Tweeting with a Purpose: Interpreting "Corrupt Persuasion" in 18 U.S.C. § 1512(b)

Jessica Ochoa
American University Washington College of Law

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TWEETING WITH A PURPOSE:
INTERPRETING “CORRUPT
PERSUASION” IN 18 U.S.C. § 1512(b)

JESSICA OCHOA

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* Jessica Ochoa is a Juris Doctor candidate at the American University Washington College of law and received a Bachelor of Arts in Psychology from Boston University. She is primarily interested in criminal law, specifically the prosecution of white-collar crime. Ms. Ochoa would like to thank her family for their support throughout all of her endeavours, both professional and personal. She would also like to thank the entire staff of the Journal of Gender, Social Policy & the Law for all their hard work to make this article better than she could have imagined.
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I. INTRODUCTION

President Donald Trump is no stranger to Twitter.¹ The American public has grown to expect impassioned statements from the President in the form of tweets.² However, the President’s tweets came under intense legal scrutiny due in part to the Mueller Investigation into possible collusion with Russia during the 2016 presidential election.³ In particular, some legal experts argued that the President’s tweets regarding Roger Stone and Paul Manafort amount to witness tampering under 18 U.S.C. § 1512(b).⁴ This

² See id. (mentioning the President’s penchant for tweeting statements especially regarding the Mueller investigation).
³ See id. (analyzing the impact of the President’s tweets on the Mueller investigation).
⁴ See 18 U.S.C. § 1512(b) (2019) (criminalizing conduct that “corruptly persuades” a witness to delay, alter or withhold testimony during a criminal trial); see also Grant, supra note 1 (discussing President Trump’s tweets praising Paul Manafort’s
situation is not unique to presidents; currently, there is a circuit split as to what exactly the term “corruptly persuade” encapsulates within § 1512(b). 18 U.S.C. § 1512(b)(1) states that “[w]hoever 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 influence, delay, or prevent the testimony of any person in an official proceeding . . . shall be fined under this title or imprisoned not more than twenty years, or both.”

The Second and Eleventh Circuits take the view that a statement or action can be witness tampering if done with an “improper purpose.” In this way, the element of “corrupt persuasion” is met if an individual has the intent to influence a witness’s testimony for her own benefit even if the action taken is otherwise legal, such as persuading someone to invoke the Fifth Amendment. Should a court take the Second and Eleventh Circuits’ view of § 1512(b), President Trump’s tweets may fall within the meaning of witness tampering.

On the other hand, the Third and Ninth Circuits have held that the act in which a person attempts to tamper with a witness must be “corrupt” in and of itself. For example, threatening a witness is “corrupt persuasion,” but persuading a witness not to testify under a right that the witness may invoke refusal to testify as possible witness tampering); Susan Hennessey and Quinta Jurecic, Is Donald Trump’s Tweet About Roger Stone Witness Tampering?, LAWFARE (Dec. 3, 2018, 4:17 PM), https://www.lawfareblog.com/donald-trumps-tweet-about-roger-stone-witness-tampering (analyzing President Trump’s praise of Roger Stone and condemnation of the Mueller investigation via Twitter as witness tampering).

5. See Hennessey, supra note 4 (discussing the circuit split on § 1512(b) and its effect on criminal convictions).

6. See 18 U.S.C. § 1512(b) (defining acts that influence testimony as those which induce a witness to “withhold testimony, . . . alter, destroy, mutilate, or conceal an object with intent to impair the object’s integrity . . . evade [the] legal process . . . [or] be absent from an official proceeding.”).

7. See Hennessey, supra note 4 (discussing the Second and Eleventh Circuits’ development of an “improper purpose” standard in interpreting 18 U.S.C. § 1512(b)).

8. See generally United States v. Shotts, 145 F.3d 1289, 1289 (11th Cir. 1998) (holding that the term “corruptly persuade” was constitutional when applied to any attempt to influence a witness with the intent to hinder, delay or prevent the administration of justice); United States v. Thompson, 76 F.3d 442, 453 (2d Cir. 1996) (holding that persuasion efforts that were “corrupt” could be satisfied if done with the purpose of influencing or delaying a witness’s testimony).

9. See Hennessey, supra note 4 (applying the Second and Eleventh Circuits’ view of witness tampering to President Trump’s tweets).

10. See id. (summarizing the Third and Ninth Circuits’ rulings regarding witness tampering that establish a “corrupt act” standard).
is not. Thus, under the Third and Ninth Circuits’ view, President Trump’s tweets would not be witness tampering.

This Comment argues that the Second and Eleventh Circuits’ broad interpretation of Section 1512(b) is the correct approach to the “corrupt persuasion” element of the statute. Part II will review the legislative history of 18 U.S.C. § 1512(b). Part II will also discuss the various cases in which the Second, Eleventh, Third, and Ninth Circuits have ruled for a more expansive or restrictive view of § 1512(b). Part III discusses why the Second and Eleventh Circuits’ holdings on witness tampering are correct because it better reflects the statute’s purpose. Part III further asserts that requiring a “corrupt act” is a restrictive standard that provides opportunities for a defendant to unfairly influence her trial while § 1512(b)’s purpose is to maintain a witness’s independence. Part IV recommends that the Supreme Court hold in favor of the “improper purpose” standard. Part V concludes that the “improper purpose” standard is a greater protection of a witness thus allowing for a more effective pursuit of justice.

II. BACKGROUND

A. Legislative History

Prior to the Victim and Witness Protection Act of 1982 ("VWPA"), prosecution for the crime of witness tampering fell under the catch-all nature of 18 U.S.C. § 1503. This provision criminalized any act that

11. See generally United States v. Doss, 630 F.3d 1181, 1190 (9th Cir. 2011) (holding that a non-coercive request for a witness to invoke a privilege is not witness tampering); United States v. Farrell, 126 F. 3d 484, 486 (3d Cir. 1997) (holding that the defendant’s attempt to convince a witness not to testify was not “corrupt persuasion”).

12. See Hennessey, supra note 4 (applying the Third and Ninth Circuits’ restrictive view of witness tampering to President Trump’s tweets).

13. See 18 U.S.C. § 1512(b) (2019) (establishing that for a defendant to be charged with witness tampering there must be an element of “corrupt persuasion”).

14. See infra Part II (discussing the legislative intent of 18 U.S.C. § 1512(b)).

15. See infra Part II (analyzing the major cases in which each circuit has ruled on the issue of witness tampering and “corrupt persuasion”).

16. See infra Part III (suggesting that a restrictive view of “corrupt persuasion” allows for loopholes through which a defendant can circumvent the statute and interfere with a witness’ testimony).

17. See infra Part IV (stressing the importance of clarity and uniformity in interpretation of § 1512(b)).

18. See infra Part V (voicing the need to uphold the integrity and purpose of the statute).

“corruptly . . . endeavors . . . to influence, obstruct or impede the due administration of justice.”20

After the VWPA, the criminalization of witness tampering was codified in § 1512(b) of the United States Code with the legislative intent of providing more robust and comprehensive protections for witnesses.21 However, the initial version of the VWPA did not include the phrase “corruptly persuades” and therefore courts, like the Second Circuit in United States v. King, were hesitant to interpret § 1512(b) as analogous to § 1503.22

In direct response to United States v. King, Congress amended the VWPA to include the term “corruptly persuade” in § 1512(b).23 Along with the modification, then-Senator Joe Biden, a member of the Senate Judiciary Committee, published an analysis of § 1512(b), in which he expressed Congress’ desire to include in § 1512(b) the same witness protections as those afforded to officers and jurors under § 1503.24

B. “Improper Purpose” Standard

To implement 1512(b)’s “corruptly persuades” prohibition, the Second and Eleventh Circuits adopted an “improper purpose” standard.25 To meet this standard, a person must act with the deliberate intent to interfere in an investigation or proceeding for her own benefit, regardless of whether the

or juror).

20. See id. (targeting anyone who influences or injures jurors or officers and setting a variety of penalties for the crime depending on the severity of the act).


22. See generally United States v. King, 762 F.2d 232, 237-38 (2d Cir. 1985) (holding that absent Congressional action, the language of § 1512(b) only applies to acts that threaten, intimidate, or harm a witness).

