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TAMPERING WITH WITNESS TAMPERING: RESOLVING THE QUANDARY SURROUNDING 18 U.S.C. §§ 1503, 1512

I. INTRODUCTION

Jason was a nineteen year old college sophomore with a bright future. In high school, Jason consistently made the Honor Roll, lettered in three varsity sports, and was extremely popular with both his classmates and teachers. Jason made the transition to college with relative ease. He maintained a 4.0 grade point average throughout his freshman year and participated in several extracurricular activities. Jason played virtually every intramural sport, became friends with a variety of new people, and began dating a very nice girl. His sophomore year promised to be just as exciting as the first year. But everything changed when Jason was arrested and charged with distribution of a controlled substance.¹ A drug informant identified Jason as the person who sold him the drugs. Jason maintained that he had never taken drugs, much less sold them to someone else.

Jason's parents, Jim and Diane, believed their son did not sell drugs. He had never been in any sort of trouble in the past. They spoke to him regularly on the phone and saw him about once every three weeks. Jason was the same bright, energetic young man he had always been. Nothing indicated to his parents that he used or distributed drugs. Jim and Diane believed that this was an incredible case of mistaken identity.

Jason contended that he had been at a college party the night of the alleged drug transaction. Jason's girlfriend had gone home that weekend and was not with him, and unfortunately none of the partygoers could place Jason at the party at the time of the drug transaction. One of Jason's friends, Brian, told the authorities he remembered seeing Jason at the party around 9:30 p.m. but could not remember seeing him there any later. After opening arguments in Jason's trial, it became apparent that the prosecution would rely heavily on the identification by the drug informant and the fact that Jason had no one to corroborate his alibi. Jim and Diane flew into a panic, fearing that their only son

1. Federal law prohibits the distribution of a controlled substance under 21 U.S.C. § 841 (1994), which provides that "it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

would spend years in a federal prison, leaving his bright future in shambles. In a devoted, but misguided, attempt to save their son, Jim and Diane approached Brian and pleaded with him to tell the jury that he now remembered seeing Jason at the party around 11:00 p.m., the time of the alleged crime. Instead of lying to the jury, Brian informed the prosecution that Jim and Diane had tried to persuade him to change his story.

Jim and Diane attempted to influence the testimony of a federal witness. If this scenario occurred in New York, federal prosecutors could prosecute Jim and Diane only under 18 U.S.C. § 1512² for their well-intentioned actions. Had

2. Section 1512, in its current form, states, in pertinent part:

(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 (2).

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

- (A) in the case of murder (as defined in section 1111), the death penalty or imprisonment for life, and in the case of any other killing, the punishment provided in section 1112;
- (B) in the case of an attempt, imprisonment for not more than twenty years.

(b) 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—

- (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, parole, or release pending judicial proceedings;

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

(c) 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, 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

this situation happened in Virginia, federal prosecutors could choose to prosecute the parents under either 18 U.S.C. § 1503³ or under 18 U.S.C. § 1512.⁴ If the same circumstances occurred in Missouri, federal prosecutors could seek convictions under both 18 U.S.C. § 1512 and 18 U.S.C. § 1503,⁵ in which case Jim and Diane could incur double prison time and double fines. Three different jurisdictions sanction three different charges with three different possible outcomes.

While the federal legal system is supposed to ensure the uniform administration of justice, the prosecution of witness tampering clearly fails to achieve this goal. Prosecutors lack proper guidance in deciding which statutes to pursue. The federal criminal system appears inconsistent, unfair, and unyielding. While one action can sometimes violate two federal criminal statutes, witness tampering, such as that committed by Jim and Diane, should only violate 18 U.S.C. § 1512.

Traditionally, federal prosecutors brought obstruction of justice charges under section 1503.⁶ This included prosecutions for attempting to or succeeding

instituted, or assisting in such prosecution or proceeding;

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

18 U.S.C. § 1512 (1994).

3. Section 1503, in its current form, states:

(a) [(1)] 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 [(2)] 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. § 1503 (1994 & Supp. III 1997) (numbers added for clarity).

4. See *infra* notes 117-129 and accompanying text.

5. See *infra* notes 68-79 and accompanying text.

6. See KATHLEEN F. BRICKEY, *CORPORATE AND WHITE COLLAR CRIME* 315 (2d ed. 1995).

in corruptly influencing or intimidating witnesses.⁷ This practice continued until Congress passed the Victim and Witness Protection Act (“VWPA”) in 1982.⁸ As part of the VWPA, Congress created section 1512 specifically to address tampering with witnesses, victims, and informants by intimidation and harassment.⁹ At the same time, the VWPA removed all references to witnesses from section 1503.¹⁰ The enactment of section 1512 produced controversy as to whether it should be the exclusive vehicle for prosecution of witness tampering or whether prosecutors could still use section 1503 as an alternative or concurrent charge. Originally, the appellate courts disagreed as to the resolution of the issue,¹¹ and they continue to disagree today despite Congress’s attempt to resolve this conflict in a 1988 amendment¹² to section 1512.¹³

This Note examines the question of whether section 1512 is the only tool available for witness tampering prosecution or whether section 1503 still applies. Part II discusses the creation of section 1512 and the judicial response to the statute. Part III examines the 1988 amendment to section 1512 and its reception in the courts. Part IV proposes the adoption of a single approach to the issue and suggests some practical methods, including model legislation, to achieve that end.

II. THE CREATION OF AND JUDICIAL RESPONSE TO SECTION 1512

Obstruction of justice is an extremely broad and general phrase encompassing numerous types of conduct. Chapter 73 of the federal criminal

7. For the full text of 18 U.S.C. § 1503 as it appeared before 1982, see *infra* note 19.

8. See Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (codified as amended in 18 U.S.C. §§ 1512-1514, 3579 (1994)).

9. See *id.* § 4. For the full text of 18 U.S.C. § 1512 as it appeared before 1982, see *infra* note 47.

10. See Victim and Witness Protection Act § 4.

11. Compare *United States v. Hernandez*, 730 F.2d 895, 899 (2d Cir. 1984) (holding section 1512 is exclusive tool for witness tampering prosecution), with *United States v. Risken*, 788 F.2d 1361, 1369 (8th Cir. 1986) (holding both section 1503 and section 1512 can be used to prosecute same underlying conduct), with *United States v. Lester*, 749 F.2d 1288, 1295 (9th Cir. 1984) (holding section 1512 is applicable to coercive witness tampering but section 1503 is still applicable to noncoercive witness tampering).

12. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7029(c), 102 Stat. 4181, 4398 (codified at 18 U.S.C. § 1512(b) (1994)) (adding language “corruptly persuades” to section 1512(b)).

13. Compare *United States v. Masterpol*, 940 F.2d 760, 763 (2d Cir. 1991) (holding section 1512 remains exclusive tool for prosecution, especially with enactment of 1988 amendment), with *United States v. Kenny*, 973 F.2d 339, 342-43 (4th Cir. 1992) (holding even after 1988 amendment either section 1503 or section 1512 can be used for witness tampering prosecution), with *United States v. Aguilar*, 21 F.3d 1475, 1485 (9th Cir. 1994) (holding that 1988 amendment made section 1512 exclusive tool for prosecution).

code, entitled “Obstruction of Justice,”¹⁴ contains many different provisions, each designed to strike at a particular act within the broader definition of “obstruction of justice.”¹⁵ For example, if a person influences a juror by writing, that person has generally obstructed justice, however, the specific offense would be a violation of 18 U.S.C. § 1504, entitled “Influencing juror by writing.” Like section 1504, sections 1503 and 1512 are found in the obstruction of justice chapter. The obstruction of justice statutes have two purposes. First, they protect the participants in judicial and administrative proceedings from being “corruptly influenced or intimidated in the discharge of their duties.”¹⁶ Second, they “preserve the integrity of judicial and administrative proceedings.”¹⁷

A. 18 U.S.C. § 1503 Before the Passage of the VWPA

Prior to 1982, 18 U.S.C. § 1503 was the most frequently employed statute for prosecution of obstruction of justice. In fact, section 1503 was the only tool available specifically for the prosecution of obstruction of justice involving witnesses in federal court proceedings.¹⁸ Section 1503 contained two basic provisions.¹⁹ The first of these criminalized the conduct of those who “corruptly,

14. See 18 U.S.C. §§ 1501-1517 (1994).

15. See *id.* “Most of the obstruction of justice offenses are found in chapter 73 of Title 18. Here one finds a conglomerate of specific statutes that protect proceedings in the three branches of government in addition to the individuals connected with these proceedings.” ELLEN S. PODGOR & JEROLD H. ISRAEL, *WHITE COLLAR CRIME IN A NUTSHELL* 91 (2d ed. 1997). The obstruction of justice chapter includes the following offenses: Assault on process server (18 U.S.C. § 1501); Resistance to extradition agent (18 U.S.C. § 1502); Influencing or injuring officer or juror generally (18 U.S.C. § 1503); Influencing juror by writing (18 U.S.C. § 1504); Obstruction of proceedings before departments, agencies, and committees (18 U.S.C. § 1505); Theft or alteration of record or process; False bail (18 U.S.C. § 1506); Picketing or parading (18 U.S.C. § 1507); Recording, listening to, or observing proceedings of grand or petit juries while deliberating or voting (18 U.S.C. § 1508); Obstruction of court orders (18 U.S.C. § 1509); Obstruction of criminal investigations (18 U.S.C. § 1510); Obstruction of State or local law enforcement (18 U.S.C. § 1511); Tampering with a witness, victim, or informant (18 U.S.C. § 1512); Retaliating against a witness, victim, or an informant (18 U.S.C. § 1513); Obstruction of Federal audit (18 U.S.C. § 1516); and Obstructing examination of financial institution (18 U.S.C. § 1517). See 18 U.S.C. §§ 1501-1517 (1994).

