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Legal Sidebar

Overview of the Indictment of Former President Trump Related to the 2020 Election

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On August 1, 2023, Special Counsel Jack Smith announced that former President Trump had been indicted by a federal grand jury in the District of Columbia. The four-count indictment alleges that the former President participated in several criminal conspiracies:

- "A conspiracy to defraud the United States by using dishonesty, fraud, and deceit to impair, obstruct, and defeat the lawful federal government function by which the results of the presidential election are collected, counted, and certified by the federal government, in violation of 18 U.S.C. § 371";
- "A conspiracy to corruptly obstruct and impede the January 6 congressional proceeding at which the collected results of the presidential election are counted and certified ... in violation of 18 U.S.C. § 1512(k)"; and
- "A conspiracy against the right to vote and to have one's vote counted, in violation of 18 U.S.C. § 241."

The indictment also alleges that the former President "attempted to, and did, corruptly obstruct and impede ... the certification of the electoral vote" in violation of 18 U.S.C. §§ 2 and 1512(c)(2). This is the third criminal indictment of former President Trump. It follows a state indictment connected to an investigation by the Manhattan District Attorney's Office into alleged payments made during the final weeks of the 2016 presidential election, and a separate federal indictment stemming from a federal grand jury investigation in Florida related to the alleged unlawful retention of national security information (discussed in this CRS product). This Legal Sidebar provides an overview of the August 1, 2023, indictment ("the Indictment"), describing general indictment procedures before summarizing the federal statutes included in the Indictment.

Legal Background on Indictments

With some exceptions, the Fifth Amendment and Rule 7 of the Federal Rules of Criminal Procedure require an indictment to prosecute someone for a federal felony (that is, an offense punishable by more than one year of imprisonment). Indictments are formal charges obtained via a grand jury, a group of citizens summoned by a court to determine—generally, in secret—whether "enough evidence exists to

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charge [a] person with a crime." Courts sometimes describe a grand jury as serving both a "sword" function through its investigative powers (such as compelling witnesses to testify) and a "shield" function in "insuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance." A federal prosecutor "ordinarily brings matters to the attention of the grand jury and gathers the evidence required for the jury's consideration." In general, the federal prosecutor also examines witnesses, summarizes evidence, and "advises the lay jury on the applicable law." An indictment requires that twelve or more jurors agree by a vote that there is probable cause to believe that the person to be indicted committed a crime. Exact formulations vary, but the Supreme Court has characterized the probable-cause standard as "the kind of 'fair probability' on which 'reasonable and prudent'" people act. Probable cause is a higher standard than "reasonable suspicion" but does not require proof that something is "more likely true than false." The federal prosecutor decides whether or not to sign an indictment and "to proceed with prosecution."

Statutes Identified in the Indictment

Obstruction of Congressional Proceeding: 18 U.S.C. §§ 2, 1512(c)(2), 1512(k)

The Indictment alleges that former President Trump violated 18 U.S.C. § 1512(c)(2), an obstruction-of-justice provision that authorizes fines and up to 20 years of imprisonment. The Indictment also charges the former President with conspiring to violate Section 1512(c)(2) in violation of Section 1512(k) and attempting to do so in violation of 18 U.S.C. § 2.

Section 1512(c)(2) makes it a crime to "corruptly ... otherwise obstruct[], influence[], or impede[] any official proceeding, or attempt[] to do so." Federal prosecutors have used § 1512(c)(2) to charge individuals for conduct such as falsifying evidence to influence a federal grand jury investigation and tipping off the target of a grand jury proceeding about an undercover operation. Numerous individuals involved in the unrest at the Capitol on January 6, 2021, have also been charged under the provision in the same jurisdiction where the Indictment has been filed. In one such case, *United States v. Fischer*, a split D.C. Circuit panel held that Section 1512(c)(2) "encompasses all forms of obstructive conduct," including "violent efforts to stop Congress from certifying the results of the 2020 presidential election."

