... Falsity under section 1001 can be established by a false representation or by concealment of a material fact”); *United States v. White*, 492 F.3d 380, 396 (6th Cir. 2007) (“Sufficient evidence also supports Defendant White’s conviction for use of a false document. Title 18 U.S.C. §1001(a)(3) prohibits ‘knowingly and willfully mak[ing] or us[ing] any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.’ 18 U.S.C. §1003(a)(3). Here, the government must prove (1) the defendant made a statement; (2) the statement is false or fraudulent; (3) the statement is material; (4) the defendant made the statement knowingly and willfully; and (5) the statement pertained to an activity within the jurisdiction of a federal agency”).

⁴⁸² *United States v. Vreeland*, 684 F.3d 653, 662 (6th Cir. 2012) (“This judicial function exception has three requirements: ‘[The defendant] must show that (1) he was a party to a judicial proceeding, (2) his statements were submitted to a judge or magistrate, and (3) his statements were made in that proceeding’”), quoting, *United States v. McNeil*, 362 F.3d 570, 572 (9th Cir. 2004).

⁴⁸³ *United States v. Horvath*, 492 F.3d 1075, 1077 (9th Cir. 2007); *United States v. Pickett*, 353 F.3d 62, 66-69 (D.C. Cir. 2004).

agency or department from matters peripheral to the business of that body.”⁴⁸⁴ Several courts have held that the phrase contemplates coverage of false statements made to state, local, or private entities but relating to matters that involve federal funds or regulations.⁴⁸⁵ Subsection 1001(b) precludes application of prohibitions in Section 1001(a) to the statements, omissions, or documentation presented to the court by a party in judicial proceedings. This includes statements of indigence filed by a defendant seeking the appoint of counsel,⁴⁸⁶ or by a defendant for a probation officer’s presentence report,⁴⁸⁷ but not statements made by one on supervised release to a parole officer.⁴⁸⁸

Although the offense can only be committed “knowingly and willfully,” the prosecution need not prove that the defendant knew that his conduct involved a “matter within the jurisdiction” of a federal entity⁴⁸⁹ nor that he intended to defraud a federal entity.⁴⁹⁰ It does, however, require the government to show the defendant knew or elected not to know that the statement, omission, or documentation was false and that the defendant presented it with the intent to deceive.⁴⁹¹ The phrase “knowingly and willfully” refers to the circumstances under which the defendant made his statement, omitted a fact he was obliged to disclose, or included with his false documentation,

⁴⁸⁴ *United States v. Rodgers*, 466 U.S. 475, 479 (1984); *United States v. King*, 660 F.3d 1071, 1081 (9th Cir. 2011); *United States v. Jackson*, 608 F.3d 193, 197 (4th Cir. 2010); *United States v. Atalig*, 502 F.3d 1063, 1068 (9th Cir. 2007); *United States v. Blankenship*, 382 F.3d 1110, 1136 (11th Cir. 2004); *United States v. White*, 270 F.3d 356, 363 (6th Cir. 2001).

⁴⁸⁵ *United States v. Ford*, 639 F.3d 718, 720 (6th Cir. 2011)(“Jurisdiction may exist when false statements were made to state or local government agencies receiving federal support or subject to federal regulation”); *United States v. Starnes*, 583 F.3d 196, 208 (3d Cir. 2009)(“Indeed, it is enough that the statement or representation pertain to a matter in which the executive branch has the power to exercise authority.... HUD, an agency within the executive branch, provided the funding for the Donoe project to VIHA and had the power to exercise authority over the project, had it chosen to do so”); *United States v. Taylor*, 582 F.3d 558, 563(5th Cir. 2009)(“The term ‘jurisdiction’ merely incorporates Congress’[s] intent that the statute apply whenever false statements would result in the perversion of the authorized functions of a federal department or agency”); *United States v. White*, 270 F.3d 356, 363 (6th Cir. 2001)(“We have in the past looked to whether the entity to which the statements were made received federal support and/or was subject to federal regulation”); *United States v. Davis*, 8 F.3d 923, 929 (2d Cir. 1993)(“In situations in which a federal agency is overseeing a state agency, it is the mere existence of the federal agency’s supervisory authority that is important to determining jurisdiction”), *contra*, *United States v. Blankenship*, 382 F.3d 1110, 1139, 1141 (11th Cir. 2004)(emphasis in the original) (“The clear, indisputable holding of *Lowe* is that a misrepresentation made to a private company concerning a project that is the subject of a contract between that company and the federal government does *not* constitute a misrepresentation about a matter within the jurisdiction of the federal government.... Because neither *Lowe* nor its central holding has ever been overruled ... it remains good law”).

