The Potential Implications of Marinello in Section 7212(a) Prosecutions

If this is the law, nobody is safe"[1]

Introduction

This Note addresses a vague criminal tax statute that the government is increasingly prosecuting. This Note analyzes whether a conviction under 26 U.S.C. § 7212(a)'s omnibus clause, for corruptly endeavoring to obstruct or impede the due administration of the tax laws requires proof that a defendant acted with knowledge of a pending Internal Revenue Service action. Part I of this Note describes Section 7212(a), its legislative history, and the three required elements that are necessary to charge a defendant with Section 7212(a)'s omnibus clause. Part II of this Note discusses the current circuit splits and how the statute is being applied differently among the varying jurisdictions. This Part also addresses Section 7212(a)'s relation to other criminal tax statutes. Part III of this Note addresses the possible alternative interpretations of how the Supreme Court may interpret Section 7212(a) either requiring or not requiring knowledge of a pending IRS investigation or proceeding.

Part I: 26 U.S.C. § 7212(a)

A. Section 7212(a)

Section 7212(a) of the Internal Revenue Code ("IRC" or "Code") consists primarily of two clauses.[2] The first clause, prohibits corrupt or forcible endeavors to interfere with United States employees acting pursuant to Title 26.[3] This addresses conduct specifically directed towards

[1] Judge Jacobs dissenting from denial of rehearing in banc, United States v. Marinello, 839 F.3d 209 (2d Cir. 2016), *reh'g en banc den.*, 855 F.3d 455 (2d Cir. 2017).
[2] *See* 26 U.S.C. § 7212.
[3] *See id.*

federal officers or employees in the discharge of their duties under Title 26.[4] The second clause, referred to as "the omnibus clause" or more recently termed "the uber tax crime statute", prohibits corrupt or by threat of force, to obstruct or impede, or endeavors to obstruct or impede the due administration of the Code.[5] The omnibus clause has an extremely broad construction.[6] The omnibus clause is a catch-all provision that criminalizes "any other way" of corruptly obstructing or impeding the "due administration" of the IRC. According to the US Department of Justice ("DOJ"), Tax Division Policy (an internal guidance document), Criminal Tax Manual ("CTM"), the omnibus clause is particularly appropriate to punish defendants for conduct that obstructs or impedes Internal Revenue Service ("IRS") personnel or operations, including audits, collection efforts, and criminal investigations.[7] The internal tax division policy further states that a charge under the omnibus charge may be appropriate to prosecute a person who, *prior to any audit or investigation,* engaged in large-scale obstructive conduct involving the tax liability of third parties.[8]

The omnibus clause is generally reserved for conduct occurring after a tax return has been filed, where the actions by the taxpayer or other person has impeded or obstructed the audit or investigation.[9] Section 7212 is only one of several general criminal provisions contained in the IRC.[10] The omnibus clause is aimed at prohibiting efforts to "impede the collection of one's taxes, the taxes of another, or the auditing of one's or another's tax records. Tax administration

[4] *See id.*
[5] Marcia Coyle, Jenner Lawyers Attack 'Uber Tax Crime Law' in New High Court Term, The National Law Journal, Aug. 11, 2017.
[6] United States v. Williams, 644 F.2d 696, 700 (8th Cir. 1981).
[7] U.S. Dep't of Justice, Criminal Tax Manual § 17.03 (2012 ed.) [hereinafter CTM], available at https://www.justice.gov/sites/default/files/tax/legacy/2013/05/14/CTM%20Chapter%2017.pdf, last visited at Sept. 3, 2017).
[8] United States v. Marinello, 839 F.3d 209 (2d Cir. 2016) (citing CTM § 17.03 (2012 ed.)(*emphasis added*).
[9] U.S. Dep't of Justice Tax Division Directive No. 129 (2004), available at https://www.justice.gov/sites/default/files/tax/legacy/2014/08/05/CTM%20Chapter%203.pdf#Directive%20No.%20129, last visited at Dec. 23, 2017.
[10] *See generally* 26 U.S.C. §§ 7201-7215.

encompasses a "vast range of activities," including "mailing out internal revenue forms; answering taxpayers' inquiries; receiving, processing, recording and maintaining tax returns, payments and other taxpayers['] submissions; as well as monitoring taxpayers' compliance with their obligations".[11] There is no requirement that the prohibited conduct be successful or have an adverse effect on the government's investigation or process.[12] There is also no such requirement that a defendant attempt to impede the IRS on his or her own behalf; impeding the IRS on behalf of another individual or entity violates the omnibus clause.[13] A violation of the omnibus clause may occur whenever a defendant intends to impede the administration of the tax laws.[14]

B. Required elements for obstruction of due administration

The government must prove three elements beyond a reasonable doubt to prosecute a defendant with violating Section 7212(a)'s omnibus clause: 1) in any way endeavored; 2) corruptly; and 3) to obstruct or impede the due administration of the IRC.[15] The omnibus clause of Section 7212(a) has been interpreted by the courts to prohibit a broad range of conduct.[16] The DOJ guidance policy suggests that Section 7212 "applies broadly to the variety of conduct used to attempt to prevent the IRS from carrying out its lawful functions and to avoid the proper assessment and payment of taxes."[17]

1. Definition of Corruptly

[11] United States v. Bowman, 173 F.3d 595, 600 (6th Cir. 1999).
[12] United States v. Cioffi, 493 F.2d 1111, 1118-19 (2d. Cir. 1974), United States v. Rosnow, 977 F.2d 399, 409 (8th Cir. 1992).
[13] United States v. McBride, 362 F.3d 360, 372-73 (6th Cir. 2004).
[14] *See* CTM § 17.04.
[15] United States v. Williams, 644 F.2d 696, 699 (8th Cir. 1981), CTM § 17.04 (2012 ed.). See Mark E. Matthews and Scott A. Schumacher, *Effectively Representing Client Before IRS* Chapter 13.2.1(American Bar Association 6th ed. Feb. 2015) (referring to United States v. Marek, 548 F.3d 147, 150 (1st Cir. 2008)).
[16] Ian M. Comisky, Lawrence S. Feld, & Steven M. Harris, *Tax Fraud & Evasion* 2.06[1] n. 303.21f (Thomson Reuters Tax and Accounting vol. 1 2017).
[17] *See* CTM § 17.02.

The term "corruptly" is not defined in the Code.[18] In United States v. Reeves, the district court defined "corruptly" as meaning "with improper motive or bad or evil purpose."[19] The Fifth Circuit reversed the district court's interpretation holding that to interpret "corruptly" to mean either 'intentionally' or 'with an improper motive or bad or evil purpose' is to render "corruptly" redundant.[20] By defining corruptly too broadly, this could potentially raise a question about the overbreadth of Section 7212(a) as well as the question of vagueness.[21] In United States v. Floyd, the court held that the term "corruptly" in Section 7212(a) means "acting with an intent to procure an unlawful benefit either for the actor or for some other person."[22] This definition of the term "corruptly" is more exacting than the definition of the term described in 18 U.S.C. § 1503(a).[23] The benefit sought under the statute by a defendant does not need to be financially driven.[24] The benefit itself does not need to be illegal, as long as the defendant commits it to secure an unlawful benefit for himself or for others, meeting the "corruptly" interpretation.[25] In United States v. Dykstra, the court held securing an unwarranted financial gain is considered a

[18] *See* 26 U.S.C. § 7701 (listing definitions).
[19] United States v. Reeves, 752 F.2d 995, 997 (5th Cir 1985).
[20] *See id.* at 998.
[21] *See id.* at 1001.
[22] 740 F.3d 22, 31 (1st Cir. 2014); United States v. Reeves, 752 F.2d 995, 998, 1001 (5th Cir 1985); *see also* CTM § 17.04[1].
[23] *See, e.g.*, United States v. Richardson, 676 F.3d 491, 508 (5th Cir. 2012) (defining "corruptly" in Section 1503(a) to mean "knowingly and dishonestly" or "with an improper motive"); United States v. Ashqar, 582 F.3d 819, 823 (7th Cir. 2009) ("with the purpose of wrongfully impeding the due administration of justice"), *cert. denied*, 559 U.S. 974 (2010); United States v. Frank, 354 F.3d 910, 922 (8th Cir. 2004) ("with an improper or evil motive or with the purpose of obstructing the due administration of justice"); *cf.* Arthur Andersen LLP v. United States, 544 U.S. 696, 705 (2005) (interpreting "corruptly" in 18 U.S.C. 1512(b) to mean "wrongful, immoral, depraved, or evil").
[24] BNA Portfolio 636-3rd:Tax Crimes, Detailed Analysis, A. Criminal Offenses Under the Internal Revenue Code at A-6 (2017) [hereinafter BNA U.S. Income Portfolios: Tax Crimes]. In United States v. Yagow, the defendant engaged in a Form 1099 scheme to liquidate his farm and there was no evidence that the defendant had sought a financial advantage from the scheme. The defendant was held to have acted "corruptly", with motive to secure a financial gain. 953 F.2d 423, 425 (8th Cir. 1992)). It should be noted that the defendant sought a *financial* advantage, not an advantage under the *tax laws*. Brief of Action Institute and National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 26, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017).
[25] United States v. Wilson, 118 F.3d 228, 234 (4th Cir. 1997) (citing United States v. Bostian, 59 F.3d. 474, 479 (4th Cir. 1995)).

