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"Say it Ain't So Barry:" A Brief Commentary on United States v. Barry Lamar Bonds and the Elusive Definition of Obstruction of Justice

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Politics can be a contact sport as is evident from the recent appointment of a Special Prosecutor to investigate alleged misdeeds by the Trump Administration including obstruction of justice. Ironically, the decision of an *en banc* panel of the Ninth Circuit Court of Appeals in Barry Bond's obstruction of justice case is newly relevant. The case is instructive for its varied definitions of the crime of obstruction of justice and for the character flaws of a seemingly reckless defendant that led the government to indict sports star Barry Bonds. The matters discussed in this article are relevant not only to high flying politicians but to individuals and businesses coping with an increasingly regulated environment .

I. Introduction

More so than the other major sports, the sport of baseball has an especially rich lore which covers a wide range from the noble, to the comic and fabulous, with a strong dose of scandal and depravity in between. For a sublime moment, consider for example, Babe Ruth's called shot in the 1932 World Series between the New York Yankees and the Chicago Cubs, where he allegedly indicated where his home run would land. For the comic and zany, consider Jimmy Piersall of the New York Mets, who ran the bases backward in 1963 upon hitting his 100th career home run, or the pitcher Rube Waddell, of the Philadelphia Athletics, who upon hearing a fire truck siren would leave the pitcher's mound during a game to chase the fire truck. Returning to the noble, who can forget Lou Gehrig's farewell speech at Yankee Stadium in 1939. For scandal we can mention Shoeless Joe ("Say It Ain't So") Jackson who in 1921 was banned from baseball merely for being associated with the scoundrels who allegedly tried to fix the 1919 World Series. More recently on the scandal front, we can point to Pete Rose, now relegated to autographing baseball paraphernalia in Las Vegas, who admitted to gambling on his players. Which finally leads us to the steroid scandal of the late 1990s and early 2000s, and a little nugget of grand jury testimony (hereafter "the Testimony") by Barry Bonds who, as a result of the Testimony, has a chance for baseball immortality, in the baseball "Hall of Shame," but not the Hall of Fame.

As reported, in *United States v. Barry Lamar Bonds*, 784 F.3d 582 (9th Cir. 2015) (*en banc*), Barry Bonds was summoned to testify before a grand jury convened in San Francisco, California to investigate drug use by athletes. Barry Bonds was granted transactional immunity from prosecution, the broadest form possible, to ensure his cooperation. As stated in the dissenting opinion in *Bonds*: "[t]he purpose of immunizing a witness in exchange for his testimony is to ensure that the witness, freed from the specter of prosecution will provide complete and truthful testimony." Id. at 602 (Rawlinson, J., dissenting). Notwithstanding the foregoing grant of immunity, during the Grand Jury proceeding Barry Bonds "gave a rambling, non-responsive answer to a simple question." Id. at 582 (*per curiam*). In the *Bonds* case this testimony was called "Statement C." For purposes of this paper, and, with apologies to Barry Bonds, who has allegedly characterized the various steroid creams allegedly applied on him as "the clear" and "the cream," we are calling the testimony at issue "the Testimony."

II. The Testimony

During the Grand Jury proceedings at issue in the *Bonds* case, the following question and answer exchange took place during the testimony given by Barry Bonds:

Q. Did Greg, your trainer, ever give you anything that required a syringe to inject yourself with?

A: I've only had one doctor touch me. And that's my only personal doctor. Greg, like I said, we don't get into each others' personal lives. We're friends, but I don't – we don't sit around and talk baseball, because he knows I don't want – don't come to my house talking baseball. If you want to come to my house and talk about fishing, some other stuff, we'll be good friends. You come around talking about baseball, you go on. I don't talk about business. You know what I mean?

Q. Right.

A. That's what keeps our friendship. You know, I am sorry, but that – you know, that – I was a celebrity child, not just in baseball by my own instincts. I became a celebrity child with a famous father. I just don't get into other people's business because of my father's situation, you see. *Id.* at 583 (Kozinski, J., concurring).

