Journal of Criminal Law and Criminology

Volume 86
Issue 4 *Summer*

Article 7

Summer 1996

The Supreme Court's Bipolar Approach to the Interpretation of 18 U.S.C. 1503 and 18 U.S.C. 2232(c)

James K. Fitzpatrick

0091-4169/96/8604-1383
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 86, No. 4
Printed in U.S.A.

THE SUPREME COURT'S BIPOLAR APPROACH TO THE INTERPRETATION OF 18 U.S.C. § 1503 AND 18 U.S.C. § 2232(c)

United States v. Aguilar, 115 S. Ct. 2357 (1995)

I. INTRODUCTION

In *United States v. Aguilar*,[1] the United States Supreme Court ruled on questions regarding the limits of the Omnibus Clause of 18 U.S.C. § 1503,[2] which prohibits a person from endeavoring to obstruct or impede the due administration of justice, and the limits of 18 U.S.C. § 2232(c),[3] which prohibits a person from disclosing a government wiretap to the person targeted under the wiretap. Regarding the Omnibus Clause, the Court held that making false statements to an investigating agent who may or may not testify before a grand jury does not violate the statute.[4] In reaching its conclusion, the Court used the

---

[1] 115 S. Ct. 2357 (1995).

[2] The full text of 18 U.S.C. § 1503 (1994) reads:

> 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 State, or officer who may be serving at any examination or other proceeding before any United States commissioner [United States magistrate judge] 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 [United States magistrate judge], or other committing magistrate in his person or property on account of the performance of his official duties, or 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.

§ 1503 is divided into two parts: (1) its specific language, which forbids influencing, intimidating or impeding any witness, juror or court official, and (2) the Omnibus Clause, which punishes efforts to influence, obstruct, or impede the due administration of justice. United States v. Howard, 569 F.2d 1331, 1333 (5th Cir. 1978), *cert. denied*, 439 U.S. 834 (1978).

[3] The full text of 18 U.S.C. § 2232(c) (1994) reads:

> Whoever, having knowledge that a Federal investigative or law enforcement officer has been authorized or has applied for authorization under chapter 119 to intercept a wire, oral, or electronic communication, in order to obstruct, impede, or prevent such interception, gives notice or attempts to give notice of the possible interception to any person shall be fined under this title or imprisoned not more than five years, or both.

[4] *Aguilar*, 115 S. Ct. at 2362.

rule of lenity to place a new limit—the nexus requirement—on the Omnibus Clause.[5] Under the nexus requirement, a violation of the Omnibus Clause does not occur unless a person's efforts have the "natural and probable" consequence of obstructing justice.[6] Regarding § 2232(c), the Court held that a person can violate the statute by disclosing an expired wiretap.[7] The Court based its interpretation on the plain language of § 2232(c).[8]

The Note argues that the Court reached the correct results regarding both statutory questions. The Court, however, should have used different reasoning regarding its interpretation of the Omnibus Clause of § 1503. First, this Note argues that the Court should not have used the rule of lenity to place a new limit—the "nexus requirement"—on the Omnibus Clause. Both the plain language of the Omnibus Clause and prior Supreme Court decisions make it clear that the statute is not violated by making false statements to a person when there is only a mere possibility that the person might testify at a judicial proceeding. Second, this Note argues that the Court's interpretation of the plain language of § 2232(c) is correct; a person can violate the statute by disclosing an expired wiretap. Furthermore, this interpretation is also consistent with congressional intent behind § 2232(c) to protect the secrecy of government wiretaps. An investigation may contain several wiretaps including both existing and expired wiretaps. Thus, protecting the secrecy of the expired wiretaps also protects the secrecy of the existing wiretaps.

II. BACKGROUND

A. THE HISTORY OF § 1503

1. The Origin of § 1503

The language of § 1503 dates back to the Act of 1789, 1 Stat. 73, 83.[9] The Act of 1789 provided that federal courts of the United States "shall have power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same."[10] Due to the broad language of the statute, it was not long before some federal judges began abusing their authority under it. The most notable case involved James H. Peck, a federal

---

5 *Id.*

6 *Id.*

7 *Id.* at 2364.

8 *Id.*

9 Nye v. United States, 313 U.S. 33, 45 (1941).

10 *Id.*

district judge.[11] Judge Peck had imprisoned and disbarred an attorney for publishing critical remarks regarding one of Judge Peck's opinions.[12] In response to Judge Peck's action, the House of Representatives initiated impeachment proceedings against him.[13] However, on January 28, 1831, by a vote of twenty-one to twenty, the Senate acquitted Judge Peck.[14]

Despite its unsuccessful bid to impeach Judge Peck, Congress decided that it needed to sharply delineate the broad undefined powers of the inferior courts under the Act of 1789.[15] As a result, Congress passed a bill that became known as the Act of March 2, 1831.[16] This Act, which was titled "[a]n Act declaratory of the law concerning contempts of court," contained two sections.[17] In Section 1,[18] Congress narrowly defined the criminal cases that could be tried using summary punishment.[19] These criminal cases involved contempts of court occurring within or near the vicinity of the courtroom.[20] Under Section 2,[21] which was added by the Senate as an amendment to Section 1,[22] Congress defined a much broader category of criminal cases involving contempts of court occurring outside the courtroom.[23] Under this section, however, a person could be punished only after indictment and trial by jury.[24] Forty years later, the Supreme Court

---

11 *Id.*

12 *Id.*

13 *Id.*

14 7 CONG. DEB. 1830-31 (1837).

15 *Nye*, 313 U.S. at 45.

16 *Id.* at 46.

17 *Id.*

18 Section 1 of the Act of March 2, 1831, ch. 99, 4 Stat. 487 reads:

That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the [misbehavior] of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the [misbehavior] of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts.

19 *Nye*, 313 U.S. at 47-49.

20 *Id.*

21 Section 2 of the Act of March 2, 1831, ch. 99, 4 Stat. 487 reads, in part:

That if any person or persons shall corruptly, or by threats or force, endeavour to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or impede, or endeavour to obstruct or impede, the due administration of justice therein, shall be liable to persecution therefor . . . .

22 Walter Nelles & Carol Weiss King, *Contempt By Publication in the United States*, 28 COLUM. L. REV. 525, 530-31 (1928).

23 *Nye*, 313 U.S. at 52.

24 *See id.* at 46-47.

upheld the Act of March 2, 1831.[25] The Court stated, "[a]s thus seen the power of these courts in the punishments of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments, and processes."[26]

2. *The Evolution of § 1503*

After various revisions, Congress codified Section 1 of the Act of March 2, 1831 as 18 U.S.C. § 401[27], and Section 2 as 18 U.S.C. § 1503.[28] Regarding the statutory history of Section 2, Congress first codified Section 2 as § 5399, then as § 135, then as § 241, and finally as § 1503. Because of the similarity between § 1503 and its predecessor statutes, courts have looked to prior decisions by the Supreme Court involving the predecessor statutes to determine the scope of the Omnibus Clause of § 1503.[29]

In construing the predecessor statute to § 1503 (Revised Stat. § 5399), the Supreme Court in *Pettibone v. United States*[30] placed two important limitations on the interpretation of the phrase "corruptly endeavors to obstruct the due administration of justice."[31] First, the *Pettibone* Court ruled that such obstruction can arise only when justice is being administered in a court of the United States.[32] Second, to convict a person of obstructing justice, that person must have knowledge that justice is being administered and intend to obstruct the justice being administered.[33]

Building on the Supreme Court's ruling in *Pettibone*, lower courts have interpreted § 1503 to apply to interference with any judicial arm of the government including grand jury proceedings.[34] Lower courts,

---

25 *Ex Parte* Robinson, 19 Wall. 505 (U.S. 1873).

26 *Id.* at 510-11.

