Vanderbilt Law Review

Volume 57 | Issue 4 Article 6

5-2004

Corruption of a Term: The Problematic Nature of 18 U.S.C. §1512(c), the New Federal Obstruction of Justice Provision

Daniel A. Shtob

Corruption of a Term: The Problematic Nature of 18 U.S.C. §1512(c), the New Federal Obstruction of Justice Provision

I. INTRODUCTION

The year 2002 may be remembered in the annals of the law as the year that corporate America became accountable for its actions. The boardroom, equated with the smoke-filled room of corrupt enterprise and political machination, came under fire as industry giants sank amidst charges of misconduct. In response to high profile allegations of corporate fraud, Congress commenced a fervent bipartisan effort to draft and implement a law to counter corporate obstruction of justice.[1] On July 1, 2002, President George W. Bush signed the Sarbanes-Oxley Act.[2] The bill included a section that prescribes strong penalties for individuals who corruptly impede an official investigation.[3] More specifically, 18 U.S.C. 1512(c), passed as part of Sarbanes-Oxley, provides that:

1. *See Democrats to Introduce Enron-Related Bills*, CNN.com (Feb. 6, 2002), (mapping congressional efforts to implement white collar crime reform), *at* http://www.cnn.com/2002/US/02/06/enron/index.html.

2. Sarbanes-Oxley Act of 2002 (Public Company Accounting Reform and Investor Protection Act), Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 U.S.C. and 18 U.S.C.).

3. 18 U.S.C.A. § 1512(c) (West Supp. 2004).

> Whoever *corruptly*—(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.[4]

Since the passage of Sarbanes-Oxley, prosecution for obstruction of justice has gained prominence as a means of criminally sanctioning individuals suspected of involvement in other substantive misconduct.[5] Subsequently, it appears that the obstruction charges have been levied as a type of proxy for substantive offenses, partially as a means to strengthen the prosecutor's hand during the inquiry stage of white-collar investigations.[6]

Close examination of the Act indicates congressional intent to significantly increase the criminal penalty for unscrupulous acts in the business setting.[7] Indeed, the Act was ascribed greater weight in Congress than a routine overhaul of criminal sanctions: its discussion was couched in crisis terms and its passage was deemed critical to both the efficient operation of capital markets and the restoration of faith in the American free enterprise system.[8] Not only politicians

---

4. *Id.* (emphasis added).

5. *See, e.g.*, Press Release No. 02-627, U.S. Dep't of Justice, Former Enron Chief Financial Officer Andrew S. Fastow Indicted For Fraud, Money Laundering, Conspiracy (Oct. 31, 2002) ("On June 15, 2002, a federal jury in Houston convicted accounting firm Arthur Andersen LLP of obstruction of justice for destroying documents to keep them from the SEC . . . . In addition, former Arthur Andersen auditor David Duncan pleaded guilty to obstruction of justice in connection with his role in the destruction of Enron-related documents."), *available at* http://www.usdoj.gov/opa/pr/2002/October/02_crm_627.htm; Press Release No. 02-356, U.S. Dep't of Justice, Statement of Deputy Attorney General Larry Thompson on the Arthur Andersen Verdict (June 15, 2002) ("This guilty verdict shows that the evidence conclusively demonstrated . . . that Andersen intentionally interfered with an official investigation concerning Andersen's client Enron Corporation when it destroyed *tons of papers documents and a large quantity of electronic information.*" (emphasis added)), *available at* http://www.usdoj.gov/opa/pr/2002/June/02_dag_356.htm.

6. *See* Riva D. Atlas, *Mutual Fund Ex-executive Is Sentenced to Prison*, N.Y. TIMES, Dec. 18, 2003, at C1.

7. *See, e.g.*, Sarbanes-Oxley Act of 2002 § 1102, 18 U.S.C.A. § 1512 (West 2000 & Supp. 2004) (prescribing new penalties for obstruction of justice); Sarbanes-Oxley Act of 2002 § 1106, 15 U.S.C. § 78ff (West, WESTLAW through Pub. L. No. 108-219) (increasing five-fold criminal money penalties for violation of certain provisions of the Securities Exchange Act of 1934); ". . .": : *see also* 148 CONG. REC. H5462 (daily ed. July 25, 2002) (statements in support of the Conference Report on H3673, the Sarbanes-Oxley Act of 2002). "[W]e must crack down on the corporate criminals and rebuild America's confidence in our markets . . . . [T]he best way to do that is to punish the corporate wrongdoers and to punish them harshly." 148 CONG. REC. H5464 (daily ed. July 25, 2002) (statement of Representative Sensenbrenner).

8. [This Act] responds in a measured way to the very real crisis of confidence among America's . . . investors . . . . Make no mistake, this is a difficult period for those who love and cherish the free enterprise system. Since early 2000, our capital markets, although still the most respected in the world, have unquestionably suffered a series of blows—mostly self-inflicted—which [sic] have truly damaged the public's faith in the integrity of corporate America . . . .

stood up and took notice. A television commercial for Heineken beer, broadcast during the 2002 holiday season, vilified document destruction as being anathema to having been "good this year."[9]

President Bush reiterated the important social interests behind subsection 1512(c), stating that the purpose of the Act was to "adopt tough new provisions to deter and punish corporate and accounting fraud and corruption, ensure justice for wrongdoers, and protect the interests of workers and shareholders."[10] While the intent behind this portion of the Act appears manifestly clear, issues of construction give rise to ambiguous interpretation that may lead to inconsistent application. Perhaps recognizing this potential, the President attempted to provide some interpretive guidance, stating that

> Several provisions of the Act require careful construction by the executive branch as it faithfully executes the Act . . . . To ensure that no infringement on the constitutional right to petition the Government for redress of grievances occurs in the enforcement of section 1512(c) of title 18 of the U.S. Code . . . which among other things prohibits corruptly influencing any official proceeding, the executive branch shall construe the term *"corruptly"* in section 1512(c)(2) *as requiring proof of a criminal state of mind on the part of the defendant.*"[11]

Still, this guidance fails to articulate the *degree* of criminal state of mind that "corruptly" implies. Over the last two decades, courts and commentators have debated the meaning of the term "corrupt" in Chapter 73 of Title 18 of the United States Code, the obstruction of justice statutes.[12] Not surprisingly, no court has yet

---

Investors will now get better information and will get it faster and they will have more faith in the numbers . . . . I have advocated a free market approach to regulation, but I also believe that capitalism can only flourish under the rule of law. Those views are not at odds. In fact, they are quite consistent. Government must be careful not to overreach and stifle the entrepreneurial spirit that has made the United States the most successful economy in the history of the world. At the same time, government has a responsibility to punish—and [sic] do so swiftly and severely—those [sic] who seek to cheat and steal from others. [Trish: This is a block quote.]
148 CONG. REC. H5462 (daily ed., July 25, 2002) (statement of Senator Oxley).

9. The television commercial began with a view of a lively holiday party from a perspective outside an apartment building, with what appeared to be snow falling outside. *Office Party* (Heineken television commercial, 2002). Panning up the apartment building, it becomes apparent to the viewer that the "snow" is in fact something akin to confetti being thrown from the top floor window. *Id.* The camera view then cuts to inside that top floor apartment, where a number of harried looking men dressed in white-collar attire are busily shredding papers and tossing them out into the winter night. *Id.* The commercial ends with a statement wishing a happy holiday season to all those who had been good in the past year. *Id.* : : .

10. Statement hy President George W. Bush upon Signing H.R. 3763 (July 30, 2002), http://www.whitehouse.gov/news/releases/2002/07/20020730-10.html.

11. *Id.* (emphasis added).

12. For an overview of some of these debates, see *infra* Parts II.A., II.B. Chapter 73 of Title 18 of the United States Code is titled "Obstruction of Justice" and comprises 18 U.S.C. §§ 1501-21. Throughout this Note, I will use the phrase "obstruction of justice statute(s)" or "Chapter 73 to refer to these sections.

had occasion to address its meaning in the context of the relatively new subsection 1512(c).

Although subsection 1512(c) is simply one provision of an omnibus act, it arguably has the potential to be regarded as the most expansive legislative revision of the obstruction of justice statutes in the history of the statutory scheme. Defining the parameters of this subsection will significantly impact prosecutors' ability to prove liability, courts' ability to assess a penalty, and the ability of individuals and businesses to avoid obstruction of justice charges.

Part II of this Note draws on history, caselaw, extrinsic, and etymological sources to delineate the foundations of corruption as a scienter element. Part III discusses the judicial interpretation of "corruptly" and further addresses the impediments in the current scheme that could inhibit its proper application. Part IV analyzes the impact of subsection 1512(c) on certain business practices, discussing the unique characteristics of legitimate business practice and corresponding government enforcement strategies as well as the controlling effect of social norms, to highlight discrete dangers that are present in its current textual form. Part V proposes revising subsection 1512(c) based on enforcement provisions contained in certain criminal and banking codes. Alternatively, that Part explores whether, in the context of subsection 1512(c), courts should abandon their lenient interpretation of "corruptly" as a scienter element and instead impose a novel three-part, super-intent requirement. This construction would best comport with the placement of subsection 1512(c) within its statutory scheme. Moreover, a clear definition or construction of the scienter element is necessary to allow individual actors inside the business world to implement effective planning and internal anti-corruption strategies. Finally, defining the scienter requirement would increase the efficiency and equity of investigations into business misconduct.

II. THE HISTORY AND DEVELOPMENT OF "CORRUPT" UNDER THE FEDERAL OBSTRUCTION OF JUSTICE PROVISIONS

A. History, Construction, and Interpretation of Federal Obstruction of Justice Statutes

The struggle to assign culpability for corrupt acts and mental states that obstruct justice stretches far through American

jurisprudential history.[13] The word corrupt has ancient roots. From antiquity to the modern day, it is clear that the term could hinge on either an act itself or on an subjective, pejorative, moral judgment of some underlying motivation.[14] Traditionally, however, corruption implied both an act and a corresponding mental state.[15] In discussing what corruptly implies in the newly minted §1512(c), it is necessary to examine its history, both alone and in reference to the obstruction of justice statutory scheme. Unfortunately, examination of the historical treatment of related obstruction of justice statutes that use corrupt as a scienter element may only prove to confuse construction of the newly added section.

Obstruction of justice as both a concept and a legal term of art has adorned the halls of Anglo-American justice in the context of professional misconduct for over four centuries.[16] In analyzing a case involving "practices obstructive or harmful to the administration of justice," Justice Cardozo considered the early instances of the attachment of culpability for such behavior.[17] This history also underscores the importance of documentation in the judicial process dating to the 16th Century.[18] At that time, the appearance of judicial propriety, equity, and fairness was the underlying rationale behind the charge.[19] While official sanctions were appropriate in particularly egregious instances, the normative pressure of the expectation of a barrister's peers was usually sufficient to keep him within the bounds of accepted practice.[20]

The charge of obstruction of justice was carried into the Americas and retained its strongly negative normative overtone.[21] The

---

13. *See infra* notes 21-38 and accompanying text.