16. BRICKEY, *supra* note 6, at 315.

17. *Id.*

18. See 128 CONG. REC. 26,350 (1982). 18 U.S.C. § 1505 concerns obstruction of justice involving witnesses before congressional or federal department or agency proceedings and 18 U.S.C. § 1510 concerns obstruction of justice relating to informants in federal criminal investigations. See *id.*

19. Before 1982 section 1503 stated:

[1] Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or 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 proceedings before any United States commissioner, other committing magistrate, in the discharge of his duty, or injures any

or by threat or force, or by any threatening letter or communication, endeavor to influence, intimidate or impede” any United States federal court *witness*, grand or petit juror, or officer of the court in the discharge of his or her duties, as well as those who injure any of these individuals on account of their activities in connection with the federal court proceeding.²⁰ The second prong, which is also known as the omnibus or residual clause of section 1503, prohibited the conduct of those who “corruptly or by threats or force or by any threatening letter or communication influence, obstruct or impede . . . the due administration of justice.”²¹ The omnibus clause served as section 1503’s catchall clause by permitting prosecutions for obstruction of justice even if the perpetrator’s actions were not specifically enumerated within section 1503 or another section of Chapter 73.²² Before 1982, section 1503 was used to protect both individuals in the federal court system and the process itself.²³ The passage of the VWPA in 1982 created confusion as to which categories of conduct remained within the scope of section 1503.²⁴

B. Legislative History and Intent of the VWPA of 1982

party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, 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, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or [(2)] corruptly or by threats of force or by any threatening letter of communication, influences, obstructs or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1503 (Supp. V 1981) (emphasis added) (numbers added for clarity).

20. *Id.*

21. *Id.*

22. In order to establish a violation of section 1503’s omnibus clause, the prosecution must show there was “1) a pending proceeding, 2) that the accused knew or had notice of, and 3) that the accused intended to influence, obstruct, or impede its administration.” PODGOR & ISRAEL, *supra* note 15, at 103.

23. For a good example of a prosecution of the two types of conduct prohibited by section 1503, see *United States v. Simmons*, 591 F.2d 206 (3d Cir. 1979). In *Simmons* the defendant was charged with two counts of obstructing justice under section 1503. *See id.* at 207. The first count charged him with the destruction of documents, and the second count charged him with instructing his employees to withhold information from the grand jury. *See id.* The defendant was interfering with the process—the due administration of justice—and with several witnesses for the federal grand jury. Before 1982 the prosecution for both types of conduct was proper under section 1503. After 1982, however, it was unclear if the “influencing of the witnesses” charge still belonged under section 1503.

24. Double jeopardy is not implicated when prosecutors invoke both sections 1503 and 1512 because the two statutes technically encompass different elements. For example, section 1503 requires that a court proceeding be underway while section 1512 does not. Thus, double jeopardy cannot be used as an argument against the simultaneous use of sections 1503 and 1512.

Although section 1503 attempted to protect witnesses and other participants in federal court proceedings,²⁵ several Congressmen expressed concerns that section 1503's protection of witnesses and victims was inadequate.²⁶ In response, Congress passed the VWPA in 1982.²⁷ Among other things, the VWPA created 18 U.S.C. § 1512, entitled "Tampering with a witness, victim or informant."²⁸ The VWPA, which specifically delineated the crime of witness tampering and modified section 1503, underwent several revisions before reaching its final form. The VWPA, including section 1512, originated in the Senate as the Omnibus Victims Protection Act.²⁹ The Senate Judiciary Committee stated, "Section 1512 provides criminal penalties for the intimidation against not only witnesses (current law) but victims as well. It also lowers the threshold of seriousness for commission of an intimidation offense and increases the penalties."³⁰

While the Senate Report cited several shortcomings of the current law under section 1503,³¹ it did not specifically say that the enactment of section 1512 abrogated section 1503 provisions allowing for the prosecution of witness

25. *See supra* note 19.

26. For example, in House debates, Representative Rodino stated:

I have been studying the plight of the victim and witness for some years now and am compelled to conclude that the concerns and needs of crime victims and witnesses have been neglected. Our criminal justice system is perceived and with much justification to be run for the convenience of judges, lawyers, police, and defendants with little regard for the convenience of victims and witnesses.

128 CONG. REC. 26,348 (1982).

A Senate Report stated that "the victim or witness has little hope of protection from the government if he is harassed or threatened by the defendant out on bail, or the defendant's friends or family; or if the convicted criminal, after serving his time, decides to retaliate against the individual who assisted the government." S. REP. NO. 97-532, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2516.

27. The Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (codified as amended at 18 U.S.C. §§ 1512-1514, 3579), was a comprehensive bill containing new provisions addressing many topics including: tampering with witnesses, victims, and informants (18 U.S.C. § 1512); retaliating against witnesses, victims and informants (18 U.S.C. § 1513); civil actions to restrain harassment victims or witnesses (18 U.S.C. § 1514); and victim restitution (18 U.S.C. § 3579). *See* 18 U.S.C. §§ 1512-1514, 3579 (1994). The stated purposes of the VWPA were: (1) to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process; (2) to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses without infringing on the constitutional rights of the defendant; and (3) to provide a model for legislation for state and local governments. *See* Victim and Witness Protection Act § 2.

28. *See* Victim and Witness Protection Act § 4 (codified as amended at 18 U.S.C. § 1512).

29. S. 2420, 97th Cong. (1982).

30. S. REP. NO. 97-532, at 14.

31. *See id.* at 15. The Senate Report said that current law would not protect a witness who could provide information about a crime but who could not testify because the testimony would constitute hearsay or would be inadmissible for other reasons. The Report continued by noting current law did not address the most common form of intimidation—verbal harassment. *See id.*

tampering.³² In fact, the Senate left section 1503 intact so that it still contained references to witnesses. The Senate version of section 1512 also included a catchall omnibus clause that was very similar to that in section 1503.³³ One prong of the proposed residual clause was “designed to carry forward the basic coverage in 18 U.S.C. § 1503.”³⁴

Later that year, the House of Representatives passed its own version of the bill. In promoting the enactment of the Comprehensive Victim and Witness Protection and Assistance Act of 1982,³⁵ several representatives stated that the bill “would revise and clarify Federal offenses relating to victim/witness tampering and retaliation and would expand those offenses in certain important aspects.”³⁶

The House version was similar to the Senate version in that they both prohibited the same types of conduct including: knowingly using physical force, intimidation, threats, or misleading conduct to influence another’s testimony; or causing another person to withhold testimony, alter, or destroy documents.³⁷ But the House version was, in a few significant ways, different than the Senate

32. See S. 2420; see also S. REP. NO. 97-532, at 14-20.

33. See S. 2420. The Senate proposed omnibus clause stated:

(a) Whoever—

(3) corruptly, by threats of force, or by any threatening letter or communication, intentionally influences, obstructs, or impedes, or attempts to influence, obstruct, or impede the— (A) enforcement and prosecution of Federal law administration of a law under which an official proceeding is being or may be conducted; or (B) exercise of a federal legislative power of inquiry, shall be punished as provided in subsection (b).

Id.

34. S. REP. NO. 97-532, at 18.

35. See H.R. 7191, 97th Cong. (1982).

36. 128 CONG. REC. 26,354 (1982) (statement of Rep. McCollum); *id.* at 26,356 (statement of Rep. Fish). These comments by Representatives McCollum and Fish echoed sentiments found in the House Judiciary Committee Report addressing the issue. The Report stated that “new section 1512 clarifies the present Federal tampering offenses (18 U.S.C. 1503, 1505, 1510) and changes them in several ways.” 128 CONG. REC. 26,350 (1982). The Report went on to give examples of the ways in which section 1512 would clarify the then existing law, including:

New section 1512 does not use the term “witnesses,” but rather focuses upon the wrongdoer’s purpose instead of upon the victim’s status. Thus, it is immaterial whether the victim was under subpoena, so long as the defendant intended, by the use of force, threat or misleading conduct, to influence a person to withhold a document from an official proceeding, for example.

Id. The Report also provided examples of how section 1512 changed current law, including “the new provision expands the present Federal tampering offenses to reach persons who provide information to Federal judges and to Federal probation and pretrial services officers.” *Id.* Of course, there are some comments by members of the House which could be construed as indicating section 1512 was merely intended as a supplement to the existing section 1503. Representative Rodino stated in floor debates that “the bill *strengthens* existing Federal criminal statutes dealing with intimidation of or retaliation against victims and witnesses by force or threats.” 128 CONG. REC. 26,348 (1982) (emphasis added).

