SUPREME COURT OF THE UNITED STATES

No. 94–270

UNITED STATES, PETITIONER *v.* ROBERT P. AGUILAR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 21, 1995]

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in part and dissenting in part.

I join all but Part I and the last paragraph of Part II of the Court's opinion. I would reverse the Court of Appeals, and would uphold respondent's conviction, on the count charging violation of 18 U. S. C. §1503.

The "omnibus clause" of §1503, under which respondent was charged, provides:

> "Whoever . . . corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U. S. C. §1503 (1988 ed.).

This makes criminal not just success in corruptly influencing the due administration of justice, but also the "endeavor" to do so. We have given this latter proscription, which respondent was specifically charged with violating, see App. 106–107, a generous reading: "The word of the section is `endeavor,' and by using it the section got rid of the technicalities which might be urged as besetting the word `attempt,' and it describes *any effort or essay* to accomplish the evil purpose that the section was enacted to prevent." *United States* v. *Russell*, 255 U. S. 138, 143 (1921) (emphasis added) (interpreting substantially identical predecessor statute). Under this reading of the statute, it is even immaterial

whether the endeavor to obstruct pending proceedings is possible of accomplishment. In *Osborn* v. *United States*, 385 U. S. 323, 333 (1966), we dismissed out of hand the "impossibility" defense of a defendant who had sought to convey a bribe to a prospective juror through an intermediary who was secretly working for the government. "Whatever continuing validity," we said, "the doctrine of `impossibility' . . . may continue to have in the law of criminal attempt, that body of law is inapplicable here." *Ibid.* (footnote omitted).[1]

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[1]This complete disavowal of the impossibility defense may be excessive. As *Pettibone* v. *United States*, 148 U. S. 197 (1893) acknowledged, an endeavor to obstruct proceedings that did not exist would not violate the statute. "[O]bstruction can only arise when justice is being administered." *Id.*, at 207. See, *e.g.*, *United States* v. *Williams*, 874 F. 2d 968, 977 (CA5 1989) ("There are three core elements that the government must establish . . . : (1) there must be a pending judicial proceeding").

Even read at its broadest, however, §1503's prohibition of "endeavors" to impede justice is not without limits. To "endeavor" means to strive or work for a certain end. Webster's New International Dictionary 844 (2d ed. 1950); 1 New Shorter Oxford English Dictionary 816 (1993). Thus, §1503 reaches only *purposeful* efforts to obstruct the due administration of justice, *i.e.*, acts performed with that very object in mind. See, *e.g.*, *United States* v. *Mullins*, 22 F. 3d 1365, 1370 (CA6 1994); *United States* v. *Ryan*, 455 F. 2d 728, 734 (CA9 1972). This limitation was clearly set forth in our first decision construing §1503's predecessor statute, *Pettibone* v. *United States*, 148 U. S. 197 (1893), which held an indictment insufficient because it had failed to allege the intent to obstruct justice. That opinion rejected the Government's contention that the intent required to violate the statute could be found in "the intent to commit an unlawful act, in the doing of which justice was in fact obstructed"; to justify a conviction, it said, "the specific intent to violate the statute must exist." *Id.*, at 207. *Pettibone* did acknowledge, however—and here is the point that is distorted to produce today's opinion—that the specific intent to obstruct justice could be found where the defendant intentionally committed a wrongful act that had obstruction of justice as its "natural and probable consequence." *Ibid.*

Today's "nexus" requirement sounds like this, but is in reality quite different. Instead of reaffirming that "natural and probable consequence" is one way of establishing intent, it *substitutes* "`"natural and probable effect"'" *for* intent, requiring that factor even when intent to obstruct justice is otherwise clear. See *ante*, at 5–6, quoting *United States* v. *Wood*, 6 F. 3d 692, 695 (CA10 1993), which in turn quotes *United States* v. *Thomas*, 916 F. 2d 647, 651

(CA11 1990).[2] But while it is quite proper to derive an *intent* requirement from §1503's use of the word "endeavor," it is quite impossible to derive a "*natural and probable consequence*" requirement. One would be "endeavoring" to obstruct justice if he intentionally set out to do it by means that would only unnaturally and improbably be successful. As we said in *Russell*, "any effort or essay" corruptly to influence, obstruct, or impede the due administration of justice constitutes a forbidden endeavor, 255 U. S., at 143, even, as we held in *Osborn*, an effort that is *incapable* of having that effect, see 385 U. S., at 333.