27 The full text of 18 U.S.C. § 401 (1994) entitled "Power of court" reads:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

28 United States v. Williams, 874 F.2d 968, 978 (5th Cir. 1989).

29 Michael Kaplan, Annotation, *Attempt to Intimidate Witness, Etc.*, 20 ALR Fed. 731, 734 (1974).

30 148 U.S. 197 (1893).

31 *Id.* at 206.

32 *Id.*

33 *Id.*

34 *See, e.g.*, United States v. Shoup, 608 F.2d 950, 960 (3d Cir. 1979).

however, have not extended the reach of § 1503 to include obstruction of governmental agency investigations including those of the Federal Bureau of Investigation (FBI).[35]

A more difficult question regarding the Omnibus Clause of § 1503 for lower courts has been the question of what acts constitute "corrupt endeavors to obstruct the due administration of justice."[36] The Supreme Court attempted to answer this question in *Osborn v. United States.*[37] In *Osborn,* the defendant sought to convey a bribe to a potential juror through an intermediary who was secretly working for the government.[38] Although it was impossible for the defendant's efforts to successfully obstruct justice, the Court ruled that the defendant violated the Omnibus Clause because he had "endeavored" to obstruct justice.[39] The Court defined "endeavor" under the Omnibus Clause as "any effort or essay to do or accomplish the evil purpose that [§ 1503] was enacted to prevent."[40] Furthermore, the *Osborn* Court noted that to violate the Omnibus Clause, a person's endeavor to obstruct justice did not have to be successful.[41]

Despite the Supreme Court's ruling in *Osborn,* lower courts continued to struggle with the question of which acts are "corrupt endeavors to obstruct justice,"—especially regarding acts of perjury.[42] Subsequently, a split among the circuit courts developed regarding the correct approach to this question.

To provide a more predictable approach for determining which acts are "corrupt endeavors to obstruct the due administration of justice," the Third, Tenth and Eleventh Circuits developed a "nexus" requirement.[43] Under the Third Circuit's definition, an endeavor must have a relationship in time, causation or logic with the judicial proceeding.[44] The Eleventh Circuit advanced the nexus requirement one step further by requiring that a person's endeavor have the "natural and probable effect" of interfering with the due administration of jus-

35 United States v. Fayer, 573 F.2d 741, 745 (2d Cir.), *cert. denied,* 439 U.S. 831 (1978).

36 *See* United States v. Walasek, 527 F.2d 676, 679 (3d Cir. 1975) (stating that one who intentionally withholds or destroys tangible evidence which he knows to be the target of a grand jury investigation violates the Omnibus Clause).

37 385 U.S. 323 (1966).

38 *Id.* at 325.

39 *Id.* at 333.

40 *Id.* (citing United States v. Russell, 255 U.S. 138, 143 (1921)).

41 *Id.*

42 *See* United States v. Rankin, 870 F.2d 109, 111 (3d Cir. 1989) (perjury by itself does not violate § 1503).

43 United States v. Wood, 6 F.3d 692, 695 (10th Cir. 1993); United States v. Thomas, 916 F.2d 647, 652 (11th Cir. 1990); United States v. Walasek, 527 F.2d 676, 679 (3d Cir. 1975).

44 *Walasek,* 527 F.2d at 679 n.12.

tice.[45] The court based its nexus requirement on the reasoning used by the Supreme Court in *In re Michael*[46] regarding perjury as a contempt of court.[47] The Tenth Circuit also adopted the reasoning used by the Eleventh Circuit regarding the nexus requirement and held that making false statements to FBI agents, who were part of a grand jury investigation, does not violate the Omnibus Clause because the false statements would not have the "natural and probable effect" of obstructing justice.[48]

The Fifth and the Ninth Circuits have used a broader interpretation to determine which acts are "corrupt endeavors to obstruct the due administration of justice" under the Omnibus Clause.[49] In *United States v. Rasheed*,[50] the Ninth Circuit ruled that the Omnibus Clause was designed to proscribe all corrupt methods of obstructing justice.[51] Likewise, the Fifth Circuit in *United States v. Williams*[52] ruled that *any* corrupt effort to obstruct justice violates the Omnibus Clause.[53] Unlike the Third, Tenth, and Eleventh Circuits, the Fifth and the Ninth Circuits have not applied the nexus requirement to the Omnibus Clause. An effort to obstruct justice does not need to have the "natural and probable" effect of obstructing justice or to result in actual obstruction of justice.[54] Furthermore, the Fifth Circuit reasoned that reliance on *In re Michael* by other circuits to interpret the Omnibus Clause was incorrect since the *In re Michael* Court ruled on the predecessor statute to § 401—which involves summary punishment—and not on the predecessor statute to the Omnibus Clause of § 1503.[55]

B. THE HISTORY OF § 2232(C)

Section 2232(c) was enacted as part of the Electronics Privacy Act of 1986, which amended Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[56] Title III of the 1968 law was designed to

---

45 *Thomas*, 916 F.2d at 652.

46 326 U.S. 224 (1945). The *Michael* Court held that regarding perjury, "that element (obstruction) must clearly be shown in every case where the power to punish for contempt is exerted." *Id.* at 228. It should be noted that the Court made its ruling regarding the predecessor statute to 18 U.S.C. § 401—which involves summary punishment—and not to the predecessor statute to § 1503 which involves indictment and trial by jury. *Id.* at 225.

47 *Thomas*, 916 F.2d at 652.

48 United States v. Wood, 6 F.3d 692, 697 (10th Cir. 1993).

49 *See* United States v. Williams, 874 F.2d 968, 979 (5th Cir. 1989); *see also* United States v. Rasheed, 663 F.2d 843, 852 (9th Cir. 1981).

50 663 F.2d 843 (9th Cir. 1981).

51 *Id.* at 852.

52 874 F.2d 968 (5th Cir. 1989).

53 *Id.* at 979.

54 *Id.*

55 *Id* at 979-80.

56 Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351 tit. III, 82

protect against the unauthorized interception of electronic communications by the government.[57] Under Title III, Congress carefully delineated the circumstances under which the Government was authorized to use electronic surveillance.[58] In subsequent years, advances in telecommunications and computer technologies soon made Title III "hopelessly out of date."[59] To ensure the continued protection of the public against unauthorized government surveillance in the face of technological advances, Congress passed the Electronic Communications Privacy Act of 1986.[60] In the statement portion of the bill, Senator Thurmond wrote that the Act "represents a fair balance between the privacy expectations of American citizens and the legitimate needs of law enforcement agencies."[61]

As part of the Electronic Communications Privacy Act of 1986, Congress also strengthened the government's ability to use electronic surveillance for law enforcement efforts.[62] Besides expanding the list of felonies for which a wiretap order could be issued, Congress created criminal penalties for those who notify a target of a government wiretap.[63] Congress added this new section creating penalties for exposing wiretaps as an amendment to 18 U.S.C. § 2232.[64] Congress codified the new section as § 2232(c).[65]

In the Senate Report concerning § 2232(c), Senator Thurmond defined the elements necessary for a person to violate § 2232(c).[66] First, the defendant must have knowledge that the Federal law enforcement officer has been authorized or has applied for an interception order.[67] Second, the person must "engage in conduct of giving notice of the possible interception to any person who was or is the target of the interception."[68] Finally, the defendant must have the intent to obstruct, impede or prevent the interception.[69]

The first and only case interpreting § 2232(c) was *United States v.*

Stat. 197, 211-23 (codified as amended at 18 U.S.C. §§ 2510 to 2520; 47 U.S.C. § 604). S. REP. No. 1064, 99th Cong., 2d Sess. 1 (1986).

57 *Id.* at 2.

58 *Id.*

59 *Id.* at 3.

60 *Id.*

61 *Id.* at 5.

62 *Id.*

63 *Id.*

64 *Id.* at 34.