37. See S. 2420, 97th Cong. § 201 (1982); see also H.R. 7191, 97th Cong. § 3 (1982).

version. Like the Senate, the House did not explicitly say that by enacting section 1512 it intended to make section 1512 the exclusive tool for prosecution of witness tampering.³⁸ In contrast, however, the House version deleted all references to witnesses from the existing obstruction of justice statute, section 1503,³⁹ while the Senate version left section 1503 untouched.⁴⁰ In addition, unlike the Senate,⁴¹ the House did not include an omnibus provision for section 1512 similar to that of section 1503.⁴²

The House sent its version of section 1512 to the Senate for approval. The Senate accepted the House's proposal to strike all references to witnesses from section 1503.⁴³ In commenting on the removal of witness references from section 1503, Senator Heinz, who was one of the originators of the legislation, stated that because the Senate version allowed overlap between section 1503 and section 1512, "[t]he compromise accepts the House position. By amending section 1503 in this way, the proposal will contribute to a clearer and less duplicative law."⁴⁴ The Senate also accepted the House's decision to exclude an omnibus clause for section 1512.⁴⁵ Senator Heinz recommended adopting the House's removal of the omnibus clause, declaring that the "general obstruction of justice residual clause of the intimidation section, was taken out of the bill as beyond the legitimate scope of this witness protection measure. It also is probably duplicative of abstraction [sic] of justice statutes already in the books."⁴⁶

The final VWPA version of section 1512,⁴⁷ therefore, was essentially the House version.⁴⁸ It deleted all references to witnesses in section 1503⁴⁹ and did

38. See H.R. 7191.

39. See *id.* § 3.

40. See S. 2420.

41. See *id.*

42. See H.R. 7191.

43. See 128 CONG. REC. 26,810 (1982).

44. *Id.* Senator Heinz further stated:

18 U.S.C. 1503 already provides some witness protections—but only as to witnesses under subpoena [sic] in active cases. The Senate passed bill allowed a slight overlap between old section 1503 and new sections 1512 and 1513. The House version amends section 1503 so it will make no mention of, and provide no protection to, subpoenaed [sic] witnesses.

Id.

45. See *id.*

46. *Id.*

47. Section 1512, "Tampering with a witness, victim, or an informant," provided in pertinent part:

(a) Whoever knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence the testimony of any person in an official proceeding;
(2) cause or induce any person to—

not include an omnibus clause in section 1512.⁵⁰ By incorporating both of these decisions, Congress sent conflicting signals to the courts. Neither the House nor the Senate ever explicitly stated that section 1512 was intended to remove all offenses concerning witness tampering from the scope of section 1503. On one hand, some courts construed Congress's actions of deleting all references to witnesses from section 1503 while creating section 1512 as an attempt to take witnesses out of the reach of section 1503.⁵¹ On the other hand, some courts

-
- (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, parole, or release pending judicial proceedings;

shall be fined not more than \$250,000 or imprisoned not more than ten years, or both.

(b) 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, 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 not more than \$25,000 or imprisoned not more than one year, or both.

18 U.S.C. § 1512 (1982).

48. See 128 CONG. REC. 27,390 (1982).

49. See 18 U.S.C. § 1503 (1982). The VWPA Amendments section detailed the deletions of the references of witnesses from section 1503. The Victim and Witness Protection Act § 4(c)(1) substituted "or juror" for "juror or witness" after "officer" in the statute's heading. The Victim and Witness Protection Act § 4(c)(2), (3) substituted in text "grand" for "witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand" after "or impede any," and struck out "injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or after discharge of his duty, or." *Id.*

50. See Victim and Witness Protection Act § 4 (codified as amended in 18 U.S.C. § 1512).

51. See Teresa Anne Pesce, Note, *Defining Witness Tampering Under 18 U.S.C. Section 1512*, 86 COLUM. L. REV. 1417 (1986) (discussing, in depth, legislative history and intent behind section 1512 and concluding that Congress did, in fact, intend to make section 1512 exclusive tool for witness tampering prosecutions); see also Joseph V. De Marco, Note, *A Funny Thing Happened on the Way to the Courthouse: Mens Rea, Document Destruction, and the Federal Obstruction of Justice Statute*, 67 N.Y.U. L. REV. 570, 597 (1992) (noting that legislative history of section 1512 shows Congress's desire to remove witnesses from protection of section 1503).

construed Congress's decision to leave section 1503's omnibus clause untouched and its refusal to include a similar provision in section 1512 as an attempt to leave witnesses within the reach of section 1503's omnibus clause.⁵² As a result, some prosecutors employed only section 1512 for witness tampering prosecutions, while others continued to use the omnibus clause of section 1503 to bring witness tampering charges. Still others utilized both section 1503 and section 1512 to bring two criminal charges for the same conduct. While the courts recognized this conflict, they failed to resolve it with a uniform solution.

C. The Judicial Response to Section 1512

The appellate courts addressed the issue of whether section 1512 was the exclusive tool for witness tampering and reached three distinct conclusions.

In *United States v. Hernandez*,⁵³ the Second Circuit held that section 1512 was the exclusive tool for prosecution in witness tampering cases.⁵⁴ While the defendant was out on bail for stolen check offenses, he threatened to kill a federal witness if the witness did not give him stolen checks in the witness's possession which the federal prosecutor planned to use against the defendant at trial.⁵⁵ The defendant was charged and convicted of one count of obstruction of justice under section 1503 and one count of witness tampering under section 1512.⁵⁶ On appeal, the defendant argued that section 1503 no longer applied to

52. See Joan E. Varney, Note, *The 1982 Victim and Witness Protection Act: The Conflict Between the Second and Fifth Circuits*, 37 SYRACUSE L. REV. 923 (1986) (discussing, in depth, legislative history and intent of section 1512, and concluding that Congress did not intend to make section 1512 exclusive tool used in prosecution of witness tampering); see also William H. Jeffress, Jr., *The New Federal Witness Tampering Statute*, 22 AM. CRIM. L. REV. 1, 22 (1984) (discussing that completely removing witnesses from scope of section 1503, including the omnibus clause, would be against congressional intent in enacting section 1512, mainly that witnesses be given more protection not less).

53. 730 F.2d 895 (2d Cir. 1984).

54. See *id.* at 899.

55. See *id.* at 897. Lorenzo Hernandez was a grocery store operator who paid various wholesalers with two hundred government checks that bore forged endorsements of the true payees and second endorsements either signed by Hernandez or stamped with the grocery store stamp. See *id.* The wholesalers' banks, realizing the checks were stolen, returned them to the wholesalers, who in turn demanded payment from Hernandez. See *id.* Hernandez, faced with the mounting debt, sold his grocery store to Rafael Gomez, one of the store's largest creditors, to whom Hernandez had paid \$20,000 in stolen checks. See *id.* Hernandez was arrested for the stolen check offenses and released on bail. See *id.* Several times, Hernandez went back to the store and demanded that Gomez give him the stolen checks that Hernandez had paid but that the bank had returned to Gomez. See *id.* Gomez gave the federal prosecutor copies of the stolen checks. See *id.* Hernandez came one last time to the store and became so angry he told Gomez he would kill him if Gomez did not give him the checks. See *id.*

56. See *id.* at 896-97.

witness tampering⁵⁷ and that he was therefore improperly convicted under section 1503.⁵⁸ He did not contest his conviction under section 1512.⁵⁹ The defendant asserted that by removing the references to witnesses from section 1503, Congress intended to limit witness tampering prosecution to section 1512.⁶⁰ The Government, however, argued that Congress actually intended to create two crimes, making witness tampering punishable under both section 1512 and the omnibus clause of section 1503.⁶¹

The court explained that had the defendant committed the offense before the passage of the VWPA, his conduct would have been punishable under section 1503.⁶² In examining the legislative intent behind section 1512, the court held that Congress “affirmatively intended to remove witnesses entirely from the scope of § 1503.”⁶³ Specifically, the court pointed to the fact that Congress deleted all references to witnesses from section 1503⁶⁴ and also to Senator Heinz’s remarks stating the purpose of deletion was clarification and less duplication.⁶⁵ Accordingly, the court determined that the Government could no longer prosecute witness tampering under section 1503 and that section 1512 was the exclusive vehicle for such prosecution.⁶⁶ The court, therefore, vacated Hernandez’s conviction under section 1503.⁶⁷

In contrast, the Eighth Circuit reached an entirely different conclusion in *United States v. Risken*⁶⁸ when it decided that both section 1503 and section 1512 could apply to the same underlying conduct in prosecutions of witness tampering.⁶⁹ In *Risken*, the defendant was charged with two counts of obstruction of justice in violation of section 1503 for endeavoring to hire someone to kill one federal witness and making false and misleading statements to a second federal witness.⁷⁰ The defendant was also charged with two counts

57. *See id.* at 897.

