§ 1519: DOJ Fires Its Anti-Obstruction Cannon


The charged multicontinent scheme publicly unraveled what U.S. Department of Justice officials describe as the largest food fraud, and largest anti-dumping, criminal prosecution in U.S. history.[2] More specifically, the indictment implicates top-ranking executives in a global effort to obstruct justice and criminally evade nearly $80 million in duties and tariffs by illegally importing mislabeled — and at times contaminated — Chinese honey.[3]

The Wolff charges may well mark the dawning of a new era for many reasons, not least of which is the government’s creative use of the U.S. Code’s most sweeping, and thus far largely ignored, obstruction statute, namely, 18 U.S.C. § 1519. The message sent in the high-profile, fact-laden, 70-page, 44-count indictment is apparent: The government is ready and willing to unleash its full arsenal against alleged corporate bad actors believed to have knowingly obstructed justice.

Wolff, therefore, puts corporations and their executives on notice that the Sarbanes-Oxley criminal-enforcement shoe has dropped; corporate violators attempting to obstruct governmental functions can expect to be prosecuted to the full extent of the law, which, post-Enron, means including under Section 1519.

Section 1519’s Relatively Short History ... But Potentially Long Reach

From its 2002 passage, white collar practitioners have hotly debated Section 1519’s potential as a prosecutorial tool. While some viewed 1519, and its 20-year maximum sentence, as a powerful new arrow in the Department of Justice’s already densely-packed quiver, others dismissed the section as little more than Macbethian sound and fury signifying nothing.[4]

The Wolff obstruction charges serve to, for now at least, settle this dispute. Wolff not only signals the government’s readiness to tactically deploy Section 1519, but it, indeed, goes further, revealing its willingness to, under the right fact pattern, push the prosecutorial envelope.[5]

Prior to digging into the Wolff case’s specifics, however, let us first take a closer look at the language of a statute that has generated so much speculation, yet has thus far resulted in so few actual prosecutions.


"Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence
the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.”[6]

Comparing Section 1519 with some of its sister-enactments helps pinpoint the source of the provision’s force.

Section 1503, for example, contains the general obstruction of justice omnibus clause, criminalizing conduct “corruptly influencing, obstructing, or impeding the due course of justice in the context of a judicial or grand jury proceeding.”[7] With slightly broader wording, Section 1505 makes it illegal to corruptly influence, obstruct, or impede a pending federal investigation.[8]

By their express language, therefore, both Sections 1503 and 1505 require the existence of a pending federal investigation or judicial proceeding. In marked contrast, under Section 1519, prosecutors need not prove that a defendant undertook the obstructive act with the corrupt intent to affect a particular government proceeding.[9]

Despite this advantageous wording, Section 1519 prosecutions thus far have been surprisingly rare. The relative novelty of the statute, prosecutors’ wariness towards relying on an untested (and perhaps underappreciated) U.S. Code section, and an absence of Main Justice pressure to indict under the statute all go far toward explaining the unanticipated dearth of 1519 charges.[10]

But times clearly have changed. The Department of Justice, through both proclamations and deeds, has dramatically ramped up its efforts to pursue corporate wrongdoers using all available means, including, most recently, Section 1519 prosecutions. Federal prosecutors have finally decided to wield (or, perhaps more appropriately, have been encouraged to wield) this potent legislative weapon in the manner its creators intended. And, in this regard, Wolff without question leads the mounting charge.

The Wolff Scheme

The company at the heart of the Wolff case is hardly an unknown recent arrival. The German-based Alfred L. Wolff company (“Wolff GmbH”), founded in 1901, served as a large-scale global supplier of natural raw materials and functional brand ingredients to the food industry, with subsidiaries and production units strategically located throughout the world, including Germany, China, Hong Kong, Hungary, Mexico and Argentina.[11]

Wolff GmbH, in short, was a significant German food conglomerate, not to mention the leading European and U.S. honey importer. Ten of the 11 individual defendants charged in Wolff were top-ranking executives of either corporate defendant Alfred L. Wolff GmbH,[12] or one of its four affiliated defendant companies.

