Stanford Law Review Online

Volume 76 January 2024

ESSAY

Interpreting Obstruction: The Capitol Riot & Donald Trump

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INTRODUCTION

At 1:00 PM on January 6, 2021, a Joint Session of Congress convened to certify the election results of President Joe Biden's victory over Donald Trump.[1] A violent mob, inspired by then-President Trump to "stop the steal,"[2] marched on the Capitol—armed and pounding on the doors of the House and Senate chambers.[3] Capitol Police barricaded the doors with tables and bookshelves before evacuating staffers, senators, representatives, and the presiding Vice President Pence from chambers.[4] The chaos left five dead, injured more than 140 people, and forced proceedings to a halt.[5] Congress could not complete the electoral vote certification until 3:40 AM the next day.[6]

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1. United States v. Montgomery, 578 F. Supp. 3d 54, 59 (D.D.C. 2021).
2. H.R. REP. NO. 117-000, at 2-3 (2022) (quoting rioter Ronald Sandlin's Tweet that "I'm going to be there to show support for our president and to do my part to stop the steal and stand behind Trump when he decides to cross the rubicon [sic]").
3. Meagan Flynn, *Lawmakers Describe Chaos from Inside the Chambers*, WASH. POST (Jan. 6, 2021, 6:16 PM EST), https//perma.cc/BX5N-2X6L; *see also* Paul Kane, *Inside the Capitol: A First Person Account of the Chaos as Pro-Trump Mob Storms the Building*, WASH. POST (Jan. 6, 2021, 3:34 PM EST), https://perma.cc/J5CR-C7AM ("From the second floor, just outside the Chamber, protesters could be heard on the first floor, as police screamed back and [a] loud thwacking sound could be heard."); Tom Dreisbach & Tim Mak, *Yes, Capitol Rioters Were Armed. Here Are the Weapons Prosecutors Say They Used*, NPR (Mar. 19, 2021, 5:06 AM ET), https://perma.cc/5FXH-KTM9.
4. Marc Fisher, Meagan Flynn, Jessica Contrera & Carol D. Leonnig, *The Four-Hour Insurrection*, WASH. POST (Jan. 7, 2021), https://perma.cc/WTX4-JNM4.
5. *Montgomery*, 578 F. Supp. 3d at 59-60.
6. *Id.* at 60.

In the legal fallout from the riot, hundreds of prosecutions, each featuring a range of offenses, pummeled the U.S. District Court for the District of Columbia ("D.D.C.") docket. One commonly charged crime, perhaps the most obvious, was obstruction of an official proceeding under 18 U.S.C. § 1512(c)(2).[7]

In full, the statute 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; 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.[8]

Of the sixteen D.D.C. judges considering this obstruction charge against January 6 defendants, only one chose to dismiss: Judge Nichols read the statute narrowly, finding that § 1512(c)(2) is limited to the destruction of documents or other physical evidence. The others favored the government's interpretation, holding that subsection (c)(2) should instead be construed broadly to encompass all possible acts of obstruction.[9] The D.C. Circuit reversed Judge Nichols's interpretation on appeal but issued three opinions, replete with three distinct interpretations.[10]

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7. About one-third of Capitol Riot defendants were charged with obstruction of an official proceeding. Jason Willick, *This Jan. 6 Case Could Make U.S. Politics Even Worse*, WASH. POST (Apr. 13, 2023, 6:03 PM EDT), https://perma.cc/2BJM-8CNP. Whereas some charges seemed too minor (surely the rioters did more than trespass) and others required proof of elements that many defendants may not have satisfied (such as assault and seditious conspiracy), obstruction hit the sweet spot.

8. 18 U.S.C. § 1512. Judge Katsas lays out the statute's key components as follows:

> First are its *actus rei* verbs—the defendant must *obstruct*, *influence*, or *impede*. Second is the adverb *otherwise*, which qualifies the verbs by indicating some relationship between the covered obstruction and the acts prohibited by subsection (c)(1). Third is the direct object—the defendant must obstruct an *official proceeding*. Fourth is a *mens rea* requirement—in obstructing an official proceeding, the defendant must act *corruptly*.

United States v. Fischer, 64 F.4th 329, 364 (D.C. Cir. 2023) (Katsas, J., dissenting).

9. United States v. Miller, 589 F. Supp. 3d 60, 78 (D.D.C. 2022); United States v. Nordean, No. 21-175 (TJK), 2022 WL 17583799, at *15 (D.D.C. Dec. 11, 2022); United States v. Hale-Cusanelli, 628 F. Supp. 3d 320, 324 (D.D.C. 2022); United States v. Robertson, 610 F. Supp. 3d 229, 233-35 (D.D.C. 2022); United States v. Williams, No. 21-618 (ABJ), 2022 WL 2237301, at *17 n.13 (D.D.C. June 22, 2022); United States v. Fitzsimons, 605 F. Supp. 3d 132, 137 (D.D.C. 2022); United States v. Bingert, 605 F. Supp. 3d 111, 120 (D.D.C. 2022); United States v. Puma, 596 F. Supp. 3d 90, 107 (D.D.C. 2022); United States v. Grider, 585 F. Supp. 3d 21, 29-30 (D.D.C. 2022); United States v. Montgomery, 578 F. Supp. 3d 54, 69-79 (D.D.C. 2021); United States v. Mostofsky, 579 F. Supp. 3d 9, 26 (D.D.C. 2021); United States v. Caldwell, 581 F. Supp. 3d 1, 21-34 (D.D.C. 2021); United States v. Sandlin, 575 F. Supp. 3d 16, 24-28 (D.D.C. 2021).

10. *Fischer*, 64 F.4th at 332.

Now before the Supreme Court in *Fischer v. United States*, subsection (c)(2) faces a moment of reckoning.[11] Should the statute bring in a broader array of obstructive conduct, in line with the plain conclusion that—*of course*—the Capitol Rioters obstructed an official proceeding? Or should it instead skew narrower, in line with the principle of judicial restraint as well as the statute's historical ties to document destruction for corporate fraud? Of the three interpretations currently contemplated by judges, none can ease the tension between these conflicting impulses. This Essay identifies a novel interpretation that may strike the balance: Subsection (c)(2) would only reach direct obstruction, not those individuals who obstruct an official proceeding *through* another person.

Part I briefly explains the reasoning and pitfalls behind the three existing interpretations contemplated by the D.D.C. and D.C. Circuit: the dissent's Evidence Interpretation, the majority's Omnibus Interpretation, and the concurrence's Mental State Interpretation.