14. *See, e.g.*, WILLIAM SHAKESPEARE, THE FIRST PART OF KING HENRY THE SIXTH act 5, sc. 4, Lines 46-48 : ("But you, that are polluted with your lusts,/ Stain'd with the guiltless blood of innocents,/ Corrupt and tainted with a thousand vices . . . .").

15. *See* WEBSTER'S DICTIONARY (1828).

16. *See* People *ex. rel.* Karlin v. Culkin, 162 N.E. 487, 489-92 (N.Y. 1928) (Cardozo, C.J.) (tracing, with derision, the history of barristers and attorneys who have been charged witb obstruction of justice back to the seventeenth century and making comparisons to contemporaneous prosecutions: "Those guilty of falsities were the ambulance chasers of the day.").

17. *Id.* at 490-91.

18. *Id.* at 491 (discussing the charge of *misprisio clerici*: the submission of writs without the required formalities).

19. "Our court is 'slandered and evil spoken of, our cares and labors made void and frustrate' by the 'negligence of clerks and ministers;' the client 'beginneth to think evil of us that are judges, to suspect our skill,' and to speak evil of the law." *Id.* (quoting in part the Lord Chief Justice of the Common Pleas, Easter Term, 9 Eliz. 1567).

20. *Id.* at 490.

21. *See* THE DECLARATION OF INDEPENDENCE para. 2, 10 (U.S. 1776), *noted in* O'Malley v. Woodrough, 307 U.S. 277, 284 (1939).

Declaration of Independence is illustrative: "The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States . . . . *He has obstructed the Administration of Justice*, by refusing his Assent to Laws for establishing Judiciary powers."[22]

The line of statutory antecedents to the current obstruction of justice provision dates to 1831 when, following a period of political acrimony fueled by a perceived overextension of judges' power, a congressional act reduced the ambit of a contempt of court charge by creating a separate criminal offense for interfering with the judicial process.[23] This was in response to a determination that the contempt power was too easily employed with an intent to constraining the unilateral power of judges to declare participants in the judicial process in contempt.[24]

In the twentieth century, federal obstruction of justice provisions expanded from a single statute to the current relatively comprehensive scheme. Section 1503 is the wellspring from which most of the obstruction of justice provisions, including section 1512, arose.[25] Section 1512, originally added by the Victim and Witness Protection Act of 1982, was amended in 1988 to increase the scope of witness tampering from threatening or intimidating behavior to include acts of "corrupt persuasion."[26] While culpability for intimidating or influencing witnesses was previously covered by section 1503, section 1512 was apparently drafted and amended to increase specific protection for witnesses.

Statutory analysis of sections 1503 and 1512 has created a great deal of judicial confusion. The current trend in statutory interpretation is deference to the will of the legislature absent clear textual ambiguity, in which case judicial interpretation may become necessary.[27] In light of the past treatment and debate surrounding its

---

22. *Id.* (emphasis added).

23. *See* Note, *Criminal Venue in the Federal Courts: The Obstruction of Justice Puzzle*, 82 MICH. L. REV. 90, 97-100 (1983) (The initial bifurcation of attempt and obstruction of justice arose out of a controversy in which Judge James H. Peck was impeached for his abuse of the contempt power and the resulting outcry over the scandal.).

24. *Id.* Although introduction of a criminal sanction might seem to be a dubious means of reducing the prosecutorial power of an institution, the additions of the associated rights and procedural safeguards of a criminal trial were intended to protect litigants. *Id.*

25. *See* United States v. Poindexter, 951 F.2d 359, 380-83 (D.C. Cir. 1991) (pProviding a detailed history of the development of federal obstruction of justice statutes including §§ 1503, 1505, and 1512).

26. Pub. L. No. 97-291, § 4, 96 Stat. 1248, 1249-50; Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7029(a), 102 Stat. 4181, 4397-98; *see also* United States v. Kenny, 973 F.2d 339, 333-43 (4th Cir. 1992).

27.

structurally similar sister sections, however, a clear textual construction of subsection 1512(c) appears impossible.[28] There are at least two likely sources of confusion.

First, should textually overlapping statutory provisions be applied together or do specific sections preempt omnibus sections? Courts generally allow prosecution under both provisions in appropriate cases.[29] For example, subsection 1512(b) proscribes conduct that tends to interfere with witnesses and other participants in a judicial proceeding.[30] Like section 1503, it includes a provision relating to acts where "corrupt" or one if its linguistic derivatives provide the applicable mental state. After the passage of the witness tampering provisions of subsection 1512(b) in 1982, courts and commentators struggled to determine whether the contemporaneous removal of all references to witnesses in section 1503 evidenced congressional intent to remove matters concerning witness tampering from the ambit of section 1503.[31] Most courts have concluded that there was no legislative intent to make witness tampering the sole province of section 1512.[32] Indeed, sections 1503 and 1512 have been broadly construed to proscribe actions beyond those enumerated in their provisions.[33] Section 1512 was thought to "significantly broaden"

> In any event, canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there .... When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."

Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (citations omitted).

28. Notwithstanding this likelihood of textual confusion, the general purposes of the obstruction sections as described by courts are simple enough to articulate: first, they are intended to protect the judicial process by ensuring channels for effective truth-seeking; second, they are intended to protect participants in the judicial process. *See, e.g.*, United States v. Cofield, 11 F.3d 413, 419 (4th Cir. 1993).

29. *See, e.g.*, United States v. Moody, 977 F.2d 1420, 1424 (11th Cir. 1992) (noting that the majority of circuits had found that § 1512 "is not the exclusive vehicle for witness tampering"). *But see* United States v. Masterpol, 940 F.2d 760, 761-63 (2d Cir. 1991) (reaching the opposite conclusion).

30. *See* Jeffrey R. Kallstrom & Suzanne E. Roe, *Obstruction of Justice*, 38 AM. CRIM. L. REV. 1081, 1106-12 (2001).

31. *See infra* notes 114-23 and accompanying text.

32. *See supra* note 29.

33. *See* Michael E. Tigar, *Crime Talk, Rights Talk, and Double-Talk: Thoughts on Reading the Encyclopedia of Crime and Justice*, 65 TEX. L. REV. 101, 111 n.72 (1986). *But see* Grace Lou & Nancy M. Ro, *Obstruction of Justice*, 36 AM. CRIM. L. REV. 929, 947-48 (1999) (observing that courts have tended to read § 1512(b) narrowly in that they exclude acts outside of the enumerated portions of the statute).

the reach of section 1503, even while 1503 was being read to reach outside its specifically enumerated scope.[34]

Second, what state of mind is implied by the requirement of "corrupt" intent?[35] Traditionally, corrupt intent was thought to mandate a specific intent to obstruct a known proceeding.[36] Modern readings of the statute, however, tend to diminish the stricture of that standard, requiring only that the act in question have the reasonably foreseeable effect of obstructing a proceeding, regardless of the defendant's actual intent.[37] The prosecutorial inquiry is not, therefore, the presence of intent to obstruct the proceeding per se, but rather the presence of intent to commit an act that could reasonably be foreseen to have that effect.[38] The next subsection will explore these developments in greater detail.

1. Historical Construction of the "Corrupt" Scienter Element within the Federal Obstruction of Justice Statutes

The formative case discussing the "corrupt" scienter element of the federal obstruction of justice statutes is *United States v. Pettibone*.[39] In *Pettibone*, the Supreme Court opined in 1893 that "corrupt" implied more than a state of general malevolence; it required a "specific design to thwart justice."[40] Courts applying this specific intent standard have typically recognized that the term corrupt implies "a higher degree of mental culpability than mere knowledge or general intent."[41]

The *Pettibone* definition lay largely untouched until the 1979 decision, *United States v. Neiswender*, where the Fourth Circuit held

---

34. Tigar, *supra* note 33, at 111 n.72.

35. Kallstrom & Roe, *supra* note 30, at 1089-90.

36. *Id.* at 1090-91.

37. *Id.*

38. *Id.*

39. 148 U.S. 197 (1893).

40. *Id.* at 206-07; Joseph V. De Marco, Note, *A Funny Thing Happened on the Way to the Courthouse: Mens Rea, Document Destruction, and the Federal Obstruction of Justice Statute*, 67 N.Y.U. L. Rev. 570, 576-77 (1992).

41. *Id.* at 577-79. Unsurprisingly, De Marco also posits that this is likely to be a point of defense—the accused will claim that, despite evil designs, there was no specific intent to thwart justice. *Id.* As discussed *infra* Part IV.C, such defenses may fail. Judicial discussion of the transitive and intransitive meanings of the term "corruptly" is an indication that the word is ambiguous by its very nature. The intransitive meaning of "corruptly" implies that an act was done with a bad purpose or motive—that the accused was "wicked" or "immoral." The transitive meaning focuses on the manner of an attempt to influence a proceeding, rather than the motive for so doing. In essence, it depends on the act itself. In practice, as here, this key distinction has proven difficult to articulate. *Cf.* United States v. Poindexter, 951 F.2d 369, 378-79 (D.C. Cir. 1991).

that a corrupt mental state is satisfied by "knowledge or notice" that obstruction of justice could reasonably occur.[42] In *Neiswender*, the defendant was accused of offering to fix a jury in return for a bribe from a defense attorney.[43] His defense was that he had no specific intent to fix the jury or to obstruct justice; he was merely trying to defraud the attorney.[44] The court first noted that the "state-of-mind requirement of [section] 1503 has long confused the courts."[45] Specifically, the court compared twentieth-century cases that support either the requirement of specific intent to obstruct justice or, alternatively, the more general requirement of intent to commit an act that would foreseeably lead to an obstruction of justice.[46] The *Neiswender* court held that "knowledge or notice" that obstruction of justice could reasonably occur is sufficient to support a conviction requiring a corrupt mental state.[47] The court thereby affirmed the conviction, reasoning that the bribery scheme might foreseeably have prejudiced the *defendant* by reducing the vigor of his defense.[48]

One commentator has observed that the *Neiswender* approach, if taken to its logical end, would support a conviction based on a standard more akin to slightly heightened criminal negligence.[49] There are, of course, cases that so clearly implicate a culpable mental state that no inferential leap is required to support a conclusion of corruption, regardless of its definition.[50] Still, difficulties arise for cases on the penumbra of the term, where application of the scienter requirement has proven to be both inconsistent and unpredictable.[51] These difficulties in prediction are underscored by the observation that, under section 1512, "intent may, *and generally must*, be proven circumstantially."[52]

---

42. 590 F.2d 1269 (4th Cir. 1979).

