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Fischer v. United States: Supreme Court Reads Federal Obstruction Provision Narrowly in Capitol Breach Prosecution

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On June 28, 2024, the Supreme Court issued an opinion 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 alleged that Joseph Fischer violated a number of federal criminal statutes including 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 concluded 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."

In *Fischer*, the Supreme Court endorsed a narrower reading of § 1512(c)(2), holding that in order to prove a violation of that provision, "the Government must establish that the defendant impaired the availability or integrity for use in an official proceeding of records, documents, objects, or . . . other things used in the proceeding, or attempted to do so." 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 part of an alleged attempt to overturn the results of the 2020 election (a prosecution that was the center of a separate Supreme Court ruling on the scope of presidential criminal immunity issued a few days after *Fischer*). This Sidebar provides legal background on § 1512(c)(2), summarizes the Court's opinion in *Fischer*, and offers congressional considerations.

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. As the Supreme Court recalled, that law was "prompted by the exposure of Enron's massive accounting fraud and revelations

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that the company's outside auditor, Arthur Andersen LLP, had systematically destroyed potentially incriminating documents."

Official Proceeding

Under § 1512(c)(2), federal prosecutors must establish that the prohibited conduct 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 "corruptly" vary somewhat, and as Justice Barrett observed in passing in her dissent in *Fischer*, the meaning of this requirement is "unsettled." 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."

Judge Pan wrote that "[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 its opinion in *Fischer*, the D.C. Circuit revisited the definition of "corrupt" intent in another Capitol breach case, *United States v. Robertson*, holding that "the ordinary meaning of the word 'corruptly' in 18 U.S.C. § 1512(c)(2) encompasses acting through independently unlawful means." The defendant met this requirement, according to the court, due to the existence of evidence that the defendant acted "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 the D.C. Circuit's opinion in *Fischer*, federal appellate courts have "unanimously" 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 "demonstrates 'restraint in assessing the reach of a federal criminal statute'" and 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."

Obstructive Acts

Fischer primarily revolved around one element of § 1512(c)(2)—the requirement that a defendant engaged in a proscribed act—that is, that he or she obstructed, influenced, impeded, or attempted one of these acts. Prior to the Supreme Court's opinion in *Fischer*, courts had 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 included "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 district 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 same 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 diverged from the district court, rejecting the argument that § 1512(c)(2) reaches only obstructive conduct related to evidence impairment.

In a 6-3 opinion authored by Chief Justice Roberts, the Supreme Court in *Fischer* disagreed with the D.C. Circuit. According to the majority, § 1512(c)(2) reaches only obstructive acts involving the actual or attempted impairment of the availability or integrity of records, documents, objects, or other things for use in an official proceeding. The Court based much of its holding on § 1512(c)(2)'s relationship to § 1512(c)(1)—another provision of the same statute that focuses specifically on 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." Looking to canons of construction, the Court explained that § 1512(c)(2)'s prohibition on otherwise obstructing, influencing, or impeding any official proceeding, or attempting to do so, must be "limited by the preceding list of criminal violations." In other words, the majority said that § 1512(c)(1) "simply consists of many specific examples of prohibited actions undertaken with the intent to impair an object's integrity or availability for use in an official proceeding: altering a record, altering a document, concealing a record, concealing a document, and so on." In light of that list, the Court viewed the scope of the residual clause in § 1512(c)(2) as "defined by reference to (c)(1)." The majority further reasoned that a broad reading of § 1512(c)(2) would result in surplusage issues, as § 1512(c)(2) would "consume" § 1512(c)(1) and a number of other federal obstruction provisions. The Court drew additional support from legislative history, identifying § 1512(c)(2) as a post-Enron effort to resolve a legal gap concerning the liability of those who destroy documents, rather than an attempt to create "a catchall provision that reaches far beyond the document shredding and similar scenarios that prompted legislation in the first place." The Court also expressed concern that reading § 1512(c)(2) as a catchall could "[c]riminalize a broad swath of prosaic conduct, exposing activists and lobbyists alike to decades in prison."