58. *See id.*

59. *See id.*

60. *See id.* at 898.

61. *See id.*

62. *See id.*

63. *Id.*

64. *See id.* at 898-99; *see also supra* notes 43-46 and accompanying text.

65. *See Hernandez*, 730 F.2d at 898 (citing 128 CONG. REC. S13,063 (daily ed. Oct. 1, 1982)); *see also supra* note 44 and accompanying text.

66. *See Hernandez*, 730 F.2d at 899.

67. *See id.*

68. 788 F.2d 1361 (8th Cir. 1986).

69. *See id.* at 1368.

70. *See id.* at 1365. The defendant owned an insurance agency and was subpoenaed to testify before a grand jury about his selling insurance to a local Teamsters union headed by Vernon Bennett. *See id.* at 1363. Bennett also appeared in front of the grand jury but pleaded the Fifth Amendment privilege against

of witness tampering in violation of section 1512 for attempting to hire someone to kill the first federal witness and for engaging in misleading conduct toward the second witness.⁷¹ In other words, the defendant was charged under both section 1503 and section 1512 for each of his actions. The jury found the defendant guilty on all four counts.⁷²

On appeal, the defendant contended that he was improperly convicted on the two counts of obstruction of justice under section 1503.⁷³ As in *Hernandez*, the defendant in *Risken* argued that because the VWPA deleted all references to witnesses in section 1503 while simultaneously creating greater protections in section 1512, section 1503 no longer applied to witness tampering situations.⁷⁴

The court rejected the defendant's argument that section 1503 no longer included witness tampering. Quoting the Fifth Circuit's opinion in *United States v. Wesley*,⁷⁵ the Eighth Circuit noted that "[t]he safeguards afforded by § 1512 are both more extensive and more detailed than those given by § 1503. Congress did not, however, remove the residual [or omnibus] clause of § 1503 in its 1982

self-incrimination. *See id.* at 1364. A couple of months later the defendant asked a man named Randall Cason if Cason could find someone to perform a "contract" killing. *See id.* The defendant told Cason that a "union man" was "involved" in a federal grand jury and he was scared the "union man" might "cause him a problem." *Id.* Cason, in turn, told a man named Greenfield who was also an FBI informant. *See id.* The defendant offered Greenfield \$2,000 to kill the "'big shot' in the Teamsters who could hurt him in a federal grand jury hearing." *Id.* Greenfield informed the FBI of the situation. *See id.* The man the defendant wanted killed was actually Bennett. *See id.* at 1364-65.

As a result, Cason was subpoenaed to testify for the grand jury. *See id.* at 1365. Cason talked to the defendant, and the defendant asked Cason what he was going to say to the grand jury. *See id.* Cason told the defendant that "all he could do was say what [defendant] had told him." *Id.* The defendant told Cason "'it was all a joke' and a 'scam' and that he had only gone along with the plan to see how far it would go." *Id.* The defendant also told Cason that if Cason would do him a favor, he would do a favor for Cason. *See id.*

71. *See id.*

72. *See id.*

73. *See id.*

74. *See id.* at 1365-67.

75. 748 F.2d 962 (5th Cir. 1984). *Wesley* is considered a major case involving the conflict between sections 1503 and 1512 and is often used to explain different reactions among the circuit courts. But some controversy exists as to *Wesley's* actual meaning. In *Wesley* the Fifth Circuit articulated the reasoning behind the continued use of section 1503 in cases involving witness tampering for the first time after the 1982 passage of the VWPA. The defendant was charged with violations of both sections 1503 and 1512. *See id.* at 963. The defendant argued that the VWPA had taken witnesses out of the scope of section 1503 and put them within the scope of the newly created section 1512. *See id.* The Fifth Circuit stated that "by enacting § 1512 to address certain kinds of witness intimidation and simultaneously deleting from § 1503 all references to witnesses we find no indication that Congress intended that threats against witnesses would fall exclusively under § 1512 and were exempt from prosecution under § 1503." *Id.* at 964. The court went on to say that the *Wesley* facts "provide[d] a graphic example for the soundness of this conclusion." *Id.* The defendant was indicted under section 1503 for "urging and advising" the witness to testify falsely. *See id.* The court stated:

[VWPA] amendments.”⁷⁶ The court went on to say that section 1503 and section 1512 were not “coextensive.”⁷⁷ In so doing, the Eighth Circuit held that attempting to hire someone to kill a federal witness and engaging in misleading conduct toward another federal witness were types of conduct punishable under both⁷⁸ section 1503 and section 1512.⁷⁹

If urging a witness to commit perjury is not prohibited by § 1512, and if witnesses have been removed entirely from the scope of § 1503, then the conduct with which Wesley is charged would violate neither section. There is simply no indication that, by enacting § 1512 to broaden the protection already afforded witnesses, available under § 1503, Congress intended to create such a gap in the statutory protection.

Id. The court held that section 1503 is applicable to obstruction of the administration of justice by attempts to influence witnesses and has not been superceded by section 1512. *See id.* at 963. In addition, the court found that the defendant was properly charged with both obstruction of justice under section 1503 and with intimidating a witness under section 1512. *See id.* at 965.

Cases following *Wesley* have cited it for the proposition that the same conduct can support “dual prosecutions” under both sections 1503 and 1512. *See United States v. Swafford*, No. 3:92-00081, 1992 WL 553666 (M.D. Tenn. Aug. 28, 1992). The *Swafford* court notes that both *United States v. Risken*, 788 F.2d 1361 (8th Cir. 1986), and *United States v. Rovetuso*, 768 F.2d 809 (7th Cir. 1985), use *Wesley* in this manner. *See Swafford*, 1992 WL 553666, at *5-*6. Nevertheless, *Swafford* points out an internal inconsistency in *Wesley*. *See id.* at *4-*5. The Fifth Circuit stated that “urging and advising” would go unpunished if section 1503 was not employed because section 1512 did not cover this type of conduct. *See Wesley*, 748 F.2d at 964. At the end of *Wesley*, however, the court says the defendant was properly charged under sections 1503 and 1512 even though it had just said “urging and advising” could not be punishable under section 1512. *See id.* at 965. *Swafford* attempts to fill in the missing link in order to explain the discrepancy. *See Swafford*, 1992 WL 553666.

Swafford explains that the Fifth Circuit’s opinion in *Wesley* was greatly redacted before publishing to conserve library resources and therefore did not contain a full fact pattern. *See id.* at *8 n.1. *Swafford* provides the full fact pattern for *Wesley*. *See id.* at *4. In *Wesley* the defendant was arrested when trying to pawn a handgun because it was illegal for him to possess it as a convicted felon. *See id.* The defendant told police the gun actually belonged to his former stepdaughter who could not pawn the gun herself because she was a minor. In jail the defendant called his girlfriend, Cooper, and told her to visit the stepdaughter so that the girl would support his story. *See id.* During Cooper’s visit, the girl said she would not help the defendant. Cooper told the girl that if she did not testify in support of Wesley, she would be visited by Wesley when he got out of jail. The girl felt threatened by this statement and was further intimidated when Wesley drove past her house honking his horn after he got out of jail. *See id.* *Swafford* contends that the only way to make *Wesley* internally inconsistent is to say that the section 1503 conviction resulted from the Cooper visit to the girl and that the section 1512 conviction arose from his driving by her home and honking. *See id.* at *5. Thus, while *Wesley* is the seminal case articulating the reasoning behind section 1503’s continued application to witness tampering, its abbreviated fact pattern makes its holding difficult to discern.

In *United States v. Branch*, 850 F.2d 1080, 1082 (5th Cir. 1988), the Fifth Circuit reaffirmed its *Wesley* decision. The Government charged Branch with obstruction of justice under section 1503 for writing threatening letters to witnesses before his trial on drug charges. *See id.* at 1081-82. The court upheld his conviction under section 1503. *See id.* at 1082. Therefore, in the Fifth Circuit, a prosecutor can use either section 1503 or section 1512 against a defendant. It is still unclear, however, if a prosecutor could use both charges for the same underlying conduct. Notably, this case was decided on July 29, 1988, before the passage of the 1988 amendment to section 1512 in November 1988.

76. *Risken*, 788 F.2d at 1367 (quoting *Wesley*, 748 F.2d at 964) (alterations in original).

77. *Id.* at 1368.

78. Since the court held that the same underlying conduct could be used as the basis of both a section

Adopting a compromise, the Ninth Circuit addressed the issue in *United States v. Lester*.⁸⁰ In *Lester* the defendants tried to prevent a federal witness from testifying for the prosecution by arranging to hide him.⁸¹ The defendants in *Lester* were charged with obstruction of justice under section 1503.⁸² They were not, however, charged with violations of witness tampering under section 1512.⁸³

On appeal, the defendants argued that their convictions under section 1503 should be reversed because section 1503 no longer applied to witness-related offenses.⁸⁴ As in the previously mentioned cases,⁸⁵ the defendants claimed that with the enactment of the VWPA in 1982, Congress intended to remove witness tampering from the scope of section 1503 and to designate all witness tampering as section 1512 violations.⁸⁶ Again, the Government argued that the omnibus clause of section 1503⁸⁷ covered this type of witness tampering.⁸⁸

In analyzing congressional intent, the Ninth Circuit commented that “Congress may well have intended to remove the protection of witnesses from section 1503. It by no means follows, however, that Congress intended to reduce the effectiveness of section 1503 in combating ‘miscarriage[s] of Justice by corrupt methods.’”⁸⁹ The Ninth Circuit declared that a statutory gap would exist

1503 count and a section 1512 count, it follows that the court would have supported the prosecutor if, instead of charging the defendant with violations of both sections, he had chosen to seek a conviction under only section 1503 or only section 1512. Under the court’s reasoning, section 1503 could be used by itself to convict a defendant of witness tampering in the Eighth Circuit.