corrupt act.[26] Section 7212(a) is directed at efforts to bring about a particular advantage such as impeding collection of one's taxes, taxes of another, or the auditing of one's or another's tax records.[27] Congress was not required to list in the legislative history every conceivable corrupt endeavor to avoid waiving the statute's application to one type of corrupt endeavor.[28]

In some circuits, "the omnibus clause could be used to prosecute a person who obstructs the administration of Title 26 with the intent to seek *any* unlawful benefit."[29] The omnibus clause of Section 7212(a) has reached beyond conduct directed at IRS employees.[30] One commenter has stated that "Title 26 covers all individuals and entities and governs transactions ranging from nonprofit creation … to financing presidential campaigns … to taxing the sale of firearms." [31] Under the current Second Circuit interpretation of the term "unlawful benefit", an indictment under the omnibus clause could arise from "any civil violation by a nonprofit, any regulatory violation for a gun sale, or a campaign finance infraction."[32]

2. Definition of Endeavor

[26] United States v. Dykstra, 991 F.2d 450, 453 (8th Cir. 1993).
[27] United States v. Reeves, 752 F.2d 995, 998 (5th Cir. 1985).
[28] United States v. Martin, 747 F.2d 1404, 1409 (11th Cir. 1984).
[29] Brief of Action Institute and National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 25, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017) . *See* United States v. Giamvalvo, 810 F.3d 1086, 1098 (8th Cir. 2016); United States v. Saldana 427 F.2d 298,305 (5th Cir. 2005); United States v. Bowman, 173 F.3d 595, 596-97 (6th Cir. 1999).
[30] Brief of Action Institute and National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 25-26, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017); "The government and some courts… have expanded[ed] the reach of Section 7212(a) to circumstances in which the harassing conduct was not directed at IRS employees, but at other government employees or private citizens", notwithstanding the US DOJ Tax Division's policy directives (current as of 1997), limiting prosecutions to "conduct directed at IRS personnel in the performance of their duties, or in the context of an ongoing investigation." *See* Kathryn Keneally, The Champion, *Column: White Collar Crime*, 21 Champion 25, 26, 28 (1997).
[31] Brief of Action Institute and National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 26, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017) (describing respectively statutes 26 U.S.C. § 501 et seq., 26 U.S.C. § 9001 et seq., and 26 U.S.C. § 5801 et seq.).
[32] Brief of Action Institute and National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 26, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017).

Courts interpreting the term "endeavor" under Section 7212(a) have looked to case law interpreting similar language in the obstruction of justice statutes such as 18 U.S.C. §§ 1503 and 1505.[33] The term "endeavor" as used in Section 7212(a) is any effort to do or accomplish the evil purpose the section was intended to prevent.[34] According to the DOJ CTM, the means by which a defendant can "endeavor" to impede the due administration of the internal revenues laws is virtually unlimited.[35] The DOJ guidance document provides that the most common way to endeavor to obstruct or impede the due administration of the tax code is to take [any] direct action against officials involved in investigating or prosecuting tax charges.[36] Such action could include the preparation and filing of false tax forms.[37]

Some courts have defined the term "endeavor" extremely broadly in a Section 7212(a) setting.[38] In United States v. Johnson, the jury was instructed that "[a]n endeavor is any effort or any act or attempt to effectuate an arrangement or try to do something, the natural and probable consequence of which is to obstruct or impede the due administration of the Internal Revenue laws."[39] In United States v. Dowell, the court instructed the jury that "[t]he endeavor not need be successful, but it must be at least have a reasonable tendency to obstruct or impede the due administration of the Internal Revenue laws."[40] In United States v. Wood, the court held that prosecutors should not charge the failure to file a tax return as an endeavor to obstruct the due

[33] *See* Jennifer Gibbons, *Note: Proof of Tax Deficiency – The Silent Element in False Statements Charges?* 50 Ariz. L. Rev. 337, 352 (2008).
[34] United States v. Martin, 747 F.2d 1404, 1409 (11th Cir. 1984) (citing Osborn v. United States, 385 U.S. 323, 333 (1966)).
[35] *See* CTM § 17.04[2].
[36] *See id.*
[37] *See* Gordon, *supra* note 33, at 352 (citing United States v. Williams, 644 F.2d 696, 701 (8th Cir. 1981).
[38] Brief of New York Council of Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 24, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017).
[39] 571 F. App'x 205, 209 (4th Cir. 2014).
[40] 430 F.3d 1100, 1111 (10th Cir. 2005).

administration of the internal revenue laws, because there is no authority suggesting that a failure to file under Section 7203 can constitute a corrupt endeavor under Section 7212(a).[41]

3. To Obstruct or Impede the Due Administration of the Code

One commenter has suggested that the third element of the omnibus clause makes clear that the "consciousness of wrongdoing" is incorporated into Section 7212(a) through the term "corruptly" and the "knowing and intentional" conduct described by the word "endeavors" must have as its end purpose, to obstruct or impede the IRS.[42] Section 7212(a) is aimed at prohibiting efforts to impede "the collection of one's taxes, the taxes of another, or the auditing of one's or another's tax records."[43] There is no requirement that a defendant's actions have an adverse effect on a government's investigation or proceeding.[44] A violation of the omnibus clause can occur *whenever* a defendant intends to impede the administration of the tax laws.[45] A wide umbrella of activities fall under due administration of the internal revenue laws, including: "mailing out internal revenue forms; answering taxpayer's inquires; receiving, processing, recording and maintaining tax returns, payments and other taxpayers[‘] submissions; as well as monitoring taxpayers' compliance with their obligations."[46] In the absence of sufficient evidence to support a defendant's actions that were done with the intent to secure an unlawful benefit, the government cannot sustain a conviction under Section 7212(a).[47]

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[41] United States v. Wood, 384 F. App'x 698, 708 (10th Cir. 2010); *see also* CTM § 17.04[2].
[42] Kathryn Keneally & Michael J. Scarduzio, The Champion, *What Does it Mean to Corruptly Endeavor to Impede the IRS?*, 35 Champion 35 (Sept./Oct. Edition).
[43] United States v. Reeves, 752 F.2d 995, 998 (5th Cir. 1985); United States v. Kuball, 976 F.2d 529, 531 (9th Cir. 1992).
[44] *See* CTM § 17.04[3] (citing United States v. Rosnow, 977 F.2d 399, 409 (8th Cir. 1992)).
[45] *See id.*
[46] United States v. Bowman, 173 F.3d 595, 600 (6th Cir. 1999).
[47] *See* Keneally & Scarduzio, *supra* note 42, at 35.