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.*

Aguilar.[70]

III. Facts and Procedural History

In 1980, a jury convicted Michael Tham, an officer of the International Brotherhood of Teamsters, of embezzling funds from the local affiliate of the Teamster's organization.[71] In July of 1987, Tham filed a motion under 28 U.S.C. § 2255 to set aside his conviction. The motion was assigned to District Judge Weigel in the Northern District of California.[72]

Seeking to improve his chances that the motion would be granted, Tham sought the assistance of attorney Edward Solomon and putative mobster Abe Chapman.[73] Tham hoped to capitalize on their acquaintances with District Judge Robert Aguilar of the Northern District of California.[74] Solomon knew Judge Aguilar from law school, and Chapman was distantly related to Judge Aguilar by marriage.[75] Judge Aguilar met with both Solomon and Chapman concerning Tham's petition, and as a result Judge Aguilar spoke with Judge Weigel about the matter.[76]

Independent of Tham's embezzlement conviction, the FBI was investigating Tham on charges of potential labor racketeering.[77] On May 20, 1987, the FBI applied and received authorization from Chief District Judge Peckham to install a wiretap on Tham's business phones.[78] Chapman appeared on the application as a potential interceptee.[79] Upon the expiration of this wiretap on June 20, 1987, Judge Peckham granted a petition by the FBI under 18 U.S.C. § 2518(8)(d) to maintain the secrecy of the wiretap.[80] From their investigation of Tham for labor racketeering, the FBI learned of the meetings between Chapman and Judge Aguilar.[81] On August 5, 1987, the FBI informed Judge Peckham about the meetings between Chapman and Judge Aguilar.[82] Four days later, Judge Peckham saw Judge Aguilar at an American Bar Association reception.[83] Concerned

70 21 F.3d 1475 (9th Cir. 1994) (en banc).
71 United States v. Aguilar, 994 F.2d 609, 612 (9th Cir. 1993).
72 *Id.*
73 *Id.*
74 United States v. Aguilar, 115 S. Ct. 2357, 2360 (1995).
75 *Id.*
76 *Id.*
77 *Id.*
78 *Id.*
79 *Id.*
80 *Id.*
81 United States v. Aguilar, 21 F.3d 1475, 1478 (9th Cir. 1994).
82 *Id.*
83 *Id.*

about appearances of impropriety, Judge Peckham informed Judge Aguilar that Chapman had a prior criminal record and that Chapman's name was listed in a wiretap authorization.[84] Judge Peckham was referring to the May 20 application.[85]

As part of the FBI's continuing investigation, Judge Peckham authorized two additional wiretaps on Tham's phones.[86] Judge Peckham named Chapman as an interceptee for the periods of September 12 through October 12, 1987, and October 22, 1987 through May 8, 1988.[87] The record does not indicate that Judge Aguilar had any specific knowledge of these new wiretaps.[88]

On February 6, 1988, five months after his encounter with Judge Peckham, Judge Aguilar met with Chapman at Judge Aguilar's house.[89] As Chapman was leaving the Aguilar house, Judge Aguilar noticed that a man was watching his home.[90] Suspecting that the man was a government agent, Judge Aguilar immediately sent a message to Chapman informing Chapman that their meeting had been observed and that Chapman's phones were being wiretapped.[91] Judge Aguilar apparently believed, in error, that Chapman's phones were tapped in connection with the initial May 20 application and that the initial authorization was still in effect.[92]

On April 26, 1988, a grand jury began to investigate an alleged conspiracy by Judge Aguilar, Tham, Chapman and Solomon to influence the outcome of Tham's case.[93] Shortly afterwards, Judge Aguilar became aware of the grand jury proceedings.[94] On June 22, 1988, two FBI agents questioned Judge Aguilar regarding his involvement in the Tham case.[95] Judge Aguilar asked the agents whether he was the target of a grand jury investigation.[96] One of the FBI agents responded: "[t]here is a Grand Jury meeting. Convening I guess [that is] the correct word. Um some evidence will be heard I'm . . . I'm sure on this issue."[97] The FBI agents were not yet part of the grand jury investiga-

---

84 *Aguilar*, 115 S. Ct. at 2360.
85 *Id.*
86 United States v. Aguilar, 994 F.2d 609, 615 (9th Cir. 1993).
87 *Id.*
88 *Id.*
89 United States v. Aguilar, 21 F.3d 1475, 1479 (9th Cir. 1994) (en banc).
90 *Id.*
91 *Id.*
92 *Id.*
93 United States v. Aguilar, 115 S. Ct. 2357, 2361 (1995).
94 United States v. Aguilar, 994 F.2d 609, 613 (9th Cir. 1993).
95 *Id.*
96 *Aguilar*, 115 S. Ct. at 2362.
97 *Id.*

tion nor did they identify themselves to Judge Aguilar as such.[98] During the interview, Judge Aguilar lied about his participation in the Tham case and his knowledge of the wiretap.[99]

A grand jury returned an indictment against Judge Aguilar.[100] Judge Aguilar was then convicted by a jury of one count of endeavoring to obstruct justice in violation of 18 U.S.C. § 1503 and one count of disclosing a wiretap in violation of 18 U.S.C. § 2232(c).[101] On appeal, the Court of Appeals for the Ninth Circuit reversed the § 1503 conviction but affirmed the § 2232(c) conviction.[102]

On rehearing en banc, the Court of Appeals reversed both convictions against Judge Aguilar.[103] In overturning the § 1503 conviction, the court held that Judge Aguilar did not endeavor to obstruct the due administration of justice when he lied to the FBI agents.[104] The court reasoned that for a person to be convicted under 18 U.S.C. § 1503, that person—by "corrupt influence" or "corrupt persuasion"—must endeavor to influence, obstruct or impede the proceedings of a grand jury investigation.[105] The FBI agents were not acting as part of the grand jury but as part of a separate FBI investigation.[106] At most, Judge Aguilar's false statements could be considered interference with an FBI investigation, but not with a judicial proceeding.[107] Interfering with a government agency's investigation is not on the same level as endeavoring to obstruct the proceedings of a grand jury.[108]

Regarding § 2232(c), the court looked at the plain language of the statute and held that interference with a "possible" wiretap interception pertained to either applications for wiretaps, or wiretaps in progress—not expired wiretaps.[109] Since Judge Aguilar interfered with an expired wiretap, the court reasoned that he could not be convicted of violating § 2232(c).[110]

Following an appeal by the United States, the United States Supreme Court granted certiorari to decide whether § 1503 punishes false statements made to an investigating agent who may or may not

98 *Id.*
99 *Aguilar*, 994 F.2d at 613.
100 *Aguilar*, 115 S. Ct. at 2360.
101 *Id.*
102 *Aguilar*, 994 F.2d at 626.
103 United States v. Aguilar, 21 F.3d 1475, 1487 (9th Cir. 1994) (en banc).
104 *Id.* at 1483.
105 *Id.* at 1485.
106 *Id.* at 1486.
107 *Id.*
108 *Id.*
109 *Id.* at 1480.
110 *Id.* at 1482.

testify before a grand jury, and to decide whether disclosure of a wiretap, after its authorization expires, violates § 2232(c).[111]

IV. Summary of Opinions

A. The Majority Opinion

Writing for the majority,[112] Chief Justice Rehnquist affirmed in part and reversed in part the Ninth Circuit's en banc decision.[113] Regarding 18 U.S.C. § 1503, Chief Justice Rehnquist affirmed the Ninth Circuit's ruling, holding that making false statements to an investigating agent who might be a potential witness before a grand jury does not violate the statute.[114] Regarding 18 U.S.C. § 2232(c), however, Chief Justice Rehnquist reversed the Ninth Circuit's ruling, holding that disclosure of a wiretap after its authorization has expired violates § 2232(c).[115]

1. 18 U.S.C. § 1503

In holding that Judge Aguilar did not violate the Omnibus Clause of § 1503, Chief Justice Rehnquist began by analyzing the statutory language of 18 U.S.C. § 1503.[116] According to Chief Justice Rehnquist, the first two clauses[117] refer only to interference with or injury to actual grand jurors, petit jurors or court officers in the discharge of their duties.[118] The third clause of the statute—the Omnibus Clause[119]—acts as a general catchall provision prohibiting persons from endeavoring to influence, obstruct or impede the due administration of justice.[120]

Chief Justice Rehnquist focused on prior rulings by the Court.[121]

---

111 United States v. Aguilar, 115 S. Ct. 571 (1994).

112 Justices O'Connor, Souter, Ginsburg and Breyer joined Chief Justice Rehnquist's opinion.

113 United States v. Aguilar, 115 S. Ct. 2357, 2359-60 (1995).

114 *Id.*

115 *Id.*

116 *Id.* at 2361.

