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Degrees of Corruption: The Current State of “Corrupt Persuasion” in 18 USC § 1512

Diane A. Shrewsbury†

INTRODUCTION

Imagine that a wife speaks with police and discloses information that may incriminate her husband. The prosecutor would like the wife to testify in the trial against her husband and the wife is unaware of her legal right not to testify in a manner that would incriminate her spouse. Her husband, however, knows about marital privilege and tells his wife that she does not have to testify against him. Should the act of explaining marital privilege to one’s spouse be classified as witness tampering and criminalized under 18 USC § 1512?

Now imagine that a defendant would like to convince a witness not to testify but, because of a fear of being prosecuted for witness tampering, he asks a third party to convince the witness not to testify. The third party simply speaks with the witness and asks the witness not to testify. Should this type of pure speech-based action be considered witness tampering? In the alternative, imagine that the defendant pays the third party to speak with the witness and convince the witness not to testify. Should the financial element affect the liability of either the defendant or the third party?

Federal witness tampering statutes often involve the word “corruptly,” and federal courts have issued countless opinions interpreting and attempting to define it in an appropriate manner. The most recent debate over the proper interpretation of “corruptly” in a witness tampering statute regards 18 USC

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1 See, for example, 18 USC §§ 1503, 1505, 1512. See also United States v Doss, 630 F3d 1181, 1187 (9th Cir 2011) (discussing the meaning of “corruptly” persuades in § 1512); United States v Abrams, 427 F2d 86, 90 (2d Cir 1970) (discussing the meaning of “corruptly” in § 1505); Martin v United States, 166 F2d 76, 79 (4th Cir 1948) (discussing the meaning of “corruptly” in § 1503).
§ 1512(b), a statute that criminalizes certain forms of witness tampering. Circuit courts are split over what is required for an individual to corruptly persuade a witness in violation of § 1512(b).2

The meaning of "corruptly persuades" in the context of § 1512(b) is important to both potential defendants and prosecutors. A clear understanding of "corruptly" will delineate exactly how a defendant—or even an uninvolved third party—can interact with potential witnesses. In addition, prosecutors will benefit from a consistent reading of the term "corruptly persuades." A uniform understanding will benefit prosecutors because it will prevent unnecessary charges where individuals fall in the portion of conduct that is only considered "corruptly persuad[ing]" in some circuit courts.

Part I of this Comment will review the history of § 1512, including its initial enactment in 1982 and its amendment in 1988. Part II will consider how a recent Supreme Court decision affects both sides of the circuit split and will discuss the different approaches to "corruptly persuades" currently employed in the circuit courts. Next, Part III will address the two hypotheticals discussed above, assessing how a court on each side of the split would rule on each scenario. Part III will also suggest an alternative approach to the hypotheticals and will discuss how the circuit split can be reconciled. Finally, Part IV will address potential counterarguments to the alternative interpretation introduced in Part III.

I. BACKGROUND

This Part discusses the enactment of § 1512 and the introduction of the term "corruptly persuades" in a 1988 amendment.

A. Background: Enactment of § 1512

With passage of the Victim and Witness Protection Act of 1982 ("The Act"),3 Congress introduced § 1512.4 Congress's goal in passing The Act was to "provide additional protections and

2 Compare, for example, United States v Gotti, 459 F3d 296, 343 (2d Cir 2006), with United States v Doss, 630 F3d 1181, 1187 (9th Cir 2011).
assistance to victims and witnesses in Federal crimes.” As originally enacted, § 1512(b) stated that:

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

(1) attending or testifying in an official proceeding;

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

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

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

or attempts to do so, shall be fined not more than $25,000 or imprisoned not more than one year, or both.

The Act was adopted for the broad purpose of “enhanc[ing] and protect[ing] the necessary role of crime victims and witnesses in the criminal justice process,” but the type of tampering that § 1512(b) criminalized was limited to “intentional harass[ment]” of another. Section 1512(a) criminalized other sorts of tampering, such as acting through the use of “intimidation or physical force.”

In 1988, Congress amended § 1512(b) by adding the phrase “corruptly persuades” and eliminating the “intentionally harasses” standard. Section 1512(b) now reads:

Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or

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5 The Act preamble, 96 Stat at 1248.
6 18 USC § 1512(b) (1982).
7 The Act § 2(b)(1), 96 Stat at 1249.
8 The Act § 4(b), 96 Stat at 1249.
9 The Act § 4(a), 96 Stat at 1249.
engages in misleading conduct toward another person, with intent to—

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

(2) cause or induce any person to—

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

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

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

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

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

shall be fined under this title or imprisoned not more than 20 years, or both.\footnote{18 USC § 1512(b).}

B. Legislative History of § 1512

The Congressional Record from 1988 includes some of the members of Congress’s reasons for substituting “corruptly persuades” in § 1512(b) and supplies examples of what some members of Congress thought would be criminalized under that phrase. The section-by-section analysis of the bill provided to the Senate states that “[c]orrupt persuasion’ of a witness is a non-coercive attempt to induce a witness to become unavailable to
testify, or to testify falsely.\textsuperscript{12} Section 1512(b) thus covers “preparing false testimony for a witness, or offering a money in return for false testimony.”\textsuperscript{13} The bill’s sponsors meant for the post-1988 version of § 1512 to reach non-coercive attempts at tampering in order to compensate for changes made to 18 USC § 1503.\textsuperscript{14} When § 1503—which covered non-coercive witness tampering—was amended in 1982, Congress focused it on preventing tampering with officers and jurors and left witness tampering to § 1512. After the 1982 amendment to § 1503, at least one circuit court understood § 1503 to be completely inapplicable to witnesses, leading prosecutors to rely solely on § 1512 for prosecuting witness tampering.\textsuperscript{15} Thus, the members of Congress who proposed the amendment reasoned that to maintain the same level of protection for witnesses that existed prior to the 1982 amendment of § 1503, it was necessary to amend § 1512 in order to criminalize a broader range of ‘witness tampering’ than under prior § 1512(b).\textsuperscript{16} To expand the applicability of § 1512(b), the enacting Congress added the phrase “corruptly persuades,” as discussed above.\textsuperscript{17} Since the addition of “corruptly persuades” to § 1512, many circuit courts have been forced to consider exactly what that phrase means.\textsuperscript{18}

