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## OBSTRUCTION OF JUSTICE: UNWARRANTED EXPANSION OF 18 U.S.C. § 1512(C)(1)

SARAH O'ROURKE SCHRUP\*

*This Article suggests that prosecutors are misusing and courts are misinterpreting the Sarbanes–Oxley obstruction of justice statute, 18 U.S.C. § 1512(c)(1). As a result, the statute is being applied far beyond the corporate fraud or even general fraud context to conduct that Congress never intended to punish with this statute. Such an expansive interpretation lays bare the ambiguity inherent in the statutory language. A proper statutory construction that explores the statute itself, related provisions, canons of construction, the legislative history, and the investigatory process at the Securities and Exchange Commission shows that Congress could not have intended the limitless sweep of the statute that some courts and prosecutors have fashioned. In fact, an expansive definition of the terms within § 1512(c)(1) carries with it a host of unintended and unwanted results. Specifically, such an interpretation is at odds with congressional intent, creates absurdities and unfair sentencing disparities, renders the statute void for vagueness, and encourages judicial and executive legislating. Courts should recognize and limit efforts to expand § 1512(c)(1)'s reach.*

### I. INTRODUCTION

In response to the 2001 and 2002 accounting scandals involving corporate luminaries such as Enron, WorldCom, Global Crossing, and Adelphia, Congress passed the Sarbanes–Oxley Act of 2002 (Act).<sup>1</sup> Although the Act's preamble is clear that the bill was designed to “protect investors by improving the accuracy and reliability of corporate disclosures

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<sup>1</sup> Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745; see Jonathan D. Glater, *From Investor Fury, a Legal Bandwagon*, N.Y. TIMES, Sept. 15, 2002, at B1.

made pursuant to the securities laws,”<sup>2</sup> prosecutors have since its enactment endeavored to expand its reach far beyond the corporate fraud context. Specifically, prosecutors have used its obstruction of justice provision in 18 U.S.C. § 1512(c)(1) in a host of other types of cases, including garden-variety drug possession,<sup>3</sup> police misconduct,<sup>4</sup> and even when a defendant burned the body of a murder victim to conceal his crime.<sup>5</sup> And courts, perhaps unwittingly, have sanctioned this expansive use of § 1512(c)(1)’s provisions. This expansion is not only unsupportable under a proper construction of the Sarbanes–Oxley Act, but it creates absurdities in application and renders the statute void for vagueness.

This Article posits that courts should reject prosecutorial efforts to expand the reach of Sarbanes–Oxley into drug crimes, which are clearly beyond its plain terms and the legislature’s intent. A proper construction of 18 U.S.C. § 1512(c)(1) and the Sarbanes–Oxley Act generally shows that Congress intended to combat corporate fraud—or at most fraud generally—and not other types of crimes. Part II of the Article conducts an in-depth statutory construction of § 1512(c)(1) by reviewing its language, structure, related provisions, canons of construction, legislative history, and the traditional SEC investigations process. Part III then examines how prosecutors have used, and courts have interpreted, § 1512(c)(1) in the ten years since its enactment. In Part IV, the Article demonstrates how this unwarranted expansion of § 1512(c)(1) leads to absurd and unintended results, and is wrong as a matter of policy. And Part V concludes by arguing that the government should abandon its use of § 1512(c)(1) beyond fraud crimes.

## II. THE PROPER CONSTRUCTION OF § 1512(C)(1)

Section 1512(c)(1) criminalizes an individual’s conduct if that person “corruptly—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.”<sup>6</sup> As discussed in more detail below,<sup>7</sup> this provision suffers from at least two textual ambiguities. First, the scope of the phrase “other object” is uncertain. Second, the specificity and temporal reach of the “official proceeding” impacts the statute’s breadth. Although a statute’s plain, unambiguous

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<sup>2</sup> *Id.* pmbl.

<sup>3</sup> *See infra* Part III.

<sup>4</sup> *See United States v. Matthews*, 505 F.3d 698 (7th Cir. 2007).

<sup>5</sup> *See United States v. Green*, No. 5:06CR-19-R, 2008 WL 4000870, at \*1, \*11 (W.D. Ky. Aug. 26, 2008).

<sup>6</sup> 18 U.S.C. § 1512(c)(1) (2006).

<sup>7</sup> *See infra* Part III.

language definitively settles its meaning,<sup>8</sup> when statutory language is susceptible to two or more meanings, courts look to interpretive aids to discern congressional intent.<sup>9</sup> The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.<sup>10</sup> If an ambiguity persists, an act's structure and context, canons of construction, and legislative history assist courts in resolving it.<sup>11</sup> When read in the context of the Act's preamble and the related sections along with the legislative history and relevant canons of construction, it becomes clear that § 1512(c)(1) was aimed at preventing corporations from destroying records relevant to federal securities investigations and was not intended to be an omnibus dragnet for a wide assortment of other non-fraud crimes.<sup>12</sup>

#### A. THE STATUTE'S STRUCTURE AND CONTEXT

The structure of the surrounding provisions in the obstruction of justice (OOJ) chapter of Title 18 provides insight into the best interpretation of § 1512(c)(1), an add-on provision that was enacted, at least in part, to fill gaps in the existing obstruction statutes.<sup>13</sup> This Section evaluates the statute's structure in four parts: (i) the Act's preamble; (ii) the pre-Sarbanes–Oxley provisions; (iii) the post-Sarbanes–Oxley provisions; and (iv) one additional OOJ provision in Chapter 109 of Title 18.

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<sup>8</sup> See *United States v. Turkette*, 452 U.S. 576, 580 (1981); *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

<sup>9</sup> See *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685–86 (1985) (finding that the sale of all outstanding stock in a lumber company constituted a sale of securities under the plain language meaning of the Securities Act of 1933).

<sup>10</sup> *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992); *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991). For this reason, arguments that the statute is unambiguous because the terms “object” and “proceeding” used in § 1512(c)(1) are easily defined cannot overcome the apparent ambiguity that arises from its virtually limitless reach and its resulting incompatibility with surrounding provisions.

<sup>11</sup> See *Negusie v. Holder*, 555 U.S. 511, 519–20 (2009) (noting the importance of statutory structure); *Landreth Timber*, 471 U.S. at 685 (finding it is “axiomatic that [t]he starting point in every case involving construction of a statute is the language itself”) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)); *Blanchard v. Bergeron*, 489 U.S. 87, 91 (1989) (noting that the legislative history is instructive in determining the reasonableness of statutory attorney's fees); *Price v. Forrest*, 173 U.S. 410, 427 (1899) (relying in part on the preamble for statutory construction of an ambiguous statute).

<sup>12</sup> And, as discussed below, *see infra* Part II.B.3, statutory ambiguity still inures to a criminal defendant's benefit under the rule of lenity.

<sup>13</sup> S. REP. NO. 107-146, at 6 (2002).

### 1. *The Act's Preamble*

The first clue Congress provided that § 1512(c)(1) was narrowly tailored towards corporate fraud is located in the Act's preamble. In fact, Congress could not have been clearer about the behavior it intended to capture under the Sarbanes–Oxley criminal provisions. The Act's preamble explicitly states that the bill was designed to “protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to securities laws.”<sup>14</sup> Although some courts may give short shrift to an Act's preamble, it nonetheless represents the very first words out of Congress's mouth about the purpose and scope of the Act. In this case, the preamble explicitly refers to the limited types of behavior captured by the criminal provisions in Sarbanes–Oxley.<sup>15</sup>

### 2. *Provisions Surrounding § 1512(c)*

Examining the companion provisions in the OoJ chapter<sup>16</sup> establishes at least three broad precepts that guide statutory interpretation and shed light on legislative intent with respect to § 1512(c)(1). First, all of the provisions are limited in either temporal scope or substantive subject matter. This limitation indicates that Congress intended to proscribe a limited set of conduct in narrowly defined parameters. For example, §§ 1516–1518 criminalize obstructions of only a few certain types of investigations: federal audits, bank examinations, and health care offenses.<sup>17</sup> Similarly, § 1519 limits itself to the destruction, alteration, or falsification of *records* during federal investigations.<sup>18</sup>

Significantly, even for those provisions whose titles are worded more broadly, the actual statutory language contains specific limits on the conduct to which it applies. In § 1510, for example, which is titled broadly “Obstruction of criminal investigations,” the conduct actually criminalized is limited to: (1) those who use bribes to obstruct or delay the delivery of information to an investigator; (2) bank officers who alert customers to audits; or (3) insurance agents who alert customers to investigations.<sup>19</sup> Similarly, § 1511 is called “Obstruction of State or local law enforcement,” but its application is limited to those who facilitate illegal gambling

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<sup>14</sup> Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, pmbl., 116 Stat. 745, 745.

<sup>15</sup> *Id.*

<sup>16</sup> 18 U.S.C. §§ 1501–1521 (2006 & Supp. IV 2010).

<sup>17</sup> §§ 1516–1518. Section 1516 discusses “Obstruction of Federal audit”; § 1517, “Obstructing examination of financial institution”; and § 1518, “Obstruction of criminal investigations of health care offenses.”

<sup>18</sup> § 1519 (discussing “[d]estruction, alteration, or falsification of records in Federal investigations and bankruptcy”).

<sup>19</sup> § 1510.

businesses.<sup>20</sup>

Thus, there simply is not a limitless omnibus obstruction provision within this chapter, even though Congress could have easily created one that captured all aspects of all federal investigations and judicial and administrative proceedings.<sup>21</sup> Even § 1519, a broadly worded provision specifically enacted as a catchall to include investigations and not just official proceedings,<sup>22</sup> limits itself to “records,” a distinct limit on its use to prosecute, for instance, drug or gun crimes.<sup>23</sup>

The second general precept that can be gleaned from a study of the OOB provisions as a whole is that § 1512, “Tampering with a witness, victim, or an informant,” which contains a number of discrete subsections, was designed to punish those who tamper with witnesses through threats, violence, or bribery in order to prevent testimony or production of documents.<sup>24</sup> Thus, Congress was concerned in this section with protecting witnesses and victims as well as the integrity of the judicial proceedings that rely on this documentary evidence often as the sole proof of wrongdoing.<sup>25</sup>

The placement of the Sarbanes–Oxley language in § 1512(c)(1) means that it should be read as criminalizing similar, serious conduct that impacts witnesses and victims and threatens the integrity of the proceedings. Under such a reading, destroying drugs during a bust or ditching a firearm during a police chase falls well outside of its ambit. It is true that “[w]hen § 1512

<sup>20</sup> § 1511.

<sup>21</sup> See U.S. CONST. art. I, § 8, cl. 18 (the Necessary and Proper clause); *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) (noting that the Necessary and Proper clause “grants Congress broad authority to enact federal legislation”).

<sup>22</sup> See *infra* note 127.

<sup>23</sup> § 1519 (criminalizing “[d]estruction, alteration, or falsification of records in Federal investigations and bankruptcy” and allowing prosecution of persons who have “the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under Title 11” (emphasis added)).

<sup>24</sup> § 1512; see, e.g., § 1512(a)(1) (proscribing the killing of “another person, with intent to—prevent the attendance of testimony of any person in an official proceeding”); § 1512(b)(1) (prohibiting knowing intimidation, threats, and corrupt persuasion of another person “with intent to—influence, delay, or prevent the testimony of any person in an official proceeding”).

<sup>25</sup> See, e.g., 148 CONG. REC. 12,915, 12,950 (2002) (“[The Act] provides tough new criminal penalties to restore accountability and transparency in our markets. It accomplishes this in three ways: punishing criminals who commit fraud, preserving evidence to prove fraud, and protecting victims of fraud.”) (statement of Sen. Patrick Leahy). As discussed below, the legislative history of § 1512(c)(1) confirms this view as the legislators consistently emphasized the importance of protecting victims of corporate fraud and whistleblowers by requiring preservation of evidence that is the best, and sometimes only, proof of wrongdoing. See *infra* Part II.C.

was first enacted in 1982, it was not limited to the white-collar crime context,<sup>26</sup> even though those earlier provisions also used the phrase “record, document, or other object.”<sup>27</sup> As a threshold matter, that courts have interpreted similar language in the witness tampering provision broadly does not necessarily mean that Congress intended its later-enacted Sarbanes–Oxley provision to be similarly sweeping.<sup>28</sup> Moreover, the differences between subsections (a)(2) and (c)(1), as well as Congress’s clearly stated motives in enacting Sarbanes–Oxley,<sup>29</sup> intimates that Congress may not have intended them to be interpreted in lockstep.<sup>30</sup>

Third, the sentencing structure contained within the OOI chapter likewise provides clues to Congress’s intent with respect to § 1512(c)(1). Most of the sections provide for a maximum five-year sentence, which seems commensurate with the criminalized conduct—falsifying documents, failing to comply with investigative demands, bribing or tipping during investigations, and interfering with audits.<sup>31</sup> Only a small handful of sections provide for substantially higher sentences in the twenty- to thirty-year range, and these are provisions implicating death, violence, or the integrity of the entire proceeding.<sup>32</sup> The severity of these sentences

<sup>26</sup> *United States v. Johnson*, 655 F.3d 594, 603 (7th Cir. 2011).

<sup>27</sup> Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 4(a), 96 Stat. 1248, 1249 (codified as amended at 18 U.S.C. § 1512(a)(2)).

<sup>28</sup> 1A NORMAN J. SINGER & J.D. SHAMBIE SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 46:5 (7th ed. June 2011) (“Two statutory provisions containing similar or identical language are not necessarily subject to the same interpretation, as there are other interpretive factors such as the purpose and context of the legislation, and legislative history.”).

<sup>29</sup> *Id.*; see also *infra* Part II.C.

<sup>30</sup> Subsection (a)(2) requires serious conduct involving the safety and sanctity of another, whereas the conduct in (c)(1) is focused solely on the defendant herself. In addition, the fact that (a)(2) focuses on witness tampering confirms the temporal limits of the provision’s reach to only actual, extant judicial proceedings. Given that some courts have now interpreted the “official proceeding” language in (c)(1) as encompassing even fledgling investigations, see, e.g., *Johnson*, 655 F.3d at 607, it would be anomalous to superimpose a definition of a phrase from another statute that is much more limited in scope.

<sup>31</sup> The following offenses require the offender to pay a fine or be imprisoned not more than five years, or both: § 1505 (obstruction of proceedings before departments, agencies, and committees), § 1506 (theft or alteration of record or process; false bail), § 1510 (obstruction of criminal investigations), § 1516 (obstruction of federal audits), § 1517 (obstructing examination of financial institution), and § 1518 (obstruction of criminal investigations of health care offenses). Section 1505 has an additional provision allowing a sentence of up to eight years “if the offense involves international or domestic terrorism.”

