8. OBSTRUCTION OF JUSTICE

Nearly every case of corporate crime includes the potential for obstruction of justice charges because (1) the federal statutes cover a very wide range of conduct; and (2) there is a near universal human impulse to avoid punishment, which almost always yields (in spite of the best efforts of skilled counsel!) some lying and covering up during the investigative process. Prosecutors indeed bring such charges in many corporate crime cases, for reasons we will discuss. The statutory scheme is, unfortunately, convoluted and has created a host of interpretive issues for the federal courts, especially on questions of mens rea.

As in other areas of the corporate crime field, however, the line-drawing problems do not come only from statutory drafting. It is once again hard for the law to find crisp distinctions—in this instance between undesirable conduct that perverts legal process and regular adversary behavior. Notice how each case in this chapter deals in some way with that basic line-drawing problem.

A. Selected Federal Obstruction of Justice Statutes

Section 1503, successor to the first federal obstruction law, includes the famous "omnibus" clause (in bold below) that has long been the go-to provision for prosecuting obstruction in federal court. But § 1503 has some limitations.

Section 1505 is § 1503's counterpart for agency and congressional proceedings. (And thus has similar limitations.)

Section 1512 is for problems of "witness tampering" and covers a more specific series of behaviors. But notice how § 1512's coverage goes well beyond witness tampering and includes several things that §§ 1503 and 1505 would not cover. Pay careful attention to the definitional provisions in § 1515 that apply to § 1512.

Finally, § 1519 is an extremely broad anti-evidence destruction statute, enacted in the wake of the Enron scandal.

As with the FCPA statutes, it pays to make a summary chart for these obstruction statutes. They give prosecutors a menu to choose from, and often more than one may apply in a particular case. The statutes differ principally on these dimensions: (1) the conduct that they cover (e.g., document destruction only or also false statements?); (2) mens rea (e.g., knowledge of exactly what and/or intent to do precisely what are required for conviction?); and (3) temporal or jurisdictional application (e.g., does the statute apply only after judicial proceedings have commenced or also during an investigation?).

Particularly critical terms in the statutes are highlighted in bold.

18 U.S.C. § 1503. Influencing or injuring officer or juror generally.

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate

judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or **corruptly** or by threats or force, or by any threatening letter or communication, **influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice**, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(b) The punishment for an offense under this section is—

(1) in the case of a killing, the punishment provided in sections 1111 and 1112;

(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and

(3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.

18 U.S.C. § 1505. Obstruction of proceedings before departments, agencies, and committees.

. . . Whoever **corruptly**, or by threats or force, or by any threatening letter or communication **influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States**, or the due and proper exercise of the power of inquiry under which any **inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress**—Shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

18 U.S.C. § 1512. Tampering with a witness, victim, or an informant.

(a) (1) Whoever kills or attempts to kill another person, with intent to—

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to—

(A) influence, delay, or prevent the testimony of any person in an official proceeding;

(B) cause or induce any person to—

(i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;

(iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(iv) be absent from an official proceeding to which that person has been summoned by legal process; or

(C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(3) The punishment for an offense under this subsection is—

(A) in the case of a killing, the punishment provided in sections 1111 and 1112;

(B) in the case of—

(i) an attempt to murder; or

(ii) the use or attempted use of physical force against any person;

imprisonment for not more than 30 years; and

(C) in the case of the threat of use of physical force against any person, imprisonment for not more than 20 years.

(b) Whoever knowingly uses intimidation, threatens, or **corruptly persuades** another person, or attempts to do so, or **engages in misleading conduct toward another person**, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation supervised release, parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than 20 years, or both.

(c) Whoever **corruptly**—

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) **otherwise obstructs, influences, or impedes any official proceeding**, **or attempts to do so,**

shall be fined under this title or imprisoned not more than 20 years, or both.

(d) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation supervised release, parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined under this title or imprisoned not more than 3 years, or both.

(e) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(f) For the purposes of this section—

(1) **an official proceeding need not be pending or about to be instituted** at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(g) In a prosecution for an offense under this section, **no state of mind need be proved with respect to the circumstance**—

(1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant. . . .

18 U.S.C. § 1515. Definitions for certain provisions; general provision.

(a) As used in sections 1512 and 1513 of this title and in this section—

(1) the term **"official proceeding"** means—

(A) a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury;

(B) a proceeding before the Congress;

(C) a proceeding before a Federal Government agency which is authorized by law; or

(D) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce;

(2) the term "physical force" means physical action against another, and includes confinement;

(3) the term "misleading conduct" means—

(A) knowingly making a false statement;

(B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement;

(C) with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity;

(D) with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or

(E) knowingly using a trick, scheme, or device with intent to mislead;

(4) the term "law enforcement officer" means an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant—

(A) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or

(B) serving as a probation or pretrial services officer under this title;

(5) the term "bodily injury" means—

(A) a cut, abrasion, bruise, burn, or disfigurement;

(B) physical pain;

(C) illness;

(D) impairment of the function of a bodily member, organ, or mental faculty; or

(E) any other injury to the body, no matter how temporary; and

(6) the term "corruptly persuades" does not include conduct which would be misleading conduct but for a lack of a state of mind.

(b) **As used in section 1505, the term "corruptly" means** acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.

(c) This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.

18 U.S.C. § 1519. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with 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, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both. . . .

When considering a particular matter or problem, *never* make the mistake of relying solely on a statutory summary as a substitute for rereading the applicable statutory language. That said, to summarize, on the basis of both the statutory text and some of the interpretive decisions included in this chapter, see the following chart:

Statute	Conduct (Actus Reus)	Mens Rea	Proceedings Covered	Temporal Limitations
§ 1503 **§ 1505**	Any obstructive effort ("omnibus" clauses).	"Corruptly" (see case law, including "nexus" requirement).	Judicial, including grand jury, under 1503. Congressional or administrative if "official" (formal), under 1505.	Proceeding must be pending, which means formally instituted.
§ 1512(a) **§ 1512(b)**	Various forms of violent and non-violent witness tampering (with varying penalty levels).	Intent to obstruct government. If the witness tampering involves only "persuasion," actor must also be "conscious of wrongdoing."	"Official" (formal) federal proceeding, in any of the three branches of government.	Anticipatory obstruction covered. Proceeding need not be pending or about to be instituted, but there must be nexus to specific potential proceeding.
§ 1512(c)	Any obstruction ("impede").	"Corruptly" (see case law, including "nexus" requirement).	"Official" (formal) federal proceeding, in any of the three branches of government.	Anticipatory obstruction covered. Proceeding need not be pending or about to be instituted, but there must be nexus to specific potential proceeding.
§ 1519	All tampering with regard to any evidence of white collar crime.	Knowingly (as to the tampering) plus intent to impede the government.	Any "matter" (including informal investigations) within the jurisdiction of the federal government.	None on the face of the statute, but courts likely will say some "nexus" to a specific actual or potential investigation is required.

B. Elements and Examples: Section 1503 and the "Omnibus" Clause

The following case is the major Supreme Court decision on § 1503. The "nexus" idea discussed here is critical to the concept of obstruction and potentially to the interpretation of all the federal obstruction statutes.

UNITED STATES v. AGUILAR, 515 U.S. 593 (1995)

Chief Justice REHNQUIST delivered the opinion of the Court.

A jury convicted United States District Judge Robert Aguilar of one count of illegally disclosing a wiretap in violation of 18 U.S.C. § 2232(c), and of one count of endeavoring to obstruct the due administration of justice in violation of § 1503. . . . We granted certiorari to resolve a conflict among the Federal Circuits over whether § 1503 punishes false statements made to potential grand jury witnesses. . . .

Many facts remain disputed by the parties. Both parties appear to agree, however, that a motion for postconviction relief filed by one Michael Rudy Tham represents the starting point from which events bearing on this case unfolded. Tham was an officer of the International Brotherhood of Teamsters, and was convicted of embezzling funds from the local affiliate of that organization. In July 1987, he filed a motion under 28 U.S.C. § 2255 to have his conviction set aside. The motion was assigned to Judge Stanley Weigel. Tham, seeking to enhance the odds that his petition would be granted, asked Edward Solomon and Abraham Chalupowitz, a.k.a. Abe Chapman, to assist him by capitalizing on their respective acquaintances with another judge in the Northern District of California, respondent Aguilar. Respondent knew Chapman as a distant relation by marriage and knew Solomon from law school. Solomon and Chapman met with respondent to discuss Tham's case, as a result of which respondent spoke with Judge Weigel about the matter.

Independent of the embezzlement conviction, the Federal Bureau of Investigation (FBI) identified Tham as a suspect in an investigation of labor racketeering. On April 20, 1987, the FBI applied for authorization to install a wiretap on Tham's business phones. Chapman appeared on the application as a potential interceptee. . . . The 30-day wiretap expired by law, . . . but Chief Judge Peckham maintained the secrecy of the wiretap under § 2518(8)(d) after a showing of good cause. During the course of the racketeering investigation, the FBI learned of the meetings between Chapman and respondent. The FBI informed Chief Judge Peckham, who, concerned with appearances of impropriety, advised respondent in August 1987 that Chapman might be connected with criminal elements because Chapman's name had appeared on a wiretap authorization.

Five months after respondent learned that Chapman had been named in a wiretap authorization, he noticed a man observing his home during a visit by Chapman. He alerted his nephew to this fact and conveyed the message (with an intent that his nephew relay the information to Chapman) that Chapman's phone was being wiretapped. . . .

Two months after the disclosure to his nephew, a grand jury began to investigate an alleged conspiracy to influence the outcome of Tham's habeas case. Two FBI agents questioned respondent. During the interview, respondent lied about his participation in the Tham case and his knowledge of the wiretap. The grand jury returned an indictment; a jury convicted Aguilar of one count of disclosing a wiretap, 18 U.S.C. § 2232(c),

and one count of endeavoring to obstruct the due administration of justice, § 1503. . . .

[T]he "Omnibus Clause" serves as a catchall, prohibiting persons from endeavoring to influence, obstruct, or impede the due administration of justice. The latter clause, it can be seen, is far more general in scope than the earlier clauses of the statute. Respondent was charged with a violation of the Omnibus Clause, to wit: with "corruptly endeavor[ing] to influence, obstruct, and impede the . . . grand jury investigation."

The first case from this Court construing the predecessor statute to § 1503 was *Pettibone v. United States,* 148 U.S. 197 (1893). There we held that "a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court." The Court reasoned that a person lacking knowledge of a pending proceeding necessarily lacked the evil intent to obstruct… The action taken by the accused must be with an intent to influence judicial or grand jury proceedings; it is not enough that there be an intent to influence some ancillary proceeding, such as an investigation independent of the court's or grand jury's authority. *United States v. Brown,* 688 F.2d 596, 598 (CA9 1982) (citing cases). Some courts have phrased this showing as a "nexus" requirement—that the act must have a relationship in time, causation, or logic with the judicial proceedings. *United States v. Wood,* 6 F.3d 692 (CA10 1993). In other words, the endeavor must have the "'natural and probable effect'" of interfering with the due administration of justice. *Wood, supra,* at 695. This is not to say that the defendant's actions need be successful; an "endeavor" suffices. *United States v. Russell,* 255 U.S. 138 (1921). But as in *Pettibone,* if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct.

Although respondent urges various broader grounds for affirmance, we find it unnecessary to address them because we think the "nexus" requirement developed in the decisions of the Courts of Appeals is a correct construction of § 1503. We have traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress, *Dowling v. United States,* 473 U.S. 207 (1985), 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," *McBoyle v. United States,* 283 U.S. 25 (1931). We do not believe that uttering false statements to an investigating agent—and that seems to be all that was proved here—who might or might not testify before a grand jury is sufficient to make out a violation of the catchall provision of § 1503.

The Government did not show here that the agents acted as an arm of the grand jury, or indeed that the grand jury had even summoned the testimony of these particular agents. The Government argues that respondent "understood that his false statements would be provided to the grand jury" and that he made the statements with the intent to thwart the grand jury investigation and not just the FBI investigation. . . .

[T]he evidence goes no further than showing that respondent testified falsely to an investigating agent. Such conduct, we believe, falls on the other side of the statutory line from that of one who delivers false documents or testimony to the grand jury itself. Conduct of the latter sort all but assures that the grand jury will consider the material in its deliberations. But what use will be made of false testimony given to an investigating agent who has not been subpoenaed or otherwise directed to appear before the grand jury is far more speculative.

We think it cannot be said to have the "natural and probable effect" of interfering with the due administration of justice.

Justice SCALIA criticizes our treatment of the statutory language for reading the word "endeavor" out of it, inasmuch as it excludes defendants who have an evil purpose but use means that would "only unnaturally and improbably be successful." This criticism is unwarranted. Our reading of the statute gives the term "endeavor" a useful function to fulfill: It makes conduct punishable where the defendant acts with an intent to obstruct justice, and in a manner that is likely to obstruct justice, but is foiled in some way. Were a defendant with the requisite intent to lie to a subpoenaed witness who is ultimately not called to testify, or who testifies but does not transmit the defendant's version of the story, the defendant has endeavored to obstruct, but has not actually obstructed, justice. Under our approach, a jury could find such defendant guilty.

Justice SCALIA also apparently believes that *any* act, done with the intent to "obstruct ... the due administration of justice," is sufficient to impose criminal liability. Under the dissent's theory, a man could be found guilty under § 1503 if he knew of a pending investigation and lied to his wife about his whereabouts at the time of the crime, thinking that an FBI agent might decide to interview her and that she might in turn be influenced in her statement to the agent by her husband's false account of his whereabouts. The intent to obstruct justice is indeed present, but the man's culpability is a good deal less clear from the statute than we usually require in order to impose criminal liability. . . .

The following case involves a federal tax obstruction statute, 26 U.S.C. § 7212. However, its discussion of the meaning of the phrase "due administration of justice" is relevant to our understanding of §§ 1503 and 1505.

MARINELLO v. UNITED STATES, 138 S. Ct. 1101 (2018)

BREYER, J.:

A clause in § 7212(a) of the Internal Revenue Code makes it a felony "corruptly or by force" to "endeavo[r] to obstruct or imped[e] the due administration of this title." 26 U.S.C. § 7212(a). The question here concerns the breadth of that statutory phrase. Does it cover virtually all governmental efforts to collect taxes? Or does it have a narrower scope? In our view, "due administration of [the Tax Code]" does not cover routine administrative procedures that are near-universally applied to all taxpayers, such as the ordinary processing of income tax returns. Rather, the clause as a whole refers to specific interference with targeted governmental tax-related proceedings, such as a particular investigation or audit.

The Internal Revenue Code provision at issue, § 7212(a), has two substantive clauses. The first clause, which we shall call the "Officer Clause," forbids

> "corruptly or by force or threats of force (including any threatening letter or communication) endeavor[ing] to intimidate or impede any *officer or employee* of the United States acting in an official capacity under [the Internal Revenue Code]." *Ibid.* (emphasis added).

The second clause, which we shall call the "Omnibus Clause," forbids

> "corruptly or by force or threats of force (including any threatening letter or communication) obstruct[ing] or imped[ing], or endeavor[ing] to obstruct or impede, *the due administration* of [the Internal Revenue Code]." *Ibid.* (emphasis added). . . .

Between 2004 and 2009, the Internal Revenue Service (IRS) opened, then closed, then reopened an investigation into the tax activities of Carlo Marinello, the petitioner here. In 2012 the Government indicted Marinello, charging him with violations of several criminal tax statutes including the Omnibus Clause. In respect to the Omnibus Clause the Government claimed that Marinello had engaged in at least one of eight different specified activities, including "failing to maintain corporate books and records," "failing to provide" his tax accountant "with complete and accurate" tax "information," "destroying . . . business records," "hiding income," and "paying employees . . . with cash." 839 F.3d 209, 213 (C.A.2 2016).

Before the jury retired to consider the charges, the judge instructed it that, to convict Marinello of violating the Omnibus Clause, it must find unanimously that he engaged in at least one of the eight practices just mentioned, that the jurors need not agree on which one, and that he did so "corruptly," meaning "with the intent to secure an unlawful advantage or benefit, either for [himself] or for another." The judge, however, did not instruct the jury that it must find that Marinello knew he was under investigation and intended corruptly to interfere with that investigation. The jury subsequently convicted Marinello on all counts. . . .

As to Congress' intent, the literal language of the statute is neutral. The statutory words "obstruct or impede" are broad. They can refer to anything that "block[s]," "make[s] difficult," or "hinder[s]." Black's Law Dictionary 1246 (10th ed. 2014) (obstruct); Webster's New International Dictionary (Webster's) 1248 (2d ed. 1954) (impede); *id.,* at 1682 (obstruct); accord, 5 Oxford English Dictionary 80 (1933) (impede); 7 *id.,* at 36 (obstruct). But the verbs "obstruct" and "impede" suggest an object—the taxpayer must hinder a particular person or thing. Here, the object is the "due administration of this title." The word "administration" can be read literally to refer to every "[a]ct or process of administering" including every act of "managing" or "conduct[ing]" any "office," or "performing the executive duties of" any "institution, business, or the like." Webster's 34. But the whole phrase—the due administration of the Tax Code—is best viewed, like the due administration of justice, as referring to only some of those acts or to some separable parts of an institution or business. *Cf. Aguilar, supra,* at 600–601, 115 S. Ct. 2357 (concluding false statements made to an investigating agent, rather than a grand jury, do not support a conviction for obstruction of justice).

Here statutory context confirms that the text refers to specific, targeted acts of administration. The Omnibus Clause appears in the middle of a statutory sentence that refers specifically to efforts to "intimidate or impede *any officer or employee of the United States* acting in an official capacity." 26 U.S.C. § 7212(a) (emphasis added). The first part of the sentence also refers to "force or threats of force," which the statute elsewhere defines as "threats of bodily harm to the *officer or employee of the United States or to a member of his family*." *Ibid.* (emphasis added). The following subsection refers to the "forcibl[e] rescu[e]" of "any *property* after it shall have been seized under" the Internal Revenue Code. § 7212(b) (emphasis added). Subsections (a) and (b) thus refer to corrupt or forceful actions taken against individual identifiable persons or property. And, in

that context the Omnibus Clause logically serves as a "catchall" in respect to the obstructive conduct the subsection sets forth, not as a "catchall" for every violation that interferes with what the Government describes as the "continuous, ubiquitous, and universally known" administration of the Internal Revenue Code. . . .

A broad interpretation would also risk the lack of fair warning and related kinds of unfairness that led this Court in *Aguilar* to "exercise" interpretive "restraint." *See* 515 U.S., at 600, 115 S. Ct. 2357; *see also Yates, supra,* at ——— – ———, 135 S. Ct., at 1087–1088; *Arthur Andersen LLP v. United States,* 544 U.S. 696, 703–704, 125 S. Ct. 2129, 161 L. Ed. 2d 1008 (2005). Interpreted broadly, the provision could apply to a person who pays a babysitter $41 per week in cash without withholding taxes, *see* 26 C.F.R. § 31.3102–1(a)(2017); IRS, Publication 926, pp. 5–6 (2018), leaves a large cash tip in a restaurant, fails to keep donation receipts from every charity to which he or she contributes, or fails to provide every record to an accountant. Such an individual may sometimes believe that, in doing so, he is running the risk of having violated an IRS rule, but we sincerely doubt he would believe he is facing a potential felony prosecution for tax obstruction. Had Congress intended that outcome, it would have spoken with more clarity than it did in § 7212(a).

