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Attempt: An Abridged Overview of Federal Criminal Law

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April 6, 2015

Congressional Research Service
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www.crs.gov
R42002

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

It is not a crime to attempt to commit most federal offenses. Unlike state law, federal law has no generally applicable crime of attempt. Congress, however, has outlawed the attempt to commit a substantial number of federal crimes on an individual basis. In doing so, it has proscribed the attempt, set its punishment, and left to the federal courts the task of further developing the law in the area.

The courts have identified two elements in the crime of attempt: an intent to commit the underlying substantive offense and some substantial step towards that end. The point at which a step may be substantial is not easily discerned; but it seems that the more serious and reprehensible the substantive offense, the less substantial the step need be. Ordinarily, the federal courts accept neither impossibility nor abandonment as an effective defense to a charge of attempt. Attempt and the substantive offense carry the same penalties in most instances.

A defendant may not be convicted of both the substantive offense and the attempt to commit it. Commission of the substantive offense, however, is neither a prerequisite for, nor a defense against, an attempt conviction.

Whether a defendant may be guilty of an attempt to attempt to commit a federal offense is often a matter of statutory construction. Attempts to conspire and attempts to aid and abet generally present less perplexing questions.

This is an abridged version of CRS Report R42001, *Attempt: An Overview of Federal Criminal Law*, by name redacted, without the footnotes, attributions, citations to authority, or appendix found in the longer report.

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Introduction

Attempt is a crime of general application in every state in the Union, and is largely defined by statute in most. The same cannot be said of federal law. There is no general applicable federal attempt statute. In fact, it is not a federal crime to attempt to commit most federal offenses. Here and there, Congress has made a separate crime of conduct that might otherwise have been considered attempt. Possession of counterfeiting equipment and solicitation of a bribe are two examples that come to mind. More often, Congress has outlawed the attempt to commit a particular crime, such as attempted murder, or the attempt to commit one of a particular block of crimes, such as the attempt to violate the controlled substance laws. In those instances, the statute simply outlaws attempt, sets the penalties, and implicitly delegates to the courts the task of developing the federal law of attempt on a case-by-case basis. Over the years, proposals have surfaced that would establish attempt as a federal crime of general application and in some instances would codify federal common law of attempt. Thus far, however, Congress has preferred to expand the number of federal attempt offenses on a much more selective basis.

Background

Attempt was not recognized as a crime of general application until the 19th century. Before then, attempt had evolved as part of the common law development of a few other specific offenses. The vagaries of these individual threads frustrated early efforts to weave them into a cohesive body of law. At mid-20th century, the Model Penal Code suggested a basic framework that has greatly influenced the development of both state and federal law.

The Model Penal Code grouped attempt with conspiracy and solicitation as "inchoate" crimes of general application. It addressed a number of questions that had until then divided commentators, courts, and legislators.

A majority of the states use the Model Penal Code approach as a guide, but deviate with some regularity. The same might be said of the approach of the National Commission established to recommend revision of federal criminal law shortly after the Model Penal Code was approved. The National Commission recommended a revision of title 18 of the United States Code that included a series of "offenses of general applicability"—attempt, facilitation, solicitation, conspiracy, and regulatory offenses.

In spite of efforts that persisted for more than a decade, Congress never enacted the National Commission's recommended revision of title 18. It did, however, continue to outlaw a growing number of attempts to commit specific federal offenses. In doing so, it rarely did more than outlaw an attempt to commit a particular substantive crime and set its punishment. Beyond that, development of the federal law of attempt has been the work of the federal courts.

Elements

Attempt may once have required little more than an evil heart. That time is long gone. The Model Penal Code defined attempt as the intent required of the predicate offense coupled with a substantial step: "A person is guilty of an attempt to commit a crime, if acting with the kind of culpability otherwise required for commission of the crime, he ... purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." The Model Penal Code then provided several examples of what might constitute a

"substantial step"—lying in wait, luring the victim, gathering the necessary implements to commit the offense, and the like.

The National Commission recommended a similar definition: "A person is guilty of criminal attempt if, acting with the kind of culpability otherwise required for commission of a crime, he intentionally engages in conduct which, in fact, constitutes a substantial step toward commission of the crime." Rather than mention the type of conduct that might constitute a substantial step, the Commission defined it: "A substantial step is any conduct which is strongly corroborative of the firmness of the actor's intent to complete the commission of the crime."

Most of the states follow the same path and define attempt as intent coupled to an overt act or some substantial step towards the completion of the substantive offense. Only rarely does a state include examples of substantial step conduct.

Intent and a Substantial Step: The federal courts are in accord and have said, "As was true at common law, the mere intent to violate a federal criminal statute is not punishable as an attempt unless it is also accompanied by significant conduct," that is, unless accompanied by "an overt act qualifying as a substantial step toward completion" of the underlying offense.

