

## Legal Sidebar

# Obstruction of Justice Statutes: Legal Issues Concerning FBI Investigations, Specific Intent, and Executive Branch Personnel

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On May 16, 2017, the *New York Times* [reported](#) that President Trump may have encouraged former Federal Bureau of Investigation (FBI) Director James Comey to terminate an investigation into former National Security Adviser Michael Flynn. The *Times* based its story on a memo that Mr. Comey reportedly wrote after a February meeting with President Trump in the Oval Office. The article's description of the meeting, coupled with [the removal of Mr. Comey from his position as FBI Director](#) and the more recent [appointment of Robert S. Mueller as special counsel](#), has generated widespread discussion of how federal laws concerning obstruction of justice might apply to the President's reported conduct.

In general terms, [obstruction of justice](#) refers to intentional interference with government proceedings by certain kinds of actions, such as violence, corruption, or destruction of evidence. Rather than one comprehensive statute, the federal criminal code contains a web of obstruction of justice-related laws, each of which punishes a specific type of conduct. [Witness tampering](#), [bribery of jurors](#), and [interference with the federal courts](#), among other offenses, all fall under separate criminal statutes.

The obstruction of justice discussion surrounding media descriptions of the Comey memo raises several legal issues. Identifying an applicable statute is first among these. None of the obstruction of justice statutes forthrightly addresses interference with an FBI investigation. One—[18 U.S.C. § 1510\(a\)](#)—does expressly cover federal criminal investigations, but it punishes only bribery, not other means of interference. Accordingly, to violate § 1510(a), an executive branch official would have to commit a quid pro quo offense by offering something of value in order to influence an investigation.

The statute that most nearly addresses the type of conduct described in the *Times* story is [18 U.S.C. § 1505](#), which applies generally to obstruction of administrative proceedings. Known as the “omnibus provision” because of its broad scope, § 1505 nonetheless requires the existence of a “pending proceeding.” Courts have not reached consensus on whether an FBI investigation meets this standard. At least [two federal district courts](#), citing a distinction between “proceedings” and criminal investigations conducted by law enforcement agencies with no adjudication or enforcement power, have held specifically that an FBI investigation falls beyond the scope of § 1505. Similarly, the D.C. Circuit has said in [dicta](#) that “mere police investigations” do not count as “pending proceedings,” and the Ninth Circuit has [held](#) that FBI investigations are not “official proceedings” under the separate but related witness tampering statute. On the other side of the ledger, courts have found that § 1505 applies to [SEC](#) and [DEA](#) investigations. Another court has suggested that [the statute should be construed to apply to all federal law enforcement investigations](#). Even so, no federal court has plainly held that § 1505 covers FBI investigations.

A second legal question concerns intent. Section 1505, like all federal criminal statutes addressing obstruction of justice, has a [state of mind requirement](#). Even if § 1505 applies to interference with an FBI investigation, it requires prosecutors to prove that the defendant intended to interfere with the investigation for an improper purpose. Evidence that a sitting president did, in fact, hinder an FBI investigation would not be enough; prosecutors would also face the potentially

difficult task of establishing the purpose behind a president's actions.

Finally, allegations of obstruction of justice against members of the executive branch turn not only on statutory elements and underlying evidence, but also on the identity of the individuals involved. For example, the Office of the Legal Counsel at the Department of Justice (DOJ) has [taken the position](#) that a sitting president has immunity from federal criminal prosecution. Courts have not weighed in on the issue, but the DOJ opinion—issued in 1973 and reiterated in 2000—shows nonetheless that an obstruction of justice prosecution against a sitting president, as opposed to other members of the executive branch, would face unique hurdles.

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