Part II sets out the novel Liability Interpretation, inspired by subtle differences between D.D.C. opinions embracing the Omnibus Interpretation. *United States v. Caldwell*, the Oathkeepers case, hints at the possibility that subsection (c)(2) covers only some, but not all, obstructive conduct. The key to unlocking this distinction resides in the interplay between direct and indirect obstruction, which the D.D.C. and D.C. Circuit opinions discuss only in passing.

To get there, Part II entertains three possible ways to understand what it might mean to directly or indirectly obstruct an official proceeding. The most viable is the Liability Interpretation: § 1512(c)(2) bars only obstructive conduct for which the actor is directly liable (rather than indirectly liable through the actions of a third party). Under the Liability Interpretation, for example, subsection (c)(2) would proscribe calling in a bomb threat to delay an official proceeding—but not blackmailing somebody else into calling in the bomb threat, which would instead violate different laws.[12] Similarly, those who actually stormed the Capitol on January 6 would come within subsection (c)(2)'s scope—but not the person who incited the rioters to do so, which would instead be illegal under different statutes.

Part III measures the Liability Interpretation against the government's Omnibus Interpretation, using as a test case the prosecution against President Trump for his involvement with the Capitol Riot. Applying § 1512(c)(2) to President Trump's conduct yields stark differences in criminal liability depending on the interpretation adopted. The Omnibus Interpretation would

11. Grant of Certiorari, Fischer v. United States, No. 23-5572, 2023 WL 8605748 (U.S. Dec. 13, 2023).

12. *See, e.g.*, 18 U.S.C. § 1512(b)(1).

include all of President Trump's conduct within its broad reading of subsection (c)(2). But under the Liability Interpretation, his actions might constitute indirect obstruction and would therefore be beyond the reach of subsection (c)(2)—though likely still illegal in other ways. To compare the merits of these two interpretations, this Essay analyzes plain meaning, statutory context, and legislative history. The Liability Interpretation makes a strong enough showing to warrant consideration.

In sum, the novel Liability Interpretation—which reads § 1512(c)(2) to bar only obstructive conduct for which the actor is directly liable, without the participation of an intermediary third party—may be a viable (or even optimal) interpretation of the statute. It passes a preliminary statutory interpretation stress test and offers a more restrained construction of a potentially expansive subsection (c)(2)—but is not so narrow as to result in the head-scratching conclusion that those storming the Capitol on January 6 were not obstructing an official proceeding.

I. Existing Interpretations

The Evidence, Omnibus, and Mental State Interpretations currently contemplated by judges on the D.D.C. and D.C. Circuit promulgate different solutions to subsection (c)(2)'s interpretive pickle. To lend helpful context throughout the analytical portions of this Essay, Part I briefly summarizes their approaches and drawbacks.

A. The Evidence Interpretation

The Evidence Interpretation, first endorsed by Judge Nichols in *United States v. Miller*,[13] contends that subsection (c)(2) is limited by the preceding subsection (c)(1), therefore only criminalizing obstructive acts related to the destruction of documents or other physical objects.[14] On appeal in *United States v. Fischer*, Judge Katsas wrote a dissent supporting this view.[15]

To reach this conclusion, both judges centered their analysis on how the term "otherwise" links subsections (c)(2) and (c)(1).[16] Informed by the Supreme

13. In prosecution arising from the Capitol Riot, defendant Garret Miller moved to dismiss the charge under § 1512(c)(2), obstruction of an official proceeding. *Miller*, 589 F. Supp. 3d at 62. Although Miller was aware that violence would break out on January 6 and rushed the Capitol armed with a grappling hook, rope, bulletproof vest, helmets, and a mouthguard, Judge Nichols did not consider his conduct obstructive within the confines of subsection (c)(2). *Id.*

14. *Miller*, 589 F. Supp. 3d at 78-79.

15. *Fischer*, 64 F.4th at 363 (Katsas, J., dissenting).

16. *See, e.g.*, *id.* ("This appeal turns on how the two subsections of 18 U.S.C. § 1512(c) interact with one another.").

Court's treatment of "otherwise" in *Begay v. United States*,[17] Judge Nichols and Judge Katsas lean on canons of statutory construction, statutory and legislative history, and principles of restraint and lenity to conclude that subsection (c)(2) "must be interpreted as limited by subsection (c)(1)."[18] Under their Evidence Interpretation, the scope of subsection (c)(2) is necessarily constrained to obstructive acts taken with respect to a document, record, or other object.[19]

But by focusing so much on the tree ("otherwise") rather than the forest (§ 1512(c) as a whole), the Evidence Interpretation presents a rather unnatural reading of the text. As Judge Cooper reasoned, like several other D.D.C. judges, "the Court might ask here: How anyone could alter, destroy, mutilate, or conceal an 'official proceeding' or how anyone could 'obstruct[], influence[], or impede[]' 'a record, document, or other object'?"[20] Where Judge Nichols omits mention of plain meaning analysis entirely,[21] Judge Katsas explains that interpretive canons like *ejusdem generis* and *noscitur a sociis* are helpful tools to approximate how an ordinary English speaker might read subsection (c)(2).[22] Either way, the Evidence Interpretation strains an ordinary reading of the statute, thereby interfering with a defendant's fair notice of their conduct's criminality under § 1512(c)(2).[23]

17. Judge Nichols rests most of his justification for this interpretation on *Begay*, in which the Court considered whether drunk driving was a "violent felony" under the Armed Career Criminal Act. *See Miller*, 589 F. Supp. 3d at 71; Begay v. United States, 553 U.S. 137, 139-40 (2008), *abrogated on other grounds by* Johnson v. United States, 576 U.S. 591 (2015). The relevant passage of the ACCA defined a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that "is burglary, arson, or extortion, involves use of explosive, or *otherwise involves conduct that presents a risk of physical injury to another.*" *Begay*, 553 U.S. at 139-40 (quoting 18 U.S.C. § 924(e)(2)(B)(ii) (2000)) (emphasis added). *Miller* reasons that "otherwise" limits subsection (c)(2) because *Begay* interpreted the ACCA as covering "only *similar* crimes, rather than *every* crime that 'presents a serious potential risk of physical injury to another.'" 589 F. Supp. 3d at 68 (quoting *Begay*, 553 U.S. at 142).

18. *Miller*, 589 F. Supp. 3d at 78; *see also Fischer*, 64 F.4th at 363 (Katsas, J., dissenting).

19. *See, e.g.*, *Miller*, 589 F. Supp. 3d at 71.

20. *Robertson*, 610 F. Supp. 3d at 234 (Cooper, J.) (quoting *Montgomery*, 578 F. Supp. 3d at 75 (alterations in original)); *see also* Yates v. United States, 574 U.S. 528, 551 (2015) (Alito, J., concurring) (asking how anyone "could make a false entry in a fish").