23. See 134 CONG. REC. S17360 (daily ed. Nov. 10, 1988) (statement of Sen. Joe Biden) (modifying § 1512(b) to include the term “corruptly persuade” in order to include witness tampering that is nonviolent in nature).

24. See id. (explaining that the term “corruptly persuade” in § 1512(b) is intended to allow the prosecution of noncoercive conduct that interferes with a witness’s testimony).

25. See generally United States v. Shotts, 145 F.3d 1289, 1300 (11th Cir. 1998) (agreeing with the Second Circuit in Thompson and adopting an “improper purpose” standard by holding that an “improper purpose” standard only targets acts motivated by self-interest); United States v. Thompson, 76 F.3d 442, 452 (2d Cir. 1996) (holding that an “improper purpose” standard is neither overbroad or vague and that the term “corruptly persuades” applies to acts that seek to impede a trial or investigation with selfish intent).
means taken are inherently corrupt.\textsuperscript{26}

1. Second Circuit

In 1996, the Second Circuit articulated in \textit{United States v. Thompson} that the term “corrupt” in § 1512(b) meant that an “improper purpose” motivated the steps a defendant took to tamper with a witness.\textsuperscript{27} The defendant, Everett W. Thompson, became aware of a federal investigation into his narcotic distribution activities and began to speak to others involved in the operation—the potential witnesses—asking that they refrain from discussing him, alter their recollection of events, and refuse to cooperate with the prosecution.\textsuperscript{28} A jury proceeded to convict Thompson of one count of witness tampering.\textsuperscript{29}

On appeal, Thompson argued that § 1512(b) was unconstitutional, as applied to his case, because it shifted the burden of proof onto him to prove a lack of corruption in his interactions with the witnesses.\textsuperscript{30} The Second Circuit relied on the common law definition of “corrupt” in § 1503 to develop the idea that an improper purpose can satisfy the element of “corrupt persuasion” in witness tampering.\textsuperscript{31} In particular, the court cited \textit{United States v. Fasolino}, which held that if a defendant knew that her actions would likely influence a witness’s testimony and aimed to use that influence to her advantage, the defendant was acting corruptly.\textsuperscript{32} Thus, the Second Circuit in \textit{Thompson} held that an act of “corrupt persuasion” simply had to have the “improper purpose” of “influencing, or obstructing, or interfering with the administration of justice.”\textsuperscript{33}

\textsuperscript{26} See Hennessey, supra note 4 (summarizing the Second and Eleventh Circuits’ “improper purpose” standard through various examples in which the standard would have a different outcome from that which would occur with a “corrupt act” standard).

\textsuperscript{27} See Thompson, 76 F.3d at 452 (discussing the constitutionality of § 1512(b)).

\textsuperscript{28} See id. (discussing the various ways in which the prosecution alleges that the defendant attempted to influence the testimony of others involved in the narcotics operation).

\textsuperscript{29} See id. (summarizing the defendant’s convictions and grounds for appeal).

\textsuperscript{30} See id. (reviewing the defendant’s argument for 18 U.S.C. §1512(b)’s unconstitutionality).

\textsuperscript{31} See id. (citing various cases in which circuit courts have held that “the qualifying term ‘corrupt’ means that the government must prove that the defendant’s attempts to persuade were motivated by an improper purpose”).

\textsuperscript{32} See U.S. v. Fasolino, 586 F.2d 939, 941 (2d Cir. 1978) (discussing the defendant’s knowledge of the relationship between the witness and the judge).

\textsuperscript{33} See Thompson, 76 F.3d at 452 (affirming the defendant’s conviction under jury instructions that defined “corrupt” as deliberately attempting to influence a witness).
2. Eleventh Circuit

In 1998, the Eleventh Circuit defined what it means to “corruptly persuade” a witness in United States v. Shotts.34 Defendant Jessie W. Shotts, a criminal defense attorney, was charged with mail fraud, bribery of a judge, and obstruction of justice.35 Shotts was convicted of witness tampering because of his attempts to gain a judge’s signature on blank bonds by telling the judge that he had “5,000 reasons to try.”36 Shotts appealed his conviction, arguing that the term “corruptly persuade” in § 1512(b) is unconstitutional because it was too vague and overbroad.37

The Eleventh Circuit rejected Shotts’ argument on the grounds that § 1512(b) does not criminalize all verbal contact with witnesses, only contact with the purpose of influencing a trial.38 The court further stated that the idea of an “improper purpose” requirement relies on § 1503’s purpose of protecting witnesses from noncoerceive influence.39 The court upheld the conviction because the combination of § 1512(b)’s similar purpose of protecting witnesses’ testimony and the absence of any divergent Congressional intent together meant that the requirement of an “improper purpose” was inherent in the protection of a witness’s role in a trial.40

C. “Corrupt Act” Standard

Unlike the Second and Eleventh Circuits, the Third and Ninth Circuits have adopted a more restrictive “corrupt act” standard in which the means that a defendant takes to tamper with a witness must also be inherently corrupt.41 The Third and Ninth Circuit Courts read the statute very narrowly

34. See U.S. v. Shotts, 145 F.3d 1289, 1301 (11th Cir. 1998) (explaining the term “corruptly persuade” includes asking an employee not to say anything to law enforcement officers about possible illegal activities of the defendant).

35. See id. at 1292 (listing the various crimes that the defendant was charged with).

36. See id. at 1291 (describing the FBI’s use of wire taps to overhear the defendant seemingly threaten the judge to sign the blank bonds).

37. See id. at 1299 (stating the defendant’s argument against his conviction that he violated § 1512(b)).

38. See id. at 1300 (reviewing the Second Circuit’s holding in U.S. v. Thompson, 76 F.3d 442 (2d Cir. 1996), that the term “corruptly persuade” was not overbroad because of the requirement of an “improper purpose”).

39. See id. at 1300 (quoting Senator Joe Biden’s, a drafter of the 1988 Amendments to § 1512(b), statement of the purpose of including § 1512(b) in the federal witness tampering statutes).

40. See id. at 1301 (rejecting the Third Circuit’s holding that proving intent to influence a trial through witness tampering needs a further level of culpability).

41. See generally United States v. Doss, 630 F.3d 1181, 1189-90 (9th Cir. 2011) (holding a “corrupt act” is required for a conviction under § 1512(b) and that persuading
and therefore believe that Congress did not intend to include acts that were not corrupt themselves.  

1. Third Circuit

In United States v. Farrell, the Third Circuit held that “corrupt persuasion” did not include attempting to deter a co-conspirator from exposing information regarding a conspiracy to sell adulterated meat to investigators. On appeal, the defendant argued that the term “corruptly persuades” does not extend to attempts to persuade a co-conspirator to refrain from aiding an investigation or taking part in a trial.

The Third Circuit held in favor of the defendant stating that the term “corruptly persuades” is ambiguous and accordingly requires a narrow interpretation. Because the “improper purpose” standard is not readily apparent in the statute, the court disavowed having jurisdiction to give additional meaning to the statute, rejecting the notion that Congress intended to criminalize noncoercive conduct. As a result, the court declined to distinguish the term “corruptly persuades” from what Congress stated in its records. The Third Circuit further stated that a § 1512(b) witness tampering conviction requires more culpability than the mere desire to influence a witness’ statement.

However, not all Third Circuit judges agree with the “corrupt act” someone to invoke a right that they are entitled to is not “corrupt” within the meaning of the statute); United States v. Farrell, 126 F.3d 484, 486 (3d Cir. 1997) (holding “corrupt persuasion” does not apply to acts that are noncoercive in nature).

42. See Farrell, 126 F.3d at 488 (stating that the legislative history of the statute did not provide any guidance in interpreting the meaning of the phrase “corruptly persuades,” and therefore, the statute must be read narrowly).

43. See id. at 486 (summarizing the defendant’s conviction for attempting to influence a trial through witness tampering).

44. See id. (giving a brief background of the investigation into the defendant’s activities, interaction with the witness, and his conviction for witness tampering).

45. See id. at 487 (summarizing the defendant’s argument against his conviction).

46. See id. (agreeing with the defendant that the term “corruptly persuades” should not be read to include “improper purpose” because to do so would be overbroad).

47. See id. at 488 (analyzing the legislative history of § 1512(b) to gain an understanding as to what Congress meant by the term “corruptly persuades”).