79. *See Risken*, 788 F.2d at 1369; *see also* *United States v. Rovetuso*, 768 F.2d 809 (7th Cir. 1985). In *Rovetuso* the defendant was convicted under both sections 1503 and 1512 for attempting to arrange for the murder of a federal witness. *See id.* at 813. The court declared that “it is entirely proper to charge defendants under § 1503 with interfering with the due administration of justice when the conduct of the defendant relates to tampering with a witness.” *Id.* at 824. Therefore, both sections 1503 and 1512 are applicable to witness tampering in the Seventh Circuit.

80. 749 F.2d 1288 (9th Cir. 1984).

81. *See id.* at 1290. Police arrested a man named Brigham, and he began cooperating with authorities. *See id.* The Oakland police later released him into the temporary protection of the FBI. *See id.* Upon his release, the defendants, Lester and McGill, found Brigham who then accompanied McGill to various locations away from Oakland for over three weeks. *See id.* at 1291. The defendants paid for all of Brigham’s travel expenses. *See id.* The defendants feared that Brigham would talk to the authorities and implicate another of their associates. *See id.* at 1290. When Brigham returned to Oakland, he was arrested. *See id.* at 1291. Lester and McGill were also arrested and charged with obstruction of justice under section 1503. *See id.*

82. *See id.* at 1291.

83. *See id.*

84. *See id.*

85. *See supra* text accompanying notes 60-61, 74-79.

86. *See Lester*, 749 F.2d at 1292.

87. *See id.*; *see also infra* Part III.

88. *See Lester*, 749 F.2d at 1292.

89. *Id.* at 1292-93 (quoting *United States v. Beatty*, 587 F. Supp. 1325, 1333 (E.D.N.Y. 1984)).

if section 1512 was the exclusive tool for prosecution and if the section 1503 omnibus clause was no longer available for prosecuting actions involving witness tampering not specifically enumerated in section 1512.⁹⁰ The court noted that with the exception of misleading conduct, which was not charged in the case before it, all enumerated violations of section 1512 involved coercive conduct.⁹¹ Not all witness tampering, however, is coercive in nature.⁹² The court stated, “[W]e believe that Congress enacted section 1512 to prohibit specific conduct comprising various forms of coercion of witnesses, leaving the omnibus provision of section 1503 to handle more imaginative forms of criminal behavior, including forms of witness tampering, that defy enumeration.”⁹³

The court used the legislative history of section 1512 to support this contention,⁹⁴ noting that before passing the Act, Congress removed the Senate’s proposed omnibus clause to section 1512.⁹⁵ In light of this history, the court concluded that the omnibus clause of section 1503 covered more inventive witness tampering.⁹⁶ The court illustrated this point with the facts of the case before it, in which the defendants hid a witness from the authorities. The court asserted that if it accepted the defendants’ contention that they did not coerce the witness to leave town, then the defendants’ conduct would fall outside section 1512’s prohibition against intimidation and harassment but would fall under the omnibus clause of section 1503.⁹⁷ The court concluded that section 1503 did, in fact, cover the defendants’ conduct.⁹⁸

Clearly, the judicial response to the VWPA did not settle whether section

90. *See id.* at 1293.

91. *See id.*

92. *See id.* at 1294. The court stated that “it would be improper to hold that Congress silently decriminalized noncoercive, but nevertheless corrupt, efforts to interfere with witnesses.” *Id.*

93. *Id.*

94. *See id.* at 1294-95.

95. *See id.* at 1295.

96. *See id.*

97. *See id.*

98. *See id.* In *Lester* the Ninth Circuit also distinguished its decision from the Second Circuit’s ruling in *Hernandez*. *See id.* at 1295. The Ninth Circuit said that the Second Circuit’s statement that Congress affirmatively intended to remove witness tampering from section 1503 was not necessary. *See id.* Nevertheless, the Ninth Circuit did agree with the Second Circuit’s comment that “Congress intended that intimidation and harassment of witnesses should thenceforth be prosecuted under § 1512 and no longer under § 1503.” *See id.* (quoting *Hernandez*, 730 F.2d at 898 (emphasis omitted)). The *Lester* court said that *Hernandez*’s conduct squarely fell within the boundaries of section 1512 because he threatened a witness with death. *See id.* Therefore, he should have only been convicted for section 1512 and not section 1503. *See id.* The Ninth Circuit’s assessment of *Hernandez* followed its own reasoning that section 1512 covers all witness tampering except those instances not specifically enumerated in section 1512, which would fall instead under section 1503’s omnibus clause. *See id.*

1512 provided the exclusive method to prosecute witness tampering. The Second Circuit decided that section 1512 was the only tool available for witness tampering prosecution, while the Eighth Circuit, at the opposite end of the spectrum, held that both section 1503 and section 1512 could be used. Finally, the Ninth Circuit struck a balance between the two extremes, determining that section 1512 only applied to those offenses enumerated in section 1512, but that section 1503 was available for those offenses, usually noncoercive in nature, that fell outside the scope of section 1512.

III. THE 1988 AMENDMENT TO SECTION 1512

By the mid-1980s, Congress recognized that the circuit courts were divided as to whether prosecutors could still bring witness tampering charges under section 1503 after the 1982 enactment of section 1512. This disagreement within the Judiciary stemmed from varying understandings of Congress's intent in amending section 1503 and creating section 1512. Courts found it especially difficult to determine Congress's intent in light of the statutory gap that would exist if section 1503 could no longer be used to punish noncoercive witness tampering because section 1512 dealt mainly with coercive tactics.

A. *The Legislative History and Intent of the 1988 Amendment*

In 1988, in response to the courts' recognition of the possible statutory gap, Congress amended section 1512. It struck "or threatens" from section 1512(b) and inserted "threatens, or corruptly persuades."⁹⁹ The House Report discussing the amendment examined the then-existing circuit division.¹⁰⁰ The Report cited with approval the Second Circuit's holding that section 1512 was the exclusive tool for prosecution.¹⁰¹ The Report stated, "Section 19(c) of the bill resolves this conflict by amending 18 U.S.C. 1512(b) to proscribe 'corrupt persuasion.' It is intended that culpable conduct that is not coercive or 'misleading conduct' be prosecuted under 18 U.S.C. 1512(b), *rather than* under the residual clause of 18 U.S.C. 1503."¹⁰² This section of the House Report strongly indicates that the House intended to remove witness tampering from the scope of section 1503 by closing the statutory gap created by section 1512.

99. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7029(c), 102 Stat. 4181, 4398 (codified as amended at 18 U.S.C. § 1512).

100. See H.R. REP. NO. 100-169, at 12 (1988).

101. See *id.*

102. *Id.* (emphasis added). The House Report stated:

In addressing the amendment on the Senate floor, Senator Biden made a similar, though less forceful, statement in which he said the amendment “would allow such prosecutions . . . to be brought under section 1512 rather than under the catch-all provision of section 1503.”¹⁰³ But Senator Biden confused the intent issue somewhat when he said the amended sections “are intended, therefore, merely to include in section 1512 the same protection of witnesses from non-coercive influence that was (*and is*) found in section 1503.”¹⁰⁴ By including “and is” in his comments, the Senator left some ambiguity as to the Senate’s intent concerning the enactment of the 1988 amendment as opposed to the clear intent of the House Report.

B. The Judicial Response to the 1988 Amendment

Despite the passage of the 1988 amendment to section 1512, which added the clearer “corruptly persuades” language in its prohibitions, the circuit courts continue to disagree as to whether or not the Government can use section 1503’s omnibus clause to prosecute witness tampering.

For example, in *United States v. Masterpol*,¹⁰⁵ the Second Circuit reaffirmed its original position that section 1512 was the only available means to prosecute witness tampering.¹⁰⁶ The defendant contacted two witnesses and urged them to write letters recanting their previous testimony at trial.¹⁰⁷ The

Federal courts have divided over whether noncoercive conduct that does not fall within the definition of “misleading conduct” (and thus is not criminal under 18 U.S.C. 1512(b)) can be prosecuted under the residual clause of 18 U.S.C. 1503, which prohibits corrupt endeavors to influence, obstruct, or impede the due administration of justice. All of the courts of appeals that have considered this issue, except the Second Circuit, have held that such conduct can be prosecuted under the residual clause of 18 U.S.C. 1503. The Second Circuit has held to the contrary. Section 19(c) of the bill resolves this conflict by amending 18 U.S.C. 1512(b) to proscribe “corrupt persuasion”. It is intended that culpable conduct that is not coercive or “misleading conduct” be prosecuted under 18 U.S.C. 1512(b), rather than under the residual clause of 18 U.S.C. 1503. Section 19(c) of the bill, therefore, will permit prosecution of such conduct in the Second Circuit, where such prosecutions cannot now be brought, and will in other circuits result in such prosecutions being brought under 18 U.S.C. 1512(b).