The Government argues that the need to show the defendant's obstructive conduct was done "corruptly" will cure any overbreadth problem. But we do not see how. The Government asserts that "corruptly" means acting with "the specific intent to obtain an unlawful advantage" for the defendant or another. Yet, practically speaking, we struggle to imagine a scenario where a taxpayer would "willfully" violate the Tax Code (the *mens rea* requirement of various tax crimes, including misdemeanors, *see, e.g.,* 26 U.S.C. §§ 7203, 7204, 7207) without intending someone to obtain an unlawful advantage. *See Cheek v. United States,* 498 U.S. 192, 201, 111 S. Ct. 604, 112 L. Ed. 2d 617 (1991) ("Willfulness . . . requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty") A taxpayer may know with a fair degree of certainty that her babysitter will not declare a cash payment as income—and, if so, a jury could readily find that the taxpayer acted to obtain an unlawful benefit for another. For the same reason, we find unconvincing the dissent's argument that the distinction between "willfully" and "corruptly"—at least as defined by the Government—reflects any meaningful difference in culpability. . . .

In sum, we follow the approach we have taken in similar cases in interpreting § 7212(a)'s Omnibus Clause. To be sure, the language and history of the provision at issue here differ somewhat from that of other obstruction provisions we have considered in the past. *See Aguilar, supra* (interpreting a statute prohibiting the obstruction of "the due administration of justice"); *Arthur Andersen, supra* (interpreting a statute prohibiting the destruction of an object with intent to impair its integrity or availability for use in an official proceeding); *Yates, supra* (interpreting a statute prohibiting the destruction, concealment, or covering up of any "record, document, or tangible object with the intent to" obstruct the "investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States"). The Government and the dissent urge us to ignore these precedents because of those differences. The dissent points out, for example, that the predecessor to the obstruction statute we interpreted in *Aguilar,* 18 U.S.C. § 1503, prohibited influencing, intimidating, or impeding "any witness or officer in any court of the United States" or endeavoring "to obstruct or imped[e] the due administration of justice *therein*." *Pettibone v. United States,* 148 U.S. 197, 202, 13 S. Ct. 542, 37 L. Ed. 419 (1893) (citing Rev. Stat. § 5399; emphasis added); *see*

post, at 1115–16. But Congress subsequently deleted the word "therein," leaving only a broadly worded prohibition against obstruction of "the due administration of justice." Act of June 25, 1948, § 1503, 62 Stat. 769–770. Congress then used that same amended formulation when it enacted § 7212, prohibiting the "obstruction of the due administration" of the Tax Code. Internal Revenue Code of 1954, 68A Stat. 855. Given this similarity, it is helpful to consider how we have interpreted § 1503 and other obstruction statutes in considering § 7212. The language of some and the underlying principles of all these cases are similar. We consequently find these precedents—though not controlling—highly instructive for use as a guide toward a proper resolution of the issue now before us. *See Smith v. City of Jackson,* 544 U.S. 228, 233, 125 S. Ct. 1536, 161 L. Ed. 2d 410 (2005).

We conclude that, to secure a conviction under the Omnibus Clause, the Government must show (among other things) that there is a "nexus" between the defendant's conduct and a particular administrative proceeding, such as an investigation, an audit, or other targeted administrative action. That nexus requires a "relationship in time, causation, or logic with the [administrative] proceeding." *Aguilar,* 515 U.S., at 599, 115 S. Ct. 2357 (citing *Wood,* 6 F.3d, at 696). By "particular administrative proceeding" we do not mean every act carried out by IRS employees in the course of their "continuous, ubiquitous, and universally known" administration of the Tax Code. While we need not here exhaustively itemize the types of administrative conduct that fall within the scope of the statute, that conduct does not include routine, day-to-day work carried out in the ordinary course by the IRS, such as the review of tax returns. The Government contends the processing of tax returns is part of the administration of the Internal Revenue Code and any corrupt effort to interfere with that task can therefore serve as the basis of an obstruction conviction. But the same could have been said of the defendant's effort to mislead the investigating agent in *Aguilar.* The agent's investigation was, at least in some broad sense, a part of the administration of justice. But we nevertheless held the defendant's conduct did not support an obstruction charge. 515 U.S., at 600, 115 S. Ct. 2357. In light of our decision in *Aguilar,* we find it appropriate to construe § 7212's Omnibus Clause more narrowly than the Government proposes. Just because a taxpayer knows that the IRS will review her tax return every year does not transform every violation of the Tax Code into an obstruction charge.

In addition to satisfying this nexus requirement, the Government must show that the proceeding was pending at the time the defendant engaged in the obstructive conduct or, at the least, was then reasonably foreseeable by the defendant. *See Arthur Andersen,* 544 U.S., at 703, 707–08, 125 S. Ct. 2129 (requiring the Government to prove a proceeding was foreseeable in order to convict a defendant for persuading others to shred documents to prevent their "use in an official proceeding"). It is not enough for the Government to claim that the defendant knew the IRS may catch on to his unlawful scheme eventually. To use a maritime analogy, the proceeding must at least be in the offing.

The following case illustrates the outer limits of the kind of conduct that could be prosecuted under § 1503's "omnibus" clause. As you read it, think about the potential lines between obstruction and regular litigation, and the role of lawyers in obstruction cases.

UNITED STATES v. CUETO, 151 F.3d 620 (7th Cir. 1998)

BAUER, Circuit Judge.

Thomas Venezia owned B & H Vending/Ace Music Corporation ("B & H"), a vending and amusement business, and operated an illegal video gambling business through a pattern of racketeering activities and illegal gambling payouts, in violation of state and federal anti-gambling and racketeering laws. Venezia hired Amiel Cueto, an attorney, to represent him as well as to defend the tavern owners associated with B & H in the event of any arrests and/or criminal charges for their participation in the illegal gambling operation. In March of 1995, Venezia and B & H were indicted on federal racketeering charges, in addition to other related charges including illegal gambling. Throughout the investigation and prior to Venezia's indictment, Cueto served as Venezia's lawyer and advisor. Cueto was not Venezia's attorney of record during the trial; nonetheless, the record indicates that Venezia continued to rely on Cueto's advice throughout the prosecution of the racketeering case.

On December 2, 1995, Venezia and B & H were convicted of racketeering, illegal gambling, and conspiracy arising out of the operation of the illegal gambling business. *United States v. B & H Vending/Ace Music Corp. & Thomas Venezia, et al.*, No. 95–30024. Seven months later, another federal grand jury returned a second indictment naming Cueto, Venezia, and Robert Romanik, a local public official and investigator who worked for Cueto and Venezia. They were charged with, *inter alia*: (1) conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and (2) obstruction of justice, in violation of the omnibus clause of 18 U.S.C. § 1503, for their conduct throughout the investigation of Venezia and his illegal gambling operation and the indictment and prosecution of the racketeering case. This second indictment is the impetus for the current appeal.

To understand the context of the instant indictment, convictions, and appeal, we examine the nature and scope of Cueto's relationship with Venezia, his association with the illegal gambling operation, and his involvement in the investigation, indictment, and prosecution of Venezia, the illegal gambling operation, and the racketeering enterprise. In 1987, Venezia purchased a vending and amusement business, later known as B & H, which operated an illegal video gambling business for about eight years. B & H supplied video poker games to local bars in the metropolitan area of East St. Louis, Illinois, including a Veterans of Foreign Wars Post ("VFW") on Scott Air Force Base, and the tavern owners agreed to make illegal gambling payouts to its customers. State agents believed the video games were being used for illegal gambling purposes, and beginning in 1992, the Illinois Liquor Control Commission ("ILCC") and the State Police initiated a joint investigation in St. Clair County, which targeted illegal gambling operations in Southern Illinois.

The ILCC has broad investigatory powers to supervise liquor licensees, and ILCC Agent Bonds Robinson worked on the task force and investigated the gambling operations in cooperation with the state police. Initially, Robinson worked in a non-undercover capacity as part of the state investigation to determine, in the course of routine liquor inspections, whether any establishment was making illegal gambling payouts. Agents of the ILCC began to strictly enforce the gambling regulations and frequently visited the taverns to ensure compliance. Eventually, the FBI became interested in the state's investigation, and ultimately decided to use

Robinson in a federal investigation of illegal gambling operations in St. Clair County, particularly Venezia's gambling operation. At some later point, Robinson assumed an undercover role for the FBI as a corrupt liquor agent in an attempt to gather evidence against Venezia and B & H. Soon thereafter, the state police raided the VFW Post, seized B & H's video poker games, and arrested two VFW employees for maintaining an illegal gambling establishment. After the raid, Venezia and B & H supplied additional video games to the VFW, which continued to provide its customers with illegal gambling payouts.

In an attempt to gather evidence, Robinson, who was present at the VFW raid, indicated that Venezia could avoid further interruptions of his illegal gambling operation if he were to offer a bribe to discourage the investigation and the interference, and he suggested to Venezia that they meet. Venezia consulted with Cueto, who instructed Venezia to meet with Tom Daley, one of his law partners at the time. In an attempt to portray Robinson as a dishonest agent, Daley reported to the ILCC that Robinson had solicited a bribe at the VFW. A meeting was then scheduled between Venezia and Robinson, who met at B & H corporate headquarters. Robinson taped the conversation at the FBI's request, and the tape was introduced into evidence in the racketeering case and at Cueto's trial. Soon after the meeting, the VFW was raided again; B & H video poker games were seized, and two employees were arrested. The ILCC issued an administrative violation to the VFW as well as a warning to remove the illegal gambling machines, otherwise, its liquor license would be revoked. Again, Venezia consulted with Cueto about the raids, the criminal charges, and the prosecutions, and they discussed available options and courses of action.

First, Cueto and Venezia drafted a letter, detailing Robinson's alleged "corrupt" conduct and accusing him of soliciting bribes, and delivered it to St. Clair County State's Attorney Robert Haida. Cueto also filed a complaint in state court against Robinson, in which Cueto alleged that Robinson was a corrupt agent. *See Venezia v. Robinson*, No. 92–CH 299. Cueto obtained a court order that required Robinson to appear for a hearing in *People v. Moore*, one of the gambling prosecutions arising from the VFW raid. Pursuant to the order, Robinson appeared in state court, and Cueto immediately served him with a subpoena, which required him to appear in court within fifteen minutes for an injunction hearing in *Venezia v. Robinson.* Cueto had prepared a petition, requesting either a temporary restraining order or a preliminary and permanent injunction against alleged extortion and other vexation to prevent Robinson from interfering with the operation of Venezia's business. Robinson had not seen a copy of the complaint, had not been served with process, and was not represented by counsel.

At the hearing, Robinson's requests for an attorney were denied, and the state court judge permitted Cueto to question Robinson about the FBI's investigation (which at that point was still a covert operation) and the evidence it had obtained in the course of the investigation. Without permitting Robinson to put on a defense and without articulating any findings of fact or conclusions of law, the state court entered a preliminary injunction against Robinson, which indefinitely enjoined him from interfering with Venezia's business operations. Venezia then returned to the VFW, as well as other taverns affiliated with the gambling operation, to advise them that a state court judge had entered an injunction against Robinson and that he could no longer interfere with their establishments and the illegal gambling operation.

Notwithstanding the injunction and pursuant to instructions from the Director of ILCC to continue his routine liquor inspections, Robinson visited another establishment associated with B & H's gambling operation and discovered that the tavern owner was providing illegal gambling payouts on some of the video machines. Thereafter, Dorothy McCaw was arrested for operating and maintaining an illegal gambling establishment, and she signed a written confession for her participation in illegal gambling activities. Upon learning of the inspection and arrest, Venezia contacted Cueto, who arranged for Venezia and Romanik, the third individual charged in the instant indictment, to obtain another statement from McCaw. Cueto then drafted a letter to the ILCC, State's Attorney Haida, the Office of the United States Attorney for the Southern District of Illinois, and the FBI, claiming that his client was suffering damage as a result of Robinson's "unlawful" interference with the operation of Venezia's business and threatened that if the conduct continued, he would file suit against the ILCC, in addition to Robinson, for damages incurred. Without McCaw's knowledge, Cueto attached to that letter the statement she had given to Venezia and Romanik, which supported Cueto's allegations of interference. Cueto also filed a rule to show cause in state court, which described Robinson's violations of the injunction and requested the court to find him in contempt; McCaw's statement also was attached to the rule to show cause, again without her knowledge. . . .

During the investigation, the record indicates that Cueto and Venezia developed more than a professional attorney-client relationship, entering into various financial transactions and business deals, some of which involved secret partnerships. A few examples include: (1) they purchased unimproved real estate, developed the real estate, built and managed a topless nightclub (Club Exposed), which operated some of B & H's illegal gambling machines; (2) Venezia and Cueto incorporated Millennium III, an asbestos removal company, and applied for and obtained a $600,000 line of credit to complete the purchase acquisition; and (3) Venezia purchased Cueto's office building and moved B & H corporate headquarters into it. The record demonstrates that in order to obtain financing, Venezia reported B & H as a principal asset on his financial statements and loan applications to establish the necessary credit he and Cueto needed to become joint borrowers on various loans. Moreover, the record indicates that the lender in the Millennium purchase relied upon Venezia's financial statement in its decision to loan the money for the acquisition.

About the time the Millennium purchase was finalized, state police and Robinson arrested George Vogt, a B & H customer, for gambling. At a hearing in the state's prosecution of Vogt, Robinson testified and Cueto cross-examined him. After the hearing, Cueto again approached State's Attorney Haida, provided him with the transcripts from the *Vogt* hearing, and urged Haida to indict Robinson for perjury. Thereafter, Haida commenced an investigation of Robinson's activities. Nothing came of Cueto's allegations of perjury, and the investigation ended without any charges being filed.

The investigation of Venezia and B & H began in early 1992, and the events discussed above occurred over a period of approximately three years. We briefly mentioned some of the initial business and financial dealings between Venezia and Cueto, but… we think it unnecessary to specifically discuss every financial transaction contained in the record except to point out that together Venezia and Cueto participated in various business transactions, in which millions of dollars exchanged hands to finance the purchases of various real estate interests and construction costs relating to various development projects, including certain gambling operations. The indictment specifically charged that Club Exposed, the nightclub owned by Venezia and

Cueto, Millennium III, as well as other business transactions in which they were involved, depended upon the continued operation of B & H and the illegal gambling business to secure and to cover the various loans and debts they incurred in their financial ventures.

Even after Cueto became a business partner of Venezia, . . . he continued to give Venezia legal advice. Although Cueto was not an attorney of record, he participated in the preparation of Venezia's defense in the racketeering prosecution. Cueto continued to urge State's Attorney Haida to indict Robinson for perjury. He also contacted Congressman Jerry Costello, who owned an equal one-third partnership interest in a gambling development project with Cueto and Venezia, and asked the Congressman to contact Haida and to offer him a seat on the judiciary in exchange for Haida's recommendation that Cueto be appointed as the next State's Attorney. Cueto also began to publish a newspaper, the *East Side Review*, and authored an article in which he indicated that in the next election he intended to run for St. Clair County State's Attorney, and in the event he was elected, he would prosecute Robinson.

In August of 1994, the government empaneled a grand jury to examine the evidence obtained in the FBI's investigation of Venezia and B & H, and the grand jury also initiated its own investigation of these allegations. In response, Cueto prepared and filed various motions to hinder the investigation and to discharge the grand jury, all of which were denied. Notwithstanding the defense tactics and delays, the grand jury indicted Venezia, among others; he was prosecuted, and ultimately, convicted for operating an illegal gambling enterprise, in addition to other related convictions. . . .

After a jury trial, Cueto was convicted of the charges in Counts 1, 2, 6, and 7 and the district court ordered him to serve a prison term of 87 months, to be followed by two years of supervised release, and imposed monetary penalties. . . .

Cueto asserts several arguments with respect to his convictions on Counts 2, 6, and 7 for obstruction of justice, contending that the omnibus clause of § 1503 is unconstitutionally vague as applied to the conduct charged in the indictment… Cueto argues that "much of what lawyers *do*—are attempts to influence the justice system," and that the omnibus clause of § 1503 was not intended to apply to the type of conduct charged in the indictment. . . .

"[I]n determining the scope of a statute, one is to look first at its language. If the language is unambiguous, ordinarily it is to be regarded as conclusive unless there is 'a clearly expressed legislative intent to the contrary.'" *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 110, 103 S. Ct. 986, 74 L. Ed. 2d 845 (1983) (internal citations omitted) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 64 L. Ed. 2d 766 (1980)). The omnibus clause of § 1503 is a catch-all provision… intended to ensure that criminals could not circumvent the statute's purpose "by devising novel and creative schemes that would interfere with the administration of justice but would nonetheless fall outside the scope of § 1503's specific prohibitions." . . .

Cueto also contends that the vagueness problems are exacerbated by this court's broad construction of the term "corruptly," arguing that it fails to provide meaningful and adequate notice as to what conduct is

proscribed by the statute. The Seventh Circuit has approved a jury instruction which articulates a definition for the term "corruptly":

> Corruptly means to act with the purpose of obstructing justice. The United States is not required to prove that the defendant's only or even main purpose was to obstruct the due administration of justice. The government only has to establish that the defendant should have reasonably seen that the natural and probable consequences of his acts was the obstruction of justice. Intent may be inferred from all of the surrounding facts and circumstances. Any act, by any party, whether lawful or unlawful on its face, may violate Section 1503, if performed with a corrupt motive.

The mere fact that a term "covers a broad spectrum of conduct" does not render it vague, and the requirement that a statute must give fair notice as to what conduct is proscribed "cannot be used as a shield by one who is already bent on serious wrongdoing." *Griffin*, 589 F.2d at 206–07.

There is little case authority directly on point to consider whether an attorney acting in his professional capacity could be criminally liable under the omnibus clause of § 1503 for traditional litigation-related conduct that results in an obstruction of justice. "Correct application of Section 1503 thus requires, in a very real sense, that the factfinder discern—by direct evidence or from inference—the motive which led an individual to perform particular actions.... 'Intent may make any otherwise innocent act criminal, if it is a step in a plot.'" *United States v. Cintolo*, 818 F.2d 980 (1st Cir. 1987). . . . Otherwise lawful conduct, even acts undertaken by an attorney in the course of representing a client, can transgress § 1503 if employed with the corrupt intent to accomplish that which the statute forbids. . . .

The government's theory of prosecution is predicated on the fact that Cueto held a personal financial interest in protecting the illegal gambling enterprise, which formed the requisite corrupt intent for his conduct to qualify as violations of the statute. Cueto focuses entirely on the legality of his conduct, and not the requisite criminal intent proscribed by § 1503. It is undisputed that an attorney may use any *lawful* means to defend his client, and there is no risk of criminal liability if those means employed by the attorney in his endeavors to represent his client remain within the scope of lawful conduct. However, it is the corrupt endeavor to protect the illegal gambling operation and to safeguard his own financial interest, which motivated Cueto's otherwise legal conduct, that separates his conduct from that which is legal.

Even though courts may be hesitant, with good reason and caution, to include traditional litigation-related conduct within the scope of § 1503, the omnibus clause has been interpreted broadly in accordance with congressional intent to promote the due administration of justice and to prevent the miscarriage of justice, and an individual's status as an attorney engaged in litigation-related conduct does not provide protection from prosecution for criminal conduct. . . . More so than an ordinary individual, an attorney, in particular a criminal defense attorney, has a sophisticated understanding of the type of conduct that constitutes criminal violations of the law. There is a discernable difference between an honest lawyer who unintentionally submits a false statement to the court and an attorney with specific corrupt intentions who files papers in bad faith knowing that they contain false representations and/or inaccurate facts in an attempt to hinder judicial

proceedings. It is true that, to a certain extent, a lawyer's conduct influences judicial proceedings, or at least attempts to affect the outcome of the proceedings. However, that influence stems from a lawyer's attempt to advocate his client's interests *within the scope of the law*. It is the "corrupt endeavor" to influence the due administration of justice that is the heart of the offense, and Cueto's personal financial interest is the heart of his corrupt motive. . . .