Prosecutors contend that the Wolff defendants employed sophisticated, carefully coordinated efforts to avoid steep U.S. import duties on honey entering America from non-market economy
China, the world’s leading honey producer. The potential motivation for doing so was significant: Between 2001 and 2007, the government imposed default anti-dumping duties on Chinese honey as high as 221 percent.[13] Honey originating from counties such as Russia, India, Taiwan and Thailand, on the other hand, was not subject to similar anti-dumping duties.

According to the government, the illegal “transshipping” of honey in Wolff occurred when defendants imported Chinese-origin honey into the U.S. through such third countries, mislabeling it and claiming it to have not originated from China. Compounding the alleged offense (at least from a public relations perspective), thousands of tons of the honey, which the government claims defendants imported through shell and front companies, were purportedly adulterated with antibiotics, cut with sugar, and then falsely labeled as “certified organic.”

The Wolff Charges

Turning to the 44 filed counts’ particulars, the government’s broad anchor allegation, set forth in Count One, is that the Wolff defendants engaged in a sophisticated global conspiracy to avoid the heavy import tariffs on Chinese honey. The government also employs Count One to set forth the bulk of its factual allegations, providing a detailed preview of the evidence it intends to confront defendants with at trial (though, since most defendants remain overseas, likely safe from extradition, the government may have a long wait before it can bring all of its evidence to bear on the top-executive defendants).

In terms of the particular criminal objects of the conspiracy, Count One charges that, between 2002 and 2009, defendants conspired to (1) illegally smuggle goods into the U.S., and (2) violate various U.S. Food and Drug Administration Acts relating to the importation of adulterated food products. Given the nature of the claimed scheme, these underlying offenses are unsurprising. What distinctly stands out, however, is the government’s decision to additionally charge that defendants (3) conspired to obstruct justice, in violation of 18 U.S.C. § 1519.

Counts 41 through 44 compound defendants’ obstruction-related troubles by alleging various discrete substantive violations of Section 1519, including the falsification of records submitted to the Department of Commerce, creation of false sales contracts, and destruction of e-mails and debit notes. The Wolff obstruction charges are therefore plainly more pivot than carousel, with the government prosecutors unambiguously signaling that they view obstruction of justice as a prominent component in their overall prosecutorial strategy.

Factual Allegations Supporting Wolff Obstruction Charges

The Wolff indictment is nothing, if not fact-intensive. The indictment lays out, in email-by-email detail, that defendants, among other things, routinely (1) reminded each other to not write e-mails concerning certain conspiracy-related subjects; (2) employed coded language in their e-mails; (3) falsified U.S. Customs entry forms; (4) hired corrupt scientists to falsify pollen analysis lab reports; (5) deliberately spoke in German to avoid potential U.S. law enforcement detection; (6) specifically sought out certain customers who defendants believe failed to test the honey they purchased for the presence of antibiotics; (7) deleted e-mails and instant message chats concerning the conspiracy (and reminded each other to consistently do so); and (8) used
difficult to trace instant messaging, Skype and personal e-mail accounts, rather than business e-mail accounts, to discuss the day-to-day workings of the conspiracy.

According to the indictment, for example, one Chinese-based co-conspirator allegedly e-mailed to co-defendants what he termed a “fake sales confirmation.” In another instance, a German defendant reminded his cohorts to exercise prudence, and to “clean up” their documentation and e-mail files on the “chance that DOC [Department of Commerce] will come to your office.” Evidence like this makes for a confident prosecution team.

Flush With Obstruction? Comparing Wolff to Carson

As Wolff demonstrates, today’s technologically savvy obstructionists frequently carry out their criminal conduct with a few key strokes. But once in a while, the more “cinematic” variety of obstruction comes along.

