Obstruction of Justice: Unwarranted Expansion of 18 U.S.C. 1512(c)(1)

Sarah O. Schrup
Obstruction of Justice: Unwarranted Expansion of 18 U.S.C. § 1512(c)(1)

ABSTRACT

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 when enacting the 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, the 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 ................................................................................................................................. 3
II. The proper construction of § 1512(c)(1). ................................................................................... 3
   A. The statute’s structure and context......................................................................................... 4
      The Act’s Preamble.................................................................................................................. 4
      Provisions Surrounding § 1512(c) .......................................................................................... 5
      Provisions added by Sarbanes-Oxley ...................................................................................... 7
      Other OOJ statutes ............................................................................................................... 8
      Interplay with the United States Sentencing Guidelines......................................................... 9
   B. Canons of Construction Confirm that § 1512(c)(1) Should be Construed Narrowly ........ 11
      Ejusdem generis .................................................................................................................... 11
      Harmonious Interpretation .................................................................................................. 12
      Rule of Lenity ....................................................................................................................... 13
   C. Sarbanes-Oxley Legislative History..................................................................................... 14

1 Sarah O’Rourke Schrup, Clinical Assistant Professor of Law, Northwestern University School of Law. I am indebted to Michael Rowe, J.D. 2011, Northwestern University School of Law, for his outstanding research and editorial assistance. Thanks also to Megan Juel and Sam Hayman for their assistance with the Article.
D. The actual investigatory process of the SEC bolsters a narrow construction of “object” and “official proceeding.”

III. Use of § 1512(c)(1) beyond the corporate-fraud context has stretched the statute beyond what Congress intended.

   A. Evolution of a § 1512 “official proceeding”
   B. Evolution of a § 1512 “other object”
   C. United States v. Johnson

IV. Expanding §1512(c)(1) beyond corporate fraud or, at the most, fraud crimes generally creates a host of unintended and unwanted results.

   A. Contravenes Congressional Intent
   B. Absurd Results and Difficulties in Administration
   C. Unfair Sentencing Disparities
   D. Void for Vagueness
   E. Judicial and Executive Legislating

CONCLUSION
I. Introduction

In response to the 2001 and 2002 accounting scandals of corporate luminaries such as Enron, WorldCom, Global Crossing, and Adelphia, Congress passed the Sarbanes-Oxley Act of 2002. Although the Act’s preamble is clear that the bill was designed to “protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws . . . .,” 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, police misconduct, and even when a defendant burned the body of a murder victim to conceal his crime. And courts, perhaps unwittingly, have sanctioned this expansive use of § 1512(c)(1)’s provisions. But this expansion is not only unsupportable under a proper construction of the Sarbanes-Oxley Act, 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 is 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 show that Congress intended to combat corporate fraud 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 corporate 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.” As discussed in more detail below, see infra Section III, 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.

---

4 See infra Section III.
5 See United States v. Matthews, 505 F.3d 698 (7th Cir. 2007).
Although a statute’s plain language, if clear, definitively settles its meaning,\(^8\) when statutory language is susceptible to two or more meanings, courts look to interpretive aids to discern congressional intent.\(^9\) As courts have made clear, 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.\(^10\) Thus, an Act’s structure and context, canons of construction, and its legislative history assist courts in this endeavor.\(^11\) 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 pursuant to a federal securities investigation and was not intended to be an omnibus dragnet for a wide assortment of other non-fraud crimes.\(^12\)

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.\(^13\) 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.

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 in 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 . . . .”


\(^{9}\) See Landreth Timber Co. v. Landreth, 471 U.S. 681, 685-686 (1985) (finding that sale of all outstanding stock in lumber company constituted a sale of securities under the plain language meaning of the Securities Act of 1933); Negusie v. Holder, 555 U.S. 511, 129 S. Ct. 1159, 1164 (2009) (discussing whether persecution executed against others under coercion or duress was a bar to refugee asylum under the textually ambiguous “persecutor bar” provision in the Immigration and Nationality Act § 101).

\(^{10}\) Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 477 (1992); McCarthy v. Bronson, 500 U.S. 136, 139 (1991); Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997). 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.


\(^{12}\) And, as discussed below, see infra Section II-B-3, statutory ambiguity still inures to a criminal defendant’s benefit under the Rule of Lenity.

\(^{13}\) S. REP. NO. 107-146, at 6 (2002).

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.15

**Provisions Surrounding § 1512(c)**

Examining the companion provisions in the OOOJ Chapter establishes at least three broad precepts that guide statutory interpretation and sheds 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, which indicates that Congress intended to proscribe a limited set of conducts 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.16 Similarly, § 1519 limits itself to the destruction, alteration or falsification of records during federal investigations.17

Significantly, even for those provisions whose title is 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.18 Similarly, § 1511 is called “Obstruction of State or Local Law Enforcement,” but it is limited to those who facilitate an illegal gambling business.19

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.20 Even § 1519, a broadly-worded provision specifically enacted as a catchall to include investigations and not just official proceedings,21 limits itself to “records,” a distinct limit on its use to prosecute, for instance, drug or gun crimes.22

The second general precept that can be gleaned from a study of the OOOJ provisions as a whole is that § 1512, Tampering with a Witness, Victim, or an Informant, which contains a

---

21 See infra n.120.
22 18 U.S.C. § 1519 (2006) (criminalizing “Destruction, 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).
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. 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 as often the sole proof of wrongdoing. 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.

Third, the sentencing structure contained within the OOO Chapter 73 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. Only a small handful of sections provide for substantially higher sentences in the twenty-to-thirty-year range, and these are provisions for which death, violence, or the integrity of the entire proceeding is at stake. The severity of these sentences necessarily implies a more limited intended application. 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 obstruction 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


24 See, e.g., 148 Cong. Rec. S6734-02, S6767 (2002) (Senator Leahy stated that 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.”). 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 Section II-C, infra.