21. *See Miller*, 589 F. Supp. 3d at 67. Rather, Judge Nichols briefly notes that "[r]eading § 1512(c)(2) alone is linguistically awkward" before homing in on how the word "otherwise" affects interpretation. *Id.*

22. *Fischer*, 64 F.4th at 366.

23. *See* United States v. Reffitt, 602 F. Supp. 3d 85, 102 (D.D.C. 2022) ("'[T]hough penal laws are to be construed strictly,' this 'maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation . . . would comprehend.'" (quoting United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820))).

B. The Omnibus Interpretation

Under the Omnibus Interpretation, the universe of § 1512(c) is broad—including all means by which a person can corruptly obstruct an official proceeding. Subsection (c)(1) exists as a bubble in that universe, carving out the specific forms of obstruction related to physical evidence. Subsection (c)(2), in turn, captures what remains: all the myriad ways of obstructing an official proceeding *other than* the actions proscribed by subsection (c)(1).

To reach this reading, the Omnibus Interpretation chiefly relies on plain meaning analysis.

In *United States v. Sandlin*, the first case to consider the question, Judge Friedrich turns to the dictionary.[24] When taken at face value, she argues, the "otherwise" at the start of subsection (c)(2) means "in a different manner" or "by other means."[25] The *actus rei* "obstruct[], influence[], and impede[]," she observes, are expansive—encompassing all sorts of actions that affect or interfere with official proceedings.[26]

Other courts agree. In *Fischer*'s majority opinion, Judge Pan adds that most, if not all, other courts across time and jurisdiction have found that subsection (c)(2)'s scope is not limited by subsection (c)(1), instead favoring a broad, catch-all reading.[27]

With great statutory breadth comes great statutory overlap—and, potentially, overreach. The rest of § 1512 proscribes a variety of ways in which

24. *Sandlin*, 575 F. Supp. 3d at 24.

25. *Id.*

26. *Id.*

27. *See* United States v. Petruk, 781 F.3d 438, 447 (8th Cir. 2015) ("§ 1512(c)(2) operates as a catch-all to cover otherwise obstructive behavior that might not constitute a more specific offense like document destruction, which is listed in (c)(1)."); United States v. Burge, 711 F.3d 803, 809 (7th Cir. 2013) ("The expansive language in this provision operates as a catch-all to cover 'otherwise' obstructive behavior that might not fall within the definition of document destruction."). Judge Pan highlights that "peer circuits have applied the statute to reach a wide range of obstructive acts." *Fischer*, 64 F.4th at 337-38 (citing *Burge*, 711 F.3d at 809 (lying in written responses to civil interrogatory questions); United States v. Volpendesto, 746 F.3d 273, 286 (7th Cir. 2014) (soliciting information about a grand jury investigation to evade surveillance); *Petruk*, 781 F.3d at 444, 447 (seeking a false alibi witness); United States v. Ahrensfield, 698 F.3d 1310, 1324-25 (10th Cir. 2012) (tipping off the targets of criminal investigations); United States v. Desposito, 704 F.3d 221, 230-33 (2d Cir. 2013) (asking third parties to create fraudulent physical evidence); United States v. Jefferson, 751 F.3d 314, 321 (5th Cir. 2014) (giving misleading testimony in a preliminary injunction hearing); United States v. Mintmire, 507 F.3d 1273, 1290 (11th Cir. 2007) (attempting to orchestrate a grand jury witness's testimony); United States v. Carson, 560 F.3d 566, 584 (6th Cir. 2009) (making false statements to a grand jury); United States v. Cervantes, No. 16-10508, 2021 WL 2666684, at *6 (9th Cir. June 29, 2021) (burning an apartment to conceal the bodies of two murder victims)).

someone can obstruct an official proceeding—and by Judge Nichols's count, the Omnibus Interpretation generates redundancies with "at least eleven subsections."[28] Subsection (a) generally condemns the use or threat of physical force to prevent someone from giving testimony or producing evidence at an official proceeding,[29] including killing another person to prevent their attendance.[30] Subsection (b) forbids using intimidation or corrupt persuasion toward another person with the intent to, among other things, influence, delay, or prevent a person's testimony.[31] And subsection (d) specifically criminalizes the intentional harassment of a person, including hindering, delaying, preventing, or dissuading any person from participating in an official proceeding.[32]

Judge Friedrich writes that this overlap is not "*intolerable*,"[33] as it is not unusual for a particular act to violate more than one criminal statute.[34] But surely it is not desirable, either—especially when another potentially plausible reading like the Liability Interpretation might lessen the surplusage.[35]

Furthermore, some legal commentators have noted the latitude that such a broad reading of subsection (c)(2) affords the Justice Department—stopping short of describing the Omnibus Interpretation as an open-ended grant of power to prosecute political dissidents under an obstruction charge.[36]

C. The Mental State Interpretation

In his concurrence, Judge Walker is similarly concerned about the Omnibus Interpretation's breadth, proposing that subsection (c)(2)'s range

28. *Miller*, 589 F. Supp. 3d at 74 (citing 18 U.S.C. §§ 1512(a)(1)(A), 1512(a)(1)(B), 1512(a)(2)(A), 1512(a)(2)(B)(i), 1512(a)(2)(B)(iii), 1512(a)(2)(B)(iv), 1512(b)(1), 1512(b)(2)(C), 1512(b)(2)(D), and 1512(d)(1)); *see also infra* Part III.B.3.

29. 18 U.S.C. § 1512(a).

30. 18 U.S.C. § 1512(a)(1)(A).

31. 18 U.S.C. § 1512(b)(1).

32. 18 U.S.C. § 1512(d).

33. *Sandlin*, 575 F. Supp. 3d at 27 (quoting United States v. Aguilar, 515 U.S. 593, 616 (1995) (Scalia, J., concurring in part and dissenting in part)).

34. *Id.* (noting that in those situations, the government may prosecute under any statute that applies); *see also Petruk*, 781 F.3d at 447; *Voldenpesto*, 746 F.3d at 286.

35. *See infra* Part III.B.3; *see also Fischer*, 64 F.4th at 383 (Katsas, J., dissenting) ("The Supreme Court's message in these and other cases has been 'unmistakable: Courts should not assign federal criminal statutes a 'breathtaking' scope when a narrower reading is reasonable.'" (quoting United States v. Dubin, 27 F.4th 1021, 1041 (5th Cir. 2022) (Costa, J., dissenting), *vacated and remanded*, 599 U.S. 110 (2023))).