The courts seem to have encountered little difficulty in identifying the requisite intent standard. In fact, they rarely do more than note that the defendant must be shown to have intended to commit the underlying offenses. What constitutes a substantial step is a little more difficult to discern. It is said that a substantial step is more than mere preparation. A substantial step is action strongly or unequivocally corroborative of the individual's intent to commit the underlying offense. It is action which if uninterrupted will result in the commission of that offense, although it need not be the penultimate act necessary for completion of the underlying offense. Furthermore, the point at which preliminary action becomes a substantial step is fact specific; action that constitutes a substantial step under some circumstances and with respect to some underlying offenses may not qualify under other circumstances and with respect to other offenses.

It is difficult to read the cases and not find that the views of Oliver Wendell Holmes continue to hold sway: the line between mere preparation and attempt is drawn where the shadow of the substantive offense begins. The line between preparation and attempt is closest to preparation where the harm and the opprobrium associated with the predicate offense are greatest.

Since conviction for attempt does not require commission of the predicate offense, conviction for attempt does not necessitate proof of every element of the predicate offense, or any element of the predicate offense for that matter. Recall that the only elements of the crime of attempt are intent to commit the predicate offense and a substantial step in that direction. Nevertheless, a court will sometimes demand proof of one or more of the elements of a predicate offense in order to avoid sweeping application of an attempt provision. For instance, the Third Circuit recently held that "acting 'under color of official right' is a required element of an extortion Hobbs Act offense, inchoate or substantive," apparently for that very reason.

Defenses

Impossibility: Defendants charged with attempt have often offered one of two defenses—impossibility and abandonment. Rarely have they prevailed. The defense of impossibility is a defense of mistake, either a mistake of law or a mistake of fact. Legal impossibility exists when "the actions which the defendant performs or sets in motion, even if fully carried out as he desires, would not constitute a crime. The traditional view is that legal impossibility is a defense to the charge of attempt – that is, if the competed offense would not be a crime, neither is a prosecution for attempt permitted."

Factual impossibility exists when "the objective of the defendant is proscribed by criminal law but a circumstance unknown to the actor prevents him from bringing about that objective." Since the completed offense would be a crime if circumstances were as the defendant believed them to be, prosecution for attempt is traditionally permitted.

Unfortunately, as the courts have observed, "the distinction between legal impossibility and factual impossibility [is] elusive." Moreover, "the distinction ... is largely a matter of semantics, for every case of legal impossibility can reasonably be characterized as a factual impossibility." Thus, shooting a stuffed deer when intending to shoot a deer out of season is offered as an example of legal impossibility. Yet, shooting into the pillows of an empty bed when intending to kill its presumed occupant is considered an example of factual impossibility.

The Model Penal Code avoided the problem by defining attempt to include instances when the defendant acted with the intent to commit the predicate offense and "engage[d] in conduct that would constitute the crime if the attendant circumstances were as he believe[d] them to be." Under the National Commission's Final Report, "[f]actual or legal impossibility of committing the crime is not a defense if the crime could have been committed had the attendant circumstances been as the actor believed them to be." Several states have also specifically refused to recognize an impossibility defense of any kind.

The federal courts have been a bit more cautious. They have sometimes conceded the possible vitality of legal impossibility as a defense, but generally have judged the cases before them to involve no more than unavailing factual impossibility. In a few instances, they have found it unnecessary to enter the quagmire, and concluded instead that Congress intended to eliminate legal impossibility with respect to attempts to commit a particular crime.

Abandonment: The Model Penal Code recognized an abandonment or renunciation defense. A defendant, however, could not claim the defense if his withdrawal was merely a postponement or was occasioned by the appearance of circumstances that made success less likely. The revised federal criminal code recommended by the National Commission contained similar provisions. Some states recognize an abandonment or renunciation defense; the federal courts do not.

Admittedly, a defendant cannot be charged with attempt if he has abandoned his pursuit of the substantive offense at the mere preparation stage. Yet, this is for want of an element of the offense of attempt—a substantial step—rather than because of the availability of an affirmative abandonment defense. Although the federal courts have recognized an affirmative voluntary abandonment defense in the case of conspiracy, the other principal inchoate offense, they have declined to recognize a comparable defense to a charge of attempt.

Sentencing

The Model Penal Code and the National Commission's Final Report both imposed the same sanctions for attempt as for the predicate offense as a general rule. However, both set the penalties for the most serious offenses at a class below that of the predicate offense, and both permitted the sentencing court to impose a reduced sentence in cases when the attempt failed to come dangerously close to the attempted predicate offense. The states set the penalties for attempt in one of two ways. Some set sanctions at a fraction of, or a class below, that of the substantive offense, with exceptions for specific offenses in some instances; others set the penalty at the same level as the crime attempted, again with exceptions for particular offenses in some states.