117 The first two clauses of 18 U.S.C. § 1503 (1994) state, in part:

> 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 . . . or injures any such grand or petit juror in his person or property on account of his being or having been such juror, or injures any such officer, commissioner . . . .

118 *Aguilar*, 115 S. Ct. at 2361.

119 The Omnibus Clause of 18 U.S.C. § 1503 (1994) states, in part: "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 . . . ."

120 *Aguilar*, 115 S. Ct. at 2361.

121 *Id.* at 2362.

He noted that the Court in *Pettibone v. United States*[122] ruled on the structure of the predecessor statute to § 1503.[123] The *Pettibone* Court ruled that "a person could not be charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court."[124] The *Pettibone* Court also reasoned that a person must first have knowledge that his actions are likely to affect the judicial proceeding, otherwise, he lacks the necessary intent to obstruct justice.[125]

Recognizing the knowledge requirement stated in *Pettibone* as one limitation on the Omnibus Clause, Chief Justice Rehnquist then looked at circuit court decisions that had placed additional limitations on the Omnibus Clause.[126] Some circuit courts developed a nexus requirement, in addition to the knowledge requirement, as a further limit on the Omnibus Clause.[127] To satisfy the nexus requirement, a person's endeavors to obstruct judicial proceedings must have a relationship in time, causation or logic with the judicial proceedings.[128] Put another way, the person's endeavors must have the "natural and probable effect" of interfering with the proceedings.[129]

Chief Justice Rehnquist adopted the nexus requirement developed in the circuit courts as a correct interpretation of the Omnibus Clause.[130] He reasoned that the nexus requirement properly restrained the reach of the Omnibus Clause.[131] The Court, he noted, has traditionally used the rule of lenity to exercise restraint in assessing the reach of federal criminal statutes out of a deference to the prerogatives of Congress, and to draw a clear line that the public can understand.[132]

Based on the nexus requirement, Chief Justice Rehnquist held that Judge Aguilar did not violate the Omnibus Clause.[133] First, applying the knowledge requirement, Chief Justice Rehnquist reasoned that a rational trier of fact could not conclude that Judge Aguilar

---

122 148 U.S. 197 (1893).

123 *Aguilar*, 115 S. Ct. at 2362.

124 *Pettibone*, 148 U.S. at 206.

125 *Id.*

126 *Aguilar*, 115 S. Ct. at 2362.

127 *Id.* (citing United States v. Wood, 6 F.3d 692, 695 (10th Cir. 1993); United States v. Walasek, 527 F.2d 676, 679 (3d Cir. 1975)).

128 *Id.*

129 *Id.* (citing United States v. Thomas, 916 F.2d 647, 651 (11th Cir. 1990)).

130 *Id.*

131 *Id.*

132 *See id.* (citing Dowling v. United States, 473 U.S. 207 (1985) (giving deference to the prerogatives of Congress); McBoyle v. United States, 283 U.S. 25, 27 (1931) (noting the importance of drawing a defined line for the public)).

133 *Id.* at 2363.

knew that his false statements would be provided to the grand jury.[134] Furthermore, applying the nexus requirement, Chief Justice Rehnquist concluded that making false statements to an investigating agent who might testify before a grand jury would not have the "natural and probable effect" of interfering with the due administration of justice.[135] The effects of making false statements to an investigating agent who had not yet been subpoenaed or directed to appear before a grand jury was too speculative.[136]

2. *18 U.S.C. § 2232(c)*

In holding that Judge Aguilar had violated § 2232(c) by disclosing an expired wiretap, Chief Justice Rehnquist began his analysis by looking at the plain language of § 2232(c).[137] Chief Justice Rehnquist divided the statute into three distinct clauses: the first clause[138] defines the knowledge requirement; the second clause[139] defines the intent requirement; and the third clause[140] defines the punishable act.[141] According to Chief Justice Rehnquist, for an act to be criminal under § 2232(c), the person committing the act must have knowledge that an officer has been authorized or has sought authorization to intercept a communication.[142] Next, the person committing the act must intend to obstruct, impede, or prevent such interception.[143] Finally based on the third clause, the act must be one in which a person attempts to give notice of the "possible" interception.[144]

In analyzing the plain language of the third clause, Chief Justice Rehnquist ruled that a person can violate § 2232(c) by disclosing a wiretap after its authorization expires.[145] The phrase "possible interception" in the third clause describes the person's act that offends the statute.[146] Chief Justice Rehnquist reasoned that by using the word "possible," Congress intended that a person could violate § 2232(c) by

---

134 *Id.*
135 *Id.*
136 *Id.*
137 *Id.*
138 The first clause of 18 U.S.C. § 2232(c) (1994) states, "[w]hoever, having knowledge that a Federal investigative or law enforcement officer has been authorized or has applied for authorization . . . ."
139 The second clause of § 2232(c) states, "in order to obstruct, impede, or prevent such interception . . . ."
140 The third clause of § 2232(c) states, "gives notice or attempts to give notice of the possible interception to any person shall be fined under this title . . . ."
141 *Aguilar*, 115 S. Ct. at 2363-64.
142 *Id.*
143 *Id.*
144 *Id.*
145 *Id.*
146 *Id.*

disclosing an application for a pending wiretap.[147] Should the application be later denied, the person would still violate § 2232(c) although the wiretap never occurred and the person did not know that the application had been denied.[148] Consequently, Chief Justice Rehnquist reasoned that Congress did not intend to limit the offense to obstruction of wiretaps that are factually possible.[149] Consequently, disclosure of a wiretap after its authorization has expired also violates § 2232(c) even though the interception is no longer factually possible.[150]

To support his broad interpretation of the phrase "possible interception," Chief Justice Rehnquist argued that this interpretation of § 2232(c) avoids the problems associated with impossibility.[151] Chief Justice Rehnquist noted that in prior decisions, the Court has expressed reservations about the "continuing validity [of] the doctrine of 'impossibility,' with all its subtleties" in the law of criminal attempt.[152] He reasoned that a narrow interpretation of § 2232(c) which restricts the phrase "possible interceptions" only to pending applications or authorized wiretaps would open the doors to a defendant's claims of impossibility.[153] For example, defendants could disclose authorized wiretaps and then claim that the wiretap was impossible should the wiretap fail due to a mechanical breakdown.[154] Thus, Chief Justice Rehnquist reasoned that a narrow interpretation of § 2232(c) would conflict with both the Court's reservation with the doctrine of impossibility and congressional intent to protect the secrecy of governmental wiretaps.[155]

In dictum, Chief Judge Rehnquist acknowledged Justice Stevens' argument that a broad interpretation of § 2232(c) places no temporal limitation on liability for expired wiretaps.[156] Thus, a defendant potentially could be prosecuted for disclosing an expired wiretap ten years later, producing an absurd result.[157] Chief Justice Rehnquist noted that although he would reserve judgment for a case that presented this question, the statutory laws on electronic surveillance suggested a plausible temporal limit on liability.[158] Pursuant to 18

147 *Id.*
148 *Id.*
149 *Id.*
150 *Id.*
151 *Id.* at 2365.
152 *Id.* (citing Osborn v. United States, 385 U.S. 323, 333 (1966)).
153 *Id.*
154 *Id.*
155 *Id.*
156 *Id.* at 2364.
157 *Id.* at 2366 (Stevens, J., concurring and dissenting).
158 *Id.* at 2364.