<sup>32</sup> Attempted murder or the use of physical force when violating § 1512 carries a thirty-year sentence, while the threat of physical force carries a twenty-year sentence. § 1512 (tampering with a witness, victim, or an informant). Sections 1513 (retaliating against a witness, victim, or an informant) and 1519 (destruction, alteration, or falsification of records in Federal investigations and bankruptcy) also carry twenty- to thirty-year sentences.

necessarily implies a more limited intended application.<sup>33</sup>

That Congress chose to create criminal obstruction provisions in §§ 1512(c)(1), 1519, and 1520 as a part of Sarbanes–Oxley and then decided to place them alongside the most serious crimes within the OoJ chapter with similarly serious sentences shows that Congress was concerned with more than mere insular evidence destruction or small-scale roadblocks to garden-variety criminal investigations. Rather, Congress seemingly analogized the impact of widespread document destruction in a corporate fraud case as equivalent to threatening or harming a witness or preventing the wholesale administration of justice. Put simply, the broad public impact of these crimes raised the stakes and required more serious punishment than other obstructive acts contained within the same chapter.

### 3. Provisions Added by Sarbanes–Oxley

Not only do the preexisting obstruction of justice provisions shed light on congressional intent, but a comparison of the provisions added to the OoJ chapter by the Sarbanes–Oxley Act reinforces the limited applicability of § 1512(c)(1) to either corporate fraud cases, fraud cases generally, or cases in which a *specific* judicial proceeding was underway or imminent.<sup>34</sup> Sarbanes–Oxley added four provisions to the OoJ chapter: § 1512(c)(1), § 1513(e), § 1519, and § 1520.<sup>35</sup> The Department of Justice summarizes the new criminal provisions as follows:

[Section 1519] expands existing law . . . [and] explicitly reaches activities by an individual “in relation to or contemplation of” any matters. No corrupt persuasion is required. New Section 1519 should be read in conjunction with [1512(c)(1)] . . . which similarly bars corrupt acts to destroy, alter, mutilate or conceal evidence, in contemplation of an “official proceeding.” Accountants who fail to retain the audit or review work papers of a covered audit for a period of 5 years will violate Section 1520 . . . . New subsection (e) of 18 U.S.C. § 1513 creates a felony offense for any

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<sup>33</sup> See, e.g., 18 U.S.C. § 2119(2) (2006) (increasing maximum penalty from fifteen to twenty-five years if serious bodily injury occurs during a carjacking); § 3553(a)(2)(A) (advising district courts to consider the seriousness of the offense in imposing the sentence); 21 U.S.C. § 841(b)(1)(A) (2006) (providing for a higher sentence if “death or serious bodily injury results from the use of” a prohibited substance). See also *United States v. Stewart*, 590 F.3d 93, 172 (2d Cir. 2009) (“Congress expressly mandated that the Sentencing Commission provide for a terrorism enhancement to ensure that crimes of terrorism were met with a punishment that reflects their extraordinary seriousness.”).

<sup>34</sup> See Attachment to Memorandum from U.S. Attorney General John Ashcroft, Field Guidance on New Criminal Authorities Enacted in the Sarbanes–Oxley Act of 2002 (H.R. 3763) Concerning Corporate Fraud and Accountability (Aug. 1, 2002) [hereinafter Attachment to Memorandum from U.S. Attorney General John Ashcroft], available at <http://www.justice.gov/ag/readingroom/sarox1.htm>.

<sup>35</sup> Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, §§ 1102, 1107, 802, 116 Stat. 745, 807, 810, 800–01 (2002) (codified at 18 U.S.C. §§ 1512(c)(1), 1513(e), 1519–1520 (2006)).

person knowingly to take any action, with intent to retaliate, harmful to a person who provides such information concerning a federal offense.<sup>36</sup>

First, as a threshold matter, the obstruction of justice provisions codified at §§ 1519 and 1520 were inserted into Title VIII of the Act, which carried the short title “Corporate and Criminal Fraud Accountability.”<sup>37</sup> Meanwhile, the obstruction of justice provision codified at § 1512(c) was inserted into Title XI of the Act, which carried the short title “Corporate Fraud Accountability.”<sup>38</sup> So although §§ 1519 and 1520 cast a wider net beyond corporate fraud into the more general criminal fraud, § 1512(c)(1) was limited to corporate fraud.

There is an additional, significant titular difference between §§ 1512 and 1519. Section 1519 is entitled “Destruction, alteration, or falsification of records in Federal investigations and bankruptcy.” The use of the term “record” in the title is significant and signals Congress’s intent to limit the provision’s reach to fraud crimes and perhaps even to the corporate fraud context.<sup>39</sup> Significantly, a title may limit the scope of an act, but it cannot broaden it.<sup>40</sup> Indeed, courts and commentators have recognized that when the text of a statute is broader than its title, some or all of that provision will be invalid.<sup>41</sup> Thus, even though the short titles of these provisions are not dispositive and cannot be considered in the absence of a textual ambiguity, the titles nonetheless provide further evidence that Congress intended § 1512(c)(1) to be narrowly construed.

Section 1519 carries one other critical difference from § 1512(c)(1) because it encompasses “*investigation* or proper administration of any matter within the jurisdiction of any department or agency of the United States,”<sup>42</sup> whereas § 1512(c)(1) is limited to “official proceeding[s].”<sup>43</sup> As relevant here, § 1515 defines official proceeding as one before a judge or court of the United States, Congress, “a Federal Government agency which

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<sup>36</sup> Attachment to Memorandum from U.S. Attorney General Ashcroft, *supra* note 34.

<sup>37</sup> Sarbanes–Oxley Act, 116 Stat. at 800.

<sup>38</sup> *Id.* at 807.

<sup>39</sup> 1A SINGER & SINGER, *supra* note 28, at § 18.7 (noting that although a title cannot be used to determine whether a statute is ambiguous, the title can be used to provide critical clues to the statute’s meaning if the provision is ambiguous); *see also* United States v. Trans-Missouri Freight Ass’n 166 U.S. 290, 352–53 (1897) (“While it is true that the title of an act cannot be used to destroy the plain import of the language found in its body, yet, when a literal interpretation will work out wrong or injury, or where the words of the statute are ambiguous, the title may be resorted to as an instrument of construction.”).

<sup>40</sup> 1A SINGER & SINGER, *supra* note 28, at § 18.7.

<sup>41</sup> *Id.*

<sup>42</sup> 18 U.S.C. § 1519 (2006) (emphasis added).

<sup>43</sup> § 1512(c)(1).

is authorized by law,” or a state insurance regulatory agency.<sup>44</sup> And although § 1512(f) states that “an official proceeding need not be pending or about to be instituted at the time of the offense,”<sup>45</sup> the Supreme Court and other courts have read an explicit foreseeability or nexus requirement into the implicit mens rea for § 1512 cases.<sup>46</sup> In any event, Congress would not have bothered to make clear that the actual proceeding need not be pending or about to be instituted if it intended for the term “official proceeding” to encompass any stage of investigation, whether known or unknown. Thus, an official proceeding under § 1512(c)(1) should be something more than a mere investigation and requires particularity and actual foreseeability of a specific proceeding. Given the difference between §§ 1512(c)(1) and 1519, it is correct to presume that the language and structure Congress chose was deliberate.<sup>47</sup>

#### 4. *Other Obstruction of Justice Statutes*

The final indication that § 1512(c)(1) does not extend to drug cases is 18 U.S.C. § 2232, “Destruction or removal of property to prevent seizure.”<sup>48</sup> Section 2232 imposes criminal penalties on anyone who “knowingly destroys, damages, wastes, disposes of, transfers, or otherwise takes any action . . . for the purpose of preventing or impairing the Government’s lawful authority to take such property into its custody.”<sup>49</sup> The maximum penalty for violating this statute is five years’ imprisonment.<sup>50</sup>

Section 2232 differs from § 1512(c)(1) and the other provisions in the OJ chapter in both the subject matter covered and the timing of when criminal liability attaches. As an initial distinction, § 2232 covers all property that could be subject to a proper seizure order or search warrant. This property might include (but is certainly not limited to) records, documents, contraband, firearms, or any other physical item that police officers could lawfully seize. Just as important, § 2232 is not constrained by the terms “investigation” or “official proceeding.” Rather, § 2232

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<sup>44</sup> § 1515.

<sup>45</sup> § 1512(f)(1).

<sup>46</sup> See *Arthur Andersen LLP v. United States*, 544 U.S. 696, 707–08 (2005) (noting the nexus requirement in § 1512(b)); *United States v. Matthews*, 505 F.3d 698, 708 (7th Cir. 2007) (extending *Andersen*’s nexus requirement to § 1512(c)).

<sup>47</sup> See *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2002) (observing that when Congress employs specific language in one statutory section but does not include it in another provision, it is presumed that “Congress acts intentionally and purposely in the disparate inclusion or exclusion” (citation omitted)).

<sup>48</sup> 18 U.S.C. § 2232.

<sup>49</sup> § 2232(a).

<sup>50</sup> *Id.*

liability attaches when an individual prevents *any* lawful seizure of property, regardless of whether the offender has knowledge that he is under investigation or subject to a future official proceeding.

Courts must consider the existence of § 2232 before extending § 1512(c)(1) beyond the corporate or criminal fraud context. Just like the pre-Sarbanes–Oxley OOI statutes and the post-Sarbanes–Oxley OOI provisions, § 2232 shines a light on the types of conduct Congress intended for § 1512(c)(1) to cover. Because § 2232 covers such a wide variety of conduct, courts must give deference to the structure of OOI statutes Congress created. Stated differently, courts must hesitate before stretching § 1512(c)(1) beyond its terms to something like the destruction of contraband during a police raid. To find otherwise would completely ignore a separate, but equally valid criminal provision that covers the exact conduct at issue.<sup>51</sup>

Ultimately, the structure of § 1512(c)(1) and the structure of the surrounding statutes both before and after Sarbanes–Oxley was enacted suggest that Congress intended for § 1512(c)(1) to be narrowly tailored to corporate fraud. Any expansion to drug possession and destruction of evidence seems beyond the express and implied scope of the Act.

##### 5. *Interplay with the United States Sentencing Guidelines*

Courts routinely refer to other statutes with similar language in order to gain clues into Congress's intent with respect to the statute before them.<sup>52</sup> The canons of harmony and consistency discussed below<sup>53</sup> fundamentally stand for the proposition that “[w]ritten law is the product of a more

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<sup>51</sup> In the case of overlapping statutes, some commentators may rightfully suggest that a prosecutor as a matter of her discretion should have the liberty to choose the statute with the greatest potential criminal penalty. Regardless of the merits of this assertion, §§ 1512(c)(1) and 2232 cover fundamentally different offenses. A defendant who destroys contraband as the police are executing a search warrant certainly falls within the ambit of § 2232, but this action does not satisfy the object element or official proceeding element of § 1512(c)(1).

<sup>52</sup> *Overstreet v. N. Shore Corp.*, 318 U.S. 125, 128–29 (1943) (comparing different statutory provisions using the phrase “engaged in commerce”); *United States v. Johnson*, 14 F.3d 766, 770 (2d Cir. 1994) (finding that Congress’s use of “substantially identical language” to that of an earlier statute “bespeaks an intention to import” judicial interpretations of that language into the new statute); 2B SINGER & SINGER, *supra* note 28, at § 53:3 (“On the basis of analogy the interpretation of a doubtful statute may be influenced by language of other statutes which are not specifically related, but which apply to similar persons, things, or relationships. By referring to other similar legislation, a court is able to learn the purpose and course of legislation in general, and by transposing the clear intent expressed in one or several statutes to a similar statute of doubtful meaning, a court not only is able to give effect to the probable intent of the legislature, but also to establish a more uniform and harmonious system of law.” (footnotes omitted)).

<sup>53</sup> See Part II.B *infra*.

specific structure involving deliberate choice . . . [to] produce a general state of harmony within the system of enacted law.”<sup>54</sup> And Congress is presumed to be aware of existing law and legislate with that in mind.<sup>55</sup>

This realm of legislation includes not only statutes enacted by Congress, but also the Sentencing Guidelines that are promulgated by the United States Sentencing Commission.<sup>56</sup> The obstruction of justice sentencing guideline, § 2J1.2, sheds light on the meaning of § 1512(c)(1) for three reasons. First, it appears that Congress relied on and incorporated principles of § 2J1.2 in the Sarbanes–Oxley OJ provisions. Section 1519 uses identical language contained in § 2J1.2(b)(3) when describing the scope of objects included within its reach—records, documents, and tangible objects.<sup>57</sup> In addition, the application notes to § 2J1.2 define that phrase as including “records, documents, or tangible objects that are stored on, or that are, magnetic, optical, digital, other electronic, or other storage mediums or devices; and [] wire or electronic communications.”<sup>58</sup> It follows that if § 1519 was intended to be the broadest of the Sarbanes–Oxley OJ provisions<sup>59</sup> and it uses facially broad terms that have been narrowly defined, then the remaining provisions, including § 1512(c)(1), must be even more limited in scope.

Second, the phrase “substantial interference with the administration of justice” within § 2J1.2(b)(2) is defined in the application notes as including “a premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of

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<sup>54</sup> 2B SINGER & SINGER, *supra* note 28, at § 53:1 (“Legislation never is written on a clean slate, nor is it ever read in isolation or applied in a vacuum. Every new act takes its place as a component of an extensive and elaborate system of written laws.”).

<sup>55</sup> *See, e.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (finding uniform judicial and administrative construction of a statutory definition and intent to incorporate that construction by repeating same language); *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 211 (1988) (presuming Congress, when enacting a new bankruptcy law, has knowledge of judicial interpretations given to the old bankruptcy law).

<sup>56</sup> *United States v. Munoz-Cerna*, 47 F.3d 207, 210 (7th Cir. 1995) (“[A]lthough Congress has chosen to address sentencing policy issues through both statutes and sentencing guidelines, we ought not presume lightly that it intended that these two vehicles of its legislative will be at odds with each other.”); *see also* *United States v. O’Flanagan*, 339 F.3d 1229, 1235 (10th Cir. 2003) (“We believe this maxim applies with equal force to promulgations from the Sentencing Commission.”); *United States v. Holbert*, 285 F.3d 1257, 1260 (10th Cir. 2002) (“We interpret the Sentencing Guidelines as though they were a statute or court rule, with ordinary rules of statutory construction.”).