At best, the Testimony could be characterized as humorous, amusing and somewhat bizarre soliloquy. We could view the Testimony as another example of the "boys will be boys" mentality that permeates the baseball locker room. Clearly, the Testimony could be the basis of a great locker room war story about how the show- boating Bonds threw the "Feds" off the scent; another triumph for the bad boys of baseball. The problem for Barry Bonds was that the Testimony was given in the context of a grand jury investigation where Barry Bonds had been granted transactional immunity and was under a legal duty to testify in a straightforward truthful manner. Thus, the United States Attorney (hereafter the "Government"), who was conducting a complex investigation into a serious matter was presumably not amused by the Testimony. From the Government's point of view, the best that could be said of the Testimony was that it was an act of disrespectful, self-absorbed arrogance and that at worst it was a violation of federal criminal law.

III. Procedural Summary

From a reading of *Bonds*, it is obvious that the Government thought the Testimony was more than a show of arrogance and disrespect. The Government concluded the Testimony constituted a felony obstruction of justice under 18 U.S.C. § 1803 and so indicted Barry Bonds on a count of obstruction of justice based on the Testimony.

If we equate the trial of the case to a baseball game, the Government was ahead going into the bottom of the ninth with the following runs scored:

1. Guilty on one count of felony obstruction of justice under 18 U.S.C. § 1803;

2. Denial of post-verdict motion for acquittal on the obstruction count; and

3. Affirmation of verdict by a three judge panel of the Ninth Circuit Federal Court of Appeals, *United States v. Bonds*, 730 F.3d 890 (9th Cir. 2013).

Going into the bottom of the ninth, Barry Bonds, with seemingly insurmountable odds against him, petitioned the entire Ninth Circuit Federal Court of Appeals for an *en banc* hearing, that is, a hearing by all the judges of the Court. Improbably, this motion was granted. See *United States v. Bonds*, 757 F.3d 994 (9th Cir. 2015). This would be the equivalent of the last batter for the home team fouling off a two strike, two out pitch in the bottom of the ninth. The grant of the *en banc* hearing gave Bonds new life in his controversy with the Government. The next development in the matter dramatically ended the case in favor of Bonds in the same manner that a winning home run ends a game victoriously with just one swing of the bat.

After taking up the case, the en banc panel tersely ruled as follows:

Per Curiam:

During a grand jury proceeding, defendant gave a rambling, non- responsive answer to a simple question. Because there is insufficient evidence that [the Testimony] was material, defendant's conviction for obstruction of justice in violation of 18 U.S.C. § 1503 is not supported by the record. Whatever section 1503's scope may be in other circumstances, defendant's conviction here must be reversed.

Bonds, 784 F.3d at 582.

IV. Strategic Overview

The *Bonds* case paired two implacable foes of unlimited strength and resources. A United States Attorney, if he wishes, given the great latitude granted him by the doctrine of prosecutorial discretion prevalent in the American legal system, can bring the entire resources of the Government to bear against any defendant it targets. Regardless of how one may feel about him, in Barry Bonds, the Government faced an adversary endowed with breath taking arrogance, unshakable self- confidence, and unlimited resources.

The Government prosecuted Barry Bonds because it would not tolerate Bonds' disrespect and obstruction of the Grand Jury proceeding. The prosecution was intended to serve as a deterrent to future witnesses. Additionally, the Government may have thought Bonds had exposed himself to possible secondary criminal liability for "cover up" activity incidental to more serious conduct for which he had not been charged. Whether such obstruction amounted to a criminal offense was beside the point. It is in the interest of the Government to encourage witnesses to testify forthrightly before the Grand Jury. The *Bonds* case is a caution to future witnesses that the Government will not tolerate a witness who impedes a grand jury investigation.

As for Barry Bonds, he has always operated as a law unto himself with little regard to normative value systems, undeterred by any obstacle put in his way, and, when such an obstacle presents itself, he doesn't just overcome it, he destroys it. These qualities are what have made him such a legendary, aloof and not very likable, but superlative, competitor. Obviously, when it came to a dispute with the Government over alleged illegal use of steroids, Bonds' approach was the same. He would either destroy the Government's position or go down swinging.

