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Legal Sidebar

Fischer v. United States: Supreme Court to Consider Federal Obstruction Provision in Capitol Breach Prosecution

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On December 13, 2023, the Supreme Court granted *certiorari* in *Fischer v. United States*, a case concerning whether a federal obstruction of justice statute covers a defendant's alleged participation in the breach of the Capitol on January 6, 2021. Federal prosecutors allege that Joseph Fischer violated 18 U.S.C. § 1512(c)(2), which authorizes felony penalties for a person who "corruptly ... otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so." The federal district court held that the statute did not apply to Fischer's conduct. A divided D.C. Circuit panel reversed, holding that § 1512(c)(2) "encompasses all forms of obstructive conduct," including "violent efforts to stop Congress from certifying the results of the 2020 presidential election."

At the Supreme Court, the Justices in *Fischer* will consider whether obstruction for § 1512(c)(2) purposes includes "acts unrelated to investigations and evidence." The conclusion could have wide-ranging implications given that the Department of Justice has charged numerous individuals involved in the Capitol breach with violating this same provision. The holding may also be relevant to the federal prosecution of former President Trump, who was indicted for conspiring to violate § 1512(c)(2), among other statutes (as discussed in another CRS product). This Sidebar provides legal background on § 1512(c)(2) and the D.C. Circuit's opinion in *Fischer*, as well as arguments before the Supreme Court.

Overview of 18 U.S.C. § 1512(c)(2)

Several of 18 U.S.C. § 1512's subsections are directed at evidence or witness tampering involving, among other things, actual or threatened force, deception, or harassment to prevent evidence production. Congress added § 1512(c) to the statute—including § 1512(c)(2)'s provision regarding otherwise obstructing official proceedings—as part of the Sarbanes-Oxley Act of 2002. That law was "prompted by the exposure of Enron's massive accounting fraud and revelations that the company's outside auditor, Arthur Andersen LLP, had systematically destroyed potentially incriminating documents."

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Obstructive Acts

To prove a § 1512(c)(2) violation, prosecutors must establish that a defendant engaged in one of the proscribed acts—that is, that he or she obstructed, influenced, impeded, or attempted one of these acts. Courts have held that a variety of acts may qualify. For example, federal prosecutors have used § 1512(c)(2) to charge individuals based on conduct such as falsifying evidence to influence a federal grand jury investigation, soliciting a fabricated confession from another to escape pending federal theft charges, tipping off the target of a grand jury proceeding about an undercover operation, and setting an apartment ablaze to destroy two deceased human bodies that were evidence of a double murder.

As indicated above, the Department of Justice has also charged numerous individuals under § 1512(c)(2) for obstructive acts pertaining to the Capitol breach. *Fischer* is one such case. There, the alleged obstructive acts include "encourag[ing] rioters to 'charge' and 'hold the line,'" pushing police, and "a 'physical encounter' with at least one law enforcement officer." Disagreeing with several other federal district court judges in the District of Columbia that had examined the scope of § 1512(c)(2), a federal judge in the *Fischer* case dismissed the § 1512(c)(2) charge against the defendant. The judge relied on a prior decision in a separate Capitol breach case in which the judge had concluded that § 1512(c)(2) "requires that the defendant have taken some action with respect to a document, record, or other object in order to corruptly obstruct, impede or influence an official proceeding."

On appeal, a divided D.C. Circuit disagreed with the district court in *Fischer* and rejected the argument that § 1512(c)(2) reaches only obstructive conduct related to evidence impairment. Judge Pan, who authored the lead opinion in the case, emphasized § 1512(c)(2)'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." Judge Pan 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)." Judge Walker concurred in this interpretation of § 1512(c)(2)'s act element. Judge Katsas dissented. Among other things, he contended that the lead opinion "dubiously reads *otherwise* to mean 'in a manner different from,' rather than 'in a manner similar to.'" According to Judge Katsas, this interpretation of § 1512(c)(2) is irreconcilable with "the structure and history of section 1512, and with decades of precedent applying section 1512(c) only to acts that affect the integrity or availability of evidence."

Official Proceeding

Under § 1512(c)(2), federal prosecutors must also establish that a prohibited obstructive act was related to an "official proceeding." A separate statute defines an "official proceeding" to include, among other things, a proceeding before federal judges, federal courts, or a federal grand jury; "a proceeding before a Federal Government agency which is authorized by law;" and a "proceeding before the Congress." A number of federal courts have construed this definition to require some level of formality beyond that of a "mere investigation." With respect to proceedings before Congress, one federal district court concluded that the Electoral College certification of the results of a presidential election is an official proceeding under § 1512(c)(2), reasoning that "a joint session of both houses of Congress that is called for by the Constitution itself, and over which the Vice President of the United States is required to preside," is sufficiently formal to qualify. In *Fischer*, the D.C. Circuit reached the same conclusion, with all three judges on the panel agreeing that the Electoral College certification is an official proceeding for § 1512(c)(2) purposes.

Acting Corruptly

Section 1512(c)(2) additionally requires proof that the defendant acted "corruptly." Constructions of this requirement vary somewhat. According to one federal appellate court, "[a]cting 'corruptly' within the meaning of § 1512(c)(2) 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].'" Another court has described acting corruptly as acting with "consciousness of wrongdoing."