25 18 U.S.C. §§ 1505-1506, 1510, 1516-18 (2006) (With the exception of § 1505, “Obstruction of proceedings before departments, agencies, and committees,” which additionally includes a sentence of eight years for an offense “involving international or domestic terrorism,” § 1506, “Theft or alteration of record or process; false bail,” § 1510, “Obstruction of criminal investigations,” § 1516, “Obstruction of Federal audit,” § 1517, “Obstructing examination of financial institution,” and § 1518, “Obstruction of criminal investigations of health care offenses” require the offender to pay a fine or be imprisoned not more than five years, or both.).

26 18 U.S.C. §§ 1512, 1513, 1519 (2006) (Attempted murder or use of physical force in § 1512, “Tampering with a witness, victim, or an informant,” carries with it a 30-year sentence, while the threat of physical force is 20 years; § 1513, “Retaliating against a witness, victim, or an informant,” and § 1519, “ Destruction, alteration, or falsification of records in Federal investigations and bankruptcy,” also carry 20- to 30-year sentences.).

27 See, e.g., 21 U.S.C. § 841(b)(1)(A) (providing for higher sentence if “death or serious bodily injury results from the use of” a prohibited substance.); 18 U.S.C. § 2119(2) (increasing maximum penalty from 15 to 25 years if serious bodily injury occurs during a carjacking); 18 U.S.C. § 3553(a)(2)(A) (advising district courts to consider the seriousness of the offense in imposing the sentence). See also United States v. Stewart, 590 F.3d 93, 172 (2d Cir. 2009) (remarking that “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.”).
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.

**Provisions added by Sarbanes-Oxley**

Not only do the pre-existing 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.28

Sarbanes-Oxley added four provisions to the OOJ chapter: §1512(c)(1); § 1513(e); § 1519; and § 1520.29 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 person knowingly to take any action, with intent to retaliate, harmful to a person who provides such information concerning a federal offense.

First, as a threshold matter, the obstruction-of-justice provisions codified at §§ 1519 and 1520 were inserted into Title VII of the Act, which carried the short title “Corporate and Criminal Fraud Accountability.”31 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.”32 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 sections 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

---


32 Id. at 807.
to limit the provision’s reach to fraud crimes and perhaps even to the corporate-fraud context.\textsuperscript{33} Significantly, a title may limit the scope of an act, but it cannot broaden it.\textsuperscript{34} 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.\textsuperscript{35} Thus, even though the short titles of this 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,”\textsuperscript{36} whereas § 1512(c)(1) is limited to “official proceedings.”\textsuperscript{37} As relevant here § 1515 defines official proceeding as one before a judge or court of the United States, Congress, or a Federal Government agency which is authorized by law.\textsuperscript{38} And although §1512(f) states that “an official proceeding need not be pending or about to be instituted at the time of the offense”\textsuperscript{39} the Supreme Court and other courts have read an explicit foreseeability or nexus requirement into the implicit mens rea for §1512(c)(1) cases.\textsuperscript{40} 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.\textsuperscript{41}

\textit{Other OOF 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.\textsuperscript{42} Section 2232 provides that an individual shall not “knowingly destroy[, damage[, waste[, dispose of, transfer, or otherwise take any action, for the purpose of preventing or impairing the Government’s lawful authority to

\begin{itemize}
\item \textsuperscript{33} Norman J. Singer & J.D. Shambie Singer, 1A SUTHERLAND STATUTORY CONSTRUCTION § 18.7 (7th ed. June 2011) (hereinafter SUTHERLAND) (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). \textit{See also} United States v. Trans-Missouri Freight Ass’n 166 U.S. 290, 352-353 (1897) (stating “[w]hile 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.”).
\item \textsuperscript{34} Id.
\item \textsuperscript{35} Id.
\item \textsuperscript{37} 18 U.S.C. § 1512(c)(1) (2006).
\item \textsuperscript{38} 18 U.S.C. § 1515 (2006).
\item \textsuperscript{39} 18 U.S.C. § 1512(f).
\item \textsuperscript{40} \textit{See} Arthur Andersen LLP v. United States, 544 U.S. 696, 708 (2005); United States v. Matthews, 505 F.3d 698, 708 (7th Cir. 2007).
\item \textsuperscript{41} \textit{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).
\item \textsuperscript{42} 18 U.S.C. § 2232 (2006).
\end{itemize}
take such property into its custody . . .

Section 2232 differs from § 1512(c)(1) and the other OOOJ provisions in Chapter 73 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 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 OOOJ statutes and the post-Sarbanes-Oxley Chapter 73 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 OOOJ 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.

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 seems beyond the express and implied scope of the Act.

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. The canons of harmony and consistency discussed below, see Section II.B infra, fundamentally stand for the proposition that

---

43 Id.
44 Id.
45 In the case of overlapping statues, 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 that destroys contraband as the police are executing a search warrant certainly falls within the ambit of § 2232, but it does not satisfy the object element or official proceeding element of § 1512 (c)(1).
46 SUTHERLAND, supra, note 33, 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.”); Overstreet v. North Shore Corp., 318 U.S. 125, 128-29 (1943) (the court compares 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).
“[w]ritten law is the product of a more specific structure involving deliberate choice . . . [to] produce a general state of harmony within the system of enacted law.” And Congress is presumed to be aware of existing law and legislate with that in mind.