⁴⁸⁶ *United States v. McNeil*, 362 F.3d 570, 573 (9th Cir. 2004)(but observing that “[s]ubmitting a false CJA-23 form may subject a defendant to criminal liability under other statutes, for example, under 18 U.S.C. 1621, the general statute on perjury, or 18 U.S.C. 1623, which punishes the making of a false material declaration in any proceeding, before, or ancillary to, any court”).

⁴⁸⁷ *United States v. Horvath*, 492 F.3d 1075, 1078-1081 (9th Cir. 2007).

⁴⁸⁸ *United States v. Curtis*, 237 F.3d 598, 605 (6th Cir. 2001).

⁴⁸⁹ *United States v. Yermian*, 468 U.S. 63, 75 (1984); *United States v. Gonzales*, 435 F.3d 64, 72 (1st Cir. 2006).

⁴⁹⁰ *United States v. Gonzales*, 435 F.3d 64, 72 (1st Cir. 2006); *United States v. Starnes*, 583 F.3d 196, 212 n. 8 (3d Cir. 2009).

⁴⁹¹ *United States v. Boffil-Rivera*, 607 F.3d 736, 741 (11th Cir. 2010)(“For purposes of the statute, the word ‘false’ requires an intent to deceive or mislead”); *United States v. Starnes*, 583 F.3d 196, 210 (3d Cir. 2009)(“In general, ‘knowingly’ requires the government to prove that a criminal defendant had ‘knowledge of the facts that constitute the offense ... willfully ... usually requires the government to prove that the defendant acted not merely voluntarily, but with a bad purpose, that is, with knowledge that his conduct was, in some general sense, unlawful”).

that is, “that the defendant knew that his statement was false when he made it or—which amounts in law to the same thing—consciously disregarded or averted his eyes from the likely falsity.”⁴⁹²

Prosecution for a violation of Section 1001 requires proof of materiality, as does conviction for perjury, and the standard is the same: the statement must have a “natural tendency to influence, or be capable of influencing the decisionmaking body to which it is addressed.”⁴⁹³ There is no need to show that the decision maker was in fact diverted or influenced.⁴⁹⁴

Conviction for false statements or false documentation under Section 1001 also requires that the statements or documentation be false, that they not be true.⁴⁹⁵ And the same can be said of the response to a question that is so fundamentally ambiguous that the defendant’s answer cannot be said to be knowingly false.⁴⁹⁶ On the other hand, unlike the perjury provision of Section 1623, “there is no safe harbor for recantation or correction of a prior false statement that violates [Section]1001.”⁴⁹⁷

Prosecutions under subsection 1001(a)(1) for concealment, rather than false statement or false documentation, must also prove the existence of duty or legal obligation not to conceal.⁴⁹⁸

⁴⁹² *United States v. Wu*, 711 F.3d 1, 28 (1st Cir. 2013); see also *United States v. Hsia*, 176 F.3d 716, 721-22 (D.C. Cir. 1999); *United States v. Hoover*, 175 F.3d 564, 571 (7th Cir. 1999).

⁴⁹³ *United States v. King*, 735 F.3d 1098, 1107-108 (9th Cir. 2013); *United States v. Mehanna*, 735 F.3d 32, 54 (1st Cir. 2013); *United States v. Gordon*, 710 F.3d 1124, 1144-145 (10th Cir. 2013); *United States v. Moore*, 708 F.3d 639, 649 (2013); *United States v. Hamilton*, 699 F.3d 356, 362 (4th Cir. 2012); *United States v. Abraham*, 678 F.3d 370, 374-76 (5th Cir. 2012).

⁴⁹⁴ *United States v. Mehanna*, 735 F.3d at 54 (“Where a defendant’s statements are intended to misdirect government investigators, they may satisfy the materiality requirement of [§]1001 even if they stand no chance of accomplishing their objective. This principle makes eminently good sense: it would stand reason on its head to excuse a defendant’s deliberate prevarication merely because his interrogators were a step ahead of him”); *United States v. King*, 735 F.3d at 1108;); *United States v. Moore*, 708 F.3d at 649; *United States v. Hamilton*, 699 F.3d at 362; *United States v. McBane*, 433 F.3d 344, 350 (3d Cir. 2005), quoting, *United States v. Gaudin*, 515 U.S. 506, 512 (1995).

⁴⁹⁵ *United States v. Good*, 326 F.3d 589, 592 (4th Cir. 2003)(“The principle articulated in *Bronston* holds true for convictions under Section 1001 ... We cannot uphold a conviction ... where the alleged statement forming the basis of a violation of Section 1001 is true on its face”); see also *United States v. Mehanna*, 735 F.3d 32, 54 (1st Cir. 2013); *United States v. Castro*, 704 F.3d 125, 139 (3d Cir. 2013).