36. *See, e.g.*, Willick, *supra* note 7 ("So in applying this statute, the legal system isn't just construing ambiguous language. It is essentially setting the boundaries of advocacy in a democracy, and the degree of punishment available for transgressions.").

ought to be reined in with an extra stringent reading of the term "corruptly."[37] The Mental State Interpretation contends that a narrower mens rea requirement, drawing on a long-established meaning at common law and in federal statutes, can limit subsection (c)(2)'s breadth by requiring more than a "wrongful purpose."[38] However, this reading practically dodges the crux of the question on appeal: What kinds of *conduct* does subsection (c)(2) prohibit?[39] This Essay will not engage with it further.

II. The Liability Interpretation

A subtle inconsistency nestled within the D.D.C. majority opinions hints at a new way to think about § 1512(c)(2). At first glance, the D.D.C. judges present a united front against *Miller* and the Evidence Interpretation. The opinions heavily cross-cite each other, all finding the rioters' conduct to fall squarely within the bounds of § 1512(c)(2). But some reach divergent conclusions about how subsection (c)(2) relates to § 1512(b), a sister provision.[40] Where *Sandlin* finds that conduct under subsection (b)—intimidation or "corrupt persuasion" of another person to obstruct an official proceeding—could just as easily be charged under subsection (c)(2), *Caldwell* finds the opposite.[41] Judge Mehta in *Caldwell* instead holds that, "consistent with its legislative purpose," subsection (c)(2) only "reach[es] obstructive acts whose object is *not* 'another person' but the official proceeding *itself*," thus avoiding conflict with subsection (b).[42]

But what does it mean to act on the official proceeding itself? The answer lies somewhere in the interplay between direct and indirect conduct.[43] This

37. *Fischer*, 64 F.4th at 361 (Walker, J., concurring).

38. *Id.*

39. Judge Pan notes that the meaning of "corruptly" was discussed "only peripherally" in the parties' briefing and in *Miller*—thus Judge Walker's concurrence "is not a product of the crucible of litigation." *Id.* at 340-41; *see also id.* at 364 (Katsas, J., dissenting) ("The question presented involves the *actus reus*—what counts as otherwise obstructing, influencing, or impeding an official proceeding.").

40. 18 U.S.C. § 1512(b) prescribes the same penalty as subsection (c)(2): a fine, imprisonment not to exceed 20 years, or both.

41. *Compare Sandlin*, 575 F. Supp. 3d at 24, *with Caldwell*, 581 F. Supp. 3d at 28.

42. *Caldwell*, 581 F. Supp. 3d at 28 (emphasis added).

43. The D.C. Circuit recognizes this dynamic at play, though ultimately holds that subsection (c)(2) prohibits both direct *and* indirect obstruction. *Fischer*, 64 F.4th at 349 ("Subsection (c) prohibits both direct and indirect obstruction of official proceedings, and adds a catch-all provision."). Judge Pan continues, arguing that although other provisions within the statutory chapter already covered indirect obstruction, "Congress chose to allow overlap in several parts of the statutory scheme" rather than completely rewriting § 1512. *Id.* For the Evidence Interpretation, Judge Katsas notes that "section 1512 reaches acts of direct obstruction such as the defendant destroying

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Part explores three possible ways to make sense of direct and indirect obstruction under § 1512(c)(2). The first two understandings are too shaky or indeterminate to warrant further exploration. But the third—what this Essay terms the "Liability Interpretation"—might be a viable new way to think about obstruction of an official proceeding. Under the Liability Interpretation, subsection (c)(2) bars all acts of obstruction where the actor is directly liable for the obstructive conduct, as opposed to indirectly liable through the corrupt persuasion of a third party.

A. Direct/Indirect Objects

First, we might understand this distinction in terms of direct and indirect objects of obstruction. For example, in *United States v. Montgomery*,[44] Judge Moss takes a grammatical look at the operative clause's subject, verbs, and object.[45] Keywords in § 1512(c) indicate that while the official proceeding is the indirect object of subsection (c)(1)'s intent requirement, it is the *direct* object of the conduct at issue in subsection (c)(2).[46] Killing or threatening a witness to hinder an official proceeding surely obstructs it, but the *actus reus* involves a third party rather than acting directly on the official proceeding itself. As such, killing a witness would not come within the bounds of subsection (c)(2). As another example, shredding documents to prevent their use in an official proceeding—conduct proscribed by subsection (c)(1)—would constitute an indirect mode of obstruction that is similarly beyond the reach of subsection (c)(2).

However, this distinction is likely untenable; indirect obstruction, by these terms, inevitably collapses into direct obstruction. Any obstructive act taking the proceeding as its indirect object could be reframed so that the proceeding is instead the direct object. For example, "conceal[ing] a record . . . to impair the object's integrity or availability for use in an official proceeding"[47] can easily transform into, say, "influencing an official proceeding by concealing a record."

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evidence himself, as well as acts of indirect obstruction such as the defendant pressuring others to do so." *Id.* at 373 (Katsas, J., dissenting).

44. Much like the other January 6 cases, *Montgomery* denied the two defendants' motion to dismiss their charges under § 1512(c)(2) (among ten other counts) for breaching the Senate Chamber and assaulting and threatening law enforcement officers. United States v. Montgomery, 578 F. Supp. 3d 54, 59-61, 72 (D.D.C. 2021). *Id.* at 72. That said, it should be noted that *Montgomery* does not make clear whether statutory construction of § 1512(c)(2) ought to include or exclude acts of obstruction where an official proceeding is the indirect object. I am only borrowing the language to better explain a possible distinction at play here.

45. *Id.* at 70.

46. *Id.* at 72.

47. 18 U.S.C. § 1512(c)(1).

Such a transformation works in the other direction too. Storming the proceeding "itself" in the Capitol Riot can instead be rephrased as breaking down the doors to the Senate Chamber, the direct object, to halt the official proceeding as an indirect object. All acts of indirect obstruction ultimately directly obstruct the official proceeding.[48]

B. Direct/Indirect Proximity to the Proceeding

Alternatively, we might conceive of the distinction between actions that affect the official proceeding "itself" and those that don't as a function of direct/indirect proximity to the proceeding. This inquiry could include factors like temporal, causal, and physical proximity. An action is more likely to be directly obstructive if the proceeding is ongoing and nearby, without an intermediate cause of obstruction. Pulling the fire alarms in the hallway to force evacuation in the middle of critical witness testimony would likely constitute an act of direct obstruction. However, bribing that witness not to testify two months before the proceeding would be indirectly obstructive.