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. The obstruction 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 OOJ 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. 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.” It follows, then, that if § 1519 was intended to be the broadest of the Sarbanes-Oxley OOJ provisions and it uses facially broad terms that have been narrowly defined, then the remaining provisions, including § 1512(c)(1), must be 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 substantial governmental or court resources.” 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. 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.” And again, if § 1519 is the broadest of the Sarbanes-Oxley OOJ provisions, then the Guidelines’s definition limiting the scope of liability for interfering with investigations to only acts that prematurely or

47 SUTHERLAND, supra, note 33, at § 53:1 (further noting that “[l]egislation 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.”).
49 United States v. Munoz-Cerna, 47 F.3d 207, 210 (7th Cir. 1995) (noting that “although 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’Planagan, 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, 1259 (10th Cir. 2002) (“We interpret the Sentencing Guidelines as though they were a statute or court rule, with ordinary rules of statutory construction.”).
50 Compare § 1519 and § 2J1.2.
51 U.S. SENTENCING GUIDELINES MANUAL § 2J1.2 cmt. n.1 (2010)
52 See discussion, infra at Section II-C.
53 U.S. SENTENCING GUIDELINES MANUAL § 2J1.2 cmt. n.1 (2010).
54 U.S. SENTENCING GUIDELINES MANUAL § 2J1.2 cmt. n.1 (2010).
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.\textsuperscript{56} 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 OOI 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 Constrained Narrowly

\textit{Ejusdem generis}

The canons of construction also confirm the limited scope of § 1512(c)(1). Specifically, \textit{ejusdem generis} and the canon of harmonious interpretation counsel in favor of a narrower definition of “object” and “official proceeding.” \textit{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.”\textsuperscript{57} As the Supreme Court has recognized, it 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.”\textsuperscript{58}

In § 1512(c)(1), Congress enumerated “record” and “document” and followed those terms with the general residual phrase “other objects.” Based on \textit{ejusdem generis}, “other objects” must be limited by the definitions of the terms “record” and “document.” As discussed below, infra Section I.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.\textsuperscript{59} Given that history, Congress intended to give “document” and “record” meanings that would only ensnare corporate fraudsters. Black’s Law Dictionary defines “document” as “[s]omething tangible on which words, symbols, or marks are recorded.”\textsuperscript{60} The same dictionary defines “record” as a “documentary account of past events, usu. designed to memorialize those events.”\textsuperscript{61} Given these two definitions and the dictates of \textit{ejusdem generis}, the phrase “other objects” must be “similar in nature” to the terms “document” and “record.”\textsuperscript{62} 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

\textsuperscript{56} U.S. SENTENCING GUIDELINES MANUAL §§ 2J1.2(c), 2X3.1 (2010).
\textsuperscript{58} Arthur Andersen LLP v. United States, 544 U.S. 696, 703 (2005) (internal citations and quotations omitted).
\textsuperscript{60} BLACK’S LAW DICTIONARY 555 (9th ed. 2009).
\textsuperscript{61} BLACK’S LAW DICTIONARY 1387 (9th ed. 2009).
\textsuperscript{62} Circuit City Stores, 532 U.S. at 114-115.
two definitions include corporate “files,” “papers,” “diskettes,” “hard-drives,” or any other objects used to document or memorialize actions.

Admittedly, courts have interpreted § 1512(c)(1)’s “other object” as extending well beyond the corporate-fraud context. For example, in United States v. Matthews the Seventh Circuit applied § 1512(c)(1) to the destruction of a gun. 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. The investigation of the crime and subsequent cover-up included officers from the East St. Louis Police Department, the Bureau of Immigration and Enforcement (“ICE”), and the FBI. Throughout the 11-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.” Notably, the Matthews court never engaged in a statutory construction of § 1512(c)(1) and therefore never considered applying *ejusdem generis* to the enumerated list in the statute. Most recently, the Seventh Circuit purported to construct the language of § 1512(c)(1) in United States v. Johnson. But in its concluding statement, the court confuses the requirements of § 1512(c)(1) with § 1519, and thereby adding further confusion to these Sarbanes-Oxley provisions.

*Harmonious Interpretation*

Even if a court rejects a strict application of *ejusdem 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, which at a minimum require that § 1512(c)(1) be limited to fraud crimes as opposed to other types of crimes. As the Supreme Court has recognized “[i]t 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, such that a court must interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole.” And many courts recognize the “cardinal canon of statutory construction” that statutes “should be interpreted harmoniously with their dominant legislative purpose.” Applying those canons here shows that an unfettered interpretation of § 1512(c)(1) would be inconsistent with the other OOJ provisions, which themselves have inherent limits. In particular, an expansive formulation of §

---

63 See infra n.138.
64 United States v. Matthews, 505 F.3d 698 (7th Cir. 2007).
65 Id. at 701.
66 Id. at 703.
67 Id.
68 United States v. Johnson, slip op. 10-1762 at 12 (7th Cir. Aug. 11, 2011). See also discussion, infra at Section III-C.
69 Id. at 24 (holding that “[Lamb’s] knowledge of a government investigation is sufficient to sustain the jury’s conclusion that Lamb foresaw an official proceeding when she destroyed evidence.”)
71 United States v. Yang, 281 F.3d 534, 543 (6th Cir. 2002). 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).
72 See supra Section I.A.2.
1512(c)(1)’s “object” and “official proceeding” would swallow up § 1519, the statute that Congress intended to be the broader “catch-all” provision.73

Some commentators 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.74 These commentators rightfully point to the axiom that courts only use interpretative aids if the statutory language is unclear.75 But, these commentators ignore 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.76 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. In this case, 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 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.

**Rule of Lenity**

The Rule of Lenity casts further doubt on an expansive reading of § 1512(c)(1).77 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.”78 The same reasons that an expansive interpretation of § 1512(c)(1) leads to absurd results and likely fails as void for vagueness,79 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.80 Thus, the Rule of Lenity likewise counsels in favor of a narrow reading of § 1512(c)(1).