Consider the 2009 case of Hong “Rose” Carson, charged with the more pedestrian, low-tech crime of flushing potentially incriminating documents down a toilet. In Carson, a key pre-Wolff Section 1519 obstruction case,[14] the accused allegedly introduced certain incriminating documents into California’s sewer system upon discovering that her employer, California-based Control Components Inc., had retained lawyers to conduct an internal investigation. The company undertook the internal investigation to determine whether the company had made any illegal overseas bribe payments.

Unfortunately for Carson, the government soon learned of her conduct, and, in an aggressive charging decision, alleged that she violated Section 1519 having obstructed “an investigation within the jurisdiction of a federal agency when she destroyed documents relevant to CCI’s internal investigation [by flushing them down the toilet].” It, of course, remains to be seen how the government will prove Carson’s specific intent to obstruct; for this we will have to wait until the November 2010 trial.

In terms of other lessons to be learned from Carson, federal prosecutors have arguably “deputized” company counsel conducting internal investigations. After all, lying to counsel, or destroying evidence to keep it from them, could threaten to expose the offending employee to up to 20 years incarceration. And the employee, if given appropriate Upjohn warnings,[15] is of course stripped of the ability to claim reliance on any attorney-client privilege.[16]

For our purposes, however, it is only critical to note that, while the defendant in Carson attempted to thwart an ongoing internal investigation in her effort to slip the proverbial noose, the aim of Wolff defendants’ obstructive conduct was twofold: to deceive a government agency in its administrative review function and to avoid any type of detection, whether internal, external, or otherwise. In that sense, Wolff’s obstruction charges are, legally speaking, the most aggressive to date, aimed at allegedly obstructive — and prospective — conduct, taking place well in advance of any law enforcement investigation appearing on the horizon.

“Anticipatory Obstruction of Justice” — The New Department of Justice Charge Du Jour?
White collar practitioners have long debated whether Section 1519’s broad language might permit the government to lodge charges not linked to any particular ongoing federal investigation.[17] Though, historically speaking, perhaps a bit late on the draw, the Wolff prosecutors have dropped a bomb in the foxhole and underscored that, as it relates to certain conduct, such aggressive charging decisions are far removed from the realm of fiction.

The Wolff prosecution team, indeed, omitted any hint of an allegation that, with respect to the defendants’ “cover up” conduct (i.e., deletion of emails and spoliation of evidence), the accused were aware of, or engaged in, the conduct to impede any particular pending federal (or, for that matter, internal) law enforcement investigation. Instead, the Count One accusation is that defendants’ “intended to impede, obstruct, and influence” either the “investigation by, and the proper administration of,” a regulatory “matter” before the Department of Commerce[18] — and “in relation to” and “contemplation” thereof, obstructed justice by destroying evidence that might someday reveal their alleged criminal course of conduct.

Put another way, the Wolff indictment’s dense factual allegations portray defendants as meticulously — and in many instances, prospectively — engaged in a variety of efforts to cover their tracks and to insulate themselves from any adverse legal, or reputational, liability, whether emanating from their bosses, in-house counsel, their competitors, the U.S. or foreign governments, or other sources.

That said, the government at trial will surely use defendants’ e-mails and other communications to brush aside possible defense claims that defendants’ conduct was not aimed at the U.S. government (and thus not violative of Section 1519), but rather was meant to keep their employers, co-workers, or others in the dark (an uphill argument for the defense to make given that the e-mails, themselves, involved top company management).

The decision to lodge innovative obstruction charges in a high-stakes case such as Wolff necessarily carries some litigation risk. The language and legislative history of Section 1519, as well as the facts alleged in Wolff, however, lend support to the Chicago prosecutors’ “anticipatory” obstruction stance. After all, the charging allure of Section 1519, setting aside its 20-year statutory maximum (which, in big-dollar fraud loss cases, is, of course, important), lies in what prosecutors are not required to prove.