⁴⁹⁶ *United States v. Culliton*, 328 F.3d 1074, 1078 (9th Cir. 2003); *United States v. Good*, 326 F.3d 589, 592 (4th Cir. 2003); cf., *United States v. Martin*, 369 F.3d 1046, 1060 (8th Cir. 2004); *United States v. Hatch*, 434 U.S. 1, 4-5 (1st Cir. 2006).

⁴⁹⁷ *United States v. Dooley*, 578 F.3d 582, 592 (7th Cir. 2009); *United States v. Stewart*, 433 F.3d 273, 318 (2d Cir. 2006), citing, *United States v. Sebagala*, 256 F.3d 59, 64 (1st Cir. 2001); *United States v. Meuli*, 8 F.3d 1481, 1486-487 (10th Cir. 1993); and *United States v. Fern*, 696 F.2d 1269, 1275 (11th Cir. 1983).

⁴⁹⁸ *United States v. Safavian*, 528 F.3d 957, 964 (D.C. Cir. 2008)(“As Safavian argues and as the government agrees, there must be a legal duty in order for there to be a concealment offense in violation of §1001(a)(1)”); *United States v. Stewart*, 433 F.3d 273, 318-19 (2d Cir. 2006)(“Defendant’s legal duty [as a broker] to be truthful under Section 1001 included a duty to disclose the information regarding the circumstances of Stewart’s December 27th trade.... Trial testimony indicated that the SEC had specifically inquired about [his] knowledge of Stewart’s trades. As a result, it was plausible for the jury to conclude that the SEC’s questioning had triggered [his] duty to disclose and that ample evidence existed that his concealment was material to the investigation ”); *United States v. Moore*, 446 F.3d 671, 678-79 (7th Cir. 2006)(regulatory obligation); *United States v. Gibson*, 409 F.3d 325, 333 (6th Cir. 2005) (“Conviction on a 18 U.S.C. 1001 concealment charge requires a showing that the ‘defendant had a legal duty to disclose the facts at the time he was alleged to have concealed them’”), quoting, *United States v. Curran*, 20 F.3d 560, 566 (3d Cir. 1994).

Obstruction of Justice by “Tip-Off”

Although an individual who obstructs a federal investigation by tipping off the targets of the investigation is likely to incur liability either as a principal under 18 U.S.C. 2 or as an accessory after the fact under 18 U.S.C. 3, there are several federal anti-tip-off statutes like §1510, which prohibits bank officials from notifying suspects that they are under investigation,⁴⁹⁹ and which imposes a similar restriction on insurance company officers and employees.⁵⁰⁰

Subsection 2511(1)(e) proscribes tipping off the targets of federal or state law enforcement wiretaps.⁵⁰¹ A similar prohibition appears in 18 U.S.C. 2232 which also outlaws improper notification in the case of search warrants or Foreign Intelligence Surveillance Act orders.⁵⁰² All three offenses are punishable by imprisonment for not more than five years.⁵⁰³

⁴⁹⁹ “(1) Whoever, being an officer of a financial institution, with the intent to obstruct a judicial proceeding, directly or indirectly notifies any other person about the existence or contents of a subpoena for records of that financial institution, or information that has been furnished to the grand jury in response to that subpoena, shall be fined under this title or imprisoned not more than five years, or both.

“(2) Whoever, being an officer of a financial institution, directly or indirectly notifies—(A) a customer of that financial institution whose records are sought by a grand jury subpoena; or (B) any other person named in that subpoena—about the existence or contents of that subpoena or information that has been furnished to the grand jury in response to that subpoena, shall be fined under this title or imprisoned not more than one year, or both.

“(3) As used in this section—(A) the term ‘an officer of a financial institution’ means an officer, director, partner, employee, agent, or attorney of or for a financial institution; and (B) the term ‘subpoena for records’ means a Federal grand jury subpoena or a Department of Justice subpoena (issued under section 3486 of title 18), for customer records that has been served relating to a violation of, or a conspiracy to violate—(i) section 215, 656, 657, 1005, 1006, 1007, 1014, 1344, 1956, 1957, or chapter 53 of title 31; or (ii) Section 1341 or 1343 affecting a financial institution,” 18 U.S.C. 1510(b).

⁵⁰⁰ “(1) Whoever—(A) acting as, or being, an officer, director, agent or employee of a person engaged in the business of insurance whose activities affect interstate commerce, or (B) is engaged in the business of insurance whose activities affect interstate commerce or is involved (other than as an insured or beneficiary under a policy of insurance) in a transaction relating to the conduct of affairs of such a business—with intent to obstruct a judicial proceeding, directly or indirectly notifies any other person about the existence or contents of a subpoena for records of that person engaged in such business or information that has been furnished to a Federal grand jury in response to that subpoena, shall be fined as provided by this title or imprisoned not more than five years, or both.