---

73 See infra n.120.
74 See, e.g., United States v. Johnson, slip op. 10-1762 at 17 (7th Cir. Aug. 11, 2011)
76 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) (citations omitted).
77 See Adamo Wrecking Co. v. United States, 434 U.S. 275, 285 (1978) (citing “familiar rule that, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.”) (internal citations and quotations omitted).
78 United States v. Thompson, 484 F.3d 877, 881 (7th Cir. 2007).
79 See Sections IV-B and IV-D. infra.
80 As discussed below, see Section IV-C. infra, 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.
C. Sarbanes-Oxley Legislative History

The Sarbanes-Oxley Act of 2002 rose from the ashes of Enron’s bankruptcy, which was only the first-revealed instance in a long line of systematic corporate abuse of the markets. 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. 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.”

As a result, Representative Oxley introduced a corporate accountability bill (H.R. 3763) into the House that passed by a vote of 334 to 90 on April 24, 2002. Senator Sarbanes proposed a similar series of provisions designed to beef up corporate reporting, impose criminal penalties, and aid audits and investigations of fraudulent behavior. Sarbanes’s bill passed the Senate with amendments on July 15, 2002, with a vote of 97-0. After reconciliation, the final conference bill was passed by overwhelming majorities in both houses: 423-3 in the House and 99-0 in the Senate.

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; (2) to aid in restoring public trust in our financial markets; (3) to better protect victims of fraud and

---

81 In re Enron Corp., 419 F.3d 115 (2d Cir. 2005).
82 Nance Lucas, An Interview with Senator Paul S. Sarbanes, J. LEADERSHIP & ORGANIZATIONAL STUDIES, June 22, 2004. (Arguing that “[b]y 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.”).
86 S. REP. NO. 107-205, at 2 (2002) (describing that the Act “address[es] the systemic and structural weaknesses affecting our capital markets which were revealed by repeated failure of audit effectiveness and corporate financial and broker-dealer responsibility in recent months and years.”).
89 S. REP. NO. 107-146 at 2 (2002) (Senate Judiciary Committee report describing the bill’s purpose was to “provide for criminal prosecution and enhanced penalties of persons who defraud investors in publicly traded securities or alter or destroy evidence in certain Federal investigations” (emphasis added).
90 Id. (stating that “[t]his 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 . . . .”).
corporate whistleblowers;\(^1\) (4) to give prosecutors tools to “prosecute those who commit securities fraud”\(^2\) by closing loopholes in existing fraud, obstruction-of-justice and securities law that had allowed these corporate fraudsters to escape liability;\(^3\) (5) to impose serious penalties on those who commit such fraud;\(^4\) and (6) to ensure that the widespread document destruction that occurred in the wake of the Enron scandal was not repeated.\(^5\)

Senator Sarbanes’s original bill did not contain the criminal provisions that were eventually added before the bill’s final adoption.\(^6\) Instead, the original bill was largely directed at the perceived failures of the accounting and auditing industry in ferreting out corporate fraud at companies such as Enron and WorldCom.\(^7\) 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.\(^8\) 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.”\(^9\) 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

---

\(^{1}\) 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 6 (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 quotations omitted)); id. (repeatedly referencing 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.”).

\(^{2}\) Id. at 2.

\(^{3}\) Id. at 6 (noting that “unlike 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 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 are is [sic] riddled with loopholes and burdensome proof requirements.”

\(^{4}\) Id. at 7 (noting that 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 12-18 (outlining new criminal penalties and sentencing enhancements).

\(^{5}\) Id. at 4 (noting that “[a]s 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)).

\(^{6}\) See S. REP. NO. 107-205 (2002).

\(^{7}\) Id.

\(^{8}\) See S. REP. NO. 107-146 (2002) (originally introduced as Senate bill 2010).

\(^{9}\) Id. at 11.
pension funds, if they defraud their investors, if they defraud the people of their own company.”

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 Commission inquiry. 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. 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 to the Act that added another group of criminal provisions. Among other effects, Senator Lott’s Amendment Number 4188 created a new obstruction of justice charge that was intended to “enact stronger laws against document shredding.” Commenting on the Lott Amendment, 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. The Lott Amendment was eventually adopted by the full Congress and is codified at 18 U.S.C. § 1512(c). 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.

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. The Act charged the PCAOB with conducting periodic inspections of audit work and drafting regulations for the public accounting industry. The Act also created new and stricter auditor independence standards that forbade auditors from providing certain consulting services to audit clients. Finally, the bill created new rules for corporations including new corporate governance standards and enhanced financial disclosure. The final version of the bill, known as the Sarbanes-Oxley Act, was signed into law in 2002. It consists of eleven titles, the most relevant of which are Title VIII, Corporate and Criminal Fraud Accountability, Title IX, White-Collar Crime Penalty Enhancements, and

101 Id. at S6537 (statement of Sen. Durbin).
104 Id. at S6545
105 Id. at S6546.
109 Id.
110 Id. at 771
111 Id. at 775 and 785.
112 38 Weekly Comp. Pres. Doc. 1286 (Aug. 5, 2002) (President noting that the “Act adopts tough new provisions to deter and punish corporate and accounting fraud and corruption, ensure justice for wrongdoers, and protect the interest of workers and shareholders.”).
Title XI, Corporate Fraud and Accountability.\textsuperscript{113} As discussed above, see supra Section I.A, four of those provisions impacted the obstruction-of-justice chapter of the U.S. Code.\textsuperscript{114}

The legislative history sheds light not only on its general intent 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.”\textsuperscript{115} The Judiciary Report further states 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.”\textsuperscript{116}

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.”\textsuperscript{117} 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.”\textsuperscript{118} 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.”\textsuperscript{119} 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 were designed to criminalize Andersen’s anticipatory document destruction.\textsuperscript{120}

