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Corrupt Persuaders

Arthur Andersen and the Debate over Witness Tampering Prosecutions

By Jeremy Freeman

The Supreme Court has now heard oral argument in the late Arthur Andersen's petition to review its conviction under the federal "witness tampering" statute, 18 U.S.C. § 1512(b)(2). This case is the most recent and infamous manifestation of a decade-long debate about the statute. Now the Court has an opportunity to impose clear rules that would resolve the uncertainty about the scope and mental state required to prove "witness tampering" in federal investigations of all kinds.

Arthur Andersen (Andersen) was convicted in 2002 on the theory that it "corruptly" persuaded members of its Enron audit engagement team to comply with Andersen's document retention policy by destroying documents while the SEC was conducting an informal inquiry into Enron. The decision transformed routine document retention issues into life or death decisions for many companies and highlighted the broad and divergent views of federal circuit courts in interpreting the law.

The Statute

Section 1512(b)(2) criminalizes killing, intimidating, threatening, and "knowingly … corruptly persuad[ing]" any person with the intent to make evidence unavailable to an "official proceeding," which "need not be pending or about to be instituted at the time of the offense." As initially drafted in 1982, § 1512(b)(2) prohibited only the use of physical force, threats, or other coercive conduct. In 1988, Congress added "corruptly persuades," thereby including non-coercive influence such as bribery and other non-physical inducements. The definitions for § 1512 are contained in its companion statute, 18 U.S.C. § 1515. However, none clarify the meaning of "corruptly" as it is used in § 1512(b)(2). Although § 1515 attempts to define an "official proceeding," it only states, in a circular manner, that it is "a proceeding before a Federal Government agency." § 1515(a)(1)(D). Neither § 1512 nor § 1515 requires that the offender have knowledge about, or notice of, the "official proceeding."

This vagueness and uncertainty requires individuals and companies to play a harrowing guessing game with regard to witness tampering. This is especially true in today's post- Sarbanes-Oxley environment, where virtually any financial-reporting abnormality sprouts a hydra of government investigations and a host of possible future "proceedings."

A Split in the Circuits

Long before the Andersen prosecution, the fault lines in § 1512(b)(2) and statutes using the same or similar language began to surface. The cracks first formed around the term "corruptly persuades."

The D.C. Circuit first identified the vagueness of the word "corruptly" as used in 18 U.S.C. § 1505, which prohibits the "obstruction of proceedings" before government agencies. *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991). In holding that § 1505 was too vague to be used to prosecute an individual for lying to Congress, the *Poindexter* court explained that the word "corruptly" was vague on its "face" and led people to "guess at its meaning and differ as to its application." Then the Third Circuit, reviewing the conviction of an individual under§ 1512(b)(2), found "corruptly persuades" to be ambiguous. *United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997). The *Farrell* court reversed the conviction on the basis that the defendant's conduct — urging a co-conspirator to assert his Fifth Amendment rights in a federal investigation — did not constitute "corrupt" persuasion because it is not "corrupt" or illegal to encourage someone to assert constitutional rights. Because of the ambiguity of "corruptly persuades," the court applied the "doctrine of lenity," a rule of statutory interpretation that mandates choosing the least onerous application of an ambiguous statute.

Other circuits disagree. The Fifth, Second, and Eleventh Circuits have taken an expansive view of § 1512(b)(2), each holding that the term "corruptly" is not unduly vague and can be interpreted to include any "improper purpose" to prevent the government from obtaining information. *See e.g.*. *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996) (defining "corruptly" as "improper purpose" does not render § 1512(b)(2) unduly vague); *United States v. Shotts*, 145 F.3d 1289 (11th Cir. 1998) ("corruptly" can properly be defined as improper purpose). Unlike the D.C. and the Third Circuits, these courts impose witness tampering liability on anyone who urges or requests others to withhold information sought by the government, without any additional showing of illegal conduct or inducements.

The courts have likewise failed to define "official proceeding" consistently. Its potential scope is enormous. It may range from an informal interview with a government agent to a letter of inquiry or subpoena. The statute does not require that an "official proceeding" be "pending" or "about to be instituted" in order to tamper with a witness to such a "proceeding."