Id.

103. 134 CONG. REC. 32,701 (1988).

104. *Id.* (emphasis added).

105. 940 F.2d 760 (2d Cir. 1991).

106. *See id.* at 763.

107. *See id.* Masterpol owned a construction company that allegedly attempted to defraud a school by overcharging it for renovation work. At trial, two of Masterpol’s former employees, Tagliamonte and Cooper, testified against Masterpol saying he had paid them less for their work on the project than he reported to the school. The jury returned a guilty verdict. Before the sentencing, Masterpol contacted Tagliamonte and Cooper individually and encouraged them to write letters renouncing their testimony. The two wrote the letters explaining that the discrepancies in the payments and reportings were due to the fact that Masterpol gave them cash and gifts to pay them. They wrote that Masterpol had in fact paid them

defendant then presented these letters for consideration in his sentencing.¹⁰⁸

The defendant was charged and convicted of attempted obstruction of justice under section 1503 for his conduct in seeking to influence the witnesses.¹⁰⁹ The defendant argued that his conviction under the omnibus clause of section 1503 was improper because of the 1982 alterations to section 1503 and the creation of section 1512.¹¹⁰ The court cited its opinion in *United States v. Hernandez*,¹¹¹ which examined the legislative intent behind the 1982 legislation and concluded that Congress had removed witness tampering from the scope of section 1503.¹¹²

The court acknowledged that some other courts had limited the *Hernandez* reasoning by saying that noncoercive conduct, such as the defendant's in *Masterpol*, must be covered by section 1503's omnibus clause because the conduct would otherwise go unpunished.¹¹³ In response the court stated, "The force of these precedents, however, was diminished significantly in 1988 when Congress amended section 1512."¹¹⁴ According to the court, the addition of the "corruptly persuades" language in section 1512 meant that the statute now reached noncoercive witness contacts.¹¹⁵ The court commented that it saw no reason to change its position from that in *Hernandez* and that "[C]ongress affirmatively intended to remove witnesses entirely from the scope of § 1503."¹¹⁶ The Second Circuit, therefore, continued to hold that section 1512 is the exclusive statutory vehicle for witness tampering prosecutions.

In contrast, the Fourth Circuit in *United States v. Kenny*¹¹⁷ held that section 1503 was still available for prosecutions of witness tampering despite the 1988 amendment to section 1512.¹¹⁸ In *Kenny* the defendant was charged with obstruction of justice under section 1503 for attempting to induce a grand jury

what he had reported to the school. *See id.*

108. *See id.*

109. *See id.* at 762.

110. *See id.*

111. 730 F.2d 895 (2d Cir. 1984).

112. *See Masterpol*, 940 F.2d at 762; *see also supra* notes 53-66 and accompanying text.

113. *See Masterpol*, 940 F.2d at 763 (citing *United States v. Lester*, 749 F.2d 1288, 1295 (9th Cir. 1984); *United States v. Beatty*, 587 F. Supp. 1325, 1331-33 (E.D.N.Y. 1984)).

114. *Id.*

115. *See id.* The court also noted that the Assistant United States Attorney said if he "had been aware of the 1988 amendment of Section 1512, [he] might have sought to charge *Masterpol* . . . under both 18 U.S.C. § 1503 and § 1512." *See id.*

116. *Id.* (quoting *United States v. Hernandez*, 730 F.2d 895, 898 (2d Cir. 1984)).

117. 973 F.2d 339 (4th Cir. 1992).

118. *See id.* at 343.

witness to withhold information and to provide false information.¹¹⁹ The defendant was also charged with witness tampering under section 1512 for the same conduct.¹²⁰ The jury found the defendant guilty of the section 1503 charge but not the section 1512 charge.¹²¹ On appeal, the defendant argued that the VWPA removed witness tampering from the scope of section 1503.¹²² The Fourth Circuit rejected the defendant's argument, holding that either section 1503 or section 1512 could be used.¹²³

The defendant distinguished earlier cases holding section 1503 applicable to witness tampering because those cases did not consider the 1988 amendment to section 1512, which made corrupt persuasion part of the section 1512 offense.¹²⁴ The defendant asserted that the 1988 amendment clearly indicated that Congress intended only section 1512 to apply to witness tampering.¹²⁵ He noted that the amendment was passed to fill the perceived statutory gap in

119. *See id.* at 341.

120. *See id.* In *Kenny* an FBI agent was investigating Kenny for stolen travel checks and personal checks. *See id.* at 340. As explanation for having stolen travelers checks, Kenny, who owned a thrift store, informed the agent of two different men who supposedly tendered the travelers checks for items at the thrift store. At Kenny's urging, his clerk Sheila Wormley confirmed that one of the men Kenny had identified had tendered the checks and that she had accepted them. *See id.* The FBI agent thought Kenny was obstructing his investigation, so he subpoenaed Kenny and Wormley to appear before a grand jury. *See id.* at 341. Wormley then informed the FBI that Kenny had given her a piece of paper with a license number on it and that he wanted her to tell the agent she had actually gotten the license number herself. She also said he told her what to say to the grand jury in exchange for \$175 he owed her. Wormley told the grand jury that Kenny told her what to say to them. *See id.*

121. *See id.*

122. *See id.* at 342. Kenny argued that corrupt persuasion of a grand jury witness was a section 1512 offense only and not a section 1503 offense. Kenny based his argument on the 1982 deletion of witnesses from section 1503 and the simultaneous creation of section 1512. Kenny said that the changes proved Congress's intent for section 1503 to provide protection of jurors and court officers and for section 1512 to provide protection of witnesses. *See id.*

123. *See id.* The Fourth Circuit acknowledged the Second Circuit's decision in *Hernandez* but expressly disagreed that section 1512 was the exclusive vehicle for witness tampering prosecution. *See id.* The court stated:

The fact that § 1512 more specifically addresses improper conduct involving a witness does not preclude application of § 1503. The existence of a more narrowly tailored statute does not necessarily prevent prosecution under a broader statute, so long as the defendant is not punished under both statutes for the same conduct.

Id.

The Fourth Circuit therefore made it clear that it thought sections 1503 and 1512 were both potential statutory tools under which witness tampering could be prosecuted. It is worth noting, however, that the court made it clear that the prosecutor must pick between the statutes and may not pursue section 1503 and section 1512 convictions for the same conduct. *See id.* This is in contrast to *United States v. Risken*, 788 F.2d 1361 (8th Cir. 1986), in which the Eighth Circuit, before the amendment, stated both statutes could be charged for the same conduct.

124. *See Kenny*, 973 F.2d at 343.

125. *See id.*

section 1512, which had not previously prohibited noncoercive witness tampering.¹²⁶ The Fourth Circuit rejected the distinction, declaring that the 1988 amendment did not change the plain language and omnibus clause of section 1503.¹²⁷ The court, therefore, held that section 1503 was still a viable tool for prosecution of witness tampering and upheld Kenny's conviction for obstruction of justice under section 1503.¹²⁸ Similarly, other circuit courts have continued to uphold their earlier decisions permitting prosecution under section 1503.¹²⁹

As a result of the 1988 amendment to section 1512, the Ninth Circuit, in *United States v. Aguilar*,¹³⁰ completely changed its position on the issue of the applicability of section 1512 and section 1503. Before the 1988 amendment, the Ninth Circuit held in *United States v. Lester*¹³¹ that section 1512 was not the exclusive tool for witness tampering prosecution.¹³² In *Aguilar*, however, the Ninth Circuit decided that the 1988 amendment filled the statutory gap and that section 1512 was now the exclusive tool for witness tampering prosecution.¹³³

Aguilar was charged and convicted of endeavoring to obstruct justice under the omnibus clause of section 1503.¹³⁴ The court examined Congress's intended application of section 1503, including Congress's enactment of the VWPA in 1982, which deleted all references to witnesses from section 1503 and created section 1512, which specifically spoke to influencing witnesses.¹³⁵ The court

126. *See id.*

127. *See id.*

128. *See id.* See also *United States v. Moody*, 977 F.2d 1420 (11th Cir. 1992), in which the Eleventh Circuit joined the majority of circuits in holding that section 1512 was not the exclusive vehicle for prosecution of witness tampering. The court expressly rejected *Hernandez* and *Masterpol*, thereby dismissing the argument that either the 1982 or 1988 amendments evidenced a congressional intent to make section 1512 exclusive. *See Moody*, 977 F.2d at 1424; *see also United States v. Maloney*, 71 F.3d 645 (7th Cir. 1995). In *Maloney* the Seventh Circuit upheld its previous decision in *United States v. Roveuso*, 768 F.2d 809 (7th Cir. 1985), rejecting the argument that the 1982 amendment to section 1503 and creation of section 1512 took witness tampering out of the scope of section 1503. *See Maloney*, 71 F.3d at 658. The court said the 1988 amendment did not change its position that section 1503 was still available. *See id.* (citing *Moody*, 977 F.2d 1420; *Kenny*, 973 F.2d 339).