\begin{itemize}
\item \textsuperscript{12} The Minor and Technical Criminal Law Amendments Acts of 1988, HR 5210, 100th Cong, 2d Sess, in 134 Cong Rec S 7446-01, 7447 (daily ed June 8, 1988).
\item \textsuperscript{13} Id.
\item \textsuperscript{14} Section 1503 as originally enacted covered attempts to influence both witnesses and jurors: “Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness [. . .] or any grand or petit juror, [. . .] shall be fined.” Pub L No 80-772, 62 Stat 683, 769-70 (1948), codified at 18 USC § 1503. Section 1503 was later amended to remove the mention of “witnesses.” See The Act § 4(c), 96 Stat at 1253. It now reads: “Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States [. . .] shall be punished.” 18 USC § 1503.
\item \textsuperscript{15} “The Second Circuit [. . .] has held that because Congress expressly removed the reference to witnesses from section 1503 [. . .] the influencing of witnesses can no longer be prosecuted under that statute.” 134 Cong Rec S at 7447 (cited in note 12), citing United States v Hernandez, 730 F2d 895, 898 (2d Cir 1984).
\item \textsuperscript{16} See 134 Cong Rec S at 7447 (cited in note 12). Members of the Senate discussed that the amendments to § 1512 were intended, merely to include in section 1512 the same protection of witnesses from non-coercive influence that was (and is) found in section 1503. It would permit prosecution of such conduct in the Second Circuit, where it is not now permitted, and would allow such prosecutions in other circuits to be brought under section 1512 rather than under the catch-all provision of section 1503.
\item \textsuperscript{17} Id.
\item \textsuperscript{18} See, for example, United States v Doss, 630 F3d 1181 (9th Cir 2011); United States
II. ARTHUR ANDERSEN AND THE CURRENT CIRCUIT SPLIT

This Part begins by discussing the Supreme Court's decision in Arthur Andersen LLP v United States\textsuperscript{19} and how the Court's discussion of § 1512 in that case can be used to flesh out the meaning of "corruptly persuades." After discussing Arthur Andersen, this Part turns to the current circuit split regarding the meaning of "corruptly persuades," explaining in detail both positions and the interpretive methods used by the courts.

A. Supreme Court Decision in Arthur Andersen

In Arthur Andersen, the defendant firm encouraged its employees to comply with a document retention program that resulted in the destruction of documents sought in a Securities and Exchange Commission investigation.\textsuperscript{20} The defendants were convicted under § 1512(b)(2)(A) of "knowingly . . . corruptly persuad[ing] another person . . . to . . . cause or induce any person to . . . withhold a record, document, or other object from an official proceeding."\textsuperscript{21} On appeal, the Court considered "what it means to knowingly . . . corruptly persuad[e] another person with intent to . . . cause that person to withhold documents from, or alter documents for use in, an official proceeding."\textsuperscript{22}

The Court dissected § 1512(b) for the first time and considered the potential meanings of "knowingly,"\textsuperscript{23} "corruptly,"\textsuperscript{24} and "persuades," determining that "[o]nly persons conscious of wrongdoing can be said to knowingly . . . corruptly persuad[e]."\textsuperscript{25} The Court decided that the jury instruction used in the lower court to define the word corruptly, "failed to convey the requisite consciousness of wrongdoing" because it "diluted the meaning of 'corruptly' so that it covered innocent conduct."\textsuperscript{26} The Court held

\textsuperscript{19} Thompson, 76 F3d 442 (2d Cir 1996); United States v Poindexter, 951 F2d 369 (DC Cir 1991).
\textsuperscript{20} 544 US 696 (2005).
\textsuperscript{21} Id at 699–702.
\textsuperscript{22} Id at 698. See also 18 USC § 1512(b)(2)(A).
\textsuperscript{23} Arthur Andersen, 544 US at 703 (quotation marks omitted).
\textsuperscript{24} The Court determined that knowingly was "normally associated with awareness, understanding, or consciousness." Id at 705.
\textsuperscript{25} Corruptly was defined by the Court as being typically associated with concepts such as "wrongful, immoral, depraved, or evil." Id.
\textsuperscript{26} Arthur Andersen, 544 US at 706. The jury was instructed to convict if they found that the defendant "intended to 'subvert, undermine, or impede' governmental factfinding." Id. The district court specifically excluded requiring the jury to find that the defend-
that the jury instructions were insufficient because the definition of "corrupt" provided to the jury did not require any type of dishonesty, but merely required the ability to impede the fact-finder's investigation.27

Even though the Court did not specifically define "corruptly persuades,"28 the Court's decision in Arthur Andersen provides some guidance as to the type of conduct necessary to sustain a charge of corrupt persuasion under § 1512. Nonetheless, only the Ninth Circuit has considered Arthur Andersen when deciding how to apply § 1512(b).29 The other circuit courts' omission of Arthur Andersen from their reasoning might demonstrate that these courts do not believe that Arthur Andersen created a concrete rule regarding the meaning of corrupt persuasion.

B. Second and Eleventh Circuit Position: Motivated by an Improper Purpose

1. The Second Circuit.

The Second Circuit first addressed the meaning of "corruptly" in United States v Fasolino,30 a case dealing with § 1503.31 The defendant was convicted of attempting to corruptly influence a judge—by repeatedly asking an attorney with whom he was acquainted to speak on his behalf to the sentencing judge—in violation of § 1503.32 The court found that the term "corruptly" in § 1503 required the defendant to have been "motivated by an improper purpose" when he sought to influence the officer of the court.33

27 Id at 706-07. The Court found that by excluding a dishonesty requirement from the jury instructions, "anyone who innocently persuades another to withhold information from the Government get[s] in the way of the progress of the Government" and would be guilty of "corruptly persuading" under the jury instruction. Therefore, "[w]ith regard to such innocent conduct, the corruptly instructions did no limiting work whatsoever." Id (quotation marks omitted).
28 See id at 706 ("The outer limits of this element need not be explored here because the jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing.").
29 See Doss, 630 F3d at 1181. See also notes 70–85 and accompanying text.
30 586 F2d 939 (2d Cir 1978).
31 Id at 940.
32 Id. See 18 USC § 1503 ("Whoever corruptly . . . endeavors to influence . . . any . . . officer in or of any court of the United States . . . in the discharge of his duty" is guilty of obstruction of justice.).
33 Fasolino, 586 F2d at 941 (quotation marks omitted).
The Second Circuit returned to the question of the meaning of “corruptly” in United States v Thompson, this time dealing with § 1512. The defendant was arrested as part of a drug distribution investigation and charged with a number of drug-related crimes, as well as witness tampering under § 1512. Thompson was convicted of attempting to corruptly persuade his co-conspirator not to speak to the police. Thompson challenged his § 1512 convictions on the grounds that the statute was unconstitutional, both because the term “corruptly persuades” is vague and because the statute violates due process by shifting the burden to the defendant to prove that his action was not corrupt.