This mode of differentiation between direct and indirect obstruction is fuzzy at best and far less determinate than the two other possible understandings of the *Caldwell* distinction. In part because there is no clear line to draw, evaluating a potential act of obstruction under these terms would need to be done in comparison to other examples rather than in reference to a rule. A deficiency in crispness is hardly a satisfactory critique, but the proximity understanding of direct/indirect obstruction is more than just messy. The Omnibus Interpretation captures a large swathe of conduct, but at least covering *all* obstructive acts is predictable. Yet defining subsection (c)(2)'s *actus reus* in proximity terms has the potential to sweep as broadly as the Omnibus Interpretation without offering any of the determinacy.

48. *United States v. McHugh* sheds some light on the boundary-drawing between direct and indirect obstruction at play here: "Like squares and rectangles, every example of indirect obstruction—say, threatening a witness to keep them from testifying at a hearing—is also an example of (or an attempt at) direct obstruction, since the act of threatening the witness itself obstructs, influences, or impedes the hearing." No. 21-453 (JDB), 2022 WL 1302880, at *8 (D.D.C. May 2, 2022). Just as there are countless different dimensions and perimeters of rectangles, there are countless ways to obstruct an official proceeding. If indirect obstruction is a square, and squares are a particular kind of rectangle, then indirect obstruction is a particular kind of direct obstruction. In this way, it is nonsensical to contend that subsection (c)(2) takes aim at direct obstruction without *also* targeting indirect obstruction simply by virtue of the direct/indirect object distinction.

C. Direct/Indirect Liability

Finally, the difference between direct and indirect obstruction could roughly map onto direct and indirect liability. Imagine person A *corruptly persuades* person B to take some action that obstructs an official proceeding. Both A and B obstruct the proceeding, but A does so indirectly—that is, *through* B's direct obstruction. Under this "Liability Interpretation," subsection (c)(2) would criminalize B's conduct but not A's. A only reaches the official proceeding through B.

Some examples may help. For instance, a bomb threat could delay an official proceeding. The person calling in the bomb threat would be directly liable under subsection (c)(2), whereas the person who blackmailed them into doing so—even though they helped to obstruct the proceeding—would need to be prosecuted under a different statute. Similarly, to directly obstruct an official proceeding, the defendant herself gives false testimony. Indirect obstruction, on the other hand, would involve corruptly persuading a witness—a third party—to provide false testimony. In other words, the indirectly obstructive act is the corrupt persuasion, not the false testimony resulting from that corrupt persuasion.

The Liability Interpretation could have two advantages: slight textual support and determinacy. First, other provisions within § 1512 may lend some textual support for "corrupt *persuasion*" acting as the specific device meant to cover the field of indirect obstruction. Indeed, this term was intentionally used to demarcate the intermediary participation of a third party to obstruct an official proceeding in the rest of § 1512,[49] and we might be able to read into its absence from subsection (c). Without the key term used to cover indirect acts of obstruction, the majority could not argue with as much force that its Omnibus Interpretation ought to include *all* acts of obstruction, including the indirect ones. Second, unlike the direct/indirect object and direct/indirect proximity understandings, thinking about this dynamic in terms of direct/indirect liability reduces the risk of unpredictability. Using the intermediary liability of a third party provides a simple and handy rule of thumb to reliably determine whether a given act would fall within subsection (c)(2)'s reach. That is, subsection (c)(2) would not reach those individuals who obstruct an official proceeding *through* another person.

49. *See* Albert D. Spalding, Jr. & Mary Ashby Morrison, *Criminal Liability for Document Shredding After Arthur Andersen LLP*, 43 AM. BUS. L.J. 647, 653 (2006) ("[T]he new subsection eliminates reference to persuasion, intimidation, or threat, thus reaching beyond the conduct of those in supervisory roles and subjecting the individual shredder to criminal penalties.").

III. Prosecuting President Trump

Ultimately, the best way to get a feel for these interpretations is to run them through fact patterns that tease apart their nuanced distinctions. While the difference between the Omnibus Interpretation and the Liability Interpretation is inconsequential for the January 6 rioters,[50] it matters a great deal for the prosecution against President Trump for his involvement with the Capitol Riot. This Part briefly summarizes the charges against President Trump and his varying liability under the two interpretations. It then compares the Omnibus and Liability Interpretations by applying the same methods of statutory interpretation previously used by the D.C. judges.

A. President Trump's Varying Liability

As recommended by the Select Committee to Investigate the January 6th Attack on the United States Capitol,[51] the Department of Justice has charged President Trump with corrupt obstruction of an official proceeding under § 1512(c)(2) and attempt to do the same.[52]

The indictment advances five main theories of liability under § 1512(c)(2). First, President Trump and his co-conspirators allegedly pressured state legislators and election officials to change legitimate electoral votes for President Biden to fraudulent ones for President Trump.[53] Second, they allegedly organized fraudulent slates of electors in targeted states, causing those fraudulent electors to transmit false certificates to the election certification proceeding on January 6.[54] Third, the indictment alleges that President Trump and his co-conspirators exploited the authority of the Justice Department to pressure state legislatures to convene so that the fraudulent electors could be chosen over the legitimate electors.[55] Fourth, the indictment further alleges that they exerted pressure on Vice President Pence to use his ceremonial role at

50. Their directly obstructive conduct falls within the scope of subsection (c)(2) under both interpretations.

51. H.R. REP. NO. 117-000, at 103 (2022). The other recommended charges include: conspiracy to defraud the U.S.; conspiracy to make a false statement to the federal government; and inciting, assisting, or aiding insurrection. *Id.* at 105, 107, 109.

52. Indictment, United States v. Trump, No. 23-cr-00257-TSC, 2023 WL 4883396 (D.D.C. Aug. 1, 2023) [hereinafter Trump Indictment]. He was charged with four criminal violations: (1) conspiracy to defraud the United States under 18 U.S.C. § 371; (2) conspiracy to obstruct an official proceeding under 18 U.S.C. § 1512(k); (3) obstruction of, and attempt to obstruct, an official proceeding under 18 U.S.C. §§ 1512(c)(2), 2; and (4) conspiracy against rights under 18 U.S.C. § 241. *Id.*

53. *Id.* ¶ 10a.

54. *Id.* ¶ 10b.