48. See id. at 489 (reading § 1512(b) as implying that persuading an individual not to cooperate in an investigation by refusing to testify is not automatically a violation of the statute).
standard.⁴⁹ In his dissent in United States v. Farrell, Judge Campbell gave
the example of a mother who implores her son to invoke his Fifth
Amendment right against self-incrimination.⁵⁰ He further explained that an
“improper purpose” does not motivate such conduct despite the fact that it
does hinder an investigation.⁵¹ In this scenario, Judge Campbell reasoned,
that the mother is not acting in her own self-interest, but rather in the interest
of her son. Therefore, her conduct would not fall under that which § 1512(b)
seeks to prevent.⁵²

2. Ninth Circuit

The first case in which the Ninth Circuit ruled in favor of a “corrupt act”
standard is United States v. Khatami.⁵³ In this case, the court stressed that,
while convincing a witness to lie to investigators is a violation of the witness
tampering statute, convincing a witness not to cooperate with an
investigation is not.⁵⁴ However, the court declined to consider whether an
“improper purpose” standard could be applied to any noncoercive attempt to
interfere with a witness’s testimony.⁵⁵

Further, the Ninth Circuit emphasized the “ambiguity” of 1512(b)’s
“corruptly persuade” phrase, admitting that it is possible that people close to
a defendant are persuaded to give false information without any outright
threats or coercion.⁵⁶ When examining the ordinary meaning of the phrase

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⁴⁹ See id. at 493 (Campbell, J., dissenting) (writing a spirited dissent in which he
argues that an “improper purpose” standard is not overbroad and is, in fact, supported by
the legislative history of the statute, therefore an “improper purpose” standard complies
with its legislative intent).

⁵⁰ See id. (explaining that an “improper purpose” standard is not overbroad and
serves to narrow the application of the statute).

⁵¹ See id. (using the example of a mother and son to further explain that the term
“corruptly” is used as a qualifier to narrow the scope of § 1512(b)).

⁵² See id. (providing examples of a news outlet criticizing a prosecutor and a citizen
writing a letter to seek clemency for a defendant to show that acts may have the intent of
hindering an investigation or the judicial process but they do not meet the level of an
inherently “corrupt” act).

⁵³ See generally United States v. Khatami, 280 F.3d 907 (9th Cir. 2002) (holding
that noncoercive attempts to persuade witnesses to provide investigators with false
information violates the witness tampering statute).

⁵⁴ See id. at 913-14 (affirming the defendant’s conviction because encouraging a
witness to lie to investigators is inherently corrupt).

⁵⁵ See id. at 913 (stating that while an “improper purpose” standard could be applied
to the defendant’s actions, the determination of what “corruptly persuades” was not
relevant to the case, and thus, was not a determination that the court was prepared to
make).

⁵⁶ See id. at 911-12 (reviewing the four categories of conduct directed at witnesses
“corruptly persuades,” the court looked to definitions that stress the importance of “improper conduct” within the term “corrupt” and inducing someone by “argument, entreaty, or expostulation into a . . . decision” when defining “persuade.” 57 Additionally, the court reiterated previous holdings in which the court agreed that the amendment to § 1512(b) had the specific purpose of including noncoercive conduct on the part of a defendant. 58

United States v. Doss stands as the seminal Ninth Circuit case that developed the Circuit’s position regarding the broadness of § 1512(b). 59 The government argued that the defendant’s attempts to convince his wife to invoke her right to marital privilege was witness tampering because Doss’ substantial steps to prevent his wife from testifying against him influenced his trial. 60

However, the Ninth Circuit found the defendant’s requests to his wife were not sufficient to establish “corruption” because the term “corrupt” requires an act that is inherently wrong. 61 His wife would have had the opportunity to invoke marital privilege anyway, so the defendant did not induce a corrupt act under this standard. 62

III. ANALYSIS

A. The Second and Eleventh Circuits Have Correctly Ruled that Interpreting § 1512(b) to Include Acts with an “Improper Purpose” Can Satisfy the Element of “Corrupt Persuasion”

1. An “Improper Purpose” Standard Is Correct Because It Aligns with the

and theorizing of other situations that do not include overt threats by the defendant that may exist thus influencing the court’s future interpretation or the statute.)

57. See id. (reviewing various definitions of the terms “corrupt” and “persuade” in order to formulate a working interpretation of the term “corrupt persuasion”).

58. See id. at 912 (discussing previous cases in which the Third Circuit analyzed § 1512(b) in light of § 1503).

59. See generally United States v. Doss, 630 F.3d 1181, 1192 (9th Cir. 2011) (holding an attempt to convince a witness to invoke a right not to speak to investigators did not constitute a § 1512(b) violation).

60. See id. (summarizing the government’s argument supporting the defendant’s conviction).

61. See id. at 1190 (reversing the defendant’s conviction of witness tampering because it could not be found beyond a reasonable doubt that the defendant asking his wife not to testify was a “corrupt” act).

62. See id. at 1189 (stating that, as opposed to convincing a witness to lie, asking a witness not to testify could be considered innocent persuasion).
Plain Meaning of the Term “Corruptly Persuades”

The plain meaning of the language in § 1512(b) supports the Second and Eleventh Circuits’ court decisions adopting an “improper purpose” standard because the ordinary meaning of the words provide a better understanding of the phrase “corruptly persuades” as a whole.63 Courts place significant emphasis on the modifying term “knowingly” when read with the term “corruptly persuade.”64 Courts arguing for a narrow interpretation of “corruptly persuade” often point to the Supreme Court’s holding in Arthur Andersen LLP v. United States.65 However, by holding that “corrupt persuasion” required proof of conscious wrongdoing, the Court emphasized the importance of a proper mens rea requirement.66 An “improper purpose” standard provides a mens rea requirement by specifying that an individual have the deliberate intent to impede a trial or investigation.67 A simple reading of the statute lends itself to an “improper purpose” standard.68 The common definition of the term “knowingly” is to act “consciously, intentionally, [and] deliberately.”69 In order for one to act “knowingly,” there must be a level of consciousness in which the person

63. See Arthur Andersen LLP v. United States, 544 U.S. 696, 705 (2005) (emphasizing the need to read “ambiguous” statutes in conjunction with the ordinary meanings of the words in order to gain a better understanding of what interpretation to apply to a statute).

64. See Daniel Leddy, Interpreting the Meaning of “Corruptly Persuades”: Why the Ninth Circuit Got It Right in United States v. Doss, 630 F.3d 1181 (9th Cir. 2011), 92 NEB. L. REV. 966, 984-85 (2014) (arguing that the term “knowingly” significantly alters the meaning of “corruptly persuade” in § 1512(b) to the point that it can no longer be held as analogous to § 1503).

65. See id. at 976 (arguing that the Court in Arthur Andersen emphasized the importance of the term “knowingly,” thus, rejecting the possibility of an “improper purpose” standard).

66. See Arthur Andersen, 544 U.S. at 706 (reversing petitioner’s conviction of obstruction of justice because “only persons conscious of their wrongdoing can be said to ‘knowingly . . . corruptly persuade[ ]’”).

67. See United States v. Farrell, 126 F.3d 484, 493 (3d Cir. 1997) (Campbell, J., dissenting) (arguing that an “improper purpose” standard requires a certain level of intent that not all actions that necessarily impede an investigation will have).

68. See Arthur Andersen, 544 U.S. at 705 (stressing the importance of reading § 1512(b) in light of the various terms’ “natural meanings” in order to properly interpret the statute).

knows her actions will likely have a result that benefits them.\textsuperscript{70} When read in conjunction with the term “corruptly,” the phrase “knowingly corruptly” translates to stating that a defendant must act intentionally and deliberately to act with an improper purpose.\textsuperscript{71} An “improper purpose” standard is inherent in the plain language dictionary reading of the term “knowingly, corruptly persuade” because to act deliberately is to act with purpose and intention to do something that is dishonest.\textsuperscript{72} Thus, by adding the term “knowingly,” Congress inherently imparted in the statute a \textit{mens rea} requirement that the “improper purpose” standard satisfies.\textsuperscript{73}

Further, by including the term “knowingly,” Congress transformed the meaning of the succeeding transitive verbs “corruptly persuade.”\textsuperscript{74} If a “corrupt act” standard was sufficient, there would be no need for the inclusion of the term “knowingly” because a corrupt act does not need additional \textit{mens rea}; the act is inherently corrupt regardless of mental state.\textsuperscript{75} Had Congress intended to exclude crimes that were typically noncoercive or nonthreatening, Congress would have chosen not to amend the statute at all.\textsuperscript{76}

The Third and Ninth Circuits’ argument that an “improper purpose” standard renders the term “corruptly” superfluous is flawed because the term

\textsuperscript{70} See id. (stating that the use of the term in an indictment is equivalent to stating that the defendant knew what he was about to do, and, with such knowledge, proceeded to do the act).