The Court does not indicate where its "nexus" requirement is to be found in the words of the statute. Instead, it justifies its holding with the assertion that "[w]e have traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress and out of concern that a fair warning should be given . . . of what the law intends to do if a certain line is passed." *Ante*, at 6 (citation and internal quotation marks omitted). But "exercising

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[2]*Thomas*, which appears to be the origin of this doctrine, made precisely the same mistake the Court does. It cited and misapplied earlier Court of Appeals cases standing for the entirely different principle—flowing from our language in *Pettibone*—that to prove an "endeavor" to obstruct justice, "all the government has to establish is that the defendant should have reasonably foreseen that the natural and probable consequence of the success of his scheme would [obstruct the due administration of justice]." *United States* v. *Silverman*, 745 F. 2d 1386, 1393 (CA11 1984). See also *United States* v. *Fields*, 838 F. 2d 1571, 1573 (CA11 1988). This does not impose a requirement of "natural and probable consequence," but approves a manner of proof of "intent." See, *e.g.*, *United States* v. *Neiswender*, 590 F. 2d 1269, 1273 (CA4), cert. denied, 441 U. S. 963 (1979).

restraint *in assessing the reach* of a federal criminal statute" (which is what the rule of lenity requires, see *United States* v. *Bass*, 404 U. S. 336, 347–348 (1971)) is quite different from importing extra-textual requirements *in order to limit the reach* of a federal criminal statute, which is what the Court has done here. By limiting §1503 to acts having the "natural and probable effect" of interfering with the due administration of justice, the Court effectively reads the word "endeavor," which we said in *Russell* embraced "any effort or essay" to obstruct justice, 255 U. S., at 143, out of the omnibus clause, leaving a prohibition of only actual obstruction and competent attempts.

The Court apparently adds to its "natural and probable effect" requirement the requirement that the defendant *know* of that natural and probable effect. See *ante*, at 6 ("[I]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct"). Separate proof of such knowledge is not, I think, required for the orthodox use of the "natural and probable effect" rule discussed in *Pettibone*: Where the defendant intentionally commits a wrongful act that *in fact* has the "natural and probable consequence" of obstructing justice, "the unintended wrong may derive its character from the wrong that was intended." 148 U. S., at 207. Or, as we would put the point in modern times, the jury is entitled to presume that a person intends the natural and probable consequences of his acts.

While inquiry into the state of the defendant's knowledge seems quite superfluous to the Court's opinion (since the act performed did not have the requisite "natural and probable effect" anyway), it is necessary to my disposition of the case. As I have said, I think an act committed *with intent to obstruct*

is all that matters; and what one can fairly be thought to have intended depends in part upon what one can fairly be thought to have known. The critical point of knowledge at issue, in my view, is not whether "respondent knew that his false statement *would be provided* to the grand jury," *ante*, at 7 (emphasis added) (a heightened burden imposed by the Court's knowledge-of-natural-and-probable-effect requirement), but rather whether respondent knew—or indeed, even erroneously *believed*—that his false statement *might* be provided to the grand jury (which is all the knowledge needed to support the conclusion that the purpose of his lie was to mislead the jury). Applying the familiar standard of *Jackson* v. *Virginia*, 443 U. S. 307 (1979), to the proper question, I find that a rational juror could readily have concluded beyond a reasonable doubt that respondent had corruptly endeavored to impede the due administration of justice, *i.e.*, that he lied to the FBI agents intending to interfere with a grand jury investigation into his misdeeds.

Recorded conversations established that respondent knew a grand jury had been convened, App. 47; that he had been told he was a target of its investigation, *id.*, at 68; and that he feared he would be unable to explain his actions if he were subpoenaed to testify, *id.*, at 51. Respondent himself testified that, at least at the conclusion of the interview, it was his "impression" that his statements to the FBI agents would be reported to the grand jury. 9 Tr. 1360 (Aug. 14, 1990). The evidence further established that respondent made false statements to the FBI agents that minimized his involvement in the matters the grand jury was investigating. See App. 73, 76, 81, 83–84, 86. Viewing this evidence in the light most favorable to the Government, I am simply unable to conclude that no rational trier of fact could have found beyond a reasonable doubt that respondent lied specifically because he thought the

agents *might* convey what he said to the grand jury—which suffices to constitute a corrupt endeavor to impede the due administration of justice. In fact, I think it would be hard for a juror to conclude otherwise.