These problems are compounded because § 1512(b)(2) lacks any requirement that a defendant have notice of an "official proceeding" in order to violate the statute. The First Circuit considered this omission in *United States v. Frankhauser*, 80 F.3d 641 (1st Cir. 1996), and simply upheld a conviction for witness tampering because there was sufficient evidence in the record that the defendant "intended to interfere with an identifiable official proceeding." The court, at least implicitly, determined that some level of notice is required, although it offered little guidance. The Fifth Circuit concluded that a defendant must intend "to affect testimony *at some particular federal proceeding* that is ongoing or scheduled to be commenced in the future." *United States v. Shively*, 927 F.2d 804, 812 (5th Cir. 1991) (emphasis added). But a third court held that any circumstantial evidence indicating that a defendant "has *reasonable cause* to believe" that some federal proceeding "*could* be commenced" in the future, justified a § 1512(b)(2) conviction. *United States v. Conneaut Industries, Inc.*, 852 F.Supp. 116, 125 (D.R.I 1994) (emphasis added). This was the muddled state of the law when Andersen became entangled in § 1512(b)(2).

The Battle over Witness Tampering

The SEC opened an "informal" inquiry into one of Andersen's largest audit clients, Enron, based on allegations of accounting fraud. In the month before Andersen received its first Enron subpoena, Enron advised Andersen that it was under SEC investigation. After concluding that the investigation might extend to Andersen, one of Andersen's in-house counsel sent e-mails to the Enron audit team, urging them to comply with Andersen's "document retention policy." Shortly after those e-mails were sent, unprecedented amounts of paper were shredded by the Enron audit team. The shredding did not stop until Andersen received its first SEC subpoena.

The government later indicted Andersen under § 1512(b)(2), alleging that Andersen knew that an SEC "proceeding" was imminent and that it "corruptly persuaded" its employees to destroy documents to thwart a federal investigation. Andersen was convicted by a jury and appealed to the Fifth Circuit.

On appeal, Andersen claimed, among other things, that the district court improperly defined "corruptly persuades" and "official proceeding" in its instructions to the jury. The Fifth Circuit affirmed the district court's definition of "corruptly" as "an intent to subvert, undermine or impede the fact finding ability of an official proceeding." Although the Court of Appeals conceded that some ambiguity may exist with respect to "corruptly persuades," it believed a broad interpretation of the language was appropriate because other circuits had reached a similar result "despite the dim light it casts upon its meaning, its circularity aside …" *United States v. Arthur Andersen, LLP*, 374 F.3d 281, 293-294 (5th Cir. 2004).

The Fifth Circuit also rejected Andersen's argument that the trial court did not require that Andersen have notice or knowledge of the particular "official proceeding" it supposedly intended to subvert. It said that § 1512(b)(2) does not require that a defendant intend to subvert a particular proceeding, nor does it "require a defendant to know that the proceeding is pending or about to be initiated," so long as it is intended to tamper with *some* proceeding. This conclusion directly contradicts a previous Fifth Circuit decision, *supra*, which required an intent to subvert "some particular federal proceeding that is ongoing or is scheduled to be commenced in the future." *Shively*, 927 F.2d at 812. The *Andersen* panel disregarded *Shively* on the basis that the language was "dicta," although it acknowledged that "without insisting that a defendant's intent to impede a proceeding have some limiting sights, companies could be convicted for maintaining records retention programs which were adopted with no proceeding in mind."

The Ball Is in the Supreme Court

Now the Supreme Court has agreed to review the ambiguities of the witness tampering statute. Andersen again argues that "corruptly persuades" is ambiguous and should be interpreted in its least onerous form. The government contends that defining "corruptly persuades" as any "improper purpose" provides a sufficiently specific mental state to justify a witness tampering conviction.

Andersen similarly argues that "official proceeding" requires limitations on what may constitute such a "proceeding," and that a defendant must have some notice of a "proceeding" before it can intend to subvert it. The government counters that such a requirement creates an "absurd loophole, permitting a company that destroyed crucial documents after learning of an imminent federal investigation to escape conviction by claiming that it did not know the 'particulars' of that investigation." Brief for the United States in opposition to certiorari at 26-27. The Court, regardless of who technically "wins" the appeal, is likely to create new uniform guidelines for § 1512(b)(2) that could have a resounding impact on every federal investigation in the country. Counsel for corporations and other organizations need to watch this one carefully.

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