\textsuperscript{71} See United States v. Haldeman, 559 F.2d 31, 114–15 (D.C. Cir. 1977) (holding that jury instructions that give the definition of “corruptly” as acting with intent or improper purpose to impede the Watergate investigation were correct).

\textsuperscript{72} See \textit{Improper}, \textsc{Cambridge Dictionary}, https://dictionary.cambridge.org/us/dictionary/english/improper (last visited Feb. 16, 2018) (giving the definition of the term “improper” as “being against a law or a rule; dishonest or illegal”).


\textsuperscript{74} See Arthur Andersen LLP v. United States, 544 U.S. 696, 704-05 (2005) (stating that the inclusion of the term knowingly modifies the subsequent verbs); see also Larkin, supra note 73, (analyzing the Court’s ruling in Flores-Figueroa v. U.S., 556 U.S. 646 (2009), in which it stated that “[W]here a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence.”).

\textsuperscript{75} But see generally Leddy, supra note 64, at 981, 984-85 (arguing the inclusion of the term “knowingly” requires a higher level of culpability than an “improper purpose”).

“corruptly” distinguishes acts that hinder an investigation but may not necessarily be corrupt, from actions that are much more deliberate in their execution.\textsuperscript{77} Once again, the importance of the term “knowingly” is crucial in the reading of the statute.\textsuperscript{78} A defendant’s actions may impede an investigation or proceeding in a variety of ways, but Congress did not mean § 1512(b) to make someone wary that any interaction with a witness will constitute a crime.\textsuperscript{79} Instead, under an “improper purpose” standard, § 1512(b) will serve to differentiate acts that impede from acts that are criminal by requiring a deliberate \textit{mens rea} for a court to find a defendant guilty of witness tampering.\textsuperscript{80}

The Court in \textit{Andersen} stressed the importance of the term “knowingly” when analyzing a defendant’s actions.\textsuperscript{81} An “improper purpose” standard encapsulates what the Court held when it stated that not requiring conscious wrongdoing dilutes the term “corruptly” to the point that it covers innocent conduct.\textsuperscript{82} The courts in \textit{Thompson} and \textit{Shotts}, as well as Judge Campbell’s dissent in \textit{Farrell}, stress that an “improper purpose” standard serves to limit the reach of § 1512(b) by excluding acts that may impede an investigation but that the defendant does not commit.\textsuperscript{83}

\textsuperscript{77} \textit{See} United States v. Farrell, 126 F.3d 484, 493 (3d Cir. 1997) (Campbell, J., dissenting) (arguing not all acts that hinder an investigation meet the requirements of witness tampering under either § 1503 or § 1512(b)).

\textsuperscript{78} \textit{But see} Leddy, \textit{supra} note 64, at 984-85 (stating the term “knowingly” modifies the phrase “corruptly persuades” in a way that significantly differentiates it from § 1503 and therefore an “improper purpose” standard cannot apply).

\textsuperscript{79} \textit{See} Farrell, 126 F.3d at 493 (Campbell, J., dissenting) (arguing that an “improper purpose” standard serves to limit the crimes to which § 1512(b) can be applied by requiring additional intent when committing the act).

\textsuperscript{80} \textit{See id.} (stating that not all actions that impede an investigation violate § 1512(b) because they lack the requisite mindset of deliberate intent and therefore an “improper purpose” standard is not overbroad).

\textsuperscript{81} \textit{See} Arthur Andersen LLP v. United States, 544 U.S. 696, 705 (2005) (analyzing the word “knowingly” in the statute and concluding that it imparts a certain level of \textit{mens rea} in “corrupt persuasion” that the prosecution must then prove).

\textsuperscript{82} \textit{See id.} at 706-07 (holding that failing to convey the importance of conscious wrongdoing reduces § 1512(b) to a prosecutorial tool defeating the purpose of targeting witness tampering through its application to almost any act that may influence a trial or investigation).

\textsuperscript{83} \textit{See} United States v. Shotts, 145 F.3d 1289, 1300 (11th Cir. 1998) (stating that by only targeting actions that are “corrupt,” an “improper purpose” standard limits only constitutionally unprotected speech and is therefore not overbroad); \textit{see also} United States v. Thompson, 76 F.3d 442, 452 (2d Cir. 1996) (holding that imparting § 1512(b) with an “improper purpose” standard does not target legally protected speech); Farrell, 126 F.3d at 493 (Campbell, J., dissenting) (arguing not all actions that hinder an
Some may argue that Judge Campbell’s example of a mother who persuades her son to invoke his Fifth Amendment right against self-incrimination is unpersuasive because the situation is unlikely to arise, but such arguments misinterpret Judge Campbell’s purpose of creating this hypothetical situation.  

While nothing guarantees this situation will occur, the point remains that Congress amended the statute to include the term “corruptly” for a reason.  

If the acts that the term “corruptly” targets are inherently corrupt to begin with, then the insertion of the term “corruptly” would be unnecessary because it already implies the criminality of the acts.

Even the Court in Andersen stressed that not all acts that impede the criminal process are liable to be “corrupt” under § 1512(b) and proceeded to reference the same example given by Judge Campbell in his Farrell dissent.  

An “improper purpose” standard creates an additional level of intent that is the Third and Ninth Circuits’ “corrupt act” standard because it requires a “corrupt” motive.  

A “corrupt” act is the simplest reading of the statute, but reading it as such renders the terms “knowingly” and “corruptly” useless—these characteristics are integral to a “corrupt act” and therefore are not needed in the language of the statute.

2. The Second and Eleventh Circuits’ “Improper Purpose” Standard Encapsulates the Legislative History of the Statute and by Doing so Better

investigation are necessarily “corrupt,” and thus, an “improper purpose” standard serves to limit prosecutions to only those acts which are done “corruptly”).

84. See Farrell, 126 F.3d at 493 (Campbell, J., dissenting) (using the example of a mother and son to show that not all acts that impede an investigation are necessarily corrupt). But see Leddy, supra note 64, at 981-82 (arguing that the example of a mother imploring her son to invoke his Fifth Amendment right is irrelevant to the argument of an “improper purpose” standard because the situation is unlikely to arise in real life).

85. But see Leddy, supra note 64, at 982 (arguing that Congress did not have situations like Judge Campbell’s example in mind when writing the statute and therefore the examples do not assist in the interpretation of § 1512(b)).

86. See id. at 982-83 (claiming that Congress’ intent in including the term “corrupt” was to target crimes that are “otherwise wrongful”).

87. See Arthur Andersen LLP v. United States, 544 U.S. 696, 703-04 (2005) (giving the example that a mother who persuades her son to invoke his right against self-incrimination is not acting “corruptly”).

88. See id. at 706 (holding that a person can only be culpable of witness tampering under § 1512(b) if the prosecution shows that they were “conscious of their wrongdoing”).

89. But see Leddy, supra note 64, at 980-82 (arguing that an “improper purpose” standard renders the term “corruptly” superfluous because it would be redundant to have the additional requisite that an act be done with the purpose to impede an official proceeding).
Applies the Law as Congress Designed It

The Second and Eleventh Circuits’ “improper purpose” standard better encapsulates the legislative history and Congressional intent of the statute’s interpretation.90 The key to the proper interpretation of § 1512(b) is the Second and Eleventh Circuits’ view of the term “corrupt;” this view encapsulates Congress’ purpose for the statute.91 As the Second Circuit states, the term “corrupt” in § 1503’s catchall provision against influencing testimony, which also targets witness tampering, includes acts with an “improper purpose.”92 By defining “corrupt” as an act with an “improper purpose,” the court does not broaden the purpose of § 1512(b) but instead specifically defines the parameters of what constitutes a violation of the statute.93

The addition of the term “corruptly persuade” in the statutory language of § 1512(b) means that the language in § 1512(b) is analogous to the language in § 1503.94 The legislative history of § 1512(b) reveals that Congress intended § 1512(b) to supplement § 1503 by covering those crimes that § 1503 did not.95 Further, when the courts became reluctant to deem § 1512(b) as analogous to § 1503 because of the lack of shared language such as the term “corruptly persuades,” Congress was quick to amend the VWPA to

90. See United States v. Shotts, 145 F.3d 1289, 1300 (11th Cir. 1998) (quoting Senator Biden’s statement that the purpose of amending § 1512(b) was to protect witnesses in the same way that they were protected under § 1503); see also Victim and Witness Protection Act, Pub. L. No. 97-291, § 2, 96 Stat. 1248, 1248-49 (1982) (codified in various sections of Title 18) (stating that the purpose of § 1512(b) was to allow the government to protect the role of witnesses in prosecutions).