Ultimately, Bonds prevailed in this saga, but his victory was hollow, a pyrrhic victory if you will. Bonds was convicted as a felon in a United States District Court in 2011, the conviction was affirmed by a panel of the Ninth Circuit Court of Appeals in 2013, and only after years of being labeled as a felon and millions of dollars of legal fees later did Bonds squeak by with a narrow victory handed by the Ninth Circuit Court of Appeals on a reconsideration *en banc* in 2015.

I would propose that the true victor in the *Bonds* case is the Government, which laid a very strong marker for future witnesses that want to play fast and loose with a grand jury. Mr. Bonds is millions of dollars poorer and his reputation has not been rehabilitated one bit. This victory in federal court might burnish his bad boy legend, but will not get him elected into the Baseball Hall of Fame.

It could be argued that the *Bonds* case represents an abuse of the prosecutional discretion and that the Government was out to get Bonds. In fact, Judge Kozinski's concurring opinion expresses concerns along those lines. *Id.* at 584. I don't think so. Bonds' behavior was a threat to the integrity of our federal judicial system. It could not be tolerated. Further, as will be seen from the legal analysis which follows, Bonds' legal position was not air tight. The legal analysis, and hence the ultimate result, could have gone either way. Thus, it was not unreasonable for the Government to charge Barry Bonds with obstruction of justice.

V. Legal Analysis

The *Bonds* case is remarkable for the diversity of viewpoints as to the interpretation of the so called "omnibus clause" of the federal statute which defines obstruction of justice. As stated in *Bonds*:

Title 18 U.S.C. § 1503(a), which defendant was convicted of violating, provides in relevant parts as follows: 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 punished as provided in subsection (b). Known as the omnibus clause, this language was designed to proscribe all manner of corrupt methods of obstructing justice. We have held that a defendant corruptly obstructs justice if he acts with the purpose of obstructing justice. As should be apparent, section 1503's coverage is vast. By its literal terms, it applies to all stages of the criminal and civil justice process, not just to conduct in the courtroom but also to trial preparation, discovery and pretrial motions.

Id. at 583 (Kozinski J., concurring) (internal quotation marks and citations omitted).

The *Bonds* case produced four concurring opinions and one dissent. The broad sweep of the omnibus clause in the obstruction of justice statute combined with the diversity of judicial opinions as to its meaning should give pause to any grand jury witness who intends to play fast and loose with his testimony. If the witness falls on the wrong side of the line, he could be convicted as a felon. Mr. Bonds, with his super-human athlete's will (or arrogance depending on one's view point) and his unlimited resources, chose to test the limits of the Government with some very provocative, non-responsive testimony and almost lost. Most potential grand jury witnesses would not survive the legal, emotional, and financial consequences were they to follow Mr. Bonds' example. The opinions in the Bonds case are briefly summarized as follows:

1. The *per curiam* opinion, which was the opinion of the court in the *Bonds* case, tersely ruled that the Testimony in the context of the proceedings was not material and, therefore, could not serve as the basis of a conviction. Id. at 582 (*per curiam*). Significantly, the opinion of the Court in *Bonds* does not rule out the possibility that a single statement from someone's grand jury testimony could constitute the basis for an obstruction of justice conviction. The Court holds only that in the context of the *Bonds* case, the Testimony was not indictable.

2. Judge Kozinski's concurrence elaborates on the *per curiam* opinion and applies a materiality test to the Testimony. It cautions that the broad sweep of the statutory language has the potential to be abused by a prosecutor which, under the American system of laws, has absolute discretion to charge or not to charge. The broad sweep of the statutory language also has the potential to violate the due process requirement that individuals receive fair notice of what constitutes criminal conduct. Accordingly, the materiality requirement must be applied to make the obstruction statute square with due process. "Materiality screens out many of the statute's troubling applications by limiting convictions to those situations where an act has a natural tendency to influence, or was capable of influencing, the decision of the decision-making body." *Id.* at 585 (Kozinski, J., concurring) (internal quotation marks and citations omitted).