Some courts have interpreted the term "to obstruct or impede" differently.[48] In United States v. Sorenson, the court held "to 'obstruct or impede' is to hinder or prevent from progress; to slow or stop progress; or to make accomplishment difficult and slow."[49] The First Circuit Pattern Jury instruction provides that "to 'obstruct or impede' means to hinder, interfere with, create obstacles or make difficult."[50] The Eleventh Circuit Pattern Jury instructions provides that "to 'try to obstruct or impede' is to consciously attempt to act, or to take some steps to hinder, prevent, delay, or make more difficult the proper administration of the Internal Revenue laws."[51]

C. Specific Intent Crime

Violation of Section 7212(a) is a specific intent crime.[52] A defendant must act with the specific intent to secure an unlawful benefit.[53] In United States v. Jaensch, the Fourth Circuit reversed a Section 7212(a) conviction holding that a district court's jury instruction was defective for instructing that to convict under the omnibus clause, the jury must only find that the defendant "knowingly and intentionally" committed the acts set out in the indictment.[54] The district court's jury instructions stated that it would be proper to convict the defendant by finding that the defendant committed acts listed in the indictment without finding that the defendant committed

[48] Brief of the Chamber of Commerce of the United States of America and National Federation of Independent Business as *Amicus Curiae* in Support of Petitioner at 5, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017)
[49] United States v. Sorenson, 801 F.3d 1217, 1229 (10th Cir. 2015).
[50] 1st Cir. Pattern Crim. Jury Instructions 4.26.7212 (2015), available at http://www.med.uscourts.gov/pdf/crpjilinks.pdf, last visited at Dec. 23, 2017.
[51] 11th Cir. Pattern Crim. Jury Instructions 0111 (2016), available at http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstructions2016.pdf, last visited at Dec. 23, 2017.
[52] United States v. Jaensch, 552 F. App'x 206, 210 (4th Cir. 2013).
[53] Brief of New York Council of Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 22 n. 12, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017) (citing United States v. Jaensch, 552 F. App'x 206, 210 (4th Cir. 2013); *accord* United States v. Dean, 487 F.3d 840, 853 (11th Cir. 2007); United States v. Saldana, 427 F.3d 298, 303 (5th Cir. 2005).
[54] United States v. Jaensch, 552 F. App'x 206, 209 (4th Cir. 2013); Justin Gelfand, The Champion, *Future: Defending a Criminal Tax Case* 40 Champion 40, 42 (Apr. 2016) (stating that the reversal of the conviction was due to the jury instruction which misstated the law).

those acts with the requisite intent to secure an unlawful benefit.[55] According to the court, this type of jury instruction improperly transforms the violation of Section 7212(a) into a general intent crime.[56]

D. The Legislative History of Section 7212(a)

Section 7212(a) was enacted in 1954 to punish acts or threats of physical force directed at IRS employees in an attempt to obstruct or impede the employee's official acts.[57] In addition, Section 7212(a) was intended to outlaw corrupt solicitation of IRS employees engaged in an investigation or collection activity such as bribery or extortion acts or attempts.[58]

The omnibus clause of Section 7212(a) was sparsely used for the first quarter-century after the statute's enactment. In 1981, one court characterized the omnibus clause as territory "where for over twenty-five years the Government has feared to tread."[59] In United States v. Williams, a case of first impression regarding interpretation of Section 7212(a)'s omnibus clause, the government acknowledged that it had previously asserted that Section 7212 applied only to situations involving force or threat of force.[60] Prior to 1981, the government took the position that the entire Section 7212 statute should only be used in cases where the defendant used physical force or threat of force against IRS officials.[61] Section 7212(a) does not have an extensive legislative history, but the statute was created from the Internal Revenue Service Act

[55] United States v. Jaensch, 552 F. App'x 206, 210 (4th Cir. 2013).
[56] *See id.* at 210.
[57] Robert S. Fink & Caroline Rule, Journal of Taxation, Fraud & Negligence, *The Growing Epidemic of Section 7212(a) Prosecutions – Is Congress The Only Cure?*, 88 J. Tax'n 356 (1998).
[58] *See* Fink & Rule, *supra* note 57, at 357.
[59] *See id.* quoting United States v. Williams, 644 F.2d 696 (8th Cir. 1981).
[60] United States v. Williams, 644 F.2d 696, 698 n. 12 (1981) (citing United States v. Henderson, 386 F.Supp. 1048, 1055-56 (S.D.N.Y. 1974).
[61] Brief of Action Institute and National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 12, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017).

of 1864, which made it a crime to "forcibly, obstruct, or hinder any assessor or assistant assessor, or any collector or deputy collector."[62]

The legislative history of Section 7212(a) discusses that the statute was designed to extend these previous protections for IRS employees to encompass all behavior that, whether through force or otherwise, targets and attempts to derail investigations or other specific collection activities by particular agents of the IRS.[63] There is nothing in the statute's legislative history that speaks to the view that the omnibus clause was intended to reach the whole gamut of acts which, could be characterized as attempts to avoid the operation of the tax laws as a whole.[64]

The Senate Report of 1954 on Section 7212(a) states: "This section provides for the punishment of threats or threatening acts against agents of the Internal Revenue Service, or any other officer or employee of the United States *or members of the families of such persons*, on account of the performance by such agents or employees of their official duties. *This section will also punish the corrupt solicitation of an internal revenue employee*.... [I]t covers threats of force, (including any threatening letter or communication) *or corrupt solicitation*."[65]

The House Report accompanying the legislation recommended that the new section be similar to 18 U.S.C. § 111, which prohibited assaults on federal employees engaged in the performance of their duties, but with the protection for IRS employees in order to "cover all cases where the officer is intimidated or injured; that is, where corruptly, by force or threat of force, directly or

[62] *See* Fink & Rule, *supra* note 57, at 357 (discussing Int. Rev. Service Act of 1864, ch. 173, 13 Stat. 23B). Essentially, the same provision was included in the Internal Revenue Code of 1939. *See also* n. 3 discussing Int. Rev. Code of 1939, ch. 34, section 3601(c)(1), 53 Stat. 436.
[63] *See* Fink & Rule, *supra* note 57, at 357.
[64] *See id.*
[65] *See id*. at 357 n. 4 (referring to **S**. Rep't No. 1622, 83d Cong., 2d Sess. (1954), reprinted in 1954 U.S. Code Cong. & Ad. News 4621, 4784 (*emphasis added*). *See also* United States v. Reeves, 752 F.2d 995 (5th Cir. 1985) n. 4.

by communication, an attempt is made to impede the administration of the internal revenue laws."[66] The House also linked the phrase "administration of this title" in Section 7212(a) with conduct directed at specific IRS agents or investigations rather than the "monolith" of the Internal Revenue Services' administration of the IRC as a whole.[67]

The limited discussion of the Section 7212(a)'s omnibus clause in both the House and Senate reports is extremely informative: Congress specifically intended to reach conduct such as the use of force or threats of force to obstruct the official acts of an individual IRS employee.[68] Congress did not intend to go further than that what was listed in the statute.[69] The statute itself includes, within the omnibus clause's prohibition of acts that obstruct or impede "the due administration" of the Code, conduct that by its very nature must be intended to disrupt particular IRS employees or activities rather than the overall operation of the tax Code.[70] If Congress had wanted to enact an additional statute to be used routinely in prosecuting tax evasion or the submission of false statements, it would have explicitly stated such a far-reaching intention rather than through the use of the term "corruptly".[71]

Congress gave no indication that by incorporating a omnibus clause, it intended to drastically expand the statute's reach to make it a felony to take any "corrupt" act – such as failing to maintain business records – that might someday, somehow interfere with the internal revenue laws.[72] The House and Senate Reports that accompanied the legislation suggest only that Congress may have intended to broaden the statute to encompass threats of force and "corrupt"

[66] *See* Fink & Rule, *supra* note 63 referring to H. Rep't No. 1337, 83d Cong. 2d Sess. (1954) reprinted in 1954 U.S. Code Cong. & Ad. News 4621, 4784. *See also* United States v. Walker, 514 F.Supp. 294 (E.D.La.1981).
[67] *See* Fink & Rule, *supra* note 63.
[68] *See id.*
[69] *See* Brief for Respondent at 36, *Marinello v. United States*, No. 16-1144 (Oct. 23, 2017).
[70] See Fink & Rule, *supra* note 63.
[71] *See id.*
[72] *See* Brief for Petitioner at 18, *Marinello v. United States*, No. 16-1144 (Mar. 21, 2017).

acts that interfered with IRS employee's enforcement activities.[73] If Congress had intended to reach corrupt acts that have no nexus to pending IRS enforcement activities and that exhibit no intent to obstruct specific IRS officers and employees engaged in enforcement activities, one would have expected Congress to make that clear.[74] According to government as stated in their reply brief, "Congress was not required to list in the legislative history every conceivable corrupt endeavor to avoid waiving the statute's application to one type of corrupt endeavor."[75]

Part II: Current Interpretation of Section 7212(a) omnibus clause

Prior to the Marinello Supreme Court's decision, there was a split among several circuit's interpretation the omnibus clause of Section 7212(a). The Sixth Circuit's Kassouf decision is the "lonewolf" among the circuits. The court held that a defendant needs to have knowledge of a pending IRS investigation or proceeding in order to be convicted under Section 7212(a)'s omnibus clause. A majority of the circuits (i.e., First, Second, Fifth, Ninth, and Tenth) have held that there is no requirement that a defendant needs to have knowledge of a pending IRS investigation or proceeding in order to be convicted of violating the omnibus clause. These circuits do not follow the Sixth Circuit's approach because some of the courts think the reasoning is flawed.