In short, the words Congress chose in these provisions was designed to close the loopholes that white-collar defense lawyers routinely used to get their wealthy corporate clients

\begin{footnotes}
\item[114] 18 U.S.C. §§ 1512(c)(1), 1513(e), 1519, and 1520.
\item[116] Id. at 15 (emphasis added)
\item[117] Id. at 4 (emphasis added).
\item[118] Id. at 7 (citing United States v. Aguillar, 115 S.Ct 593 (1995)).
\item[119] Id.
\item[120] See id. at 27 (recognizing that “section 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.”)
\end{footnotes}
off the hook. As the legislative history shows, these provisions were never intended to be used as a prosecutorial fall-back 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.\(^{121}\) Congress was undoubtedly aware of the slow, circuitous, and often informal route that SEC investigations take, and 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.\(^{122}\) 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.\(^{123}\) The first stage is a “matter under inquiry” or an “MUI.”\(^{124}\) 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 occurred.\(^{125}\) At the conclusion of this first informal investigation, the SEC investigators next may decide seek a formal order of investigation or their inquiry may end altogether.\(^{126}\) Under a formal investigation, the SEC has the ability to issue subpoenas and administer oaths.\(^{127}\) At the end of the formal investigation, the next step is to recommend the initiation of an enforcement action.\(^{128}\) 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.\(^{129}\) 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.\(^{130}\) These preliminary investigatory stages can take several months, even years, 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.\(^{132}\)

\(^{122}\) SEC Enforcement Manual, §§ 2.2.1 and 2.2.2, Aug. 2, 2011.
\(^{123}\) JAMES D. COX, SECURITIES REGULATION CASES AND MATERIALS 800 (6th ed. 2009).
\(^{125}\) Peter J. Wallison, Rude Awakening at the SEC, American Enterprise Institute for Public Policy Research (May 1, 2006), http://www.aei.org/article/24268.
\(^{126}\) SEC Enforcement Manual, § 2.3.2, 3.2.6, Aug. 2, 2011.
\(^{127}\) Id. at §§ 2.3.3, 2.3.4.
\(^{128}\) Id. at § 2.5.
\(^{129}\) Id. at § 2.4. See also Christine Nelson et al., Disclosures of SEC Investigations Resulting in Wells Notices, SEC. LITIG. J. Summer 2009, at 19.
\(^{130}\) Id. at § 2.5.
\(^{131}\) Christine Nelson et al., Disclosures of SEC Investigations Resulting in Wells Notices, SEC. LITIG. J., Summer 2009, 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.”).
\(^{132}\) SEC Enforcement Manual, § 6, Aug. 2, 2011 (explaining the SEC’s position that cooperation between the agency and the accused is critical in advancing the mission of the agency).
Unlike the cooperative, collaborative process that inheres in nearly all SEC investigations and, indeed most other white-collar/corporate investigations, other criminal enterprises are investigated covertly and without the target’s knowledge. 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 weeks or even months after its initial inquiry. 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. 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, there are just a handful of reported decisions addressing § 1512(c)(1). 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. Of the eleven remaining cases, prosecutors

---

135 See Arthur Andersen v. United States, 544 U.S. 696, 701-02 (2005) (describing that Andersen had actual knowledge of an SEC investigation in September and October 2001, but the firm continued destroying documents until it was officially served with a subpoena on November 8, 2001).
136 See, e.g., United States v. Winbush, 580 F.3d 503, 505 (7th Cir. 2009) (police watched defendant sell crack to a confidential informant and brandish a gun; 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).
brought § 1512(c)(1) charges based on an expansive interpretation of “other object.” 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 upheld prosecutors’ decisions to extend the language of § 1512(c)(1) to drugs, to cases that preceded an official proceeding, and in one instance, to both in a garden-variety drug bust. As explained below, see infra Section III, 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.” But even the Johnson Court gave only short shrift to this issue, because it purportedly found no ambiguity in the term “other object.” Thus, Johnson did not perform any meaningful statutory analysis or construction, nor did the court consider the “object” element in conjunction with the provision’s legislative 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. With Johnson, that is precisely what happened. In its concluding remarks, the Johnson

546 F.3d 300 (4th Cir. 2008) (concealing documents related to bribery charges 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. White, 256 F. App’x 333 (11th Cir. 2007) (destroying an audio recording post-indictment); United States v. Castellar, 242 F. App’x 773 (2d Cir. 2007) (altering documents during an IRS investigation); United States v. Russell, 639 F. Supp. 2d 226 (D. Conn. 2007) (destroying a laptop computer during an investigation); 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 a FDA investigation).


139 See, e.g., United States v. Johnson, 237 F. App’x 575 (11th Cir. 2007).

140 See, e.g., United States v. Ramos, 537 F.3d 439, 447 (5th Cir. 2008) (charging and convicting officer-defendants with obstruction of justice for failure to report a police shooting although this conviction was later overturned by the Fifth Circuit).

141 United States v. Johnson, slip op. 10-1762 at 3-4 (7th Cir. Aug. 11, 2011).

142 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 n.138, supra.

143 Id. at 17.

144 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) (narrowly 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.”).
Court conflates the § 1512(c)(1) “official proceeding” element with the § 1519 investigation element.145

This section 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 section 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 cut a plea deal in exchange for testimony against her co-defendant.