“(2) As used in paragraph (1), the term ‘subpoena for records’ means a Federal grand jury subpoena for records that has been served relating to a violation of, or a conspiracy to violate, Section 1033 of this title,” 18 U.S.C. 1510(d).

⁵⁰¹ “(1) Except as otherwise specifically provided in this chapter any person who ... (e) (i) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized by subsections 2511(2)(a)(ii), 2511(2)(b) to (c), 2511(2)(e), 2516, and 2518 of this chapter, (ii) knowing or having reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation, (iii) having obtained or received the information in connection with a criminal investigation, and (iv) with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation ... (4)(a) ... shall be fined under this title or imprisoned not more than five years, or both,” 18 U.S.C. 2511(1)(e), (4)(a).

⁵⁰² “(c) Notice of search or execution of seizure warrant or warrant of arrest in rem.— Whoever, having knowledge that any person authorized to make searches and seizures, or to execute a seizure warrant or warrant of arrest in rem, in order to prevent the authorized seizing or securing of any person or property, gives notice or attempts to give notice in advance of the search, seizure, or execution of a seizure warrant or warrant of arrest in rem, to any person shall be fined under this title or imprisoned not more than five years, or both.

“(d) Notice of certain electronic surveillance.— Whoever, having knowledge that a Federal investigative or law enforcement officer has been authorized or has applied for authorization under chapter 119 to intercept a wire, oral, or electronic communication, in order to obstruct, impede, or prevent such interception, gives notice or attempts to give notice of the possible interception to any person shall be fined under this title or imprisoned not more than five years, or both.

(continued...)

Specific Obstructions

A number of federal statutes proscribe obstruction of specific types of investigations or proceedings in general terms. Their prohibitions may be breached by bribery, deception, violence, or threat; although the limited case law suggests that most are more likely to be violated by corruption or deception than violence. Numbered among them are: 18 U.S.C. 1511 that outlaws obstruction of state illegal gambling business investigations;⁵⁰⁴ 18 U.S.C. 1516 that bans obstruction of a federal audit of an activity involving more than \$100,000 in federal funds;⁵⁰⁵ 18 U.S.C. 1517 that prohibits obstruction of the federal audit of a financial institution;⁵⁰⁶ 18 U.S.C. 1518 that condemns obstruction of federal criminal investigation of possible health care offenses;⁵⁰⁷ 18 U.S.C. 118 that proscribes obstructing federal protection of foreign diplomats and other dignitaries in this country and of personnel in federal facilities overseas;⁵⁰⁸ and 18 U.S.C.

(...continued)

“(e) Foreign intelligence surveillance.—Whoever, having knowledge that a Federal officer has been authorized or has applied for authorization to conduct electronic surveillance under the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801, et seq.), in order to obstruct, impede, or prevent such activity, gives notice or attempts to give notice of the possible activity to any person shall be fined under this title or imprisoned not more than five years, or both,” 18 U.S.C. 2232(c), (d), (e).

⁵⁰³ *Id.*

⁵⁰⁴ “(a) It shall be unlawful for two or more persons to conspire to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business if—(1) one or more of such persons does any act to effect the object of such a conspiracy; (2) one or more of such persons is an official or employee, elected, appointed, or otherwise, of such State or political subdivision; and (3) one or more of such persons conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business. (b) As used in this section—(1) ‘illegal gambling business’ means a gambling business which— (i) is a violation of the law of a State or political subdivision in which it is conducted; (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day. (2) ‘gambling’ includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels, or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein. (3) ‘State’ means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States. . . . (d) Whoever violates this section shall be punished by a fine under this title or imprisonment for not more than five years, or both,” 18 U.S.C. 1511(a), (b), (d).

⁵⁰⁵ 18 U.S.C. 1516 (“(a) Whoever, with intent to deceive or defraud the United States, endeavors to influence, obstruct, or impede a Federal auditor in the performance of official duties relating to a person, entity, or program receiving in excess of \$100,000, directly or indirectly, from the United States in any 1 year period under a contract or subcontract, grant, or cooperative agreement, or relating to any property that is security for a mortgage note that is insured, guaranteed, acquired, or held by the Secretary of Housing and Urban Development pursuant to any Act administered by the Secretary, or relating to any property that is security for a loan that is made or guaranteed under title V of the Housing Act of 1949, shall be fined under this title, or imprisoned not more than 5 years, or both.

“(b) For purposes of this section— (1) the term “Federal auditor” means any person employed on a full- or part-time or contractual basis to perform an audit or a quality assurance inspection for or on behalf of the United States; and (2) the term “in any 1 year period” has the meaning given to the term “in any one-year period” in section 666”).