U.S.C. § 2518(8)(d), the authorizing judge must notify the interceptees and related parties of the wiretap within a reasonable time after denial of the application or termination of a wiretap.[159] Thus, Chief Justice Rehnquist suggested that after the judge notifies the parties, liability might no longer exist.[160]

Finally, Chief Justice Rehnquist addressed one last issue concerning the construction of § 2232(c).[161] The respondents argued that a broad interpretation of § 2232(c) would violate a person's First Amendment rights.[162] Chief Justice Rehnquist responded that government officials in sensitive confidential positions have special duties of nondisclosure.[163] Consequently, government officials are subject to more stringent standards on nondisclosure than members of the public.[164] Chief Justice Rehnquist concluded that the government's interest in protecting the secrecy of its electronic surveillance is sufficient to justify this construction of § 2232(c), and thus this construction does not violate the First Amendment.[165]

Using a broad interpretation of § 2232(c), Chief Justice Rehnquist held that Judge Aguilar violated the statute by disclosing information regarding an expired wiretap as prohibited under the statute.[166]

B. JUSTICE STEVENS' CONCURRENCE/DISSENT

Writing separately, Justice Stevens concurred with the majority's opinion regarding § 1503 but dissented from the majority's opinion regarding § 2232(c).[167] He reasoned that disclosure of an expired wiretap under § 2232(c) does not violate the statute because the statute only prohibits disclosure of authorized wiretaps or applications for wiretaps.[168]

Regarding § 2232(c), Justice Stevens noted that Judge Aguilar had been convicted of an attempt to do the impossible: interfere with a nonexistent wiretap.[169] According to Justice Stevens, the law does not proscribe a criminal attempt unless the defendant's intent is accompanied by "a dangerous probability that [the unlawful result] will

159 *Id.*
160 *Id.*
161 *Id.* at 2365.
162 *Id.*
163 *Id.*
164 *Id.* (citing Snepp v. United States, 444 U.S. 507 (1980) (per curiam)).
165 *Id.*
166 *Id.*
167 *Id.* (Stevens, J., concurring and dissenting).
168 *Id.* (Stevens, J., concurring and dissenting).
169 *Id.* (Stevens, J., concurring and dissenting).

happen."[170] In this case, there was no probability that Judge Aguilar could reveal the existence of an interception or an application for an interception since none existed.[171] Furthermore, Justice Stevens noted that a criminal statute should not be construed to criminalize an evil intent accompanied by a harmless act.[172] Judge Aguilar committed a harmless act: disclosure of an expired wiretap.[173]

Next, Justice Stevens reasoned that interpretation of the plain language of § 2232(c) demonstrates that the statute can be violated only by disclosure of either a pending application or an authorized wiretap, but not by disclosure of an expired wiretap.[174] He noted that the second clause of § 2232(c) requires that a person intend to impede "such interception."[175] The phrase "such interception" refers to a person's knowledge that a federal officer "has been authorized or has applied for authorization" to make a wiretap.[176] Thus, the interceptions that Congress intended to protect from illegal disclosure were either pending applications for interceptions or authorized interceptions.[177] Justice Stevens reasoned further that to infer from the statutory language—as the majority did—that defendants should be held liable for expired authorizations or subsequent reauthorizations would undermine the knowledge requirement of § 2232(c).[178] Holding a defendant liable for conjectural or nonexistent authorizations would contradict the Court's usual practice of giving strict effect to scienter provisions.[179]

Finally, Justice Stevens addressed the majority's interpretation of the word "possible interceptions" in the third clause of § 2232(c).[180] Justice Stevens disagreed with the majority view that "possible interceptions" also includes expired wiretaps.[181] According to Justice Stevens, the phrase "such interceptions" in the second clause refers to the acts that violate the statute, and "such interceptions" only includes

---

170 *Id.* at 2366 (Stevens, J., concurring and dissenting) (citing Swift & Co. v. United States, 196 U.S. 375, 396 (1905) (Holmes, J.)).

171 *Id.* (Stevens, J., concurring and dissenting).

172 *Id.* (Stevens, J., concurring and dissenting) (citing Simpson v. United States, 435 U.S. 6, 14-15 (1978)).

173 *Id.* (Stevens, J., concurring and dissenting).

174 *Id.* (Stevens, J., concurring and dissenting).

175 *Id.* (Stevens, J., concurring and dissenting).

176 *Id.* (Stevens, J., concurring and dissenting).

177 *Id.* (Stevens, J., concurring and dissenting).

178 *Id.* (Stevens, J., concurring and dissenting).

179 *Id.* (Stevens, J., concurring and dissenting) (citing United States v. X-citement Video, Inc., 115 S. Ct. 464, 467 (1994)).

180 *Id.* (Stevens, J., concurring and dissenting).

181 *Id.* (Stevens, J., concurring and dissenting).

applications for interceptions or authorized wiretaps.[182] Justice Stevens argued that Congress used the phrase "possible interceptions" in the third clause to place a temporal limitation on potential liability.[183] The phrase "possible interceptions" applies only to present or pending authorizations and not to expired wiretaps.[184] Otherwise, a person could violate the statute by disclosing an expired ten year old application or authorization.[185] Justice Stevens reasoned that this absurd result is avoided if the phrase "possible interceptions" is properly understood as a temporal limitation on potential liability.[186]

Using a narrow interpretation of § 2232(c), Justice Stevens reasoned that Judge Aguilar did not violate § 2232(c) since Judge Aguilar disclosed an expired wiretap that is not protected under the statute.[187]

C. JUSTICE SCALIA'S CONCURRENCE/DISSENT

Justice Scalia[188] concurred with the majority's opinion regarding § 2232(c), but dissented from the majority's opinion regarding the Omnibus Clause of § 1503.[189] He reasoned that the nexus requirement is not a proper interpretation of the statute.[190]

Justice Scalia began his opinion by addressing the construction of the Omnibus Clause.[191] Based on *Pettibone*, Justice Scalia agreed with the majority opinion that a person must have knowledge of a judicial proceeding and intend to interfere with this proceeding.[192] Justice Scalia, however, strongly disagreed with the majority's use of a nexus requirement to restrain the scope of the Omnibus Clause.[193] He argued that the majority incorrectly used the rule of lenity since the plain language of the Omnibus Clause is clear regarding the reach of the statute. Rather, the majority was "importing extra-textual requirements to limit the reach of the federal criminal statute."[194] By limiting the Omnibus Clause to acts having the "natural and probable effect" of interfering with the administration of justice, Justice Scalia argued that the majority changed the plain meaning of the clause by effectively limiting the clause to cover only those acts that would be

182 *Id.* (Stevens, J., concurring and dissenting).
183 *Id.* (Stevens, J., concurring and dissenting).
184 *Id.* (Stevens, J., concurring and dissenting).
185 *Id.* (Stevens, J., concurring and dissenting).
186 *Id.* (Stevens, J., concurring and dissenting).
187 *Id.* (Stevens, J., concurring and dissenting).
188 Justice Thomas and Justice Kennedy joined Justice Scalia.
189 *Id.* at 2367 (Scalia, J., concurring and dissenting).
190 *Id.* (Scalia, J., concurring and dissenting).
191 *Id.* (Scalia, J., concurring and dissenting).
192 *Id.* (Scalia, J., concurring and dissenting).
193 *Id.* (Scalia, J., concurring and dissenting).
194 *Id.* at 2368 (Scalia, J., concurring and dissenting).

successful at obstructing justice.[195]