<sup>57</sup> 18 U.S.C. § 1519 (2006); U.S. SENTENCING GUIDELINES MANUAL § 2J1.2 (2010) [hereinafter USSG MANUAL].

<sup>58</sup> USSG MANUAL, *supra* note 57, § 2J1.2 cmt. n.1.

<sup>59</sup> *See infra* Part II.C.

substantial governmental or court resources.”<sup>60</sup> Thus, the application notes indicate that the OOJ guideline is to be used only when an investigation is prematurely or improperly terminated, not merely stymied.<sup>61</sup> Again, § 1519 contains similar language by targeting those who have “the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States.”<sup>62</sup> And again, if § 1519 is the broadest of the Sarbanes–Oxley OOJ provisions, then the guideline’s definition limiting the scope of liability for interfering with investigations only to acts that prematurely or improperly terminate investigations means that the more limited term “official proceeding” in § 1512(c)(1) must be construed as encompassing even less.

Finally, the cross-reference contained within § 2J1.2(c) is one for *accessories after the fact*, not *participants during the fact*.<sup>63</sup> Although this distinction may seem facile at first blush, the import lies in recognizing how these types of obstruction crimes have traditionally been viewed. Any expansion of the Sarbanes–Oxley OOJ provisions, and specifically § 1512(c)(1), to contemporaneous conduct by the perpetrator falls well outside any prior understanding of that term.

## B. CANONS OF CONSTRUCTION CONFIRM THAT § 1512(C)(1) SHOULD BE CONSTRUED NARROWLY

### I. Ejusdem Generis

The canons of construction also confirm the limited scope of § 1512(c)(1). Specifically, *ejusdem generis* and the canon of harmonious interpretation counsel in favor of narrowly defining “object” and “official proceeding.” *Ejusdem generis* provides that “[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.”<sup>64</sup> The Supreme Court has

traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress, and out of concern that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.<sup>65</sup>

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<sup>60</sup> USSG MANUAL, *supra* note 57, § 2J1.2 cmt. n.1.

<sup>61</sup> *Id.*

<sup>62</sup> 18 U.S.C. § 1519.

<sup>63</sup> USSG MANUAL, *supra* note 57, at §§ 2J1.2(c), 2X3.1.

<sup>64</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001) (quoting 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47:17 (5th ed. 1991)).

<sup>65</sup> *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005) (internal citations

In § 1512(c)(1), Congress enumerated “record” and “document” and followed those terms with the general residual phrase “other objects.” Based on *ejusdem generis*, “other objects” must be limited by the definitions of the terms “record” and “document.” As discussed below in Part II.C, even a passing evaluation of the committee reports and congressional debate associated with the Sarbanes–Oxley Act of 2002 demonstrates that the bill was largely informed by the wholesale document destruction at Arthur Andersen and Enron.<sup>66</sup> Given that history, Congress intended to give “document” and “record” meanings that would only ensnare corporate fraudsters. *Black’s Law Dictionary* defines a “document” as “[s]omething tangible on which words, symbols, or marks are recorded.”<sup>67</sup> The same dictionary defines a “record” as a “documentary account of past events, [usually] designed to memorialize those events.”<sup>68</sup>

Given these two definitions and the dictates of *ejusdem generis*, the phrase “other objects” must be “similar in nature” to the terms “document” and “record.”<sup>69</sup> Therefore, the meaning of “other objects” must include some documentation of a past event or some tangible thing designed to memorialize some other event. Additionally, an “other object” should also have characteristics that permit a person to write or mark on it. Examples of “other objects” that clearly meet these two definitions include corporate files, papers, diskettes, hard drives, or any other objects used to document or memorialize actions.

Courts have interpreted § 1512(c)(1)’s “other objects” as extending well beyond the corporate fraud context, but have almost uniformly done so without following the principles of statutory interpretation.<sup>70</sup> For example, in *United States v. Matthews*, the Seventh Circuit applied § 1512(c)(1) to the destruction of a gun.<sup>71</sup> In *Matthews*, the defendant was the East St. Louis chief of police, who was convicted of attempted obstruction of justice and lying to a grand jury for his role in unlawfully concealing the firearm of a friend who was subject to a separate criminal investigation.<sup>72</sup> The investigation of the crime and subsequent cover-up included officers from the East St. Louis Police Department, U.S. Immigration and Customs

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and quotation marks omitted) (quoting *United States v. Aguilar*, 515 U.S. 593, 600 (1995)).

<sup>66</sup> Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

<sup>67</sup> BLACK’S LAW DICTIONARY 555 (9th ed. 2009).

<sup>68</sup> *Id.* at 1387.

<sup>69</sup> *Circuit City Stores*, 532 U.S. at 114–15.

<sup>70</sup> See *infra* note 144. But see *United States v. Johnson*, 655 F.3d 594, 603–05 (7th Cir. 2011).

<sup>71</sup> 505 F.3d 698, 704 (7th Cir. 2007).

<sup>72</sup> *Id.* at 701.

Enforcement, and the FBI.<sup>73</sup> Throughout the eleven-week investigation, Matthews appeared to have actual knowledge of the investigation into the missing firearm, and he even commented that “the Feds were snooping around.”<sup>74</sup> As noted above, the *Matthews* court never engaged in a statutory construction of § 1512(c)(1) and therefore never considered applying *eiusdem generis* to the enumerated list in the statute. And although the Seventh Circuit purported to construe the language of § 1512(c)(1) in the recent case of *United States v. Johnson*,<sup>75</sup> the court ultimately confused the requirements of § 1512(c)(1) with those of § 1519,<sup>76</sup> thereby further muddling these Sarbanes–Oxley provisions.

## 2. Harmonious Interpretation

Even if a court rejects a strict application of *eiusdem generis* to the enumerated list ending with “other objects” as limited to records, documents, and the corporate fraud context, one cannot ignore the impact of the canons of harmonious interpretation. At a minimum, these canons require that § 1512(c)(1) be limited to fraud crimes as opposed to other types of crimes. As the Supreme Court has recognized,

It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole.<sup>77</sup>

And many courts recognize the “cardinal canon of statutory construction” that statutes “should be interpreted harmoniously with their dominant legislative purpose.”<sup>78</sup> Applying those canons here shows that an unfettered interpretation of § 1512(c)(1) would be inconsistent with the other OOO provisions, which themselves have inherent limits.<sup>79</sup> In particular, an expansive formulation of § 1512(c)(1)’s “object” and “official proceeding” would swallow up § 1519, the statute that Congress intended to be the

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<sup>73</sup> *Id.* at 703.

<sup>74</sup> *Id.*

<sup>75</sup> *Johnson*, 655 F.3d at 603; *see also infra* Part III.C.

<sup>76</sup> *Johnson*, 655 F.3d at 607 (holding that “[the defendant’s] knowledge of a government investigation is sufficient to sustain the jury’s conclusion that she foresaw an official proceeding when she destroyed evidence”).

<sup>77</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal citations omitted) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995); *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989); *F.T.C. v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959)).

<sup>78</sup> *United States v. Yang*, 281 F.3d 534, 543 (6th Cir. 2002) (quoting *United States v. Barry*, 888 F.2d 1092, 1096–97 (6th Cir. 1990)); *see also* *United States v. Havelock*, 619 F.3d 1091, 1100 (9th Cir. 2010); *Dupuy v. Dupuy*, 511 F.2d 641, 643 (5th Cir. 1975).

<sup>79</sup> *See supra* Part II.A.2.

broader catch-all provision.<sup>80</sup>

Some might contend that reliance on the canons of statutory interpretation is misplaced because a plain reading of the text provides that any “other object” can be subject to a § 1512(c)(1) charge.<sup>81</sup> They rightfully point to the axiom that courts only use interpretative aids if the statutory language is unclear.<sup>82</sup> But this position ignores the obvious ambiguity in the residual clause and statute as a whole. First, if “other object” were stretched to its outer limit, then Congress would have had no need to specifically enumerate “record” or “document.” In other words, the broadest reading of “other object” ignores the two objects Congress specifically enumerated, which come before the residual clause.<sup>83</sup>

Moreover, the broadest interpretation of “other object” could produce an absurd judicial result, which itself creates enough ambiguity to permit a court to use statutory interpretation tools to construe the natural meaning of the statute. For example, an individual currently possessing contraband faces a damned if you do, damned if you don’t situation. If that person continues possessing contraband, she is criminally liable for that possession if apprehended. But if that person destroys the contraband, she could be liable for obstruction of justice either under § 1512(c)(1) or § 1519. The incongruity of this absurd result at a minimum suggests that the statute is ambiguous with respect to whether “other object” covers contraband. Because the residual phrase is ambiguous, a court should resort to all of the available tools of statutory construction in its interpretation.

### 3. *Rule of Lenity*

The rule of lenity casts further doubt on an expansive reading of § 1512(c)(1).<sup>84</sup> That rule “insists that ambiguity in criminal legislation be read against the prosecutor, lest the judiciary create, in common-law fashion, offenses that have never received legislative approbation, and about which adequate notice has not been given to those who might be ensnared.”<sup>85</sup> The same reasons that an expansive interpretation of

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<sup>80</sup> See *infra* note 127.

<sup>81</sup> See, e.g., *Johnson*, 655 F.3d at 604.

<sup>82</sup> See, e.g., *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985).

<sup>83</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114 (2001) (holding that the broadest reading of the residual clause would render the specific enumeration superfluous); see also *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (finding the Court must give independent meaning to each word in a statutory scheme).

<sup>84</sup> See *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 285 (1978) (citing the “familiar rule that, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant” (internal quotation marks omitted) (quoting *United States v. Bass*, 404 U.S. 336, 348 (1971))).

<sup>85</sup> *United States v. Thompson*, 484 F.3d 877, 881 (7th Cir. 2007).

§ 1512(c)(1) leads to absurd results and likely fails as void for vagueness<sup>86</sup> likewise show why a narrower reading should prevail. Specifically, a limitless definition of “other object,” and fluid definitions of “official proceeding” and the foreseeability requirement, would capture innocent conduct, conduct that individuals would not expect to rise to the level of a federal felony, or at least conduct that individuals would not know amounted to this specific felony with its weighty maximum penalties.<sup>87</sup> Thus, the rule of lenity likewise counsels in favor of a narrow reading of § 1512(c)(1).

### C. SARBANES–OXLEY LEGISLATIVE HISTORY

The Sarbanes–Oxley Act of 2002 rose from the ashes of Enron’s bankruptcy,<sup>88</sup> which was only the first-revealed instance in a long line of systematic corporate abuse of the markets.<sup>89</sup> In the wake of these events, the Senate Banking Committee held hearings over a six-week period where it polled current and former SEC chiefs, former regulators, academics, and industry and consumer-group leaders on the macroeconomic consequences of these frauds.<sup>90</sup> At the end of these hearings, the following was clear: the markets suffered from “inadequate oversight of accountants, lack of auditor independence, weak corporate governance procedures, stock analysts’ conflict of interests, inadequate disclosure provisions, and grossly inadequate funding of the Securities and Exchange Commission.”<sup>91</sup>

As a result, Representative Oxley introduced a corporate accountability bill that passed the House by a vote of 334 to 90 on April 24,

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<sup>86</sup> See *infra* Parts IV.B and IV.D.

<sup>87</sup> As discussed below, see *infra* Part IV.C, the Olympic athlete and the recreational marijuana smoker are just two examples of individuals who could unwittingly be ensnared by a broad interpretation of the statute.

<sup>88</sup> *Midland Cogeneration Venture Ltd. P’ship v. Enron Corp. (In re Enron Corp.)*, 419 F.3d 115 (2d Cir. 2005).

<sup>89</sup> Nance Lucas, *An Interview with United States Senator Paul S. Sarbanes*, J. 11 LEADERSHIP & ORGANIZATIONAL STUD. 3, 4 (2004) (“By the end of 2001, Enron was bankrupt, and as it turned out, it was the canary in the mineshaft. The abuses in the capital markets did not begin or end with Enron. There were problems in the market—problems that were broad, deep, systemic, and structural. News stories at the time made this clear: ‘Financial Restatements Up Sharply’—New York Times; ‘Securities Suits Hit Record Total’—Wall Street Journal; ‘If You Can’t Believe the Auditors, Who Can You Believe?’—Business Week; ‘System Failure . . . This isn’t just a few bad apples we’re talking about here. This, my friends, is a systemic breakdown.’—Fortune. A number of very major, highly-regarded public companies, along with their auditors, were relying upon convoluted and often fraudulent accounting devices to inflate earnings, hide losses, and drive up stock prices.”).

<sup>90</sup> S. REP. NO. 107-205, at 2–4 (2002).

<sup>91</sup> Lucas, *supra* note 89, at 5.

2002.<sup>92</sup> Senator Sarbanes proposed a similar series of provisions designed to enhance corporate reporting, impose criminal penalties, and aid audits and investigations of fraudulent behavior.<sup>93</sup> Sarbanes's bill passed the Senate with amendments on July 15, 2002, by a vote of 97 to 0.<sup>94</sup> After reconciliation, the final conference bill was passed by overwhelming majorities in both houses: 423 to 3 in the House and 99 to 0 in the Senate.<sup>95</sup>

As relevant to this Article and § 1512(c)(1), the legislative history reveals that the goals of the legislation were many: (1) to combat fraud and, specifically, corporate fraud;<sup>96</sup> (2) to aid in restoring public trust in our financial markets;<sup>97</sup> (3) to better protect fraud victims and corporate whistleblowers;<sup>98</sup> (4) to give prosecutors tools to “prosecute those who commit securities fraud”<sup>99</sup> by closing loopholes in existing fraud, obstruction of justice, and securities laws that had allowed corporate fraudsters to escape liability;<sup>100</sup> (5) to impose serious penalties on those who

<sup>92</sup> 148 CONG. REC. 5548 (2002) (reporting the vote on H.R. 3763).

<sup>93</sup> S. REP. NO. 107-205, at 2 (2002) (“[The Act] address[es] the systemic and structural weaknesses affecting our capital markets which were revealed by repeated failures of audit effectiveness and corporate financial and broker-dealer responsibility in recent months and years.”).

<sup>94</sup> 148 CONG. REC. 12,961 (2002).

<sup>95</sup> *Id.* at 14,505; *id.* at 14,458.