43. *Id.* at 1270.

44. *Id.* at 1272.

45. *Id.* at 1273.

46. *Id.*

47. *Id.* at 1273-74; *see also* De Marco, *supra* note 40, at 588-89.

48. *Neiswender*, 590 F.2d at 1273.

49. De Marco, *supra* note 40F, at 571.

50. *See, e.g.*, United States v. LeQuire, 943 F.2d 1554 (11th Cir. 1991). Although *LeQuire* was decided under the enumerated "physical force" element of § 1512(b), it represents an act—the firing of a machine gun through the wall of a prospective witness' house, killing his mother—that certainly falls on the corrupt side of the fence, regardless of the standard employed. *Id.*

51. *See infra* section III.A.

52. United States v. Shively, 927 F.2d 804, 811 (5th Cir. 1991) (emphasis added). Although circumstantial evidence is often "no less probative than direct evidence," the existence of an inferential leap from the factual basis of a case to the determinative issue of mental state has led to heavy appellate litigation, particularly on the subject of whether non-coercive attempts to

2. The Modern Nexus Approach to Construction of the "Corrupt" Scienter Element in Section 1503

The most prominent post-*Neiswender* Supreme Court case involving section 1503 crafted a "nexus" requirement for its scienter standard: to be "corrupt" an act must only have the natural and probable effect of interfering with an official proceeding.[53] In *United States v. Aguilar*, a federal judge was convicted of both illegally disclosing a wiretap and obstruction of justice.[54] At issue in the obstruction of justice charge was whether his attempt to mislead a potential grand jury witness was sufficient to support a section 1503 conviction.[55] In construing the omnibus clause of section 1503 that prohibits "corruptly endeavoring to influence, obstruct, and impede the . . . grand jury investigation," Justice Rehnquist, writing for the court, excluded from culpability those acts that did not have the natural and probable effect of obstructing justice.[56] The key inquiry was whether there was a "nexus of time, causation or logic" between the act and the proceeding in question.[57] The Court thus affirmed the reversal of Aguilar's jury conviction for obstruction of justice, noting that the proof offered at trial was not within this construction of the omnibus provision.[58]

In dissent, Justice Scalia criticized the majority for inserting greater extratextual requirements than those traditionally required to satisfy the rule of lenity.[59] Justice Scalia suggested both that the term

---

persuade a possible witness to alter their testimony qualify as corrupt. *See, e.g.*, United States v. Balzano, 916 F.2d 1273, 1291 (7th Cir. 1990).

53. United States v. Aguilar, 515 U.S. 593, 598-601 (1995). *Aguilar* affirms, by extension, the *Neiswender* line of cases, presumably including their doctrinal conflation of natural and probable consequences of an act with the reasonably foreseeable results of that act, through its approval of *United States v. Thomas*, 916 F.2d 647, 651 (11th Cir. 1990), which in turn cites *United States v. Silverman*, 745 F.2d 1386, 1393-94 (11th Cir. 1984), which in turn cites *Neiswender*, 590 F.2d 1269. For examples of the conflation of these doctrines in practice, see *United States v. Rogers*, 636 F. Supp. 237, 252-53 (D. Colo. 1986) and *United States v. Mitchell*, No. R-87-0132, 1988 U.S. Dist. LEXIS 16625, at *12-15 (D. Md. Jan. 12, 1988), which also discusses extending such treatment of "corruptly" into sister provisions of Chapter 73.

54. *Aguilar*, 515 U.S. at 595.

55. *Id.*

56. *Id.* at 598-99.

57. *Id.* at 599.

58. *Id.* at 597, 600.

59. *Id.* at 610-12 (Scalia, J., concurring in part, dissenting in part). Justice Scalia criticized the new construction of the statute on a number of pertinent grounds. First, he read the majority's opinion as discarding the term "endeavor" and the intent required by that term. *Id.* at 610. Second, he noted that the specific intent jurisprudence arising from *Pettibone* discouraged the majority's substitution of "natural and probable effect" for actual intent. *Id.* at 613. Third, he criticized the majority for inserting a requirement that the accused know of the natural and probable effect of his actions. *Id.* Justice Scalia noted that an act that had the "unnatural[ ] and

corruptly does have a long-standing definition in the context of federal criminal law[60] and that, under the majority's definition, "[a]cts specifically intended to 'influence, obstruct or impede the due administration of justice' . . . are necessarily 'corrupt.'"[61] He further criticized the Court for affirming a mistaken precept of *Neiswender* and its progeny, opining that the "natural and probable consequence" language arising in dicta in *Pettibone* and the attendant reasonably foreseeable result test should remain an evidentiary aspect of actual intent instead of supplanting the requirement of actual intent.[62]

Both *Neiswender* and *Pettibone* couched the requirement of reasonable foreseeability as an exclusionary element, effectively permitting intentional acts that have only an unnatural and improbable effect on a proceeding.[63] Neither contemplated whether such a test may actually work in the opposite fashion by including acts that would otherwise be excluded under a strict specific intent requirement.[64] Furthermore, the dispute in *Aguilar* was both cabined within the confines of the omnibus provision of section 1503 and highly dependent upon the prominence given to the textual phrase "corruptly . . . endeavors."[65] As such, even if it were extremely clear, *Aguilar* would not remove the inherent confusion surrounding the application of "corruptly" as used in other portions of the federal obstruction of justice statutes.

---

improbabl[e]" effect of obstructing justice would be deemed innocent, even if intent to obstruct justice could otherwise be clearly discerned. *Id.* at 612. This is despite the fact that, following his reading, the text of the statute criminalizes intent over result. *See id.* at 609-17; *see also infra* note 204 (describing the rule of lenity).

60. Namely, Justice Scalia opines that corruptly implies "an act done with an intent to give some advantage inconsistent with official duty and the rights of otbers." Aguilar, 515 U.S. at 616.

61. *Id.* at 617.

62. *Id.* at 611-12 n.2, 613; *see also supra* note 53 (noting that *Thomas*, 916 F.2d at 647, is a lineal descendant of *Neiswender*).

63. *See Aguilar*, 515 U.S. at at 599-600; *Neiswender*, 590 F.2d at 1273-74 ("Requiring notice of this proscribed result focuses the constraints of the law on those sought to be deterred while ensuring that only the culpable are punished.")

64. *Compare Aguilar*, 515 U.S. at 599-600 ("Recent decisions of Courts of Appeals have . . . tended to place metes and bounds on the very broad language of [§ 1503] . . . . Some courts have phrased [these limits] as a 'nexus' requirement . . . . [W]e think the 'nexus' requirement developed in the decisions of the Courts of Appeals is a correct construction of § 1503.") *with* De Marco, *supra* note 40, at 598-604 (presenting a hypothetical, in the context of corporate document destruction, where the foreseeability standard developed by *Neiswender* and its progeny would expand the realm of liability past specific intent and into what the author terms criminal negligence based on a "quasi-negligence analysis").

65. *See supra* notes 55-58. Section 1512(c) contains a similar term—"corruptly . . . attempts," which underscores the pertinence of the criticism of the *Neiswender* approach to section 1503, in particular the substitution of "natural and probable consequences" for actual intent, to the context of the new section 1512(c). *See supra* notes 59-62 and accompanying text.

For example, in *United States v. Farrell*,[66] the defendant was convicted, under subsection 1512(b)(3), of attempting to impede a USDA investigation by encouraging an alleged coconspirator to withhold information from USDA agents.[67] The court determined that the phrase "corruptly persuades" was ambiguous, then turned to legislative history and extra-legislative sources to determine its meaning.[68] In the limited context of a conspiracy, the *Farrell* court determined that noncoercively encouraging a coconspirator to withhold information from federal investigators may not fit within subsection 1512(b) because to so hold would render the statutory term "corruptly" duplicative.[69] The government urged the court to rely on cases interpreting section 1503 and to interpret the statute as proscribing any conduct that is "motivated by an improper purpose."[70] The Third Circuit rejected that argument, reasoning that noncoercive encouragement, without anything more, is not corrupt behavior.[71] The holding was largely a result of the district court's finding of fact that no coercion had occurred, regardless of the defendant's actual intent.[72] While the requirement of actual coercion was not well received by other circuits,[73] *Farrell* illustrates the debate over whether section 1503 should be used to help define corruptly as it is used in its sister provisions.[74]

The use of "corruptly" as a scienter requirement within the obstruction of justice statutes has elicited judicial struggle and made

66. 126 F.3d 484 (3d Cir. 1997).

67. *Id.* at 486.

68. Namely, they reviewed dictionary definitions of the term. *Id.* at 488 n.2.

69. *Id.* at 490.

70. *Id.* at 489-90.

71. *Id.*

72. *Id.* It is critical, in this context, to note that the conviction would likely have been affirmed in the absence of the express conclusion of the trial court following a bench trial that the defendant did not "knowingly use intimidation." *Id.* at 487. The trial court found that while the defendant had encouraged his co-conspirator not to cooperate with investigators, he did not employ coercion in so doing. *Id.* Reviewing the facts as presented in the Third Circuit case, it is plain to see that they could easily support an affirmance of a jury conviction (for which no written findings are generally provided), given the harsh words used in the apparent attempt at non-coercive persuasion. *Id.* Even had a jury used precisely the same reasoning as the district court in convicting the defendant the evidence presented would likely support affirmation on the basis that a conclusion of actual coercion was reasonable. *See id.* at 485-87, 489 (defendant told his co-conspirator that if his co-conspirator cooperated with investigators, he would be "crucif[ied]").

73. *See* United States v. Khatami, 280 F.3d 907, 913 (9th Cir. 2002) ("The Eleventh Circuit . . . has expressly rejected *Farrell's* reasoning."); United States v. Shotts, 145 F.3d 1289, 1301 (11th Cir. 1998) (noting that "corrupt" under section 1503 has long been held to require an improper purpose); United States v. Thompson, 76 F.3d 442, 452-53 (2d Cir. 1996).

74. *Farrell*, 126 F.3d at 491-92 (Campbell, J., dissenting).

application and enforcement of its provisions unduly difficult.[75] Unable to rely on clear precedent, multiple circuits have referenced dictionary definitions, antiquated legislative histories, and nuances in linguistic analysis to define the term.[76] Given the troubling interpretive history of "corruptly" within the federal obstruction of justice statutes, it seems implausible that the bill's drafters intended to perpetuate this ambiguity, especially in the context of subsection 1512(c), which prescribes a punishment of up to twenty years incarceration.

