I. BACKGROUND LEGAL AND EVIDENTIARY PRINCIPLES

A. Legal Framework of Obstruction of Justice

The May 17, 2017 Appointment Order and the Special Counsel regulations provide this Office with jurisdiction to investigate “federal crimes committed in the course of, and with intent to interfere with, the Special Counsel’s investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.” 28 C.F.R. § 600.4(a). Because of that description of our jurisdiction, we sought evidence for our obstruction-of-justice investigation with the elements of obstruction offenses in mind. Our evidentiary analysis is similarly focused on the elements of such offenses, although we do not draw conclusions on the ultimate questions that govern a prosecutorial decision under the Principles of Federal Prosecution. See Justice Manual § 9-27.000 et seq. (2018).

Here, we summarize the law interpreting the elements of potentially relevant obstruction statutes in an ordinary case. This discussion does not address the unique constitutional issues that arise in an inquiry into official acts by the President. Those issues are discussed in a later section of this report addressing constitutional defenses that the President’s counsel have raised. See Volume II, Section III.B, infra.

Three basic elements are common to most of the relevant obstruction statutes: (1) an obstructive act; (2) a nexus between the obstructive act and an official proceeding; and (3) a corrupt intent. See, e.g., 18 U.S.C. §§ 1503, 1505, 1512(c)(2). We describe those elements as they have been interpreted by the courts. We then discuss a more specific statute aimed at witness tampering, see 18 U.S.C. § 1512(b), and describe the requirements for attempted offenses and endeavors to obstruct justice, see 18 U.S.C. §§ 1503, 1512(c)(2).

Obstructive act. Obstruction-of-justice law “reaches all corrupt conduct capable of producing an effect that prevents justice from being duly administered, regardless of the means employed.” United States v. Silverman, 745 F.2d 1386, 1393 (11th Cir. 1984) (interpreting 18 U.S.C. § 1503). At “effort to influence” a proceeding can qualify as an endeavor to obstruct justice even if the effort was “subtle or circuitous” and “however cleverly or with whatever cloaking of purpose” it was made. United States v. Roe, 529 F.2d 629, 632 (4th Cir. 1975); see also United States v. Quattrone, 441 F.3d 153, 173 (2d Cir. 2006). The verbs “obstruct or impede” are broad” and “can refer to anything that blocks, makes difficult, or hinders.” Marinello v. United States, 138 S. Ct. 1101, 1106 (2018) (internal brackets and quotation marks omitted).

An improper motive can render an actor’s conduct criminal even when the conduct would otherwise be lawful and within the actor’s authority. See United States v. Cueto, 151 F.3d 620, 631 (7th Cir. 1998) (affirming obstruction conviction of a criminal defense attorney for “litigation-related conduct”); United States v. Cintolo, 818 F.2d 980, 992 (1st Cir. 1987) (“any act by any party—whether lawful or unlawful on its face—may abridge § 1503 if performed with a corrupt motive”).

Nexus to a pending or contemplated official proceeding. Obstruction-of-justice law generally requires a nexus, or connection, to an official proceeding. In Section 1503, the nexus must be to pending “judicial or grand jury proceedings.” United States v. Aguilar, 515 U.S. 593,
599 (1995). In Section 1505, the nexus can include a connection to a “pending” federal agency proceeding or a congressional inquiry or investigation. Under both statutes, the government must demonstrate “a relationship in time, causation, or logic” between the obstructive act and the proceeding or inquiry to be obstructed. Id. at 599; see also Arthur Andersen LLP v. United States, 544 U.S. 696, 707-708 (2005). Section 1512(c) prohibits obstructive efforts aimed at official proceedings including judicial or grand jury proceedings. 18 U.S.C. § 1515(a)(1)(A). “For purposes of” Section 1512, “an official proceeding need not be pending or about to be instituted at the time of the offense.” 18 U.S.C. § 1512(f)(1). Although a proceeding need not already be in progress to trigger liability under Section 1512(c), a nexus to a contemplated proceeding still must be shown. United States v. Young, 916 F.3d 368, 386 (4th Cir. 2019); United States v. Petruk, 781 F.3d 438, 445 (8th Cir. 2015); United States v. Phillips, 583 F.3d 1261, 1264 (10th Cir. 2009); United States v. Reich, 479 F.3d 179, 186 (2d Cir. 2007). The nexus requirement narrows the scope of obstruction statutes to ensure that individuals have “fair warning” of what the law proscribes. Aguilar, 515 U.S. at 600 (internal quotation marks omitted).