<sup>96</sup> The Senate Judiciary Committee report described the bill’s purpose as “provid[ing] for criminal prosecution and enhanced penalties of persons who defraud investors in publicly traded securities or alter or destroy evidence in *certain* Federal investigations.” S. REP. NO. 107-146, at 2 (2002) (emphasis added).

<sup>97</sup> *Id.* (“This bill would play a crucial role in restoring trust in the financial markets by ensuring that the corporate fraud and greed may be better detected, prevented and prosecuted.”); *see also id.* at 11 (stating that the “majority of Americans depend on capital markets to invest in the future needs of their families—from their children’s college fund to their retirement nest eggs,” and that “Congress must act now to restore confidence in the integrity of the public markets”).

<sup>98</sup> *Id.* at 2 (identifying another specific aim as “protect[ing] victims of such fraud”); *see also id.* at 10 (noting that “corporate whistleblowers are left unprotected under current law” yet they are the only people who can testify as to “who knew what, and when”); *id.* at 5 (finding that this “corporate code of silence not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity” (internal quotation marks omitted)); *id.* at 6 (referencing repeatedly Congress’s aim to aid “the regulators, the victims of fraud, and the corporate whistleblowers [who were] faced with daunting challenges to punish the wrongdoers and protect the victims’ rights”).

<sup>99</sup> *Id.* at 2.

<sup>100</sup> *Id.* at 6 (“[U]nlike bank fraud, health care fraud, and bankruptcy fraud, there is no specific securities fraud provision in the criminal code to outlaw the breadth of schemes and artifices to defraud investors in publicly traded companies. Currently, . . . prosecutors must rely on generic mail and wire charges that carry maximum penalties of up to only five years imprisonment and require prosecutors to carry the sometimes awkward burden of proving the use of the mail or the interstate wires to carry out the fraud. Alternatively, prosecutors may charge a willful violation of certain specific securities laws or regulations, but such

commit such fraud;<sup>101</sup> and (6) to ensure that the widespread document destruction that occurred in the wake of the Enron scandal was not repeated.<sup>102</sup>

Senator Sarbanes's original bill did not contain the criminal provisions that were eventually added before the bill's final adoption.<sup>103</sup> Instead, the original bill was largely directed at the perceived failures of the accounting and auditing industry to ferret out corporate fraud at companies such as Enron and WorldCom.<sup>104</sup> Shortly after Senator Sarbanes introduced his bill, the Senate considered two significant amendments that added criminal provisions to the Act. Senators Leahy and McCain proposed the first amendment.<sup>105</sup> The Leahy–McCain amendment sought to: (1) provide “prosecutors with new and better tools to effectively prosecute and punish those who defraud investors”; (2) establish “tools to improve the ability of investigators and regulators to collect and preserve evidence which proves fraud”; and (3) protect “victims’ rights to recover from those who have cheated them.”<sup>106</sup> To avoid any ambiguity in his amendment’s interpretation, Senator Leahy clarified on the Senate floor that the “Leahy–McCain, et al., amendment makes it very clear that these people are going to face jail terms if they loot the pension funds, if they defraud their investors, if they defraud the people of their own company.”<sup>107</sup>

Senator Durbin added that the Leahy–McCain provisions were enacted in response to Enron and its auditors engaging in wholesale document destruction in the days leading up to an anticipated Securities and Exchange

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regulations often contain technical legal requirements, and proving willful violations of these complex regulations allows defendants to argue that they did not possess the requisite criminal intent.”). Finally, Congress recognized that “current federal obstruction of justice statutes relating to document destruction is [sic] riddled with loopholes and burdensome proof requirements.” *Id.*

<sup>101</sup> *Id.* at 7 (“[Current] federal sentences sufficiently neither punish serious frauds and obstruction of justice nor take into account all aggravating factors that should be considered in order to enhance sentences for the most serious fraud and obstruction of justice cases.”); *see also id.* at 12–14 (outlining new criminal penalties and sentencing enhancements).

<sup>102</sup> *Id.* at 4 (“As investors and regulators attempted to ascertain both the extent and cause of their losses, employees from Andersen were allegedly shredding tons of documents, according to the Andersen Indictment. Instead of preserving records relevant and material to the later investigation of Enron or any private action against Enron, Andersen [engaged in] a wholesale destruction of documents . . . .” (internal quotation marks omitted)).

<sup>103</sup> S. REP. NO. 107-205 (2002).

<sup>104</sup> *Id.*

<sup>105</sup> *See* S. REP. NO. 107-146 (2002) (originally introduced as S. 2010, 107th Cong. (2002)).

<sup>106</sup> *Id.* at 11.

<sup>107</sup> 148 CONG. REC. 12,500–01 (2002) (statement of Sen. Patrick Leahy).

Commission inquiry.<sup>108</sup> His statements, about “effectively prosecut[ing] and punish[ing] those who defraud investors” and creating tools to better detect fraud, make clear that the amendment was designed specifically to criminalize the obstruction of an investigation into corporate wrongdoing.<sup>109</sup> The full Senate passed the Leahy–McCain amendment and the provisions were later codified in 18 U.S.C. §§ 1519 and 1520.

Senator Lott introduced a second amendment that added another group of criminal provisions.<sup>110</sup> Among other effects, Senator Lott’s amendment created a new obstruction of justice offense that was intended to “enact stronger laws against document shredding.”<sup>111</sup> Senator Hatch praised Senator Lott’s proposal as one that “will be a comprehensive legislative proposal that calls for harsh, swift punishment of corporate executives who exploited the trust of their shareholders and employees while enriching themselves.”<sup>112</sup> The Lott amendment was eventually adopted by the full Congress and is codified at 18 U.S.C. § 1512(c).<sup>113</sup> Similar to the Leahy–McCain amendment, the comments of sponsors and supporters discussing swift punishment to corporate fraudsters prove that the bill was aimed exclusively at punishing corporate wrongdoing.<sup>114</sup>

The final bill also contained a substantial number of provisions from Senator Sarbanes’s original bill, including the creation of the Public Company Accounting Oversight Board (PCAOB) to promulgate new rules for auditors.<sup>115</sup> The bill charged the PCAOB with conducting periodic inspections of audit work and drafting regulations for the public accounting industry.<sup>116</sup> The bill also created new and stricter auditor independence standards that forbade auditors from providing certain consulting services to audit clients.<sup>117</sup> Finally, the bill created new rules for corporations including new corporate governance standards and enhanced financial disclosure requirements.<sup>118</sup>

The final version of the bill, known as the Sarbanes–Oxley Act, was signed into law in 2002.<sup>119</sup> It consists of eleven titles, the most relevant of

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<sup>108</sup> *Id.* at 12,504 (statement of Sen. Dick Durbin).

<sup>109</sup> S. REP. NO. 107-146, at 11 (2002).

<sup>110</sup> *See* 148 CONG. REC. 12,509 (2002) (statement of Sen. Trent Lott).

<sup>111</sup> *Id.* at 12,512.

<sup>112</sup> *Id.* at 12,513.

<sup>113</sup> *See* Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, § 1102, 116 Stat. 745, 807.

<sup>114</sup> *See, e.g.*, 148 CONG. REC. 12,513 (2002) (statement of Sen. Orrin Hatch).

<sup>115</sup> Sarbanes–Oxley Act of 2002, § 101.

<sup>116</sup> *Id.*

<sup>117</sup> § 201(a), 116 Stat. at 771–72.

<sup>118</sup> §§ 301–409, 116 Stat. at 775–91.

<sup>119</sup> 38 Weekly Comp. Pres. Doc. 1286 (July 30, 2002) (reporting the President’s

which are Title VIII, Corporate and Criminal Fraud Accountability; Title IX, White-Collar Crime Penalty Enhancements; and Title XI, Corporate Fraud and Accountability.<sup>120</sup> As discussed above in Part II.A, four of those provisions impacted the obstruction of justice chapter of the U.S. Code.<sup>121</sup>

The legislative history sheds light not only on the Act's general purpose to combat corporate fraud, but also on the meaning of the terms "object" and "official proceeding," which form the basis for prosecutorial expansion of the statute beyond the corporate fraud context. Although the dictionary definitions of these terms are broad, Congress intended them to have very specific and narrowly tailored meanings. With respect to "object," Congress wanted to ensure that the full range of records would be encompassed by the legislation. The Senate Judiciary Report noted that "[t]he systematic destruction of records apparently extended beyond paper records and included efforts to purge the computer hard drives and E-mail system of Enron related files."<sup>122</sup> The Judiciary Report further stated that the purpose of the criminal obstruction of justice provisions is simply to prohibit individuals from "destroying, altering, or falsifying *documents* to obstruct any government function."<sup>123</sup>

As for the term "official proceeding," Congress noted that much of Enron's document destruction was "undertaken *in anticipation of* a SEC subpoena to Andersen for its auditing and consulting work related to Enron."<sup>124</sup> Congress expressed concern with the omnibus obstruction of justice provision at § 1503—the prohibition against influencing or injuring any court officer or juror—which courts had narrowly construed to apply only in "situations when the obstruction of justice may be closely tied to a judicial proceeding."<sup>125</sup> Congress was adamant that "[w]hen a person destroys evidence with the intent of obstructing any type of investigation and the matter is within the jurisdiction of a federal agency, overly technical legal distinctions should neither hinder nor prevent prosecution and punishment."<sup>126</sup> Given the magnitude of recent frauds involving Enron and others, Congress clearly intended to strip the current obstruction of justice formalities away from corporate fraud prosecutions. These new provisions

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statement that the "Act adopts 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").

<sup>120</sup> Pub. L. No. 107-204, 116 Stat. 745 (2002).

<sup>121</sup> 18 U.S.C. §§ 1512(c)(1), 1513(e), 1519, 1520 (2006).

<sup>122</sup> S. REP. NO. 107-146, at 4 (2002) (internal quotation marks omitted).

<sup>123</sup> *Id.* at 15 (emphasis added).

<sup>124</sup> *Id.* at 4 (emphasis added).

<sup>125</sup> *Id.* at 6–7 (citing *United States v. Aguilar*, 515 U.S. 593 (1995); *United States v. Frankenhauser*, 80 F.3d 641 (1st Cir. 1996)).

<sup>126</sup> *Id.*

were designed to criminalize actions such as Andersen’s anticipatory document destruction.<sup>127</sup>

In short, the words Congress chose in these provisions were designed to close the loopholes that white-collar defense lawyers routinely used to get their wealthy corporate clients off the hook. As the legislative history shows, these provisions were never intended to be used as a prosecutorial fallback when the substantive charges could not be easily proven.

#### D. THE ACTUAL INVESTIGATORY PROCESS OF THE SEC BOLSTERS A NARROW CONSTRUCTION OF “OBJECT” AND “OFFICIAL PROCEEDING”

No less than five former SEC chiefs and countless other former regulators testified before Congress preceding the drafting of the Sarbanes–Oxley Act.<sup>128</sup> Congress was undoubtedly aware of the slow, circuitous, and often informal route that SEC investigations take. The resulting language in Sarbanes–Oxley and, specifically, in § 1512(c)(1) likely reflects that knowledge.

SEC investigations are initiated by a number of triggers, including routine review of SEC filings, routine inspections, public tips, media reports, and referrals from other governmental agencies.<sup>129</sup> SEC investigations unfold in stages, and the early stages occur informally and without SEC subpoena power; thus, the SEC must rely on the cooperation of the corporation to gather its information.<sup>130</sup> The first stage is a “matter under inquiry” (MUI).<sup>131</sup> An SEC staff attorney initiates the MUI by simply placing a phone call or writing a letter requesting of the corporation information that would allow it to determine whether a violation of the law

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<sup>127</sup> See *id.* at 27 (“[S]ection 1519 overlaps with a number of existing obstruction of justice statutes, but we also believe it captures a small category of criminal acts which are not currently covered under existing laws—for example, acts of destruction committed by an individual acting alone and with the intent to obstruct a future criminal investigation. We have voiced our concern that section 1519, and in particular, the phrase ‘or proper administration of any matter . . .’ could be interpreted more broadly than we intend. In our view, section 1519 should be used to prosecute only those individuals who destroy evidence with the specific intent to impede or obstruct a pending or future criminal investigation, a formal administrative proceeding, or bankruptcy case. It should not cover the destruction of documents in the ordinary course of business, even where the individual may have reason to believe that the documents may tangentially relate to some future matter within the conceivable jurisdiction of an arm of the federal bureaucracy.”).

<sup>128</sup> S. REP. NO. 107-205, at 2–4 (2002).

<sup>129</sup> See OFFICE OF CHIEF LEGAL COUNSEL, DIV. OF ENFORCEMENT, SEC. & EXCH. COMM’N, ENFORCEMENT MANUAL, §§ 2.2.1–2 (2011) [hereinafter SEC ENFORCEMENT MANUAL], available at <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

<sup>130</sup> JAMES D. COX, SECURITIES REGULATION 800 (5th ed. 2006).

<sup>131</sup> SEC ENFORCEMENT MANUAL, *supra* note 129, § 2.3.

occurred.<sup>132</sup> At the conclusion of this first informal investigation, the SEC investigators next may decide to seek a formal order of investigation or their inquiry may end altogether.<sup>133</sup> Under a formal investigation, the SEC has the ability to issue subpoenas and administer oaths.<sup>134</sup> At the end of the formal investigation, the next step is to recommend the initiation of an enforcement action.<sup>135</sup> The corporation is given notice of the SEC's intent to file an enforcement action (a "Wells notice") and is typically given a month to submit a brief arguing to the Commission that no enforcement action should be taken.<sup>136</sup> If the SEC decides at the end of the Wells process to seek enforcement, it may either file a federal civil action or an order instituting an administrative proceeding.<sup>137</sup> These preliminary investigatory stages can take several months, even years,<sup>138</sup> but the corporation is on notice from the very first moment of that investigation and is expected to cooperate with the SEC's requests for information.<sup>139</sup>

Unlike the cooperative, collaborative process that inheres in nearly all SEC investigations and, indeed most other white-collar or corporate investigations,<sup>140</sup> investigations of other criminal enterprises proceed covertly and without the target's knowledge.<sup>141</sup> Accordingly, corporate fraud defendants are in the unique position of obstructing an official proceeding even before it officially begins. That is, Arthur Andersen knew that the SEC had requested information long before it had the legal obligation to provide it; the SEC's subpoena power did not kick in for

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<sup>132</sup> Peter J. Wallison, *Rude Awakening at the SEC*, AM. SPECTATOR, May 1, 2006, at 22, available at <http://www.aei.org/article/24268>.

<sup>133</sup> SEC ENFORCEMENT MANUAL, *supra* note 129, §§ 2.3.2, 4.