A. Circuit Splits

1. Sixth Circuit Interpretation

I. The Kassouf Decision

[73] *See* H.R. Rep No. 83-1337, at 108 (1954).
[74] *See* Brief for Petitioner at 19, Marinello v. United States, No. 16-1144 (Mar. 21, 2017).
[75] Brief for Respondent at 37, *Marinello v. United States*, No. 16-1144 (Oct. 23, 2017) (quoting United States v. Martin, 747 F.2d 1404, 1409 (11th Cir. 1984)).

No Circuit Courts prior to United States v. Kassouf had decided directly the exact issue of whether the omnibus clause of Section 7212(a) requires a pending IRS proceeding or investigation of which the defendant was aware.[76] Some courts had applied the omnibus clause to cases in which there was no pending investigation or proceeding, without directly addressing the precise issue.[77] The Sixth Circuit's interpretation of Section 7212(a) is the minority among several court of appeals across the country.[78] Title 26 of the IRC encompasses a variety of tasks that deal with administration of the Internal Revenue Code which include: "mailing out internal revenue forms; answering taxpayer's inquires; receiving, processing, recording and maintaining tax returns, payments and other taxpayers' submissions; as well as monitoring taxpayers' compliance with their obligations."[79] In light of these responsibilities, it is apparent that "the IRS does duly administer the tax laws even before initiating a proceeding."[80]

In Kassouf, the defendant was charged with using partnership and controlled corporate general partners in order to conduct transactions for his personal benefit without keeping records to determine the tax consequences of those transactions and failing to maintain partnership books

[76] United States v. Kassouf, 144 F.3d 952, 955 (6th Cir. 1998).
[77] *See* United States v. Hanson, 2 F.3d 942, 946-47 (9th Cir. 1993; United States v. Mitchell, 985 F.2d 1275, 1276-49 (4th Cir. 1993); (United States v. Kuball, 976 F.2d 529, 531 (9th Cir. 1992); United States v. Popkin, 943 F.2d 1535, 1540-41 (11th Cir. 1991); United States v. Williams, 644 F.2d 696, 701 (8th Cir. 1981); United States v. Toliver, 972 F.Supp. 1030, 1034-35 (W.D.Va. 1997). All of the Circuit Court decisions noted above were decided before United States v. Aguilar, 515 U.S. 593 (1995).
[78] United States v. Floyd, 740 F.3d 22 (1st Cir. 2014); United State v Marinello, 839 F.3d 209 (2d Cir. 2016), *cert. granted*, No. 16-1144, 2017 BL 220665 (U.S. June 27, 2017); United States v. Westbrooks, 858 F.3d 317 (5th Cir. 2017); United States v. Massey, 419 F.3d 1008 (9th Cir. 2005); United States v. Sorensen, 801 F.3d 1217 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 1163 (2016)).
[79] United States v. Kassouf, 144 F.3d 952, 956 (6th Cir. 1998). *see also Sorensen*, 801 F.3d at 1232 ("[T]he IRS duly administers the internal-revenue laws ... [by] carrying out its lawful functions to ascertain income[and to] compute, assess, and collect income taxes[.]" (internal quotation marks and citation omitted)).
[80] *Sorensen*, 801 F.3d at 1232; *see* Direct Mktg. Ass'n v. Brohl, 135 S.Ct. 1124, 1129, (2015) ("[T]he Federal Tax Code has long treated information gathering as a phase of tax administration procedure that occurs before assessment, levy, or collection."). Thus, it is possible to violate section 7212(a) by corruptly obstructing or impeding the due administration of the Internal Revenue Code "without an awareness of a particular [IRS] action or investigation" (for instance, "by thwarting the annual reporting of income"). United States v. Wood, 384 F. App'x 698, 704 (10th Cir. 2010).

and records.[81] The indictment also alleged that the defendant made it more difficult to discover and trace his activities by transferring funds between bank accounts and affirmatively misled the IRS by filing tax returns, which failed to disclose the transactions, the bank accounts, and other assets, and the interest earned on those accounts.[82]

The district court granted the defendant's motion to dismiss the Section 7212(a) count from the indictment for failure to state an offense, finding that the government had not met their burden showing that the defendant had knowledge of a pending IRS investigation or investigation.[83] The Sixth Circuit affirmed, agreeing with the district court that "due administration of the Title requires some pending IRS action" – such as "subpoenas, audits, or criminal tax investigations" – "of which the defendant was aware."[84]

The Sixth Circuit based its conclusion on a comparison of the omnibus clause with 18 U.S.C. § 1503 and consulted case law interpreting Section 1503 for guidance on how to construe the phrase, "the due administration of this title" under Section 7212(a).[85] Specifically the Sixth Circuit looked to United States v. Aguilar, a decision addressing the scope of conduct covered by Section 1503(a)'s broad prohibition on corrupt efforts to influence, obstruct, or impede the due administration of justice.[86] The Supreme Court decision was motivated by a concern that Section 1503(a) could sweep too broadly.[87] Section 1503 has been uniformly interpreted as requiring a pending judicial proceeding.[88] In Aguilar, the Supreme Court limited the reach of the statute to

[81] United States v. Kassouf, 144 F.3d 952, 953.
[82] *See id.* at 953.
[83] *See id.* at 954.
[84] *See id.* at 957 n.2.
[85] *See id.* at 956-58.
[86] 515 U.S. 593, 598-600 (1995).
[87] *See id.* at 593, 599.
[88] United States v. Kassouf, 144 F.3d 952, 955 (6th Cir. 1998).

pending proceedings which had a nexus between the act and the judicial proceeding such that "the act must have a relationship in time, causation, or logic with the judicial proceedings."[89]

The Sixth Circuit believed if they imposed liability for conduct with less of a causal connection than what was rejected by the Supreme Court in Aguilar, they would be permitting the IRS to impose liability for conduct which was legal and occurred [well] before an IRS audit, or even tax return was filed.[90] According to the Sixth Circuit, courts should interpret statutes that impose criminal liability narrowly to ensure proper notice to the accused.[91]

The Court stated in Kassouf, "it would be highly speculative to find conduct such as the destruction of records, which might or might not be needed, in an audit which might or might not ever occur, is sufficient to make out an omnibus clause violation."[92] The Sixth Circuit discussed if Kassouf knew that the IRS was conducting an audit of his tax returns and then he began destroying records to prevent detection of his illegal actions, then Section 7212(a) would clearly apply.[93]

II. The Sixth Circuit's Limitation of Kassouf

In United States v. Miner, the defendant offered assistance to client in requesting alterations to their Individual Master Files ("IMF"), which are internal IRS records pertaining to each taxpayer.[94] The Sixth Circuit held that given all the amble evidence that Miner was aware of one

[89] *See id.* at 957 (quoting United States v. Aguilar, 515 U.S. 593, 599 (1995)).
[90] *See id.* at 957.
[91] *See id.* at 958.
[92] *See id.*
[93] *See id.*
[94] United States v. Miner, 774 F.3d 336, 339-340 (6th Cir. 2014). The defendant promised individuals to obtain the IMF from the IRS, to "decode" them in order to expose "erroneous information", to "gather the evidence necessary to effectively challenge the IRS with substantiated allegations of fraud", and to "force the IRS to make changes to your IMF necessary to get it out of your life." The defendant also helped clients navigate existing IRS difficulties and advised them to create trusts to avoiding the paying income taxes.

or more pending IRS proceedings when he corruptly attempted to obstruct the IRS's administration of the tax laws, the district court's failure to instruct to give a jury instruction that was consistent with Kassouf, was harmless beyond a reasonable doubt.[95] At Miner's trial, there was evidence presented which showed that Miner had knowledge of pending IRS proceedings at the time that he had engaged in obstructive conduct for which he was convicted.[96] There was no real dispute over whether Miner acted with awareness that the IRS was actively investigating his clients when he engaged in most of the prohibited conduct.[97]

The Sixth Circuit held that that the district court should have instructed the jury that it could convict the defendant of violating Section 7212(a) only if it found that he was aware of a pending IRS proceeding.[98] Miner relied heavily on Kassouf by focusing on Section 7212(a)'s requirement that a defendant's conduct be aimed at impeding the "due administration" of the internal revenue laws.[99] The Kassouf decision strictly construes the omnibus clause as requiring proof that a defendant was aware of "some pending IRS action".[100]

In Miner, the government relied on the Sixth Circuit's decision in United States v. Bowman to argue that Kassouf's broad impact was narrowly construed.[101] In Bowman, the defendant was prosecuted under the omnibus clause after he attempted to prompt an IRS investigation into several of his creditors by filing forms with the IRS that falsely indicated that his creditors had received certain taxable income.[102] The Sixth Circuit held that the defendant was convicted of violating the Section 7212(a) omnibus clause even though the defendant had acted without any