The nexus showing has subjective and objective components. As an objective matter, a defendant must act “in a manner that is likely to obstruct justice,” such that the statute “excludes defendants who have an evil purpose but use means that would only unnaturally and improbably be successful.” Aguilar, 515 U.S. at 601-602 (emphasis added; internal quotation marks omitted). “[T]he endeavor must have the natural and probable effect of interfering with the due administration of justice.” Id. at 599 (citation and internal quotation marks omitted). As a subjective matter, the actor must have “contemplated a particular, foreseeable proceeding.” Petruk, 781 F.3d at 445-446. A defendant need not directly impede the proceeding. Rather, a nexus exists if “discretionary actions of a third person would be required to obstruct the judicial proceeding if it was foreseeable to the defendant that the third party would act on the [defendant’s] communication in such a way as to obstruct the judicial proceeding.” United States v. Martinez, 862 F.3d 223, 238 (2d Cir. 2017) (brackets, ellipses, and internal quotation marks omitted).

Corruptly. The word “corruptly” provides the intent element for obstruction of justice and means acting “knowingly and dishonestly” or “with an improper motive.” United States v. Richardson, 676 F.3d 491, 508 (5th Cir. 2012); United States v. Gordon, 710 F.3d 1124, 1151 (10th Cir. 2013) (to act corruptly means to “act[] with an improper purpose and to engage in conduct knowingly and dishonestly with the specific intent to subvert, impede or obstruct” the relevant proceeding)(some quotation marks omitted); see 18 U.S.C. § 1515(b) (“As used in section 1505, the term ‘corruptly’ means acting with an improper purpose, personally or by influencing another.”); see also Arthur Andersen, 544 U.S. at 705-706 (interpreting “corruptly” to mean “wrongful, immoral, depraved, or evil” and holding that acting “knowingly . . . corruptly” in 18 U.S.C. § 1512(b) requires “consciousness of wrongdoing”). The requisite showing is made when a person acted with an intent to obtain an “improper advantage for [him]self or someone else, inconsistent with official duty and the rights of others.” BALLENTINE’S LAW DICTIONARY 276 (3d ed. 1969); see United States v. Pasha, 797 F.3d 1122, 1132 (D.C. Cir. 2015); Aguilar, 515 U.S. at 616 (Scalia, J., concurring in part and dissenting in part) (characterizing this definition as the “longstanding and well-accepted meaning” of “corruptly”).

Witness tampering. A more specific provision in Section 1512 prohibits tampering with a witness. See 18 U.S.C. § 1512(b)(1), (3) (making it a crime to “knowingly use[] intimidation . . . or corruptly persuade[] another person,” or “engage[] in misleading conduct towards another
person,” with the intent to “influence, delay, or prevent the testimony of any person in an official proceeding” or to “hinder, delay, or prevent the communication to a law enforcement officer . . . of information relating to the commission or possible commission of a Federal offense”). To establish corrupt persuasion, it is sufficient that the defendant asked a potential witness to lie to investigators in contemplation of a likely federal investigation into his conduct. United States v. Edlind, 887 F.3d 166, 174 (4th Cir. 2018); United States v. Sparks, 791 F.3d 1188, 1191-1192 (10th Cir. 2015); United States v. Byrne, 435 F.3d 16, 23-26 (1st Cir. 2006); United States v. LaShay, 417 F.3d 715, 718-719 (7th Cir. 2005); United States v. Burns, 298 F.3d 523, 539-540 (6th Cir. 2002); United States v. Pennington, 168 F.3d 1060, 1066 (8th Cir. 1999). The “persuasion” need not be coercive, intimidating, or explicit; it is sufficient to “urge,” “induce,” “ask[],” “argu[e],” “giv[e] reasons,” Sparks, 791 F.3d at 1192, or “coach[] or remind[] witnesses by planting misleading facts,” Edlind, 887 F.3d at 174. Corrupt persuasion is shown “where a defendant tells a potential witness a false story as if the story were true, intending that the witness believe the story and testify to it.” United States v. Rodolitz, 786 F.2d 77, 82 (2d Cir. 1986); see United States v. Gabriel, 125 F.3d 89, 102 (2d Cir. 1997). It also covers urging a witness to recall a fact that the witness did not know, even if the fact was actually true. See LaShay, 417 F.3d at 719. Corrupt persuasion also can be shown in certain circumstances when a person, with an improper motive, urges a witness not to cooperate with law enforcement. See United States v. Shotts, 145 F.3d 1289, 1301 (11th Cir. 1998) (telling Secretary “not to [say] anything [to the FBI] and [she] would not be bothered”).