According to Justice Scalia, a person violates the Omnibus Clause by "endeavoring" to do so, and not by whether the endeavor would be successful or not.[196] The use of the word "endeavor" in the Omnibus Clause describes *any* effort or assay to accomplish the evil purpose that the section was enacted to prevent.[197] Moreover, it is immaterial whether the effort to obstruct a pending proceeding can actually be achieved.[198] The Omnibus Clause reaches all purposeful efforts with the intent to obstruct justice.[199] Thus, Justice Scalia reasoned that the Omnibus Clause reaches any act performed with the intention of obstructing justice and not just to those acts that have the natural and probable consequence of obstructing justice.[200]

Based on his interpretation of the Omnibus Clause, Justice Scalia argued that Judge Aguilar violated the Omnibus Clause.[201] Judge Aguilar knew that a grand jury was investigating a conspiracy charge against him.[202] Thus, Judge Aguilar knew that his false statements to the FBI agents *might* be provided to the grand jury.[203] Justice Scalia reasoned that a reasonable juror could have concluded that Judge Aguilar had corruptly endeavored to obstruct justice because Judge Aguilar made false statements to the FBI agents with the intent to obstruct the grand jury investigation.[204]

V. ANALYSIS

A. § 1503

The Supreme Court correctly concluded that making false statements to an investigating agent who might testify before a grand jury does not violate the Omnibus Clause of § 1503. In reaching its conclusion, the Court used the rule of lenity to affirm the use of the nexus requirement as a proper approach to interpret the Omnibus Clause.[205] By affirming the use of the nexus requirement, however,

---

195 *Id.* (Scalia, J., concurring and dissenting).
196 *Id.* at 2367 (Scalia, J., concurring and dissenting).
197 *Id.* (Scalia, J., concurring and dissenting) (citing United States v. Russell, 255 U.S. 138, 143 (1921)) (emphasis added).
198 *Id.* (Scalia, J., concurring and dissenting) (citing Osborn v. United States, 385 U.S. 323, 333 (1966)).
199 *Id.* (Scalia, J., concurring and dissenting) (citing United States v. Mullins, 22 F.3d 1365, 1370 (6th Cir. 1994).
200 *Id.* (Scalia, J., concurring and dissenting).
201 *Id.* at 2369 (Scalia, J., concurring and dissenting).
202 *Id.* (Scalia, J., concurring and dissenting).
203 *Id.* (Scalia, J., concurring and dissenting) (emphasis added).
204 *Id.* (Scalia, J., concurring and dissenting).
205 *Id.* at 2362.

the Court changed the plain meaning of the Omnibus Clause.[206] The Court essentially read the phrase "endeavor to obstruct justice" out of the Omnibus Clause and replaced it with the phrase "efforts that have the natural and probable consequence of obstruction of justice."[207] This interpretation is inconsistent with both the plain language of and congressional intent behind the Omnibus Clause which prohibits *any* endeavor to obstruct justice. Rather than using the rule of lenity, the Court should have used stare decisis to reach its conclusion that making false statements to an investigating agent does not violate the Omnibus Clause.

1. Plain Language

Interpretation of a statute begins by looking at the plain language used in the statute.[208] The plain language used in the Omnibus Clause indicates that Congress intended to proscribe all efforts with the intent to obstruct justice whatever the potential success of the efforts used.

The Omnibus Clause of § 1503 provides: "[w]hoever . . . 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 . . . ."[209] As defined in *Webster's Ninth New Collegiate Dictionary*, "endeavor" means to achieve or reach, or to work with a set purpose.[210] The meaning of the word endeavor has remained essentially the same since the early 1800s.[211] As defined in *A Complete and Universal English Dictionary* in 1809, "to endeavour" means to exert power, in order to gain some end; to make an attempt; to try.[212] Thus, by using the word "endeavor," Congress intended to proscribe any corrupt effort with the purpose to either obstruct, impede or influence the due administration of justice. Congress however did not use language in the statute which required that the efforts should be capable of successfully obstructing justice.

By using the nexus requirement, the Supreme Court changed the plain meaning of the word endeavor as previously used by Congress. The Court now holds that an "endeavor," as used in the Omnibus

206 *See id.* at 2368 (Scalia, J., concurring and dissenting).
207 *Id.*
208 United States v. Turkette, 452 U.S. 576, 580 (1981).
209 18 U.S.C. § 1503 (1994) (emphasis added).
210 WEBSTER'S NEW COLLEGIATE DICTIONARY 410 (1991).
211 The word "endeavor" was spelled "endeavour" in 1809. A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY 312 (1809).
212 *Id.*

Clause, must have the "natural and probable consequence" of obstructing justice.[213] As defined in *Webster's Ninth New Collegiate Dictionary*, "natural" means happening in the ordinary course of things, and "probable" means likely to be or become true.[214] In essence, an effort that would have the "natural and probable consequence" of obstructing justice is equivalent to an effort that if carried out, would be "successful" in obstructing justice.

The Court's nexus requirement that a person's efforts be the type that would be "successful" in obstructing justice is not consistent with the plain language used by Congress in the Omnibus Clause. The plain language of the statute prohibits *any* effort with the evil intent to obstruct justice and places no limits on the potential success of the efforts used. As Justice Scalia noted, "the Court effectively reads the word 'endeavor' . . . out of the [O]mnibus [C]lause."[215]

2. *Legislative History*

The Omnibus Clause of § 1503, which has its origins in Section 2 of the Act of March 2, 1831, should not be narrowly construed as the Supreme Court has done by creating the nexus requirement. Based on the legislative history, Congress intended that Section 2 should be broadly construed.[216] The purpose behind Section 2 was to prohibit any attempt to obstruct justice made outside the courtroom.[217] Punishment for these attempts required indictment and trial by jury.[218] By contrast, Congress intended that Section 1 (the predecessor statute to § 401) should be narrowly construed since this section involved contempts of court occurring within the courtroom and subject to summary punishment.[219]

Both the congressional intent behind the Act of March 2, 1831, and the manner in which the legislation was passed indicate that Section 1 was to be narrowly construed and Section 2 was to be broadly construed. Congress introduced the legislation in response to the Senate's acquittal of Judge Peck.[220] Its purpose was to narrowly limit the rights of inferior court judges to use summary punishment for contempts of court occurring within the courtroom.[221] The original legislation presented to the House contained only Section 1 involving

213 United States v. Aguilar, 115 S. Ct. 2357, 2362 (1995).
214 WEBSTER'S NEW COLLEGIATE DICTIONARY 788, 937 (1991).
215 *Aguilar*, 115 S. Ct. at 2368 (Scalia, J., concurring and dissenting).
216 Nye v. United States, 313 U.S. 33, 52 (1941); Nelles & King, *supra* note 22, at 531.
217 Nelles & King, *supra* note 22, at 530-31.
218 *Id.*
219 *Nye*, 313 U.S. at 47-49.
220 *Id.* at 45-46.
221 *Id.*

summary punishment.[222] After the House passed Section 1, the Senate amended the House legislation by adding Section 2 involving contempts of court occurring outside the courtroom punishable by indictment and trial by jury.[223] The timing of the legislation indicates that Congress was concerned that Section 1, by itself, was too narrow to be the only law to cover contempts of court.[224] Thus, Congress added Section 2 to broadly cover all contempts of court not covered by the narrowly defined Section 1.[225] Furthermore, Section 2 need not require a narrow construction since this section has the safeguard of punishment with trial by jury rather than by summary punishment.[226]

The language used by Congress further supports the argument that Section 1 should be narrowly construed and Section 2 should be broadly construed. The language in Section 1 specifically listed the violations that were considered contempts of court and required that there had to be actual obstruction of justice to justify summary judgment. By contrast, Section 2 not only listed specific violations, but also prohibited *any* effort to obstruct or impede justice. Thus, any effort to obstruct justice would violate the statute even if no obstruction of justice results. By using the word "endeavor," Congress attempted to cover those means of interference which the draftsmen did not have the foresight to enumerate.[227]

Congress intended Section 2 of the Act of 1831—the predecessor to the Omnibus Clause of § 1503—to broadly cover efforts to obstruct justice occurring outside the courtroom. A narrow construction of the Omnibus Clause using the nexus requirement, which restricts efforts to obstruct justice to those efforts that would be successful, is inconsistent with congressional intent.