A. Evolution of a § 1512 “official proceeding”

Section 1512(c)(1) requires the accused to have destroyed, concealed, or altered an object for the purpose of impairing that object’s use in an “official proceeding.”146 “Official proceeding” is briefly defined at § 1512(f), but that provision provides 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 § 1512.147 But 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.148 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),149 an obstruction-of-justice statute that also uses the phrase “official proceeding.”150 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).151 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.152 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 § 1519.153 The Second Circuit asserted that § 1512(c)(1) criminal liability attaches

---

145 Id. at 24.
148 See Section II-D, supra.
151 Arthur Andersen, 544 U.S. at 708.
152 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.”).
153 United States v. Gray, 642 F.3d 371, 376-77 (2d Cir. 2011) (comparing the formalities of an official proceeding with the informality of an investigation and noting Congressional intent in creating two statutes to address two different stages of a prosecution).
when the accused can foresee an official judicial proceeding, while § 1519 criminal liability attaches when the accused can foresee a mere investigation.\textsuperscript{154}

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 a former Army veteran with obstruction of justice for burning the body and clothes of his murder victim in addition to burning the murder weapon.\textsuperscript{155} This interpretation of “official proceeding” completely ignores the foreseeability requirement imposed by \textit{Arthur Andersen}. On the one hand, the defendant in \textit{Green} could obviously foresee an official proceeding related to the homicide he helped conduct. An accused murderer 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 murderer, burglar, or arsonist is always criminally liable for his underlying crime \textit{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 murders.

Prosecutors in the Western District of Texas also attempted to stretch the definition of “official proceeding” in \textit{United States v. Ramos}.\textsuperscript{156} 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 in violation of internal Border Patrol policy.\textsuperscript{157} 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.\textsuperscript{158} Although the Fifth Circuit ultimately reversed the § 1512(c)(1) conviction,\textsuperscript{159} 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, catchall phrase in the statute after specifically enumerating the terms “record” and “document.”\textsuperscript{160} 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.\textsuperscript{161} 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

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{154} \textit{Id.}
\item \textsuperscript{155} Indictment at 19, United States v. Green, No. 5:06 CR-19-R (W.D. Ky. 2006)
\item \textsuperscript{156} United States v. Ramos, 537 F.3d 439 (5th Cir. 2008).
\item \textsuperscript{157} \textit{Id.} at 442.
\item \textsuperscript{158} \textit{Id.} at 460-61.
\item \textsuperscript{159} \textit{Id.} at 462 (finding that “that § 1512 does not apply to routine agency investigations of employee misconduct”).
\item \textsuperscript{160} 18 U.S.C. § 1512(c)(1) (2006). \textit{See also}, Section II-B-1, \textit{supra}.
\item \textsuperscript{161} See Section III-A, \textit{supra}.
\end{itemize}
\end{footnotesize}
destroying or concealing firearms,\textsuperscript{162} an automobile,\textsuperscript{163} a murder victim’s body,\textsuperscript{164} tools,\textsuperscript{165} and a suitcase containing drugs, guns, and money.\textsuperscript{166}

The misuse of “official proceeding” and “other object” in § 1512(c)(1) is similar to the misuse of the honest services doctrine pre-\textit{Skilling}. There, successive courts continually expanded the types of conduct covered by the honest services statute until the Supreme Court was forced to intervene. 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.

\textbf{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 destroying trace amounts of cocaine base in violation of § 1512(c)(1).\textsuperscript{167} 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.\textsuperscript{168} The officers failed to bring a copy of the search warrant to the door, and Lamb refused entry to the officers.\textsuperscript{169} In the fifteen minutes that officers were at Johnson’s door but unable to gain entry, the government alleges that Lisa Lamb destroyed Johnson’s stash of cocaine base with the intent to impair its availability at an official proceeding related to Johnson’s drug conspiracy.\textsuperscript{170} Importantly, Lamb was never implicated in Johnson’s conspiracy nor did the police ever witness Lamb destroying any contraband.\textsuperscript{171}

Lisa Lamb’s prosecution raises both types of prosecutorial overreach. 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 \textit{Arthur Andersen} and \textit{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 \textit{Arthur Andersen} nexus requirement for an official proceeding, although it is a closer question whether Lamb’s alleged conduct might have violated § 1519. 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.

\textsuperscript{162} United States v. Matthews, 505 F.3d 698 (7th Cir. 2007).
\textsuperscript{163} United States v. Ortiz, 220 F. App’x 13 (2d Cir. 2007)
\textsuperscript{165} United States v. Cain, No. 05-CR-360A(Sr), 2007 WL 1385726 (W.D.N.Y. May 9, 2007)
\textsuperscript{166} United States v. Thompson, 237 F. App’x 575 (11th Cir. 2007)
\textsuperscript{167} United States v. Johnson, slip op. 10-1762, at 4 (7th Cir. Aug. 11, 2011). The author represented Lisa Lamb on her direct appeal to the Seventh Circuit.
\textsuperscript{168} \textit{Id.} at 3.
\textsuperscript{169} \textit{Id.} at 3-4.
\textsuperscript{170} Indictment at 3, United States v. Lamb, No. 08-CR-30217 (S.D. Ill. 2009).
\textsuperscript{171} Johnson, slip op. 10-1762, at 4 (the government originally charged Lamb as a co-conspirator with Scott Lee Johnson, but the government dropped those charges only days before trial).
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 on 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 purported to engage in a statutory construction of § 1512(c)(1) and it ultimately chose to broadly interpret § 1512(c)(1) for two reasons. First, the court reasoned that the phrase “record, document, and other object” is used in other portions of § 1512, and that those invocations predate Sarbanes-Oxley. Accordingly, Congress could not have intended for “other object” to be narrowly construed to fraud and corporate fraud. The Court specifically points to § 1512(a) and (b) as an example 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 the intent to—prevent the attendance or testimony of any person in an official proceeding.” This of course is in addition to the prohibition of the murder or attempted murder of a person “with the intent to—prevent the production of a record, document, or other object, in an official proceeding,” which is found in the very next subsection. In § 1512(b), Congress sought to prohibit witness intimidation for the purposes of withholding that testimony or a record, document, or other object from an official proceeding. 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.” Section 1512(b)(2)(A) when read with subsection A is instructive of Congressional intent. It suggests that Congress was worried specifically about records, documents, and other objects in subsection (A), but it was also concerned more generally with plain objects as seen in subsection (B). In other words, Congress intended for “other object” to be constrained by “record” and “document” in subsection (A), but “object” standing alone in subsection (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.