We have carefully examined the fears articulated by the National Association of Criminal Defense Lawyers, in addition to the arguments put forth by the defendant, that a decision upholding the application of the omnibus clause of § 1503 to litigation-related conduct may deter or somehow chill the criminal defense lawyers in zealous advocacy, and we find those concerns to be exaggerated, at least as considered in light of the facts in the present case. Although we appreciate that it is of significant importance to avoid chilling vigorous advocacy and to maintain the balance of effective representation, we also recognize that a lawyer's misconduct and criminal acts are not absolutely immune from prosecution. We cannot ignore Cueto's corrupt endeavors to manipulate the administration of justice and his clear criminal violations of the law. As the First Circuit recognized in *Cintolo*:

> Nothing in the caselaw, fairly read, suggests that lawyers should be plucked gently from the maddening [sic] crowd and sheltered from the rigors of 18 U.S.C. § 1503 in the manner urged by appellant and by the amici. Nor is there sufficient public policy justification favoring such a result. To the contrary, the overriding public policy interest is that "[t]he attorney-client relationship cannot . . . be used to shield or promote illegitimate acts. . . ." "[A]ttorneys, just like all other persons, . . . are not above the law and are subject to its full application under appropriate circumstances."

818 F.2d at 993–94 (internal citations omitted). Accordingly, we conclude that the omnibus clause of § 1503 may be used to prosecute a lawyer's litigation-related criminality and that neither the omnibus clause of § 1503 nor this court's construction of the term "corruptly" is unconstitutionally vague as applied to the conduct charged in the indictment for which Cueto was convicted.

We now turn to Cueto's argument that his convictions on the obstruction of justice counts were not supported by sufficient evidence. Cueto's task is a formidable one, and an examination of the record illuminates that the evidence presented in this case overwhelmingly supports the jury's verdict. . . .

Cueto's conduct, though nominally litigation-related conduct on behalf of his client, was undertaken with the corrupt intent to protect Venezia, Venezia's associates, and his business from criminal prosecution and to safeguard his personal financial interest in the illegal gambling operation, whatever the costs and consequences to the due administration of justice.

The charges in Count 2 of the indictment included allegations of a corrupt endeavor to obstruct the due administration of justice in *Venezia v. Robinson* by filing pleadings in federal district court and a continued attempt to hinder the proceedings by filing an appeal in this court and a petition for certiorari in the United States Supreme Court. The evidence demonstrates that Cueto successfully exposed the FBI's investigation, uncovered the evidence it had gathered, obtained the injunction against Robinson, and continued to file

frivolous appeals after the district court dismissed the injunction and the complaint. . . . The jury was amply justified in concluding that Cueto's repeated filings were motivated by his attempt to protect his client from prosecution and to safeguard his financial interest. Cueto's actions may qualify as traditional litigation-related conduct in form, but not in substance, and the evidence presented at trial demonstrates that Cueto clearly intended and corruptly endeavored to obstruct the due administration of justice in *Venezia v. Robinson*.

Similar to Count 2, Count 7 includes allegations of preparing and filing and causing defense counsel to prepare and file false pleadings and other court papers; the indictment specifically charged Cueto with encouraging defense counsel in the racketeering case to file false motions and pleadings for the purpose of impeding and obstructing the administration of justice in that case. We have no doubt that Cueto in fact intended to interfere with the investigation, attempted to delay the indictment, and endeavored to obstruct the proceedings in federal district court in connection with the prosecution of Venezia. We simply are not dealing with non-corrupt, legitimate involvement in the preparation of Venezia's (and his co-defendants') defense. Nor are we dealing with inadvertent interference. From the evidence presented at trial, the jury was amply justified in concluding without a doubt that Cueto corruptly endeavored to obstruct the district court's proceedings in the gambling and racketeering prosecution.

In response to his conviction on Count 6, Cueto argues that his conviction should be reversed because the *Aguilar* nexus is absent; he contends that the government presented insufficient evidence to establish the relationship between his attempts to persuade State's Attorney Haida to investigate and indict Robinson and a pending judicial proceeding. . . . "It is well established that investigations undertaken with the intention of presenting evidence before a grand jury are sufficient to constitute 'the due administration of justice' under § 1503." *Maloney,* 71 F.3d at 657.

Though Cueto's initial calls and letters to State's Attorney Haida may pre-date the empaneling of the grand jury, the phone call to Congressman Costello occurred after the indictment was unsealed. In addition, his letters to the State's Attorney occurred throughout the investigation, and the evidence indicates that Cueto knew of the investigation. Accordingly, Cueto's conduct prior to the empaneling of the grand jury as well as his subsequent acts to encourage State's Attorney Haida to investigate and prosecute Agent Robinson have the requisite nexus to the judicial proceedings. . . .

Whatever the contours of the line between traditional lawyering and criminal conduct, they must inevitably be drawn case-by-case. We refuse to accept the notion that lawyers may do anything, including violating the law, to zealously advocate their clients' interests and then avoid criminal prosecution by claiming that they were "just doing their job." . . . We respect the importance of allowing defense counsel to perform legitimate activities without hindrance and recognize the potential dangers that could arise if prosecutors were permitted to inquire into the motives of criminal defense attorneys ad hoc. This case, however, does not create that avenue of inquiry; our conclusion is limited to the specific facts of this case. . . . The jury was justified in concluding that Cueto had the requisite knowledge of the FBI's investigation of Venezia, the grand jury's inquiry, and the district court's proceedings and then acted in a manner that had the natural and probable effect of interfering with the lawful function of those governmental entities and the due administration of

justice. His role as a defense attorney did not insulate him from the criminal consequences of his corruptly-motivated actions. . . .

C. Elements and Examples: Section 1512 and Document Destruction

This case involves the interpretation of (an older version of) § 1512 and its mens rea requirements, as well as further discussion of the nexus issue. (What was § 1512(c) at the time of this case is now § 1512(b).) More importantly, it involves another line-drawing problem relevant to the corporate context: How do we distinguish between acceptable evidence destruction in advance of litigation and obstruction of justice?

ARTHUR ANDERSEN LLP v. UNITED STATES, 544 U.S. 696 (2005)

Chief Justice REHNQUIST delivered the opinion of the Court.

As Enron Corporation's financial difficulties became public in 2001, petitioner Arthur Andersen LLP, Enron's auditor, instructed its employees to destroy documents pursuant to its document retention policy. A jury found that this action made petitioner guilty of violating 18 U.S.C. §§ 1512(b)(2)(A) and (B). These sections make it a crime to "knowingly us[e] intimidation or physical force, threate[n], or corruptly persuad[e] another person . . . with intent to . . . cause" that person to "withhold" documents from, or "alter" documents for use in, an "official proceeding." The Court of Appeals for the Fifth Circuit affirmed. We hold that the jury instructions failed to convey properly the elements of a "corrup[t] persua[sion]" conviction under § 1512(b), and therefore reverse.

Enron Corporation, during the 1990's, switched its business from operation of natural gas pipelines to an energy conglomerate, a move that was accompanied by aggressive accounting practices and rapid growth. Petitioner audited Enron's publicly filed financial statements and provided internal audit and consulting services to it. Petitioner's "engagement team" for Enron was headed by David Duncan. Beginning in 2000, Enron's financial performance began to suffer, and, as 2001 wore on, worsened. On August 14, 2001, Jeffrey Skilling, Enron's Chief Executive Officer (CEO), unexpectedly resigned. Within days, Sherron Watkins, a senior accountant at Enron, warned Kenneth Lay, Enron's newly reappointed CEO, that Enron could "implode in a wave of accounting scandals." She likewise informed Duncan and Michael Odom, one of petitioner's partners who had supervisory responsibility over Duncan, of the looming problems.

On August 28, an article in the Wall Street Journal suggested improprieties at Enron, and the SEC opened an informal investigation. By early September, petitioner had formed an Enron "crisis-response" team, which included Nancy Temple, an in-house counsel. On October 8, petitioner retained outside counsel to represent it in any litigation that might arise from the Enron matter. The next day, Temple discussed Enron with other in-house counsel. Her notes from that meeting reflect that "some SEC investigation" is "highly probable."

On October 10, Odom spoke at a general training meeting attended by 89 employees. . . . Odom urged everyone to comply with the firm's document retention policy. He added: "'[I]f it's destroyed in the course of [the] normal policy and litigation is filed the next day, that's great. . . . [W]e've followed our own policy, and whatever there was that might have been of interest to somebody is gone and irretrievable.'" On October

12, Temple entered the Enron matter into her computer, designating the "Type of Potential Claim" as "Professional Practice—Government/Regulatory Inv[estigation]." Temple also e-mailed Odom, suggesting that he "'remin[d] the engagement team of our documentation and retention policy.'"

On October 16, Enron announced its third quarter results. That release disclosed a $1.01 billion charge to earnings. The following day, the SEC notified Enron by letter that it had opened an investigation in August and requested certain information and documents. On October 19, Enron forwarded a copy of that letter to petitioner.

On the same day, Temple also sent an e-mail to a member of petitioner's internal team of accounting experts and attached a copy of the document policy. On October 20, the Enron crisis-response team held a conference call, during which Temple instructed everyone to "[m]ake sure to follow the [document] policy." On October 23, Enron CEO Lay declined to answer questions during a call with analysts because of "potential lawsuits, as well as the SEC inquiry." After the call, Duncan met with other Andersen partners on the Enron engagement team and told them that they should ensure team members were complying with the document policy. Another meeting for all team members followed, during which Duncan distributed the policy and told everyone to comply. These, and other smaller meetings, were followed by substantial destruction of paper and electronic documents.

On October 26, one of petitioner's senior partners circulated a New York Times article discussing the SEC's response to Enron. His e-mail commented that "the problems are just beginning and we will be in the cross hairs. The marketplace is going to keep the pressure on this and is going to force the SEC to be tough." On October 30, the SEC opened a formal investigation and sent Enron a letter that requested accounting documents.

Throughout this time period, the document destruction continued, despite reservations by some of petitioner's managers. On November 8, Enron announced that it would issue a comprehensive restatement of its earnings and assets. Also on November 8, the SEC served Enron and petitioner with subpoenas for records. On November 9, Duncan's secretary sent an e-mail that stated: "Per Dave—No more shredding.... We have been officially served for our documents." Enron filed for bankruptcy less than a month later. Duncan was fired and later pleaded guilty to witness tampering.

In March 2002, petitioner was indicted in the Southern District of Texas on one count of violating §§ 1512(b)(2)(A) and (B). The indictment alleged that, between October 10 and November 9, 2001, petitioner "did knowingly, intentionally and corruptly persuade . . . other persons, to wit: [petitioner's] employees, with intent to cause" them to withhold documents from, and alter documents for use in, "official proceedings, namely: regulatory and criminal proceedings and investigations." . . . The jury returned a guilty verdict.

Chapter 73 of Title 18 of the United States Code provides criminal sanctions for those who obstruct justice. Sections 1512(b)(2)(A) and (B), part of the witness tampering provisions, provide in relevant part:

> Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person,

> with intent to . . . cause or induce any person to . . . withhold testimony, or withhold a record, document, or other object, from an official proceeding [or] alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding . . . shall be fined under this title or imprisoned not more than ten years, or both.

In this case, our attention is focused on what it means to "knowingly . . . corruptly persuad[e]" another person "with intent to . . . cause" that person to "withhold" documents from, or "alter" documents for use in, an "official proceeding." . . .

Indeed, "persuad[ing]" a person "with intent to . . . cause" that person to "withhold" testimony or documents from a Government proceeding or Government official is not inherently malign. Consider, for instance, a mother who suggests to her son that he invoke his right against compelled self-incrimination, *see* U.S. Const., Amdt. 5, or a wife who persuades her husband not to disclose marital confidences.

Nor is it necessarily corrupt for an attorney to "persuad[e]" a client "with intent to . . . cause" that client to "withhold" documents from the Government. In *Upjohn Co. v. United States,* 449 U.S. 383 (1981), for example, we held that Upjohn was justified in withholding documents that were covered by the attorney-client privilege from the Internal Revenue Service (IRS). No one would suggest that an attorney who "persuade[d]" Upjohn to take that step acted wrongfully, even though he surely intended that his client keep those documents out of the IRS' hands.

"Document retention policies," which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business. It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances. . . .

Section 1512(b) punishes not just "corruptly persuad[ing]" another, but "*knowingly* corruptly persuad[ing]" another. (Emphasis added.) The Government suggests that "knowingly" does not modify "corruptly persuades," but that is not how the statute most naturally reads. It provides the *mens rea*—"knowingly"—and then a list of acts—"uses intimidation or physical force, threatens, or corruptly persuades." We have recognized with regard to similar statutory language that the *mens rea* at least applies to the acts that immediately follow, if not to other elements down the statutory chain. The Government suggests that it is "questionable whether Congress would employ such an inelegant formulation as 'knowingly . . . corruptly persuades.'" Long experience has not taught us to share the Government's doubts on this score, and we must simply interpret the statute as written.

The parties have not pointed us to another interpretation of "knowingly . . . corruptly" to guide us here. . . . "[K]nowledge" and "knowingly" are normally associated with awareness, understanding, or consciousness. "Corrupt" and "corruptly" are normally associated with wrongful, immoral, depraved, or evil. Joining these meanings together here makes sense both linguistically and in the statutory scheme. Only persons conscious of wrongdoing can be said to "knowingly . . . corruptly persuad[e]." And limiting criminality to persuaders conscious of their wrongdoing sensibly allows § 1512(b) to reach only those with the level of "culpability . . . we usually require in order to impose criminal liability."

The outer limits of this element need not be explored here because the jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing. Indeed, it is striking how little culpability the instructions required. . . . The instructions also diluted the meaning of "corruptly" so that it covered innocent conduct.

The parties vigorously disputed how the jury would be instructed on "corruptly." The District Court based its instruction on the definition of that term found in the Fifth Circuit Pattern Jury Instruction for § 1503. This pattern instruction defined "corruptly" as "'knowingly and dishonestly, with the specific intent to subvert or undermine the integrity'" of a proceeding. The Government, however, insisted on excluding "dishonestly" and adding the term "impede" to the phrase "subvert or undermine." The District Court agreed over petitioner's objections, and the jury was told to convict if it found petitioner intended to "subvert, undermine, or impede" governmental factfinding by suggesting to its employees that they enforce the document retention policy.

These changes were significant. No longer was any type of "dishonest[y]" necessary to a finding of guilt, and it was enough for petitioner to have simply "impede[d]" the Government's factfinding ability. As the Government conceded at oral argument, "'[i]mpede'" has broader connotations than "'subvert'" or even "'[u]ndermine,'" and many of these connotations do not incorporate any "corrupt[ness]" at all. The dictionary defines "impede" as "to interfere with or get in the way of the progress of" or "hold up" or "detract from." Webster's. By definition, anyone who innocently persuades another to withhold information from the Government "get[s] in the way of the progress of" the Government. With regard to such innocent conduct, the "corruptly" instructions did no limiting work whatsoever.

The instructions also were infirm for another reason. They led the jury to believe that it did not have to find *any* nexus between the "persua[sion]" to destroy documents and any particular proceeding. In resisting any type of nexus element, the Government relies heavily on § 1512(e)(1), which states that an official proceeding "need not be pending or about to be instituted at the time of the offense." It is, however, 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. A "knowingly . . . corrup[t] persaude[r]" cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material.

We faced a similar situation in *Aguilar.* Respondent Aguilar lied to a Federal Bureau of Investigation agent in the course of an investigation and was convicted of "'corruptly endeavor[ing] to influence, obstruct, and impede [a] . . . grand jury investigation'." All the Government had shown was that Aguilar had uttered false statements to an investigating agent "who might or might not testify before a grand jury." We held that § 1503 required something more—specifically, a "nexus" between the obstructive act and the proceeding. "[I]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding," we explained, "he lacks the requisite intent to obstruct." . . .

Problem 8-1

Mary, General Counsel of Garmentcorp, learns that Garmentcorp is to be subject to a DOJ investigation for potential violations of the Foreign Corrupt Practices Act involving its operations in Bangladesh. DOJ informs Mary that it intends to interview dozens of Garmentcorp employees and/or subpoena them to testify before a grand jury. Mary retains Biglawfirm, which does not represent Garmentcorp as a corporation, to represent the Garmentcorp employees individually in their interactions with the government, at Garmentcorp's expense. After discussing the fee arrangements with the lead partner on the matter at Biglawfirm, Mary says to her, "Make sure to pound it into their heads that they should say they 'do not recall' if they are the least bit unsure about whether they are getting a fact correct." Has Mary committed a crime?

Special Counsel Robert Mueller's report on obstruction of justice in connection with President Trump and the investigation of 2016 Russian election interference, excerpted below, serves two purposes here: (i) to summarize the law of obstruction of justice; and (ii) to provide a challenging scenario, based on which you should ask: Did the President commit one or more violations of the obstruction statutes, leaving aside the question of whether a sitting president is constitutionally amenable to indictment?[2]

Report On The Investigation Into Russian Interference In The 2016 Presidential Election

Volume II of II

Special Counsel Robert S. Mueller, III

Washington, D.C. March 2019

EXECUTIVE SUMMARY TO VOLUME II

Our obstruction-of-justice inquiry focused on a series of actions by the President that related to the Russia interference investigations, including the President's conduct towards the law enforcement officials overseeing the investigations and the witnesses to relevant events.

FACTUAL RESULTS OF THE OBSTRUCTION INVESTIGATION

The key issues and events we examined include the following:

The Campaign's response to reports about Russian support for Trump. During the 2016 presidential campaign, questions arose about the Russian government's apparent support for candidate Trump. After WikiLeaks released politically damaging Democratic Party emails that were reported to have been hacked by Russia, Trump publicly expressed skepticism that Russia was responsible for the hacks at the same time that he and other Campaign officials privately sought information about any further planned WikiLeaks releases.

[2] The legal analysis in Volume II of the report is far longer than these excerpts and is a useful reference source on the law of obstruction, as well as on some separation-of-powers questions. For the full volume, see ROBERT S. MUELLER, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (March 2019), https://www.justice.gov/storage/report.pdf.

Trump also denied having any business in or connections to Russia, even though as late as June 2016 the Trump Organization had been pursuing a licensing deal for a skyscraper to be built in Russia called Trump Tower Moscow. After the election, the President expressed concerns to advisors that reports of Russia's election interference might lead the public to question the legitimacy of his election.

Conduct involving FBI Director Comey and Michael Flynn. In mid-January 2017, incoming National Security Advisor Michael Flynn falsely denied to the Vice President, other administration officials, and FBI agents that he had talked to Russian Ambassador Sergey Kislyak about Russia's response to U.S. sanctions on Russia for its election interference. On January 27, the day after the President was told that Flynn had lied to the Vice President and had made similar statements to the FBI, the President invited FBI Director Comey to a private dinner at the White House and told Comey that he needed loyalty. On February 14, the day after the President requested Flynn's resignation, the President told an outside advisor, "Now that we fired Flynn, the Russia thing is over." The advisor disagreed and said the investigations would continue.

Later that afternoon, the President cleared the Oval Office to have a one-on-one meeting with Comey. Referring to the FBI's investigation of Flynn, the President said, "I hope you can see your way clear to letting this go, to letting Flynn go. He is a good guy. I hope you can let this go." Shortly after requesting Flynn's resignation and speaking privately to Comey, the President sought to have Deputy National Security Advisor K.T. McFarland draft an internal letter stating that the President had not directed Flynn to discuss sanctions with Kislyak. McFarland declined because she did not know whether that was true, and a White House Counsel's Office attorney thought that the request would look like a quid pro quo for an ambassadorship she had been offered.