3. Stare Decisis

The Supreme Court used the nexus requirement to decide that making false statements to an investigating agent who might testify before a grand jury does not violate the Omnibus Clause. Besides being inconsistent with the plain language and congressional intent, the nexus requirement is also inconsistent with stare decisis.

By contrast, prior Supreme Court decisions are consistent with a broad interpretation of the Omnibus Clause. In *Osborn v. United*

222 Nelles & King, *supra* note 22, at 530-31.
223 *Id.* at 531 n.24.
224 *See id.*
225 *Id.*
226 *Cf.* Nye v. United States, 313 U.S. 33, 49 (1941).
227 *See* United States v. Bonanno, 177 F. Supp. 106, 114 (S.D.N.Y. 1959).

States,[228] the Court defined "endeavor" in the Omnibus Clause as "any effort or essay to do or accomplish the evil purpose that the section was enacted to prevent."[229] More importantly, the Court stated that "[t]he section is not directed at success in corrupting [justice], but at the 'endeavor' to do so."[230] Thus, the *Osborn* Court held that what was important was not that the act to obstruct justice was successful, but that the person had the purpose of obstructing justice through his efforts.[231] The Court's nexus requirement is not consistent with the broad definition of the word "endeavor" used by the Court in *Osborn*.

Instead of creating a nexus requirement, the Court should have used stare decisis to answer the question whether making false statements to an investigating agent violates the Omnibus Clause. The Court in *Pettibone v. United States*[232] ruled that to violate Revised Stat. § 5399 (the predecessor statute to § 1503), a person must have knowledge of the judicial proceeding and intend to obstruct the proceeding.[233] Based on the *Pettibone* decision, the Government must establish three core elements to successfully convict a defendant under § 1503: (1) there must be a judicial proceeding; (2) the person must have knowledge of the judicial proceeding; and (3) the person must intend to obstruct the judicial proceeding.[234] The *Pettibone* decision is consistent with a broad interpretation of the Omnibus Clause because it does not place any limits on what constitutes endeavors to obstruct justice.

Based on the *Pettibone* decision, making false statements to an investigating agent who might testify before a grand jury does not violate the Omnibus Clause because it does not involve a judicial proceeding and it does not show an intent to obstruct justice.[235] First, an investigating agent is not part of a judicial proceeding. An investigating agent is part of a government agency which does not administer justice within the meaning of § 1503.[236] Second, the requirement that a person intend to obstruct the judicial proceeding is also lacking. When a person makes false statements to an investigating agent, that person's actions show an intent only to obstruct the investigation of a government agency. An intent to obstruct a judicial proceeding is

---

228 385 U.S. 323 (1966).

229 *Id.* at 333.

230 *Id.*

231 *Id.*

232 148 U.S. 197 (1893).

233 *Id.* at 206.

234 United States v. Williams, 874 F.2d 968, 977 (5th Cir. 1989).

235 *See* United States v. Scoratow, 137 F. Supp. 620, 622 (W.D. Pa. 1956) (holding that making false statements to the Federal Bureau of Investigation does not violate § 1503).

236 *Id.*

absent since the person cannot be certain if the investigating agent will testify before the judicial proceeding. Thus, Judge Aguilar did not violate the Omnibus Clause by making false statements to an investigating agent who was not part of a judicial proceeding. Moreover, Judge Aguilar could not be certain that his statements would be given to the grand jury since the investigating agents did not identify themselves as an arm of the grand jury proceeding. Although Judge Aguilar might have violated a statute dealing with obstruction of a government agency, he did not violate the Omnibus Clause.[237]

4. *Rule of Lenity of Nexus Requirement*

Based on the rule of lenity, the Supreme Court accepted the nexus requirement developed in lower court decisions as a reasonable interpretation of the Omnibus Clause.[238] A court should reserve the rule of lenity for those situations in which a reasonable doubt persists about a statute's intended scope after resort to the plain language and motivating policies behind the statute.[239] The rule of lenity is unnecessary to determine the reach of the Omnibus Clause since the plain language and motivating policies of § 1503 are clear regarding its limits. The plain language of the Omnibus Clause indicates that Congress intended to prohibit *any* corrupt effort to obstruct justice. Furthermore, Congress enacted the predecessor statute to § 1503 as a broad prohibition against all possible efforts to obstruct justice occurring outside the courtroom.

In its decision, the Court cited lower court rulings that have developed the nexus requirement.[240] The reasoning of the lower courts that have adopted the nexus requirement however, is incorrect. In *United States v. Thomas*,[241] the Eleventh Circuit defined the nexus requirement as a reasonable limit on the Omnibus Clause.[242] The Eleventh Circuit based its decision in part on two early Supreme Court decisions—*In re Michael* and *Ex parte Hudgings*.[243] In both cases, the Supreme Court narrowly defined the circumstances under which perjury could be punished as an obstruction of justice.[244] In both of these cases, however, the Court was dealing with summary punish-

237 18 U.S.C. § 1001 (1994) (prohibiting making false statements to federal agencies or departments).

238 United States v. Aguilar, 115 S. Ct. 2357, 2362 (1995).

239 Moskal v. United States, 498 U.S. 103, 108 (1990).

240 *Id.*

241 916 F.2d 647 (11th Cir. 1990).

242 *Id.* at 652.

243 *Id.* (citing *In re* Michael, 326 U.S. 224 (1945); *Ex parte* Hudgings, 249 U.S. 378 (1919)).

244 *In re* Michael, 326 U.S. at 228; *Ex parte* Hudgings, 249 U.S. at 382-83.

ment under the predecessor statute to 18 U.S.C. § 401—not the predecessor statute of the Omnibus Clause.[245] Under § 401, a judge has the discretionary power to place the defendant in jail for a contempt of court without a trial by jury. Consequently, although a narrow interpretation might be appropriate for § 401, it is not appropriate for the Omnibus Clause of § 1503 since the defendant has the protection of a trial by jury before being punished.

B. § 2232(C)

The Supreme Court correctly decided that Judge Aguilar violated § 2232(c) by disclosing an expired wiretap. Both the plain language of § 2232(c) and the legislative history behind the statute indicate that Congress intended that a person would violate the statute by disclosing an expired wiretap. The plain language of § 2232(c) indicates that Congress intended to prohibit the disclosure of information regarding a government wiretap whether or not the wiretap is a factual possibility.[246] Thus, a person can violate § 2232(c) by disclosing nonexistent wiretaps—including expired wiretaps.[247] Furthermore, the legislative history behind § 2232(c) indicates that Congress intended to protect the secrecy of government wiretaps by punishing those who disclose the wiretap to the intended target.[248] Prohibiting the disclosure of an expired wiretap protects the secrecy of governmental investigations that use both existing and expired wiretaps and is thus consistent with congressional intent.

1. Plain Language of § 2232(c)

Interpretation of a statute begins by looking at the plain language used in the statute.[249] Based on the plain language of § 2232(c), a person can violate the statute by disclosing information regarding a wiretap that is not factually possible—including an expired wiretap.