[95] *See id.* at 346.
[96] *See id.*
[97] *See id.*
[98] *See id.* at 342.
[99] United States v. Kassouf, 144 F.3d 952, 957 (6th Cir. 1998).
[100] *See id.*
[101] United States v. Miner, 774 F.3d 336, 344 (6th Cir. 2014).
[102] 173 F.3d 595, 599 (6th Cir. 1999).

awareness of a preexisting, pending IRS proceeding.[103] The Sixth Circuit panel held in Bowman that "Kassouf must be limited to its precise holding and facts," refusing to construe it as "encompass[ing] the kind of activity for which Bowman was indicted."[104] According to the Bowman decision, Kassouf should not be interpreted to suggest that Section 7212(a) may never apply to defendants who anticipatorily try to impede the administration of the internal revenue laws before an IRS proceeding has yet begun. In Bowman, all of the Kassouf reasoning supports the conclusion that an individual's deliberate filing of false forms with the IRS specifically for the purpose of causing the IRS to initiate action against a taxpayer is encompassed within Section 7212(a)'s prohibited conduct.[105]

According to the Sixth Circuit, the Kassouf reasoning should be analyzed in scenarios in which defendants whose conduct in failing to disclose their income and financial transactions generally makes it more difficult for the IRS to identify and collect taxable funds.[106] By contrast, the Bowman methodology should be considered when defendants who intentionally attempt to institute a frivolous IRS proceeding, who cannot claim to have lacked the necessary required intent to impede the IRS's administration of its statutory duties within respect to that particular proceeding.[107]

In conclusion, in the Sixth Circuit, where the rationales of Kassouf and Bowman conflict, the Sixth Circuit is bound to follow Kassouf.[108] In a post-Kassouf and post-Bowman Sixth Circuit

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[103] United States v. Bowman, 173 F.3d 595, 599 (6th Cir. 1999).
[104] United States v. Miner, 774 F.3d 336, 344 (6th Cir. 2014) (quoting United States v. Bowman, 173 F.3d 595, 600 (6th Cir. 1999).
[105] *See id.* at 344 (citing United States v. Bowman, 173 F.3d 595, 600 (6th Cir. 1999).
[106] *See id.* at 345 (citing United States v. Kassouf, 144 F.3d 952, 953 (6th Cir. 1998)).
[107] United States v. Miner, 774 F.3d 336, 345 (6th Cir. 2014) (citing United States v. Bowman, 173 F.3d F.3d 595, 600 (6th Cir. 1999)).
[108] United States v. Miner, 774 F.3d 336, 345 (6th Cir. 2014) (citing Ward, 733 F.3d at 608); ("When a later decision of this court conflicts with one of our prior published decisions, we are still bound by the holding of the earlier case." Darrah v. City of Oak Park, 255 F.3d 301, 310 (6th Cir.2001) (citing Sowards v. Loudon Cnty., Tenn., 203

setting, a defendant may not be convicted under the omnibus clause unless he is "acting in response to some pending IRS action of which [he is] aware".[109]

2. First Circuit Interpretation

In United States v. Floyd, the defendant was involved in the evasion of payroll taxes by third-party employers and was convicted of violating Section 7212(a).[110] A part of the defendant's tax scheme involved the defendant commingling personal funds and funds of other clients in an attempt to confuse the IRS about the source of the funds.[111] The government's contention was that the scheme was designed to obstruct the IRS's assessment of personal income tax liability.[112] The defendant challenged the conviction on the grounds that there was no proof that they earned enough to pay taxes during the relevant time period, or that they filed false tax returns, or that they were audited by the IRS.[113] The First Circuit held that a conviction for violation of Section 7212(a) does not require proof of either a tax deficiency or an ongoing audit.[114] The First Circuit was aware of the Sixth Circuit's Kassouf decision, but did not regard it as good law because it was limited by the Circuit to its peculiar facts as discussed in Bowman.[115]

3. Fifth Circuit Interpretation

F.3d 426, 431 n. 1 (6th Cir.2000); Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 180 F.3d 758, 765 (6th Cir.1999), *rev'd on other grounds,* 531 U.S. 288 (2001)).

[109] United States v. Miner, 774 F.3d 336, 345 (6th Cir. 2014) (quoting United States v. McBride 362 F.3d 360, 372 (6th Cir. 2004) (*internal quotation marks omitted*).

[110] United States v. Floyd, 740 F.3d 22, 26 (1st Cir. 2014).

[111] *See id.* at 26.

[112] *See id.*

[113] *See id.* at 31.

[114] *See id.* at 31. *e.g.,* United States v. Marek 548 F.3d 147, 150-55 (1st Cir. 2008), United States v. Wood, 384 F. App'x 698, 704 (10th Cir. 2010).

[115] *See id.* at 31.

In United States v. Westbrooks, the defendant operated two businesses that helped people prepare their taxes.[116] The defendant was charged with obstructive conduct by submitting falsely stated low income tax returns for her businesses.[117] Recently, the Fifth Circuit joined their sister circuits by holding that Section 7212(a) does not require an ongoing IRS proceeding, showing that the Sixth Circuit in Kassouf did not correctly interpret Section 7212(a).[118] The prior case law in the Fifth Circuit did not require knowledge of a pending IRS action.[119] "The breath of Section 7212(a)'s language shows that the omnibus clause was intended to prevent frustration of tax collection efforts, a purpose which would be thwarted by Westbrook's narrow interpretation."[120]

4. Ninth Circuit Interpretation

In United States v. Massey, the defendant did not file accurate federal income tax returns for several years and when contacted by the IRS regarding the defendant's non-compliance with the Internal Revenue Code, the defendant threatened to sue the IRS and its agents.[121] The Ninth circuit held that it is sufficient if a defendant hoped "to benefit financially" from sending threatening letters to the IRS.[122] The Court stated that the laws of the Ninth Circuit have established that the government does not need to prove that a defendant was aware of an ongoing tax investigation to obtain a conviction under Section 7212(a).[123] The Circuit affirmed the

[116] United States v. Westbrooks 858 F.3d 317, 321 (5th Cir. 2017).
[117] *See id.* at 321.
[118] *See id.* at 322.
[119] *See id.* discussing United States v. Reeves, 752 F.2d 995 (5th Cir. 1985); United States v. Saldana, 427 F.3d 298, 301, 304-05 (5th Cir. 2005)).
[120] *See id.* at 323.
[121] United States v. Massey, 419 F.3d 1008, 1009 (9th Cir. 2005).
[122] *See id.* at 1010 (citing United States v. Kuball, 976 F.2d 529, 531 (9th Cir. 1992)).
[123] *See id.* at 1010.

defendant's Section 7212(a) conviction, the government alleged that the defendant hoped "to benefit financially" by threatening the IRS.[124]

5. Tenth Circuit Interpretation

In Sorensen, the defendant, an oral surgeon, concealed his income from the IRS by using a "pure trust" scheme.[125] The defendant deposited his business income into trusts without reporting all of it to the IRS as income.[126] The defendant even admitted at trial that the payments made to the pure trusts were not legitimate business deductions because their only purpose was to avoid paying taxes.[127] The trial court instructed the jury that to act "corruptly", the defendant must have acted knowingly and dishonestly, with the specific intent to gain an unlawful advantage or benefit for himself or another.[128] The defendant suggested that the government can only charge tax obstruction under Section 7212(a) when a defendant knows of a pending IRS investigation or audit.[129] The Tenth Circuit sided with its unreported decision from United States v. Wood and chose not to follow the Kassouf reasoning, holding a defendant can violate Section 7212(a) without an ongoing proceeding.[130]

In an unreported decision from the Tenth Circuit, in United States v. Wood, the Court found that 18 U.S.C. § 1503, the obstruction of justice statute that the Sixth Circuit had relied on in Kassouf, is "substantially different than [Section] 7212(a)."[131] The Court believed that the

[124] United States v. Massey, 419 F.3d 1008, 1010 (9th Cir. 2005).
[125] United States v. Sorensen, 801 F.3d 1217, 1220 (10th Cir. 2015).
[126] *See id.* at 1220.
[127] *See id.* at 1223.
[128] *See id.* at 1230.
[129] *See id.* at 1231.
[130] *See id.* at 1232.
[131] United States v. Sorensen, 801 F.3d 1217, 1232 (10th Cir. 2015) (quoting United States v. Wood, 384 F. App'x 698, 703-04 (10th Cir. 2010)).