⁵⁰⁶ 18 U.S.C. 1517 (“Whoever corruptly obstructs or attempts to obstruct any examination of a financial institution by an agency of the United States with jurisdiction to conduct an examination of such financial institution shall be fined under this title, imprisoned not more than 5 years, or both”).

⁵⁰⁷ 18 U.S.C. 1518 (“(a) Whoever willfully prevents, obstructs, misleads, delays or attempts to prevent, obstruct, mislead, or delay the communication of information or records relating to a violation of a Federal health care offense to a criminal investigator shall be fined under this title or imprisoned not more than 5 years, or both. (b) As used in this section the term ‘criminal investigator’ means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations for prosecutions for violations of health care offenses”).

⁵⁰⁸ 18 U.S.C. 118 (“Any person who knowingly and willfully obstructs, resists, or interferes with a Federal law enforcement agent engaged, within the United States, in the performance of the protective functions authorized under (continued...)”).

1521 that proscribes retaliating against federal judges, officers, or employees by subjecting their property to false liens.⁵⁰⁹ The penalty for violating each of the sections other than §118 or §1521 is imprisonment for not more than five years.⁵¹⁰ Section 1521 offenses are punishable by imprisonment for not more than 10 years, and §118 offenses are punishable by imprisonment for not more than one year.⁵¹¹

Several of the human trafficking and sex trafficking statutes found in chapter 77 of title 18 of the United States Code proscribe obstructing an investigation into the possible violation of their provisions.⁵¹² In most instances, obstruction and the underlying offense carry the same penalty.⁵¹³

Influencing Jurors by Writing (18 U.S.C. 1504)

It is a federal crime to communicate in writing with any member of federal grand or trial jury in an attempt to influence the performance of his or her duties.⁵¹⁴ Violations are punishable by imprisonment for not more than 6 months and/or a fine of not more than \$5,000. The section appears to have been prosecuted only infrequently, perhaps in part because of the availability of prosecution under other statutes such as contempt or obstruction of justice.⁵¹⁵

Although the statute suggests that the section does not preclude written requests to appear before the grand jury (“nothing in this section shall be construed to prohibit the communication of a request to appear before the grand jury”), the cases indicate the exception is limited to

(...continued)

section 37 of the State Department Basic Authorities Act of 1956 (232 U.S.C. 2709) or Section 103 of the Diplomatic Security Act (22 U.S.C. 4802) shall be fined under this title, imprisoned not more than 1 year, or both”).

⁵⁰⁹ 18 U.S.C. 1521 (“Whoever files, attempts to file, or conspires to file, in any public record or in any private record which is generally available to the public, any false lien or encumbrance against the real or personal property of an individual described in section 1114, on account of the performance of official duties by that individual, knowing or having reason to know that such lien or encumbrance is false or contains any materially false, fictitious, or fraudulent statement or representation, shall be fined under this title or imprisoned for not more than 10 years, or both”).

⁵¹⁰ 18 U.S.C. 1516, 1517, 1518. Each offense also carries with it liability for a criminal fine of not more than \$250,000, *id.* and 18 U.S.C. 3571.

⁵¹¹ 18 U.S.C. 118, 1521. The maximum fine for an offense under §118 is \$100,000; the maximum for an offense under §1521 is \$250,000, *id.* and 18 U.S.C. 3571.

⁵¹² 18 U.S.C. 1590(b)(trafficking with respect to peonage, slavery, involuntary servitude, or forced labor), for example, provides, “Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be subject to the penalties under subsection (a).” Comparable provisions appear in 18 U.S.C. 1581(peonage), 1583(enticement into slavery), 1584(sale into involuntary servitude), 1591(sex trafficking of children or by force, fraud, or coercion), 1952(unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor), and 1957 (unlawful conduct with respect to immigration documents).

⁵¹³ Punishment for the obstruction component of 18 U.S.C. 1591, however, is imprisonment for not more than 20 years, although the maximum penalty for the underlying offense is imprisonment for life.

⁵¹⁴ 18 U.S.C. 1504 (“Whoever attempts to influence the action or decision of any grand or petit juror of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any written communication, in relation to such issue or matter, shall be fined under this title or imprisoned not more than six months, or both. Nothing in this section shall be construed to prohibit the communication of a request to appear before the grand jury”).