To prove a § 1512(c)(2) violation, prosecutors must establish that the defendant engaged in one of the proscribed acts, that is, that he obstructed, influenced, impeded, or attempted to do so. The *Fischer* court rejected the argument that § 1512(c)(2) reaches only obstructive conduct related to evidence impairment. In reaching that conclusion, the court emphasized the subsection's relationship to § 1512(c)(1)—another subsection of the same statute that focuses specifically on certain alteration, destruction, mutilation, or concealment of documents or other objects "with the intent to impair [their] integrity or availability for use in an official proceeding." The court determined that § 1512(c)(2)'s use of the word "otherwise" before its list of prohibited acts means that it "applies to all forms of corrupt obstruction of an official proceeding, other than the conduct that is already covered by § 1512(c)(1)."

Second, federal prosecutors must establish that the obstruction or other proscribed conduct was in relation to an official proceeding. The *Fischer* court concluded that the Electoral College count qualifies. The court explained that the relevant statutory definition of "official proceeding" expressly includes "a proceeding before the Congress." Although the defendants in *Fischer* contended that only congressional proceedings involving "investigations and evidence" are covered, the court disagreed based on the plain meaning of "proceeding" and the nature of the vote certification.

Third, § 1512(c)(2) requires proof that the defendant acted "corruptly." This intent element may be complicated by the split opinion in *Fischer*. Judge Pan, who authored the lead opinion in the case, declined to adopt "any particular definition of 'corruptly'" but considered "three candidates:"

1. wrongful, immoral, depraved, or evil;
2. with corrupt purpose; and
3. "voluntarily and intentionally to bring about either an unlawful result or a lawful result by some unlawful method, with a hope or expectation of either financial gain or other benefit to oneself or a benefit of another person."

According to Judge Pan, "[u]nder all those formulations, 'corrupt' intent exists at least when an obstructive action is independently unlawful," and the third definition requires an additional element of hope or expectation of personal benefit to oneself or another. Judge Pan concluded that the alleged conduct in *Fischer*—"assaulting law enforcement officers while participating in the Capitol riot" with the intent of "helping their preferred candidate overturn the election results"—would have satisfied any of the three definitions. In a concurring opinion, Judge Walker disagreed with Judge Pan's decision not to define "corruptly," because the combination of "a broad act element *and* an even broader mental state" would leave § 1512(c)(2) with a "'breathtaking' scope." Judge Walker would have "give[n] 'corruptly' its long-standing meaning" of "an intent to procure an unlawful benefit either for himself or for some other person." In a dissenting opinion, Judge Katsas disputed the various formulations of "corruptly" articulated in the lead and concurring opinions, calling the term a "broad and vague adverb" without "meaningful limits" and arguing that Congress intended to cabin the statute through a narrow interpretation of the "obstruct[], influence[], or impede[]" elements.

Although unaddressed in *Fischer*, several federal appellate courts have concluded that § 1512(c)(2) also contains a nexus requirement, meaning that the charged conduct must have the "'natural and probable effect of interfering with' an official proceeding" and that the accused must know it was likely his actions would affect "a particular proceeding." A number of opinions from the U.S. District Court for the District of Columbia predating *Fischer* have concluded that § 1512(c)(2) contains a nexus requirement, including some that the *Fischer* court described in passing as "thorough and persuasive."

On May 23, 2023, the D.C. Circuit issued an order rejecting a motion for rehearing in *Fischer*. At least one co-defendant in *Fischer* is seeking certiorari from the Supreme Court.

Conspiracy, 18 U.S.C. § 371

The Indictment further alleges that former President Trump violated 18 U.S.C. § 371, a federal conspiracy statute that authorizes fines and up to five years of imprisonment. Exact formulations of the statute's elements vary, but ordinarily to prove a § 371 violation, federal prosecutors first need to establish an "agreement between two or more persons to pursue an unlawful objective." The agreement may be tacit or explicit. The government does not need to show that the conspirators agreed on all "details of their criminal scheme," so long as they decided on the "essential nature" of it. Given the inherently secretive nature of conspiracies, "direct evidence of the crime is frequently difficult to obtain." As such, prosecutors may instead rely on circumstantial evidence to establish the existence of an unlawful agreement. Such evidence could include, among other things, "inferences from the conduct of the alleged participants," the "joint appearance of defendants at transactions and negotiations in furtherance of the conspiracy," and other evidence showing "unity of purpose" between conspirators.