The language of § 2232(c) in part states that "[w]hoever, having knowledge that a federal investigative or law enforcement officer has been authorized or has applied for authorization . . . in order to obstruct, impede, or prevent such interception gives notice or attempts to give notice of the possible interception to any person . . . ."[250] Based on the first clause of § 2232(c), a person can violate the statute by attempting to disclose a wiretap that is nonexistent. Once a person

245 *Id.*
246 United States v. Aguilar, 115 S. Ct. 2357, 2364 (1995).
247 *Id.*
248 S. REP. No. 541, 99th Cong., 2d Sess. 5 (1986).
249 United States v. Turkette, 452 U.S. 576, 580 (1981).
250 18 U.S.C. § 2232(c) (1994).

has knowledge that an officer "has been authorized" or "has applied for authorization," a person violates § 2232(c) by attempting to disclose this information.[251] The offense is complete though the wiretap may not be put into place.[252] For example, a judge may either deny the application for the wiretap, or the authorized wiretap may not be used by the investigating agency. In either case, a person, with the intent to obstruct a wiretap violates § 2232(c) by attempting to disclose information regarding a nonexistent wiretap.

Use of the phrase "possible interception" in the third clause gives further support to the argument that Congress did not intend that a wiretap has to be factually possible. As defined in *Webster's Ninth New Collegiate Dictionary*, "possible" means "capable of existing" or "something that may or may not occur."[253] Thus, a person can violate § 2232(c) by disclosing a wiretap that may not occur, or in other words, one that is not factually possible.

The plain language used in the first and third clauses of § 2232(c) shows that Congress did not intend to prohibit only disclosure of factually possible wiretaps. Rather, Congress intended to prohibit a person from disclosing information learned from an application for or from an authorization for a wiretap. If at the time of disclosure, the wiretap has not yet been put into place, or will not be put into place, or has expired, a person still violates § 2232(c) by disclosing information to the original target of the wiretap.

2. *Legislative History of § 2232(c)*

Besides the plain language, the legislative history and motivating policies behind § 2232(c) are also important aids for interpreting the scope of a criminal statute.[254] The legislative history behind § 2232(c) indicates that prohibiting disclosure of an expired wiretap is consis-

---

251 *Aguilar*, 115 S. Ct. at 2364.

252 *Id.*

253 WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 918 (1991).

254 *See* Moskal v. United States, 498 U.S. 103, 113 (1990) (quoting United States v. Bramblett, 348 U.S. 503, 509-10 (1955)). In *Moskal*, the defendants had purchased used cars in Pennsylvania, rolled back the cars' odometers, and transported the cars to Virginia. *Id.* at 105. Virginia authorities, unaware of the alterations, issued Virginia titles incorporating the false mileage figures. *Id.* at 106. The cars were then taken back to Pennsylvania and sold to unsuspecting customers. *Id.* Under 18 U.S.C. § 2314, a person is prohibited from transporting "in interstate . . . commerce any falsely made, forged, altered, or counterfeited securities . . . knowing the same to have been falsely made, forged, altered or counterfeited." *Id.* The defendants claimed that the titles were genuine titles issued by Virginia and not falsely made. *Id.* The Court held that the defendants had violated § 2314 even though the titles were genuine because the titles contained false information. *Id.* at 114. The Court reasoned that a broad interpretation is consistent with both the plain language of § 2314 and with congressional intent behind the statute. *Id.*

tent with congressional intent behind § 2232(c) to protect the secrecy of government wiretaps by punishing those who disclose a wiretap during an investigation.[255]

When the Electronic Communications Privacy Act of 1986 was enacted, Congress included three measures in the Act that were designed to strengthen government wiretap laws from a law enforcement perspective.[256] The first two measures expanded the list of felonies for which a wiretap could be issued and included provisions making it easier for law enforcement officials to deal with targets who repeatedly changed telephones to thwart interceptions.[257] The third measure, § 2232(c), was designed to protect the secrecy of governmental electronic surveillance by creating criminal penalties for those who disclose the wiretap to the intended target.[258] Senator Thurmond stated: "[t]hese provisions will be particularly helpful to the Justice Department in its fight against drug trafficking."[259]

Prohibiting disclosure of an expired wiretap is consistent with congressional intent to protect the secrecy of government wiretaps because some government investigations simultaneously use both existing and expired wiretaps. When the Government decides to use a wiretap as part of an investigation, the Government must submit an application for the wiretap.[260] Under 18 U.S.C. § 2518, a judge can authorize a wiretap that will have a thirty day limit before expiration.[261] If the wiretap is needed for longer than thirty days, the Government can petition the judge for an extension.[262] For instance, if the Government needs to change the number of wiretaps, or change the persons under surveillance, the Government must submit an application for a *new* wiretap.[263] In the meantime, the original wiretap will expire.[264] Consequently, the investigation will simultaneously include both an existing and an expired wiretap.[265] Furthermore, if an application for an extension of an existing wiretap is not granted by the end of the thirty day period, the wiretap will expire until the extension is granted.[266] Should court delays, personnel problems or other logistic problems occur, the order granting an extension may

255 *See* S. REP. No. 541, 99th Cong., 2d Sess. 5 (1986).
256 *Id.*
257 *Id.*
258 *Id.*
259 *Id.*
260 18 U.S.C. § 2518(1) (1994).
261 18 U.S.C. § 2518(5) (1994).
262 18 U.S.C. § 2518(1)(f) (1994).
263 United States v. Vazquez, 605 F.2d 1269, 1277 (2d Cir. 1979).
264 *See Id.*
265 *See id.*
266 *See* United States v. Massino, 605 F. Supp. 1565, 1570 (S.D.N.Y. 1985).

come days and even weeks after the thirty day expiration.[267] Thus, technically, the wiretap will be expired until the extension is granted.

Since some governmental investigations can include expired wiretaps, allowing a person to disclose an expired wiretap would endanger the secrecy of the existing wiretaps. A person could disclose the expired wiretap to the interceptee, compromise the secrecy of the continuing investigation, and escape punishment because the disclosure involved an expired wiretap. For example, in this case, Judge Aguilar disclosed a wiretap nine months after it had expired.[268] The Government, however, was using a new wiretap as part of the continuing investigation of Chapman.[269] Thus, Judge Aguilar—whose intent was to obstruct the wiretap—compromised the secrecy of the government's ongoing investigation of Chapman. If disclosure of an expired wiretap were not prohibited, Judge Aguilar would have compromised the secrecy of the wiretap and also have escaped punishment. Thus, an interpretation of § 2232(c) which prohibits disclosure of an expired wiretap furthers congressional intent.

VI. Conclusion

The Supreme Court correctly concluded that 1) under the Omnibus Clause of § 1503, making false statements to an investigating agent who may testify before a grand jury does not violate the Omnibus Clause; and 2) under § 2232(c) a person who discloses an expired wiretap violates the statute. However, the Court should have used different reasoning concerning its interpretation of the Omnibus Clause.

In reaching its conclusion concerning the Omnibus Clause, the Court—using the rule of lenity—affirmed the use of the "nexus" requirement as a proper interpretation of the clause. Under the nexus requirement, a person's efforts to obstruct justice must have the "natural and probable consequence" of obstructing justice to violate the Omnibus Clause. The nexus requirement, however, is inconsistent with the plain language of the statute and with congressional intent. The Omnibus Clause prohibits *any* effort or essay to obstruct the due administration of justice whatever the possible outcome. Rather than using the nexus requirement, the Court should have used stare decisis to reach the conclusion that making false statements to an investigating agent who might testify before a grand jury does not violate the Omnibus Clause. Based on stare decisis, efforts to obstruct an investigating agent do not violate the Omnibus Clause unless the agent is

267 *Id.*

268 United States v. Aguilar, 21 F.3d 1475, 1478-79 (9th Cir. 1994) (en banc).

269 *Id.*

part of a judicial proceeding.

Regarding § 2232(c), the Court correctly concluded that disclosure of an expired wiretap violates the statute. Based on the plain language, a person violates the statute by disclosing an expired wiretap. This conclusion is correct since the plain language of § 2232(c) does not indicate that the wiretap has to be factually possible. Furthermore, this broad interpretation is consistent with congressional intent to protect the secrecy of governmental wiretaps.

JAMES K. FITZPATRICK