Justice Jackson joined the majority opinion but wrote separately to convey her view of how legislative purpose supported the Court's interpretation of § 1512(c)(2). Justice Barrett, joined by Justices Sotomayor and Kagan, dissented, offering a different interpretation of, among other things, the text, legislative history, and statutory context of § 1512(c)(2). They argued that "otherwise" means "in a different manner" or "by other means," and therefore its use to introduce § 1512(c)(2) does not "narrow its scope." Rather, in light of the text, the dissenting Justices concluded that § 1512(c)(2) "prohibits obstructing, influencing, or impeding an official proceeding by means *different* from those specified in (c)(1), thereby serving as a catchall" for obstructive activities not covered in § 1512(c)(1). The dissenting opinion said that although this reading of § 1512(c)(2) would make it a "very broad provision," "Congress meant what it said" in the plain text. With respect to the surplusage argument, the dissent observed that "'substantial' overlap 'is not uncommon in criminal statutes'" and contended that the Court's holding created as much "statutory overlap" with other obstruction provisions as the dissent's construction would. Finally, for the dissenting Justices, § 1512(c)(2)'s requirement of a "corrupt" mental state would "screen out innocent activists and lobbyists who engage in lawful activity."

Impact of *Fischer*

In *Fischer*, the D.C. Circuit had reversed the district court's dismissal of the § 1512(c)(2) count against the defendant; the Supreme Court has now vacated that judgment and remanded the case for further consideration in light of its holding. In doing so, the Court observed that the D.C. Circuit could "assess the sufficiency of [the § 1512(c)(2) count] of Fischer's indictment in light of our interpretation of Section 1512(c)(2)." That is, as Justice Jackson put it, the lower courts may examine whether "Fischer's conduct . . . involved the impairment (or the attempted impairment) of the availability or integrity of things used during the January 6 proceeding 'in ways other than those specified in (c)(1)'" and "[i]f so, then Fischer's prosecution under § 1512(c)(2) can, and should, proceed."

The impact of *Fischer* on other Capitol breach prosecutions involving § 1512(c)(2) charges may vary depending on their current status, other charges at issue, and the conduct alleged. Federal prosecutors are reportedly "evaluating the impact of the decision" and have requested a delay in sentencing proceedings

in at least one Capitol breach case in light of *Fischer*. Many of the Capitol breach defendants who were charged under § 1512(c)(2) were also charged with violating other statutes, which remain unimpacted by the Court's holding in *Fischer*. This is also true of Fischer himself. Even if the courts on remand conclude that his conduct did not satisfy the majority's construction of § 1512(c)(2), he is still facing charges for violating separate federal laws prohibiting assault on federal officers and disruptive conduct at the Capitol. One analysis of Capitol breach cases found that defendants convicted at trial of § 1512(c)(2) were also convicted of additional charges. To the extent the lengths of their respective sentences hinge on the § 1512(c)(2) conviction, resentencing will likely occur. Following *Fischer*, at least one Capitol breach defendant convicted under § 1512(c)(2) (along with other laws) has been ordered released pending appeal. The DOJ did not oppose the defendant's release "in light of the recency and complexity of the issues left unresolved by *Fischer*" and given that the defendant's sentence was scheduled to end in August 2024.

With respect to individuals who have pleaded guilty under § 1512(c)(2) in connection with a Capitol breach prosecution, those plea agreements contain provisions stipulating that if the conviction is vacated "for any reason," it is possible that a prosecution may be reinstated, "including any counts that the Government has agreed not to prosecute or to dismiss at sentencing." In other words, as some observers have indicated, that subset of defendants who pleaded guilty to violating § 1512(c)(2) may potentially still be prosecuted by DOJ under different statutes. (Those who were charged under § 1512(c)(2) but who ultimately pleaded guilty to a different violation are not affected.)

Former President Trump was also charged under § 1512(c)(2)—among other statutes—in a federal indictment, as discussed. Some legal commentators have questioned the practical impact of *Fischer* on that case, though the Court's opinion in *Trump v. United States* granting Presidents and former Presidents some immunity may raise other questions in the case.

Considerations for Congress

The Supreme Court in *Fischer* acknowledged that multiple interpretations of the text of § 1512(c)(2) were possible but concluded that its narrow, evidence-focused construction was the "most plausible." If Congress instead intended for § 1512(c)(2) to encompass a broader range of obstructive acts or to serve as a catchall—as the dissent believed—then Congress may amend the statute to clarify its intended reach. In her concurring opinion, Justice Jackson discussed examples of catchall obstruction provisions from state and model laws, including § 242.1 of the influential Model Penal Code (MPC), a comprehensive model statute first created by the American Law Institute in 1962 for American jurisdictions to use in revising their criminal codes. As Justice Jackson explained, MPC § 242.1 creates a model for a "general obstruction crime" by authorizing misdemeanor penalties for any person who "purposely obstructs, impairs or perverts the administration of law or other governmental function by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act."

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