When the charge is acting with the intent to hinder, delay, or prevent the communication of information to law enforcement under Section 1512(b)(3), the “nexus” to a proceeding inquiry articulated in Aguilar—that an individual have “knowledge that his actions are likely to affect the judicial proceeding.” 515 U.S. at 599—does not apply because the obstructive act is aimed at the communication of information to investigators, not at impeding an official proceeding.

Acting “knowingly . . . corruptly” requires proof that the individual was “conscious of wrongdoing.” Arthur Andersen, 544 U.S. at 705-706 (declining to explore “[t]he outer limits of this element” but indicating that an instruction was infirm where it permitted conviction even if the defendant “honestly and sincerely believed that [the] conduct was lawful”). It is an affirmative defense that “the conduct consisted solely of lawful conduct and that the defendant’s sole intention was to encourage, induce, or cause the other person to testify truthfully.” 18 U.S.C. § 1512(c).

Attempts and endeavors. Section 1512(c)(2) covers both substantive obstruction offenses and attempts to obstruct justice. Under general principles of attempt law, a person is guilty of an attempt when he has the intent to commit a substantive offense and takes an overt act that constitutes a substantial step towards that goal. See United States v. Resendiz-Ponce, 549 U.S. 102, 106-107 (2007). “[T]he act [must be] substantial, in that it was strongly corroborative of the defendant’s criminal purpose.” United States v. Pratt, 351 F.3d 131, 135 (4th Cir. 2003). While “mere abstract talk” does not suffice, any “concrete and specific” acts that corroborate the defendant’s intent can constitute a “substantial step.” United States v. Irving, 665 F.3d 1184, 1198-1205 (10th Cir. 2011). Thus, “soliciting an innocent agent to engage in conduct constituting an element of the crime” may qualify as a substantial step. Model Penal Code § 5.01(2)(g); see United States v. Lucas, 499 F.3d 769, 781 (8th Cir. 2007).
The omnibus clause of 18 U.S.C. § 1503 prohibits an “endeavor” to obstruct justice, which sweeps more broadly than Section 1512’s attempt provision. See United States v. Sampson, 898 F.3d 287, 302 (2d Cir. 2018); United States v. Leisure, 844 F.2d 1347, 1366-1367 (8th Cir. 1988) (collecting cases). “It is well established that a[n] [obstruction-of-justice] offense is complete when one corruptly endeavors to obstruct or impede the due administration of justice; the prosecution need not prove that the due administration of justice was actually obstructed or impeded.” United States v. Davis, 854 F.3d 1276, 1292 (11th Cir. 2017) (internal quotation marks omitted).

B. Investigative and Evidentiary Considerations

After the appointment of the Special Counsel, this Office obtained evidence about the following events relating to potential issues of obstruction of justice involving the President:

(a) The President’s January 27, 2017 dinner with former FBI Director James Comey in which the President reportedly asked for Comey’s loyalty, one day after the White House had been briefed by the Department of Justice on contacts between former National Security Advisor Michael Flynn and the Russian Ambassador;

(b) The President’s February 14, 2017 meeting with Comey in which the President reportedly asked Comey not to pursue an investigation of Flynn;

(c) The President’s private requests to Comey to make public the fact that the President was not the subject of an FBI investigation and to lift what the President regarded as a cloud;

(d) The President’s outreach to the Director of National Intelligence and the Directors of the National Security Agency and the Central Intelligence Agency about the FBI’s Russia investigation;

(c) The President’s stated rationales for terminating Comey on May 9, 2017, including statements that could reasonably be understood as acknowledging that the FBI’s Russia investigation was a factor in Comey’s termination; and

(f) The President’s reported involvement in issuing a statement about the June 9, 2016 Trump Tower meeting between Russians and senior Trump Campaign officials that said the meeting was about adoption and omitted that the Russians had offered to provide the Trump Campaign with derogatory information about Hillary Clinton.

Taking into account that information and our analysis of applicable statutory and constitutional principles (discussed below in Volume II, Section III, infra), we determined that there was a sufficient factual and legal basis to further investigate potential obstruction-of-justice issues involving the President.

Many of the core issues in an obstruction-of-justice investigation turn on an individual’s actions and intent. We therefore requested that the White House provide us with documentary evidence in its possession on the relevant events. We also sought and obtained the White House’s concurrence in our conducting interviews of White House personnel who had relevant information. And we interviewed other witnesses who had pertinent knowledge, obtained documents on a