⁵¹⁵ In *United States v. Burkowski*, 435 F.2d 1094, 1104 (7th Cir. 1970), a juror—convicted of contempt for reading outside material and engaging in outside discussion on issues before the jury during the course of the trial—argued unsuccessfully that he should have been tried under the less severe provisions of 18 U.S.C. 1504.

communications forwarded through the court or the prosecutor or to those requested by the grand jury itself.⁵¹⁶

On a practical note, a federal court in Southern District of New York recently explained that, “jury tampering is generally prosecuted under the statute prohibiting influencing a juror generally, 18 U.S.C. 1503, or through contempt statutes.”⁵¹⁷ Faced with one of the few exceptions, the court declared that:

Based upon the plain meaning of the text of 18 U.S.C. 1504, reinforced by relevant judicial interpretations and the doctrine of constitutional avoidance, the court holds that a person violates the statute only when he knowingly attempts to influence the action or decision of a juror upon an issue or matter pending before that juror or pertaining to that juror’s duties by means of written communication made in relation to *a specific case pending before that juror in relation to a point in dispute between the parties before that juror.*⁵¹⁸

Obstruction of Justice as a Sentencing Factor (U.S.S.G. §3C1.1)

Regardless of the offense for which an individual is convicted, his sentence may be enhanced as a consequence of any obstruction of justice for which he is responsible, if committed during the course of the investigation, prosecution, or sentencing for the offense of his conviction.⁵¹⁹ The enhancement may result in an increase in his term of imprisonment by as much as 4 years. The enhancement is the product of the influence of §3C1.1 of the United States Sentencing Guidelines.

Federal sentencing begins with, and is greatly influenced by, the calculation of the applicable sentencing range under the Sentencing Guidelines.⁵²⁰ The Guidelines assign every federal crime a

⁵¹⁶ *In re New Haven Grand Jury*, 604 F.Supp. 453, 457 (D.Conn. 1985); *United States v. Smyth*, 104 F.Supp. 283, 299 (N.D.Cal. 1952).

⁵¹⁷ *United States v. Heicklen*, 858 F.Supp.2d 256, 272 (S.D.N.Y. 2012).

⁵¹⁸ *Id.* at 275 (emphasis in the original).

⁵¹⁹ If the defendant is convicted of an obstruction of justice offense, the enhancement only applies “if a significant further obstruction occurred during the investigation, prosecution, or sentencing of the obstruction offense itself (e.g., if the defendant threatened a witness during the course of the prosecution for the obstruction offense),” U.S.S.G. §3C1.1, cmt., app. n. 7.

⁵²⁰ *Gall v. United States*, 552 U.S. 38, 49-51 (2007) (“[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.... [A]fter giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the [18 U.S.C.] §3553(a) factors to determine whether they support the sentence requested by a party... If he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one. After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.... Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the §3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range. Assuming that the district court’s sentencing decision is procedurally sound, the appellate court should then consider (continued...)”)

base offense level to which they add levels for various aggravating factors. Obstruction of justice is one of those factors. Each of the final 43 offense levels is assigned to one of six sentencing ranges, depending on the extent of the defendant's past crime history. For example, a final offense level of 15 means a sentencing range of from 18 to 24 months in prison for a first time offender (criminal history category I) and from 41 to 51 months for a defendant with a very extensive criminal record (criminal history category VI).⁵²¹ Two levels higher, at a final offense level of 17, the range for first time offenders is 24 to 30 months; and 51 to 63 months for the defendant with a very extensive prior record.⁵²² The impact of a 2-level increase spans from no impact at the lowest final offense levels to a difference of an additional 68 months at the highest levels.⁵²³

Section 3C1.1 instructs sentencing courts to add 2 offense levels in the case of an obstruction of justice:

If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (Bi) a closely related offense, increase the offense level by 2 levels. U.S.S.G. §3C1.1.

The accompanying commentary explains that the section “is not intended to punish a defendant for the exercise of a constitutional right.”⁵²⁴ More specifically, a “defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision.”⁵²⁵ Early on, the Supreme Court made it clear that an individual's sentence might be enhanced under U.S.S.G §3C1.1, if he committed perjury during the course of his trial.⁵²⁶ Moreover, the examples provided elsewhere in the section's commentary and the cases applying the section confirm that it reaches perjurious statements in a number of judicial contexts and to false statements in a number of others. The examples in the section's commentary cover conduct:

(B) committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding if such perjury pertains to conduct that forms the basis of the offense of conviction;

(...continued)

the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the §3553(a) factors, on a whole, justify the extent of the variance”).

⁵²¹ U.S.S.G. ch. 5 Sentencing Table.

⁵²² *Id.*

⁵²³ *Id.*

⁵²⁴ U.S.S.G. §3C1.1, cmt., app. n. 2.

⁵²⁵ *Id.*

⁵²⁶ *United States v. Dunnigan*, 507 U.S. 87, 98 (1993); see also *United States v. Tuma*, 738 F.3d 681, 694 (5th Cir. 2013) (“[A] criminal defendant cannot argue that increasing his sentence based on his perjury interfered with his right to testify because a defendant's right to testify does not include a right to commit perjury. Tuma acknowledges this precedent, briefly argues it was wrongly decided, and writes to preserve the issue. *Dunnigan* forecloses Tuma's argument”).