III. ACTS, MENTAL STATES AND INCONGRUITIES IN THE CURRENT FEDERAL OBSTRUCTION OF JUSTICE STATUTORY SCHEME

A. The Basic Obstruction of Justice Statutory Scheme: A Spider's Web of Act and Intent

Mindful that the federal obstruction of justice statutes have been interpreted in reference to their overall statutory scheme, this section will delineate the various mental states required by each section. Perhaps a sign of their importance to the fair and efficient administration of justice, obstruction of justice statutes are one part of a multifaceted scheme that combines both criminal and evidentiary sanctions for their combined deterrent and punitive effect.[77] The statutory portion of this scheme contains both a broad omnibus provision and a number of sections that regulate conduct in discrete circumstances. Section 1503 is the omnibus catchall provision; it proscribes any "endeavors" to "influence, intimidate, or impede" any jury investigation or determination.[78] It has been interpreted broadly to "generally prohibit[] conduct that interferes with the due administration of justice."[79]

---

75. It should be noted that 18 U.S.C. § 1515 (2000), the obstruction of justice definitional section, defines the term "corruptly" with respect to § 1505 only, statutorily adopting one reasonable reading of the word and focusing on the purpose behind the act in question. *See* § 1515(b). The Section also defines the term "corruptly persuades." § 1515(a)(6). Nowhere does the statute attempt to define "corrupt" or "corruptly" standing alone outside of their use in § 1505. *See* § 1515.

76. *See, e.g.*, *Farrell*, 126 F.3d at 488 n.2; United States v. Poindexter, 951 F.2d 359, 379 (D.C. Cir. 1991).

77. *Cf.* Alycia Sykora, Comment, *Forfeiture by Misconduct: Proposed Federal Rule of Evidence 804(b)(6)*, 75 OR. L. REV. 855, 869-70 (1996).

78. 18 U.S.C. § 1503(a).

79. United States v. Atkin, 107 F.3d 1213, 1218 (6th Cir. 1997) (quoting United States v. Bashsaw, 982 F.2d 168, 170 (6th Cir. 1992) (quoting United States v. Thomas, 916 F.2d 647, 650 n.3 (11th Cir. 1990))).

The import of the term "endeavor" as used in section 1503 signifies a standard lower than that of attempt and, while like attempt it does not require success, it necessarily implies an element of intent.[80] Of the act requirements specified by section 1503, two define discrete types of conduct: that which is threatening or undertaken by force.[81] The third, "to impede," implies both an act and a mental state.[82] This scienter requirement has been broadly construed to include actions that are considered per se corrupt because they tend to impede the administration of justice.[83] Section 1504 complements section 1503's regulation of judicial proceedings, expanding upon its proscriptions to reach written attempts to influence jurors.[84]

The remaining sections deal primarily with discrete factual circumstances surrounding an obstruction charge. "[Section] 1505 serves a purpose in the administrative field similar to that of [sections] 1503 and 1504 in the judicial field."[85] Sections 1506 through 1509 seek to maintain the integrity of the judicial process by protecting it from abuse.[86] Section 1510 includes criminal penalties for a multiplicity of acts that obstruct a federal criminal investigation. Section 1511 expands this to include the obstruction of state or local law enforcement investigations of illegal gambling businesses.[87] Section 1513 prohibits retaliation against a victim or witness, and section 1514 expands this prohibition to provide civil remedies to restrain harassment.[88] Sections 1516 through 1519 address obstructive acts in specific contexts, including federal audits,

80. *See* United States v. Reeves, 752 F.2d 995, 998 (5th Cir. 1985); *see also* Tigar, *supra* note 33, at 111 n.72 (discussing the attachment of liability pursuant to the terms "attempt" and "endeavor").

81. § 1503(a).

82. *Id.*

83. *See Reeves*, 752 F.2d at 998-99 (discussing how courts impute corrupt intent to acts but concluding that a taxpayer's attempt to place a false lien on the home of an Internal Revenue agent could not fit under the ambit of "corrupt" under tbe statute; suggesting that the agent bad recourse through the use of civil remedies).

84. 18 U.S.C. § 1504.

85. Taran v. United States, 266 F.2d 561, 562 (8th Cir. 1959).

86. *See* 18 U.S.C. § 1506 (theft or alteration of records or process and false bail); 18 U.S.C. § 1507 (picketing or parading that interferes with the ability of a judge, witness, juror or court officer to discharge their duties); 18 U.S.C. § 1508 (recording, listening to, or observing grand or petit jury deliberations or voting); 18 U.S.C. § 1509 (obstruction of court orders).

87. 18 U.S.C. § 1511 (2000).

88. 18 U.S.C.A. § 1513 (West 2000 & Supp. 2004); 18 U.S.C. § 1514 (2000).

examinations of financial institutions, inquiries into health care-related offenses, and bankruptcy investigations.[89]

B. The Placement of Section 1512 within the Web: The New and Sticky Strand

Section 1512 prohibits acts committed with the intent to thwart the procurement of truthful evidence. Titled "[t]ampering with a witness, victim or informant," it proscribes killing or attempting to kill, threatening, intimidating, harassing, corruptly persuading, or misleading such a person.[90] Subsection 1512(c)(1) is unique in that it protects nonhuman "witnesses" by proscribing the alteration, mutilation, destruction or concealment of a record with the intent to impair an official proceeding.[91] Unique among the obstruction of justice statutory scheme, subsection 1512(c)(2) also bars any "corrupt" attempt to obstruct an official proceeding yet provides neither a specific act requirement nor further guidance as to what constitutes corrupt behavior.[92]

1. Prior Use of Mental States in Federal Obstruction of Justice Statutes

More importantly, subsection 1512(c), especially subsection (c)(2), has a mental state requirement that seems to take little account of the development of the obstruction of justice statutory scheme. Section 1503, through the use of the phrase "corruptly endeavor," superimposes a level of intent.[93] Section 1504 reaches a similar conclusion through its use of "attempt."[94] Section 1505 uses both intent to obstruct an administrative antitrust proceeding and willfulness to keep evidence out of the adverse party's hands; its Congressional proceeding section mirrors the scienter language of section 1503.[95] Section 1506 employs the term "feloniously," and section 1507 uses "intent".[96] Sections 1508 through 1511 employ "knowingly and willfully," "knowingly," "willfully endeavors" and

89. 18 U.S.C.A. § 1516 (West 2000 & Supp. 2004); 18 U.S.C. §§ 1517-1518 (2000); 18 U.S.C. § 1519 (West 2000 & Supp. 2004).

90. § 1512.

91. § 1512(c)(1).

92. § 1512(c)(2).

93. § 1503.

94. § 1504.

95. § 1505.

96. §§ 1506-1507.

"intent."[97] Section 1513 uses a graded scale of intent and knowledge.[98] Section 1516 uses "intent," section 1518 uses "willfully" and section 1519 uses "knowingly."[99] The witness tampering provisions of section 1512 use a mixture of knowledge and intent.[100] Section 1520, which was passed contemporaneously with 1512(c) as part of Sarbanes-Oxley and with an apparently similar purpose of supporting a factual trail of documentation for use by governmental entities, only proscribes knowing or willful violations of its provisions.[101]

2. Problems that Arise from the Addition of the Corrupt Mental State in Subsection 1512(c)

Given the comprehensive nature and structure of the obstruction of justice statutes, it might be expected that in the wake of Sarbanes-Oxley a clear and concise addition to the scheme would be expected. Unfortunately, such an expectation is overly optimistic; subsection 1512(c) is perhaps the least concise addition to the scheme. Aside from the newly added subsection 1512(c)(2), only section 1517[102] relies solely on "corruptly" to determine its mental state.[103] Even subsection 1512(c)(1), passed along with subsection 1512(c)(2), tempers its use of "corruptly" by requiring intent to impair production of documents.[104] Following the principle that criminal punishment ought to be reserved for those who are morally blameworthy, it might be assumed that mental states that present a high bar to the prosecutor would lead to harsher punishment.[105] Given that the definition of the term "corrupt" may be construed to include

97. §§ 1508-1511.

98. § 1513.

99. §§ 1516, 1518-1519.

100. § 1512.

101. 18 U.S.C.A. § 1520 (West Supp. 2004) creates a statutory mandate for accountants to retain the audit records of companies issuing securities under section 10A(a) of the Securities Exchange Act of 1934 for five years, whether or not an investigation or proceeding has been launched. In so doing, it punts the question of the specifics of its mandate to the Securities and Exchange Commission. *See* § 1520(a). This is more of a preemptive mandate that creates an independent duty, while section 1512(c) appears to have more of a reactive mandate that punishes those who act *ex post facto*. It also differs from § 1512(c) in that it creates a duty applicable to a group that is typically sophisticated and professional, and only those members of the group who engage in activities in situations covered by a specific statutory mandate. *See* §§ 1512(c), 1520.

102. Section 1517, however, pertains to examinations of financial institutions. § 1517.

103. Each of these statutes, however, includes within its ambit liability for an "attempt." §§ 1512(c), 1517.

104. § 1512(c)(1).

105. *See* JOHN KAPLAN ET AL., CRIMINAL LAW CASES AND MATERIALS 181-83 (4th ed. 2000).

heightened negligence,[106] would it be expected that the highest degree of punishment—save that for trying to kill a participant in a judicial proceeding—is to be found under section 1512(c)(2): twenty years imprisonment?[107] Surely not. Imposition of such a severe punishment by section 1512(c) may, however, in the end, provide clues for the most logical construction: the imposition of three-part super-intent requirement.[108]

C. Ends-Based Culpability, Statutory Overlap, and the Enumerated Acts Paradox

The proposed three-part super intent standard is tied to the observation that the term corruptly has, in certain historical circumstances, been construed to impose a heightened specific intent requirement;[109] a requirement that exceeds the scienter requirements found in other obstruction of justice statutes that apply to the same acts.[110] A witness tampering charge, for example, might now be prosecuted under section 1503 if the obstructive action has the

106. See *supra* note 64 and accompanying text.

107. In addition to the fine allowed under each section noted, the statutorily noted terms of imprisonment for §§ 1503-1520 are: § 1503 (excluding cases where successful killing was involved), twenty years for either an attempted killing or a class A or B felony that involved a petit jurorn any other case, ten years; § 1504, six months; § 1505, five years; § 1506, five years; § 1507, one year; § 1508, one year; § 1509, one year; § 1510, five years for an attempt to obstruct the flow of information to an investigation by means of bribery, either one or five years for various acts pertaining specifically to the financial and insurance industries; § 1511, five years; § 1512 (excluding cases where successful killing was involved), twenty years for attempted murder or use of physical force—ten years for threat to use physical force where there was an intent towards the realization of a specified end, or ten years when such acts are done knowingly, with a one-year sentence for certain types of harassment; § 1513 (excluding cases where successful killing was involved), twenty years for attempted killing and ten years for attempting to or succeeding in causing bodily injury, damage to tangible property, or any other harmful action, including disruption of employment; § 1516 five years; § 1517, five years; § 1518, five years; § 1519, twenty years; § 1520, 10 years. Also, in regard to § 1512, if the underlying proceeding was criminal, the maximum penalty is the higher of the penalty stated in § 1512 or the penalty of the underlying criminal proceeding.