Second, the government must prove that the agreement was to either "commit a specific offense," or—as alleged in the Indictment—to "defraud the United States." In this context, the phrase "defraud the United States" reaches "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government." For § 371 purposes, conspiracies to "defraud" generally involve

"deceit, craft or trickery" or other dishonest means, but financial loss is not required. Rather, as one federal appellate court put it, § 371 "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."

Third, § 371 requires proof that the defendant had "knowledge of the conspiratorial purpose." As one federal appellate court has explained, this ordinarily requires the government to show that "the defendant knew of his connection to the charged conspiracy." This element does not require proof "that the conspirators were aware of the criminality of their objective," but merely "that the defendant was aware of 'the unlawful object toward which the agreement [was] directed.'"

Fourth, prosecutors must demonstrate that a "member of the conspiracy commit[ted] 'at least one overt act ... in furtherance of the conspiracy.'" An overt act is the performance of "[a]n outward, physical manifestation" of the conspiracy, which need not itself be criminal or the element of a crime.

Conspiracy Against Free Exercise or Enjoyment of Rights, 18 U.S.C. § 241

Section 241 contains a provision that makes it a crime for "two or more persons [to] conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." Violations of the statute are ordinarily punishable by fines and up to ten years of imprisonment, with higher penalties if death results (among other things). The statute, which dates to the Reconstruction Era, is perhaps most associated with its use to prosecute bias-motivated conduct, particularly starting in the mid-twentieth century. Federal prosecutors have also used § 241 to charge other types of civil rights conspiracies, however, including a man convicted in 2023 of using social media to suppress the presidential vote by spreading disinformation.

To prove a § 241 violation, the government must first show an agreement between two or more people, which requires proof that at least two individuals came to a common understanding with a shared purpose. As with § 371, the agreement need not be formal and can instead be established by proof of a mere "tacit understanding."

Second, the government must prove that the purpose of the agreement was to injure, threaten, oppress, or intimidate, which requires proof only that the defendant specifically *intended* to injure, threaten, oppress, or intimidate, not that a victim was *actually* injured, threatened, oppressed, or intimidated. A wide variety of conduct may support intent to "injure, threaten, oppress, or intimidate." Although § 241 caselaw often involves violent or threatening conduct, other behaviors, such as conspiring to "cast false votes in an election for federal office," may suffice. For example, in its 1941 opinion in *United States v. Classic*, the Supreme Court examined whether a predecessor statute to § 241 could apply to a conspiracy to "alter[] and falsely count[] and certif[y] the ballots of voters cast in [a] primary election." The Court concluded that "conspiracy to prevent the official count of a citizen's ballot" is "a conspiracy to injure and oppress the citizen when the ballots are cast in a primary election." In an earlier case, the Court reached a similar conclusion with respect to a congressional election.

Third, the government must demonstrate that the agreement was intended to affect "any person in any State, Territory, Commonwealth, Possession, or District." In establishing this element, the government need not prove that the defendant identified and intended harm to a *specific* victim or victims. Rather, a § 241 violation can occur where the defendant interferes with the rights of "a broad class of potential victims."

Fourth, there must be proof that the agreement was "directed towards the free exercise or enjoyment of rights and privileges secured by the Constitution and federal law," that is, rights "made specific either by the express terms of the Federal Constitution or laws or by decisions interpreting them." Typically, § 241

prosecutions have involved deprivations of constitutional rights or rights created by statutes that are themselves aimed at enforcing constitutional rights. Voting rights are one example covered by § 241.

A defendant in a § 241 case must also have had the "specific intent" or "particular purpose" of interfering with the victim's enjoyment of the federal right. The D.C. Circuit has interpreted this element as requiring only a defendant's intent to interfere with an *activity or interest* that is a protected right, not an understanding by the defendant that the activity or interest is legally protected as a federal right.

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