91. See United States v. Thompson, 76 F.3d 442, 452 (2d Cir. 1996) (explaining that the term “corrupt” is already defined in other statutes and that the court should continue to follow preceding case interpretations).

92. See id. (reviewing prior cases that ruled on the proper definition of the term “corrupt” in § 1503, such as United States v. Fasolino, 586 F.2d 939 (2d Cir. 1978)); see also 18 U.S.C. § 1503 (making it a felony to influence, intimidate, or impede any juror by corrupt means including letters or communication endeavors).

93. See Thompson, 76 F.3d at 452 (defining the term “corrupt” in § 1512(b) as being specific enough to refute the defendant’s argument that the phrase is too vague, making it unconstitutional).

94. See generally Tina M. Riley, Tampering with Witness Tampering: Resolving the Quandary Surrounding 18 U.S.C. § 1503, 1512, 77 WASH. U. L. Q. 249, 265-66 (1999) (discussing the legislative history and interpretation of the term “corruptly persuade” in § 1512(b) and § 1503 in order to establish a connection between the phrase in § 1512(b) to that in § 1503 as a way of supporting the belief that the same standard used in § 1503 is applicable to § 1512(b)).

rectify the discrepancy. Had Congress not intended the term “corruptly persuade” to have the same effect as it did in § 1503, it would not have felt compelled to amend the statute in response to the court in King.

Taking into account the context in which Congress amended the VWPA and § 1512(b), the Second and Eleventh Circuit’s reasoning for an improper purpose standard relies heavily on the courts’ interpretation of the term “corruptly persuades” in § 1503. The Second Circuit determined that an “improper purpose” standard exists in the reading of the term “corruptly persuades” because without doing so renders the term “corrupt” meaningless. Coupled with the legislative history of the statute, it attributes to the term “corruptly persuade” in § 1512(b) a meaning analogous to that which is in § 1503.

Further, the legislative history also points to the original purpose and Congressional intent of the statute: to protect the judicial process by providing legal safeguards for a witness’s testimony. The Second and Eleventh Circuits’ “improper purpose” standard is correct because it better protects the integrity and purpose of the judicial system. Specifically, the

96. See id. (referencing the Second Circuit’s holding in King that, absent Congressional action to amend § 1512(b), § 1512(b) could not be read in the same light as § 1503).
97. See id. (stating that Congress intended the amendment to § 1512(b) to offer the same protections to witnesses as § 1503).
98. See United States v. Thompson, 76 F.3d 442, 452 (2d Cir. 1996) (citing United States v. Fasolino, 586 F.2d 939 (2d Cir. 1978), United States v. Rasheed, 663 F.2d 843 (9th Cir. 1981), and United States v. Jeter, 775 F.2d 670 (6th Cir. 1985) which held that an “improper purpose” standard was sufficient when interpreting the term “corruptly persuades” within § 1503); see also United States v. Shotts, 145 F.3d 1289, 1300 (11th Cir. 1998) (citing United States v. Cintolo, 818 F.2d 980 (1st Cir. 1987) and Martin v. United States, 166 F.2d 76 (4th Cir. 1948) holding the language of § 1503 to encapsulate acts with an “improper purpose”).
99. See generally United States v. Fasolino, 586 F.2d 939, 941 (2d Cir. 1978) (holding that the element of “corruption” requires instruction that there must be an “improper purpose” to the defendant’s actions).
100. See Thompson, 76 F.3d at 452 (holding that the term “corruptly persuades” in § 1512(b) is analogous to the phrase in § 1503).
101. See 134 CONG. REC. S17360 (daily ed. Nov. 10, 1988) (statement of Sen. Biden) (codifying that the purpose of § 1512(b) is to protect the role of witnesses by protecting their testimony from defendants who may attempt to influence or impede a trial or investigation).
102. See generally Thompson, 76 F.3d at 453 (stating that witness tampering through noncoercive attempts falls within the meaning of “corruptly persuades”); see also Shotts, 145 F.3d at 1299 (writing that attempting to hinder, delay, or prevent communication by a witness to law enforcement falls within the legislative purpose of the term “corruptly
“improper purpose” standard encompasses the natural meaning of “corrupt” and correctly applies it to § 1512(b) in order to achieve its legislative purpose of protecting witnesses.103 When drafting the first iteration of the VWPA, Congress enumerated the ways in which the criminal justice system relies on witnesses in order to function.104 An “improper purpose” standard would hold defendants accountable for acts that, while not overt threats or coercion, still impede the judicial process.105 By recognizing that defendants commit certain acts with the express purpose of influencing a trial to their benefit, an “improper purpose” standard strikes at the heart of why defendants commit witness tampering thus helping to prevent such abuses.106

The Third and Ninth Circuits’ view that an act must be “corrupt” unduly restricts the application of § 1512(b) by allowing defendants to find loopholes to interfere with testimony in their trial, without triggering a witness tampering charge under § 1512(b).107 By requiring a corrupt act, courts will embolden defendants to commit acts that affect a witness’s testimony to their benefit but that do not rise to the level of a “corrupt act” thus subverting the purpose of § 1512(b).108

Motivating a witness to invoke her Fifth Amendment right may not be criminal on its face, but when done out of self-interest, the act transforms into an action that § 1512(b) protects against.109 Congress intended that a

persuades” as included in § 1512(b).

103. See Shotts, 145 F.3d at 1300 (affirming the Second Circuit’s interpretation of the “motivated by an improper purpose” definition of the term “corrupt” and confirming that it follows preceding cases).


105. See id. (giving the reason for § 1512(b) as to enhance and protect witnesses to maintain their necessary role in the judicial system).

106. See generally United States v. King, 762 F.2d 232, 237-38 (2d Cir. 1985) (stating that by limiting § 1512(b) to certain forms of witness tampering that fall under the category of intimidation or physical harm, Congress has excluded actions that have the intent and likelihood of affecting the outcome of a trial in much the same way as overt coercion).

107. See 134 CONG. REC. S17360 (daily ed. Nov. 10, 1988) (statement of Sen. Biden) (stating that Congress’ purpose of including the phrase “corruptly persuades” in § 1512(b) is to remove the gap between coercive and non-coercive conduct that results in witness tampering thus removing prosecutorial loopholes discussed in United States v. King, 762 F.2d 232, 238 (2d Cir. 1985)).

108. See id. (explaining that amending § 1512(b) allows for the prosecution of non-coercive conduct for application of the statute to fall in line with its legislative intent).

109. See United States v. Farrell, 126 F. 3d 484, 494 (3d Cir. 1997) (Campbell, J.,
witness have the freedom to decide whether or not to testify without the undue influence of someone with a personal stake on the outcome of the trial.\textsuperscript{110} Without such protections, witnesses are at a risk of harm to themselves, those around them, or their property.\textsuperscript{111} Further, risk of harm also jeopardizes the reliability of the witnesses’ testimony, undermining the judicial process as a whole, should they feel that they must alter or omit certain parts of their testimony.\textsuperscript{112} An “improper purpose” standard prevents the subversion of the judicial process through the possibility of a ten year prison sentence for violating § 1512(b).\textsuperscript{113} By contrast, a “corrupt act” standard results in a gap between overtly corrupt behavior and behavior that is much more manipulative in its execution.\textsuperscript{114}

An “improper purpose” standard targets “non-misleading, non-threatening, [and] non-intimidating attempt[s]” to interfere with a witness in response to the Second Circuit’s decision in \textit{King}.\textsuperscript{115} In this way, the legislative history, in the context of it as a response to \textit{King}, points toward

dissenting) (citing United States v. Cioffi, 493 F.2d 1111 (2d Cir.1974) and Cole v. United States, 329 F.2d 437 (9th Cir.1964), in which courts have ruled that otherwise innocent acts can become criminal when the intent is “improper”).