108. *See* Steven M. Kowal, *When Unexpected Government Agents Drop In: Responding to Requests for Immediate Interviews*, 54 FOOD & DRUG L.J. 93, 106 (1999) (The author, a practicing white collar criminal defense attorney, opines that five years of incarceration is "severe.").

109. *See supra* notes 39-41and accompanying text.

110. The widespread disparity in mental states throughout the obstruction of justice statutes may be partially attributable to changing legislative attitudes. The assignment of mental states in this statutory scheme, however, appears to have no temporal connection to its dates of passage. For example, both subsection 1512(c), passed in 2002, and section 1517, passed in 1990, employ "corruptly," while other sections promulgated in the intermediate period contain varying mental states. *See* §§ 1512, 1517. *But see, e.g.*, § 1518 (passed in 1996 using the term "willfully.").

probable effect of interfering with a proceeding.[111] Alternatively, the same act might also be prosecuted under subsection 1512(c) if there was a specific design to thwart justice or if the demonstrated intent was otherwise sufficiently egregious.[112] This interpretation, however, would require a deviation, in the specific context of subsection 1512(c) prosecutions, from the nexus requirement developed in *Aguilar*.[113]

1. Statutory Overlap Among Obstruction Sections

The first instance of logical support for this super-intent requirement relates to whether sections 1503 and 1512 are mutually exclusive.[114] As previously mentioned, a question has arisen as to the interrelationship between various provisions of the obstruction of justice statutory scheme. Specifically, the presence of an omnibus section lends credence to the conclusion that subsection 1512(c) was indeed intended to be a catchall. Section 1512 was initially passed to make up for the "inadequate" protection of victims and witnesses under the omnibus provision of section 1503.[115] In short, Congress deleted all references to witnesses from 1503 when 1512 was created.[116] Nevertheless, Congress failed to otherwise clarify whether section 1512 was intended to be the exclusive vehicle for witness tampering charges.[117] Courts subsequently disagreed over whether to allow witness tampering prosecutions under 1512 exclusively, under both sections concurrently, or under section 1512 exclusively when one of the acts enumerated in section 1512 was involved.[118]

In 1988, Congress attempted to remedy this uncertainty by amending section 1512 to "clos[e] the statutory gap" that had led to this difference of opinion.[119] Subsequently, "the majority of circuits hold that section 1503 is applicable in witness tampering prosecutions

111. *See supra* notes 45-56 and accompanying text.

112. *See* § 1512(c).

113. *See Aguilar*, 515 U.S. at 599-600, 616; *cf.* De Marco, *supra* note 40, at 601-04 (noting that prior to the *Aguilar* decision and in the context of § 1503, a requirement of specific corrupt intent to obstruct justice is preferable to imputation of sucb intent using a foreseeability analysis).

114. *See* Tina M. Riley, Note, *Tampering With Witness Tampering: Resolving the Quandary Surrounding 18 U.S.C. §§ 1503, 1512*, 77 Wash. U. L.Q. 249, 250-51 (1999).

115. *Id.* at 255.

116. *Id.* at 257-59.

117. *See* P.L. No. 107-204 (2002). While other amendments to Chapter 73 of Title 18 included the addition of §§ 1519 and 1520 in full and a provision relating to witness retaliation in § 1513, none of these changes appear to address the question of whether § 1512(c) should be the exclusive vehicle. *See* Sarbanes-Oxley Act of 2002 §§ 802(a), 1107.

118. Riley, *supra* note 114, at 264-65.

119. *Id.* at 265-66, 271.

as either an alternative to section 1512 or in addition."[120] This approach is not without its critics. At least one commentator observes that the minority position—that section 1512 ought to be the exclusive vehicle for witness tampering prosecutions—is preferable to the majority position in the interests of providing uniformity and consistency in federal law, the appearance of fairness, actual fairness in application of the law, and the effectuation of congressional intent.[121] In short, in the interest of providing "a clearer and less duplicative law," this position is preferable because it would create a clean line of distinction between the competing statutes.[122]

2. The Ends-Based Penalty Provision of Subsection 1512(c)(1)

In reference to subsection 1512(c)(1), a number of provisions are likely to cause overlap similar to that seen in the past. For example, the omnibus provision of section 1503 traditionally prohibited document alteration, destruction or manipulation with improper purpose.[123] The state of affairs since the passage of subsection 1512(c)—that an omnibus clause and a more specific clause overlap—directly mirrors the scenario that had developed between the 1982 addition of section 1512 and its 1988 amendment.

In comparing the culpability required by the obstruction of justice statutes, a striking disconnect appears between the penalties assessed for the destruction of documents and other proscribed acts. Obstruction of justice by an attempt to destroy documents under subsection 1512(c)(1) carries the same criminal culpability as an attempt to kill or physically harm a witness under subsection 1512(a).[124] Assuming that society considers an attempt to kill another person to be a more heinous and criminal act than an attempt to mutilate or destroy a piece of paper, the logical conclusion is that this scheme is not a means-based method of assigning culpability. Instead, it must focus on the end result of obstruction of justice.[125]

---

120. *Id.* at 272 (emphasis added).

121. *Id.* at 272-73.

122. *Id.* at 273. (quoting 128 CONG. REC. 26,810 (1982) (statement of Senator Heinz)).

123. Eric Lent & Melinda Williams, *Obstruction of Justice*, 39 AM. CRIM. L. REV. 865, 875-77 (2002).

124.18 U.S.C. §§ 1512(a), 1512(c)(1) (2000).

125. The Supreme Court's focus on the natural and probable effect of an act to satisfy the "corruptly endeavor" element of section 1503 also indicates a focus on the ends as opposed to the means. *See supra* Part II.B.2.

3. The Ends-Based Penalty Provision of Subsection 1512(c)(2)

Subsection 1512(c)(2) creates a conflict even more troubling than that of its close neighbor because it carries a harsher penalty than sections that specifically enumerate criminal acts. It reads, "[w]hoever corruptly . . . *otherwise obstructs*, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both."[126] Considered on its own, and given that it carries a heavier prison term that any other attempt to obstruct justice not involving murder, subsection 1512(c)(2) seems to render a number of provisions of the code surplusage if interpreted in accordance with the *Aguilar* standard.[127] For example, if obstruction of justice by an enumerated act carries a lesser penalty than otherwise obstructing justice, then does obstruction by an enumerated means constitute a defense? Further complicating the analysis is the fact that, unlike the 1982 passage of the witness tampering provisions of section 1512, there is little reference to other code sections in the legislative history and no contemporaneous direct amendment of preexisting obstruction of justice statutes.[128]

One possible explanation for the disparity between the included mental states required for a number of these offenses is that, as legislative attitudes and mores change over time, the preferences of Congress in implementing laws change in accordance. The assignment of mental states in this statutory scheme, however, appears to have no temporal connection to the date of passage. For example, the passage of subsection 1512(c) in 2002 and section 1517 in

126. § 1512(c)(2) (emphasis added). Read solely in conjunction with § 1512(c)(1), this section may also be read as reading out the requirement that there be an intent to impair an object's availability for an official proceeding. Subsection (c)(2) omits the "intent to impair" language, and uses the term "otherwise" to differentiate its language from that of subsection (c)(1). *See* § 1512(c). Logically, the use of "otherwise," and the omission of the requirement of an intent to obstruct, could lead to the conclusion that the statutory section applies regardless of intent to impair availability. Alternative constructions of the two subsections taken together may imply any one of the following: that they both relate to impairment of tangible evidence availability, but with different consideration of intent to impede an official proceeding; that the former relates to tangible evidence *specifically* while the latter relates to *any* obstructive act, regardless of an intent to impede an official proceeding; that the former is a specific document-destruction provision and the latter merely an attempt to restate obstruction of justice provisions found elsewhere in Section 73; or that the "corruptly" language was intended to take on a meaning of its own, distinguishing the provisions in subsection (c) from the other provisions of §§ 1503 and 1512. The focus of the term "otherwise," never clarified, is crucial to drawing this distinction, as is the question of whether the "corruptly" scienter element can sufficiently be distinguished from other forms of culpable obstruction to justify the higher punitive sanction. As discussed *infra*, perhaps the best means of remedying this quandary is to read the statutory sections not in light of one another, but in light of their relationship with the other provisions of Chapter 73.

127. *See generally supra* Part II.A.2.

128. *See* Pub. L. No. 107-204 (2002); *see* Sarbanes-Oxley Act of 2002 § 1107.

1990, both of which employ the term corruptly, combined with the observation that other sections with variant mental states were passed in the intermediate period, suggests that no significant relationship exists between timing and the selection of a mental state.[129] The creation of both subsection 1512(c) and section 1517 are connected in a more normative sense: at the time of passage of each, there was a great hue and cry about the state of the industry for which they were intended.[130] The statutes are also similar in that they appear to have been passed reactively.[131] While the express intent of Congress in each instance was commendable and timely, in execution it appears that Section 1512(c) will likely impose upon courts many of the same struggles they have faced in the past.[132]

As discussed above, while there are cases that could reasonably be decided without any doubt or error, it is the cases on the penumbra of the statute that are likely to create consternation.[133] In the next section a sampling of possible negative effects of the newly minted obstruction of justice statute will be further explored.

IV. "CORRUPTLY" APPLIED TO THE BUSINESS CONTEXT: FUTURE DIFFICULTIES IN APPLICATION, ENFORCEMENT, AND PLANNING

A. Obstruction of Justice and Obstruction of Commendable Policy

Section 1512 has been applied to both criminal and civil prosecutions.[134] Given the context surrounding its passage, it is

129. *See, e.g.*, 18 U.S.C. § 1510(d) (2000) (added in 1994 using "intent"); § 1518 (passed in 1996 using "willfully"). In addition, there may be no clear answer or rationale for this scheme. "[O]ne would expect the common law approach to mens rea to have settled most of its significant issues long ago. Surprisingly, however, there are important fundamental mens rea questions that still have no clear answers." Robert Batey, *Judicial Exploitation of Mens Rea Confusion, at Common Law and Under the Model Penal Code*, 18 GA. ST. U. L. REV. 341, 341-42 (2001).

130. *See supra* Part I (outlining some of the popular and governmental responses to corporate scandals affecting the everyman shortly before the passage of Sarbanes-Oxley); *infra* Part V (outlining the similar reactions to the Thrift Crisis of the 1980s, which shortly preceded the passage of § 1517).