The Kozinski concurrence observed that while the Testimony might be irritating or obnoxious, it did not intrinsically mislead or impede the decision maker, it was just part of the push and pull of litigation. Judge Kozinski felt that the Testimony standing on its own or in context of the entire proceeding was not material for purpose of applying the obstruction of justice statute. Of significance to Judge Kozinski was that ultimately Barry Bonds did answer the questions posed, hence the Testimony could not be material. Importantly, Judge Kozinski's concurrence took the view that, in a different context, where the Testimony was part of numerous evasive statements, it might constitute an indictable statement under the obstruction of justice statute. *Id.* at 582-86. (Kozinski, J., concurring).

3. The concurrence of Judge N.R. Smith took a much narrower view and opined that a single statement, such as the Testimony under any context could not as a matter of law constitute a criminal obstruction of justice. Judge Smith cited two reasons: (i) the Government has a duty and opportunity to clarify "merely misleading or evasive testimony" by further examination; and (ii) the Government must show "that truthful but misleading or evasive testimony must amount to a refusal to testify before it is material." *Id.* at 588 (Smith, J., concurring). In Judge Smith's view, an indictment based on a single truthful but evasive statement can never serve as the basis of conviction for obstruction of justice. *Id.* at 587-90 (Smith, J., concurring)

The standard of materiality used by Judge Smith differed from that used by Judge Kozinski. The standard used by Judge Smith was "the endeavor must have the natural and probable effect of interfering with the administration of Justice." *Id.* at 587. This standard would establish a higher bar than the standard used by Judge Kozinski which focuses on the tendency of a statement to influence the decision making body.

4. The concurrence of Judge Reinhardt argues for an even more restrictive application of the obstruction of justice statute. Judge Reinhardt agreed with Judge Smith's narrow concurrence. However, he went further and using an "original intent" construction based on legislative history at the time of enactment of the statute concluded that the obstruction statute should never apply to in court testimony, but only to acts committed outside the courtroom. *Id.* at 590-94 (Reinhardt, J., concurring).

5. The concurrence of Judge Fletcher also argues for a narrow interpretation of the obstruction statute based on an "original intent" analysis. He said Bonds could only be convicted if he gave his testimony "corruptly," and that, based on the legislative history, "corruptly" was equivalent to bribery in the sense of paying money to improperly influence a government official. Since in court testimony by its very nature can never constitute bribery, the Testimony could not constitute obstruction of justice as a matter of law. *Id.* at 594-601 (Fletcher, J., concurring)

6. Judge Rawlinson, dissenting, in a witty and lengthy opinion, argued, with apologies to the author of "Casey at the Bat," that the Testimony, viewed in the light most favorable to the Government, established an obstruction of justice and that the verdict of the Grand Jury should not be disturbed. *Id.* at 601-11 (Rawlinson, J., dissenting).

VI. The Score Card

The *Bonds* case is remarkable for the diversity of judicial views as to what constitutes an obstruction of justice under the omnibus clause of 18 U.S.C. § 1503(a). There were literally six differing judicial score cards as to whether a seemingly innocuous but evasive and disrespectful answer could constitute an obstruction of justice.

An individual who has been granted immunity and requested to testify before the grand jury needs to tread carefully before providing evasive and non-response testimony such as Barry Bonds did. Such an individual needs to remember that the prosecutor in the American legal system has great discretion in determining whether to bring a criminal case and oftentimes may bring a criminal case regardless of its merits just to establish deterrence so as to indirectly punish an accused. The broad net cast by the text of the obstruction of justice statute as well as the differing judicial interpretations as to its meaning gives a prosecutor even more cover in exercising his prosecutorial discretion against a recalcitrant or disrespectful witness. The individual called to testify before a grand jury should consult counsel and educate himself as to how to testify in a manner that protects his best interests, but also satisfies his legal obligation to testify truthfully. Failure to tread carefully could result at worst in a felony conviction and, at best, in many sleepless nights and substantial legal bills.

Play ball!

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