\textsuperscript{110} \textit{See} Victim and Witness Protection Act, Pub. L. No. 97-291, § 2(b), 96 Stat. 1248, 1249 (1982) (codified in various sections of Title 18) (stating that the cooperation of a witness is crucial to the administration of justice and that the purpose of the statute is to minimize actions that may jeopardize their testimony).

\textsuperscript{111} \textit{See id. at} 1248 (emphasizing the risks that witness’ face when taking part in a proceeding, including, but not limited to, the loss of valuable property and repeated contact with the defendant and their family thus increasing the likelihood of intimidation).

\textsuperscript{112} \textit{See id.} (stressing the importance of a witness’s testimony being reliable in order for the proper administration of justice to occur).

\textsuperscript{113} \textit{See id.} (codifying that the punishment for witness tampering under § 1512(b) as including a fine of up to $250,000 or a ten-year prison sentence, or both).

\textsuperscript{114} \textit{See} United States v. King, 762 F.2d 232, 237-38 (2d Cir. 1985) (holding that without Congressional action, there will remain a gap between coercive conduct that affects an investigation or proceeding and acts that are non-threatening but may have the same effect on a witness’s testimony); \textit{see also} 134 CONG. REC. S17360 (daily ed. Nov. 10, 1988) (statement of Sen. Biden) (responding to the court in \textit{King} and amending § 1512(b) by removing the term “threats” and replacing it with the phrase “threatens, or corruptly persuades” in order to bridge the gap between overt coercion and nonthreatening acts).

\textsuperscript{115} \textit{See} 134 CONG. REC. S17360 (daily ed. Nov. 10, 1988) (statement of Sen. Biden) (stating that the purpose of amending § 1512(b) is to “address an omission in the Victim and Witness Protection Act of 1982 identified by the Second Circuit in \textit{United States v. King}’); \textit{see also} United States v. King, 762 F.2d 232, 238 (2d Cir. 1985) (stressing that if Congress intended to include acts that are not in the narrow reading of § 1512(b) then it must enact legislation that states so).
an “improper purpose” standard. This is because the acts that the King court held were not covered under the original witness tampering statute were acts that are inherently noncoercive and nonthreatening.

The purpose of enacting § 1512(b) was to “protect the necessary role of . . . witnesses in the criminal justice process . . . without infringing on the constitutional rights of the defendant.” Congress made clear, as did the Court in Andersen, that while preventing witness tampering is crucial, maintaining due process is still important when prosecuting under § 1512(b)—prosecutors could not be overzealous in their application of the statute. An “improper purpose” standard protects the constitutional rights of defendants by forcing the government to do more than merely prove a certain act occurred.

3. Case Law Supports an “Improper Purpose” Standard Because It Provides Uniformity Among the Courts

The importance of uniformity among the courts cannot be overstated because it provides consistent application of the law regardless of

116. See 134 CONG. REC. S17360 (daily ed. Nov. 10, 1988) (statement of Sen. Biden) (reiterating that the Second Circuit in United States v. King explicitly recommended to Congress that, if its intent was to protect witnesses from conduct that is not typically seen as impeding or hindering an investigation, it must amend § 1512(b)).

117. See King, 762 F.2d at 238 (stating that Congress had deleted a proposed passage of the bill that would have criminalized inducing a person to stay silent regardless of whether deception, threats, or force was used therefore the belief that § 1512(b) could apply to noncoercive acts was flawed because Congress specifically removed that section of the bill).

118. See Victim and Witness Protection Act, Pub. L. No. 97-291, § 2(b), 96 Stat 1248, 1249 (1982) (codified in various sections of Title 18) (enumerating the importance of witnesses in participating in an investigation or a trial and how the Act seeks to safeguard their role in the criminal process).

119. See id. (stating that the purpose of the statute is to protect witnesses with as many safeguards as possible but without infringing on the rights of a defendant to be able to mount an adequate defense); see also Arthur Andersen LLP v. United States, 544 U.S. 696, 703-08 (2005) (remanding the defendant’s conviction because the jury instructions did not convey the requisite consciousness of wrongdoing required under the statute, thus subjecting the defendant to governmental overreach).

120. See United States v. Farrell, 126 F. 3d 484, 493 (3d Cir. 1997) (Campbell, J., dissenting) (arguing that an “improper purpose” standard results in the term “corruptly” indicating “that persuasion of another which is intended to hinder, delay or prevent communications to a law enforcement officer or judge is criminal only if the dimension of improper purpose can also be found,” meaning the prosecution now has an additional element to prove, thus providing defendants with additional protection against broad application of the statute).
This in turn protects defendants from differing sentences depending on what state they are in. Without uniformity, defendants may be more likely to forum shop or commit crimes in states in which they are aware they will have a more lenient sentence if they are caught. Courts value uniformity to help avoid situations such as the discrepancy between the Fourth Circuit Court of Appeals and the D.C. Circuit Court of Appeals in regards to tax credits of the Affordable Care Act (ACA). Had the Supreme Court not resolved the split, residents of some states would have been able to benefit from the ACA while the ACA was rendered almost useless in others thus exemplifying the importance of uniformity among the courts to ensure equal application of the law. An “improper purpose” standard aligns not only with a number of courts that apply an “improper purpose” standard to similar statutes but also the general principles of criminal law in other contexts.

Courts have routinely held that even if an act is legal in any other context, intent can transform the act into something criminal, especially when applied

121. See Hertz Corp. v. Friend, 559 U.S. 77, 96 (2010) (holding that, while not perfect, a uniform legal system avoids complications of differing jurisdictional approaches); see also Martin v. Hunter’s Lessee, 14 U.S. 304, 381 (1816) (holding that the Supreme Court has the constitutional right to exercise authority over state courts in order to provide “tranquility” among the courts that might be “material[]” to the Union).

122. See Hunter’s Lessee, 14 U.S. at 348 (stating that while the law may remain the same, the varying beliefs and personal interests of the courts in each state will result in different applications of the same law depending on what state the defendant is in).

123. See id. (stressing that “the public mischief that would attend” varying applications of the law would harm the state of the Union and therefore “it cannot be believed that [it] could have escaped the enlightened convention which formed the constitution” thus the founders would have intended uniformity among the courts).

124. See King v. Burwell, 759 F.3d 358, 374 (4th Cir. 2014) (holding that in order for the Affordable Care Act to fulfill its purpose, it is “essential” that tax credits be available for government sponsored health insurance plans); see also Halbig v. Burwell, 758 F.3d 390, 412 (D.C. Cir. 2014) (holding that the language of the ACA only established tax credits for state-run health insurance plans and not for those that are federally sponsored).

125. See Halbig, 758 F.3d at 412-13 (Edwards, S.J., dissenting) (stating that the court’s ruling is a “not-so-veiled attempt” to “gut” the Affordable Care Act and that such rulings in other states would permit the exemption of large groups of people whom the ACA was meant to protect).

126. See United States v. Rasheed, 663 F.2d 843, 852 (9th Cir. 1981) (citing Knight v. United States, 310 F.2d 305, 307-08 (5th Cir. 1962)) (holding that the use of the word “corruptly” in § 1503 indicates that “not every violation . . . involves threats or intimidation” thus resulting in an “improper purpose” standard); see also United States v. Fasolino, 586 F.2d 939, 941 (2d Cir. 1978) (stating that “corrupt persuasion” in § 1503 “can be committed by mere words” and that proper jury instructions emphasize that the act be “motivated by an improper purpose”).
of obstruction of justice statutes, in particular § 1503. In this way, an “improper purpose” standard would be in line with the view of several circuits that intent can change the permissibility of an act when the intent is to impede an investigation for the benefit of the defendant. Following the lead of other circuits allows for greater uniformity among the courts, allowing the law’s application in a more efficient and productive way.