131. *See supra* Part I; *infra* Part V.

132. For an analysis of past problems, *see supra* Part II.

133. The problems that an ill-defined mental state requirement present "should now be crystal clear: Courts manipulate the definition of [mental states] to achieve the results they desire in individual cases and across case classes." Batey, *supra* note 129, at 399.

134. *See, e.g.*, United States v. LeQuire, 943 F.2d 1554, 1557-59 (11th Cir. 1991) (involving the smuggling of drugs worth over a quarter of a billion dollars, violent intimidation, and murder); United States v. Khatami, 280 F.3d 907, 908-10 (9th Cir. 2002) (involving a babysitter who asked two of her clients to tell a SSA investigator that she had not been paid for her services); United States v. Gabriel, 125 F.3d 89, 92-94 (2d Cir. 1997) (involving two schemes in

reasonable to suspect that subsection 1512(c) was primarily intended to bolster enforcement actions in a business setting.[135] Its implementation will bring new challenges to bear on the commercial world, courts, and enforcement agencies partially because "the elements of several white collar offenses, including obstruction . . . frequently fail to distinguish between criminal and legitimate conduct."[136] Inequitable application of the law may also occur due to the immense discretion given to enforcement agencies both in their formal and informal capacities.[137] In short, while subsection 1512(c) was based on commendable policy goals, there will be significant functional impediments to its successful implementation unless a novel interpretive scheme is developed.

B. Parsing the Difficult Line Between Legitimate Practice and Illegal Activity

Returning to section 1512(c), it is apparent that the content of the subsection will be difficult to apply in the business context. The use of documentation and the preservation of internal records are critical in investigating allegations of illegal business practice.[138] The importance of this paper trail in an investigation is illustrated by a complaint based upon document destruction filed in the federal antitrust litigation involving Rambus Incorporated (Rambus).[139] In an administrative hearing, the Federal Trade Commission complaint counsel moved for a default judgment against Rambus in the antitrust case as a sanction for bad-faith document destruction.[140]

At issue in this ongoing determination is whether Rambus' destruction of relevant documents was a bad-faith attempt to skirt predicted litigation or whether it was part of an established and innocent, if misguided, document retention and destruction regimen.[141] Although the issue in *Rambus* was primarily evidentiary

---

which attempts were made to conceal the fact that substandard repairs were made on commercial jet aircraft engines).

135. *See supra* Part I.

136. James F. Ponsoldt & Stephen Marsh, *Entrapment When the Spoken Word Is the Crime*, 68 FORDHAM L. REV. 1199, 1202 (2000).

137. *See infra* Part IV.C.-D.

138. *See infra* notes 145-47.

139. *See* Counsel's Motion for Default Judgment Relating to Respondent Rambus, Inc.'s Willful, Bad-Faith Destruction of Material Evidence at 1, *In re* Rambus, Inc. (No. 9302) (Dec. 20, 2003) (Some portions of the document have been excised in the public version but the relevant issues are still reasonably clear.) http://www.ftc.gov/os/adjpro/d9302/030116scanpubversionccmotdejudg.pdf.

140. *Id.* at 108.

141. *Id.* at 3-5.

in nature, the case illustrates both the importance of corporate documentation as an evidentiary tool in all types of proceedings (administrative, civil, or criminal) and the intersection between legitimate and criminal conduct.[142] Complaint counsel's contention of bad-faith destruction relied heavily upon statements made by Rambus employees, both those directly linking document destruction to anticipated litigation,[143] as well as statements requiring an inferential leap between that which was stated and a nefarious intent.[144] The decision whether to retain or destroy documents is omnipresent in the business world and may require balancing a number of competing interests.

> Internal corporate document retention policies allow companies some leeway in destroying documents. Courts have recognized that organizations, due to high storage and organization costs, cannot be expected to keep documents forever. Most times, these records may be destroyed as long as they are not relevant to some ongoing or foreseeable litigation . . . [Professor Solum and Marzen] argued destruction of evidence undermined two important goals of the judicial system—truth and fairness . . . Thus, prohibitions on the destruction of evidence punish, deter, compensate and restore accuracy to the fact-finding process.[145]

The preservation of internal records becomes critical during an investigation of alleged illegal business practice. Probative of this is the placement of subsection 1512(c)'s document-destruction provision within the "Tampering with a Witness" section.[146] The corporate paper trail may often become an important witness when complex criminal acts are alleged.

Document retention determinations are often informed by legitimate cost concerns. While the cost of retaining documents pertaining to an ongoing or foreseeable dispute may be minimal, "legal control on the destruction of evidence may be wasteful and inefficient . . . [and] may impose great financial costs and recordkeeping burdens."[147] A routine cost-based document destruction policy may provoke less suspicion than one that is performed "informally or on an

---

142. *Id.*

143. *See, e.g., id.* at 3, 46 (recounting direct admissions in depositions by Rambus employees that the intention behind their document destruction policy was to prevent the use of such documents in future litigation).

144. *See, e.g., id.* at 65 ("[W]e can *infer* from [a Rambus employee's email]—in which he jokes about documents *'falling victim to the document retention policy :-)'* that . . . important . . . documents . . . were destroyed." (italics added and emoticon in original)); *id.* at 55 ("The existence of [untruthful] testimony invites *inferences* of deliberate wrongdoing and bad-faith . . . ." (emphasis added)).

145. Matthew J. Bester, *A Wreck on the Info-Bahn: Electronic Mail and the Destruction of Evidence*, 6 COMMLAW CONSPECTUS 75, 79-80 (1998).

146. *See* 18 U.S.C. § 1512 (2000).

147. *See* Lawrence Solum & Stephen Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1140-41 (1987).

as-needed basis."[148] Selective retention may also be costly due to difficulties associated with identifying and culling the appropriate documents.[149] Furthermore, as businesses increasingly accept electronic messaging as a preferred communication mechanism, document destruction has become largely automatic, raising new issues of mental state and foreseeability.[150]

There may also be ancillary benefits and hindrances created by the imposition of restrictions on document destruction.[151] The economic model of document destruction recognizes that a regime that has the positive benefit of "chilling the creation of documents evidencing unlawful activity . . . directly increas[ing] the cost of lawbreaking itself,"[152] may, at the same time, have the negative effect of "chilling the production of useful documentary evidence," which may result in inefficient and unsafe decisions.[153] While with twenty-twenty hindsight it is apparent that the costs of unregulated document destruction can be extraordinarily high, the costs of document retention also may exact a price by presenting managers with this Hobson's choice.[154]

For example, one commentator reported that the New York Times installed a program on its computers that automatically deletes email after thirty days.[155] Given that an errant keystroke might be sufficient to impute intent to obstruct justice,[156] the implications of this practice for any organization that frequently finds itself involved in litigation are significant.[157] If litigation is to be anticipated as a regular aspect of doing business, automatic destruction opens the company up to liability. Conversely, a regular destruction regime

148. Bester, *supra* note 145, at 84-85.

149. Solum & Marzen, *supra* note 147, at 1140-41.

150. Bester, *supra* note 145, at 86-87 ("[C]ourts should not leap to conclusions based on traditional document destruction. . . . Intent is much more difficult to measure when a user hits the enter button by mistake and destroys the last copy of an email message . . . . [N]early every computer user has inadvertently hit the wrong key and supplied the computer with an unintended command . . . . [In such an instance] under the Neiswender approach it appears that courts may impute intent."); *see also supra* note 5 (noting that Arthur Andersen's conviction in the Enron obstruction case involved the destruction of both tangible and electronic information).

151. Solum & Marzen, *supra* note 147, at 1141.

152. *Id.*

153. *Id.*

154. *Id.*

155. Bester, *supra* note 145, at 87 n.184.

156. *Id.* at 87.

157. *See id.* A Lexis search using the operator "NAME (New York Times)" for the ten-year period ending on January 20, 2003, returned 175 hits, exclusive of unpublished cases. While there were a number of cases that appeared multiple times in the list, and some returns pointed to organizations such as the New York Times Employees Federal Credit Union, it is still safe to say that The New York Times is not infrequently involved in litigation.

might shield an otherwise culpable party from liability.[158] The choice thus presented to managers exacerbates the potential for abuses of the obstruction of justice statutes through selective prosecution based on inferential evidence.[159]

An additional problem is that those with a motive to destroy evidence have a litany of methods available to circumvent the strictures of the law.[160] Given that "permissibility of destruction arguably turns on the intent of the destroyer . . . [and] proof of a party's subjective motivation is difficult," creative methods of avoiding obstruction of justice are available.[161] This is another negative effect of a broad and ill-defined criminal obstruction rule. Although documentary evidence may be necessary in the discovery and prosecution of corporate corruption, the regime currently in place may prove to be both over-inclusive by potentially criminalizing a business necessity with only the benefit of an *ex post* inquiry into intent, and under-inclusive by allowing a claim of regular business activity to shield a malicious act. These observations underscore the restraint that will be necessary in construction of the current scienter element of subsection 1512(c) due to its propensity, absent such restraint, to limit useful activity.

C. Problems of Prosecutorial and Judicial Discretion

There will likely be significant problems in adapting corporate practice and government enforcement strategies to the requirements of subsection 1512(c). Given the strict penalties imposed by subsection 1512(c), and the prevalence of routine document destruction, legislative clarification of "corruption" is needed to prevent unpredictable interpretation and selective application by the judicial system.[162] The ambiguous nature of the statutory language presents

158. Bester notes that a routine document retention policy may invoke less suspicion than one that is performed "informally or on an as-needed basis." *Id.* at 84-85.

159. *Compare* Frank O. Bowman, III & Stephen L. Sepinuck, *"High Crimes and Misdemeanors": Defining the Constitutional Limits on Presidential Impeachment*, 72 S. CAL. L. REV. 1517, 1556-57 (1999) (noting that, on average, each U.S. Attorneys' office handles an obstruction of justice or perjury prosecution arising out of a civil cases where the United States or an agency thereof was not a party about once every half-century, and then usually only when there is a strong federal interest), *with* Atlas, *supra* note 6, at C1 (noting the modern ascendance of obstruction charges as a prosecutorial tool).