129. *See, e.g., United States v. Risken*, 788 F.2d 1361 (8th Cir. 1986); *United States v. Branch*, 850 F.2d 1080 (5th Cir. 1988); *Roveuso*, 768 F.2d 809.

130. 21 F.3d 1475 (9th Cir. 1994).

131. 749 F.2d 1288 (9th Cir. 1984).

132. *See id.* at 1295-96. Finding a statutory gap existed as to noncoercive witness tampering, the *Lester* court stated that prosecutors were to use section 1512 in regard to coercive witness tampering, but that they were to use the omnibus clause of section 1503 in regard to noncoercive witness tampering. *See id.* at 1293-94.

133. *See Aguilar*, 21 F.3d at 1485.

134. *See id.* at 1483.

135. *See id.* at 1484-85. *Aguilar*, a judge, was acquainted with men named Tham, Chapman, and Solomon. *See id.* at 1477. Solomon advised Tham that the best way to get his conviction for embezzlement overturned was to file a petition of habeas corpus. Tham and the others wanted to use Judge

then discussed the Second Circuit's decision in *United States v. Hernandez*¹³⁶ in which the Second Circuit held that section 1512 replaced section 1503 in terms of witness tampering and that charging the defendant for threatening to kill a witness was improper under section 1503.¹³⁷ The court stated that it had faced the same question under different circumstances in *Lester*.¹³⁸ Prior to the 1988 amendment, however, it had disagreed with the Second Circuit because section 1512 only dealt with coercive witness tampering and did not deal at all with noncoercive witness tampering.¹³⁹

While the Second and the Ninth Circuits were previously in clear conflict, the 1988 amendment enabled the Ninth Circuit to adopt a view consistent with that of the Second Circuit. The Ninth Circuit explained, "In 1988, Congress obviated this conflict between the Ninth and Second Circuits by amending section 1512 to cover specifically noncoercive witness tampering. This eliminated the problem that we discussed in *Lester*."¹⁴⁰ In the court's opinion, the 1988 amendment's addition of the "corruptly persuades" language provided section 1512 coverage for noncoercive witness tampering, thus closing the statutory gap the court had identified in *Lester*.¹⁴¹ The court held that section

Aguilar's influence with presiding Judge Weigel to secure a favorable ruling on Tham's petition. In response to phone calls from Tham, Aguilar did check the court calendar twice to see if the hearing had been set. *See id.* The FBI began conducting an investigation into the events surrounding Tham's habeas corpus petition and the possible illegal attempt to influence Judge Weigel. *See id.* at 1478. Aguilar was charged with participating in a conspiracy to impede criminal investigations and to influence Judge Weigel in his decisions concerning Tham's petition. Judge Weigel testified that Aguilar never attempted to influence him in his ruling on the petition. Aguilar was acquitted on the conspiracy charge. *See id.*

During the investigation, FBI agents interviewed Aguilar in order to discover his involvement in the matter. *See id.* at 1483. They asked Aguilar about his involvement with Tham, Chapman, and Solomon concerning Tham's petition and about his knowledge of a wiretap. The jury subsequently determined that some of Aguilar's statements were false and misleading. *See id.*

136. 730 F.2d 895 (2d Cir. 1984).

137. *See Aguilar*, 21 F.3d at 1484.

138. *See id.* (citing *United States v. Lester*, 749 F.2d 1288 (9th Cir. 1984)).

139. *See id.* at 1484-85. In *Lester* the court concluded section 1503's omnibus clause still covered noncoercive witness tampering. *See id.* at 1485.

140. *Id.* at 1485.

141. *See id.* The only problem in the Aguilar case was that Aguilar's conduct during the FBI investigation occurred five months before Congress passed the 1988 amendment. *See id.* Thus, at the time of the offense, section 1503 still applied to noncoercive witness tampering. *See id.*

But the Ninth Circuit used the 1988 amendment legislative history to determine the types of noncoercive conduct Congress intended to proscribe with regard to witnesses when it eliminated the conflict between the Ninth Circuit and the Second Circuit. Congress specifically prohibited conduct that "corruptly persuades . . . or attempts to do so" in order to influence or prevent the testimony of any person in an official proceeding. *Id.* The court stated that Congress, by its 1988 amendment to section 1512, intended that punishable conduct include corrupt persuasion or an attempt to persuade a witness. *See id.* The court went on to say that bribery and extortion would clearly fall within the meaning of corrupt. *See id.* But the court stated that simply making a false statement to a *potential* witness (the FBI agent) was not

1512 was the exclusive tool for witness tampering prosecutions.¹⁴²

IV. ANALYSIS AND PROPOSAL

With the enactment of the VWPA in 1982, Congress specifically delineated the crime of witness tampering by creating 18 U.S.C. § 1512. Congress's intent was unclear, however, because while the VWPA removed all references to witnesses from section 1503, it left the omnibus clause of section 1503 intact. The appellate courts could not agree whether section 1512 was the exclusive mechanism for prosecution of witness tampering or whether section 1503 could still be used through its omnibus clause. The majority of the circuit courts held that prosecutors could still use section 1503 as either an alternative to section 1512 or in addition to section 1512. The Second Circuit represented the

to corruptly persuade. *See id.* at 1485-86 (emphasis added). The Ninth Circuit therefore concluded that Aguilar's conduct did not violate section 1503. *See id.* at 1486.

142. *See Aguilar*, 21 F.3d at 1486. The Supreme Court granted certiorari, 513 U.S. 1013 (1994), in *United States v. Aguilar*, 515 U.S. 593 (1995). Though the parties briefed and argued the question of section 1503's applicability, the Court decided the case on different grounds and did not reach the question of section 1503's use as opposed to that of section 1512. *See id.* at 600. The Court held that the "nexus" requirement developed in the courts of appeals was the correct construction of section 1503. *See id.* The Court stated "[w]e do not believe that uttering false statements to an investigating agent—and that seems to be all that was proven here—who might or might not testify before a grand jury is sufficient to make out a violation of the catchall provision of section 1503." *Id.* In his dissent, Justice Scalia addressed the issue of section 1503's applicability to witness tampering, saying the 1982 act did not amend the omnibus clause of section 1503. *See id.* at 615-16 (Scalia, J., dissenting). He noted it was not unusual for the same conduct to violate two statutes, and thus, section 1503 was still applicable. *See id.* at 616. This therefore left intact the Ninth Circuit's decision that section 1512 was the exclusive vehicle for witness tampering prosecution. *See* James K. Fitzpatrick, *The Supreme Court's Bipolar Approach to the Interpretation of 18 U.S.C. § 1503 and 18 U.S.C. § 2232(c)*, 86 J. CRIM. L. & CRIMINOLOGY 1383 (1996) (discussing Supreme Court's use of nexus requirement in *Aguilar*).

The parties' briefs in *Aguilar* reiterated the parallel arguments of the Government and defendants as to whether section 1503 could still be used to prosecute witness tampering. In the Brief for Petitioner, the United States of America, the Solicitor General's office contended that section 1503 could still be employed because neither the VWPA nor the 1988 amendment had changed the omnibus clause of section 1503. *See* Brief for Petitioner at *22, *Aguilar* (No. 94-270), available in 1995 WL 15025 (Jan. 12, 1995). The Government noted that some conduct that would violate section 1503 would also violate section 1512, but that it was a familiar principle that the same conduct could violate two statutes. *See id.* at *25. The respondent, Aguilar, argued that the VWPA removed all coverage of witness tampering from the scope of section 1503 since all references to witnesses were deleted and section 1512 was created. *See* Brief for Respondent at *24-*25, *Aguilar* (No. 94-270), available in 1995 WL 60727 (Feb. 13, 1995). Aguilar said that Congress never intended to leave any type of witness tampering within section 1503's omnibus clause. *See id.* at *27. In addition, Aguilar made the interesting point that none of the pre-1982 cases on which the Government relied used the omnibus clause as their method of prosecution. *See id.* at *29. Aguilar also said that the 1988 amendment was further evidence of Congress's intent to place witness tampering prosecution under section 1512. *See id.* at *34-*35. Thus, petitioner and respondent offered essentially the same arguments that lower courts had been hearing for quite some time. But because the Supreme Court declined to decide the issue, the split in the circuits remains.

minority interpretation that section 1512 was the only statutory tool available to prosecute witness tampering. The Ninth Circuit established the middle ground stating that section 1503 still covered noncoercive witness tampering because section 1512 only dealt with coercive conduct. Within six years, Congress responded by amending section 1512 in 1988 by adding “corruptly persuades” to the language of section 1512(b). According to a House Report, the intent of this amendment was to bring noncoercive witness tampering within the scope of section 1512 and remove it from the ambit of section 1503. As a result, the Ninth Circuit recognized that Congress had closed the statutory gap and that section 1512 is the exclusive tool for witness tampering prosecutions. Still, the majority of circuits hold that section 1503 is applicable in witness tampering prosecutions as either an alternative to section 1512 or in addition to section 1512.