The Second Circuit determined that the phrase “corruptly persuades” was not unconstitutionally vague and applied the definition used in Fasolino, stating that an individual is guilty of corrupt persuasion if he is “motivated by an improper purpose.” The court also found that because the statute was only targeting “constitutionally unprotected and purportedly illicit activity”—activity “motivated by an improper purpose”—there was no violation of due process. The defendant, therefore, was not required to demonstrate that his activity was not corrupt. Rather, the burden fell on the government to prove that the defendant was “motivated by an improper purpose,” which in Thompson’s case was the intent to avoid criminal charges.

The most recent Second Circuit opinion to address § 1512 and consider the meaning of “corruptly persuades” was United States v Gotti. Gotti dealt with the corrupt acts of the Gambino Family, including its unlawful influence over individuals and businesses in Brooklyn and Staten Island. The defendants were charged with a number of corruption-related offenses, one of which was witness tampering under § 1512. The defendants allegedly told witnesses to invoke their Fifth Amendment right

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34 76 F3d 442 (2d Cir 1996).
35 Id at 445.
36 Id at 447.
37 Id at 452.
38 Thompson, 76 F3d at 452, citing Fasolino, 586 F2d at 941.
39 Thompson, 76 F3d at 452.
40 Id at 453.
41 459 F3d 296 (2d Cir 2006). Gotti was decided after Arthur Andersen, but the Second Circuit did not mention the Supreme Court’s decision in that case and did not attempt to reconcile its interpretation of “corruptly persuades” with the Court’s understanding of the extent of § 1512.
42 Id at 300–01.
43 Id at 301.
not to testify. The court followed *Thompson* and found that the defendants needed only to have been "motivated by an improper purpose" to have corruptly persuaded the witnesses not to testify. The court relied upon earlier precedent to hold that, even if the witness is corruptly influenced to exercise his *constitutional right* not to testify, "the Obstruction of Justice Act can be violated." Therefore, despite the fact that the defendants were persuading witnesses to act in a constitutionally protected manner, they could still be understood to have "corruptly influence[d]" the witnesses under § 1512.

2. The Eleventh Circuit.

The Eleventh Circuit has also addressed the definition of "corruptly" and has agreed with the interpretation of the Second Circuit. In *United States v Shotts*, the defendant was charged with witness tampering when he asked the witness "to not tell anything to law enforcement agents." The defendant argued that § 1512 was unconstitutionally vague and supported his argument with reference to *United States v Poindexter*. In *Poindexter*, the defendant challenged his conviction under § 1505 for tampering on the ground that:

[U]se of the term 'corruptly' renders the statute unconstitutionally vague as applied to this conduct. [The defendant argued that t]hat term must have some meaning . . . because otherwise the statute would criminalize all attempts to 'influence' congressional inquiries—an absurd result that the Congress could not have intended in enacting the statute.

*Poindexter*, 951 F2d at 377–78. The court in *Poindexter* agreed that the word "corruptly" was vague "on its face" because "in the absence of some narrowing gloss, people must guess at its meaning and differ as to its application." Id at 378 (quotation marks and citation omitted).

[However,] *Poindexter's* holding has been overturned by Congress's enactment of 18 U.S.C. § 1515(b), which provides that 'corruptly,' when used in the context of this statutory provision, means 'acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.'

dexter, the DC Circuit held that § 1505 was unconstitutionally vague because “corruptly” was vague as applied to defendant Poindexter’s actions.51 In Shotts, the Eleventh Circuit declined to extend Poindexter to § 1512, holding instead that “corruptly” can be understood to mean “motivated by an improper purpose” and is therefore not vague.52

C. Third and Ninth Circuit Position: Additional Conduct Required

1. The Third Circuit.

The Third Circuit first addressed the meaning of the term “corruptly persuades” in United States v Farrell.53 The defendant was convicted of witness tampering under § 1512.54 Farrell had allegedly tampered with a witness, his co-conspirator, by telling him “[i]f you crucify me, I’ll have to turn around and crucify you,” and that “they would be okay if they stuck together.”55

The Third Circuit considered the meaning of “corruptly persuades” in § 1512 and found the term ambiguous.56 The court’s interpretation was greatly influenced by the judges’ understanding of the presumption against redundancy.57

The court, therefore, considered potential meanings of the word “corruptly” and settled on the idea that the statute required some additional sort of culpable conduct in conjunction with persuasion to be understood as “corruptly persuading.”58 The court was unwilling to recognize non-coercive persuasion as adequate under § 1512, and especially resisted the suggestion that non-coercive encouragement to exercise the Fifth Amendment right

51 Poindexter, 951 F2d at 378.
52 Shotts, 145 F3d at 1300. The Shotts court also discussed the Third Circuit’s opinion in United States v Farrell, 126 F3d 484 (3d Cir 1997), but declined to follow that case’s interpretation of “corruptly.” Shotts, 145 F3d at 1300–01. See Part IIC1 below for a discussion of Farrell.
53 126 F3d 484 (3d Cir 1997).
54 Id at 486.
55 Id (quotation marks omitted).
56 Id at 487 (noting that “the phrase cannot mean simply ‘persuades with the intent to hinder communications to law enforcement’ because such an interpretation would render the word ‘corruptly’ meaningless”).
57 See Farrell, 126 F3d at 487.
58 Id at 488. The court listed “morally degenerate and perverted,” “characterized by improper conduct (as bribery or the selling of favors),” and “to change [someone] from good to bad in morals” as potential meanings. Id at 487 n 2, citing Webster’s Ninth New Collegiate Dictionary 293–94 (Merriam Webster 1985) (quotation marks omitted).
not to testify was corrupt persuasion.\textsuperscript{59} Without distinguishing behavior that dealt with constitutionally protected rights, the court was worried that the only form of non-corrupt persuasion would be interactions covered by attorney-client privilege.\textsuperscript{60}

In \textit{Farrell}, the court also discussed the fact that under the rule of lenity—even if it were possible to understand the defendant’s actions as constituting “corrupt persuasion”—the court was required to interpret any ambiguities in favor of the defendant. Therefore, the ambiguity of “corruptly persuades” could not be used against the defendant.\textsuperscript{61}

The Third Circuit also addressed the government’s argument that § 1512 should be interpreted consistently with § 1503 to mean “motivated by an improper purpose.”\textsuperscript{62} However, the court differentiated the statutes by reading “corruptly” in § 1503 as a mens rea requirement. In its analysis of § 1512, the court determined that use of “corruptly persuades” was not meant to reflect a mens rea requirement because the statute already required the defendant to “knowingly” commit the action.\textsuperscript{63} Therefore, the Third Circuit found that the defendant’s behavior did not qualify as corrupt persuasion and reversed his conviction.\textsuperscript{64}

2. The Ninth Circuit.

The Ninth Circuit first addressed § 1512 in \textit{United States v Khatami}.\textsuperscript{65} The case involved a defendant who was convicted of witness tampering under § 1512.\textsuperscript{66} The court determined that the details of the case did not require defining the limits of “corruptly

\textsuperscript{59} See \textit{Farrell}, 126 F3d at 488.