Additionally, a number of circuit courts of appeal apart from the Second and Eleventh Circuits adopted an “improper purpose” standard of “corrupt persuasion.” Importantly, courts have found an “improper purpose” standard in § 1512(c). Thus, an “improper purpose” standard would allow

127. See United States v. Smith, 831 F.3d 1207, 1211 (9th Cir. 2016) (affirming the convictions of officers under § 1503 who impeded a FBI investigation by seizing cell phones from prisoners and imposing communication restrictions, even though those actions on their face would have been legal, but for the intent to obstruct the investigation); see also United States v. Cueto, 151 F.3d 620, 628-29 (7th Cir. 1998) (stating that “[o]therwise lawful conduct . . . can transgress § 1503 if employed with the corrupt intent to accomplish that which the statute forbids”); United States v. Mitchell, 877 F.2d 294, 299 (4th Cir. 1989) (holding that other means besides inherently “illegal means”, when used to obstruct justice, fall within the actions prohibited by § 1503); United States v. Cintolo, 818 F.2d 980, 991 (1st Cir. 1987) (holding that any act, lawful or unlawful, by a party may expose them to liability under § 1503 if done with a “corrupt motive”).

128. See United States v Thompson, 76 F.3d 442, 452 (2d Cir. 1996) (holding that the an “improper purpose” standard can be read into § 1512(b) because it is analogous to § 1503 as it has been interpreted by other courts). But see Leddy, supra note 64, at 984-86 (arguing that comparing § 1512(b) with § 1503 is inappropriate because the language is not the same and therefore the use of the term “corruptly” cannot be construed as being analogous to each other).

129. See Riley, supra note 94, at 273 (describing the possibility that defendants may receive harsher punishments because of their jurisdiction and arguing that a uniform standard better protects defendants from unclear punishments).

130. See United States v. Gordon, 710 F.3d 1124, 1151 (10th Cir. 2013) (giving the definition of “corruptly” as “acting with an improper purpose and to engage in conduct knowingly and dishonestly with the specific intent to subvert, impede, or obstruct the proceeding”); see also United States v. Haldeman, 559 F.2d 31, 114 (D.C. Cir. 1976) (holding that the term “corruptly” means acting with an “improper purpose” to obstruct an investigation).

131. See United States v. Mintmire, 507 F.3d 1273, 1289 (11th Cir. 2007) (holding that the definition of “corruptly” means to act with an “improper purpose” and to act knowingly and dishonestly to impede or obstruct an investigation); see also United States v. Friske, 640 F.3d 1288, 1291 (11th Cir. 2011) (quoting Mintmire, 507 F.3d at 1289) (holding that the term “corruptly” in § 1512(c)(2) requires a jury find that a defendant acted with an “improper purpose” beyond a reasonable doubt); see also Gordon, 710 F.3d 1124 at 1151 (holding that an “improper purpose” standard satisfies the term “corruptly” in § 1512(c)(2)).
for consistency among the courts and, in turn, protect the equality of the law.132

4. The Third and Ninth Circuits’ Belief that an “Improper Purpose” Standard is Not Specific and Will Apply to Any Actions that Affect a Witness’s Testimony Is Flawed Because an “Improper Purpose” Standard Is Neither Ambiguous nor Overbroad

   a. An “Improper Purpose” Standard Is Not Ambiguous Because It Provides Proper Notice to a Defendant of What a Witness Tampering Charge Entails

   The term “corruptly persuades” is not ambiguous within the context of its legislative purpose because an “improper purpose” standard provides adequate notice to a defendant of what constitutes witness tampering under §1512(b).133 The rule of lenity is a judicial doctrine requiring that courts read an ambiguous term in the light most favorable to the defendant; however, applying the rule of lenity cannot come at the expense of the proper execution of the justice system.134 The rule of lenity applies to ambiguous statutes under the VWPA; however, the rule does not apply to § 1512(b) because it lacks the requisite ambiguity.135

   Instead, the law provides proper notice to the defendant of what acts constitute witness tampering as the Court required in Andersen.136 The term,

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132. See Riley, supra note 94, at 272 (arguing that consistency among the courts is imperative in the application of § 1512(b) because “[i]nconsistent application damages the image of the federal law and the Federal Judiciary because it makes the law and courts appear inconsistent, unfair, and unyielding”).

133. See United States v. Shotts, 145 F. 3d 1289, 1300 (11th Cir. 1998) (stating that the term “corrupt” is not constitutionally vague because it provides the defendant with the requisite knowledge of what constitutes the offense therefore an “improper purpose” can be applied).

134. But see Leddy, supra note 64, at 983-84 (arguing that because of ambiguity of the term “corruptly” in § 1512(b) the rule of lenity demands that courts apply the statute in a way that favors the defendant because a defendant must have a “fair warning” that the act they are committing is a crime).

135. See Hughey v. United States, 495 U.S. 411, 422 (1990) (holding that ambiguities in the VWPA should be resolved through application of the rule of lenity).

136. See generally Arthur Andersen LLP v. United States, 544 U.S. 696, 703 (2005) (quoting United States v. Aguilar, 515 U.S. 593, 600 (1995)) (stating that the rule of lenity is crucial in giving defendants a “fair warning . . . of what the law intends to do if a certain line is passed”). But see Leddy, supra note 64, at 976 (stating that the Supreme Court in Arthur Andersen, LLP v. United States meant to indicate to courts that they must interpret the term “corruptly” in a way that gives fair warning to a defendant that an act they are committing is criminal in nature).
“corruptly,” indicates to a defendant that acts impeding the proper execution of justice are criminal when the act arises out of self-interested motives.\textsuperscript{137} By adopting an “improper purpose” standard, it is difficult for a defendant to interpret the term “corruptly” differently because someone must be consciously aware of her motive in order to do anything “knowingly.”\textsuperscript{138} Should the prosecution be able to prove an “improper purpose,” if a defendant is aware of the repercussions, she will be more wary of committing overt acts that may impede an investigation or trial.\textsuperscript{139} Maintaining the integrity of the judicial system through the reduction of crimes that may unfairly influence the judicial process better achieves the purpose of § 1512(b).\textsuperscript{140}

If a “corrupt act” standard was all that § 1512(b) required, defendants could find more ways to interfere with a proceeding without penalty because, so long as the act is not overt, prosecutors are less likely to bring witness tampering charges.\textsuperscript{141} By focusing on the mental state of a defendant using an “improper purpose” standard, the statute can then reach the legal gray area of witness tampering in which the defendant affects the investigation or proceeding through acts that are not typically threatening or coercive.\textsuperscript{142} An “improper purpose” standard reaches all forms of witness tampering

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\item \textsuperscript{137} See Shotts, 145 F.3d at 1300 (rejecting the Third Circuit’s holding that the term “corruptly persuade” is ambiguous and instead upholding the defendant’s conviction on the grounds that the statute is specific enough to provide proper notice to a defendant of the criminality of his acts).
\item \textsuperscript{138} See Arthur Andersen, 544 U.S. at 706 (stating that limiting culpability to those who are aware their acts are wrong allows § 1512(b) to reach Congress’ intended targets).
\item \textsuperscript{139} See Shotts, 145 F.3d at 1300 (holding that by defining the term “corruptly” with an “improper purpose” standard the term “corruptly” serves as a “scienter requirement which provides adequate notice” of what conduct is targeted by the statute”); see also United States v. Thompson, 76 F.3d 442, 452 (2d Cir. 1996) (holding that § 1512(b) is not vague because using an “improper purpose” standard provides the defendant with adequate notice of what conduct the statute proscribed).
\item \textsuperscript{140} See 134 CONG. REC. S17360 (daily ed. Nov. 10, 1988) (statement of Sen. Biden) (stating that by amending § 1512(b), Congress meant to define “corrupt persuasion” as “a non-coercive attempt to induce a witness to become unavailable to testify or to testify falsely”).
\item \textsuperscript{141} See United States v. Farrell, 126 F. 3d 484, 493 (3d Cir. 1997) (Campbell, J., dissenting) (stating that by inducing a witness to invoke his Fifth Amendment right against self-incrimination, the defendant acted improperly because Congress meant § 1512(b) to prevent witness tampering in noncoercive and nonthreatening forms).
\item \textsuperscript{142} See 134 CONG. REC. S17360 (daily ed. Nov. 10, 1988) (statement of Sen. Biden) (stating that, in response to United States v. King, Congress amended § 1512(b) to include acts that are inherently noncoercive or threatening).
\end{itemize}
Congress meant to target in the creation of the statute.143

b. The “Improper Purpose” Standard is Not Overbroad Because the Term “Corruptly” Targets Only Deliberate Acts that Impede a Witness’s Testimony