Kassouf reasoning was questionable and not persuasive.[132] The Tenth Circuit did not believe that Section 1503(a) is sufficiently similar to apply it in a 7212(a) setting.[133] Section 1503(a) requires that a defendant must corruptly endeavor to influence, intimidate, or impede any juror, officer of the court, or magistrate judge in court-related duties, it inherently requires that the obstructive conduct taken place during an ongoing proceeding.[134] In contrast, Section 7212(a) does not require an ongoing proceeding when a defendant "corruptly … endeavor[s] to obstruct or impede the due administration of" the tax laws.[135] According to the Tenth Circuit as discussed in Sorenson, there are many scenarios in which the IRS duly administers the tax laws even before initiating a proceeding such as when computing taxes owed.[136]

B. The Second Circuit's Interpretation in Marinello

I. District Court Decision

Marinello was prosecuted in the Western District of New York for violating the omnibus clause of Section 7212(a) for failing to maintain corporate books and records for his business and failing to furnish complete and accurate records for his accountant.[137] Marinello did not maintain business records of file corporate or personal income tax returns from approximately 1992 through 2010.[138] A jury convicted Marinello of obstructing and impeding the due administration

[132] United States v. Wood, 384 F. App'x 698, 704 (10th Cir. 2010).
[133] United States v. Sorensen, 801 F.3d 1217, 1232 (10th Cir. 2015).
[134] *See id.*
[135] *See id.* citing United States v. Floyd, 740 F.3d 22, 31-32 & n.4 (1st Cir. 2014)).
[136] *See id.* at 1232-33.
[137] *See* Brief for Petitioner at 6a-7a, *Marinello v. United States*, No. 16-1144 (Mar. 21, 2017). Marinello was charged with from January 2005 until April 15, 2009: 1) failing to maintain corporate books and records; (2) failing to provide his accountant with complete and accurate information related to his personal income and the income of his business; (3) destroying, shredding, and discarding business records; (4) cashed business checks received for services rendered; (5) hiding business income in personal accounts; (6) transferred assets to a nominee; (7) paid employees with cash; and (8) used business receipts and funds from business accounts to pay personal expenses.
[138] *See* Brief for Petitioner at 4a, *Marinello v. United States*, No. 16-1144 (Mar. 21, 2017).

of the tax laws under Section 7212(a), failing to file individual and corporate tax returns under Section 7203.[139]

Marinello argued that the government had failed to introduce sufficient evidence that he acted with the intent to *corruptly endeavor* to obstruct or impede the due administration of the tax laws and failed to establish that he *knew* the IRS was investigating him.[140] The government presented sufficient evidence at trial from which a jury could reasonably infer that Marinello engaged in the alleged conduct to secure an unlawful benefit and to obstruct due administration.[141] The district court declined to construe Section 7212(a) as narrowly as the Sixth Circuit's did in Kassouf.[142] Since Kassouf was limited to its particular facts, many other district and circuit courts across the country have declined to follow the case's reasoning, the Western District of New York held that [k]nowledge of a pending [IRS] investigation is not an essential element of the crime.[143] In the court's view, "t]he jury was entitled to infer ... that Marinello acted corruptly to impede or obstruct the due administration of the Internal Revenue laws" by otherwise hindering the collection of taxes due.[144] The court further held that "due administration of this title" does not require knowledge of any pending investigation.[145]

II. The Second Circuit Appeal

[139] United States v. Marinello, No. 12-CR-53S, 2015 BL 475209 (W.D.N.Y. June 26, 2015), Court Opinion
[140] United States v. Marinello, No. 12-CR-53S, 2015 BL 475209 at *3 (W.D.N.Y. June 26, 2015), Court Opinion (*emphasis added*).
[141] *See id.*
[142] United States v. Marinello, 839 F.3d 209, 214 (2d Cir. 2016).
[143] United States v. Marinello, No. 12 Cr. 53S, 2015 BL 475209 at *4 (W.D.N.Y. June 26, 2015) (citing United States v. Bowman, 173 F.3d 595, 600 (6th Cir. 1999).
[144] United States v. Marinello, 839 F.3d 209, 214 (2d Cir. 2016) (citing United States v. Marinello, No. 12 Cr. 53S, 2015 BL 475209 at *3 (W.D.N.Y. June 26, 2015).
[145] United States v. Marinello, No. 12-CR-53S, 2015 BL 475209 at *3 (W.D.N.Y. June 26, 2015), Court Opinion (citing 1 L. Sand, et al., *Modern Federal Jury Instructions —Criminal*, ¶ 59.05, at Instruction 59-32 (2014).

The Second Circuit affirmed Marinello's conviction without showing that he was aware of a pending IRS proceeding at the time of his obstructive behavior, and declined to follow the Kassouf standard on the grounds that the text of Section 1503(a) is distinguishable from Section 7212(a). [146] The Circuit stated that Section 1503(a)'s statutory language focuses on grand jury or judicial proceedings and there is a "long list of specific prohibitions of conduct that interferes with actual judicial proceedings".[147] The Circuit further held that Section 7212(a) does not contain any such reference to specific IRS actions, investigations, or proceedings that would support analogizing it to Section 1503(a).[148] The two statutes employ different statutory phrases: "the due administration of *justice*," 18 U.S.C. § 1503(a) (emphasis added), and "the due administration of *this title*," 26 U.S.C. § 7212(a) (emphasis added).[149] This difference indicates that the statutes carry different meanings.[150]

The Second Circuit panel in Marinello held that even doing nothing at all can be viewed as obstruction of the internal revenue laws if done with an intent to obtain an unlawful benefit.[151] The Circuit cited its prior decision in Kelly in which it described the omnibus clause as "render[ing] criminal 'any other' action which serves to obstruct or impede the due administration of the revenue laws."[152] The use of the term "corruptly" in Section 7212(a) does

[146] United States v. Marinello, 839 F.2d 209, 222 (2nd Cir. 2016).
[147] *See id.* at 220 (citing United States v. Wood, 384 F. Appx. 698, 704 (10th Cir. 2010), *cert. denied*, 562 U.S. 1225, 131 S.Ct. 1476, (2011).
[148] *See id.* at 220.
[149] *See id.* at 221.
[150] *See id.* citing Kassouf, 144 F.3d at 960 (Daughtrey, J. dissenting in part) ("[I]f Congress wished 26 U.S.C. § 7212(a) to be interpreted in an identical fashion, identical language would have been inserted into that statute.") ("Although no federal court of appeals appears to have addressed directly the precise issue now before us, every sister circuit that has examined the reach of 26 U.S.C. § 7212(a) has accepted the principle that the provisions of that subsection do not require the government to prove the existence of an ongoing or pending tax investigation or proceeding".)
[151] United States v. Marinello, 839 F.3d 209, 225 (2d Cir. 2016) (stating that "an omission [could] be a means by which a defendant corruptly obstructs or impedes the due administration of the Internal Revenue Code.")
[152] *See id.* at 224 (quoting United States v. Kelly, 147 F.3d 172, 175 (2d Cir. 1998)).

not render the provision unconstitutionally vague or overbroad.[153] In United States v. Kelly, it was determined that the term "corruptly endeavors" in Section 7212(a) is "as comprehensive and accurate as if the word 'willfully' was incorporated in the statute."[154] Section 7212(a) explicitly does not include any language requiring that a defendant acted willfully. [155] Section 7212(a) broadly prohibits corruptly obstructing or impeding, or endeavoring to obstruct or impede, the due administration of the tax laws "in any other way".[156]

The Second Circuit stated that "[it does] not see how a defendant could escape criminal liability under the omnibus clause for a corrupt omission that is designed to delay the IRS in the administration of its duties merely because the offense conduct involved an omission".[157] The Circuit agrees that a defendant could be charged under Section 7212(a) for knowingly failing to provide the IRS with materials that it requests, or, as in Marinello's case, for failing to document or provide a proper accounting of business income and expenses.[158] The panel stated that the jury could have relied on Marinello's failure to keep company books and records, or to provide his accountant with complete and accurate information, as a basis for the [Section 7212(a)] conviction.[159] There is no requirement under the statute to make certain, if [the defendant] were convicted, the conviction was based solely on an affirmative action and not an omission.[160] The Second Circuit explicitly stated that "we nonetheless recognize that the scope of omissions on which an omnibus clause violation could be based is not limitless."[161] However, the court held

[153] United States v. Kelly, 147 F.3d 172, 176 (2d Cir. 1998) (citing United States v. Brennick, 908 F.Supp. 1004, 1010-13 (D. Mass. 1995)).
[154] *See id.* at 177.
[155] *See* CTM § 17.04.
[156] United States v. Marinello, 839 F.3d 209, 224 (2d Cir. 2016) (citing 26 U.S.C. § 7212(a)).
[157] *See id.* at 225.
[158] *See id.* at 224 n.15.
[159] *See id.* at 225.
[160] *See id.*
[161] *See id.* at 224.