\textsuperscript{60} See id.

\textsuperscript{61} Id at 489 (finding that “[t]he rule of lenity demands resolution of ambiguities in criminal statutes in favor of the defendant”) (quotation marks and citation omitted).

\textsuperscript{62} Id at 489–90.

\textsuperscript{63} See \textit{Farrell}, 126 F3d at 490.

\textsuperscript{64} Id. The dissent in \textit{Farrell} argued that the term “corruptly” in § 1512 should have the same meaning as in § 1503. The dissent focused on the number of prior cases that had adopted the meaning “motivated by an improper purpose” and on the fact that such a test would still exempt necessary behavior. Specifically, the dissent noted that “a mother urging her son, in his own interest, to claim his Fifth Amendment right to remain silent would hardly be acting ‘corruptly,’ that is, with an improper purpose.” Id at 493 (Campbell dissenting). The majority did not specifically address whether this situation would be exempt under the § 1503 definition of “corruptly,” but it would be reasonable to understand the majority opinion as advocating for a more expansive list of exempt behavior. Indeed, the majority can be read as accepting as permissible under § 1512(b) most persuasive behavior centered around the Fifth Amendment right not to testify, even when the persuading individual has something to gain.

\textsuperscript{65} 280 F3d 907 (9th Cir 2002).

\textsuperscript{66} Id at 908.
persuades." Instead, the court found that the defendant had attempted to persuade the witness to lie to law enforcement, which under all of the then-existing approaches to corrupt persuasion was prohibited behavior. Therefore, the court affirmed the witness tampering conviction.

The Ninth Circuit was again asked to address the issue of "the type of conduct that falls within the ambit of th[e] phrase" "corrupt persuasion" in United States v Doss. After summarizing the current debate, the Ninth Circuit decided to follow the Third Circuit's interpretation, which the court viewed as most consistent with Arthur Andersen.

The defendant in Doss was "indicted . . . for numerous counts of sex trafficking of children and transportation of minors into prostitution." The grand jury later added three charges of witness tampering involving the defendant's wife, a juvenile witness, and a fellow prisoner. In response, Doss argued "there was nothing inherently corrupt about urging someone not under a compulsion to testify to exercise their right not to testify."

The Ninth Circuit began by recognizing its decision in Khatami and differentiating the current case as one requiring the court to determine how "corruptly persuades" should be interpreted and what type of conduct should not be prohibited under the statute. The court then summarized the history of § 1512 and the nature of the current circuit split. The court specifically highlighted the fact that before "corruptly persuades" was a part of § 1512(b), courts "concluded [that] the section did not criminalize non-misleading, non-threatening, non-intimidating attempts to have a person give false information to

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67 Id at 913–14.
68 Id at 914–15.
69 Doss, 630 F3d at 1186.
70 Id at 1189 ("[T]he Third Circuit recognized that construing 'corruptly' to mean 'for an improper purpose' [as the Second and Eleventh Circuits have done] . . . is circular . . . [and] [t]he Supreme Court echoes this concern in Arthur Andersen, pointing out that persuading someone with intent to cause them to withhold testimony is not inherently malign."). For the Third Circuit's interpretation, see notes 53–64 and accompanying text.
71 Id at 1184.
72 See id.
73 Doss, 630 F3d at 1184.
74 Id at 1186 ("In United States v. Khatami, we recognized the circuit split, but ultimately decided not to resolve the issue there because the circuits were in agreement that, at a minimum, persuading a witness to affirmatively lie to investigators would violate § 1512(b.") (citation omitted). The court also recognized a Tenth Circuit decision regarding § 1512(b) that did not reach the issue of the circuit split but rather was decided on the premise that asking a witness to lie was considered sufficient by all circuits. Id at 1186 n 3, citing United States v Weiss, 630 F3d 1263, 1273–75 (10th Cir 2010).
the government.” Accordingly, it was the intent of Congress to close that gap with the inclusion of “corruptly persuades” in 1988.76

In analyzing the circuit split, the court decided that it would be best to “consider which of the two competing approaches [it] should adopt” in light of the Supreme Court decision in Arthur Andersen.77 The Ninth Circuit focused on the Supreme Court’s comment that:

[T]he act underlying the conviction—persuasion—is by itself innocuous. Indeed, persuading a person with intent to [ ] cause that person to withhold testimony or documents from a Government proceeding or Government official is not inherently malign. Consider, for instance, a mother who suggests to her son that he invoke his right against compelled self-incrimination.78

The Ninth Circuit further emphasized the Supreme Court’s conclusion that an individual must be “conscious of wrongdoing” in order to be convicted of witness tampering under § 1512.79 Therefore, the Doss court found that the Third Circuit’s interpretation of “corruptly persuades” was the interpretation most consistent with the intent of the statute and with Arthur Andersen.80

The Ninth Circuit applied the Third Circuit’s interpretation and found that the defendant’s wife “had the legal option not to testify, and thus Doss’s request, without more, was insufficient to establish ‘corrupt’ as opposed to innocent persuasion.”81 Although the court noted that the defendant did not act corruptly in persuading his wife to exercise marital privilege, it did not preclude the possibility that in another situation such persuasion could occur in a corrupt manner.82 Thus, the Third and Ninth Circuits

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75 Doss, 630 F3d at 1187 (emphasis added).
76 Id.
77 Id at 1188.
78 Id, citing Arthur Andersen, 544 US at 703–04.
79 Doss, 630 F3d at 1188–89, quoting Arthur Andersen, 544 US at 703–04.
80 Doss, 630 F3d at 1189 (“[W]e find the Third Circuit’s reasoning the more persuasive and the most consistent with the Supreme Court’s later analysis of § 1512 in Arthur Andersen.”).
81 Id at 1190.
82 Id. The court reasoned that:

If it is not . . . inherently malign for a spouse to ask her husband to exercise the marital privilege (even though made with the intent to cause that person to withhold testimony), then a defendant could not be shown to act with consciousness of wrongdoing merely by asking a spouse to withhold testimony (that
followed the same interpretation of "corruptly persuades," requiring that, in order to be convicted of witness tampering under § 1512(b), an individual must have acted with "some other wrongful conduct" when persuading a witness to exercise a constitutional right not to testify.83

III. HYPOTHETICALS ANALYZED AND AN ALTERNATIVE INTERPRETATION

This Part considers problems with both of the above interpretations. First, it assesses how courts on each side of the circuit split would deal with two hypotheticals. Then it proposes a solution that addresses the failures of the circuit positions and is consistent with Arthur Andersen.