Most federal attempt crimes carry the same penalties as the substantive offense. The Sentencing Guidelines, which greatly influence federal sentencing beneath the maximum penalties set by statute, reflect the equivalent sentencing prospective. Except for certain terrorism, drug

trafficking, assault, and tampering offenses, however, the Guidelines recommend slightly lower sentences for defendants who have yet to take all the steps required of them for commission of the predicate offense.

Relation to Other Offenses

The relation of attempt to the predicate offense is another of the interesting features of the law of attempt. It raises those questions which the Model Penal Code and the National Commission sought to address. May a defendant be charged with attempt even if he has not completed the underlying offense? May a defendant be charged with attempt even if he has also committed the underlying offense? May a defendant be convicted for both attempt and commission of the underlying offense? May a defendant be charged with attempting to attempt an offense? May a defendant be charged with conspiracy to attempt or attempt to conspire? May a defendant be charged with aiding and abetting an attempt or with attempting to aid and abet?

Relation to the Predicate Offense: A defendant need not commit the predicate offense to be guilty of attempt. On the other hand, some 19th century courts held that a defendant could not be convicted of attempt if the evidence indicated that he had in fact committed the predicate offense. This is no longer the case in federal court—if it ever was. In federal law, "[n]either common sense nor precedent supports success as a defense to a charge of attempt."

The Double Jeopardy Clause ordinarily precludes conviction for both the substantive offense and the attempt to commit it. The clause prohibits both dual prosecutions and dual punishment for the same offense. Punishment for both a principal and a lesser included offense constitutes such dual punishment, and attempt ordinarily constitutes a lesser included offense of the substantive crime.

Instances where the federal law literally appears to create an attempt to attempt offense present an intriguing question of interpretation. Occasionally, a federal statute will call for equivalent punishment for attempt to commit any of a series of offenses proscribed in other statutes, even though the other statutes already proscribe attempt. For example, 18 U.S.C. 1349 declares that any attempt to violate any of the provisions of chapter 63 of title 18 of the United States Code "shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt." Within chapter 63 are sections that make it a crime to attempt to commit bank fraud, health care fraud, and securities fraud. There may be some dispute over whether provisions like those of Section 1349 are intended to outlaw attempts to commit an attempt or simply to reiterate a determination to punish equally the substantive offenses and attempts to commit them.

Relation to Other General Provisions

Conspiracy: The Model Penal Code and National Commission resolved attempt to attempt and conspiracy to attempt questions by banning dual application. Crimes of general application would not have applied to other crimes of general application. A few states have comparable provisions. The federal code does not. The attempting to conspire or conspiring to attempt questions do not offer as many issues of unsettled interpretation as the attempt to attempt questions, for several reasons. First, the courts have had more occasion to address them. For instance, it is already clearly established that a defendant may be simultaneously prosecuted for conspiracy to commit and for attempt to commit the same substantive offense. Second, as a particular matter, conspiracies to attempt a particular crime are relatively uncommon; most individuals conspire to accomplish, not to attempt.

Third, in a sense, attempting to conspire is already a separate crime, or alternatively, is a separate basis for criminal liability. Solicitation is essentially an invitation to conspire, and solicitation to commit a crime of violence is a separate federal offense. Moreover, attempts that take the form of counseling, commanding, inducing, or procuring another to commit a crime is already a separate basis for criminal liability.

Fourth, a component of the general conspiracy statute allows simultaneous prosecution of conspiracy and a substantive offense without having to addressing the conspire to attempt quandary. The conspiracy statute outlaws two kinds of conspiracies: conspiracy to violate a federal criminal statute and conspiracy to defraud the United States. Conspiracy to defraud the United States is a separate crime, one that need not otherwise involve the violation of a federal criminal statute. Consequently, when attempt or words of attempt appear as elements in a substantive criminal provision, conspiracy to attempt issues can be avoided by recourse to a conspiracy to defraud charge. For example, the principal federal bribery statute outlaws attempted public corruption. The offense occurs though no tainted official act has been performed or foregone. It is enough that the official has sought or been offered a bribe with the intent of corrupting the performance of his duties. Bribery conspiracy charges appear generally to have been prosecuted, along with bribery, as conspiracy to defraud rather than conspiracy to violate the bribery statute.

Aiding and Abetting: Unlike attempt, aiding and abetting is not a separate offense; it is an alternative basis for liability for the substantive offense. Anyone who aids, abets, counsels, commands, induces, or procures the commission of a federal crime by another is as guilty as if he committed it himself. Aiding and abetting requires proof of intentional assistance in the commission of a crime by another. When attempt is a federal crime, the cases suggest that a defendant may be punished for aiding and abetting the attempt and that a defendant may be punished by attempting to aid and abet the substantive offense.

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