55. *Id.* ¶ 10c.

the January 6 certification proceeding to fraudulently alter the election results—either by using the fraudulent electoral votes, by rejecting the legitimate electoral votes, or by sending legitimate electoral votes to state legislatures for review rather than counting them.[56] And fifth, President Trump and his co-conspirators allegedly exploited the disruption caused by the rioters—"including many individuals whom the Defendant had deceived"—to further delay the certification of the election.[57]

Depending on the interpretation adopted, President Trump's actions may or may not fall within the scope of subsection (c)(2). Most, if not all, of this conduct falls under the broad brushstroke of the Omnibus Interpretation. But under the Liability Interpretation, the § 1512(c)(2) charges against President Trump are not nearly as clear-cut. While certainly despicable, many of his actions may not be criminal under subsection (c)(2) because much of his conduct only indirectly obstructed (or would have indirectly obstructed) the official proceeding. President Trump's conduct may instead be a better fit for a different provision within § 1512—corrupt persuasion of another person—if the electors' participation in the proceeding could be properly analogized to "testimony."[58]

For example, organizing the fraudulent electors and electoral slates involves the intervening obstructive conduct of others. The indictment describes this plan as an attempt "to marshal individuals who would have served as [President Trump's] electors, had he won the popular vote, in seven targeted states . . . and *cause those individuals* to make and send to the Vice President and Congress false certifications that they were legitimate electors."[59] President Trump and his co-conspirators may be the architects of this plan, but the obstruction could not be executed without the participation of others; "those individuals" would be the ones making and sending false certifications, not President Trump. In this way, the plan amounts to indirect obstruction, which, under the Liability Interpretation, does not fall within the scope of subsection (c)(2).

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56. *Id.* ¶ 10d.

57. *Id.* ¶ 10e.

58. *See* 18 U.S.C. § 1512(b)(1)-(2) ("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; [or] (2) 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 20 years, or both.").

59. Trump Indictment, *supra* note 52, ¶ 53 (emphasis added).

Similarly, the pressure President Trump and others exerted on Vice President Pence and state legislators to accept those fraudulent slates constitutes indirect obstruction. Attempting to persuade state officials into disputing the legitimate election results would have involved the intervening actions of state officials.[60] Likewise, "enlist[ing]" Vice President Pence breaks the chain between President Trump and the official proceeding: President Trump was trying to achieve his ultimate goal of obstruction *through* Vice President Pence's actions.[61]

President Trump's involvement with the Capitol Riot would likewise not come within subsection (c)(2)'s scope under the Liability Interpretation. President Trump was not himself directly obstructing the proceeding—rather, he "sent" the rioters to the Capitol.[62] Thus, the rioters' intervening obstructive conduct transforms President Trump's actions into indirect obstruction.

As such, the Liability Interpretation reflects more than just splitting interpretive hairs. Its divergence from the Omnibus Interpretation is meaningful and could potentially be the difference between a failed or successful § 1512(c)(2) charge against President Trump for his conduct on January 6.

B. Adjudicating Between the Omnibus and Liability Interpretations

Deciding between the Omnibus and Liability Interpretations requires making a choice about the bounds of subsection (c)(2).[63] In the prosecution against President Trump for charges under § 1512(c)(2), how might a court decide between these conflicting interpretations? Weighing different modes of statutory interpretation is beyond the scope of this Essay. I will therefore compare the Omnibus and Liability Interpretations on the D.D.C. and D.C. Circuit judges' own terms: by applying the same steps of statutory interpretation they used to reach their respective conclusions.

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60. *See, e.g.*, *id.* ¶ 18 (Arizona House Speaker); *id.* ¶ 24 (Georgia Attorney General); *id.* ¶ 39 (Michigan Senate Majority Leader).

61. *See id.* ¶ 86.

62. *See* Spencer S. Hsu & Devlin Barrett, *Special Counsel Alleges Trump 'Sent' Supporters on Path to Jan. 6 Violence*, WASH. POST. (Dec. 5, 2023, 1:49 PM EST), https://perma.cc/NX8A-RV73.

63. As a refresher, the text of § 1512(c) reads:

> 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.

18 U.S.C. § 1512(c).

1. Plain Meaning

When courts say they begin statutory interpretation with the text, they generally mean starting with the plain or ordinary meaning of its language (though *Miller* is a notable exception).[64] Further, the Court has held that "[w]hen the words of a statute are unambiguous, then, this first judicial canon is also the last: 'judicial inquiry is complete.'"[65] However, ordinary meaning is a "notoriously undefined concept" in statutory interpretation with little guidance on how judges are meant to identify clarity in a given text.[66] Likewise, the case law provides little guidance on how to navigate the subtly ambiguous morass between the Omnibus and Liability Interpretations. But foundationally, the plain meaning inquiry is about legislative intent and fair notice; The Court assumes that the ordinary meaning of language selected by Congress accurately expresses its legislative purpose,[67] and the ordinary meaning of the statute's language is how a defendant is most likely to understand it.[68]

While the Omnibus Interpretation offers a perhaps more natural reading of the statute, in line with how a defendant may understand it, the Liability Interpretation could reflect the careful consideration of legislative purpose. To uncover the provision's plain meaning, judges considering § 1512(c)(2) have turned to dictionary definitions of the word "otherwise" to conclude that subsection (c)(2) covers conduct different than that proscribed in subsection (c)(1).[69] To set the bounds (or a lack thereof) on subsection (c)(2), Judge Friedrich highlights the "expansiveness" of subsection (c)(2) terms like "obstruct," "impede," and "influence" as evidence that § 1512(c)(2) ought to be construed broadly.[70] Thus, the Omnibus Interpretation likely aligns with how a defendant may comprehend and be put on notice of the subsection's scope. And given that it took a fair amount of heavily italicized text in Part II to reach

64. *See, e.g.*, United States v. Bingert, 605 F. Supp. 3d 111, 120 (D.D.C. 2022).

65. Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (quoting Rubin v. United States, 449 U.S. 424, 430 (1981)); *accord* United States v. Fischer, 64 F.4th 329, 335 (D.C. Cir. 2023).

66. Anita S. Krishnakumar, *Metarules for Ordinary Meaning*, 134 HARV. L. REV. FORUM 167, 167 (2021).

67. *See, e.g.*, Microsoft Corp. v. i4i Ltd. P'ship, 564 U.S. 91, 101 (2011).

68. United States v. Robertson, 610 F. Supp. 3d 229, 234 (D.D.C. 2022).

69. *See, e.g.*, *Fischer*, 64 F.4th at 336 (defining "otherwise" as "[i]n another way or ways; in a different manner; by other means; in other words; differently" (quoting *Otherwise, Oxford English Dictionary* (3d ed. 2004)) (citing *Otherwise, Black's Law Dictionary* (6th ed. 1990) (defining "otherwise" as "[i]n a different manner; in another way"))).