The President's reaction to the continuing Russia investigation. ln February 2017, Attorney General Jeff Sessions began to assess whether he had to recuse himself from campaign-related investigations because of his role in the Trump Campaign. In early March, the President told White House Counsel Donald McGahn to stop Sessions from recusing. And after Sessions announced his recusal on March 2, the President expressed anger at the decision and told advisors that he should have an Attorney General who would protect him. That weekend, the President took Sessions aside at an event and urged him to "unrecuse." Later in March, Comey publicly disclosed at a congressional hearing that the FBI was investigating "the Russian government's efforts to interfere in the 2016 presidential election," including any links or coordination between the Russian government and the Trump Campaign. In the following days, the President reached out to the Director of National Intelligence and the leaders of the Central Intelligence Agency (CIA) and the National Security Agency (NSA) to ask them what they could do to publicly dispel the suggestion that the President had any connection to the Russian election-interference effort. The President also twice called Comey directly, notwithstanding guidance from McGahn to avoid direct contacts with the Department of Justice. Comey had previously assured the President that the FBI was not investigating him personally, and the President asked Comey to "lift the cloud" of the Russia investigation by saying that publicly.

The President's termination of Comey. On May 3, 2017, Comey testified in a congressional hearing, but declined to answer questions about whether the President was personally under investigation. Within days, the President decided to terminate Comey. The President insisted that the termination letter, which was written

for public release, state that Comey had informed the President that he was not under investigation. The day of the firing, the White House maintained that Comey's termination resulted from independent recommendations from the Attorney General and Deputy Attorney General that Comey should be discharged for mishandling the Hillary Clinton email investigation. But the President had decided to fire Comey before hearing from the Department of Justice. The day after firing Comey, the President told Russian officials that he had "faced great pressure because of Russia," which had been "taken off" by Comey's firing. The next day, the President acknowledged in a television interview that he was going to fire Comey regardless of the Department of Justice's recommendation and that when he "decided to just do it," he was thinking that "this thing with Trump and Russia is a made-up story." In response to a question about whether he was angry with Comey about the Russia investigation, the President said, "As far as I'm concerned, I want that thing to be absolutely done properly," adding that firing Comey "might even lengthen out the investigation."

The appointment of a Special Counsel and efforts to remove him. On May 17, 2017, the Acting Attorney General for the Russia investigation appointed a Special Counsel to conduct the investigation and related matters. The President reacted to news that a Special Counsel had been appointed by telling advisors that it was "the end of his presidency" and demanding that Sessions resign. Sessions submitted his resignation, but the President ultimately did not accept it. The President told aides that the Special Counsel had conflicts of interest and suggested that the Special Counsel therefore could not serve. The President's advisors told him the asserted conflicts were meritless and had already been considered by the Department of Justice.

On June 14, 2017, the media reported that the Special Counsel's Office was investigating whether the President had obstructed justice. Press reports called this "a major turning point" in the investigation: while Comey had told the President he was not under investigation, following Comey's firing, the President now was under investigation. The President reacted to this news with a series of tweets criticizing the Department of Justice and the Special Counsel's investigation. On June 17, 2017, the President called McGahn at home and directed him to call the Acting Attorney General and say that the Special Counsel had conflicts of interest and must be removed. McGahn did not carry out the direction, however, deciding that he would resign rather than trigger what he regarded as a potential Saturday Night Massacre.

Efforts to curtail the Special Counsel's investigation. Two days after directing McGahn to have the Special Counsel removed, the President made another attempt to affect the course of the Russia investigation. On June 19, 2017, the President met one-on-one in the Oval Office with his former campaign manager Corey Lewandowski, a trusted advisor outside the government, and dictated a message for Lewandowski to deliver to Sessions. The message said that Sessions should publicly announce that, notwithstanding his recusal from the Russia investigation, the investigation was "very unfair" to the President, the President had done nothing wrong, and Sessions planned to meet with the Special Counsel and "let [him] move forward with investigating election meddling for future elections." Lewandowski said he understood what the President wanted Sessions to do.

One month later, in another private meeting with Lewandowski on July 19, 2017, the President asked about the status of his message for Sessions to limit the Special Counsel investigation to future election interference. Lewandowski told the President that the message would be delivered soon. Hours after that meeting, the

President publicly criticized Sessions in an interview with the New York Times, and then issued a series of tweets making it clear that Sessions's job was in jeopardy. Lewandowski did not want to deliver the President's message personally, so he asked senior White House official Rick Dearborn to deliver it to Sessions. Dearborn was uncomfortable with the task and did not follow through.

Efforts to prevent public disclosure of evidence. In the summer of 2017, the President learned that media outlets were asking questions about the June 9, 2016 meeting at Trump Tower between senior campaign officials, including Donald Trump Jr., and a Russian lawyer who was said to be offering damaging information about Hillary Clinton as "part of Russia and its government's support for Mr. Trump." On several occasions, the President directed aides not to publicly disclose the emails setting up the June 9 meeting, suggesting that the emails would not leak and that the number of lawyers with access to them should be limited. Before the emails became public, the President edited a press statement for Trump Jr. by deleting a line that acknowledged that the meeting was with "an individual who [Trump Jr.] was told might have information helpful to the campaign" and instead said only that the meeting was about adoptions of Russian children. When the press asked questions about the President's involvement in Trump Jr.'s statement, the President's personal lawyer repeatedly denied the President had played any role.

Further efforts to have the Attorney General take control of the investigation. In early summer 2017, the President called Sessions at home and again asked him to reverse his recusal from the Russia investigation. Sessions did not reverse his recusal. In October 2017, the President met privately with Sessions in the Oval Office and asked him to "take [a] look" at investigating Clinton. In December 2017, shortly after Flynn pleaded guilty pursuant to a cooperation agreement, the President met with Sessions in the Oval Office and suggested, according to notes taken by a senior advisor, that if Sessions unrecused and took back supervision of the Russia investigation, he would be a "hero." The President told Sessions, "I' m not going to do anything or direct you to do anything. I just want to be treated fairly." In response, Sessions volunteered that he had never seen anything "improper" on the campaign and told the President there was a "whole new leadership team" in place. He did not unrecuse.

Efforts to have McGahn deny that the President had ordered him to have the Special Counsel removed. In early 2018, the press reported that the President had directed McGahn to have the Special Counsel removed in June 2017 and that McGahn had threatened to resign rather than carry out the order. The President reacted to the news stories by directing White House officials to tell McGahn to dispute the story and create a record stating he had not been ordered to have the Special Counsel removed. McGahn told those officials that the media reports were accurate in stating that the President had directed McGahn to have the Special Counsel removed. The President then met with McGahn in the Oval Office and again pressured him to deny the reports. In the same meeting, the President also asked McGahn why he had told the Special Counsel about the President's effort to remove the Special Counsel and why McGahn took notes of his conversations with the President. McGahn refused to back away from what he remembered happening and perceived the President to be testing his mettle.

Conduct towards Flynn, Manafort. After Flynn withdrew from a joint defense agreement with the President and began cooperating with the government, the President's personal counsel left a message for Flynn's attorneys reminding them of the President's warm feelings towards Flynn, which he said "still remains," and asking for a "heads up" if Flynn knew "information that implicates the President." When Flynn's counsel reiterated that Flynn could no longer share information pursuant to a joint defense agreement, the President's personal counsel said he would make sure that the President knew that Flynn's actions reflected "hostility" towards the President. During Manafort's prosecution and when the jury in his criminal trial was deliberating, the President praised Manafort in public, said that Manafort was being treated unfairly, and declined to rule out a pardon. After Manafort was convicted, the President called Manafort "a brave man" for refusing to "break" and said that "flipping" "almost ought to be outlawed." . . .

Conduct involving Michael Cohen. The President's conduct towards Michael Cohen, a former Trump Organization executive, changed from praise for Cohen when he falsely minimized the President's involvement in the Trump Tower Moscow project, to castigation of Cohen when he became a cooperating witness. From September 2015 to June 2016, Cohen had pursued the Trump Tower Moscow project on behalf of the Trump Organization and had briefed candidate Trump on the project numerous times, including discussing whether Trump should travel to Russia to advance the deal. In 2017, Cohen provided false testimony to Congress about the project, including stating that he had only briefed Trump on the project three times and never discussed travel to Russia with him, in an effort to adhere to a "party line" that Cohen said was developed to minimize the President's connections to Russia. While preparing for his congressional testimony, Cohen had extensive discussions with the President's personal counsel, who, according to Cohen, said that Cohen should "stay on message" and not contradict the President. After the FBI searched Cohen's home and office in April 2018, the President publicly asserted that Cohen would not "flip," contacted him directly to tell him to "stay strong," and privately passed messages of support to him. Cohen also discussed pardons with the President's personal counsel and believed that if he stayed on message he would be taken care of. But after Cohen began cooperating with the government in the summer of 2018, the President publicly criticized him, called him a "rat," and suggested that his family members had committed crimes.

Overarching factual issues. We did not make a traditional prosecution decision about these facts, but the evidence we obtained supports several general statements about the President's conduct. Several features of the conduct we investigated distinguish it from typical obstruction-of-justice cases. First, the investigation concerned the President, and some of his actions, such as firing the FBI Director, involved facially lawful acts within his Article II authority, which raises constitutional issues discussed below. At the same time, the President's position as the head of the Executive Branch provided him with unique and powerful means of influencing official proceedings, subordinate officers, and potential witnesses-all of which is relevant to a potential obstruction-of-justice analysis. Second, unlike cases in which a subject engages in obstruction of justice to cover up a crime, the evidence we obtained did not establish that the President was involved in an underlying crime related to Russian election interference. Although the obstruction statutes do not require proof of such a crime, the absence of that evidence affects the analysis of the President's intent and requires consideration of other possible motives for his conduct. Third, many of the President's acts directed at witnesses, including discouragement of cooperation with the government and suggestions of possible future

pardons, took place in public view. That circumstance is unusual, but no principle of law excludes public acts from the reach of the obstruction laws. If the likely effect of public acts is to influence witnesses or alter their testimony, the harm to the justice system's integrity is the same.

Although the series of events we investigated involved discrete acts, the overall pattern of the President's conduct towards the investigations can shed light on the nature of the President's acts and the inferences that can be drawn about his intent. In particular, the actions we investigated can be divided into two phases, reflecting a possible shift in the President's motives. The first phase covered the period from the President's first interactions with Comey through the President's firing of Comey. During that time, the President had been repeatedly told he was not personally under investigation. Soon after the firing of Comey and the appointment of the Special Counsel, however, the President became aware that his own conduct was being investigated in an obstruction-of-justice inquiry. At that point, the President engaged in a second phase of conduct, involving public attacks on the investigation, non-public efforts to control it, and efforts in both public and private to encourage witnesses not to cooperate with the investigation. Judgments about the nature of the President's motives during each phase would be informed by the totality of the evidence. . . .

Because we determined not to make a traditional prosecutorial judgment, we did not draw ultimate conclusions about the President's conduct. The evidence we obtained about the President's actions and intent presents difficult issues that would need to be resolved if we were making a traditional prosecutorial judgment. At the same time, if we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state. Based on the facts and the applicable legal standards, we are unable to reach that judgment. Accordingly, while this report does not conclude that the President committed a crime, it also does not exonerate him.

I. BACKGROUND LEGAL AND EVIDENTIARY PRINCIPLES

A. Legal Framework of Obstruction of Justice

. . . Three basic elements are common to most of the relevant obstruction statutes: (1) an obstructive act; (2) a nexus between the obstructive act and an official proceeding; and (3) a corrupt intent. *See, e.g.*, 18 U.S.C. §§ 1503, 1505, 1512(c)(2). We describe those elements as they have been interpreted by the courts. We then discuss a more specific statute aimed at witness tampering, *see* 18 U.S.C. § 1512(b), and describe the requirements for attempted offenses and endeavors to obstruct justice, *see* 18 U.S.C. §§ 1503, 1512(c)(2).

Obstructive act. Obstruction-of-justice law "reaches all corrupt conduct capable of producing an effect that prevents justice from being duly administered, regardless of the means employed." *United States v. Silverman*, 745 F.2d 1386, 1393 (11th Cir. 1984) (interpreting 18 U.S.C. § 1503). An "effort to influence" a proceeding can qualify as an endeavor to obstruct justice even if the effort was "subtle or circuitous" and "however cleverly or with whatever cloaking of purpose" it was made. *United States v. Roe*, 529 F.2d 629, 632 (4th Cir. 1975); *see also United States v. Quattrone*, 441 F.3d 153, 173 (2d Cir. 2006). The verbs "'obstruct or impede' are broad" and "can refer to anything that blocks, makes difficult, or hinders." *Marinello v. United States*, 138 S. Ct. 1101, 1106 (2018) (internal brackets and quotation marks omitted).

An improper motive can render an actor's conduct criminal even when the conduct would otherwise be lawful and within the actor's authority. *See United States v. Cueto*, 151 F.3d 620, 631 (7th Cir. 1998) (affirming obstruction conviction of a criminal defense attorney for "litigation- related conduct"); *United States v. Cintolo*, 818 F.2d 980, 992 (1st Cir. 1987) ("any act by any party-whether lawful or unlawful on its face-may abridge § 1503 if performed with a corrupt motive").

Nexus to a pending or contemplated official proceeding. Obstruction-of-justice law generally requires a nexus, or connection, to an official proceeding. In Section 1503, the nexus must be to pending "judicial or grand jury proceedings." *United States v. Aguilar*, 515 U.S. 593, 599 (1995). In Section 1505, the nexus can include a connection to a "pending" federal agency proceeding or a congressional inquiry or investigation. Under both statutes, the government must demonstrate "a relationship in time, causation, or logic" between the obstructive act and the proceeding or inquiry to be obstructed. *Id.* at 599; *see also Arthur Andersen LLP v. United States*, 544 U.S. 696, 707–08 (2005). Section 1512(c) prohibits obstructive efforts aimed at official proceedings including judicial or grand jury proceedings. 18 U.S.C. § 1515(a)(1)(A). For purposes of Section 1512, “an official proceeding need not be pending or about to be instituted at the time of the offense.” 18 U.S.C. § 1512(f)(1). Although a proceeding need not already be in progress to trigger liability under Section 1512(c), a nexus to a contemplated proceeding still must be shown. *United States v. Young*, 916 F.3d 368, 386 (4th Cir. 2019); *United States v. Petruk*, 781 F.3d 438, 445 (8th Cir. 2015); *United States v. Phillips*, 583 F.3d 1261, 1264 (10th Cir. 2009); *United States v. Reich*, 479 F.3d 179, 186 (2d Cir. 2007). The nexus requirement narrows the scope of obstruction statutes to ensure that individuals have "fair warning" of what the law proscribes. *Aguilar*, 515 U.S. at 600 (internal quotation marks omitted).

The nexus showing has subjective and objective components. As an objective matter, a defendant must act "in a manner that is likely to obstruct justice," such that the statute "excludes defendants who have an evil purpose but use means that would only unnaturally and improbably be successful." *Aguilar*, 515 U.S. at 601–02 (emphasis added; internal quotation marks omitted). "[T]he endeavor must have the natural and probable effect of interfering with the due administration of justice." *Id.* at 599 (citation and internal quotation marks omitted). As a subjective matter, the actor must have "contemplated a particular, foreseeable proceeding." *Petruk*, 781 F.3d at 445–46. A defendant need not directly impede the proceeding. Rather, a nexus exists if "discretionary actions of a third person would be required to obstruct the judicial proceeding if it was foreseeable to the defendant that the third party would act on the [defendant's] communication in such a way as to obstruct the judicial proceeding." *United States v. Martinez*, 862 F.3d 223, 238 (2d Cir. 2017) (brackets, ellipses, and internal quotation marks omitted).

Corruptly. The word "corruptly" provides the intent element for obstruction of justice and means acting "knowingly and dishonestly" or "with an improper motive." *United States v. Richardson*, 676 F.3d 491, 508 (5th Cir. 2012); *United States v. Gordon*, 710 F.3d 1124, 1151 (10th Cir. 2013) (to act corruptly means to "act[] with an improper purpose and to engage in conduct knowingly and dishonestly with the specific intent to subvert, impede or obstruct" the relevant proceeding) (some quotation marks omitted); *see* 18 U.S.C. § 1515(6) ("As used in section 1505, the term 'corruptly' means acting with an improper purpose, personally or by influencing another."); *see also Arthur Andersen*, 544 U.S. at 705–06 (interpreting "corruptly" to mean "wrongful, immoral, depraved, or evil" and holding that acting "knowingly . . . corruptly" in 18 U.S.C. §

1512(c) requires "consciousness of wrongdoing"). The requisite showing is made when a person acted with an intent to obtain an "improper advantage for [him]self or someone else, inconsistent with official duty and the rights of others." BALLENTINE'S LAW DICTIONARY 276 (3d ed. 1969); *see United States v. Pasha*, 797 F.3d 1122, 1132 (D.C. Cir. 2015); *Aguilar*, 515 U.S. at 616 (Scalia, J., concurring in part and dissenting in part) (characterizing this definition as the "longstanding and well-accepted meaning" of "corruptly").

Witness tampering. A more specific provision in Section 1512 prohibits tampering with a witness. *See* 18 U.S.C. § 1512(b)(1)(3) (making it a crime to "knowingly use[] intimidation . . . or corruptly persuade[] another person," or "engage[] in misleading conduct towards another person," with the intent to "influence, delay, or prevent the testimony of any person in an official proceeding" or to "hinder, delay, or prevent the communication to a law enforcement officer . . . of information relating to the commission or possible commission of a Federal offense"). To establish corrupt persuasion, it is sufficient that the defendant asked a potential witness to lie to investigators in contemplation of a likely federal investigation into his conduct. The "persuasion" need not be coercive, intimidating, or explicit; it is sufficient to "urge," " induce," "ask[] ," "argu[e]," "giv[e] reasons," *Sparks*, 791 F.3d at 1192, or "coach[] or remind[] witnesses by planting misleading facts," *Edlund*, 887 F.3d at 174. Corrupt persuasion is shown "where a defendant tells a potential witness a false story as if the story were true, intending that the witness believe the story and testify to it." *United States v. Rodolitz*, 786 F.2d 77, 82 (2d Cir. 1986); *see United States v. Gabriel*, 125 F.3d 89, 102 (2d Cir. 1997). It also covers urging a witness to recall a fact that the witness did not know, even if the fact was actually true. *See LaShay*, 417 F.3d at 719. Corrupt persuasion also can be shown in certain circumstances when a person, with an improper motive, urges a witness not to cooperate with law enforcement. *See United States v. Shotts*, 145 F.3d 1289, 1301 (11th Cir. 1998) (telling secretary "not to [say] anything [to the FBI] and [she] would not be bothered"). . . .

Attempts and endeavors. Section 1512(c)(2) covers both substantive obstruction offenses and attempts to obstruct justice. Under general principles of attempt law, a person is guilty of an attempt when he has the intent to commit a substantive offense and takes an overt act that constitutes a substantial step towards that goal. "[T]he act [must be] substantial, in that it was strongly corroborative of the defendant's criminal purpose." *United States v. Pratt*, 351 F.3d 131, 135 (4th Cir. 2003). While "mere abstract talk" does not suffice, any "concrete and specific" acts that corroborate the defendant's intent can constitute a "substantial step." *United States v. Irving*, 665 F.3d 1184, 1198–1205 (10th Cir. 2011). Thus, "soliciting an innocent agent to engage in conduct constituting an element of the crime" may qualify as a substantial step. Model Penal Code § 5.01(2)(g); *see United States v. Lucas*, 499 F.3d 769, 781 (8th Cir. 2007).