A. Husband and Wife Hypothetical

A wife speaks with police and discloses information that may incriminate her husband. The prosecutor would like the wife to testify in the trial against her husband and the wife is unaware of her legal right not to testify against her spouse in an incriminating manner. Her husband, however, knows about marital privilege and tells his wife that she does not have to testify against him.

1. Third and Ninth Circuits' resolution.

The Third and Ninth Circuits would not criminalize the behavior of the husband because he only persuaded his wife not to testify by informing her of the existence of marital privilege. In the Third and Ninth Circuits, an additional element of corruption—such as a bribe or a threat—is necessary in order to sustain a charge of witness tampering by corrupt persuasion.84 Therefore, because the husband in this hypothetical did not act in a manner that was inherently corrupt, neither the Third nor the Ninth Circuit would find his behavior criminal under § 1512(b). This interpretation protects the right of marital privi-

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83 See, for example, id at 1190.
84 See, for example, Farrell, 126 F3d at 488.
2. Second and Eleventh Circuits' resolution.

Applying the Second and Eleventh Circuits' interpretation to the hypothetical is more complicated, but would most likely result in criminalization of the husband's behavior. These circuits understand "corruptly" as used in § 1512(b) to require only that the persuading individual be "motivated by an improper purpose." An improper purpose includes self-interest. Therefore, because the husband was motivated by the self-interest of avoiding conviction when he informed his wife of her right not to testify, his acts were "motivated by an improper purpose." He corruptly persuaded a witness not to testify in violation of § 1512(b).

If, as the Second and Eleventh Circuits have held, § 1512(b) only requires that individuals be "motivated by an improper purpose" when persuading a witness not to testify, and if being motivated by self-interest in avoiding prosecution is an improper purpose, then an individual can be convicted under § 1512(b) based purely on non-coercive speech to a witness. This result criminalizes speech that is otherwise permissible and, in fact, commonly occurs during the preparation of a defendant's case.

The interpretation of § 1512(b) advanced in the Second and Eleventh Circuits criminalizes attempts to persuade a witness not to testify that are "motivated by an improper purpose." Thus, any time a defendant speaks with a witness—even if only to inform the witness of a constitutional right not to testify—the defendant faces the risk that his behavior constitutes an attempt at corrupt persuasion.

This restriction on a defendant's speech could lead to excessive caution and could even reach speech that is otherwise protected—specifically by the spousal communications privilege, which protects communications between spouses. A defendant whose spouse is a potential witness for the prosecution should not be prevented from discussing the availability of marital privilege with his spouse or from encouraging his spouse not to testify. The Second and Eleventh Circuits, however, have significantly limited the power of marital privilege by forcing a defendant to

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85 See, for example, Thompson, 76 F.3d at 452.
86 See Gotti, 459 F.3d at 343 (holding that the "motivation from an improper purpose" requirement was satisfied when the defendant acted "to ensure that [a witness] did not implicate him").
choose between (1) protecting himself from conviction by encouraging his spouse not to testify, but risking a charge of witness tampering or (2) risking conviction on the substantive offense by not talking with his spouse about the privilege.

3. Why the hypothetical matters.

One reason the husband and wife hypothetical is concerning is that if the Second and Eleventh Circuits continue to criminalize behavior in situations of spousal privilege, they will create a serious conflict between federal and state law. The federal witness tampering law in those circuits will severely limit the power of state marital privilege.87

Historically, courts protected marital privilege because “protecting the harmony of legal marital unions was more important than truth-seeking at trial. Courts assert[ed] that the marital privilege [was] ‘necessary to foster family peace, not only for the benefit of husband, wife, and children, but for the benefit of the public as well.’”88 The Supreme Court addressed the scope of marital privilege in 1980 and decided that the privilege could only be invoked by the witness spouse.89 Marriage continues to be an important institution in American society; the debate over extending the right to marry to same-sex couples confirms this.90 Thus, courts should continue to protect marital privilege and should interpret statutes not to criminalize defendants for encouraging the use of spousal privilege.

Courts should also be concerned about potential problems with notice if intra-spousal speech is criminalized as witness tampering. “Our Constitution requires fair notice so that the law-abiding can conform their conduct to the requirements of the law.”91 It is unlikely that defendants who are aware of the privilege also know that requesting that their spouses not testify against them risks criminal liability under § 1512. Moreover, the

87 State law on marital privilege will not be changed.
89 Trammel, 445 US at 52–53 (holding that “the witness-spouse alone has a privilege to refuse to testify adversely,” rather than continuing the common law precedent of allowing the defendant-spouse to invoke marital privilege on behalf of the witness-spouse).
current disparities between the Third and Ninth Circuits and the Second and Eleventh Circuits demonstrate that the law is not providing fair notice about the power of marital privilege.

4. Reconciling the interpretations with *Arthur Andersen* and congressional intent.

In *Arthur Andersen*, the Supreme Court clearly understood that situations exist in which a defendant could attempt to persuade an individual not to testify and not be acting corruptly.\(^{92}\) The Court discussed a number of such situations, including specifically "a mother who suggests to her son that he invoke his right against compelled self-incrimination, or a wife who persuades her husband not to disclose marital confidences."\(^{93}\) In these situations, an individual's persuasive actions should not be viewed as corrupt because the actions themselves were "not inherently malign."\(^{94}\) Therefore, under *Arthur Andersen*, the actions of the hypothetical husband would not be criminal under § 1512(b); the husband's situation is equivalent to one of the Court's explicitly stated examples in which corrupt persuasion is not present.