The D.C. Circuit splintered over the appropriate construction of "corruptly" in *Fischer*. Judge Pan's lead opinion 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 satisfy any of the three definitions. In his 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 dissent, 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[]" element. For Judge Katsas, relying only on "corruptly" to narrow the reach of § 1512(c)(2) would not be enough to keep the provision from sweeping in constitutionally protected activities such as lobbying or peaceful protest, which he warned could result in First Amendment overbreadth issues. Judge Katsas also expressed concern that the "corruptly" requirement does not successfully narrow the scope of § 1512(c)(2) to avoid constitutional vagueness problems, which occur when a criminal law lacks "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."

Following *Fischer*, the D.C. Circuit revisited the definition of "corrupt" intent in another Capitol breach case, holding that "the ordinary meaning of the word 'corruptly' in 18 U.S.C. § 1512(c)(2) encompasses acting through independently unlawful means." The court in that case, *United States v. Robertson*, deemed sufficient the evidence establishing that the defendant met this requirement by acting "feloniously to obstruct a proceeding before the Congress, with no evidence or argument that he was merely engaged in peaceful expression . . . ." One judge on the panel in *Robertson* dissented, arguing that the *Robertson* majority was bound by Judge Walker's construction of "corruptly" in *Fischer* because that definition "was necessary to create a holding." The dissenting judge also expressed concern that the *Robertson* majority's formulation of "corruptly" as "having an 'unlawful' purpose or acting through 'unlawful' means" would make "the commission of *any* crime 'corrupt' because any crime requires the use of unlawful means or an unlawful purpose or both."

Nexus Requirement

Although it is unaddressed in *Fischer*, several federal courts have concluded that § 1512(c)(2) also contains a nexus requirement. As one federal district court described it, the nexus requirement means that the charged conduct must have the "'natural and probable effect of interfering with' an official proceeding" and requires that the accused must know that his actions would likely affect "a particular proceeding." The nexus requirement serves to "reinforce the principles of deference to Congress and fair notice to the accused." For at least one federal appellate court, the nexus requirement may be less a distinct element of § 1512(c)(2) and more "an articulation of the proof of wrongful intent that will satisfy the *mens rea* requirement of 'corruptly' obstructing."

Arguments at the Supreme Court

Before the Supreme Court, Fischer argues that the D.C. Circuit misconstrued § 1512(c)(2). Among other things, Fischer contends that with respect to the obstructive acts covered by the provision, the "text targets discrete acts intended to affect the availability or integrity of evidence for use in an official proceeding." According to Fischer, the use of the word "otherwise" before § 1512(c)(2)'s list of prohibited acts is best understood as limiting the covered obstructive acts to those similar to the ones listed in § 1512(c)(1)—that is, "alter[ing], destroy[ing], mutilat[ing], or conceal[ing] a record, document, or other object." Further, Fischer claims that construing "otherwise" as the D.C. Circuit did in his case converts § 1512(c)(2) into an "all-encompassing separate offense" that would render § 1512(c)(1) and other federal obstruction provisions redundant. According to Fischer, both the legislative history of § 1512(c)(2) and the types of cases in which the statute has been used support the conclusion that the provision "has never been anything other than an evidence impairment statute that focuses on spoliation." Echoing Judge Katsas's dissent, Fischer also disputes that the requirement that a defendant acts "corruptly" can alone sufficiently cabin § 1512(c)(2) to avoid overbreadth issues.

In contrast, the government argues that the "text, context, and history of [§ 1512(c)(2)] establish that it functions as a catchall offense designed to ensure complete coverage of all forms of corrupt obstruction of an official proceeding." According to the government, the scope of § 1512(c)(2) stems from the phrase "obstructs, influences, or impedes," which "encompasses myriad ways of hindering a proceeding"; and the word "otherwise," which means "in a different manner." Taking those phrases in conjunction, the government asserts that § 1512(c)(2) "reaches methods of obstructing a proceeding that are different from—not simply the same as—the evidence tampering that Section 1512(c)(1) covers." In addition, the government avers that if § 1512(c)(2) reached only "evidence-focused obstruction," it would render § 1512(c)(1) duplicative and meaningless. To the extent that the government's interpretation of § 1512(c)(2) creates overlap with other obstruction provisions, the government contends that overlap is common in criminal statutes and is actually an intended feature of catchall provisions like § 1512(c)(2) that are designed to capture "matters not specifically contemplated—known unknowns." With respect to legislative history, the government claims that Congress "enacted 18 U.S.C. 1512(c)(2) to address the larger problem the Enron scandal brought to light—namely, the risk that corrupt obstruction could occur in unanticipated ways not prohibited by statutes targeted at specific forms of obstruction." The government also pushes back on Fischer's overbreadth concerns, pointing to § 1512(c)(2)'s nexus and mental state requirements, among other things.

Oral arguments in *Fischer* are scheduled for April 16, 2024. A decision in *Fischer* is expected before the Court's summer recess. If the Court interprets the scope of § 1512(c)(2) in a manner contrary to Congress's intent, Congress could respond to clarify the statute's reach.

Author Information

Peter G. Berris
Legislative Attorney

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