Although the Wolff prosecutors must, of course, still establish (1) that defendants knowingly directed the obstructive act to impact an issue or matter within the jurisdiction of any U.S. department or agency, and (2) that defendants acted at least “in relation to” or “in contemplation” of such issue or matter, they need not establish (3) which specific “pending proceeding” defendants attempted to obstruct.[19] Section 1519’s calculated act of unburdening prosecutors from the nettlesome “pending proceeding” element is far from insignificant.

In Wolff, the government has set the stage for what it undoubtedly hopes will be a convincing and public test of 1519’s prosecutive power. The creative and aggressive charging decision, moreover, underscores that the government means business when it comes to white collar obstruction, and is willing to push the envelope in those cases it deems important.
Of at least equal significance is the reality that high-profile, cutting-edge prosecutions such as Wolff, if successful, naturally invite imitators. White collar practitioners are therefore well advised to keep a close eye on Chicago’s Dirksen Federal Building for a glimpse of what could well be a pivotal future battlefield in the government’s stepped-up war against white collar offenders.

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[5] The Eleventh Circuit Court of Appeal, for one, in 2008 upheld Section 1519’s constitutionality in United States v. Hunt [insert cite] (11th Cir. 2008). Rejecting defendant’s void for vagueness challenge, the court concluded “[n]othing here suggests [Section 1519] is, in the context before us, vague. ... By its plain text, the statute placed Hunt on notice his conduct was unlawful.”


[7] Note that in United States v. Aguilar, the U.S. Supreme Court upheld the reversal of a conviction of a judge who lied to FBI agents during an investigation into his conduct. The Court,
on textual grounds, required a “nexus” between the charged conduct and a judicial proceeding or, more generally, the administration of justice. See United States v. Aguilar, 515 U.S. 593, 599 (1995). The court described the “nexus” element under § 1503 as requiring that “the act must have a relationship in time, causation, or logic with the judicial proceedings,” and that “the endeavor must have the ‘natural and probable effect’ of interfering with the due administration of justice.”

[8] Note that Sarbanes-Oxley’s § 1102 amended 18 U.S.C. § 1512 (“Tampering with a Record or Otherwise Impeding and Official Proceeding”) to increase the penalties for destruction or altering of corporate audit records. 18 U.S.C. § 1512 now contains the following new subsection:

"(c) Whoever corruptly –

"alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object’s integrity or availability for use in an official proceeding; or otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both."

Prior to the amendment, anyone who obstructed justice without influencing or intimidating another could not be prosecuted under 18 U.S.C. § 1512. See also 18 U.S.C. § 1520 (prohibiting the destruction of corporate audit records).

[9] The legislative history of Section 1519 confirms congressional intent to eliminate the requirement that the obstructive conduct be tied by intent to any pending or imminent proceeding. See generally 148 Cong. Rec. S7,419 (daily ed. July 26, 2002) (statement of Sen. Patrick Leahy)). Courts have found that a plain-language reading of Section 1519’s supports this legislative intent. See, e.g., United States v. Jho, 534 F.3d 398 (5th Cir. 2008) (defendant found guilty of conspiring to violate 1519 for falsifying records relating to ship’s oil pollution equipment); United States v. Ray, No. 2:08-cr–01443 (C.D. Cal. Dec. 15, 2008) (executive’s false statements to general counsel concerning practice of back-dating stock options violated Section 1519 because executive knew SEC investigation was in the cards). Moreover, as the Department of Justice’s “Field Guidance” publication succinctly put it, “[n]o corrupt persuasion is required [for a Section 1519 conviction].” See Field Guidance on New Criminal Authorities Enacted in the Sarbanes-Oxley Act of 2002 (H.R. 3763) Concerning Corporate Fraud and Accountability, at http://www.justice.gov/ag/readingroom/sarox1.htm (visited September 13, 2010).