160. Solum & Marzen, *supra* note 147, at 1142.

161. *Id.*

162. *See* 18 U.S.C. § 1515(b)(6) (2000) (defining the mental state element of § 1505). *See generally* United States v. Poindexter, 951 F.2d 359, 369 (D.C. Cir. 1991). In *Poindexter*, after the court struck down the mental state requirement of Section 1503 as unconstitutional due to vagueness, Congress clarified the scienter element to revive the statute.

two dangers. First, an interpretation focusing solely on the unclear words of the statute could trump whatever legislative intent spurred its passage.[163] Second, judicial interpretation of ambiguous text creates the danger that the intent of some legislators will be prioritized over others, thereby prejudicing the judicial process and discouraging future legislation.[164]

There are substantial arguments against the placement of this type of statutory regime into the hands of individual actors in the judicial system. Attorney General and later Supreme Court Justice Robert H. Jackson observed that:

> One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints.
>
> If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him.[165]

While selective prosecution is not unique to obstruction of justice, the inferential nature of many obstruction of justice accusations invites abuse.[166] Although the statutory obstruction of justice regime was established and has been developed partially to provide the accused with a modicum of protection from zealotry,[167] it is necessary to recognize the potential for the degradation of such

---

163. *See* Daniel B. Rodriguez & Barry Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1525-26 (2003).

164. *See id.*

165. Morrison v. Olson, 487 U.S. 654, 727-28 (1988) (Scalia, J., dissenting) (quoting Attorney General Robert H. Jackson, Address Delivered at the Second Annual Conference of United States Attorneys (Apr. 1, 1940)).

166. Because criminal obstruction charges rarely arise from civil suits and because when they do they generally are only brought when a strong federal interest is present in a case (despite the fact that obstruction charges can be brought pursuant to criminal and civil cases), the argument that prosecutors use their discretion when bringing obstruction charges is particularly strong. *See* Bowman & Sepinuck, *supra* note 159, at 1556-57. Even assuming an intention by courts and prosecutors to apply the law evenly and equitably, then-Justice Jackson made a complementary observation in another context, noting that "[f]air prosecutors and conscientious judges sometimes are misinformed *or draw inferences* from conflicting evidence with which we would not agree"; adding shortly thereafter that "even an erroneous judgment, based on a scrupulous and diligent search for truth, may be due process of law." Townsend v. Burke, 334 U.S. 736, 741 (1948) (emphasis added).

167. *See supra* Part II.A.

protections.[168] First, "[j]udicial usurpation of the legislature's prerogative to define crimes seriously undermines the principle of legality, our societal commitment to prospective legislative definition of criminal offenses."[169] The importance of this principle is underscored by the fact that a criminal acquittal is rarely, if ever, the same as never having been charged in the first place.[170]

Second, vagueness of a statute may place "unfettered discretion . . . in the hands of the . . . police."[171] Finally, once they have attained a large degree of discretionary power, enforcement agencies also have the benefit of informal enforcement actions that exist outside of the strictures of statute.[172] Ultimately, the risks of judicial discretion associated with an ambiguous statute must be borne out by the general public.

D. Social and Other Extralegal Consequences for Prosecuted Individuals and Businesses

The ramifications of the ambiguity found in 1512(c) may manifest not only directly through the judicial system and prescribed penalties, but also through extralegal social effects. These social effects take two forms that are particularly pronounced with regard to obstruction of justice: the effects of an indictment or investigation; and the effects of prosecution or sanction may allow for undue official pressure, whether or not the underlying charges would have eventually been substantiated. It is not advisable to allow social interest and pressures to select the boundaries of whether an actor is subject to prosecution under a particular criminal statute. In the words of Justice Cardozo:

> We are not unmindful of the public interests, of the insistent hope and need that the ways of bribers and corruptionists shall be exposed to an indignant world. Commanding as those interests are, they do not supply us with a license to palter with the truth or to twist what has been written in the statutes into something else that we should like to see. Historic liberties and privileges are not to bend from day to day "because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment."[173]

While vigilance against a break from the strictures of the law is commendable, such vigilance can be a double-edged sword. Justice

168. *See supra* notes 23-24 and accompanying text.

169. Batey, *supra* note 129, at 342.

170. See *infra* notes 176-78 and accompanying text.

171. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 168 (1972).

172. *See infra* Part IV.D.

173. Doyle v. Hofstader, 177 N.E. 489, 498 (N.Y. 1931) (quoting N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting)).

Cardozo's words, written in regards to a case where the actual construction of the statute was beneficial to the defendant, are no less important where the construction may work against the defendant.[174]

In the case of health-care fraud, an aspect of the criminal law specifically dealt with in the obstruction of justice statutes, one commentator warned: "[n]o one could dispute that hardship or not, fraudulent institutions should be . . . relentlessly prosecuted. However, the . . . costs of such investigations are high, and care should be taken so that the mystique of the . . . law enforcement machine does not seduce the regulator into becoming a hunter when there is no prey."[175] The chance of such seduction may be heightened by exigent social interests, such as when the public demands accountability from those charged with enforcement.

A criminal proceeding may impose costs upon the defendant regardless of an eventual acquittal.[176] One commentator described the interaction between a criminal acquittal and the socially normative view of innocence in the following manner: "[o]ne barrier to acquitted defendants achieving vindication is that the presumption of innocence is a legal requirement, not a social norm . . . we strongly suspect many defendants who are acquitted are in fact guilty . . . leaving the innocent defendant with no ability to persuade others that his case was different."[177]

Transposition of this observation on a business environment as opposed to a "standard" criminal environment may magnify the gap between socially normative and legally conclusive behavior. The social effects of accusation upon the innocent live as substantial burdens because "the sequella of an indictment may leave the defendant's reputation, personal relationships, and ability to earn a living so badly damaged that he may never be able to return to the life he knew before."[178]

Obstruction of justice may be particularly susceptible to assumptions based upon social belief as opposed to proven fact. An example is the spoliation doctrine, which applies when it is alleged that relevant evidence was intentionally destroyed or otherwise made

174. See *supra* note 64 for the debate over whether modern interpretations of statutes involving a "corruptly" scienter element are in fact defendant friendly.

175. Pamela H. Bucy, *The Path from Regulator to Hunter: The Exercise of Prosecutorial Discretion in the Investigation of Physicians at Teaching Hospitals*, 44 ST. LOUIS U. L.J. 3, 50 (2000).

176. *See generally* Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297 (2000) (discussing some extralegal consequences for the defendant in a criminal proceeding).

177. *Id.* at 1299-1300.

178. *Id.* at 1299.

unavailable by a party in a legal dispute.[179] The spoliation principle "infers from the fact that evidence was destroyed that the spoliator was conscious of her guilt."[180] This inference also leads to the presumption that the spoliator was guilty of the full litany of mental states and actions that could possibly underlie the alleged unlawful act.[181] By extension, the social and legal conceptualizations of obstruction of justice may implicate an innocent defendant in both the alleged obstructive act as well as in the subject matter of the original proceeding or investigation.[182] The traditional spoliation inference has been attacked on the ground that even an innocent litigant may destroy evidence that she feels is misleading and would wrongly implicate her.[183] In defense of the inference is the principle of "'courtroom truth' [where] a correct verdict . . . results from a fair process."[184] Under this notion, even production of misleading documents is necessary because the purpose of a trial is to parse what is true from what the litigant might presume to be misleading.[185] This debate illustrates the somewhat independent natures of legal conclusions from a criminal conviction and social sanctions that arise from the destruction of evidence.

This doctrine mirrors one of the underlying principles that provide the basis for the very existence of obstruction of justice as a crime—the preservation of a full and complete documentary trail.[186] Moreover, both the spoliation doctrine and the obstruction of justice regime are indicative of a social reality in which a popular inference of guilt may be forged from an investigation, indictment or acquittal. Obstruction of justice is often a criminal charge built largely upon inference.[187] The combination of a social inference of guilt from investigation or indictment and the heightened inferential basis for

---

179. *See* BLACK'S LAW DICTIONARY 1409 (7th ed. 1999).

180. Solum & Marzen, *supra* note 147, at 1160. Solum and Marzen describe the words of Learned Hand as the "classic statement" on the spoliation principle: "[w]hen a party is once found to be fabricating or suppressing documents, *the natural, indeed, the inevitable conclusion* is that he has something to conceal, and is conscious of guilt." *Id.* at 1161 (emphasis added).

181. *See id.* at 1160-61.

182. Even the statutory text seems to reflect this idea:

> "If the offense under this section [1512] occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case."

§ 1512(j).

183. Solum & Marzen, *supra* note 147, at 1161.

184. *Id.* at 1162.

185. *Id.*

186. *Id.*

187. *See supra* notes 138-44 and accompanying text.

guilt where a charge of destruction of evidence is involved creates a circumstance where the danger of unfounded social stigma is particularly strong.

The inference, conjecture, and social stigma that are associated with obstruction of justice charges in the business setting may be exploited without resort to any formal proceeding or sanction through regulatory arm-twisting. During this process, an enforcement agency pursues an entity, not through established channels of administrative procedure or legal action, but by a "threat . . . to impose a sanction or withhold a benefit in hopes of encouraging 'voluntary' compliance with a request that the agency could not impose directly on a[n] . . . entity."[188] Essentially, arm-twisting is a means of evading substantive limitations on an agency's regulatory power where compliance is sometimes procured through the threat of either a release of adverse publicity or resort to the official sanctioning process.[189] The inferential and socially costly nature of an obstruction indictment may make it particularly susceptible to such arm-twisting.

V. SOLUTION: LEGISLATIVE CLARIFICATION OR JUDICIAL CONSTRUCTION

The obvious and presumably most effective way to remedy the inadequacies of subsection 1512(c) is congressional inclusion of a well-defined scienter element. As a model, Congress may look to federal banking laws, which were passed under circumstances similar to those under which Sarbanes-Oxley came to exist. Alternatively, Congress could reference the text of the Model Penal Code (MPC) for the purpose of clarifying the mental state requirement of subsection 1512(c). This Part both discusses these changes and suggests a judicial reading of subsection 1512(c) that would better comport with its placement in the statutory scheme, allow for more effective document retention planning, and better effectuate the purposes for which it was passed.

A. Optimal Solution: Banking Law as a Model for Revising Subsection 1512(c)

One template for revision is the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), which imposes criminal sanctions for misdeeds in the banking sector. Both Acts were

188. Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873, 874.

189. *Id.* at 874-76.

promulgated in reaction to social outcry over major corporate scandals.[190]

In the late 1980s, a rash of thrift failures bankrupted the Federal Savings and Loan Insurance Fund.[191] The Office of the Comptroller of the Currency determined that poor management, specifically insider abuse, fraud, and misconduct, played a significant role in the wave of failures that came to be known as the Thrift Crisis.[192] To protect the unwitting public and restore confidence in the banking industry, Congress passed FIRREA, which "dramatically strengthened . . . [the government's] enforcement tools" necessary to regulate the banking industry.[193] President George H.W. Bush stated that "[b]eginning today . . . criminal penalties will be toughened from yesterday's slap on the wrist to the clang of a prison door . . . [t]hose who try to loot the savings of their fellow citizens deserve, and will receive, swift punishment."[194]

FIRREA was significant in that: (1) it set a clear and standardized scienter requirement for criminal liability; (2) it acknowledged the business reality that certain individuals are better situated to gauge the illegality of a course of action; and (3) most importantly, by instituting a graded scale for the scienter required for prosecution, it expressly differentiated between persons who had substantial versus casual participation in the illegal conduct.[195] In essence, FIRREA protected banking institutions and the general public, while shielding innocent employees from the threat of criminal liability.[196]

Applying the textual logic of FIRREA to subsection 1512(c) would allow greater criminal culpability for true obstruction of justice, while recognizing that statutes should consider the context in which they will be enforced.[197] First, importing FIRREA's scienter

190. *See* JONATHAN R. MACEY ET AL., BANKING LAW AND REGULATION 20-22, 661-63 (3d ed. 2001); *supra* notes 7-9 and accompanying text.