that whatever "those limits may be", the omissions at issue in Marinello's case do not exceed the limits.[162] The Second Circuit has noted that the government has prosecuted on the basis of an omission as a means of violating Section 7212(a)'s omnibus clause.[163] By enabling omissions of an act, misdemeanor conduct could be prosecuted as felonies.[164]

Prior to Marinello, the Second Circuit did not explicitly adopted the rule, but the Court had implicitly applied it by affirming convictions under Section 7212(a)'s omnibus clause without discussion of a defendant's awareness of a pending IRS proceeding.[165] In the Second Circuit's interpretation of the statutory intent of Section 7212(a), between the forty-four years that elapsed between Section 7212(a)'s enactment in 1954 and Kassouf's holding in 1998, the government assures [this Court] that no court had limited the omnibus clause's application to the corrupt obstruction or impediment of a known and pending IRS action.[166] Contemporary model jury instructions for use outside the Sixth Circuit do not include these criteria as elements of the obstruction offense.[167]

III. Dissent of Marinello's Rehearing En Banc Review

The Second Circuit denied an en banc review of Marinello's case.[168] Judge Jacobs, strongly dissented stating that the broad interpretation and application of the statute could lead to allow

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[162] *See id.* at 224.
[163] *See id.* at 225 n. 16 (discussing United States v. Kassouf 144 F.3d 952, 953 n.1 (6th Cir. 1998); United States v. Armstrong, 974 F.Supp. 528, 531 (E.D. Va. 1997); United States v. Bezmalinovic, No. S3 96 CR 97, 1996 WL 737037 at *2 (S.D.N.Y. Dec. 26, 1996)).
[164] Brief of New York Council of Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 10, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017).
[165] United States v. Marinello, 839 F.3d 209, 222 (2d Cir. 2016) (discussing United States v. McLeod, 251 F.3d 78, 80 (2d Cir. 2001), Kelly, 147 F.3d at 174–75).
[166] United States v. Marinello, 839 F.3d 209, 223 (2d Cir. 2016); *see* Brief for Petitioner at 19, Marinello v. United States, No. 16-1144 (Mar. 21, 2017).
[167] *See* 3 Leonard B. Sand et al., *Modern Federal Jury Instructions: Criminal* ¶ 59.05, Instruction 59–32 & cmt. (2016) (containing pattern instructions or formulations for a violation of section 7212(a)'s omnibus clause in the First, Seventh, Tenth, and Eleventh Circuits).
[168] *See id.* at 455.

any prosecutor to say "show me the man, and I'll find you the crime."[169] "If [a]prosecutor is obliged to choose his case, it follows that he can choose his defendants. [This] is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted."[170] Judge Jacobs felt that the panel should have gone in banc to determine whether such a limitless statute is constitutional.[171]

Judge Jacobs believes that "the panel opinion in Marinello affords the sort of capacious, unbounded, and oppressive opportunity for prosecutorial abuse that the Supreme Court has previously curtailed."[172] The actus reus for this crime is the failure to keep sufficient books and records.[173] In Judge Jacobs' dissent, he suggests that the panel likely took comfort in the mens rea requirement that the act or acts be done in a "corrupt" manner.[174] Judge Jacobs further stated that "any such comfort is surely illusory.[175] The line between aggressive tax avoidance and "corrupt" obstruction can be hard to discern, especially when no IRS investigation is active.[176] Alleging a corrupt motive is no burden at all.[177] Prosecutorial power is not just the power to convict those we are sure have guilty minds; it is also the power to destroy people."[178] Judge Jacobs suggests that under the panel's opinion it would be extremely easy for an "overzealous

[169] *See id.* at 459.
[170] Morrison v. Olson, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting) (quoting Attorney General Robert H. Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys, Apr. 1, 1940).
[171] United States v. Marinello, 855 F.3d 455, 459 (2d Cir. 2017).
[172] *See id.* at 457.
[173] *See id.*
[174] *See id.*
[175] *See id.*
[176] *See id.*
[177] *See id.*
[178] *See id.*

prosecutor to investigate, to threaten, to force into pleading, or perhaps (with luck) to convict *anybody*."[179]

Judge Jacobs believes that the saving requirement that the Sixth Circuit added to the mens rea requirement that there must have been a pending IRS action of which the defendant was aware.[180] "[This] measure is a good way toward setting some bound[aries]."[181] It construes the statute as a specialized tool for active IRS investigations, rather than a prosecutor's hammer that can be brought down upon any citizen.[182] "Indiscriminate application of [Section 7212(a)'s] omnibus clause serves only to snag citizens who cannot be caught in the fine-drawn net of specified offenses, or to pile on offenses when a real tax cheat is convicted."[183]

The panel does not consider the risk of prosecutorial abuse at all, dismissing overbreadth and vagueness in a single paragraph – and that paragraph merely cites other decisions.[184] The panel spends a significant amount of pages "positing" differences between the phrases "due administration of justice" and due administration of this title", looking to statutory context and legislative history in an attempt to distinguish the Supreme Court's interpretation of a nearly identical statute in Aguilar.[185] Judge Jacobs believes that there is relevant legislative history for Section 7212(a).[186] Judge Jacobs stated "[i]f Congress intended to dramatically expand the scope of the law in the way that the panel conceives, the legislative history gives no hint of that."[187]

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[179] *See id.*
[180] *See id.*
[181] *See id.*
[182] *See id.*
[183] *See id.*
[184] *See id.* at 457 (referring to United States v. Marinello, 839 F.3d 209, 221-22 (2d Cir. 2016)).
[185] *See id.* at 457-58.
[186] United States v. Marinello, 855 F.3d 455, 459 & n. 3 (2d Cir. 2017). The prior version of Section 7212(a) only prohibited *forcible* obstruction of IRS officers. See Int. Rev. Code of 1939, ch. 34, § 3601(c)(1).
When Congress re-wrote the tax code and re-drafted Section 7212(a) in 1954, the Senate and House Reports only briefly explained the purpose of Section 7212(a) (their explanation for the addition to the statute is in italics):

C. Importance of a Self-Reporting System of IRS Administration

The government argues that the omnibus clause of Section 7212(a) serves an important function in a self-reporting system of the IRS administration.[188] The income tax system depends upon taxpayers voluntarily complying with their responsibilities and self-reporting their income in good faith.[189] It is necessary to have in place a comprehensive statute in order to prevent taxpayers and their [advisors] from gaining unlawful benefits by employing that "variety of corrupt methods" that is "limited only by the imagination of the criminally inclined."[190]

D. The Risk of the Second Circuit's Interpretation

Marinello and others in support of his position as stated in several amicus briefs have deep concerns about the risk of the Second Circuit's interpretation of the Section 7212(a) omnibus clause.[191] This next section will describe the petitioner's concerns of fair notice, constitutional vagueness, omission conduct, and the risk of felony prosecution.

Subsection (a) of this section, relating to the intimidation or impeding of any officer or employee of the United States acting in an official capacity under this title, or by force or threat of force attempting to obstruct or impede the due administration of this title is new in part. This section provides for the punishment of threats or threatening acts against agents of the Internal Revenue Service, or any other officer or employee of the United States, or members of the families of such persons, on account of the performance by such agents or officers or employees of their official duties. *This section will also punish the corrupt solicitation of an internal revenue employee*. *See* H.R.Rep. No. 1337, 83rd Cong., 2d Sess. (1954); S.Rep. No. 1622, 83rd Cong., 2d Sess. (1954) (*emphasis added*)).

[187] *See id.* at 459.

[188] See Brief for Respondent at 14, *Marinello v. United States*, No. 16-1144 (May 22, 2017) (citing United States v. Popkin, 943 F.2d 1535, 1540 (11th Cir. 1991)).

[189] *See* Brief for Respondent at 11, *Marinello v. United States*, No. 16-1144 (Oct. 23, 2017).

[190] United States v. Popkin, 943 F.2d 1535, 1540 (11th Cir. 1991) (citing United States v. Martin, 747 F.2d 1404, 1409 (11th Cir. 1984).

[191] *See generally* Brief for Petitioner, *Marinello v. United States*, No. 16-1144 (Sept. 1, 2017), Brief of Action Institute and National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017), Brief of the Chamber of Commerce of the United States of America and National Federation of Independent Business as *Amicus Curiae* in Support of Petitioner, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017), Brief of Action Institute and National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017), Brief of the Am. College of Tax Counsel as *Amicus Curiae* in Support of Petitioner, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017), Brief of New York Council of Defense Lawyers as *Amicus Curiae* in Support of Petitioner, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017).