<sup>134</sup> *Id.* §§ 2.3.3–4.

<sup>135</sup> *Id.* § 2.5.

<sup>136</sup> *Id.* § 2.4; see also Christine Nelson et al., *Disclosures of SEC Investigations Resulting in Wells Notices*, SEC. LITIG. J., Summer 2009, at 19, 19.

<sup>137</sup> SEC ENFORCEMENT MANUAL, *supra* note 129, § 2.5.

<sup>138</sup> Nelson et al., *supra* note 136, at 19–20 (summarizing a sample of cases that revealed in part that "the average length of time between the announcement of the informal investigation and the announcement of the Wells notice was one year and four months").

<sup>139</sup> SEC ENFORCEMENT MANUAL, *supra* note 129, § 6 (explaining the SEC's position that cooperation between the agency and the accused is critical in advancing the mission of the agency).

<sup>140</sup> See ERIN M. COLLINS & EDWARD M. ROBBINS, JR., PRACTISING LAW INSTITUTE: INTERNAL REVENUE SERVICE PRACTICE AND PROCEDURE DESKBOOK, § 13:5.3 (2011) (focusing solely on criminal tax investigations and describing the length of those investigations).

<sup>141</sup> See, e.g., *United States v. Jackson*, 207 F.3d 910, 913–14 (7th Cir.), *vacated in part and remanded*, 531 U.S. 953 (2000) (describing FBI surveillance of the Chicago-based Gangster Disciples street gang, which included electronic surveillance of a prisoner and audio surveillance of cell phones).

weeks or even months after its initial inquiry.<sup>142</sup> And corporate fraud defendants are also uniquely situated to foresee a particular “official proceeding” that would ultimately emanate from these early investigations.

Unlike the early notice provided to potential white-collar corporate fraud defendants, police have generally found catching their targets unaware and ideally “in the act” more conducive to uncovering crime. For this reason, knowledge of any “investigation” often arises simultaneously with the alleged obstructive act.<sup>143</sup> The wholesale differences between a white-collar investigation and investigations into “street” crime provide yet more evidence that Congress could not have intended to ensnare drug users in the web of Sarbanes–Oxley criminal provisions.

### III. USE OF § 1512(C)(1) BEYOND THE CORPORATE FRAUD CONTEXT HAS STRETCHED THE STATUTE BEYOND WHAT CONGRESS INTENDED

As a relatively new statute, § 1512(c)(1) is addressed in just a handful of reported decisions. Since its adoption in 2002, there have been only twenty-nine decisions that include a § 1512(c)(1) charge. Of those twenty-nine, the majority—eighteen cases—concerned corporate fraud, fraud, or document alteration or destruction.<sup>144</sup> Of the eleven remaining cases,

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<sup>142</sup> See *Arthur Andersen LLP v. United States*, 544 U.S. 696, 699–702 (2005) (describing Andersen’s actual knowledge of an SEC investigation in September and October 2001, but stating the firm continued destroying documents until it was officially served with a subpoena on November 8, 2001).

<sup>143</sup> See, e.g., *United States v. Winbush*, 580 F.3d 503, 505 (7th Cir. 2009) (describing how police watched the defendant sell crack to a confidential informant and brandish a gun; the defendant was thereafter convicted of five federal offenses despite his attempts to shed the gun, drugs, and distinctive clothing tying him to the drug sale as he fled police).

<sup>144</sup> See Indictment at 58, *United States v. Jefferson*, 546 F.3d 300 (4th Cir. 2008) (No. 1:07CR209) (concealing documents related to bribery charges during an investigation); Superseding Indictment at 48, *United States v. Simpson*, No. 3:09-CR-249-D(06), 2011 WL 195676 (N.D. Tex. Jan. 20, 2011) (destroying computer data related to a fraud investigation); *United States v. Townsend*, 630 F.3d 1003 (11th Cir. 2011) (altering correctional documents post-arrest); *United States v. Black*, 625 F.3d 386 (7th Cir. 2010) (concealing documents related to an SEC investigation); *United States v. Dooley*, 578 F.3d 582 (7th Cir. 2009) (altering data on a computer hard drive to impede investigation); *United States v. Greene*, 305 F. App’x 59 (4th Cir. 2008) (concealing counterfeit bills during an investigation); *United States v. Ramos*, 537 F.3d 439 (5th Cir. 2008) (concealing records to cover-up police misconduct during an internal investigation); *United States v. Castellar*, 242 F. App’x 773 (2d Cir. 2007) (altering, concealing, or destroying documents during an IRS investigation); *United States v. White*, 256 F. App’x 333 (11th Cir. 2007) (destroying an audio recording post-indictment); *United States v. Arbolaez*, 450 F.3d 1283 (11th Cir. 2006) (destroying a cell phone after a co-defendant was arrested); *United States v. Stevens*, 771 F. Supp. 2d 556 (D. Md. 2011) (concealing documents from federal regulators during an FDA investigation); *United States v. Hakimian*, No. CR-09-0021 DLJ, 2010 WL 2673407 (N.D. Cal. July 1, 2010) (removing documents after the execution of a search warrant); *United States v. Jahedi*, 681 F. Supp. 2d 430 (S.D.N.Y. 2009) (destroying subpoenaed documents); *United States v.*

prosecutors brought § 1512(c)(1) charges based on an expansive interpretation of “other object.”<sup>145</sup> These cases define “other object” to include items such as a car, firearms, tools, and shoes. Perhaps most troubling is the fact that courts have allowed prosecutors to extend the language of § 1512(c)(1) to drugs,<sup>146</sup> to cases that preceded an official proceeding,<sup>147</sup> and, in one instance, to both in a garden-variety drug bust.<sup>148</sup> As explained below, see *infra* Part IV, such an expansion leads to a host of absurd, unfair, and even unconstitutional results.

As noted above, only the most recent § 1512(c)(1) case addressed the precise issue raised here: the proper scope of the term “object.”<sup>149</sup> But even the *Johnson* court gave only short shrift to this issue because it found no ambiguity in the term “other object.”<sup>150</sup> Thus, the *Johnson* opinion did not perform any meaningful statutory analysis or construction, nor did the court consider the “object” element in conjunction with the provision’s legislative

Coren, No. 07-CR-265 (ENV), 2009 WL 2579260 (E.D.N.Y. Aug. 20, 2009) (altering payroll records during a grand jury investigation); *United States v. Fumo*, No. 06-319, 2009 WL 1688482, at \*54 (E.D. Pa. June 17, 2009) (destroying documents related to a grand jury investigation); *United States v. Garrett*, No. 4:08CR00703 ERW, 2009 WL 1086974 (E.D. Mo. Apr. 22, 2009) (concealing documents during a valid search warrant); *United States v. Russell*, 639 F. Supp. 2d 226 (D. Conn. 2007) (destroying a laptop computer during an investigation); *United States v. Butler*, 351 F. Supp. 2d 121 (S.D.N.Y. 2004) (withholding documents related to a validly issued subpoena).

<sup>145</sup> See *United States v. Johnson*, 655 F.3d 594, 603 (7th Cir. 2011) (finding that destruction of drugs fell within the scope of § 1512(c)(1)); *United States v. Fernandes*, 391 F. App’x 547, 548 (7th Cir. 2010) (disposing of child pornography during an investigation); *United States v. Matthews*, 505 F.3d 698 (7th Cir. 2007) (concealing a firearm during a grand jury investigation); *United States v. Thompson*, 237 F. App’x 575 (11th Cir. 2007) (concealing a suitcase containing drugs, money, and firearms following an arrest); *United States v. Ortiz*, 220 F. App’x 13 (2d Cir. 2007) (concealing a car following an arrest); *United States v. Moyer*, 726 F. Supp. 2d 498 (M.D. Pa. 2010) (concealing shoes during an investigation); *Dolbin v. United States*, No. 1:03-cr-00118, 2010 WL 1904528 (M.D. Pa. May 11, 2010) (concealing a firearm and drug paraphernalia following an arrest); *United States v. Green*, No. 5:06CR-19-R, 2008 WL 4000870 (W.D. Ky. Aug. 26, 2008) (destroying a murder victim’s body following the crime); *United States v. Cain*, No. 05-CR-360A(Sr), 2007 WL 1385726 (W.D.N.Y. May 9, 2007) (concealing tools during an investigation); *United States v. Makhani*, No. 03-30069-AA, 2005 WL 3533263 (D. Or. Dec. 23, 2005) (concealing drug paraphernalia during an investigation); *United States v. Wilkins*, No. 05-40007-01-RDR, 2005 WL 1799203 (D. Kan. June 17, 2005) (concealing a weapon for an unknown period of time).

<sup>146</sup> See, e.g., *Thompson*, 237 F. App’x 575.

<sup>147</sup> See, e.g., *Ramos*, 537 F.3d at 447 (noting that officer-defendants were convicted of obstruction of justice for failure to report a police shooting; this conviction was later overturned by the Fifth Circuit).

<sup>148</sup> *Johnson*, 655 F.3d at 599.

<sup>149</sup> *Id.* None of the remaining ten courts that faced § 1512(c)(1) charges outside of the corporate-fraud context considered the scope of the statute. See cases cited *supra* note 145.

<sup>150</sup> *Johnson*, 655 F.3d at 604–05.

history. Yet that is precisely how these slippery slopes start, through incremental and seemingly innocuous holdings that unwittingly set the groundwork for an unwarranted expansion of the law beyond its intended limits.<sup>151</sup> With *Johnson*, that is precisely what happened. In its concluding remarks, the *Johnson* court conflates the § 1512(c)(1) “official proceeding” element with the § 1519 investigation element.<sup>152</sup>

This Part tracks the evolution of the terms “official proceeding” and “other object” from terms of art to a malleable phrase that seemingly covers any type of conduct that could potentially obstruct some future proceeding. This Part concludes by reviewing a case where prosecutors ignore the plain meaning of both “official proceeding” and “other object,” all in an attempt to induce the accused to cut a plea deal in exchange for testimony against her co-defendant.

#### A. EVOLUTION OF A § 1512 “OFFICIAL PROCEEDING”

To violate § 1512(c)(1), the accused must have destroyed, concealed, or altered an object for the purpose of impairing that object’s use in an “official proceeding.”<sup>153</sup> “Official proceeding” is briefly mentioned at § 1512(f), but that provision states only that “an official proceeding need not be pending or about to be instituted at the time of the offense” to qualify for purposes of § 1512.<sup>154</sup>

The legislative history and Supreme Court precedent add much-needed context. For example, the legislative history of § 1512(c)(1) suggests that an “official proceeding” is a term of art that specifically requires the obstructive act to have been committed with knowledge that a formal SEC investigation is imminent.<sup>155</sup> The Supreme Court’s decision in *Arthur Andersen v. United States* confirms Congress’s initial interpretation of “official proceeding” in the context of 18 U.S.C. § 1512(b)(2),<sup>156</sup> an obstruction of justice statute that also uses the phrase “official

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<sup>151</sup> For example, the Supreme Court in *Skilling* recognized that the expansion of the honest services doctrine beyond its initial core of bribe-and-kickback schemes led to disarray and ambiguity. *Skilling v. United States*, 130 S. Ct. 2896, 2929 (2010) (holding that honest services fraud only applies to bribe-and-kickback schemes). Like the honest services doctrine, § 1512(c)(1) was enacted as a statute aimed at corporate actors who fraudulently altered, destroyed, or mutilated records, documents, or other similar objects. *See also* *United States v. Thornton*, 539 F.3d 741, 747 (7th Cir. 2008) (reversing a conviction under 18 U.S.C. § 2113(a) and noting that the government attempted to stretch the statute “to cover an act that is not criminalized by the statute”).

<sup>152</sup> *Johnson*, 655 F.3d at 607.

<sup>153</sup> 18 U.S.C. § 1512(c)(1) (2006).

<sup>154</sup> § 1512(f).

<sup>155</sup> *See supra* Part II.D.

<sup>156</sup> 544 U.S. 696 (2004).

proceeding.”<sup>157</sup> The *Arthur Andersen* Court held that prosecutors must demonstrate “a ‘nexus’ between the obstructive act and the [official] proceeding” for criminal liability to attach under § 1512(b)(2).<sup>158</sup> In other words, the actor must reasonably foresee that his obstructive act will impair some particular or specific official proceeding. Although the Supreme Court has not extended the § 1512(b)(2) definition of “official proceeding” to § 1512(c)(1), at least one circuit court has done so.<sup>159</sup> The geographic proximity of § 1512(b)(2) and § 1512(c)(1) in the U.S. Code provides further evidence that Congress intended both invocations of “official proceeding” to have the same meaning. Finally, the Second Circuit has implicitly defined “official proceeding” in construing the definition of “investigation” for purposes of § 1519.<sup>160</sup> The Second Circuit asserted that § 1512(b)(2) criminal liability attaches when the accused can foresee an official judicial proceeding, while § 1519 criminal liability attaches when the accused can foresee a mere investigation.<sup>161</sup> The court explicitly noted Congress’s intent in creating two statutes that address two different stages of a criminal prosecution.<sup>162</sup>

Despite the seemingly plain meaning of official proceeding, some prosecutors have ignored this critical temporal dimension in § 1512(c)(1). For example, one group of prosecutors in the Western District of Kentucky charged an Army veteran with obstruction of justice for burning the body and clothes of his murder victim in addition to burning the murder weapon.<sup>163</sup> This interpretation of “official proceeding” completely ignores the foreseeability requirement imposed by *Arthur Andersen*. On the one hand, the veteran-defendant could obviously foresee an official proceeding related to the homicide he helped conduct. Such a defendant can always foresee that prosecutors will be interested in convening a grand jury to bring murder charges. On the other hand, this interpretation provides that a

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<sup>157</sup> 18 U.S.C. § 1512(b)(2) (2006 & Supp. IV (2010)).

<sup>158</sup> *Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005) (quoting *United States v. Aguilar*, 515 U.S. 593, 599–600 (1995)).

<sup>159</sup> *See United States v. Matthews*, 505 F.3d 698, 708 (7th Cir. 2007) (holding that an obstructive act must have a “relationship in time, causation, or logic with the judicial proceedings,” and suggesting that “[i]t is . . . one thing to say that a proceeding ‘need not be pending or about to be instituted at the time of the offense,’ and quite another to say a proceeding need not even be foreseen” (quoting *Aguilar*, 515 U.S. at 599; *Andersen*, 544 U.S. at 707–08)).