172 Id. at 13.
173 Id. at 15.
177 Id. at § 1512(b)(2)(B).
Second, the *Johnson* Court found no ambiguity in the term “other object,” and as such, it had no need to rely on *ejusdem generis*, statutory structure, or legislative history in its interpretation of § 1512(c)(1). If the *Johnson* Court is correct in finding no ambiguity, it has not done a good job of reasoning why Congress explicitly enumerated “record” and “document.” In other words, if “other object” includes the universe of potential objects, then Congress would have had no reason to specifically enumerate “record” and “document.” This clear, textual ambiguity should be enough for a Court to more fully analyze the meaning of § 1512(c)(1).

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 with distribution. Instead, they 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 alleged obstructive act.

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 afool 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 to satisfy the elements of the crime 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. Contravenes 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 and structure of the Sarbanes-Oxley Act both strongly favor a narrow construction of § 1512(c)(1). Likewise, other Sarbanes-Oxley provisions, other obstruction-of-justice provisions, and even the legislative history of § 1512(c)(1) all suggest that Congress could never have intended for prosecutors to use this statute outside of the fraud or corporate fraud context.

---

178 Johnson, slip op. at 17.
179 *See* Section II-B-2, supra.
180 *See* Section I-D, supra (describing 18 U.S.C. § 2232 as covering obstructive acts committed during a validly executed search warrant).
181 *See* Section II-A-1 and II-B-1, supra.
182 *See* Section II-B-2, supra.
183 *See* Section II-B-3, supra.
184 *See* Section II-B-4, supra.
185 *See* Section II-C, supra.
B. Absurd Results and Difficulties in Administration

It is axiomatic that statutes should not be construed in a way that renders absurd results.\textsuperscript{186} 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.\textsuperscript{187}

These absurdities inevitably lead to difficulties in administering the statute, another reason to avoid and 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 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.\textsuperscript{188} 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 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. As discussed above,\textsuperscript{189} Congress has passed a host of obstruction statutes that separately cover very specific conduct. The Sentencing Table (“Appendix A”) attached to the United States Sentencing Guidelines (“USSG”) identifies approximately 25 statutes as encompassing the criminal act of obstruction of justice.\textsuperscript{190} With only four exceptions—18 U.S.C. §§ 1033, 1512, 186 E.E.O.C. v. Commercial Office Products Co., 486 U.S. 107, 120-121 (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 citations and quotations omitted).
\(188\) See Section IV-D, infra.
\(189\) See Section II-A, supra.
\(190\) See 18 U.S.C. § 245(b) (obstructing civil rights and providing for maximum 1-year penalty); 18 U.S.C. § 505 (court forgeries and providing for maximum 5-year penalty); 18 U.S.C. § 551 (obstructing customs inspections and providing for maximum 2-year penalty); 18 U.S.C. § 665(c) (obstructing Job Training Act investigations and
1513, and 1519—the maximum statutory penalties range from 1-5 years.¹⁹¹ Sentencing for these obstruction crimes is handled in Chapter 2, Part J of the USSG.¹⁹² Under USSG § 2J1.2, a defendant’s base offense level starts at level 14 and is enhanced by special offense characteristics such as whether a certain subset of obstructive statutes was violated, whether the conduct involved injury or property damage, or whether the act involved domestic or international terrorism.¹⁹³ Furthermore, the guideline allows for additional enhancements if the conduct constituted a substantial interference with the administration of justice (+3) or if it involved the destruction or alteration of especially probative records (+2).¹⁹⁴ 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 . . . if the resulting offense level is greater than that determined above.”¹⁹⁵ 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 30.¹⁹⁶

When a defendant commits another type of crime but engages in obstructive conduct during the course of that crime or its investigation or prosecution, a different guideline 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

¹⁹¹ See fn. 190, supra. Maximum penalties for §§ 1033, 1512(a)-(c), 1513, and 1519 are much higher and range from 10 to 30 years.
¹⁹² U.S. SENTENCING GUIDELINES MANUAL § 2J1.2 (2010).
¹⁹³ U.S. SENTENCING GUIDELINES MANUAL § 2J1.2(b) (2010).
¹⁹⁴ U.S. SENTENCING GUIDELINES MANUAL § 2J1.2(b) (2010).
¹⁹⁵ U.S. SENTENCING GUIDELINES MANUAL § 2J1.2(c) (2010).
¹⁹⁶ U.S. SENTENCING GUIDELINES MANUAL § 2X3.1 (2010).
conviction.” Because § 3C1.1 applies to any underlying criminal conduct it obviously is used much more frequently than the obstruction-specific provisions in §2J1.2.

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. Thus, less serious crimes have lower base offense levels; as the seriousness of the crime rises, so does the base offense level. 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 simply tweaks the sentence slightly 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 summarized in the chart below best illustrates the point:

<table>
<thead>
<tr>
<th>SCENARIO</th>
<th>FACTS</th>
<th>STATUTORY MAXIMUM SENTENCE</th>
<th>TYPICAL SENTENCING RANGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Standard Obstruction of Justice Conviction Sentenced under §2J1.2</td>
<td>Bank employee contacts bank customer to inform him that the Internal Revenue Service is conducting a confidential audit of his account, which violates 18 U.S.C. § 1510.</td>
<td>5 years</td>
<td>15-21 months.</td>
</tr>
<tr>
<td>II: Egregious Obstruction of Justice Conviction with § 2X3.1 Cross-Reference</td>
<td>Defendant threatens to kill his brother’s wife if she testifies against the brother in his armed bank robbery trial where a gun was fired, seriously injuring a teller, and where the robbers absconded with $60,000, which violates 18 U.S.C. § 1512(b).</td>
<td>20 years</td>
<td>87-108 months.</td>
</tr>
</tbody>
</table>

197 U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (2010).
198 In 2010, for example, § 3C1.1 was applied in 1843 cases, or 2.4% of the criminal cases nationwide, whereas § 2J1.2 was applied in only 170 cases, or 0.2% of them.
201 All of these scenarios assume that the defendant has a criminal history category of I.
202 Base offense level of 14 yields a sentencing range of 15-21 months.
203 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 two 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
### III: 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

### 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

### 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

### 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

Even a cursory analysis of the chart 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 cross reference requires the court to subtract six levels, so the final offense level is 29 with a sentencing range of 87-108 months.