70. United States v. Reffitt, 602 F. Supp. 3d 85, 98-99 (D.D.C. 2022); *see also id.* (citing United States v. Aguilar, 515 U.S. 593, 598 (noting that this expansiveness aligns with the function of omnibus clauses)).

the Liability Interpretation, a defendant would not likely reach the same conclusion about the statute's meaning at first glance. However, it may be more representative of legislative intent—plain meaning's other guiding light—and the process of carefully drafting statutory language.[71]

Other elements of the plain meaning rule do not settle the score between the Omnibus and Liability Interpretations. Courts generally avoid interpreting statutory language to have a subtle meaning,[72] which could count against the more nuanced Liability Interpretation. At the same time, a statute's plain meaning does not always turn on the broadest possible definitions of its components—a possible point against the Omnibus Interpretation.[73]

Statutory interpretation begins with the text's plain meaning and potentially ends there, provided that its meaning is unambiguous.[74] However, the mere existence of a plausible alternative reading like the Liability Interpretation might be prima facie evidence that subsection (c)(2)'s plain meaning is ambiguous—or at least not *un*ambiguous. Perhaps the duel between the Liability and Omnibus Interpretations is *just* contentious enough to open up discussion of other elements of statutory interpretation. In any case, debates over statutory interpretation increasingly recognize that meaning depends on additional context beyond the four corners of the specific provision's text.[75]

2. Statutory Context and Surplusage

§ 1512 as a whole proscribes several means of obstructing an official proceeding.[76] Subsection (a) bars the use or threat of physical force aimed at preventing testimony or evidence production at an official proceeding,[77] including killing another person to prevent their attendance.[78] Subsection (b) condemns the use of intimidation or corrupt persuasion of another individual with the intent to, among other things, influence, delay, or prevent a person's testimony.[79] Finally, subsection (d) specifically prohibits intentional

71. *See infra* Part III.B.3.

72. United States v. Temple, 105 U.S. 97, 99 (1881). A highly nuanced interpretation may "read[] like [an] elaborate effort[] to avoid the most natural meaning of the text." Patel v. Garland, 142 S. Ct. 1614, 1623 (2022).

73. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1631 (2018).

74. Nat'l Ass'n of Mfrs. v. Dep't of Def., 584 U.S. 109, 127 (2018).

75. Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 274 (2019).

76. 18 U.S.C. § 1512.

77. 18 U.S.C. § 1512(a).

78. 18 U.S.C. § 1512(a)(1)(A).

79. 18 U.S.C. § 1512(b)(1).

harassment of a person to prevent, impede, or delay their participation in an official proceeding.[80]

The Omnibus Interpretation of subsection (c)(2) obviates, for example, subsections (a)(1)(A) and (b)(2)(A) (killing a witness to prevent their testimony; intimidating a person into withholding a record), among others, but subsections (a)(1)(C), (a)(2)(C), (b)(3), and (d)(2)-(4), which proscribe conduct unrelated to an "official proceeding," remain undisturbed.[81] To justify these redundancies, *Sandlin* simply notes that "[i]t is not unusual for a particular act to violate more than one criminal statute."[82]

The Liability Interpretation, on the other hand, generates less overlap with the rest of § 1512. While still broad, narrowing § 1512(c)(2) to only those acts which obstruct the official proceeding without an intermediary third party may well avoid unnecessary surplusage. Judge Mehta observed that his interpretation of subsection (c)(2) in *Caldwell* "creates no conflict with subsection 1512(b)," which prohibits intimidation, threats, and corrupt persuasion of "another person."[83] The same is true for subsection (d), which involves harassment of another person to obstruct an official proceeding.[84]

However, two potential redundancies arise when comparing the Liability Interpretation's subsection (c)(2) to subsections (a)(1)(A) (killing a witness) and (c)(1) (obstructing via documents). First, while § 1512(a)(1)(A) does involve the (albeit involuntary) participation of a third party,[85] killing a witness to prevent them from giving testimony may be more akin to destroying a document than to getting the third party to act obstructively themselves (as in subsection (b)). In this way, it is not immediately clear whether the Liability Interpretation would indeed avoid overlap with subsection (a)(1)(A).

Second, an astute observer might argue that the Liability Interpretation has the same pitfall as the Omnibus Interpretation: failure to identify a meaningful distinction between subsections (c)(1) and (c)(2) beyond a technical carveout. While this could be an accurate critique, it is likely not a highly consequential one. True, subsection (c)(1) may be part and parcel of subsection (c)(2)—merely an isolated example of one way to directly obstruct an official proceeding. But this relationship between subsections (c)(1) and (c)(2) could be a feature, not a bug. Given the legislative context following the Enron scandal, legislators were sure to be especially concerned about document

80. 18 U.S.C. § 1512(d).

81. *See, e.g.*, *Sandlin*, 575 F. Supp. 3d at 27.

82. *Id.* (quoting United States v. Aguilar, 515 U.S. 593, 616 (Scalia, J., concurring in part and dissenting in part)).

83. *Caldwell*, 581 F. Supp. 3d at 28.

84. *Id.*

85. Morbid as this may be!

destruction and likely pulled out subsection (c)(1) to emphasize the prohibition.[86]

So how meaningful is the difference in surplusage between the Omnibus and Liability Interpretations? Most conservatively, the only significant divergence between the two is how they handle § 1512(b)—intimidation, threats, and corrupt persuasion of another person. *Sandlin* holds that such a charge could alternatively be brought under subsection (c)(2), whereas *Caldwell* maintains that subsection (c)(2) instead prohibits distinct kinds of conduct. Both provisions prescribe the same punishment: a fine, imprisonment up to 20 years, or both. However, they require different mental states. Where subsection (b) requires a defendant to "*knowingly* use[] intimidation, threaten[], or corruptly persuade[] another person," subsection (c)(2) requires that the obstructive act be done "*corruptly*." In President Trump's case, then, the prosecution could have had a lower bar to meet if it brought charges under subsection (b) rather than subsection (c)(2),[87] with the added benefit of avoiding the potential absence of liability under the Liability Interpretation's subsection (c)(2).

3. Legislative History and Intent

While by no means an ace in the hole, the legislative history behind § 1512(c)(2) might point toward the Liability Interpretation's middle ground.

In the legal fallout from the Capitol Riot, § 1512 has seen a revival from its roots in early-2000s corporate scandals, including Enron and Worldcom.[88]

86. *See infra* Part III.B.3.

87. *Compare Robertson*, 610 F. Supp. 3d at 233 (noting that the *mens rea* element "corruptly" in § 1512(c) "requires acting with consciousness of wrongdoing" (internal quotation marks omitted) (collecting cases)), *with* Bryan v. United States, 524 U.S. 184, 193 (1998) (holding that "the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense"). To be sure, there is some overlap to the extent that subsection (b) also covers an individual who "knowingly . . . corruptly persuades another person." *See* Arthur Andersen LLP v. United States, 544 U.S. 696, 705-07 (2005).