The omnibus clause of 18 U.S.C. § 1503 prohibits an "endeavor" to obstruct justice, which sweeps more broadly than Section 1512's attempt provision. "It is well established that a[n] [obstruction-of-justice] offense is complete when one corruptly endeavors to obstruct or impede the due administration of justice; the prosecution need not prove that the due administration of justice was actually obstructed or impeded." *United States v. Davis*, 854 F.3d 1276, 1292 (11th Cir. 2017) (internal quotation marks omitted). . . .

III. LEGAL DEFENSES TO THE APPLICATION OF OBSTRUCTION-OF-JUSTICE STATUTES TO THE PRESIDENT

The President's personal counsel has written to this Office to advance statutory and constitutional defenses to the potential application of the obstruction-of-justice statutes to the President's conduct. As a statutory matter, the President's counsel has argued that a core obstruction-of-justice statute, 18 U.S.C. § 1512(c)(2), does not cover the President's actions. As a constitutional matter, the President's counsel argued that the President cannot obstruct justice by exercising his constitutional authority to close Department of Justice investigations or terminate the FBI Director. Under that view, any statute that restricts the President's exercise of those powers would impermissibly intrude on the President's constitutional role. The President's counsel has conceded that the President may be subject to criminal laws that do not directly involve exercises of his Article II authority, such as laws prohibiting bribing witnesses or suborning perjury. But counsel has made a categorical argument that "the President's exercise of his constitutional authority here to terminate an FBI Director and to close investigations cannot constitutionally constitute obstruction of justice." . . .

As for the constitutional arguments, we recognized that the Department of Justice and the courts have not definitively resolved these constitutional issues. We therefore analyzed the President's position through the framework of Supreme Court precedent addressing the separation of powers. Under that framework, we concluded, Article II of the Constitution does not categorically and permanently immunize the President from potential liability for the conduct that we investigated. Rather, our analysis led us to conclude that the obstruction-of-justice statutes can validly prohibit a President's corrupt efforts to use his official powers to curtail, end, or interfere with an investigation.

. . . The Department of Justice has taken the position that Section 1512(c)(2) states a broad, independent, and unqualified prohibition on obstruction of justice. While defendants have argued that subsection (c)(2) should be read to cover only acts that would impair the availability or integrity of evidence because that is subsection (c)(1)'s focus, strong arguments weigh against that proposed limitation. The text of Section 1512(c)(2) confirms that its sweep is not tethered to Section 1512(c)(1); courts have so interpreted it; its history does not counsel otherwise; and no principle of statutory construction dictates a contrary view. On its face, therefore, Section 1512(c)(2) applies to all corrupt means of obstructing a proceeding, pending or contemplated- including by improper exercises of official power. In addition, other statutory provisions that are potentially applicable to certain conduct we investigated broadly prohibit obstruction of proceedings that are pending before courts, grand juries, and Congress. *See* 18 U.S.C. §§ 1503, 1505. Congress has also specifically prohibited witness tampering. *See* 18 U.S.C. § 1512(b). . . .

The President has broad discretion to direct criminal investigations. The Constitution vests the "executive Power" in the President and enjoins him to "take Care that the Laws be faithfully executed." U.S. CONST. ART II, §§ 1, 3. Those powers and duties form the foundation of prosecutorial discretion. *See* United States v. Armstrong, 517 U.S. 456, 464 (1996) (Attorney General and United States Attorneys "have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'"). The President also has authority to appoint

officers of the United States and to remove those whom he has appointed. U.S. CONST. ART II, § 2, cl. 2 (granting authority to the President to appoint all officers with the advice and consent of the Senate, but providing that Congress may vest the appointment of inferior officers in the President alone, the heads of departments, or the courts of law). . . .

Although the President has broad authority under Article II, that authority coexists with Congress's Article I power to enact laws that protect congressional proceedings, federal investigations, the courts, and grand juries against corrupt efforts to undermine their functions. Usually, those constitutional powers function in harmony, with the President enforcing the criminal laws under Article Il to protect against corrupt obstructive acts. But when the President's official actions come into conflict with the prohibitions in the obstruction statutes, any constitutional tension is reconciled through separation-of-powers analysis.

The President' s counsel has argued that "the President' s exercise of his constitutional authority . . . to terminate an FBI Director and to close investigations . . . cannot constitutionally constitute obstruction of justice." As noted above, no Department of Justice position or Supreme Court precedent directly resolved this issue. We did not find counsel's contention, however, to accord with our reading of the Supreme Court authority addressing separation-of-powers issues. Applying the Court's framework for analysis, we concluded that Congress can validly regulate the President's exercise of official duties to prohibit actions motivated by a corrupt intent to obstruct justice. The limited effect on presidential power that results from that restriction would not impermissibly undermine the President's ability to perform his Article II functions.

Before addressing Article II issues directly, we consider one threshold statutory-construction principle that is unique to the presidency: "The principle that general statutes must be read as not applying to the President if they do not expressly apply where application would arguably limit the President's constitutional role." OLC, Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges, 19 Op. O.L.C. 350, 352 (1995). This "clear statement rule," id., has its source in two principles: statutes should be construed to avoid serious constitutional questions, and Congress should not be assumed to have altered the constitutional separation of powers without clear assurance that it intended that result. OLC, The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 178 (1996). . . .

But OLC has also recognized that this clear-statement rule "does not apply with respect to a statute that raises no separation of powers questions were it to be applied to the President," such as the federal bribery statute, 18 U.S.C. § 201. Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges, 19 Op. O.L.C. at 357 n.11. OLC explained that "[a]pplication of § 201 raises no separation of powers question, let alone a serious one," because "[t]he Constitution confers no power in the President to receive bribes." *Id.* In support of that conclusion, OLC noted constitutional provisions that forbid increases in the President's compensation while in office, "which is what a bribe would function to do," *id.* (citing U.S. CONST. ART. II, § 1, cl. 7), and the express constitutional power of "Congress to impeach [and convict] a President for, inter alia, bribery," *id.* (citing U.S. CONST. ART II, § 4).

Under OLC's analysis, Congress can permissibly criminalize certain obstructive conduct by the President, such as suborning perjury, intimidating witnesses, or fabricating evidence, because those prohibitions raise

no separation-of-powers questions. *See* Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges, 19 Op. O.L.C. at 357 n.11. The Constitution does not authorize the President to engage in such conduct, and those actions would transgress the President's duty to "take Care that the Laws be faithfully executed." U.S. CONST. ART II, § 3. In view of those clearly permissible applications of the obstruction statutes to the President, *Franklin*'s holding that the President is entirely excluded from a statute absent a clear statement would not apply in this context. . . .

Under the Supreme Court's balancing test for analyzing separation-of-powers issues, the first task is to assess the degree to which applying obstruction-of-justice statutes to presidential actions affects the President's ability to carry out his Article II responsibilities. Administrator of General Services, 433 U.S. at 443. As discussed above, applying obstruction-of-justice statutes to presidential conduct that does not involve the President's conduct of office-such as influencing the testimony of witnesses-is constitutionally unproblematic. The President has no more right than other citizens to impede official proceedings by corruptly influencing witness testimony. The conduct would be equally improper whether effectuated through direct efforts to produce false testimony or suppress the truth, or through the actual, threatened, or proposed use of official powers to achieve the same result.

The President's action in curtailing criminal investigations or prosecutions, or discharging law enforcement officials, raises different questions. Each type of action involves the exercise of executive discretion in furtherance of the President's duty to "take Care that the Laws be faithfully executed." U.S. CONST., ART. II, § 3. Congress may not supplant the President's exercise of executive power to supervise prosecutions or to remove officers who occupy law enforcement positions. *See Bowsher v. Synar*, 478 U.S. 714, 726–27 (1986) ("Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment. . . . [Because t]he structure of the Constitution does not permit Congress to execute the laws, . . . [t]his kind of congressional control over the execution of the laws . . . is constitutionally impermissible."). Yet the obstruction-of-justice statutes do not aggrandize power in Congress or usurp executive authority. Instead, they impose a discrete limitation on conduct only when it is taken with the "corrupt" intent to obstruct justice. The obstruction statutes thus would restrict presidential action only by prohibiting the President from acting to obstruct official proceedings for the improper purpose of protecting his own interests.

The direct effect on the President's freedom of action would correspondingly be a limited one. A preclusion of "corrupt" official action is not a major intrusion on Article II powers. For example, the proper supervision of criminal law does not demand freedom for the President to act with the intention of shielding himself from criminal punishment, avoiding financial liability, or preventing personal embarrassment. To the contrary, a statute that prohibits official action undertaken for such personal purposes furthers, rather than hinders, the impartial and evenhanded administration of the law. And the Constitution does not mandate that the President have unfettered authority to direct investigations or prosecutions, with no limits whatsoever, in order to carry out his Article II functions. . . .

Congress has Article I authority to define generally applicable criminal law and apply it to all persons-including the President. Congress clearly has authority to protect its own legislative functions against corrupt

efforts designed to impede legitimate fact-gathering and lawmaking efforts. Congress also has authority to establish a system of federal courts, which includes the power to protect the judiciary against obstructive acts. *See* U.S. CONST. ART. I, § 8, cls. 9, 18 ("The Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court" and "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers"). The long lineage of the obstruction-of-justice statutes, which can be traced to at least 1831, attests to the necessity for that protection. *See* An Act Declaratory of the Law Concerning Contempts of Court, 4 Stat. 487-488 § 2 (1831) (making it a crime if "any person or persons shall corruptly . . . endeavor to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly . . . obstruct, or impede, or endeavor to obstruct or impede, the due administration of justice therein").

The Article III courts have an equally strong interest in being protected against obstructive acts, whatever their source. As the Supreme Court explained in *United States v. Nixon*, a "primary constitutional duty of the Judicial Branch" is "to do justice in criminal prosecutions." 418 U.S. at 707; *accord Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367, 384 (2004). In *Nixon*, the Court rejected the President's claim of absolute executive privilege because "the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts." 407 U.S. at 712. As *Nixon* illustrates, the need to safeguard judicial integrity is a compelling constitutional interest. *See id.* at 709 (noting that the denial of full disclosure of the facts surrounding relevant presidential communications threatens "[t]he very integrity of the judicial system and public confidence in the system").

Finally, the grand jury cannot achieve its constitutional purpose absent protection from corrupt acts. Serious federal criminal charges generally reach the Article III courts based on an indictment issued by a grand jury. *Cobbledick v. United States*, 309 U.S. 323, 327 (1940) ("The Constitution itself makes the grand jury a part of the judicial process."). And the grand jury's function is enshrined in the Fifth Amendment. U.S. CONST. AMEND. V. ("[n]o person shall be held to answer" for a serious crime "unless on a presentment or indictment of a Grand Jury"). "[T]he whole theory of [the grand jury's] function is that it belongs to no branch of the institutional government, serving as a kind of buffer or referee between the Government and the people," *United States v. Williams*, 504 U.S. 36, 47 (1992), "pledged to indict no one because of prejudice and to free no one because of special favor." *Costello v. United States*, 350 U.S. 359, 362 (1956). If the grand jury were not protected against corrupt interference from all persons, its function as an independent charging body would be thwarted. And an impartial grand jury investigation to determine whether probable cause exists to indict is vital to the criminal justice process.

The final step in the constitutional balancing process is to assess whether the separation-of-powers doctrine permits Congress to take action within its constitutional authority notwithstanding the potential impact on Article II functions. *See* Administrator of General Services, 433 U.S. at 443; *see also Morrison*, 487 U.S. at 691–93, 695–96; *United States v. Nixon*, 418 U.S. at 711–12. In the case of the obstruction-of-justice statutes, our assessment of the weighing of interests leads us to conclude that Congress has the authority to impose the limited restrictions contained in those statutes on the President's official conduct to protect the integrity of important functions of other branches of government.

A general ban on corrupt action does not unduly intrude on the President's responsibility to "take Care that the Laws be faithfully executed." U.S. CONST. ART II, §§ 3. To the contrary, the concept of "faithful execution" connotes the use of power in the interest of the public, not in the office holder's personal interests. *See* 1 Samuel Johnson, A Dictionary of the English Language 763 (1755) ("faithfully" def. 3: "[w]ith strict adherence to duty and allegiance"). And immunizing the President from the generally applicable criminal prohibition against corrupt obstruction of official proceedings would seriously impair Congress's power to enact laws "to promote objectives within [its] constitutional authority," Administrator of General Services, 433 U.S. at 425-i.e., protecting the integrity of its own proceedings and the proceedings of Article TTI courts and grand juries. . . .

Applying the obstruction statutes to the President's official conduct would involve determining as a factual matter whether he engaged in an obstructive act, whether the act had a nexus to official proceedings, and whether he was motivated by corrupt intent. But applying those standards to the President' s official conduct should not hinder his ability to perform his Article II duties. *Cf. Nixon v. Fitzgerald*, 457 U.S. at 752–53 & n.32 (taking into account chilling effect on the President in adopting a constitutional rule of presidential immunity from private civil damages action based on official duties). Several safeguards would prevent a chilling effect: the existence of settled legal standards, the presumption of regularity in prosecutorial actions, and the existence of evidentiary limitations on probing the President's motives. And historical experience confirms that no impermissible chill should exist.

As an initial matter, the term "corruptly" sets a demanding standard. It requires a concrete showing that a person acted with an intent to obtain an "improper advantage for [him]self or someone else, inconsistent with official duty and the rights of others." BALLENTINE'S LAW DICTIONARY 276 (3d ed. 1969); *see United States v. Pasha*, 797 F.3d 1122, 1132 (D.C. Cir. 2015); *Aguilar*, 515 U.S. at 616 (Scalia, J., concurring in part and dissenting in part). That standard parallels the President's constitutional obligation to ensure the faithful execution of the laws. And virtually everything that the President does in the routine conduct of office will have a clear governmental purpose and will not be contrary to his official duty. Accordingly, the President has no reason to be chilled in those actions because, in virtually all instances, there will be no credible basis for suspecting a corrupt personal motive.

That point is illustrated by examples of conduct that would and would not satisfy the stringent corrupt-motive standard. Direct or indirect action by the President to end a criminal investigation into his own or his family members' conduct to protect against personal embarrassment or legal liability would constitute a core example of corruptly motivated conduct. So too would action to halt an enforcement proceeding that directly and adversely affected the President's financial interests for the purpose of protecting those interests. In those examples, official power is being used for the purpose of protecting the President's personal interests. ln contrast, the President's actions to serve political or policy interests would not qualify as corrupt. The President's role as head of the government necessarily requires him to take into account political factors in making policy decisions that affect law-enforcement actions and proceedings. For instance, the President's decision to curtail a law-enforcement investigation to avoid international friction would not implicate the obstruction-of-justice statutes. The criminal law does not seek to regulate the consideration of such political or policy factors in the conduct of government. And when legitimate interests animate the President's conduct,

those interests will almost invariably be readily identifiable based on objective factors. Because the President's conduct in those instances will obviously fall outside the zone of obstruction law, no chilling concern should arise. . . .

[Volume II of the Mueller report did not reach a legal conclusion regarding the President's conduct, which it described as presenting "difficult issues," on the ground that an existing opinion of the Department of Justice concluded that a President may not constitutionally be subject to indictment while still in office. It would be inappropriate for a prosecutor to state a position on the President's liability, the report concluded, when there could be no prospect of contesting such an allegation in court.]

D. Elements and Examples: Section 1519

The following two cases deal with interpretation of the newer § 1519 statute, specifically with regards to what mens rea and/or nexus requirements it might or might not have, and what kinds of acts the statute covers. This statute involves many of the same policy problems presented by the other statutes but in the context of different statutory text. Notice how courts try to deal with the interaction of policy considerations and text.

UNITED STATES v. YIELDING, 657 F.3d 688 (8th Cir. 2011)

COLLOTON, Circuit Judge.

In approximately 1998, Yielding began to work as a surgical and administrative assistant for Dr. Richard Jordan, a neurosurgeon in North Little Rock, Arkansas. Dr. Jordan performed surgeries at several area hospitals, including Baptist Health Medical Center in North Little Rock ("Baptist"). Yielding was responsible for ensuring that the required equipment was present at all of Dr. Jordan's surgeries.

Jordan "Jody" Wall was a charge nurse at Baptist in 2003 and 2004. He was responsible for ordering medical supplies for Dr. Jordan's surgeries at that hospital. Yielding told Wall which supplies were needed for each scheduled surgery, and Wall ensured that the requested items were available. When Baptist did not have enough supplies on hand, Wall asked Denise Rhodes, the hospital's senior inventory coordinator, to order the needed items.

In 2002, Yielding's wife, Kelley Yielding, incorporated Advanced Neurophysiology, Inc. ("ANI"), a medical services company of which she was the sole shareholder. By 2003, Kelley had begun to work as an independent sales agent for two medical supply companies known as Orthofix and Osteotech. Orthofix sold external bone growth stimulators, which promote bone growth following surgery in patients who would otherwise have difficulty growing new bone. Osteotech sold bone allograft, which is substitute bone that is used to fill a void in a patient's bone after surgery or trauma.

Kelley Yielding marketed the two companies' products to surgeons, and received commissions on each sale. From February 2003 to October 2004, Kelley received approximately $384,000 in commissions from Osteotech and Orthofix that were attributable to purchases by Baptist. During the same period, ANI issued twenty-two checks to Wall totaling $54,366.08.

In November 2004, Baptist terminated Wall and Rhodes after an internal investigation revealed irregularities in the ordering of Osteotech bone and Orthofix bone growth stimulators. Baptist determined that Rhodes had placed purchasing orders for the Osteotech and Orthofix products without proper authorization, and that the hospital should not have purchased any Orthofix bone growth stimulators. Baptist also discovered that more than one hundred pieces of bone were missing from the hospital's inventory.

On December 27, 2004, Dr. Jordan forwarded to the Yieldings an e-mail he had received from a Baptist administrator. In the e-mail, the administrator characterized the purchases of the bone growth stimulators as "very suspicious," and informed Dr. Jordan that the hospital was "continuing [its] investigation of this issue as well as the . . . missing pieces of bone."

Three days later, U.S. Bank issued a check to ANI for $34,018.90. This was the precise amount of ANI's total payments to Wall in 2004. The check listed the remitter as Jordan Wall, and the purpose of the payment as "REPAYMENT ON LOAN." Bank records showed that on the same day, Yielding withdrew $21,018.90 from the Yieldings' personal bank account at U.S. Bank. A receipt and currency transaction report indicated that Yielding also paid the bank $13,000 in cash.

The Federal Bureau of Investigation opened an inquiry into the irregularities at Baptist in mid–2005. In an interview in October 2005, Wall told investigators that the Yieldings had given him a loan of "[m]aybe $10,000," not the $34,018.90 paid by check in December 2004. On April 14, 2006, the FBI executed search warrants at the Yieldings' home and at Dr. Jordan's office. During the search of the Yielding residence, the agents discovered a promissory note describing an interest-free loan of $34,018.90 issued from ANI to Wall in January 2004. The note was marked as paid on December 30, 2004.

The agents also interviewed Kelley Yielding. She initially described the payments from ANI to Wall as a loan and denied that Wall had been employed by ANI. Yielding told the agents that he and his wife had given Wall a loan of approximately $30,000, that the loan had been documented, and that Wall had repaid the loan. After the agents confronted Yielding with bank records indicating that he used his own funds to purchase Wall's check to ANI, however, Yielding stated that Wall had convinced him to pay Wall approximately $3000 per month in exchange for Wall's promise to keep all of Kelley Yielding's supplies fully in stock. Yielding told the agents that Wall asked him to purchase a cashier's check to make it appear as if the payments to Wall had been a loan that Wall was paying back. On the same day, the FBI again interviewed Wall, who then admitted that he had received payments from the Yieldings in exchange for ordering Osteotech bone and Orthofix bone growth stimulators.