<sup>160</sup> *United States v. Gray*, 642 F.3d 371, 376–78 (2d Cir. 2011) (comparing the formalities of an official proceeding with the informality of an investigation).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> Indictment at 19, *United States v. Green*, 2008 WL 4000870 (W.D. Ky. Nov. 2, 2006) (No. 5:06 CR-19-R).

murderer, burglar, or arsonist is always criminally liable for his underlying crime *and* obstruction of justice to the extent that he attempted to cover-up the just-perpetrated crime. Ultimately, it is hard to imagine that Congress intended for the Sarbanes–Oxley criminal provisions to give prosecutors a second weapon against accused murderers.

Prosecutors in the Western District of Texas also attempted to stretch the definition of “official proceeding” in *United States v. Ramos*.<sup>164</sup> Here, two border patrol agents were charged with § 1512(c)(1) obstruction of justice for failing to file a required police report after they fired their service weapons.<sup>165</sup> The prosecutors alleged that this failure to report was equivalent to concealing documents with the intent to disrupt the agency’s internal investigation of agent misconduct.<sup>166</sup> Although the Fifth Circuit ultimately reversed the conviction as outside the scope of § 1512(c)(1),<sup>167</sup> the fact remains that emboldened prosecutors are increasingly loose with what qualifies as an “official proceeding.” Applying § 1512(c)(1) to what cannot even be described as a quasi-judicial proceeding contravenes the plain meaning of the statute.

#### B. EVOLUTION OF A § 1512 “OTHER OBJECT”

The government is also taking liberties with the “other object” element in § 1512(c)(1). Recall that Congress used “other object” as a residual, catch-all phrase in the statute after specifically enumerating the terms “record” and “document.”<sup>168</sup> As previously discussed, the most natural reading of “other object” limits the statute to items that are similar to records and documents. Indeed, the majority of reported § 1512(c)(1) cases are premised on the destruction of documents related to some type of fraud or corporate fraud.<sup>169</sup> But even a cursory review of reported § 1512(c)(1) cases illustrates that prosecutors have incrementally moved away from the most natural reading of the statute. For example, prosecutors have charged defendants with destroying or concealing firearms,<sup>170</sup> an automobile,<sup>171</sup> a murder victim’s body,<sup>172</sup> tools,<sup>173</sup> and a suitcase containing drugs, guns, and

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<sup>164</sup> 537 F.3d 439 (5th Cir. 2008).

<sup>165</sup> *Id.* at 442, 447.

<sup>166</sup> *Id.* at 460–61.

<sup>167</sup> *Id.* at 462 (finding “that § 1512 does not apply to routine agency investigations of employee misconduct”).

<sup>168</sup> 18 U.S.C. § 1512(c)(1) (2006); *see also supra* Part II.B.1.

<sup>169</sup> *See supra* Part III.

<sup>170</sup> *United States v. Matthews*, 505 F.3d 698, 701 (7th Cir. 2007).

<sup>171</sup> *United States v. Ortiz*, 220 F. App’x 13 (2d Cir. 2007).

<sup>172</sup> *United States v. Green*, No. 5:06CR-19-R, 2008 WL 4000870, at \*11 (W.D. Ky. Aug. 26, 2008).

money.<sup>174</sup>

The misuse of “official proceeding” and “other object” in § 1512(c)(1) is similar to the misuse of the honest services doctrine pre-*Skilling*. There, prosecutors and courts continually expanded the types of conduct covered by the honest services statute.<sup>175</sup> Petitioner Skilling complained that this expansion beyond its historic “core” of bribe and kickback schemes rendered the statute constitutionally infirm.<sup>176</sup> The Supreme Court agreed and intervened to halt this unwarranted expansion.<sup>177</sup> In this case, if trial courts continue to allow prosecutors free rein in expansively defining these two elements, the Sarbanes–Oxley obstruction of justice provisions will become just as unrecognizable as the honest services doctrine.

### C. *UNITED STATES V. JOHNSON*

The government has recently started using § 1512(c)(1) for garden-variety drug offenses, which have typically been the domain of § 841 drug crimes. In perhaps the most egregious instance yet of an expansive interpretation of § 1512(c)(1), the government charged Lisa Lamb with obstructing justice by destroying trace amounts of cocaine base in violation of § 1512(c)(1).<sup>178</sup> In this case, local and federal drug enforcement officers sought to execute a search warrant at the residence of Scott Lee Johnson, Lisa Lamb’s then-boyfriend.<sup>179</sup> The officers failed to bring a copy of the search warrant to the door, and Lamb refused entry to the officers.<sup>180</sup> In the fifteen minutes that officers were at Johnson’s door but unable to gain entry, the government alleged that Lisa Lamb destroyed Johnson’s stash of cocaine with the intent to impair its availability at an official proceeding related to Johnson’s drug conspiracy.<sup>181</sup> Importantly, Lamb was never

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<sup>173</sup> Third Superseding Indictment at 33, *United States v. Cain*, 2007 WL 1385726 (W.D.N.Y. May 9, 2007) (No. 05-CR-360A(Sr)).

<sup>174</sup> *United States v. Thompson*, 237 F. App’x 575, 576 (11th Cir. 2007).

<sup>175</sup> Sara Sun Beale, *Comparing the Scope of the Federal Government’s Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal*, 51 *HASTINGS L.J.* 699, 713 (2000) (remarking that “[t]he absence of any statutory definition of the term honest services has left prosecutors and courts to define what this term means on a case-by-case basis” and “[f]ederal prosecutors have responded by bringing not only cases based upon allegations of bribery, but also prosecutions based upon ethical breaches that would not violate the criminal statutes regulating the conduct of federal officers and employees”).

<sup>176</sup> *Skilling v. United States*, 130 S. Ct. 2896, 2907 (2010).

<sup>177</sup> *Id.*

<sup>178</sup> *United States v. Johnson*, 655 F.3d 594, 599 (7th Cir. 2011). The author represented Lisa Lamb on her direct appeal to the Seventh Circuit.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 599–600.

<sup>181</sup> Indictment at 2, *United States v. Johnson*, 2009 WL 3125306 (S.D. Ill. Sept. 24,

implicated in Johnson's conspiracy, nor did the police ever witness Lamb destroying any contraband.<sup>182</sup>

Lisa Lamb's prosecution raises both types of prosecutorial overreaching. Namely, Lamb's alleged conduct meets neither the "official proceeding" nor "other object" element for a § 1512(c)(1) conviction. First, her conduct does not satisfy the "official proceeding" element as outlined in *Arthur Andersen* and *Matthews*, even if Lamb did willfully destroy contraband while federal agents were at her boyfriend's front door. In other words, destroying contraband while officers are attempting to investigate a crime is never enough to meet the *Arthur Andersen* nexus requirement for an *official proceeding*, although it is a closer question whether Lamb's alleged conduct might have violated § 1519.<sup>183</sup> The facts in this case are even more troubling because Lamb was never tried for her boyfriend's drug conspiracy, her name was not on the search warrant, and the officers never produced a copy of the actual search warrant. Each of these facts suggests that Lamb could not and did not foresee any particular and specific official proceeding. More than that, an executed search is too early in the investigation process to allow a defendant to foresee the use of evidence in an "official proceeding." In fact, a search warrant may never lead to an official proceeding. Therefore, stretching a Sarbanes–Oxley statute to cover minor drug offenses surely could not have been in Congress's mind when this bill passed.

The second troubling component of Lamb's conviction is that the government unilaterally extended the "other object" element in § 1512(c)(1) to cover contraband. As a threshold matter, cocaine base and other illegal drugs cannot possibly be described as something akin to a "record" or "document." Plainly, cocaine base cannot be marked, nor can it be used to memorialize past events. Because "other object" should be interpreted in light of the specific enumeration in § 1512(c)(1), district courts should not permit the government to define "other object" as including cocaine base.

Despite what appears to be government overreaching in applying § 1512(c)(1) to Lamb, the Seventh Circuit nonetheless affirmed her conviction. In doing so, the Seventh Circuit ultimately chose to broadly interpret § 1512(c)(1) for two reasons.<sup>184</sup> First, the court reasoned that the

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2009) (No. 3:08-CR-30217MJR).

<sup>182</sup> *Johnson*, 655 F.3d at 599 (stating that the government originally charged Lamb as a co-conspirator with Scott Lee Johnson, but the government dropped those charges only days before trial).

<sup>183</sup> The Sixth Circuit recently held that proof that a defendant "believed a federal investigation was at least the possible outcome of his actions" was sufficient to sustain a conviction under § 1519. *United States v. Kernell*, 667 F.3d 746 (6th Cir. 2012).

<sup>184</sup> *Johnson*, 655 F.3d at 603–04.

phrase “record, document, and other object” is used in other portions of § 1512, and that those invocations predate Sarbanes–Oxley.<sup>185</sup> Accordingly, Congress could not have intended for “other object” to be narrowly construed in the context of fraud and corporate fraud. The court specifically pointed to § 1512(a) and (b) as examples of the previous use of this phrase. But the Seventh Circuit ignores that this earlier usage of “record, document, and other object” was accompanied with broader obstruction of justice prohibitions. For example, § 1512(a)(1)(A) prohibits the murder or attempted murder of a person “with intent to—prevent the attendance or testimony of any person in an official proceeding.”<sup>186</sup> This of course is in addition to the prohibition of the murder or attempted murder of a person “with intent to—prevent the production of a record, document, or other object, in an official proceeding,”<sup>187</sup> which is found in the very next subsection. In § 1512(b), Congress sought to prohibit witness intimidation for the purposes of withholding that witness’s testimony or a record, document, or other object from an official proceeding.<sup>188</sup> But § 1512(b)(2)(B) is even broader, as it prohibits the inducement of any person to “alter, destroy, mutilate, or conceal an *object* with intent to impair the object’s integrity or availability for use in an official proceeding.”<sup>189</sup> Section 1512(b)(2)(B), when read with subparagraph (A), is instructive of congressional intent. It suggests that Congress was worried specifically about records, documents, and other objects in subparagraph (A), but it was also concerned more generally with plain objects as seen in subparagraph (B). In other words, Congress intended for “other object” to be constrained by “record” and “document” in subparagraph (A), but “object” standing alone in subparagraph (B) could be defined to include any object. Thus, although the court was correct in suggesting that the phrase “record, document, and other object” was used prior to Sarbanes–Oxley, it was just as likely that Congress intended to limit “other object” to something similar to a “record” or “document” when that specific phrase was used.

Second, the *Johnson* court found no ambiguity in the term “other object,” and thus claimed no need to rely on *ejusdem generis*, statutory structure, or legislative history in its interpretation of § 1512(c)(1).<sup>190</sup> But

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<sup>185</sup> *Id.*

<sup>186</sup> 18 U.S.C. § 1512(a)(1)(A) (2006 & Supp. IV (2010)).

<sup>187</sup> § 1512(a)(1)(B).

<sup>188</sup> § 1512(b)(2)(A).

<sup>189</sup> § 1512(b)(2)(B) (emphasis added).

<sup>190</sup> *Johnson*, 655 F.3d at 604–05. Despite its insistence that the statutory language was clear, the *Johnson* Court resorted to tools of statutory interpretation when it examined the neighboring provisions in § 1512(a) and the history of § 1512 generally in order to ascertain the meaning of § 1512(c)(1). *Id.*

the court never explained why Congress would have explicitly enumerated “record” and “document,” if “other object” included the universe of potential objects.<sup>191</sup> Thus, an ambiguity does, in fact, persist.

Ultimately, *United States v. Johnson* is the paradigmatic example of prosecutorial overreaching. After all, the government contravened the plain meaning of two critical elements for a § 1512(c)(1) prosecution. The most upsetting facet of Lamb’s prosecution is that the government could not try her for drug conspiracy or for drug distribution. Instead, it improperly used § 1512(c)(1)’s twenty-year statutory maximum as a weapon to induce her to testify against her then-boyfriend. This is a patent misuse of Sarbanes–Oxley, especially when other statutes are designed to address Lamb’s allegedly obstructive act.<sup>192</sup>

#### IV. EXPANDING § 1512(C)(1) BEYOND CORPORATE FRAUD OR, AT THE MOST, FRAUD CRIMES GENERALLY CREATES A HOST OF UNINTENDED AND UNWANTED RESULTS

There are a number of reasons why courts should halt this recent expansion of § 1512(c)(1) beyond the fraud context. First, quite simply, any other interpretation runs afoul of any commonsense statutory interpretation. Second, applying § 1512(c)(1) to other types of crimes—in particular drug crimes—creates absurd results and requires courts and parties to engage in legal fictions that make the statute difficult to administer. Third, such an approach results in illogical and unfair sentences, particularly in the drug-crime context. Finally, reading the statute in an expansive manner encourages improper judicial and executive legislating and renders the statute void for vagueness.

##### A. CONTRAVENING CONGRESSIONAL INTENT

Congress never intended for prosecutors to use § 1512(c)(1) as a general-purpose weapon against garden-variety drug offenses. Specifically, the text<sup>193</sup> and structure<sup>194</sup> of the Sarbanes–Oxley Act both strongly favor a narrow construction of § 1512(c)(1). Likewise, other Sarbanes–Oxley provisions,<sup>195</sup> other obstruction of justice provisions,<sup>196</sup> and even the legislative history<sup>197</sup> of § 1512(c)(1) all suggest that Congress could never

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<sup>191</sup> See *supra* Part II.B.2.

<sup>192</sup> See *supra* Part II.A.4 (describing 18 U.S.C. § 2232 as covering obstructive acts committed during valid execution of a search warrant).

<sup>193</sup> See *supra* Part II.B.

<sup>194</sup> See *supra* Part II.A.

<sup>195</sup> See *supra* Part II.A.3.

<sup>196</sup> See *supra* Part II.A.4.

<sup>197</sup> See *supra* Part II.C.

have intended for prosecutors to use this statute outside of the fraud or corporate fraud context.