Narrowing the definition of “corrupt” allows courts to apply § 1512(b)’s core purpose of preventing a defendant from interfering in his or her trial.144 Importantly, by defining “corrupt” as having an “improper purpose,” courts do not outlaw all speech that may persuade a witness one way or another.145 In this way, the Second and Eleventh Circuit clarifies that the term “corrupt” applies only to those circumstances in which the defendant intends and is aware that her actions will have the effect of deterring a witness from testifying.146 An “improper purpose” standard, therefore, is not overbroad because it targets only coercive acts that § 1512(b) seeks to prevent.147

Moreover, the term “corrupt” affords a defendant an additional layer of protection against an overbroad application of the statute because the term “corrupt” imposes a burden on the government to prove that a defendant had an “improper purpose.”148 An “improper purpose” requires a prosecutor in a witness tampering case to provide evidence that the defendant acted with the culpable mens rea.149 Conversely, the “corrupt act” standard merely requires that the act is inherently wrong; the prosecutor has no burden other than to show a jury that such an act happened.150

143. See generally id. (explaining that by amending § 1512(b) Congress intended to criminalize acts that were not inherently threatening or coercive as described in United States v. King).

144. See United States v. Thompson, 76 F.3d 442, 452 (2d Cir. 1996) (discussing that there needs to be adequate notice that an act is a crime in order for a statute to be constitutional).

145. See id. (emphasizing that § 1512(b) is not overbroad because it allows for “lawful and constitutionally protected speech”).

146. See id. (narrowly interpreting § 1512(b) in regard to the type of speech that it seeks to prevent).

147. See id. (stressing the importance of viewing § 1512(b) in light of the original purpose of preventing witness tampering by the defendant).

148. See id. at 452 (holding that an “improper purpose” standard does not shift the burden onto the defendant to prove that there was not a level of “corruption” in his or her act and that the prosecution must still prove that an act was criminal in its intent).

149. See United States v. Farrell, 126 F. 3d 484, 493 (3d Cir. 1997) (Campbell, J., dissenting) (arguing that an “improper purpose” standard, in relation to the term “corruptly,” serves as a tool in which to limit the reach of the statute).

150. See id. (Campbell, J., dissenting) (arguing that the term “corruptly” sufficiently differentiates conduct motivated by self-interest from that which is done for reasons other
IV. POLICY RECOMMENDATION

An “improper purpose” standard protects more than just the witnesses named in the VWPA. The underlying purpose for protecting witnesses is to ultimately protect the judicial process. By protecting witnesses, Congress sends a message that our judicial system is built on the ability of its people to freely and willingly participate. Without the help of witnesses, it would be incredibly difficult for law enforcement to adequately combat crime and aid in the administration of justice because law enforcement would lack the firsthand knowledge that can be crucial to convicting a defendant.

The various investigations into President Trump’s actions during his election campaign and the subsequent Mueller investigation have brought up the importance of a unilateral standard for witness tampering. When analyzed under the “improper purpose” standard, President Trump’s tweets and interactions with those under investigation may be considered witness tampering. An “improper purpose” standard would make the president’s actions potentially criminal while a “corrupt act” standard would see nothing

than solely preventing or hindering a witness’s testimony).


152. See id. (stating that “without the cooperation of victims and witnesses, the judicial system would cease to function,” therefore, it is Congress’ responsibility to protect the “necessary role” of witnesses in the judicial process).


155. See Grant, supra note 1 (analyzing the President’s tweets regarding Paul Manafort in light of § 1512(b)); see also Hennessey, supra note 4 (discussing the potential legal consequences of the President’s tweets about Roger Stone when read under an “improper purpose” standard of § 1512(b)).

156. See Hennessey, supra note 4 (asserting that a prosecutor would have a greater chance of pursuing a witness tampering charge for the President’s tweets under the Second and Eleventh Circuits’ interpretation of “corrupt persuasion”).
more than a form of expression. \(^{157}\)

Regardless of political motivations, the importance of setting a unilateral standard on what the term “corruptly persuades” means becomes clear because of the vastly different outcomes that are possible under the holdings of the different circuits. \(^{158}\) Because of this, the Supreme Court should confront the issue it avoided in Arthur Andersen: to concretely define the term “corruptly persuade.” \(^{159}\) Further, the Court should adopt the Second and Eleventh Circuits’ “improper purpose” standard because it encapsulates Congress’ core purpose behind enacting the statute. \(^{160}\) This standard properly protects witnesses, while simultaneously protecting the rights of defendants to mount an adequate defense. \(^{161}\) A variety of justifications exist as to why a defendant does something that is non-threatening and noncoercive. \(^{162}\) An “improper purpose” standard allows defendants the chance to mount a defense that can be based on something more than just claiming an action did not occur. \(^{163}\) An “improper purpose” standard allows defendants the ability to craft defenses that take into account the multifaceted nature of the human experience. \(^{164}\)

\(^{157}\) See Grant, supra note 1 (stating that the Third and Ninth Circuits’ restrictive approach to “corrupt persuasion” makes it easier for the President to argue that he is simply praising Paul Manafort for invoking a right he would otherwise have and is therefore not subject to § 1512(b)’s reach).

\(^{158}\) See id. (explaining the discrepancies between the circuit courts and the varying outcomes different cases would have depending on the jurisdiction).

\(^{159}\) See Arthur Andersen LLP v. United States, 544 U.S. 696, 704 (2005) (focusing solely on the importance of the term “knowingly” in the statute’s “corruptly persuade” language, but forgoing providing an interpretation of the phrase “corruptly persuade”).

\(^{160}\) See Victim and Witness Protection Act, Pub. L. No. 97-291, § 2(a)-(b), 96 Stat. 1248, 1248-49 (1982) (codified in various sections of Title 18) (enumerating the issues that Congress saw in regards to the protection of witnesses and explaining the importance of the role that victims and witnesses play in the pursuit of justice).

\(^{161}\) See id. (stating that the Federal Government will do all it can to protect and assist witnesses “without infringing on the constitutional rights of the defendant”).

\(^{162}\) See United States v. Farrell, 126 F. 3d 484, 493 (3d Cir. 1997) (Campbell, J., dissenting) (using the analogy of a mother urging her son to invoke his right to remain silent under the Fifth Amendment to discuss the possibility that someone would interfere with a witness’s testimony and cooperation for a reason other than protecting themselves).

\(^{163}\) See id. (Campbell, J., dissenting) (arguing that an “improper purpose” standard may benefit defendants because there is an additional element of mens rea that the government now has the burden of proving).

\(^{164}\) See Arthur Andersen, 544 U.S. at 703-04 (stressing that attempts to persuade an individual’s testimony, even with the intent to impede an investigation, is not “necessarily malign”).
V. CONCLUSION

An “improper purpose” standard encapsulates Congress’ efforts to protect witnesses from various forms of interference that are not commonly prosecuted forms of witness tampering.\textsuperscript{165} The purpose of § 1512(b) is to adequately protect a witness’s testimony; a narrow interpretation of a “corrupt act” excludes conduct that will inherently impede an investigation to the benefit of the defendant.\textsuperscript{166} Rather than make the application of § 1512(b) overbroad, the term “corruptly” is used to differentiate conduct that is otherwise innocent from that which whose motives are anything but innocent.\textsuperscript{167}

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\textsuperscript{165} See Farrell, 126 F. 3d at 492 (Campbell, J., dissenting) (arguing that an “improper purpose” standard is the proper interpretation of Senator Biden’s statements conveying Congress’ intent in amending § 1512(b) to include the term “corruptly” and rebuffing the majority’s claim that the legislative history of the statute is unhelpful in the application of the statute).

\textsuperscript{166} But see Leddy, supra note 64, at 986 (stating that Congress could not have meant to criminalize acts that impede “otherwise innocent conduct solely because it is done with self-interest”).

\textsuperscript{167} See Farrell, 126 F.3d at 493 (Campbell, J., dissenting) (stating that the addition of the term “corruptly” adds another dimension to witness tampering in which an act does not need to be inherently wrong, but the intent behind the act can render the act wrong).
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