Kelley Yielding died on October 2, 2006. . . . On May 8, 2008, a grand jury indicted Yielding on forty-six counts of mail fraud, falsification of documents, and payment of kickbacks involving a federal health care program.

At trial, . . . Wall testified that Yielding had approached him and had offered to pay him in exchange for ordering the products sold by Kelley Yielding. According to Wall, Yielding gave Wall lists of items to order, and Wall then asked Rhodes to obtain the listed supplies. Wall recalled that Yielding once told him to order some bone products so that Kelley would qualify for a free vacation. In return for Wall's efforts, Yielding

gave him envelopes containing checks from ANI. Wall testified that Yielding told him to "keep it quiet," and asked him in approximately December 2004 to sign and date a promissory note so that the note would appear to have been signed in January 2004. Wall said that Yielding also asked him to sign a cashier's check that would make the payments from ANI to Wall look like a loan. . . .

Yielding raises several challenges to his conviction on count two for violating 18 U.S.C. § 1519, an obstruction of justice statute. Section 1519 . . . provides:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with 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, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

18 U.S.C. § 1519. The charge in this case was based on Yielding's knowing falsification of a promissory note with the intent to disguise checks paid from ANI to Wall as "loans" rather than kickbacks.

Yielding's narrowest challenge is to the district court's jury instructions on the § 1519 charge. The district court instructed the jury as follows:

> The crime of falsifying a document as charged in Count Two of the indictment, has three essential elements, which are:
>
> One, the defendant knowingly falsified a document;
>
> Two, the defendant did so with the intent to impede, obstruct, or influence the investigation or proper administration of any matter or in contemplation of or relation to any such matter; and
>
> Three, the matter was within the jurisdiction of the United States Department of Health and Human Services which is an agency of the United States.
>
> If all of these essential elements have been proved beyond a reasonable doubt as to the defendant then you must find the defendant guilty of the crime charged under Count Two; otherwise you must find the defendant not guilty of this crime under Count Two.
>
> The United States does not have to prove that the matter be pending at the time of the obstruction, but only that the acts be taken in relation to or contemplation of any such matter or case.
>
> Further, the United States does not have to prove that the falsifying of the document would naturally or probably result in obstruction.
>
> In order to meet its burden, the United States need not prove that the defendant specifically knew that the matter was within the jurisdiction of a department or agency.

Yielding renews objections lodged in the district court regarding the elements of the offense. To resolve the challenges to the instructions, therefore, we must consider what proof is required to establish a violation of § 1519.

One element on which both parties agree is that the government must prove that Yielding "knowingly . . . falsifie[d] . . . any . . . document." The falsification must be done knowingly; an unwitting falsehood will not suffice.

The element of intent is more complex. The statute provides that liability may arise in three different situations involving matters within the jurisdiction of a federal department or agency: (1) when a defendant acts directly with respect to "the investigation or proper administration of any matter," that is, a pending matter, (2) when a defendant acts "in . . . contemplation of any such matter," and (3) when a defendant acts "in relation to . . . any such matter." Although the phrasing of the statute is a bit awkward, the government concedes that the prosecution must show intent to impede, obstruct, or influence the investigation or proper administration of a matter in each of these three scenarios. We think this is the better reading of the statute. The phrase "or in relation to or contemplation of any such matter" is set off by commas and follows the reference to an accused's intent to obstruct the investigation of "any matter." It seems to us that Congress thereby sought to extend the prohibition to situations in which the accused does not act directly with respect to a pending matter, but acts either in contemplation of a future matter or in relation to a pending matter. The statute, for example, does not allow a defendant to escape liability for shredding documents with intent to obstruct a foreseeable investigation of a matter within the jurisdiction of a federal agency just because the investigation has not yet commenced.

But we do not think Congress, in expanding the scope of § 1519 beyond actions directed to a pending matter, eliminated the need for proof of intent to impede, obstruct, or influence a federal matter. In other words, the statute does not impose liability for "knowingly . . . destroy[ing] . . . any . . . document . . . in . . . contemplation of any [federal] matter," *without* an intent to impede, obstruct, or influence a matter. If it did, then the statute would forbid innocent conduct such as routine destruction of documents that a person consciously and in good faith determines are irrelevant to a foreseeable federal matter. We thus understand the intent element of the statute to encompass three possible scenarios: (1) a defendant acts with intent to impede, obstruct, or influence the investigation or proper administration of a federal matter, (2) a defendant, in contemplation of a federal matter, acts with intent to impede, obstruct, or influence the investigation or proper administration of the matter, and (3) a defendant, in relation to a federal matter, acts with intent to impede, obstruct, or influence the investigation or proper administration of the matter.

The parties disagree, however, about whether the intent element of § 1519 also requires what the Supreme Court has described as a "nexus" between the alleged obstructive act and the federal matter. Yielding contends that the government was required to prove not only that he intended to impede, obstruct, or influence the investigation or proper administration of a matter, but also that he knew that his actions would have the "natural and probable effect" of interfering with the investigation or proper administration of a matter. He objects that the district court erred by instructing the jury that the government need not "prove that the falsifying of the document would naturally or probably result in obstruction." . . .

We conclude that the "nexus" requirement urged by Yielding—that the government must show the accused knew his actions were likely to affect a federal matter—does not apply to a prosecution for the knowing falsification of documents under § 1519. The text of § 1519 requires only proof that the accused knowingly committed one of several acts, including falsification of a document, and did so "with the intent to impede, obstruct, or influence the investigation or proper administration" of a federal matter. The requisite knowledge and intent can be present even if the accused lacks knowledge that he is likely to succeed in obstructing the matter. It presumably will be easier to prove that an accused intended to obstruct an investigation if the obstructive act was likely to affect the investigation. But we do not think the statute allows an accused with the requisite intent to avoid liability if he overestimated the importance of a falsified record or shredded a document for the purpose of eliminating a small but appreciable risk that the document would lead investigators to discover his wrongdoing.

The language of § 1519 is materially different from the statutes considered in *Aguilar* and *Arthur Andersen.* The former forbade "corruptly endeavor[ing]" to obstruct, and the latter prohibited "knowingly corrup[t] persau[sion]." In both cases, the Court was thus required to discern the substance of an intent requirement from statutory terms that appeared to imply one, but did not speak directly to its content….But in § 1519, Congress spoke more directly to the requisite intent and described its scope more precisely. The statute includes no ambiguous phrase such as "corruptly endeavor" or "knowingly corruptly persuade" that calls for implication of an additional intent requirement. . . . We think the text of § 1519 gives fair warning that knowingly falsifying a document, in contemplation of a federal matter, with intent to impede, obstruct, or interfere with that matter may result in criminal liability, whether or not the obstruction was likely to succeed. That the accused's intent must be wrongful is evident from the nature of the acts prohibited, such as knowing falsification of documents, and the requisite intent to influence, obstruct, or impede an investigation or proper administration of a federal matter. The jury instruction was therefore not erroneous, because § 1519 does not require a nexus of the kind articulated in *Aguilar* and *Arthur Andersen.* . . .

As of now, no other circuit has refuted the holding of *Yielding* that § 1519 does not contain a nexus requirement. However, not many opinions have affirmed it either. Does the absence of a nexus requirement create any problems from a policy standpoint?

UNITED STATES v. YATES, 574 U.S. 528 (2015)

Justice GINSBURG announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Justice BREYER, and Justice SOTOMAYOR join. [Justice ALITO concurred on narrower grounds; his concurrence is omitted]

John Yates, a commercial fisherman, caught undersized red grouper in federal waters in the Gulf of Mexico. To prevent federal authorities from confirming that he had harvested undersized fish, Yates ordered a crew member to toss the suspect catch into the sea. For this offense, he was charged with, and convicted of, violating 18 U.S.C. § 1519, which provides:

> "Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with 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, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both."

. . . [Yates] maintains that fish are not trapped within the term "tangible object," as that term is used in § 1519.

Section 1519 was enacted as part of the Sarbanes–Oxley Act of 2002, 116 Stat. 745, legislation designed to protect investors and restore trust in financial markets following the collapse of Enron Corporation. A fish is no doubt an object that is tangible; fish can be seen, caught, and handled, and a catch, as this case illustrates, is vulnerable to destruction. But it would cut § 1519 loose from its financial-fraud mooring to hold that it encompasses any and all objects, whatever their size or significance, destroyed with obstructive intent. Mindful that in Sarbanes–Oxley, Congress trained its attention on corporate and accounting deception and cover-ups, we conclude that a matching construction of § 1519 is in order: A tangible object captured by § 1519, we hold, must be one used to record or preserve information.

On August 23, 2007, the Miss Katie, a commercial fishing boat, was six days into an expedition in the Gulf of Mexico. Her crew numbered three, including Yates, the captain. Engaged in a routine offshore patrol to inspect both recreational and commercial vessels, Officer John Jones of the Florida Fish and Wildlife Conservation Commission decided to board the Miss Katie to check on the vessel's compliance with fishing rules. Although the Miss Katie was far enough from the Florida coast to be in exclusively federal waters, she was nevertheless within Officer Jones's jurisdiction. Because he had been deputized as a federal agent by the National Marine Fisheries Service, Officer Jones had authority to enforce federal, as well as state, fishing laws.

Upon boarding the Miss Katie, Officer Jones noticed three red grouper that appeared to be undersized hanging from a hook on the deck. At the time, federal conservation regulations required immediate release of red grouper less than 20 inches long. 50 C.F.R. § 622.37(d)(2)(ii) (effective April 2, 2007). Violation of those regulations is a civil offense punishable by a fine or fishing license suspension. *See* 16 U.S.C. §§ 1857(1)(A), (G), 1858(a), (g).

Suspecting that other undersized fish might be on board, Officer Jones proceeded to inspect the ship's catch, setting aside and measuring only fish that appeared to him to be shorter than 20 inches. Officer Jones ultimately determined that 72 fish fell short of the 20–inch mark. A fellow officer recorded the length of each of the undersized fish on a catch measurement verification form. With few exceptions, the measured fish were between 19 and 20 inches; three were less than 19 inches; none were less than 18.75 inches. After separating the fish measuring below 20 inches from the rest of the catch by placing them in wooden crates, Officer Jones directed Yates to leave the fish, thus segregated, in the crates until the Miss Katie returned to port. Before departing, Officer Jones issued Yates a citation for possession of undersized fish.

Four days later, after the Miss Katie had docked in Cortez, Florida, Officer Jones measured the fish contained

in the wooden crates. This time, however, the measured fish, although still less than 20 inches, slightly exceeded the lengths recorded on board. Jones surmised that the fish brought to port were not the same as those he had detected during his initial inspection. Under questioning, one of the crew members admitted that, at Yates's direction, he had thrown overboard the fish Officer Jones had measured at sea, and that he and Yates had replaced the tossed grouper with fish from the rest of the catch. . . .

The Sarbanes–Oxley Act, all agree, was prompted by the exposure of Enron's massive accounting fraud and revelations that the company's outside auditor, Arthur Andersen LLP, had systematically destroyed potentially incriminating documents. The Government acknowledges that § 1519 was intended to prohibit, in particular, corporate document-shredding to hide evidence of financial wrongdoing. Brief for United States 46. Prior law made it an offense to "intimidat[e], threate[n], or corruptly persuad[e] another person" to shred documents. § 1512(b) (emphasis added). Section 1519 cured a conspicuous omission by imposing liability on a person who destroys records himself. *See* S.Rep. No. 107–146, p. 14 (2002) (describing § 1519 as "a new general anti shredding provision" and explaining that "certain current provisions make it a crime to persuade another person to destroy documents, but not a crime to actually destroy the same documents yourself"). The new section also expanded prior law by including within the provision's reach "any matter within the jurisdiction of any department or agency of the United States." *Id.*, at 14–15. . . .

The ordinary meaning of an "object" that is "tangible," as stated in dictionary definitions, is "a discrete . . . thing," Webster's Third New International Dictionary 1555 (2002), that "possess[es] physical form," Black's Law Dictionary 1683 (10th ed. 2014). From this premise, the Government concludes that "tangible object," as that term appears in § 1519, covers the waterfront, including fish from the sea.

Whether a statutory term is unambiguous, however, does not turn solely on dictionary definitions of its component words. Rather, "[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997). *See also Deal v. United States*, 508 U.S. 129, 132, 113 S. Ct. 1993, 124 L. Ed. 2d 44 (1993) (it is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used"). Ordinarily, a word's usage accords with its dictionary definition. In law as in life, however, the same words, placed in different contexts, sometimes mean different things. . . .

We note first § 1519's caption: "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy." That heading conveys no suggestion that the section prohibits spoliation of any and all physical evidence, however remote from records. Neither does the title of the section of the Sarbanes–Oxley Act in which § 1519 was placed, § 802: "Criminal penalties for altering documents." 116 Stat. 800. Furthermore, § 1520, the only other provision passed as part of § 802, is titled "Destruction of corporate audit records" and addresses only that specific subset of records and documents. While these headings are not commanding, they supply cues that Congress did not intend "tangible object" in § 1519 to sweep within its reach physical objects of every kind, including things no one would describe as records, documents, or devices closely associated with them. *See Almendarez–Torres v. United States*, 523 U.S. 224, 234, 118 S. Ct. 1219,

140 L. Ed. 2d 350 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." (internal quotation marks omitted)). If Congress indeed meant to make § 1519 an all-encompassing ban on the spoliation of evidence, as the dissent believes Congress did, one would have expected a clearer indication of that intent.

Section 1519's position within Chapter 73 of Title 18 further signals that § 1519 was not intended to serve as a cross-the-board ban on the destruction of physical evidence of every kind. Congress placed § 1519 (and its companion provision § 1520) at the end of the chapter, following immediately after the pre-existing § 1516, § 1517, and § 1518, each of them prohibiting obstructive acts in specific contexts. See § 1516 (audits of recipients of federal funds); § 1517 (federal examinations of financial institutions); § 1518 (criminal investigations of federal health care offenses). *See also* S. Rep. No. 107–146, at 7 (observing that § 1517 and § 1518 "apply to obstruction in certain limited types of cases, such as bankruptcy fraud, examinations of financial institutions, and healthcare fraud"). . . .

The contemporaneous passage of § 1512(c)(1), which was contained in a section of the Sarbanes–Oxley Act discrete from the section embracing § 1519 and § 1520, is also instructive. Section 1512(c)(1) provides:

> "(c) Whoever corruptly—
>
> "(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding . . . .
>
> "shall be fined under this title or imprisoned not more than 20 years, or both."

The legislative history reveals that § 1512(c)(1) was drafted and proposed after § 1519. *See* 148 Cong. Rec. 12518, 13088–13089 (2002). The Government argues, and Yates does not dispute, that § 1512(c)(1)'s reference to "other object" includes any and every physical object. But if § 1519's reference to "tangible object" already included all physical objects, as the Government and the dissent contend, then Congress had no reason to enact § 1512(c)(1): Virtually any act that would violate § 1512(c)(1) no doubt would violate § 1519 as well, for § 1519 applies to "the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . or in relation to or contemplation of any such matter," not just to "an official proceeding."

The Government acknowledges that, under its reading, § 1519 and § 1512(c)(1) "significantly overlap." Nowhere does the Government explain what independent function § 1512(c)(1) would serve if the Government is right about the sweeping scope of § 1519. We resist a reading of § 1519 that would render superfluous an entire provision passed in proximity as part of the same Act. *See Marx v. General Revenue Corp.*, 568 U.S. ——, ——, 133 S. Ct. 1166, 1178, 185 L. Ed. 2d 242 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

The words immediately surrounding "tangible object" in § 1519—"falsifies, or makes a false entry in any record [or] document"—also cabin the contextual meaning of that term. As explained in *Gustafson v. Alloyd*

Co., 513 U.S. 561, 575, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995), we rely on the principle of noscitur a sociis—a word is known by the company it keeps—to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." (internal quotation marks omitted). *See also United States v. Williams*, 553 U.S. 285, 294, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008) ("a word is given more precise content by the neighboring words with which it is associated"). In *Gustafson*, we interpreted the word "communication" in § 2(10) of the Securities Act of 1933 to refer to a public communication, rather than any communication, because the word appeared in a list with other words, notably "notice, circular, [and] advertisement," making it "apparent that the list refer[red] to documents of wide dissemination." 513 U.S., at 575–576, 115 S. Ct. 1061. And we did so even though the list began with the word "any."

The noscitur a sociis canon operates in a similar manner here. "Tangible object" is the last in a list of terms that begins "any record [or] document." The term is therefore appropriately read to refer, not to any tangible object, but specifically to the subset of tangible objects involving records and documents, i.e., objects used to record or preserve information. . . .

This moderate interpretation of "tangible object" accords with the list of actions § 1519 proscribes. The section applies to anyone who "alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object" with the requisite obstructive intent. (Emphasis added.) The last two verbs, "falsif[y]" and "mak[e] a false entry in," typically take as grammatical objects records, documents, or things used to record or preserve information, such as logbooks or hard drives. *See, e.g.*, Black's Law Dictionary 720 (10th ed. 2014) (defining "falsify" as "[t]o make deceptive; to counterfeit, forge, or misrepresent; esp., to tamper with (a document, record, etc.)"). It would be unnatural, for example, to describe a killer's act of wiping his fingerprints from a gun as "falsifying" the murder weapon. But it would not be strange to refer to "falsifying" data stored on a hard drive as simply "falsifying" a hard drive. Furthermore, Congress did not include on § 1512(c)(1)'s list of prohibited actions "falsifies" or "makes a false entry in." *See* § 1512(c)(1) (making it unlawful to "alte[r], destro [y], mutilat[e], or concea[l] a record, document, or other object" with the requisite obstructive intent). That contemporaneous omission also suggests that Congress intended "tangible object" in § 1519 to have a narrower scope than "other object" in § 1512(c)(1).

A canon related to noscitur a sociis, ejusdem generis, counsels: "Where general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384, 123 S. Ct. 1017, 154 L. Ed. 2d 972 (2003) (internal quotation marks omitted). In *Begay v. United States*, 553 U.S. 137, 142–143, 128 S. Ct. 1581, 170 L. Ed. 2d 490 (2008), for example, we relied on this principle to determine what crimes were covered by the statutory phrase "any crime . . . that . . . is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii). The enumeration of specific crimes, we explained, indicates that the "otherwise involves" provision covers "only similar crimes, rather than every crime that 'presents a serious potential risk of physical injury to another.'" 553 U.S., at 142, 128 S. Ct. 1581. Had Congress intended the latter "all encompassing" meaning, we observed, "it is hard to see why it would have needed to include the examples

at all." *Ibid. See also CSX Transp., Inc. v. Alabama Dept. of Revenue*, 562 U.S. 277, 131 S. Ct. 1101, 1113, 179 L. Ed. 2d 37 (2011) ("We typically use ejusdem generis to ensure that a general word will not render specific words meaningless."). Just so here. Had Congress intended "tangible object" in § 1519 to be interpreted so generically as to capture physical objects as dissimilar as documents and fish, Congress would have had no reason to refer specifically to "record" or "document." The Government's unbounded reading of "tangible object" would render those words misleading surplusage. . . . It is highly improbable that Congress would have buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial record-keeping. . . .

Justice KAGAN, with whom Justice SCALIA, Justice KENNEDY, and Justice THOMAS join, dissenting.