191. *Id.* at 20-22, 661-63.

192. *Id.*

193. *Id.* at 661-63

194. *Id.* at 662 (quoting 1989 PUB. PAPERS 1072).

195. *Id.*

196. 12 U.S.C. § 1813(u)(4) (2000). Pursuant to the graded scale of culpability, bank directors and officers are held to a more stringent standard, while independent contractors, defined as attorneys, accountants, and appraisers, must have acted knowingly or recklessly to be held criminally liable.

197. *See supra* Part I. The recent corporate scandals generally mirror those in the banking industry around the time FIRREA was passed, suggesting that an importation of the statutory scheme might be in order. Wholesale importation of this provision, however, may prove to be problematic because one of its provisions dealing with obstruction of an examination of a

requirement into subsection 1512(c) would clarify and standardize its culpable mental state, thereby providing greater guidance for enforcement efforts.[198] This clarification would also better enable business professionals to conform their behavior to the standards of the law. Second, the proposed revision would accurately reflect business practices by assigning liability only to those individuals having a high level of knowledge about and direct responsibility for internal governance policies, including document destruction. Adopting a liability structure similar to that of FIRREA would allow for graded culpability, with inner-circle participants held to a higher standard than individuals playing only a tangential role in the obstructive conduct. Third, a FIRREA-based revision would reduce the potential for subsection1512(c) to be used as a catchall by defining the relationships and circumstances under which the law applies.

B. Default Solution: Adoption of a Model Penal Code-Based Mental State Requirement

If nothing else, Congress ought to amend subsection 1512(c) to express a clearly defined state of mind requirement. Such revision would provide guidance for courts and enforcement agencies in the effective discharge of their official duties. An ancillary benefit will accrue to defendants in that they will be put on better notice of what is statutorily required of them as they develop plans for internal monitoring, make decisions on document retention or destruction, or make daily choices as to how to manage their professional affairs.

The insertion of a specific intent standard could track the graded intent provisions of the MPC, an academic effort that has gained increased acceptance in a number of states in terms of both adoption and influence on reform.[199] An application of MPC-based principles would serve to clarify the mental state requirement because it both defines its mental state terms and simplifies differentiation between terms used for its mental states.[200] The primary lesson to be taken away from the MPC is that it may be relatively easy to clearly define a mental state.

In examining the sister statutes present in Chapter 73, there are a number of provisions that, if emulated, would also allow for a

---

financial institution by its regulatory agency, also uses the ambiguous term "corruptly." *See* 18 U.S.C. § 1517.

198. This Note makes no attempt to gauge or comment upon the efficacy of FIRREA in practice. Instead, it embraces the nuanced structure of its mental state requirement.

199. *See* MODEL PENAL CODE § 2.02 (Draft 1985); KAPLAN ET AL., *supra* note 105, at 12.

200. *See* MODEL PENAL CODE § 2.02 (Draft 1985).

clearer interpretation of subsection1512(c). First, section 1515 is a definitional section.[201] Where better to succinctly define "corruptly" than in a definitional section that already contains a definition for the term "corruptly persuades" in relation to a similar code section?[202]

Provisions similar in substance to this suggestion are not unknown in the federal criminal code. Of course, this type of an amendment might alter the standard for criminal culpability, but careful drafting could easily cure such concerns.[203] The relative gravity of the mental state requirement is not so much the issue as there being *any* clearly defined mental state. The use of an MPC-based approach, or one imported from another area of substantive law, should meet the independently justifiable ends of clarity and certainty in the federal criminal code.

C. Intermediate Solution: Judicial Imposition of a Three-Part Super Intent Requirement

Unless or until subsection 1512(c) is amended, judicial interpretation of the term corruptly will be necessary. In order to accurately reflect its place in the statutory scheme, subsection 1512(c) offense should require: (1) knowledge of the predicate possibly illegal act; (2) knowledge of a proceeding or investigation in connection with that act; and (3) the specific intent to commit an additional act with the express or manifestly clear purpose of obstructing justice.[204]

---

201. 18 U.S.C. § 1515.

202. *See* 18 U.S.C. § 1515(b)(6). *But see* United States v. Khatami, 280 F.3d 907, 911 (9th Cir. 2002) (deriding that definition as "circuitous . . . and unhelpful").

203. In examining the base-level scienter requirement in the current form of § 1512(c), it is apparent that the scienter level could be held as high as purpose, if it is interpreted in light of the definition in § 1515(b)(6) or as low as negligence, should a court desire. *See* De Marco, *supra* note 40, at 598-604. Still, even if the interpretation were based on § 1515(b)(6), the phrase "acting with an improper purpose" should hardly be held up as a scion of legislative clarity. § 1515(b)(6).

204. In the event that a judge or prosecutor is faced with a situation that reflects tbe problematic nature of §1512(c), a judicial interpretation may be in order. Whatever the course of conduct, a judge ought not to live up to this tradition, as expressed by Professor Batey: "Old habits are hard to break, and one of the most deeply engrained habits in the American judiciary is a propensity to treat the mental requirement for a particular crime as merely a suggestion, which is subject to change if judges think they have a better idea." Batey, *supra* note 129, at 414; *see also* Ponsoldt & Marsh, *supra* note 136, at 1242-43. As a means of combating this habit in the face of an ambiguous statute, the statute should be strictly construed as a nod to the rule of lenity. The rule of lenity prescribes that statutory ambiguity in a criminal case be resolved in favor of the defendant. *See* BLACK'S LAW DICTIONARY 1332-33 (7th ed. 1999).It has been used in cases involving the term "corruptly" directly in response to the ambiguous nature of the term. In at least one of these contexts there has been disagreement concerning its use. *See* United States v. Farrell, 126 F.3d 484, 489 (3d Cir. 1997). *But see Khatami*, 280 F.3d at 913. This Note argues in favor of the former due to both the ambiguity in the statutory text and the potential for

Setting aside prior judicial interpretation of the meaning of "corruptly" in its sister statutes, a close reading of subsection 1512(c) indicates that, as used therein, the term logically implies this three-part *super-intent* requirement. Under this reading, subsection 1512(c) would encompass all obstructive acts so long as the prosecutor can satisfy this heightened mental state requirement. Essentially, subsection 1512(c) could be deemed to proscribe all acts that tend to obstruct justice; however, its "corruptly" intent provision coupled with its heightened sanction suggests that more than mere reasonable foreseeability should be required for liability.[205] Moreover, this construction does not require deviation from either the application of a nexus requirement or the reasonable foreseeability standard that controls construction of its sister statutes.[206]

Reading a super-intent requirement into subsection 1512(c) would resolve two important problems with the current statutory structure. First, it would eliminate the problem of ends-based culpability premised solely on reasonable foreseeability of justice being obstructed. Requiring super-intent would most likely allow application of the section's harsh penalty to attempts to impede justice when particularly egregious motives or premeditation are clear. At the same time, heightening the scienter requirement in subsection 1512(c) would not prevent its lower penalty sister provisions from policing obstructive actions that are committed with relatively less intent to impede justice, thereby imputing a system of graded intent within the statutory scheme. Graded liability would have little impact on the prosecution of relatively innocent obstructive acts, while accurately reflecting the legislative ire that was aimed primarily at egregious offenses.[207]

---

dangerous application. *See supra* Parts III, IV. Literally, however, the language of the statute intones that the word "corruptly" implies a form of super-intent.

205. Under such an approach, Section 1512(c)(1) would apply specifically to instances where tangible evidence was at issue, with Section 1512(c)(2) applying in all other circumstances due to a broad reading of the word "otherwise." *See* § 1512(c).

206. This would also mark something of a return to the *Pettibone* standard, where both knowledge of a proceeding and the specific intent to obstruct or impede justice were required. While the term "natural and probable consequence" also arose from *Pettibone*, its treatment in that case was primarily an evidentiary standard. *See Pettibone*, 148 U.S. 197, 206-07, 209-10 (1893). Additionally, it would avoid the importation of doctrines such as natural and probable consequences and reasonable foreseeability from Section 1503 cases, avoiding the types of doctrinal difficulties identified by Justice Scalia in United States v. Aguilar, 515 U.S. 593, 611-12 (1995), from that section's use of "endeavor" to the use of "attempt" in Section 1512(c) and would dovetail with the mention of "attempt" in Section 1512(c).

207. *See supra* notes 5-6. Such a definition would also be consonant with Justice Scalia's definition of the term "corruptly"—"an act done with an intent to give some advantage inconsistent with official duty and the rights of others"—so long as avoidance of possible civil or criminal liability is considered an advantage. *See supra* notes 60-61 and accompanying text.

Second, imposing a three-part super-intent requirement would avoid prosecution under multiple statutes since the graded culpability scale would allow prosecution in the alternative but only a single conviction for each relevant act. This would further simplify the task of distinguishing between legitimate business practice and illegal activity. Moreover, subsection 1512(c) could not be judged to criminalize previously innocent behavior; instead, it would simply increase the sanctions available for behavior that previously could have been deemed illegal based on intent.

VI. CONCLUSION

While 18 U.S.C. 1512(c) was part of an appropriate collective response to exigent social ills, close examination of its terms reveals a potential for abuse. Moreover, due to ambiguous language and loose construction of similar provisions of the federal criminal code, it exhibits a particular propensity towards both direct abuse and inefficient and costly indirect effects. Strict construction of its mental state element—a three part super-intent requirement—would cure some of the potential ills of the statute by focusing its ambit on particularly egregious behavior instead of behavior that closely resembles legitimate activity. Such a construction would also comport with its placement within the obstruction of justice statutory scheme by embracing a graded scale of intent and culpability. Alternatively,

amendment of the statute for the purpose of either simple clarity or development of a statutory graded intent scheme is preferable to the current state of affairs.

Daniel A. Shtob[*]

[*] Candidate, Doctor of Jurisprudence, May 2004. The author would like to thank Professors Don Hall, Robert Rasmussen and Randall Thomas for their assistance and insight. All errors are, of course, mine.