It is unclear from the Court's opinion in *Arthur Andersen* whether the mother or the wife in its examples could also be the defendant without changing the outcome. In order for the interpretation of the Second and Eleventh Circuits to be consistent with *Arthur Andersen*, the Court's examples can only be applied to third-party scenarios.\(^{95}\)

However, if the Court's mother-son or husband-wife scenarios cannot lead to an indictment for witness tampering in any situation—even if the mother or wife is a defendant—then the interpretation of the Second and Eleventh Circuits cannot be reconciled with *Arthur Andersen*. On the other hand, the Third and Ninth Circuits' approach does allow for the *Arthur Andersen* examples; those courts would not permit the prosecution of a defendant under § 1512 for informing someone of his constitutional

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92 See *Arthur Andersen*, 544 US at 704.
93 Id (citations omitted).
94 Id at 704.
95 As discussed in Part IIIA, it is unclear how the Second and Eleventh Circuits would deal with third-party persuaders who were not "motivated by an improper purpose." See notes 85–86 and accompanying text. A finding of improper purpose might be difficult in situations in which a mother is protecting her son or a wife is concerned for her husband.
right not to testify without proof of an additional element of corrup-


tion.\textsuperscript{96}

The restriction on speech arising from the interpretation of the Second and Eleventh Circuits likely would affect any person who attempts to persuade a witness not to testify or encourages a witness to exercise his right not to testify, not only to defendants.\textsuperscript{97} Any person who attempts to persuade a witness not to testify or encourages a witness to exercise his right not to testify and is “motivated by an improper purpose” could be prosecuted under § 1512.\textsuperscript{98} Therefore, depending on the motivation of the mother or the wife in the Arthur Andersen scenarios, either could be held liable for her speech encouraging the witness not to testify, even if she was a third party.

A resolution of the husband-wife scenario that is consistent with congressional intent regarding § 1512(b) cannot criminalize the husband’s conduct. Congress was most concerned with “providing additional protections and assistance to victims and witnesses in Federal crimes.”\textsuperscript{99} In situations in which a husband does not threaten or bribe his spouse into exercising the marital privilege, there is less of a reason to be concerned with the safety of the witness (in this case, the wife). If the husband-wife hypothetical did involve a threat or a bribe, the husband’s acts would undoubtedly be considered criminal in all four of the circuits. In such a case—where there is a reason to be concerned with protecting the witness—the circuits all react accordingly.

While the legislative history of § 1512(b) suggests that the term “corruptly persuades” was meant to encompass additional non-coercive attempts to persuade a witness,\textsuperscript{100} this should not be understood as eliminating the existence of marital privilege and criminalizing the behavior of the hypothetical husband. The legislative history specifically identifies attempts to prepare false testimony or to bribe witnesses as behavior intended to be cov-

\textsuperscript{96} See Farrell, 126 F3d at 488, 492; Doss, 630 F3d at 1190.

\textsuperscript{97} The Second and Eleventh Circuits require that the individual doing the persuading be “motivated by an improper purpose,” but do not specify that only defendants in criminal proceedings can be “motivated by an improper purpose” when attempting to persuade a witness not to testify. See Thompson, 76 F3d at 452 (noting that the “defendant’s attempts to persuade were motivated by an improper purpose”). “Defendant” in the Thompson quote means “the defendant in the witness tampering action” and should not be viewed as a requirement that an individual must currently be a defendant in a federal criminal proceeding in order to tamper with a witness under § 1512.

\textsuperscript{98} Farrell, 126 F3d at 489-90.

\textsuperscript{99} The Act preamble, 96 Stat at 1248. See notes 5–9 and accompanying text.

\textsuperscript{100} 134 Cong Rec S at 7447 (cited in note 12).
erered by the "corruptly persuades" language. Therefore, although the actions of the hypothetical husband are clearly a non-coercive attempt to stop his wife from testifying, they should not be understood as "corrupt" because they are not equivalent to bribery or the preparation of false testimony.

Arthur Andersen explicitly mentions marital privilege as outside of § 1512 liability, and reading § 1512 as protecting marital privilege is most consistent with its legislative history. Thus, there should not be liability in the husband and wife hypothetical.

B. Third Party Persuader Hypothetical

A defendant would like to convince a witness not to testify, but because of a fear of being prosecuted for witness tampering, he asks a third party to convince the witness not to testify. The third party speaks with the witness and explains why he should not testify. In the alternative, the defendant pays the third party to convince the witness not to testify. The third party keeps the money and speaks with the witness, convincing him not to testify.

1. Third and Ninth Circuits' resolution.

The interpretation used in the Third and Ninth Circuits requires some additional evidence of corruption beyond being "motivated by an improper purpose." Farrell and Doss provide examples of behavior that satisfies this requirement and examples of some situations in which corruption is not understood to exist. The first iteration of the third party hypothetical introduced above would not lead to liability for either the defendant or the third party. In the "pure speech" hypothetical, as in the hus-

101 Id.
102 See Farrell, 126 F3d at 488; Doss, 630 F3d at 1190.
103 See Farrell, 126 F3d at 488 n 2 (stating that "corruptly in § 1512(b) may modify persuades to require persuasion through some corrupt means, persuasion of someone to engage in some corrupt conduct, and/or persuasion characterized by some morally debased purpose") (quotation marks omitted); id at 488 (listing "offer[s] to reward financially" and "attempt[s] to persuade the coconspirator to lie" as corrupt persuasion); Doss, 630 F3d at 1190 (listing "some other wrongful conduct, such as coercion, intimidation, bribery, [or] suborning perjury" as examples of acting corruptly) (emphasis in original).
104 See Farrell, 126 F3d at 487 (finding that "the phrase [corruptly persuade] cannot mean simply 'persuades with the intent to hinder communication to law enforcement'"); id at 488 (noting that the "corruptly persuade" clause does not include a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information") (emphasis added).
band and wife hypothetical, there was no additional evidence of corruption because the persuasion took place purely through speech and was not accompanied by any sort of bribe, threat, or coercion.

While the Third and Ninth Circuits would not allow the defendant to pay the witness not to testify—this would unquestionably qualify as an additional element that shows “corrupt persuasion”\(^\text{105}\)—the Third and Ninth Circuits might, however, allow the defendant to pay the unrelated third party to persuade the witness not to testify. If the third party persuades the witness not to testify (or to exercise a constitutional right not to testify) without any additional coercive behavior, such as a threat or a bribe, then the third party might not be liable for § 1512(b) corrupt persuasion in the Third and Ninth Circuits. The defendant, on the other hand, might still be charged under § 1512 with conspiracy to corruptly persuade a witness. If the third party is not found to have violated § 1512(b), the defendant may also avoid prosecution for tampering, because the defendant’s liability would have been tied to his actions as an accomplice to the acts of the third party. However, if the third party’s actions do violate § 1512(b), then the defendant has also violated the statute.

The ability of a defendant to avoid the witness tampering statute by using a third party is a loophole in the Third and Ninth Circuits’ interpretation. This might not be a serious issue, however, if the Third and Ninth Circuits can still deal with situations in which there is some amount of threat or potential danger to the witness, as this is the goal of § 1512.