88. Most notably, § 1512(b) was used to prosecute accounting firm Arthur Andersen, LLP for its misconduct surrounding the Enron scandal. Kyle R. Taylor, *The Obstruction of Justice Nexus Requirement After Arthur Andersen and Sarbanes-Oxley*, 93 CORNELL L. REV. 401, 414-17 (2008). Enron, an energy company based in Houston and a client of Arthur Andersen, hid billions of dollars in debt by manipulating accounting loopholes and fraught financial reporting. *Id.* at 414. In 2001, Enron shareholders filed a $40 billion lawsuit after the company's stock price plummeted. *Id.* Arthur Andersen, for its part, illegally destroyed accounting documents pertinent to the resulting SEC investigation and was charged with obstruction of the official proceeding under § 1512(b). *Id.* at 414-17. Similarly, in *Fischer*, Judge Pan acknowledges this difference in typical application. United States v. Fischer, 64 F.4th 329, 339 (D.C. Cir. 2023) ("To be sure, outside of the January 6 cases brought in this jurisdiction, there is no precedent for using § 1512(c)(2) to prosecute the type of conduct at issue in this case.").

Congressmembers observing those debacles from Capitol Hill found the existing obstruction statutes inadequate, riddled with technical ambiguities and distinctions that made it unnecessarily difficult for prosecutors to establish a liability hook.[89] § 1512(b) technically only reached the conduct of those in supervisory roles rather than subjecting the individual who actually shredded the documents to criminal penalties.[90] Passed swiftly and nearly unanimously, the Sarbanes-Oxley Act of 2002 amended § 1512 to include subsection (c), among other alterations.[91] The amendment, Congress stated, was part of a larger effort to "clarify and plug holes in the current criminal laws relating to the destruction or fabrication of evidence and the preservation of financial and audit records."[92]

The little relevant evidence available demonstrates a congressional intent to close a loophole where those directly liable for an obstructive act could escape prosecution under § 1512. § 1512(c), unlike the other provisions of the Act, was introduced in a floor amendment late in the legislative process with the only hints at congressional intent popping up in floor statements.[93] The only relevant portion of floor statements includes an observation made by Senator Orrin Hatch,[94] who explained that the § 1512(c) addition would

89. Gary G. Grindler & Jason A. Jones, *Please Step Away from the Shredder and the "Delete" Key: §§ 802 and 1102 of the Sarbanes-Oxley Act*, 41 AM. CRIM. L. REV. 67, 77 (2004) (quoting S. REP. NO. 107-146, at 7 (2002)); *see also* S. REP. NO. 107-146, at 6-7 (May 6, 2002) ("[C]ertain current provisions in Title 18, such as section 1512(b), make it a crime to persuade another person to destroy documents, but not a crime for a person to destroy the same documents personally . . . . [I]n the current Andersen case, prosecutors have been forced to use the 'witness tampering' statute, 18 U.S.C. 1512, and to proceed under the legal fiction that the defendants are being prosecuted for telling other people to shred documents, not simply for destroying evidence themselves.").

90. *Id.*; *see also* Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 FORDHAM J. CORP. & FIN. L. 721, 741 (2003) (describing the distinction as a "technical loophole").

91. Michael A. Perino, *Enron's Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes-Oxley Act of 2002*, 76 ST. JOHN'S L. REV. 671, 671, 678 (2002). President Bush described the Act as one of "the most far-reaching reforms of American business practices since the time of Franklin Delano Roosevelt." *Id.* at 671.

92. *See* 148 Cong. Rec. E463 (daily ed. Apr. 9, 2002) (statement of Rep. Conyers).

93. *See* 148 Cong. Rec. S6542 (daily ed. July 10, 2002). It is worthwhile to note that "floor statements by individual legislators rank among the least illuminating forms of legislative history." NLRB v. SW Gen., Inc., 580 U.S. 288, 307 (2017) (citing Milner v. Dept. of Navy, 562 U. S. 562, 572 (2011)).

94. United States v. Montgomery, 578 F. Supp. 3d 54, 76 (D.D.C. 2021). Judge Pan also references the statements of other senators, though they largely repeat the sentiment of Senator Hatch's statement. *See Fischer*, 64 F.4th at 347-48. Some of the cited statements reference document destruction specifically but nonetheless emphasize that the amended statute must cover the "individual who acts *alone* in destroying evidence." *Id.* at 348 (emphasis added). This is consistent with the Liability Interpretation.

"strengthen[]" the statute by prohibiting acts of obstruction "committed by a defendant acting alone," as opposed to "prohibiting individuals from *persuading others* to engage in obstructive conduct."[95] In this way, § 1512(c) closed a "loophole."[96]

Thinking about § 1512(c), and especially (c)(2), as a plug to a loophole could favor the narrower Liability Interpretation. Yes, a broader reading like the Omnibus Interpretation would be a safer bet—broadly proscribing all other obstructive acts would eliminate other previously considered loopholes. But why would Congress wildly expand the statute when existing provisions did the job of covering indirect obstruction just fine? In *Montgomery*'s evaluation of the legislative history, Judge Moss observed:

> Congress recognized that the existing portions of Section 1512—somewhat oddly—made it a crime to kill, assault, threaten, intimidate, corruptly persuade, or harass another person and, thereby, indirectly to obstruct an official proceeding, *but did not make it a crime for the defendant to do so without the (willing or unwilling) participation of a third party.*"[97]

A more precise plug like the Liability Interpretation would ensure that, by excluding indirect obstruction via third-party participation, Congress didn't fill a molehill-sized loophole with a mountain-sized subsection (c)(2).

C. The Liability Interpretation Warrants Consideration

After exhausting tools of statutory interpretation, the gap between the Liability and Omnibus Interpretations may not amount to a "grievous ambiguity" that would warrant calling in a tie-breaker like the rule of lenity.[98] But because the Liability Interpretation's merits put up a fair fight against the dominant Omnibus Interpretation in this interpretive battle, it does warrant consideration—or at least a hesitancy to lump *any* act of obstruction into subsection (c)(2).

CONCLUSION

In the interest of judicial restraint, we want our laws to be interpreted as narrowly as possible without failing common sense. The novel Liability Interpretation may lessen the Omnibus Interpretation's superfluity while still passing the common-sense test that the Evidence Interpretation fails. Subsection (c)(2) need not swallow the rest of its chapter, but neither must it

95. 148 Cong. Rec. S6550 (daily ed. July 10, 2002) (statement of Sen. Hatch).

96. *Id.*

97. United States v. Montgomery, 578 F. Supp. 3d 54, 77 (D.D.C. 2021) (emphasis added).

98. *See* United States v. Robertson, 610 F. Supp. 3d 229, 234 (D.D.C. 2022).

result in the head-scratching conclusion that the rioters' violent delay of the election certification was not an obstruction of an official proceeding.