#### B. ABSURD RESULTS AND DIFFICULTIES IN ADMINISTRATION

It is axiomatic that statutes should not be construed in a way that renders absurd results.<sup>198</sup> Yet an expansive interpretation of § 1512(c)(1) would do just that. For example, if the statute is extended to drug arrests, defendants will be required to continue possessing contraband in violation of federal law instead of lawfully destroying it, to act criminally rather than lawfully abandon a prior illegal pursuit. Similarly absurd is the argument that any criminal behavior makes an official proceeding foreseeable and thus satisfies the nexus requirement that the Supreme Court set forth in *Arthur Andersen*.<sup>199</sup>

These absurdities inevitably lead to difficulties in administering the statute, another reason to avoid an expansive interpretation. First, as noted above, courts must embrace the legal fiction that the foreseeability requirement is satisfied whenever an individual engages in criminal conduct. Second, to be faithful to this expansive reading, courts must presume that “official proceeding” means any possible proceeding that might arise from that criminal conduct. Construing that term in any other way would undermine the foreseeability requirements because any given number of charges can result (or not result) from a single criminal act. Third, if the type of proceeding must be generalized, then courts must also presume that the temporal scope of the “official proceeding” encompasses any possible future proceeding that will occur at any time within the applicable statute of limitations. Once these legal fictions are in place, however, the corrupt intent requirement becomes so attenuated that it necessarily raises constitutional void for vagueness concerns, as discussed below.<sup>200</sup> To combat this inevitable challenge, prosecutors will have to create yet another explanation as to how a person can corruptly alter or destroy an “other object” when he has no idea that he will even be caught, let alone charged with a crime stemming from that conduct. Thus, courts and prosecutors must engage in so many legal contortions to bolster an expansive interpretation of § 1512(c)(1) while preserving it from constitutional challenge that it becomes clear that this is not what Congress

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<sup>198</sup> *E.E.O.C. v. Commercial Office Products Co.*, 486 U.S. 107, 120–21 (1988) (recognizing that the “respondent’s interpretation of the language of § 706(c) leads to absurd or futile results . . . plainly at variance with the policy of the legislation as a whole, which this Court need not and should not countenance” (internal quotation marks omitted) (quoting *United States v. American Trucking Ass’ns, Inc.*, 310 U.S. 543 (1940))).

<sup>199</sup> *See Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005).

<sup>200</sup> *See infra* Part IV.D.

intended in enacting the statute.

### C. UNFAIR SENTENCING DISPARITIES

Allowing prosecutors to add § 1512(c)(1) to their charging arsenal in drug crimes creates vast and unfair sentencing disparities that Congress simply could not have intended.<sup>201</sup> As discussed above,<sup>202</sup> Congress has passed a host of obstruction of justice statutes that separately cover very specific conduct. The Sentencing Table (Appendix A) attached to the United States Sentencing Guidelines (USSG) identifies approximately twenty-five statutes as encompassing the criminal act of obstruction of justice.<sup>203</sup> With only five exceptions—18 U.S.C. §§ 1001, 1033, 1512,

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<sup>201</sup> One primary purpose of the Sentencing Reform Act was to “establish sentencing policies and practices for the Federal criminal justice system that . . . provide certainty and fairness in meeting the purposes of sentencing.” Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 217, 98 Stat. 1976, 2018; *see also* USSG MANUAL, *supra* note 57, at ch. 1, pt. A.1.3 (2010) (noting that, in the Sentencing Reform Act, “Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders”).

<sup>202</sup> *See supra* Part II.A.

<sup>203</sup> *See* 18 U.S.C. § 245(b) (2006) (prohibiting obstruction of civil rights and providing for maximum one-year penalty); § 505 (prohibiting court forgeries and providing for maximum five-year penalty); § 551 (prohibiting obstruction of customs inspections and providing for maximum two-year penalty); § 665(c) (prohibiting obstruction of Job Training Act investigations and providing for maximum one-year penalty); § 1001 (prohibiting fraud and false statements and providing for maximum five- to eight-year penalty); § 1033 (prohibiting obstruction within insurance crimes and providing for maximum fifteen-year penalty); § 1204 (prohibiting international parental kidnapping and providing for maximum three-year penalty); § 1503 (prohibiting influencing or injuring court officers and providing for maximum ten-year penalty); § 1505 (prohibiting obstruction before departments, agencies, and committees and providing for maximum five-year penalty, unless terrorism is involved, in which case the penalty rises to eight years); § 1506 (prohibiting theft or alteration of bail records and providing for maximum five-year penalty); § 1507 (prohibiting obstruction of parading or picketing and providing for maximum five-year penalty); § 1508 (prohibiting recording grand or petit juries and providing for maximum one-year penalty); § 1509 (prohibiting obstruction of court orders and providing for maximum one-year penalty); 18 U.S.C. § 1510 (2006 & Supp. IV (2010)) (prohibiting obstruction of criminal investigations and providing for maximum five-year penalty); § 1511 (prohibiting obstruction of state or local law enforcement and providing for maximum five-year penalty); § 1512(a) (prohibiting witness tampering through killing and providing for maximum of life imprisonment or even the death penalty); § 1512(b) (prohibiting witness tampering through intimidation and providing for maximum twenty-year penalty); § 1512(c) (prohibiting obstruction through document destruction and providing for maximum twenty-year penalty); § 1512(d) (prohibiting witness tampering through harassment and providing for maximum three-year penalty); § 1513 (prohibiting retaliation against victim, witness, or informant and providing for non-murder maximum thirty-year penalty); 18 U.S.C. § 1516 (2006) (prohibiting obstruction of federal audit and providing for maximum five-year penalty); § 1517 (prohibiting obstruction of examination of financial institution and providing for maximum five-year penalty); § 1518 (prohibiting obstruction of health care offense

1513, and 1519—the maximum statutory penalties range from one to five years.<sup>204</sup> Sentencing for these obstruction crimes is handled in Chapter 2, Part J of the USSG.<sup>205</sup> Under USSG § 2J1.2, a defendant's base offense level starts at level 14 and is enhanced by specific offense characteristics such as whether a certain subset of obstruction of justice statutes was violated, whether the conduct involved injury or property damage, or whether the act involved domestic or international terrorism.<sup>206</sup> Furthermore, the guideline allows for additional enhancements if the conduct constituted a substantial interference with the administration of justice or if it involved the destruction or alteration of especially probative records.<sup>207</sup> Finally, § 2J1.2(c) provides for a cross-reference to § 2X3.1—the accessory-after-the-fact guideline—“if the offense involved obstructing the investigation or prosecution of a criminal offense, apply § 2X3.1 . . . if the resulting offense level is greater than that determined above.”<sup>208</sup> The accessory-after-the-fact guideline, in turn, links the obstruction sentence to the underlying crime by using that crime's base offense level up to a maximum of 30.<sup>209</sup>

When a defendant commits a non-obstruction crime but engages in obstructive conduct during the course of that crime or its investigation or prosecution, another sentencing adjustment applies: § 3C1.1. Under that guideline, a defendant is subject to a two-level upward adjustment if she “willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction.”<sup>210</sup> Because § 3C1.1 applies to any underlying criminal conduct, it obviously is used much more frequently than the obstruction-specific provisions in § 2J1.2.<sup>211</sup>

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investigations and providing for maximum five-year penalty); § 1519 (prohibiting destruction of records in federal investigations and providing for maximum twenty-year penalty); § 2232 (prohibiting obstruction of the service of a warrant and providing for maximum five-year penalty); 26 U.S.C. § 7212(a) (2006) (prohibiting IRS obstruction and providing for maximum one-year penalty).

<sup>204</sup> See *supra* note 203. Maximum penalties for §§ 1033, 1512(a)–(c), 1513, and 1519 are much higher and range from ten years to life imprisonment. The maximum penalty for § 1001 is five to eight years.

<sup>205</sup> USSG MANUAL, *supra* note 57, at § 2J1.2.

<sup>206</sup> § 2J1.2(b).

<sup>207</sup> *Id.*

<sup>208</sup> § 2J1.2(c).

<sup>209</sup> § 2X3.1.

<sup>210</sup> § 3C1.1.

<sup>211</sup> In 2010, for example, § 3C1.1 was applied in 1,843 cases, or 2.4% of the criminal cases nationwide, whereas § 2J1.2 was applied in only 170 cases, or 0.2% of them. U.S. SENTENCING COMM'N, CHAPTER THREE ADJUSTMENTS: FY 2010, at 2, *available at* [http://www.ussc.gov/Data\\_and\\_Statistics/Federal\\_Sentencing\\_Statistics/Guideline\\_Applicati](http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Guideline_Applicati)

These guidelines were created based on the conduct of the underlying statutes and reflect to a certain extent Congress's reasoned judgment as to the seriousness of the various crimes.<sup>212</sup> Thus, less serious crimes typically have lower base offense levels; as the seriousness of the crime rises, so does the base offense level.<sup>213</sup> In a typical obstruction case, this logic plays out and the combination of base offense levels and special offense characteristics align fairly well with the statutory maximum sentences contained in the obstruction statutes themselves. Similarly, the two-level adjustment contained in § 3C1.1 tweaks the sentence upward to account for the defendant's additional wrongful conduct. But when the obstruction statutes, and thus the obstruction guidelines contained in § 2J1.2, are applied to drug crimes, the sentencing scheme goes seriously awry and shows how Congress could not have intended for the statutes to be used in this way. A series of hypothetical examples<sup>214</sup> summarized in Table 1 below best illustrates the point:

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**Table 1**

| TYPICAL SENTENCING RANGE  |   |         |                             |
|---|---|---------|-----------------------------|
| STATUTORY MAXIMUM SENTENCE  |   | FACTS   |                             |
| SCENARIO  |   |         |                             |
| I. Standard Obstruction of Justice Conviction Sentenced Under § 2J1.2 | Bank employee contacts bank customer to inform him that the IRS is conducting a confidential audit of his account, which violates 18 U.S.C. § 1510. | 5 years | 15–21 months <sup>215</sup> |

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on\_Frequencies/2010/10\_chapter3.pdf; U.S. SENTENCING COMM'N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS: FISCAL YEAR 2010, at 48, available at [http://www.ussc.gov/Data\\_and\\_Statistics/Federal\\_Sentencing\\_Statistics/Guideline\\_Application\\_Frequencies/2010/10\\_glinexgline.pdf](http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Guideline_Application_Frequencies/2010/10_glinexgline.pdf).

<sup>212</sup> USSG MANUAL, *supra* note 57, at ch. 1, pt. A.

<sup>213</sup> U.S. SENTENCING COMM'N, AN OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES, available at [http://www.ussc.gov/About\\_the\\_Commission/Overview\\_of\\_the\\_USSC/Overview\\_Federal\\_Sentencing\\_Guidelines.pdf](http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/Overview_Federal_Sentencing_Guidelines.pdf).

<sup>214</sup> All of these scenarios assume that the defendant has a criminal history category of I and that no "acceptance of responsibility" adjustment applies. See generally USSG MANUAL, *supra* note 57, ch. 5, pt. A (Sentencing Table).

<sup>215</sup> A base offense level of 14 yields a sentencing range of 15–21 months. *Id.*

| TYPICAL SENTENCING RANGE   |   |          |                              |
|--|---|----------|------------------------------|
| STATUTORY MAXIMUM SENTENCE   |   |          |                              |
| FACTS  |   |          |                              |
| SCENARIO   |   |          |                              |
| II: Egregious Obstruction of Justice Conviction Sentenced Under § 2J1.2                | Defendant threatens to kill his brother's wife if she testifies against him, which violates 18 U.S.C. § 1512(b). The wife refuses to testify, which causes the prosecutor to dismiss the charges.   | 20 years | 57–71 months <sup>216</sup>  |
| III: Egregious Obstruction of Justice Conviction with § 2X3.1 Cross-Reference          | Defendant threatens to kill his brother's wife if she testifies against the brother in his armed bank robbery trial. A gun was fired during the robbery, seriously injuring a teller. The robbers absconded with \$60,000. This threat violates 18 U.S.C. § 1512(b).  | 20 years | 87–108 months <sup>217</sup> |
| IV: Applying Obstruction of Justice Statute to Drug Crime and Sentencing under § 2J1.2 | Police arrive to search a home of known drug dealer. Drug dealer's wife flushes some amount of drugs down the toilet before the police gain access to the home. Officers find trace amounts of cocaine near the toilet and a small amount (half ounce) in a baggie next to the toilet. Prosecutors charge her with obstruction of justice under 18 U.S.C. § 1512(c)(1). | 20 years | 15–21 months <sup>218</sup>  |

<sup>216</sup> Base offense level of 14. Special offense characteristics: threatened injury (+8) and substantial interference with administration of justice (+3). Offense level 25 renders a sentencing range of 57–71 months. *Id.*

<sup>217</sup> Base offense level of 14, which yields a sentencing range of 15–21 months. The prosecutor wants a higher sentence, so he suggests the use of the § 2X3.1 cross-reference. The underlying crime is bank robbery, which falls under § 2B3.1. The base offense level for robbery is 20. Add 2 for bank, add 7 for discharging a firearm, add 4 for serious bodily injury, and add 2 for loss in excess of \$50,000. This yields a base offense level of 35, but the § 2X3.1 cross-reference requires the court to subtract 6 levels, so the final offense level is 29 with a sentencing range of 87–108 months. *Id.*

<sup>218</sup> Base offense level of 14 yields sentencing range of 15–21 months. *Id.*

| TYPICAL SENTENCING RANGE  |   |                                  |                             |
|---|---|----------------------------------|-----------------------------|
| STATUTORY MAXIMUM SENTENCE  |   |                                  |                             |
| FACTS   |   |                                  |                             |
| SCENARIO  |   |                                  |                             |
| V: Applying Obstruction of Justice Statute to Drug Crime and Sentencing under § 2J1.2 and § 2X3.1 | Same facts as scenario IV.  | 20 years                         | 78–97 months <sup>219</sup> |
| VI: Standard Drug Possession Charge with Obstruction of Justice Adjustment under § 3C1.1          | Same facts as scenario IV except prosecutors charge her with possession of cocaine under 18 U.S.C. § 841. | 1 year under 21 U.S.C. § 844(a). | 0–6 months <sup>220</sup>   |

Even a cursory analysis of Table 1 above lays bare the unforeseen sentencing disparities that arise when § 1512(c)(1) is charged outside the fraud or corporate fraud context. Scenarios I through III illustrate how the obstruction of justice statutes were intended to be used and how the resulting Guideline sentencing range actually mirrors congressional intent. That is, more serious obstructionist conduct—that which involves actual or threatened bodily harm or jeopardizes the entire judicial proceeding—garners a much higher sentencing range. Those ranges are typically three to four times higher than standard, run-of-the-mill obstructionist conduct. Conversely, scenarios IV through VI set forth the very skewed sentencing ranges that can result from the exact same conduct when in drug-based crimes prosecutors use § 1512(c)(1) in lieu of the more appropriate drug-possession charge, even one that accounts for the defendant’s obstructionist