Courts may rightfully be unconcerned with a third party who does not threaten the witness, but it is also possible that the defendant, by using a bribe to coerce the third party, has simply made the third party an accomplice to witness tampering. Then, both individuals would be held liable in the Third and Ninth Circuits. Thus, the Third and Ninth Circuits’ interpretation does hold any defendant and third party liable if a threat or bribe is used to directly coerce a witness.

\(^{105}\) Id at 488 (“Thus, we are confident that both attempting to bribe someone to withhold information and attempting to persuade someone to provide false information to federal investigators constitute ‘corrupt persuasion’ punishable under § 1512(b).”) (emphasis omitted).
2. Second and Eleventh Circuits’ resolution.

The Second and Eleventh Circuits would most likely resolve the third party hypothetical differently from the Third and Ninth Circuits. Because the Second and Eleventh Circuits do not require an additional element to demonstrate corrupt persuasion, the pure speech of the third party in the first iteration of the hypothetical could be enough to constitute witness tampering under § 1512. The defendant that used the third party to persuade the witness would also be liable. The third party could argue that he was not “motivated by an improper purpose,” but the intent of the defendant could be attributed to the third party via accomplice liability and therefore the third party could be held liable under § 1512.

These circuits would more easily find that the third party in the cash transfer hypothetical violated § 1512, because the third party was induced by a bribe to persuade the witness not to testify. The third party was motivated by the bribe, which could easily qualify as being “motivated by an improper purpose,” when he acted to persuade the witness not to testify.

There is a potential limit to the Second and Eleventh Circuits’ approach. Courts have not addressed third party persuaders, so there is the possibility for consistency between the circuits on this issue. For example, both sides of the circuit split might agree that, in the following scenario, the individual has not engaged in corrupt persuasion. Suppose an avid supporter of Fifth Amendment rights hands out flyers on the courthouse steps. The flyers explain the constitutional rights not to testify and encourage all witnesses to exercise the rights as applicable. The pamphleteer may succeed in persuading a witness to exercise his Fifth Amendment right not to testify, but he is neither “motivated by an improper purpose” nor attempting to bribe or threaten that witness.

106 See, for example, Thompson, 76 F3d at 452 (requiring only that the persuader be “motivated by an improper purpose”).

107 The only other situation in which the circuits might agree—in fact they must agree—is the exemption for an attorney advising their client. See, for example, Farrell, 126 F3d at 488 (recognizing 18 USC § 1515(c), which states that the witness tampering statutes “do[,] not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding”).

108 An extremely motivated prosecutor may argue that encouraging more witnesses to exercise their rights not to testify is an improper purpose because it attempts to impede criminal prosecutions, but it seems like a stretch even for the Second and Eleventh Circuits’ approach.
Although the Second and Eleventh Circuits’ view is the most expansive—the prosecutor would have to show that the pamphleteer was “motivated by an improper purpose”—§ 1512 would not extend to the behavior of the Fifth Amendment pamphleteer, and the less stringent Third and Ninth Circuits’ view would absolutely not subject the pamphleteer to liability for witness tampering under § 1512.

3. Reconciling the interpretations with Arthur Andersen and congressional intent.

The Supreme Court does not explicitly consider third-party scenarios in Arthur Andersen but, as discussed above, the husband-wife and mother-son examples provided by the Court could be understood to counsel against a finding of liability when the wife or mother is a third party who persuades the witness not to testify. Although Arthur Andersen does not provide clear direction on how the Court would resolve a third-party persuader scenario, the legislative history of § 1512 does shed light on the result that Congress envisioned. Because Congress intended to prohibit coercion that took place due to the exchange of money, the second iteration of the third party hypothetical—paying the third party to persuade the witness—should clearly be understood as a violation of § 1512(b).

The pure speech third party hypothetical is slightly more difficult. On one hand, because the scenario contemplates no danger to the witness, Congress likely did not intend to criminalize this behavior. Conversely, because the House Report specifically stated that § 1512 was meant to criminalize “non-coercive attempt[s] to induce a witness” not to testify, it might be the case that Congress did want to prevent the purely verbal, non-threatening, and non-coercive behavior of the pure speech third party hypothetical. In the end, the pure speech hypothetical can be equated with any other situation in which speech alone is used to convince a witness not to testify. Such speech is harmless to the witness and should be permitted under § 1512(b).

109 See 134 Cong Rec S at 7447 (cited in note 12) (stating that an example of corrupt persuasion is “offering a witness money in return for false testimony”).

110 See The Act preamble, 96 Stat at 1248 (stating that Congress’s goal in passing The Act was to “provide additional protections and assistance to victims and witnesses in Federal crimes”).

111 See 134 Cong Rec S at 7447 (cited in note 12).
C. Alternative Interpretation of “Corruptly Persuades”

Rather than follow the reasoning of either branch of the circuit split, courts should interpret § 1512(b) consistently with *Arthur Andersen* and the definitions provided in § 1515.112

In *Poindexter*, the court found that “corruptly” was vague on its face and, therefore, “in the absence of some narrowing gloss, people must guess at its meaning and [may] differ as to its application.”113 In response to this finding, Congress amended § 1515, which provides definitions for some of the terms used in the witness tampering statutes.114 Section 1515 specifically limits the meaning of the term “corruptly persuades,” as used in § 1512, by stating that it “does not include conduct which would be misleading conduct but for a lack of a state of mind.”115 The statute also includes a specific definition of the term “corruptly,” as used in § 1505: “acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.”116

Because of this differentiation between the meanings of “corruptly persuades” in § 1512 and “corruptly” in § 1505, courts should not read “corruptly” as having the same meaning within every section of the federal witness tampering statute. Yet the Second and Eleventh Circuits’ interpretation appears to borrow “acting with an improper purpose” from § 1515’s definition of “corruptly” (as used in § 1505) and to apply it as the necessary “state of mind” requirement for § 1512 (as announced in § 1515).117 Rather than attempting to marry portions of § 1515—specifically, the definition of § 1503 “corruptly” and the negative definition of § 1512 “corruptly persuades”—to create a consistent understanding of “corruptly persuades,” courts should consider the fact that Congress intended “corruptly” to have a different meaning depending on its context.