[10] FCPA prosecutions have gone through similar birthing pains – moving from relative obscurity to 26 DOJ criminal prosecution by the end of 2009.


[12] The Wolff Company is the food branch of the German Wolff & Olsen holding group.

[13] China produces more honey than any other country, but its domestic consumption of honey is minimal. The reputation of Chinese honey, moreover, took a major hit in 2002 when a scandal
broke, revealing that Chinese honey was routinely tainted with antibiotics; the EU that year banned all Chinese honey imports.

[14] See also United States v. Jho, 534 F.3d 398 (5th Cir. 2008) (defendant found guilty of conspiring to violate 1519 for falsifying records relating to ship’s oil pollution equipment; conviction was based on defendant’s intent to obstruct a matter within jurisdiction of the U.S. Coast Guard); United States v. Ray, No. 2:08-cr–01443 (C.D. Cal. Dec. 15, 2008) (executive’s false statements to general counsel concerning practice of back-dating stock options intended, at least in part, to thwart SEC investigation).

[15] In light of the potential ramifications from such internal investigation-related conduct, attorneys must be mindful to incorporate the giving of Upjohn warnings into their standard practice. (An Upjohn warning, a name derived from the famous Supreme Court case of Upjohn Company v. United States, is a privilege-related disclaimer issued by a company attorney to an employee of the company, advising the employee that that the attorney does not represent the employee, but rather the company as legal entity).

[16] In a related context, note the European Court of Justice’s recent, and very significant, Sept. 14, 2010, Akzo Nobel Chemicals ruling. In Akzo, the Court held that that communications — in this case two emails — between management and in-house attorneys are not privileged or otherwise protected from disclosure or discovery in investigations by the European Commission. Communications between management and more “professionally independent” external lawyers, however, appear to still be protected in the EU.

[17] See, e.g., Dana E. Hill, “Anticipatory Obstruction of Justice: Pre-Emptive Document Destruction Under the Sarbanes-Oxley Anti-Shredding Statute,” 18 U.S.C. § 1519, 89 Cornell L. Rev. 1519 (2004); Michael M. Farhang, “Section 1519: Why Obstructing an Investigation By Company Counsel May Now Be a Federal Crime, 4 WCR 191 at 4 (March 13, 2009) (“Until recently ... only lies made to government agents and not company counsel risked creating independent criminal liability under federal law. ... Given that the government is increasingly the ‘end user’ of the fruits of corporate investigative efforts, it should come as no surprise that federal prosecutors have in several recent cases attempted to apply these statutes to obstructive acts directed at corporate counsel rather than their own investigators. But these prosecutions have only addressed misstatements to private counsel under circumstances where the defendant clearly understood that the misstatements would ultimately influence already pending government investigations.”).

[18] Specifically, in paragraphs 56-62 of the Wolff indictment, the prosecutors identify the "investigation" or "matter" that is the subject of the 1519 substantive charges and the third object of the charged Count One conspiracy — it is the U.S. Department of Commerce's "new shipper review" of China-based defendant QHD Sanhai Honey Co. Ltd. This administrative review process permitted certain companies to obtain individualized anti-dumping duty deposit rates based on the exporter or producer's own sales information, rather than on the prevailing default anti-dumping duty deposit rate on Chinese-origin honey. That said, the Wolff charged conduct also captures anticipatory law enforcement detection at some possible unforeseen date. In other words, according to the indictment, the defendants determined that, after they had managed to
successfully "impede, obstruct, or influence the investigation or proper administration" of the new shipper review process, they decided to make sure that no one ever found out about it. And, they intended to bury their conduct from future, yet-unknown federal investigators by deleting emails and destroying documents and records.

[19] The Wolff prosecutors, however, opted to identify the US Department of Commerce's new shipper review program as the primary — but not necessarily exclusive — focus of defendants' alleged obstructive strategy.

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