(F) providing materially false information to a judge or magistrate;

(G) providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;

(H) providing materially false information to a probation officer in respect to a presentence or other investigation for the court; [and]

(I) other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (e.g., 18 U.S.C. §§1510, 1511).⁵²⁷

The courts have concluded that an enhancement under the section is appropriate, for instance, when a defendant has (1) given preposterous or outrageous, perjurious testimony during his own trial;⁵²⁸ (2) given perjurious testimony at his suppression hearing; (3) given perjurious, exculpatory testimony at the separate trial of his girlfriend;⁵²⁹ (4) made false statements in connection with a probation officer's bail report;⁵³⁰ (5) made false statements to the court in an attempt to change his guilty plea;⁵³¹ (6) made false statements to federal investigators;⁵³² and (7) made false statements to state investigators relating to conduct for which the defendant was ultimately convicted.⁵³³

When perjury provides the basis for an enhancement under the section, the court must find that the defendant willfully testified falsely with respect to a material matter.⁵³⁴ When based upon a false statement not under oath, the statement must still be material, that is, it must “tend to influence or affect the issue under determination.”⁵³⁵ Even then, false identification at the time of

⁵²⁷ U.S.S.G. §3C1.1, cmt., app. n. 4(a).

⁵²⁸ *United States v. Dinga*, 609 F.3d 904, 909 (7th Cir. 2010); *United States v. Watkins*, 691 F.3d 841, 853-54 (6th Cir. 2012).

⁵²⁹ *United States v. Quintero*, 618 F.3d 746, 752-53 (7th Cir. 2010); see also *United States v. Quirion*, 714 F.3d 77, 80-81 (1st Cir. 2013)(false statements to protect a girlfriend).

⁵³⁰ *United States v. Bedolla-Zavala*, 611 F.3d 392, 395 (7th Cir. 2010).

⁵³¹ *United States v. Alvarado*, 615 F.3d 916, 922-23 (8th Cir. 2010); *United States v. Greig*, 717 F.3d 212, 220-21 (1st Cir. 2013).

⁵³² *United States v. Jones*, 612 F.3d 1040, 1046-47 (8th Cir. 2010).

⁵³³ *United States v. Alexander*, 602 F.3d 639, 642-43 & n.4 (5th Cir. 2010)(“The First, Second, Third, Forth, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits have all held that obstruction of a state investigation based on the same facts as the eventual federal conviction qualifies for enhancement under U.S.S.G. §3C1.1.... Only the Seventh Circuit has held the obstruction of a state proceeding does not qualify ...”).

⁵³⁴ *United States v. Riney*, 742 F.3d 785, 790 (7th Cir. 2014)(“To apply the enhancement based on perjury, the district court should make a finding as to all the factual predicates necessary for a finding of perjury: false testimony, materiality, and willful intent”), citing *United States v. Dunnigan*, 507 U.S. 87, 95 (1993); *United States v. Simpson*, 741 F.3d 539, 555 (5th Cir. 2014); *United States v. Kahre*, 737 F.3d 554, 582-83 (9th Cir. 2013); but see *United States v. Parker*, 716 F.3d 999, 1012 (7th Cir. 2013)(enhancement inappropriate where neither the court nor appellate counsel could identify a willfully false statement and the trial court had noted that “Ms. Parker may even believe herself that she didn’t negotiate these checks”); *United States v. Macias-Farias*, 706 F.3d 775, 782 (6th Cir. 2013)(enhancement inappropriate where the sentencing court failed to identify the statements it found perjurious).

⁵³⁵ U.S.S.G. §3C1.1, cmt., app. n. 6; *United States v. Greig*, 717 F.3d 212, 222 (1st Cir. 2013); *United States v. McKinney*, 686 F.3d 432, 437-38 (7th Cir. 2012); see also U.S.S.G. §3C1.1, cmt., app. n. 5(C)(“Examples of Conduct Ordinarily Not Covered—... The following is a non-exhaustive list of examples of the types of conduct to which this application note applies ... (C) providing incomplete or misleading information, amounting to a material falsehood, in respect to a presentencing investigation”); *United States v. Perez-Solis*, 709 F.3d 453, 470 (5th Cir. 2013)(“The sentencing court need not expressly find that the false testimony concerned a material matter; it is enough that materiality is obvious”).

arrest only warrants a sentencing enhancement under the section when the deception significantly hinders the investigation or prosecution.⁵³⁶