<sup>219</sup> Base offense level of 14 yields a sentencing range of 15–21 months, so prosecutors suggest the use of the § 2X3.1 cross-reference for accessory-after-the-fact to her husband’s drug conspiracy. Seventeen kilograms of cocaine is attributed to her for her husband’s conspiracy pursuant to § 2D1.1, which yields a base offense level of 34. Section 2X3.1 requires a 6-level reduction from that amount, so the final base offense level is 28 with a sentencing range of 78–97 months. *Id.*

<sup>220</sup> Base offense level of 6 yields a guideline range of 0–6 months. Adding a 2-level enhancement for obstruction of justice under § 3C1.1 also yields a 0–6 month sentencing range. *Id.*

conduct in destroying drugs.<sup>221</sup> Specifically, a defendant's sentencing range is effectively tripled at the low end and, if a § 2X3.1 cross-reference is used, a sentence ten to fifteen times higher will routinely result. These disparities are further proof that Congress did not intend for § 1512(c)(1) to be used as a ready substitute for the crimes contained within Title 21, Chapter 13.<sup>222</sup>

#### D. VOID FOR VAGUENESS

The void for vagueness doctrine, an outgrowth of the Due Process Clause of the Fifth Amendment, strikes down statutes that fail “to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.”<sup>223</sup> Section 1512(c)(1), if unblinkingly expanded beyond corporate fraud or general fraudulent conduct, falls prey to both maladies that the doctrine seeks to avoid. First, any widened interpretation of the statute leaves individuals unsure of what conduct is prohibited, which itself is more than sufficient reason to counsel in favor of a narrow interpretation. For example, § 1512(c)(1) criminalizes attempts to abandon prior criminal conduct, a result that most individuals would not foresee. As discussed above,<sup>224</sup> the drug addict who wants to come clean would theoretically be violating § 1512(c)(1) when he discards his stash before entering rehab treatment. The drugs are an “object” under an expansive reading of § 1512(c)(1), his possessing them is illegal and, therefore, he could foresee an official proceeding arising from that possession. Section § 1512(c)(1) also ratchets up the criminality of other illegal conduct in ways that prevent individuals from weighing the consequences of their behavior. The college pot smoker who stuffs her baggie of dope under the car seat when she is pulled over for a traffic violation could be prosecuted for obstruction of justice when her mere possession would be charged as nothing more than a misdemeanor. So although she might have calculated and accepted the risk of a minor marijuana-possession charge when she pulled out of her driveway, she certainly could not anticipate a federal obstruction felony charge. Finally, an Olympic athlete who tries to rid his system of illegal performance-enhancing drugs prior to testing by the United States Anti-Doping Agency likewise could be arrested and deemed a felon under § 1512(c)(1). By “altering” his blood composition (“other object”) in anticipation of mandatory drug testing (an “official proceeding”), he

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<sup>221</sup> As noted above, *see supra* note 220, even adding a 2-level upward adjustment for obstruction of justice under § 3C1.1 does not alter the defendant's sentencing range.

<sup>222</sup> *See* 21 U.S.C. §§ 841–865 (2006).

<sup>223</sup> *United States v. Williams* 553 U.S. 285, 304 (2008) (citations omitted); *see also* *Skilling v. United States*, 130 S. Ct. 2896, 2927–28 (2010).

<sup>224</sup> *See supra* Part IV.B (suggesting absurd results).

technically violates the terms of § 1512(c)(1)—even though his doping, if discovered, would have resulted in assorted sanctions by the Agency, none of them including prison time.<sup>225</sup>

Moreover, the second prong of the void for vagueness test is also fulfilled because an expansive definition of § 1512(c)(1) fails to establish minimal guidelines to govern law enforcement and thus beckons discriminatory application.<sup>226</sup> As the Supreme Court has explained, where the legislature fails to provide such minimal guidelines, a criminal statute may permit “a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.”<sup>227</sup> Despite the hypotheticals of reformed drug addicts and fallen sports heroes, the reality is that this statute would be used against a much more vulnerable population. It is the ideal stick for prosecutors to employ when they want to persuade bit players in a crime to roll over on a bigger fish, especially in drug cases where proving participation in a wider conspiracy, specific actual drug deals, and drug amounts can be difficult.<sup>228</sup> And because the statutory elements are virtually limitless in an expansive reading of § 1512(c)(1), there is no downside to using it; prosecutors can easily secure a conviction that carries hefty penalties should the defendant forego cooperation or a plea offer.

Thus, § 1512(c)(1) should be construed narrowly as only reaching the destruction and concealment of documents, records, diskettes, files, and similar objects—or, at most, reaching fraudulent destruction of evidence in the face of an actual, articulable, and specific judicial proceeding. This interpretation is consistent with the genesis of § 1512(c)(1) as an outgrowth of the corporate fraud scandals the Sarbanes–Oxley Act sought to punish and could potentially save the statute from a constitutional challenge.

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<sup>225</sup> See *Anti-Doping Rule Violations*, U.S. ANTI-DOPING AGENCY, <http://www.usada.org/athletes-adrv/> (last visited Oct. 10, 2009) (identifying sanctions for committing an anti-doping rule violation, including disqualification from events, forfeiture of medals or prizes, ineligibility periods, and public announcements of the athlete’s identity).

<sup>226</sup> *Kolender v. Lawson*, 461 U.S. 352, 357–62 (1983) (finding CAL. PENAL CODE § 647(e) unconstitutionally vague on its face because it encourages arbitrary enforcement by failing “to describe with sufficient particularity what a suspect must do” and vesting “virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute”).

<sup>227</sup> *Id.* at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)); see also *United States v. Reese*, 92 U.S. 214, 221(1875) (“It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.”).

<sup>228</sup> *United States v. Johnson*, 655 F.3d 594, 602 (7th Cir. 2011).

## E. JUDICIAL AND EXECUTIVE LEGISLATING

A corollary problem arising from courts' and prosecutors' expansive interpretation of statutes is that it creates separation of powers concerns. Many observers and the Supreme Court itself have noted that the "Framers of the Federal Constitution similarly viewed the principle of separation of powers as the absolutely central guarantee of a just Government."<sup>229</sup> As such, courts have repeatedly cautioned against unwarranted judicial legislating,<sup>230</sup> although the Supreme Court in particular has not been the model of clarity in this regard.<sup>231</sup> Even conceding that dissenting judges and justices are typically the ones to play the judicial activism card, it cannot be denied that the Constitution firmly created three separate branches of government. Accordingly, courts must be careful to confine their activities to interpreting the law, instead of creating it.<sup>232</sup> The courts' acceptance of a version of § 1512(c)(1) that ignores the text, structure, and legislative history of the provision is equivalent to judicial legislating. In

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<sup>229</sup> *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

<sup>230</sup> *United States v. Lopez*, 514 U.S. 549, 611 (1995) (Souter, J. dissenting) (noting that "nothing about the judiciary as an institution made it a superior source of policy on the subject Congress dealt with"); *United States v. Batchelder*, 442 U.S. 114, 121–22 (1979) (declaring that judges have "no justification for taking liberties with unequivocal statutory language"); *Barrett v. United States*, 423 U.S. 212, 218 (1976) ("A criminal statute, to be sure, is to be strictly construed, but it is 'not to be construed so strictly as to defeat the obvious intention of the legislature.'" (quoting *Huddleston v. United States*, 415 U.S. 814, 831 (1974))); *United States v. Nofziger*, 878 F.2d 442, 455–56 (D.C. Cir. 1989) (Edwards, J., dissenting) (criticizing the majority for disregarding the clear terms of the statute and ignoring the clear expressions of congressional intent: "The majority opinion thus enters the dangerous territory of judicial legislating. The doctrine of separation of powers proscribes any judicial rewriting of otherwise valid congressional statutes. The criminal justice process is sufficiently flexible to accommodate 'quirks' in the system, through devices such as the exercise of prosecutorial discretion, plea bargaining arrangements, sentencing determinations and, sometimes, even through the questionable means of 'jury nullification.' But 'judicial nullification' is not a permissible way to ameliorate the consequences of a criminal prosecution."); *Blackfeet Tribe of Indians v. Groff*, 729 F.2d 1185, 1190 (9th Cir. 1982) ("The Tribe's use of this canon of construction would have us amend the 1938 Act to include an express repeal of the 1924 Act. That, however, would be going beyond a liberal interpretation of an ambiguous clause or phrase to the point of judicial legislating. This we will not do.")

<sup>231</sup> See *Brzonkala v. Va. Polytechnic Inst. and State Univ.*, 169 F.3d 820, 890–93 (4th Cir. 1999) (Wilkinson, J., concurring) (stating that judicial activism existed in three stages throughout the twentieth century, but its three manifestations were quite different); see also Keenan D. Kmiec, Note, *The Origin and Current Meanings of 'Judicial Activism'*, 92 CALIF. L. REV. 1441, 1461–75 (2004) (defining the various permutations of judicial activism and judicial legislating).

<sup>232</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is," not to create the law.); see also Thomas L. Jipping, *Legislating from the Bench: The Greatest Threat to Judicial Independence*, 43 S. TEX. L. REV. 141 (2001).

other words, a loose interpretation of “other object” and “official proceeding” overrides the express will of Congress, a separate and coequal branch of government.

In the same vein, executive legislating is as offensive to the Constitution’s separation of powers principle as judicial legislating is. As the Seventh Circuit has recognized, “[a]lthough we understand the temptation to dilate criminal statutes so that corrupt officials get their comeuppance, . . . [changes to the law] should occur through legislation rather than prosecutorial and judicial creativity.”<sup>233</sup> Notably, courts are well positioned to stop prosecutors from unilaterally stretching a statute beyond what Congress provided.<sup>234</sup> As has been demonstrated throughout this Article, the government, in cases like *United States v. Johnson*, has stretched § 1512(c)(1) beyond all practical limits and certainly beyond the

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<sup>233</sup> *United States v. Genova*, 333 F.3d 750, 757–58 (7th Cir. 2003); *see also* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992) (discussing the separation of powers doctrine).

<sup>234</sup> *See, e.g., United States v. Cuellar*, 553 U.S. 550, 567 (2008) (reversing a money laundering conviction on the grounds that the prosecution stretched the meaning of the “designed to conceal” element); *United States v. Johnson*, 655 F.3d 594 (7th Cir. 2011) (stretching a Sarbanes–Oxley provision to cover destruction of contraband); *United States v. Goyal*, 629 F.3d 912, 922 (9th Cir. 2010) (Kozinski, J., concurring) (describing four recent cases where prosecutors have stretched the law beyond recognition and stating that “[t]his is not the way criminal law is supposed to work . . . . But criminal law should clearly separate conduct that is criminal from conduct that is legal”); *United States v. Thornton*, 539 F.3d 741, 747 (7th Cir. 2008) (reversing a conviction under 18 U.S.C. § 2113(a) and noting that the government attempted to stretch the statute “to cover an act that is not criminalized by the statute”); *United States v. Salgado*, 519 F.3d 411, 413 (7th Cir. 2008) (rejecting the prosecution’s invitation to extend 18 U.S.C. § 2114(a) to cover robberies of federal officials who hold no money); *United States v. Jones*, 471 F.3d 478, 482 (3d Cir. 2006) (reversing a health care fraud conviction and finding that the “Government has stretched the statute to cover activity beyond its plain words”); *United States v. Hunt*, 456 F.3d 1255, 1259, 1264 (10th Cir. 2006) (reversing a conviction on the grounds that the defendant did not “forge” checks from his employer’s account, even though the list of crimes for which the defendant could have been charged was lengthy); *United States v. Myr Grp.*, 361 F.3d 364, 366 (7th Cir. 2004) (affirming dismissal of indictment and chiding prosecutors for stretching an OSHA statute by filing a criminal indictment); *United States v. Errol D., Jr.*, 292 F.3d 1159, 1160–61 (9th Cir. 2002) (holding that the Indian Major Crimes Act did not grant the U.S. government jurisdiction over a defendant accused of burglary); *United States v. Mohrbacher*, 182 F.3d 1041, 1050 (9th Cir. 1999) (reversing a defendant’s conviction for transporting visual depictions of minors engaged in sexually explicit conduct on the grounds that a computer download does not constitute transport); *United States v. Palmieri*, 21 F.3d 1265, 1277 (3d Cir.) (Cowen, J., dissenting), *vacated*, 513 U.S. 957 (1994) (relying on legislative history and statutory structure in suggesting that the prosecution wrongfully ignored the gun collector exception inherent in the Gun Control Act of 1968); *United States v. Doe*, 878 F.2d 1546, 1548 (1st Cir. 1989) (reversing a conviction because the government charged under the wrong statute and the government offered insufficient evidence to convict on the other charges).

plain language and intended meaning of the text. Section 1512(c)(1) was never designed to ensnare the garden-variety drug offender.

#### V. CONCLUSION

Nearly ten years after Sarbanes–Oxley was enacted, scholars<sup>235</sup> and investors<sup>236</sup> continue to debate whether the Act has reduced corporate fraud or the need for nearly constant corporate earnings restatements. After all, the Act was certainly no help in preventing the housing bubble, the subsequent credit crisis, the myriad of Ponzi schemes, and the general economic malaise that has hung over the country for the past several years. But perhaps the one certain effect to come of the Act is the government's newfound power to charge drug dealers, murderers, and other street criminals under its obstruction of justice criminal provisions. And given that one court of appeals has formally blessed this expansive reading of § 1512(c)(1), we can expect prosecutors far and wide to continue to use Sarbanes–Oxley as an all-purpose weapon against all types of lawbreakers. One can only hope that it does not take the Supreme Court seventy years<sup>237</sup> to invalidate § 1512(c)(1) convictions beyond fraud and corporate fraud.

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<sup>235</sup> Andy Howlett, *Judge Easterbrook Gives Keynote Speech at SEC Conference*, VA. L. WKLY., Oct. 3, 2008, at 1, 1, available at [http://www.lawweekly.org/pdf\\_archives/20081003.pdf](http://www.lawweekly.org/pdf_archives/20081003.pdf) (reporting Chief Judge Easterbrook's criticism of the effectiveness of Sarbanes–Oxley).

<sup>236</sup> *A Price Worth Paying?*, ECONOMIST, May 21, 2005, at 71, 71 (quoting a study that suggests the aggregate cost to investors from the Sarbanes–Oxley Act is \$1.4 trillion).

<sup>237</sup> *Skilling v. United States*, 130 S. Ct. 2896, 2926 (2010) (stating that the honest services doctrine was first conceived by the Fifth Circuit in *Shushan v. United States*, 117 F.2d 110 (5th Cir. 1941)).