A. *The Appropriate Judicial Approach*

Courts should adopt the minority position. There are numerous benefits in following the minority’s determination that section 1512 is the exclusive tool for witness tampering prosecutions. First, this position helps promote uniformity of federal law. Congress intends the federal courts to apply its laws consistently. The fact that the circuit courts interpret the same law differently defeats the goal of uniformity. Inconsistent application damages the image of the federal law and the Federal Judiciary because it makes the law and courts appear inconsistent, unfair, and unyielding.

Second, the minority position more closely reflects congressional intent. While the legislative intent was unclear after 1982, Congress spoke more decisively when it passed the 1988 amendment bringing noncoercive witness tampering within the scope of section 1512. The majority of courts have ignored the ramifications of the 1988 amendment. In their post-1988 decisions, they have not even considered Congress’s intent to make section 1512 the exclusive mechanism as expressed in the House Report accompanying the amendment.¹⁴³

143. In the only circuit case decided since the Supreme Court declined to decide the issue in *Aguilar*, the Sixth Circuit held in *United States v. Tackett*, 113 F.3d 603 (6th Cir. 1997), that Senator Biden’s remarks during the Senate debates on the 1988 amendment were indicative of Congress’s intent. *See id.* at 611. The Sixth Circuit noted that statements made in the reporting of a bill out of committee are accorded the same weight as committee reports. *See id.* (citing 2A NORMAN J. SINGER, SUTHERLAND STATUTES and STATUTORY CONSTRUCTION § 48.14 (5th ed. 1992)). The court went on to say that “[t]his suggests that the drafters of the 1988 legislation believed . . . that the omnibus clause of § 1503 still prohibited witness tampering.” *See id.* But the Sixth Circuit made no mention of the House Report that accompanied the statute which conveyed the opposite intent. *See* H.R. REP. NO. 100-169, at 12 (1988). The logic of the

As a result of this lack of uniformity, defendants are being treated unfairly. Defendants may receive harsher punishments depending upon the circuit in which they are prosecuted. For example, if a defendant tampers with a witness in the Second Circuit she can only be prosecuted and punished under section 1512. But if that same defendant tampers with a witness in the Eighth Circuit, the Government can prosecute and punish her under both section 1503 and section 1512, thus imposing increased fines and prison time. The law today, therefore, provides no real warning to defendants as to the consequences of their conduct.¹⁴⁴ When the House version of the VWPA came to the Senate, the Senate agreed to remove all references to witnesses from section 1503 and to remove the proposed omnibus clause to section 1512 because, in the words of Senator Heinz, these changes would lead to “a clearer and less duplicative law.”¹⁴⁵ By following the minority position, the courts better protect defendants from the harsh, unclear, and duplicative consequences of the continued use of section 1503.

Accepting section 1512 as the only available tool for prosecution also helps federal prosecutors. Currently, prosecutors may be unsure which law they should pursue in order to assure witness tampering convictions. Adoption of section 1512 as the exclusive avenue of witness tampering prosecution would show prosecutors exactly which statute they should employ. It would also benefit federal prosecutors and the Government because the standards for proving a violation of section 1512 are lower than the standards for proving a violation of section 1503.¹⁴⁶ The lower standards would make it easier for the

Sixth Circuit is flawed in another respect. In addressing the 1988 amendment and the other changes, Senator Biden stated, “These sections are derived, virtually without change, from Title I of H.R. 2182, the technical amendments bill passed by the House in June, 1987. Those provisions are well described in House Report 100-169 and the subsequent floor statement of Rep. Glickman on June 22, 1987.” 134 CONG. REC. 32,701 (1988). This indicates that Senator Biden, despite his own vague comments concerning the 1988 amendment, deferred in essence to the House Report, which said it wanted to resolve the conflict. As the House Report indicates, the House did intend to exclude witness protection from section 1503. *See* H.R. Rep. 100-169, at 12 (1988). This is particularly important because committee reports are “the most persuasive indicia of congressional intent in enacting a statute.” SINGER, *supra*, at § 48.06. Because the Senate essentially deferred to the House Report, Congress intended to resolve the conflict between the circuit courts in favor of using section 1512 only as stipulated by the House.

144. The Rule of Lenity also supports the exclusive use of section 1512 because it provides that if courts do see ambiguity in the statutory construction, they should strictly construe the statute in favor of the defendant. *See* BLACK’S LAW DICTIONARY 1332 (6th ed. 1990). Therefore, while some circuits view Congress’s intent as quite clearly favoring the exclusive use of section 1512, those that do not see the intent issue as clearly expressed should still adopt the minority position because it provides greater protection to the defendant.

145. 128 CONG. REC. 26,810 (1982).

146. For example, under section 1512 an official proceeding need not be pending in order to gain a conviction. Under section 1503, however, a pending proceeding must exist to gain a conviction. By

Government to convict defendants for witness tampering.¹⁴⁷

B. The Appropriate Legislative Approach

To facilitate the adoption of section 1512 as the exclusive tool for witness tampering prosecution, Congress should reorganize the obstruction of justice chapter of the criminal code and rewrite section 1503 to make it more precise.¹⁴⁸ First, Congress should rearrange and renumber the specific statutes of the obstruction of justice chapter by grouping together those statutes that address defendants who interfere, influence, or tamper with other individuals. They should, then, group together those statutes that address defendants who do not interfere with other individuals but who act on their own to interfere with the actual judicial proceedings. In so doing, Congress would clearly separate obstruction of justice into two types of general conduct.

At the same time, Congress should rewrite section 1503. First, Congress should break the two parts of section 1503 into two separate statutes.¹⁴⁹ Thus, one statute would proscribe the interference or tampering with jurors and other officers of the court. In addition, Congress should create a completely new statute containing what is now section 1503's omnibus clause. The new statute with the old omnibus clause should be written to contain more precise language. For example, the statute might look like the following model legislation:

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 a judge or court of the United States, a United States magistrate, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the

employing section 1512 the prosecutors have one less element to prove.

147. In addition, one of the original purposes of the VWPA was to create model legislation for state and local governments. *See* Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 2, 96 Stat. 1248, 1249. This purpose is severely undermined if the federal legislation is interpreted and applied in several different ways.

148. Teresa Anne Pesce suggested adding an omnibus clause to section 1512 to resolve the conflict in favor of section 1512. *See* Pesce, *supra* note 51, at 1434. As previous discussions in this Note indicate, however, Congress attempted to make its intent clear. An omnibus clause is not needed and is apparently not wanted because, when amending the statute, Congress chose to fill the statutory gap not with an omnibus clause but with more specific language. Congress further demonstrated this in 1994 when it added language addressing "in the case of a killing" to make the statute more specific as to the conduct covered. *See* 18 U.S.C. § 1512 (1994).

149. *See, e.g., supra* note 19-22 and accompanying text.

Tax Court, a judge of the United States Claims Court, or a Federal grand jury shall be fined under this title or imprisoned not more than ten years, or both. The purpose of this law is to protect the federal judicial process. This statute is not intended to protect the individuals associated with the federal court proceedings as they are already covered by other more specific obstruction of justice statutes.¹⁵⁰

By reorganizing the obstruction of justice laws and adopting the rewritten version of section 1503, Congress could create a more organized, less duplicative, and more understandable guide to prosecution of all obstruction of justice crimes, especially witness tampering. For example, if a defendant corruptly persuaded a witness to destroy documents, the federal prosecutors would charge the defendant with violating section 1512 only. If a defendant himself destroyed documents, then the federal prosecutor would charge him with the newly rewritten section 1503 which would deal exclusively with defendants themselves interfering with the due administration of justice. By enacting this statute, Congress could establish that, indeed, section 1512 is the exclusive tool for witness tampering prosecutions.

V. CONCLUSION

The controversy surrounding the crime of witness tampering is a serious one. The majority of circuit courts hold that the Government may use section 1503 as an alternative to or in addition to section 1512 in the prosecution of witness tampering, while the minority of the circuit courts hold that section 1512 is the exclusive tool for the prosecution of witness tampering. This Note proposes that the courts adopt the minority position and that Congress facilitate that adoption by reorganizing the obstruction of justice statutes and rewriting section 1503. For the sake of uniformity and fairness, section 1512 should be the exclusive tool used for witness tampering prosecution. Whether or not the Federal Government can prosecute witness tampering under both section 1503 and section 1512 is very important because, as the law stands today, defendants in different jurisdictions are not treated in the same manner. In addition, prosecutors lack guidance as to which statute to pursue in prosecuting federal witness tampering. By mandating that witness tampering be prosecuted exclusively under section 1512, the Judiciary and Congress can insure that

150. The language involving the due and proper administration of justice is influenced by 18 U.S.C. § 1510. The language concerning the types of federal courts affected is drawn from 18 U.S.C. § 1515(a).

fairness and uniformity are restored to the prosecution of witness tampering.

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