The commentary accompanying the section also states that the enhancement may be warranted when the defendant threatens or otherwise tampers with a victim, witness, or juror;⁵³⁷ submits false documentations;⁵³⁸ destroys evidence;⁵³⁹ flees (in some cases);⁵⁴⁰ or engages in any other conduct that constitutes an obstruction of justice under the criminal law provisions of title 18 of the United States Code.⁵⁴¹ By definition, however, the enhancement is only available when the

⁵³⁶ U.S.S.G. §3C1.1, cmt., app. n. 5(a); *United States v. Williams*, 709 F.3d 1183, 1186 (6th Cir. 2013) (“Thus, for the district court to determine that Williams’ alias was ‘material,’ the court first had to identify the issues that the magistrate judge decided and then determine whether Williams’s alias had any tendency to influence the magistrate judge’s decision on those issues. . . . The record thus provides no basis to find that Williams’s false identity had any tendency to affect the court’s decision whether to appoint counsel for Williams. The second issue that the magistrate judge determined was that DEA agents had probable cause to arrest Williams for possessing oxycodone without intent to distribute . . . That Williams identified himself as Fordham, therefore, made no difference to this determination either”).

⁵³⁷ U.S.S.G. §3C1.1, cmt., app. n. 4(A), (K) (“Examples of Covered Conduct.—The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies: (A) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so; . . . (K) threatening the victim of the offense in an attempt to prevent the victim from reporting the conduct constituting the offense of conviction”); *United States v. Greco*, 734 F.3d 441, 448-49 (6th Cir. 2013)(enhancement appropriate where the defendant encouraged the minor witness to lie to authorities); *United States v. Hutterer*, 706 F.3d 921, 925 (11th Cir. 2013)(enhancement appropriate for threatening potential witness); *United States v. McKeighan*, 685 F.3d 956, 975-76 (10th Cir. 2012)(induced a witness to create false evidence).

⁵³⁸ U.S.S.G. §3C1.1, cmt., app. n. 4(C) (“Examples of Covered Conduct.—The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies: . . . (C) producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding”); cf., *United States v. Batchu*, 724 F.3d 1, 27 (1st Cir. 2013).

⁵³⁹ U.S.S.G. §3C1.1, cmt., app. n. 4(D) (“Examples of Covered Conduct.—The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies: . . . (D) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it results in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender”); *United States v. Greco*, 734 F.3d 441, 448-49 (6th Cir. 2013)(altering and concealing evidentiary documents); *United States v. King*, 604 F.3d 125, 141 (3d Cir. 2010)(destruction of evidence-containing computer hard drives).

⁵⁴⁰ U.S.S.G. §3C1.1, cmt., app. n. 4(E) (“Examples of Covered Conduct.—The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies: . . . (E) escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding”); but see U.S.S.G. §3C1.1, cmt., app. n. 5(D) (“Examples of Conduct Not Covered. . . The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies: . . . (D) avoiding or fleeing from arrest”); *United States v. Nduribe*, 703 F.3d 1049, 1051-53 (7th Cir. 2013)(discussing cases endeavoring to distinguish the two statements in the commentary); *United States v. Manning*, 704 F.3d 584, 587 (9th Cir. 2012) (“In addition to making false statements to [Officer] Stranieri, Manning both fled to Mexico while on pretrial release and failed to appear at his revocation hearing, each of which qualifies as obstruction of justice”).

⁵⁴¹ U.S.S.G. §3C1.1, cmt., app. n. 4(I) (“Examples of Covered Conduct.—The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies: . . . (E) other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (e.g., 18 U.S.C. §§1510, 1511”); see *United States v. Cheek*, 740 F.3d 440, 453-54 (7th Cir. 2014)(enhancement appropriate for efforts to influence a witness’ testimony through her daughter); *United States v. Aldawsari*, 740 F.3d 1015, 1021 (5th Cir. 2014)(enhancement appropriate where the defendant feigned mental illness to avoid trial); *United States v. Dufresne*, 698 F.3d 663, 665-66 (8th Cir. 2012)(concealing forfeitable assets); *United States v. Wahlstrom*, 588 F.3d 538, 543-44 (8th Cir. 2009)(enhancement appropriate for efforts to arrange the murder of the prosecutor’s wife).

obstruction occurs “during the course of the investigation, prosecution, or sentencing of the instance offense.”⁵⁴²

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⁵⁴² *United States v. Greco*, 734 F.3d 441, 448-49 (6th Cir. 2013)(quoting U.S.S.G. §3C1.1)(prior to the investigation); *United States v. Galaviz*, 687 F.3d 1042, 1043 (8th Cir. 2012)(unrelated to the crime of conviction); *United States v. Williams*, 693 F.3d 1067, 1076 (2012)(same).