204 Base offense level of 14. Special offense characteristics: threatened injury (+8) and substantial interference with administration of justice (+3). Offense level 25 yields a sentencing range of 57-71 months.

205 Base offense level of 14 yields sentencing range of 15-21 months.

206 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. 17 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 six-level reduction from that amount, so the final base offense level is 28 with a sentencing range of 78-97 months.

207 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.
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 conduct in destroying drugs. 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 with Title 21, Chapter 13.

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.”

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, 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 prevents 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 (“USADA”) 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 technically violates the

---

208 As noted above, see note 46, supra, even adding a two-level upward adjustment for obstruction of justice under § 3C1.1 does not alter the defendant’s sentencing range.


211 See Section IV-B, supra (absurd results).
terms of § 1512(c)(1). Even though his doping, if discovered, would have resulted in assorted sanctions by the Agency, none of them included prison time.\footnote{212}{See http://www.usada.org/athletes-adrv/ (identifying sanctions for committing an anti-doping rule violation, including disqualification from events, forfeiture of medals or prizes, ineligibility periods, public announcements of the athlete’s identity).}

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.\footnote{213}{Kolender v. Lawson, 461 U.S. 352, 357-362 (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.”).} 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.”\footnote{214}{id. (internal citations omitted); 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.”).} 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.\footnote{215}{United States v. Johnson, slip op. 10-1762 at 12 (7th Cir. Aug. 11, 2011).} 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.

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.”\footnote{216}{Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).} As such, courts have repeatedly cautioned against unwarranted judicial legislating,\footnote{217}{Batchelder, 442 U.S. 114, 121-22 (1979) (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.”); 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. Nofziger,} although the
Supreme Court in particular has not been the model of clarity in this regard. 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, but equal branches of government. Accordingly, courts must be careful to confine their Constitutional role to interpreting the law, instead of creating it. 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 other words, a loose interpretation of “other object” and “official proceeding” overrides the express will of Congress; a separate, but co-equal branch of government.

In the same vein, executive legislating is as offensive to the Constitution’s separation of powers principle as judicial legislating. Notably, courts have provided better guidance in

878 F.2d 442, 455-456 (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) (stating 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.”).

See Brzonkala v. Virginia Polytechnic Institute and State University, 169 F.3d 820, 890 (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 C.A.L. REV. 1441, 1461-75 (2004) (defining the various permutations of judicial activism and judicial legislating).

Marbury v. Madison, 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).
prohibiting prosecutors from unilaterally stretching a statute beyond what Congress provided. As has been demonstrated throughout this article, the government, in cases like United States v. Lamb, has stretched § 1512(c)(1) beyond all practical limits and certainly beyond the plain language and meaning of the text. Section 1512(c)(1) was never designed to ensnare the garden-variety drug offender.

CONCLUSION

Nearly ten years after Sarbanes-Oxley was enacted scholars and investors have and will 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, 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

---

220 See, e.g., United States v. Thornton I, 539 F.3d 741, 747 (7th Cir.) (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.) (rejecting prosecution’s invitation to extend 18 U.S.C. § 2114(a) to cover robberies of federal officials who hold no money); United States v. Lamb, No. 10-2230 (7th Cir. appealed May 18, 2010) (stretching 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. Jones, 471 F.3d 478, 482 (3d Cir. 2006) (reversing health-care fraud conviction and finding that the “Government has stretched the statute to cover activity beyond its plain words.”); United States v. Myr Group, 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. Cuellar, 553 U.S. 550 (2008) (reversing money laundering conviction on the grounds that prosecution stretched the meaning of the “designed to conceal” element); United States v. Pamieri, 21 F.3d 1265, 1277 (3d Cir. 1994) (Cowen, J. dissenting), vacated, 513 U.S. 957 (1994) (relying on legislative history and statutory structure in suggesting that the prosecution wrongly ignored the gun collector exception inherent in the Gun Control Act of 1968); United States v. Hunt, 456 F.3d 1255, 1259 (10th Cir. 2006) (reversing 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. Errol D., 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 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. Doe, 878 F.2d 1546, 1548 (1st Cir. 1989) (reversing conviction because the government charged the wrong statute and the government offered insufficient evidence to convict on the other charges).


222 A Price Worth Paying, The Economist, May 19, 2005, at70 (quoting a study that suggests the aggregate cost to investors from the Sarbanes-Oxley Act is $1.4 trillion).
can expect prosecutors far-and-wide to continue to use Sarbanes-Oxley as an all-purpose weapon against all types of lawbreakers.

Certainly, no one could take issue with the government’s use of § 1512(c)(1) if Congress firmly intended to create this broad prosecutorial power. But, the text, structure, other obstruction-of-justice provisions, legislative history, and the constitutional questions raised by this expansion, all suggest that Congress intended only to punish corporate wrongdoers. With the Seventh Circuit now committed to a § 1512(c)(1) expansion, the government will continue to misuse this provision in the same way it misused the honest-services statute. One can only hope that it does not take the Supreme Court seventy years\(^\text{223}\) to invalidate § 1512(c)(1) convictions beyond fraud and corporate fraud.

\(^{223}\)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 (1941)).