A criminal law, 18 U.S.C. § 1519, prohibits tampering with "any record, document, or tangible object" in an attempt to obstruct a federal investigation. This case raises the question whether the term "tangible object" means the same thing in § 1519 as it means in everyday language—any object capable of being touched. The answer should be easy: Yes. The term "tangible object" is broad, but clear. Throughout the U.S. Code and many States' laws, it invariably covers physical objects of all kinds. And in § 1519, context confirms what bare text says: All the words surrounding "tangible object" show that Congress meant the term to have a wide range. That fits with Congress's evident purpose in enacting § 1519: to punish those who alter or destroy physical evidence—any physical evidence—with the intent of thwarting federal law enforcement.

The plurality instead interprets "tangible object" to cover "only objects one can use to record or preserve information." Ante, at 1081. The concurring opinion similarly, if more vaguely, contends that "tangible object" should refer to "something similar to records or documents"—and shouldn't include colonial farmhouses, crocodiles, or fish. *Ante*, at 1089 (ALITO, J., concurring in judgment). In my view, conventional tools of statutory construction all lead to a more conventional result: A "tangible object" is an object that's tangible. I would apply the statute that Congress enacted and affirm the judgment below.

While the plurality starts its analysis with § 1519's heading, *see ante*, at 1083 ("We note first § 1519's caption"), I would begin with § 1519's text. When Congress has not supplied a definition, we generally give a statutory term its ordinary meaning. *See, e.g.*, *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. ——, ——, 131 S. Ct. 1885, 1891, 179 L. Ed. 2d 825 (2011). As the plurality must acknowledge, the ordinary meaning of "tangible object" is "a discrete thing that possesses physical form." *Ante*, at 1081 (punctuation and citation omitted). A fish is, of course, a discrete thing that possesses physical form. *See generally* Dr. Seuss, One Fish Two Fish Red Fish Blue Fish (1960). So the ordinary meaning of the term "tangible object" in § 1519, as no one here disputes, covers fish (including too-small red grouper).

That interpretation accords with endless uses of the term in statute and rule books as construed by courts. Dozens of federal laws and rules of procedure (and hundreds of state enactments) include the term "tangible object" or its first cousin "tangible thing"—some in association with documents, others not. . . .

That is not necessarily the end of the matter; I agree with the plurality (really, who does not?) that context matters in interpreting statutes. We do not "construe the meaning of statutory terms in a vacuum." *Tyler v. Cain*, 533 U.S. 656, 662, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001). Rather, we interpret particular words "in

their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989). And sometimes that means, as the plurality says, that the dictionary definition of a disputed term cannot control. *See, e.g.*, *Bloate v. United States*, 559 U.S. 196, 205, n.9, 130 S. Ct. 1345, 176 L. Ed. 2d 54 (2010). But this is not such an occasion, for here the text and its context point the same way. Stepping back from the words "tangible object" provides only further evidence that Congress said what it meant and meant what it said.

Begin with the way the surrounding words in § 1519 reinforce the breadth of the term at issue. Section 1519 refers to "any" tangible object, thus indicating (in line with that word's plain meaning) a tangible object "of whatever kind." Webster's Third New International Dictionary 97 (2002). This Court has time and again recognized that "any" has "an expansive meaning," bringing within a statute's reach all types of the item (here, "tangible object") to which the law refers. *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 131, 122 S. Ct. 1230, 152 L. Ed. 2d 258 (2002); *see, e.g.*, *Republic of Iraq v. Beaty*, 556 U.S. 848, 856, 129 S. Ct. 2183, 173 L. Ed. 2d 1193 (2009); *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 219–220, 128 S. Ct. 831, 169 L. Ed. 2d 680 (2008). And the adjacent laundry list of verbs in § 1519 ("alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry") further shows that Congress wrote a statute with a wide scope. Those words are supposed to ensure—just as "tangible object" is meant to—that § 1519 covers the whole world of evidence-tampering, in all its prodigious variety. *See United States v. Rodgers*, 466 U.S. 475, 480, 104 S. Ct. 1942, 80 L. Ed. 2d 492 (1984) (rejecting a "narrow, technical definition" of a statutory term when it "clashes strongly" with "sweeping" language in the same sentence).

Still more, "tangible object" appears as part of a three-noun phrase (including also "records" and "documents") common to evidence-tampering laws and always understood to embrace things of all kinds. The Model Penal Code's evidence-tampering section, drafted more than 50 years ago, similarly prohibits a person from "alter[ing], destroy[ing], conceal[ing] or remov[ing] any record, document or thing " in an effort to thwart an official investigation or proceeding. ALI, Model Penal Code § 241.7(1), p. 175 (1962) (emphasis added). The Code's commentary emphasizes that the offense described in that provision is "not limited to conduct that [alters] a written instrument." *Id.*, § 241.7, Comment 3, at 179. Rather, the language extends to "any physical object." *Ibid*. . . .

The words "record, document, or tangible object" in § 1519 also track language in 18 U.S.C. § 1512, the federal witness-tampering law covering (as even the plurality accepts, *see ante*, at 1084) physical evidence in all its forms. Section 1512, both in its original version (preceding § 1519) and today, repeatedly uses the phrase "record, document, or other object"—most notably, in a provision prohibiting the use of force or threat to induce another person to withhold any of those materials from an official proceeding. § 4(a) of the Victim and Witness Protection Act of 1982, 96 Stat. 1249, as amended, 18 U.S.C. § 1512(b)(2). That language, which itself likely derived from the Model Penal Code, encompasses no less the bloody knife than the incriminating letter, as all courts have for decades agreed. *See, e.g.*, *United States v. Kellington*, 217 F.3d 1084, 1088 (C.A.9 2000) (boat); *United States v. Applewhaite*, 195 F.3d 679, 688 (C.A.3 1999) (stone wall). And typically "only the most compelling evidence" will persuade this Court that Congress intended "nearly identical language" in provisions dealing with related subjects to bear different meanings. *Communications Workers v. Beck*, 487 U.S. 735, 754, 108 S. Ct. 2641, 101 L. Ed. 2d 634 (1988); *see* A. Scalia & B. Garner, Reading Law: The

Interpretation of Legal Texts 252 (2012). Context thus again confirms what text indicates.

And legislative history, for those who care about it, puts extra icing on a cake already frosted. Section 1519, as the plurality notes, see ante, at 1079, 1081, was enacted after the Enron Corporation's collapse, as part of the Sarbanes–Oxley Act of 2002, 116 Stat. 745. But the provision began its life in a separate bill, and the drafters emphasized that Enron was "only a case study exposing the shortcomings in our current laws" relating to both "corporate and criminal" fraud. S. Rep. No. 107–146, pp. 2, 11 (2002). The primary "loophole[ ]" Congress identified, see id., at 14, arose from limits in the part of § 1512 just described: That provision, as uniformly construed, prohibited a person from inducing another to destroy "record[s], document[s], or other object[s]"—of every type—but not from doing so himself. § 1512(b)(2); see supra, at 1093. Congress (as even the plurality agrees, see ante, at 1081) enacted § 1519 to close that yawning gap. But § 1519 could fully achieve that goal only if it covered all the records, documents, and objects § 1512 did, as well as all the means of tampering with them. And so § 1519 was written to do exactly that—"to apply broadly to any acts to destroy or fabricate physical evidence," as long as performed with the requisite intent. S. Rep. No. 107–146, at 14. "When a person destroys evidence," the drafters explained, "overly technical legal distinctions should neither hinder nor prevent prosecution." *Id.*, at 7. Ah well: Congress, meet today's Court, which here invents just such a distinction with just such an effect. *See United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 343, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963) ("[C]reat[ing] a large loophole in a statute designed to close a loophole" is "illogical and disrespectful of . . . congressional purpose").

As Congress recognized in using a broad term, giving immunity to those who destroy non-documentary evidence has no sensible basis in penal policy. A person who hides a murder victim's body is no less culpable than one who burns the victim's diary. A fisherman, like John Yates, who dumps undersized fish to avoid a fine is no less blameworthy than one who shreds his vessel's catch log for the same reason. Congress thus treated both offenders in the same way. It understood, in enacting § 1519, that destroying evidence is destroying evidence, whether or not that evidence takes documentary form. . . .

[A]ssigning "tangible object" its ordinary meaning comports with noscitur a sociis and ejusdem generis when applied, as they should be, with attention to § 1519's subject and purpose. Those canons require identifying a common trait that links all the words in a statutory phrase. *See, e.g.*, *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 289, n.7, 130 S. Ct. 1396, 176 L. Ed. 2d 225 (2010); *Ali*, 552 U.S., at 224–26, 128 S. Ct. 831. In responding to that demand, the plurality characterizes records and documents as things that preserve information—and so they are. But just as much, they are things that provide information, and thus potentially serve as evidence relevant to matters under review. And in a statute pertaining to obstruction of federal investigations, that evidentiary function comes to the fore. The destruction of records and documents prevents law enforcement agents from gathering facts relevant to official inquiries. And so too does the destruction of tangible objects—of whatever kind. Whether the item is a fisherman's ledger or an undersized fish, throwing it overboard has the identical effect on the administration of justice. *See supra*, at 1094. For purposes of § 1519, records, documents, and (all) tangible objects are therefore alike. . . .

I tend to think, for the reasons the plurality gives, that § 1519 is a bad law—too broad and undifferentiated,

with too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion. And I'd go further: In those ways, § 1519 is unfortunately not an outlier, but an emblem of a deeper pathology in the federal criminal code.

But whatever the wisdom or folly of § 1519, this Court does not get to rewrite the law. "Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress." *Rodgers*, 466 U.S., at 484, 104 S. Ct. 1942. If judges disagree with Congress's choice, we are perfectly entitled to say so—in lectures, in law review articles, and even in dicta. But we are not entitled to replace the statute Congress enacted with an alternative of our own design.

The next case, another decision interpreting § 1519, includes more material on the relationship between obstruction and the role of lawyers, as well as on reliance on advice of counsel in the obstruction context. See if you can understand what is going on procedurally in this case and why the court reaches the issues of statutory interpretation that it does. Note that this is a single district court opinion—important for what it discusses and because there are relatively few decisions on § 1519, but not of course a generally binding decision or one that has yet produced followers.

UNITED STATES v. STEVENS, 771 F. Supp. 2d 556 (D. Md. 2011)

ROGER W. TITUS, District Judge.

On November 8, 2010, a grand jury for the United States District Court for the District of Maryland returned a six-Count indictment against Lauren Stevens ("Stevens"), former Vice President and Associate General Counsel of GlaxoSmithKline ("GSK"). The indictment charged Stevens with one count of obstruction of a proceeding in violation of 18 U.S.C. § 1512, one count of falsification and concealment of documents in violation of 18 U.S.C. § 1519, and four counts of making a false statement in violation of 18 U.S.C. § 1001. The charges arose out of Stevens' response to an inquiry by the United States Food and Drug Administration ("FDA") into GSK's alleged off-label promotion of the anti-depressant drug Wellbutrin SR ("Wellbutrin"). A jury trial is scheduled to begin April 5, 2011. The parties have filed multiple pretrial motions, most of which will be discussed below.

On October 9, 2002, the FDA sent a letter to GSK stating that the FDA had recently received information indicating that GSK had possibly promoted Wellbutrin for weight loss, a use not approved by the FDA. The FDA asked GSK to provide it with materials related to Wellbutrin promotional programs sponsored by GSK, including copies of all slides, videos, handouts, and other materials presented or distributed at any GSK program or activity related to Wellbutrin. *Id.* Stevens was "in charge of" GSK's "response to the FDA's inquiry and investigation" and "led a team of lawyers and paralegals who gathered documents and information."

The United States alleges that Stevens obstructed the FDA's investigation by withholding and concealing documents and other information about GSK's promotional activities for Wellbutrin, including for

unapproved uses, while representing to the FDA that she had completed her response to its inquiry, and that Stevens falsified and altered documents in order to impede the FDA's investigation of GSK. In particular, the Government alleges Stevens withheld slide sets used by speakers at GSK promotional events that promoted off-label use of Wellbutrin and withheld information regarding compensation received by attendees at promotional events. The Government alleges that Stevens signed and sent to the FDA six letters containing materially false statements regarding GSK's promotion of Wellbutrin for off-label uses.

In responding to the FDA's inquiry, Stevens was assisted by GSK in-house counsel and outside counsel from the law firm of King & Spalding. Stevens' primary defense to the charges in the indictment is that she relied in good faith on the advice of counsel in responding to the FDA's inquiry, and that such reliance negated the requisite intent to obstruct the FDA's investigation or to make false statements.

The Government filed two pretrial motions. The first seeks to preclude Stevens from asserting good faith reliance on the advice of counsel as a defense to Count 2. The Government argues that good faith reliance on the advice of counsel is not a defense to Count 2 because 18 U.S.C. § 1519 is a general intent crime, and good faith reliance on advice of counsel is only a defense to specific intent crimes. The Government also moved in limine to exclude evidence regarding the opinions of other in-house and outside counsel that were not expressed to Stevens at the time of GSK's response to the FDA's inquiry, regarding whether they viewed GSK's responses to be appropriate and not misleading. . . .

Good faith reliance on the advice of counsel is only relevant to specific intent crimes because such reliance demonstrates a defendant's lack of the requisite intent to violate the law. *United States v. Miller*, 658 F.2d 235, 237 (4th Cir. 1981) ("The reliance defense . . . is designed to refute the government's proof that the defendant intended to commit the offense."), *United States v. Polytarides*, 584 F.2d 1350, 1353 (4th Cir. 1978) ("The basis for the defense of action taken on the advice of counsel is that, in relying on counsel's advice, defendant lacked the requisite intent to violate the law."). The United States argues that 18 U.S.C. § 1519 is a general intent crime, and therefore Stevens' good faith reliance on advice of counsel is irrelevant to a determination of her guilt on Count 2.

Whether a conviction under § 1519 requires proof that a defendant acted with the specific intent to violate the law is a question of statutory construction. *Staples v. United States*, 511 U.S. 600, 604, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994). A close reading of the statutory language reveals that a conviction under § 1519 can only be premised on conduct that was intentional or willful. . . .

The Supreme Court's decision in *Arthur Andersen* guides this Court's interpretation of § 1519. In *Arthur Andersen LLP v. United States*, the Supreme Court interpreted the language of 18 U.S.C. § 1512(b)(2)(A), a similar obstruction statute, which provides, in relevant part:

> "Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to ... cause or induce any person to ... withhold testimony, or withhold a record, document, or other object, from an official proceeding [or] alter, destroy, mutilate, or conceal

> an object with intent to impair the object's integrity or availability for use in an official proceeding ... shall be fined under this title or imprisoned not more than ten years, or both."

The Court held that the most natural reading of the statute was one in which the word "knowingly" modifies "corruptly persuades." *Id.* The Court explained

> "[The statute] provides the mens rea—'knowingly'—and then a list of acts—'uses intimidation or physical force, threatens, or corruptly persuades.' We have recognized with regard to similar statutory language that the mens rea at least applies to the acts that immediately follow, if not to other elements down the statutory chain." *Id.*

The Supreme Court held that one could not "knowingly . . . corruptly persuad[e]" another person with intent to cause that person to withhold documents from, or alter documents for use in, an official proceeding without being "conscious of [his] wrongdoing." *Andersen*, 544 U.S. at 705–706, 125 S. Ct. 2129. The Court stated that "limiting criminality to persuaders conscious of their wrongdoing sensibly allows § 1512(b) to reach only those with the level of culpability usually required to impose criminal liability." *Id.*

As in *Arthur Andersen*, the most natural, grammatical reading of § 1519 is one in which the word "knowingly" modifies "with intent to impede, obstruct, or influence." The mens rea of 1519 is not just "knowingly"—meaning "with awareness, understanding, or consciousness"—as the Government suggests. *Id.* at 705, 125 S. Ct. 2129. Rather, the mens rea is "knowingly . . . with intent to impede, obstruct, or influence," a mens rea clearly requiring consciousness of wrongdoing. One cannot be said to "knowingly . . . alter [ ], . . . conceal[ ], cover[ ] up, falsif[y], or make[ ] false entry in any record [or] document . . . with intent to impede, obstruct, or influence" an investigation or administration of a matter within the jurisdiction of a federal agency unless it is that individual's intent to do that which is wrongful. As one of our sister courts has held, though the word "corruptly" is not found in § 1519, the same evil intent embodied in § 1512 is embodied in § 1519. *United States v. Moyer*, 726 F.Supp.2d 498, 506 (M.D. Pa. 2010). The language "with intent to impede, obstruct, or influence" "imposes upon the § 1519 defendant the same sinister mentality which 'corruptly' requires of a § 1512(b)(2) defendant." *Id.* As with 18 U.S.C. § 1512, the most reasonable reading of Section 1519 is one which imposes criminal liability only on those who were conscious of the wrongfulness of their actions. To hold otherwise would allow § 1519 to reach inherently innocent conduct, such as a lawyer's instruction to his client to withhold documents the lawyer in good faith believes are privileged. . . .

Stevens moved for disclosure of the Government's presentation to the grand jury, arguing that disclosure was warranted pursuant to Federal Rule of Criminal Procedure 6(e)(3)(E)(ii) because the Government may have failed to properly instruct the grand jury regarding the advice of counsel defense and may have failed to present critical exculpatory evidence. In response to Stevens' motion, the Government filed both a redacted and an unredacted opposition. In its unredacted opposition, filed under seal for the Court's in camera review, the Government conceded that a grand juror had asked a question about the advice of counsel defense, and that a response was given, but the Government did not disclose to the Court the nature of that response. The Court ordered the grand jury transcripts disclosed for the Court's immediate, in camera review, reviewed the

transcripts, and disclosed a brief excerpt from the grand jury transcripts to Stevens to allow for further briefing on whether the grand jury was properly instructed on the advice of counsel defense.

The excerpt disclosed by the Court read as follows:

> MR. JASPERSE: Do the Grand Jurors have any legal questions for Ms. Bloom or I?
>
> A JUROR: I have a question. Does it matter that maybe she was-that Lauren Stevens was getting direction from somebody else about how to handle this? Does it matter or is it not relevant?
>
> MR. JASPERSE: There is something in the law called the advice of counsel defense and that is a defense that a defendant can raise, once the defendant has been charged.
>
> There are also exceptions to the advice of counsel defense. So in other words, a person who is charged with a crime cannot simply say, Well, my lawyer said it was okay. There are various requirements, including that the purpose in getting the advice cannot be to commit a crime or to engage in fraud. Another requirement is that the person receiving the advice must provide full information, all of the information, to the attorney who is rendering the advice.
>
> MS. BLOOM: And I think essentially if the elements of the crime are met, that the person knows that they are submitting a false statement and—what the advice of counsel defense goes to is if someone reasonably relies on someone else to believe that they are not committing a crime, but when—if you have an attorney who knowingly submits a false statement—and I think you saw some evidence—you know, would that person know that that's a crime.
>
> So, that while it can be relevant at trial what a person knows and who else gave them advice, if you find probable cause for the elements here that the attorney Lauren Stevens reasonably knew that she was making false statements and the elements that Patrick went through, then that's sufficient to find probable cause.
>
> Does that help?
>
> A JUROR: Yes.

. . . Stevens argued that dismissal of the indictment was warranted because the advice of counsel instruction was incorrect, and there was grave doubt that the decision to indict was free from the substantial influence of the improper instruction. The Government argued that the grand jury was properly instructed and that even if the instruction was deficient, dismissal of the indictment was neither required nor warranted.

Though often referred to as the "advice of counsel defense," this label is actually a misnomer. Good faith reliance on the advice of counsel, when proven, negates the element of wrongful intent of a defendant that is required for a conviction. *See United States v. Peterson*, 101 F.3d 375, 381 (5th Cir. 1996) ("A good faith reliance on the advice of counsel is not a defense to securities fraud. It is simply a means of demonstrating good faith and represents possible evidence of an absence of any intent to defraud."); *see also Oakley, Inc. v.*

Bugaboos, 2010 U.S. Dist. LEXIS 123976, *11–12 (S.D. Cal. Nov. 23, 2010) (just because the " 'advice of counsel defense' contains the word defense . . . does not an affirmative defense make.")