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112 Section 1515 provides definitions for some terms as used in the preceding sections of the Victim and Witness Protection Act. See 18 USC § 1515.
113 951 F2d at 378 (quotation marks omitted). See also notes 50–51 and accompanying text.
114 See note 50. See also False Statements Accountability Act of 1996 § 3, Pub L No 104-292, 110 Stat 3459, 3460, codified at 18 USC § 1515.
115 18 USC § 1515(a)(6).
116 18 USC § 1515(b).
117 See Thompson, 76 F3d at 452, citing Fasolino, 586 F2d at 941 (applying the § 1503 meaning of “corruptly” to § 1512).
Section 1515’s limiting of the scope of the term “corruptly persuades” suggests that the essential factor in determining if conduct is corruptly persuading for purposes of § 1512 is the persuader’s state of mind. Although Congress did not explain how courts should judge the state of mind of an allegedly corrupt persuader, courts can reasonably understand the state of mind requirement to be that the individual must have knowingly acted in a manner that was intended to corrupt.

Section 1512 specifically requires that an individual “knowingly . . . corruptly persuade[1]” in order to be guilty of witness tampering. If the state of mind required by “corruptly” is equated with knowledge, § 1512 would be redundant—the inclusion of “knowingly” would have no effect on the meaning of the statute. Therefore, courts should interpret the § 1515 definition of “corruptly persuades” as requiring a more culpable state of mind regarding the conduct that is intended to corruptly persuade. By requiring a persuader to act knowingly and with intent to corruptly persuade, courts can eliminate the potential third party loophole. Both the defendant and the third party could use pure speech to convince a witness not to testify without violating § 1512(b) as long as they did not intend corrupt influence. Therefore, a defendant can, in a non-corrupt manner, potentially persuade an individual not to testify.

The loophole for third parties created by the Third and Ninth Circuits’ interpretation can also be avoided by understanding Congress’s use of different definitions for “corruptly” and “corruptly persuades” as suggesting that the use of a third party persuader is explicitly prohibited by § 1505, but not by § 1512. The lack of a reference to third parties in § 1512 indicates that Congress did not intend to criminalize the use of third-party persuaders in § 1512.

There are also potential public policy arguments for allowing the use of third party persuaders. First, one of the main purposes of the witness protection statutes is to prevent harm to witnesses that are testifying for the government.118 By using third parties, the likelihood for harm may be significantly decreased. If the main concern behind these statutes is that a defendant might act in a manner that harms or threatens a witness, the use of a third party is an acceptable alternative because there is, in such cases, some degree of separation between the defendant and the witness.

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118 See The Act preamble, 96 Stat at 1248.
Second, this alternative interpretation also reflects the Supreme Court's decision in *Arthur Andersen* by recognizing an exemption for familial situations. By understanding *Arthur Andersen* to declare complete protection from § 1512 if the persuader is a family member of the witness, courts will avoid the potential notice problem that results from the criminalization of behavior that an average citizen would not view as criminal.

Overall, requiring knowledge and intent to corruptly persuade allows for the results in familial situations that the Supreme Court approved in *Arthur Andersen* and allows for third party persuasion, which might support the goal of decreasing harm to witnesses.

IV. COUNTERARGUMENTS

A. Marital Privilege is Not Threatened

One possible counterargument is that, even under the expansive interpretation of the Second and Eleventh Circuits, marital privilege is not rendered useless. Supporters of the Second and Eleventh Circuits' interpretation might argue that even if a defendant is not permitted to encourage his spouse to invoke marital privilege, the spouse will likely be notified of that right not to testify by either the defendant's attorney or the prosecutor. Neither side, the argument goes, would want a witness to argue later that he was tricked into giving up his constitutional right and testifying.

This counterargument assumes too much and places a large amount of trust in the prosecutor to carefully notify each spouse of the right not to testify. Although prosecutors do have an interest in maintaining the reliability of their witnesses, it is not clear that this reliability would be lost if a spouse/witness later complains that he would not have testified had he known about marital privilege. Therefore, there may be no negative consequence arising from a prosecutor's failure to inform a spouse/witness of marital privilege. In such a case, there is no incentive for the prosecutor to be upfront with a witness about the existence of marital privilege, especially considering the risk that the well-informed witness may decide not to testify.

Finally, even if prosecutors were required to notify every testifying witness about the constitutional rights not to testify, the

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119 See *Arthur Andersen*, 544 US at 704 (providing family member hypotheticals that do not result in liability without considering which family member is the defendant).
protection of spousal communications is still important. If there is no threat to the spouse/witness, there is no reason to criminalize a discussion between spouses about marital privilege, even if the defendant spouse is motivated by a self-interested desire to avoid conviction.

B. Third Party Persuaders Can Be Just as Dangerous as Defendants

Another counterargument may question whether third party persuaders are actually less dangerous than defendant persuaders. For example, third parties might be equally dangerous in situations in which they act at the behest of defendants who would do anything to avoid conviction. A third party might even be more dangerous than a defendant when a defendant is being detained and therefore does not have physical access to a witness. In such a situation, the third party has the actual ability to confront the witness and cause more harm than the detained defendant.

Although the concern that witnesses may have more to fear from third party persuaders than from defendants is a serious one, the proposed alternative interpretation still criminalizes behavior by third party persuaders that includes an added element of corruption, such as bribery, threats, and the like. Therefore, if a witness felt threatened or faced danger from a third party persuader, the third party would be held liable under the proposed alternative interpretation. In fact, third party persuaders can escape § 1512(b) liability under the proposed alternative only when they speak to witnesses without any added element of coercion or threat. Therefore, the alternative interpretation effectively deals with the danger of allowing the use of third party persuaders.

V. Conclusion

The meaning of "corruptly persuades" in § 1512(b) has been a source of debate among circuit courts. Despite the significant differences in the interpretations of that phrase currently in use, all of the circuits have the potential to create inconsistencies by treating defendant persuaders and third party persuaders differently for engaging in the same conduct. Courts have attempted to make clear distinctions between corrupt and non-corrupt behavior, but each court's definition is insufficient to prevent runaround through the use of third parties.
Moreover, under the Supreme Court's decision in *Arthur Andersen*, § 1512 should be understood to allow for some persuasion not to testify that does not qualify as corrupt persuasion. The reasoning of the Second and Eleventh Circuits does not allow for the specific situations enumerated by the Court in *Arthur Andersen*. Therefore, the Third and Ninth Circuits define "corruptly persuades" most consistently with the Supreme Court's interpretation in *Arthur Andersen*.

The alternative solution proposed here better protects marital privilege and eliminates inconsistent treatment by not criminalizing non-threatening, speech-based coercion no matter who the persuader is. By following the alternative interpretation, courts can reduce the possibility that individuals will be surprised by criminal liability under § 1512 because the behaviors criminalized by the alternative approach (bribery, threats, and the like) are widely understood to be prohibited by witness tampering statutes.