Since I find against respondent on the §1503 count, I must consider several other grounds offered by respondent for affirming the Court of Appeals' setting aside of his conviction. First, invoking the interpretive canon of *ejusdem generis*, he argues that, since all the rest of §1503 refers only to actions directed at jurors and court officers,[3] the omnibus clause cannot apply to actions directed at witnesses. But the rule of *ejusdem generis*, which "limits general terms which follow specific ones to matters similar to those specified," *Gooch* v. *United States*, 297 U. S. 124, 128 (1936); accord *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 588 (1980), has no application here. Although something of a catch-all, the omnibus clause is *not* a general or collective term following a

[3]Those clauses provide:

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U. S. C. §1503 (1988 ed.).

list of specific items to which a particular statutory command is applicable (*e.g.*, "fishing rods, nets, hooks, bobbers, sinkers, and other equipment"). Rather, it is one of the several distinct and independent prohibitions contained in §1503 that share only the word "Whoever," which begins the statute, and the penalty provision which ends it. Indeed, given the already broad terms of the other clauses in §1503, to limit the omnibus clause in the manner respondent urges would render it superfluous. See *United States* v. *Howard*, 569 F. 2d 1331, 1333 (CA5 1978).

Respondent next contends that because Congress in 1982 enacted a different statute, 18 U. S. C. §1512, dealing with witness tampering, and simultaneously removed from §1503 the provisions it had previously contained specifically addressing efforts to influence or injure witnesses, see Victim and Witness Protection Act of 1982, Pub. L. 97–291, 96 Stat. 1249–1250, 1253, his witness-related conduct is no longer punishable under the omnibus clause of §1503. The 1982 amendment, however, did nothing to alter the omnibus clause, which by its terms encompasses corrupt "endeavors to influence, obstruct, or impede, the due administration of justice." The fact that there is now some overlap between §1503 and §1512 is no more intolerable than the fact that there is some overlap between the omnibus clause of §1503 and the other provisions of §1503 itself. It hardly leads to the conclusion that §1503 was, to the extent of the overlap, silently repealed. It is not unusual for a particular act to violate more than one criminal statute, see, *e.g.*, *Gavieres* v. *United States*, 220 U. S. 338, 342 (1911), and in such situations the Government may proceed under any statute that applies, see, *e.g.*, *United States* v. *Batchelder*, 442 U. S. 114, 123–124 (1979); *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 45–46 (1952). It is, moreover, "a cardinal principle of statutory

construction that repeals by implication are not favored." *United States* v. *United Continental Tuna Corp.*, 425 U. S. 164, 168 (1976); see also *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936).

Finally, respondent posits that the phrase "`corruptly . . . endeavors to influence, obstruct, or impede'" "may be unconstitutionally vague," in that it fails to provide sufficient notice that lying to potential grand jury witnesses in an effort to thwart a grand jury investigation is proscribed. Brief for Respondent 22, n. 13. Statutory language need not be colloquial, however, and the term "corruptly" in criminal laws has a long-standing and well-accepted meaning. It denotes "[a]n act done with an intent to give some advantage inconsistent with official duty and the rights of others. . . . It includes bribery but is more comprehensive; because an act may be corruptly done though the advantage to be derived from it be not offered by another." *United States* v. *Ogle*, 613 F. 2d 233, 238 (CA10) (internal quotation marks omitted), cert. denied, 449 U. S. 825 (1980). See also Ballentine's Law Dictionary 276 (3d ed. 1969); Black's Law Dictionary 345 (6th ed. 1990). As the District Court here instructed the jury:

> "An act is done corruptly if it's done 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." App. 117.

Moreover, in the context of obstructing jury proceedings, any claim of ignorance of wrongdoing is incredible. Acts specifically intended to "influence, obstruct, or impede, the due administration of justice" are obviously wrongful, just as they are necessarily "corrupt." See *Ogle*, *supra*, at 239; *United States* v. *North*, 910 F. 2d 843, 941 (Silberman, J., concurring in part and dissenting in part), modified, 920 F. 2d 940 (CADC 1990); *United States* v. *Reeves*,

752 F. 2d 995, 999 (CA5), cert. denied, 474 U. S. 834 (1985).

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The "nexus" requirement that the Court today engrafts into §1503 has no basis in the words Congress enacted. I would reverse that part of the Court of Appeals' judgment which set aside respondent's conviction under that statute.