An affirmative defense is "[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true." Black's Law Dictionary 482 (9th ed. 2009). By contrast, the advice of counsel "defense" negates the defendant's wrongful intent, and therefore demonstrates an absence of an element of the offense—mens rea. . . .

The Court has grave doubts as to whether the decision to indict was free from the substantial influence of the improper advice of counsel instruction. *Bank of Nova Scotia*, 487 U.S. at 256, 108 S. Ct. 2369. A grand juror explicitly asked about the legal implications of Stevens' reliance on the advice of others in responding to the FDA and whether it was relevant. The grand juror was essentially told that advice of counsel was not relevant to the decision to indict, but rather was an issue to be raised in defense at trial.

The grand juror's question was not just any question, but rather was much akin to asking about an elephant in the room. The grand jury was well aware of the Defendant's role as the leader of a team of lawyers and paralegals, and the question was a natural one that arose out of her status. The question went to the heart of the intent required to indict. The incorrect answer either substantially influenced the decision to indict or, at the very least, creates grave doubt as to that decision. Accordingly, dismissal of the indictment is appropriate and required in the interests of justice.

The parties differ as to whether a dismissal should be with or without prejudice. The Court has carefully reviewed the grand jury transcripts and found no evidence that the prosecutors involved engaged in "willful prosecutorial misconduct." *United States v. Feurtado*, 191 F.3d 420, 424 (4th Cir. 1999). This is not a case in which the Government attempted to affirmatively mislead the grand jury to obtain an indictment-rather it is a case in which prosecutors simply misinstructed the grand jury on the law. However, even in the absence of willful prosecutorial misconduct, "a defendant is entitled to dismissal of an indictment . . . where actual prejudice is established." *Id.* Under these circumstances, dismissal of the indictment is necessary to allay the Court's grave doubts about the grand jury's decision to indict, but dismissal with prejudice is wholly inappropriate. *Id.* (affirming district court's dismissal without prejudice where government's errors before the grand jury were unintentional, rather than the product of prosecutorial misconduct). Accordingly, the indictment shall be dismissed without prejudice to the Government's right to seek Steven's indictment before a different grand jury that is appropriately instructed as to the law in conformity with this opinion.

Problem 8-2

Walter hands a laptop to his wife Skylar and says, "I think I am going to be in trouble with the police soon. This has stuff on it I am not allowed to have. Take it to my lawyer Saul, he will know what to do with it." Walter then runs out of the house and takes off in his car. Skylar takes the laptop to Saul's office. Saul says he cannot say how he knows, but the laptop contains images of child pornography, the possession of which is a federal felony. Skylar gives Saul her consent when he asks if he can destroy the hard drive. Saul then destroys the hard drive. What crimes, if any, have Skylar and Saul committed and what defenses, if any, might they have?

Problem 8-3

Review the following facts, considering the problem of wide prosecutorial discretion under the obstruction of justice statutes. If you were the federal prosecutor assigned to this case, would you have sought an indictment for obstruction of justice?

UNITED STATES v. STEWART, 433 F.3d 273 (2d Cir. 2006) (Excerpted Facts)

In the fall of 2001, [Martha] Stewart was the CEO of Martha Stewart Living Omnimedia, Inc. ("MSLO"), and [Peter] Bacanovic was a stockbroker at Merrill Lynch. Among Bacanovic's clients were Stewart, Samuel Waksal, who was then the CEO of ImClone, and Waksal's daughter Aliza. At that time, ImClone had great expectations for its lead product, the cancer-treating drug Erbitux. The biotechnology company was anticipating that the Food and Drug Administration ("FDA") would approve its application for the drug by early 2002. With the prospect of commercialization on the horizon, Bristol-Myers Squibb made a tender offer to purchase 20 percent of ImClone's outstanding shares at a price of $70 per share and agreed to fund ImClone's continued development of Erbitux while undertaking responsibility for sales and marketing following FDA approval.

In October 2001, the MSLO pension fund held 51,800 shares of ImClone, apparently acquired over the course of the previous decade, and Stewart owned an additional 5,000 shares personally. All of the shares in the MSLO pension fund and those held by Stewart individually were tendered in response to Bristol-Myers' offer, and all but 3,928 of the shares in Stewart's personal account were sold. Stewart's remaining ImClone stock represented approximately 10 percent of her total Merrill Lynch portfolio in November 2001.

During the last week of December 2001 and the first week of January 2002, Bacanovic was vacationing in Florida. Douglas Faneuil, a Merrill Lynch client associate in his mid-twenties who had been working as Bacanovic's assistant for about six months, was responsible for covering Bacanovic's desk when he was away. Between 9:00 and 10:00 on the morning of December 27th, Faneuil received several phone calls on Bacanovic's line from Sam Waksal's daughters, Aliza Waksal and Elana Waksal Posner, and from Waksal's accountant, Alan Goldberg. Prior to the opening of the market, Aliza Waksal placed a market order to sell all

of her approximately 40,000 ImClone shares, which Faneuil executed. Shortly thereafter, Faneuil received a call from Alan Goldberg directing him to sell all of Sam Waksal's ImClone shares immediately. Faneuil advised Goldberg that he was unable to do so because of SEC rules restricting Waksal's trading of his company's shares. Goldberg informed Faneuil that, pursuant to facsimile instructions from Waksal that were dated December 26th (but not received at Merrill Lynch until December 27th), he was to transfer Waksal's entire holding of approximately 80,000 ImClone shares to the account of his daughter Aliza and sell it from there. Faneuil confirmed-with both Bacanovic and Merrill Lynch compliance personnel-his understanding that the proposed transaction was not permissible. Faneuil spoke with Goldberg five or six times by phone that day, and the transfer between accounts took place the following day, December 28th. Faneuil also received two calls that morning from Elana Waksal Posner regarding the sale of her ImClone shares; she expressed disappointment that the price was "already going down."

Faneuil kept Bacanovic apprised of the details of the calls from the Waksal family by telephone. In the midst of one of their conversations, Faneuil heard Bacanovic say suddenly, "Oh, my God, get Martha [Stewart] on the phone." With Bacanovic on the line, Faneuil placed a call to Stewart's New York office. Bacanovic left a message after being told by Stewart's assistant, Ann Armstrong, that Stewart was traveling. Armstrong logged the message as follows: "Peter Bacanovic thinks ImClone is going to start trading downward." In a follow-up call, Bacanovic instructed Faneuil "to tell [Stewart] what's going on" when she returned the call. Faneuil recalled that Bacanovic expressly confirmed that Faneuil was to advise Stewart of Waksal's efforts to sell his ImClone stock, a communication that Faneuil knew would violate Merrill Lynch's client confidentiality policy.

At 1:18 p.m. Bacanovic sent an email to Faneuil inquiring as to whether any news had "come out" regarding ImClone; Faneuil responded that there had been nothing yet. Shortly thereafter, Stewart-who was en route to Mexico for a vacation with her friend Mariana Pasternak-called her office and was informed by Armstrong of Bacanovic's message. Armstrong transferred the call to Bacanovic's office, where Faneuil answered, "Merrill Lynch, Peter Bacanovic's office." It is unclear whether Faneuil identified himself to Stewart. Faneuil told Stewart that, although there had been no news release from ImClone, Bacanovic thought she would "like to act on the information that Sam Waksal was trying to sell all of his shares," at least those he held in Merrill Lynch accounts. Stewart asked Faneuil for a price quote and directed him to sell all of the ImClone shares that remained in her portfolio.

Stewart then placed a call to Sam Waksal, reaching his secretary Emily Perret. Stewart asked Perret if she knew what was going on with ImClone and told Perret to find Waksal. Perret informed Stewart that Waksal was not in the office, and she noted the call on Waksal's messages sheet for December 27, 2001 as follows:

> 1:43 Martha Stewart something is going on with ImClone and she wants to know what She is on her way to Mexico and she is staying at Los Vantanos [sic].

Back in New York, Stewart's ImClone sell order was executed at an average price of $58.43 per share, yielding proceeds of approximately $230,000. Pursuant to Stewart's instructions, Faneuil sent an email to her

personal account confirming the trade. Faneuil also informed Bacanovic that, after hearing that Waksal was trying to sell all of his ImClone shares, Stewart sold her own shares.

Several days later, while Stewart and Mariana Pasternak were visiting in Mexico, their discussion turned to the New Year's plans of various friends, and Pasternak inquired about Sam Waksal. Among other things, Stewart told Pasternak about the decline in ImClone's stock price, Waksal's efforts to sell his holdings, and her own sale. Pasternak later testified that she was either told by Stewart or was left with the impression that it was "nice to have brokers who tell you those things," and she acknowledged knowing that Bacanovic was Stewart's broker.

On December 28, 2001, the day following Stewart's ImClone sale, ImClone announced that the FDA had rejected its application for Erbitux approval. When the market next opened, on December 31, 2001, ImClone's stock price had dropped approximately 18 percent to $45.39 per share. Prompted by these developments, Merrill Lynch compliance personnel reviewed ImClone trade data preceding the announcement. Upon discovery of the sales by the Waksals and Stewart—all clients of Bacanovic—the matter was referred to Merrill Lynch senior management, who directed further inquiry.

Merrill Lynch compliance personnel contacted Faneuil and Bacanovic on December 31st with questions about the ImClone trades. Bacanovic, who was still out of town, told Merrill Lynch administrative manager Julia Monaghan that Faneuil handled the trades. He also said that Stewart's sale was part of her planned year-end tax loss selling. Monaghan then sought out Faneuil. Immediately after speaking with Monaghan, Faneuil called Bacanovic to confirm the accuracy of an answer he had given to Monaghan. Bacanovic, as though coaching Faneuil, repeatedly stated that Stewart's trade was made pursuant to a pre-existing plan for year-end tax loss selling to offset gains in other investments. Faneuil knew, however, that the timing of the ImClone sale and its gain to Stewart were inconsistent with a tax loss strategy.

Based on the results of its internal review, Merrill Lynch referred the ImClone matter to the SEC. The SEC launched an investigation, as did the FBI and the U.S. Attorney. On January 3, 2002, the SEC interviewed Faneuil by phone, focusing the inquiry on the Waksal family's trading on December 27th. With regard to Stewart's trade, Faneuil explained only that Stewart had called, requested a quote and decided to sell. He then reported the substance of the SEC interview to Bacanovic, using a borrowed cell phone to avoid any possibility that the call would be preserved on a Merrill Lynch taped line. On the following Monday, Faneuil approached Merrill Lynch about retaining outside counsel for him.

Soon after the January 3rd SEC interview, Faneuil received a call from Stewart's business manager, Heidi DeLuca, complaining that the ImClone sale generated a gain that compromised Stewart's tax loss selling plan and created a tax liability. Faneuil reported DeLuca's call to Bacanovic. Bacanovic then gave Faneuil a different explanation for the trade, insisting that Stewart sold the ImClone stock on December 27th pursuant to a pre-existing agreement to sell if the price dropped to $60 per share, although no such order had been entered into Merrill Lynch's computer system. Called as a defense witness at trial, DeLuca confirmed the existence of that stop-loss order. She asserted, however, that the conversation with Faneuil regarding the ImClone gain took place in February, rather than early January as Faneuil had recalled.

Upon returning to the office from vacation on January 7th, Bacanovic was questioned again by Merrill Lynch's Monaghan about Stewart's trade. Bacanovic told her that earlier in December, while he and Stewart were reviewing Stewart's portfolio and tax loss strategy, they decided to sell ImClone if the price dropped to or below $60 per share. He recounted the $60 per share stop-loss order story to the SEC in a telephone interview later that day, explaining that on December 27th he advised Stewart that ImClone had dropped below $60, and she told him to sell it.

After speaking to the SEC, Bacanovic took Faneuil out for coffee and a talk. Bacanovic explained Stewart's integral role in advancing his career and stressed his loyalty to her. Faneuil brought up the events of December 27th and reminded Bacanovic that he knew what really transpired, at which point Bacanovic asserted that Faneuil did not know what was going on that day and admonished Faneuil for being selfish.

When Faneuil returned from a week's vacation in mid-January, Bacanovic told him that he had met recently with Stewart and discussed the events of December 27th with her. Stewart's calendar, which Armstrong maintained, reflected a breakfast meeting with Bacanovic on January 16th. According to Faneuil, Bacanovic said to him, “Everyone's telling the same story. This was a $60 stop-loss order. That was the reason for her sale. We're all on the same page, and it's the truth. It's the true story. Everyone's telling the same story.”

On or around January 22, 2002, Stewart consulted with counsel from Wachtell, Lipton, Rosen & Katz, whose records reflect that work on “MS/ImClone matters” would be undertaken. Several days thereafter, Stewart's attorneys were contacted by the offices of the U.S. Attorney and the FBI, who asked to speak with her. Over the next week, Stewart met with and spoke by phone to her attorneys several times. At the end of one such call on January 31st, Stewart asked Armstrong to send to the law firm copies of messages that she had received during the period from December 26, 2001 through January 7, 2002. Stewart then asked Armstrong to show her the messages, including the entry for the December 27th message from Bacanovic. Upon reading the message, Stewart took the computer mouse from Armstrong and deleted and typed over a portion of the text so that what initially read, “Peter Bacanovic thinks Imclone is going to start trading downward” was revised to read, “Peter Bacanovic re imclone [sic].” Immediately thereafter, Stewart told Armstrong to restore the message to the original, and Armstrong did so.

On February 4, 2002, in response to the SEC's request for an interview, Stewart met at the offices of the U.S. Attorney with two SEC enforcement attorneys, an Assistant United States Attorney and an FBI agent, all of whom were investigating the December 27th ImClone trading. Stewart told the investigators that in the fall of 2001, shortly after selling a portion of her ImClone stock to Bristol-Myers, she decided with Bacanovic to sell the remainder if the price fell to $60 per share. Stewart recounted receiving a message to call Bacanovic while she was en route to Mexico. Stewart said that she called Bacanovic, who advised her that ImClone shares were trading below $60, and directed him to sell all of her shares. She explained to the investigators that she wanted to take care of the matter at that time rather than be bothered during her vacation. She stated that she spoke with Bacanovic on December 27th, and she denied speaking with his assistant. Stewart added that during the call she and Bacanovic also discussed her company's stock as well as K-Mart.

Although Stewart had reviewed the message log reflecting the call from Bacanovic only four days earlier at Armstrong's desk, Stewart denied in the interview that she knew whether there was a written record of Bacanovic's message but agreed to check into the matter. Stewart also denied that she had discussed ImClone with Bacanovic during the week leading up to December 27th and said that her several discussions with him since that time had been limited to matters in the "public arena." Although Stewart told investigators that Bacanovic had informed her that the SEC was questioning Merrill Lynch about the December 27th trading, Stewart also said that Bacanovic did not tell her whether he had been questioned or whether any questions involved her. Stewart said nothing at the interview about being aware of the Waksals' intentions to sell their ImClone shares on December 27th.

Bacanovic gave sworn testimony to the SEC on February 13, 2002, responding to questions about ImClone trading in the Waksal family accounts that he managed and about Stewart's holdings, including ImClone and her decision to sell on December 27th. He denied telling Stewart on December 27th of Waksal's efforts to sell his ImClone stock and stated that he would never discuss one client's transactions with another. Describing the events of December 27th, Bacanovic told investigators that Faneuil's phone calls to him regarding the Waksal family prompted him to remember Stewart's decision to sell her ImClone shares if the price dropped to $60 per share. Bacanovic commented that Stewart never thought that would happen. Bacanovic testified that Stewart made up her mind to sell the declining ImClone shares, which he believed she held out of loyalty to Waksal, at $60 per share during a "comprehensive portfolio review" with him on December 20th. He referred to a contemporaneous worksheet, which was later produced to the SEC, reflecting that and other decisions.

Bacanovic explained that no order was entered into Merrill Lynch's computer system to trigger the sale of ImClone because Stewart, like most of his clients, eschewed automatic execution in favor of having him track a stock and give notice if and when it reached the target price. Bacanovic told investigators that on December 27th he left a message with Stewart's assistant, advising her of ImClone's price and asking that Stewart "[c]all my office." He stated that Faneuil later reported to him that Stewart called Bacanovic's line on the 27th and directed him to sell her shares. Bacanovic denied speaking with Stewart on that day. He also represented that in conversations since December 27th he and Stewart had discussed ImClone in general terms and that he had informed her of an internal Merrill Lynch review. He denied speaking with Stewart about her own ImClone trades, the government investigation, or the fact that he had been questioned about the events of December 27th.

On March 7, 2002, several weeks after Bacanovic's SEC testimony, Faneuil was interviewed by representatives from the SEC, the FBI and the U.S. Attorney's Office. He stated, as he had previously, that on December 27th, Stewart called for a quote and decided to sell. He did not mention to the investigators that during the call he informed Stewart of Waksal's efforts to sell, nor did he say that Bacanovic had told him to do so. When Faneuil reported this to Bacanovic, Bacanovic replied, "good."

After receiving a copy of Sam Waksal's phone log, which reflected a call from Stewart on the morning of December 27th, investigators requested another meeting with Stewart, and she agreed to speak with them. During that April 10, 2002 interview, Stewart stated that she had no recollection of having been told on

December 27th that any of the Waksals were selling their ImClone stock. Stewart was asked about Bacanovic's December 27th phone message, which Armstrong had entered in the log as "Peter Bacanovic thinks ImClone is going to start trading downward." Stewart stated that she did not recall that Armstrong told her about the content of Bacanovic's message. Rather she recalled being told that Bacanovic called and wanted to speak with her before the end of the day.

On April 10th, the investigators also questioned Stewart about the message she left with Sam Waksal's secretary on the morning of December 27th, asking what was "going on with ImClone." Stewart told investigators that she called Waksal on the 27th for the purpose of seeing how he was and making sure everything was okay. She also stated that when she was interviewed two months earlier on February 4th, she did not recall having made the call to Waksal.

During the period between February and May 2002, Bacanovic talked to Faneuil about the investigation approximately five times, each time reiterating to Faneuil that he had spoken with Stewart and that everyone was "on the same page" and telling the same $60 stop-loss story, which was the "truth." During one such conversation in April or May, Faneuil reminded Bacanovic that it was Faneuil who spoke with Stewart on December 27th and that he knew what actually had been said. At that point, according to Faneuil, Bacanovic said, "don't even say that, just don't even say that." Faneuil admitted at trial, however, that Bacanovic never explicitly told him to lie. A month or two later, in June 2002, although he had not been served with a subpoena, Faneuil admitted to Merrill Lynch and to the government investigators that he had lied twice to the SEC about the content of his December 27th phone conversation with Stewart. Faneuil testified at trial that the lies and subsequent cover-up became too much to bear. Faneuil entered into a cooperation agreement with the Government, pleading guilty to the misdemeanor charge of receiving money or things of value as a consideration for not informing against a violation of the law in violation of 18 U.S.C. § 873. He agreed with the SEC to a lifetime exclusion from work in the securities industry.

In June 2002, media reports stated that a congressional investigation into the FDA's denial of the Erbitux application had revealed the December 27th ImClone transactions by Waksal and Stewart. Thereafter, the value of MSLO shares declined, which resulted in a corresponding decrease in Stewart's net worth. Stewart issued two public statements, one in a press release and one addressed to a conference of securities analysts and advisors. Stewart explained that her sale had been triggered by the pre-existing decision to sell ImClone if and when it reached $60 per share and not by information that was unavailable to the public. She also represented that she had cooperated fully with government investigators. MSLO shares enjoyed a modest rebound.