I. Fair Notice Concerns

Several amicus brief submissions in support of Marinello's position strongly believe that there are significant fair notice concerns with the Second Circuit's interpretation of the omnibus clause.[192] It is a violation of the due process clause to "tak[e] away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so, standardless that it invites arbitrary enforcement.[193] The fair notice requirement also ensures to "avoid a "standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."[194]

Some commenters supporting Marinello, feel that the omnibus clause, as applied in a majority of the circuits, runs counter to the blackletter principles of fair notice and un-vague statutory interpretation.[195] According to one commenter, the Second Circuit's interpretation of the omnibus clause lacks fair notice and threatens to criminalize otherwise innocent activity.[196] Virtually every business decision that is taken because of its potential tax consequences could become subject to review and potentially prosecutable if the government can allege that it was done in a "corruptly" type manner.[197] The question for the Supreme Court to decide is whether the average taxpayer would know that *not* doing something – [such as not keeping adequate tax

[192] *See id.*
[193] United States v. Johnson, 135 S.Ct. 2251, 2256-57 (2015) (citing Kolender v. Lawson, 461 U.S. 352, 357-58 (1983)).
[194] Brief of the Chamber of Commerce of the United States of America and National Federation of Independent Business as *Amicus Curiae* in Support of Petitioner at 4-5, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017) (quoting Kolender v. Lawson, 461 U.S. 352, 358 (*internal quotation marks omitted*); *see also* Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) (*same*).
[195] Brief of Action Institute and National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 3, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017).
[196] Brief of the Chamber of Commerce of the United States of America and National Federation of Independent Business as *Amicus Curiae* in Support of Petitioner at 5, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017).
[197] *See id.* at 18.

documentations] – would be a felony obstruction of the IRS's administration of the tax code.[198] The current government's interpretation of the statute is that it doesn't require that the taxpayer know that this type of conduct could later obstruct or impede an IRS administration of the tax code that could result in a felony charge.[199]

The tax laws are already extremely complex and fact-dependent that it likely would not be difficult for the government to allege after the fact that an action that a business or individual claimed was in good faith conferred a benefit that was not justified, "i.e., was unlawful".[200] An "unlawful benefit" could be simply paying less taxes than was legally required.[201]

The mens rea requirement of most of the substantive offenses of the criminal tax code are exacting.[202] Most of the substantive offenses contain the mens rea requirement that the defendant had acted "willfully" to commit the accused crime. A "willful" violation occurs where the defendant actually knew the terms of the statute and that their conduct violated the statute.[203] As the Supreme Court noted in the Cheek v. United States decision, the tax law's complexity and potential for "ensnaring" the innocent require "the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and

[198] Brief of Action Institute and National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 9, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017).
[199] *See id.*
[200] Brief of the Chamber of Commerce of the United States of America and National Federation of Independent Business as *Amicus Curiae* in Support of Petitioner at 17, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017). It is a fundamental [part] of our law, well established for [many] decades, that "[a]ny one may so arrange [their] affairs that [their] taxes shall be as low as possible; [they are] not bound to choose that pattern which will best pay the Treasury; there is not event a patriotic duty to increase one's taxes." *See id.* at 6 (quoting Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934) (Hand, J.) (*citations omitted*)).
[201] *See id.* at 18.
[202] Brief of Action Institute and National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 18, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017).
[203] Cheek v. United States, 498 U.S. 192 (1991).

intentionally violated that duty."[204] The "corruptly" mens rea requirement of the omnibus clause presents the opportunity for prosecutors to charge conduct as "obstruction" without having to overcome the difficulty of proving any willful conduct violation.[205] The term "corruptly" is not even mentioned in the tax code.[206] It is much easier for the government to prove a "corrupt" intent than the "willfulness" it must prove for other tax offenses.[207] A defense attorney can combat a prosecutor's theory of willfulness by arguing that a defendant acted in good faith.[208] If a jury finds that a defendant was wrong but legitimately thought that they were following the law, regardless of whether the defendant's state of mind was objectively reasonable, the jury is instructed to must acquit the defendant unless the defendant was willfully blind.[209]

II. Constitutional Concerns

A. Vagueness and Overbreadth

The Supreme Court has long held that criminal statutes should not be given vague and overbroad interpretations that could give rise to the risk of discriminatory enforcement.[210] The Supreme Court has routinely cabined criminal statues within their proper textual context where the outer bounds of statutory interpretation threaten vagueness and fail to provide fair notice to ensure that

[204] Brief of Action Institute and National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 18, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017) (quoting Cheek v. United States, 498 U.S. 192, 201, 205 (1991)).
[205] Brief of Action Institute and National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 18, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017).
[206] *See supra* note 18.
[207] Brief of New York Council of Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 20, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017).
[208] Justin Gelfand, The Champion, *Future: Defending a Criminal Tax Case*, 40 Champion 41 (Apr. 2016).
[209] *See id.* at 40 (citing Cheek v. United States, 498 U.S. 192, 201 (1991)).
[210] Brief of the Chamber of Commerce of the United States of America and National Federation of Independent Business as *Amicus Curiae* in Support of Petitioner at 18, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017).

everyone indicted under a statute knows they were violating the law. [211] These mens rea requirements are essential to our criminal law jurisprudence.[212]

The government argues that any constitutional vagueness concerns are limited by the Section 7212(a)'s mens rea requirement, which the defendant acted "corruptly".[213] In United States v. Kelly, the Second Circuit rejected vagueness and overbreadth challenges to Section 7212(a) and took the position agreeing with five other circuits in concluding that the use of the term "corruptly" in Section 7212(a) does not render the provision unconstitutionally vague or overbroad. [214] The government asserts that the definition of "corruptly" as defined by the courts, informs the average person about the type of conduct that is criminal in the IRS's "omnipresent" administration of the tax code.[215]

However, "administration of the tax code" can encompass a long laundry list of items.[216] The government contends that a defendant must be aware that their obstructive acts are directed at the

[211] Brief of Action Institute and National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 4, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017) (citing McDonnell v. United States, 136 S. Ct. 2355, 2367 (2016); Yates, 135 S. Ct. at 1974; Arthur Andersen LLP v. United States, 544 U.S. 696 (2005); United States v. Aguilar, 515 U.S. 593 (1995)).
[212] Brief of Action Institute and National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 4, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017).
[213] *See* Brief for Respondent at 11, *Marinello v. United States*, No. 16-1144 (May 22, 2017).
[214] Brief of Action Institute and National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 21, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017) (referring to United States v. Kelly, 147 F.3d 172, 176 (2d Cir. 1998)(citing United States v. Brennick, 808 F. Supp. 1004, 1010-13 (D. Mass. 1995)).
[215] Brief of Action Institute and National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 20, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017).
[216] *See supra* note 80, about Title 26 activities. "In administering the tax code, the IRS plays every conceivable role: lawmaker when it promulgates regulations and rulings; administrator when it processes returns and payments; investigator when it conducts civil audits or criminal investigations; settlement officer when the Office of Appeals considers a disagreement between the taxpayer and examiner; litigator when attorneys in the Office of Chief Counsel represent the IRS in adversarial court proceedings; decision-maker when it rules on Private Letter Ruling requests; and ethics board when it creates rules for practice before the IRS and enforces those rules through its Office of Professional Responsibility. Countless types of acts or omissions could impede the IRS in one of its myriad roles. By giving prosecutors the discretion to convert any one of those countless acts or omissions into a federal felony, the residual clause violates the Constitution's prohibition on vague criminal laws."(quoting Brief of the Am. College of Tax Counsel as *Amicus Curiae* in Support of Petitioner at 11-12, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017)).

IRS's administration of the tax code.[217] These mens rea requirements distinguish purposeful tax violators from those who lack a culpable intent to obstruct and ensure that the provision is not a trap for the unwary.[218]

One commenter in support of Marinello's position suggests "at a bare minimum, in cases such as this one, in which the complex statutory and regulatory scheme lends itself to any number of interpretations, we should be included to rely on the traditional canon that construes revenue-raising laws against their drafter."[219] In construing the tax crimes enacted by Congress, the courts have recognized the importance of giving taxpayers fair notice of where the lines are drawn between lawful conduct and a crime and have further refined those lines.[220]

B. Willful Conduct

In Spies v. United States, the Supreme Court distinguished tax misdemeanors and felonies, explaining that willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.[221] The requirement of an offense committed

[217] *See* Brief for Respondent at 22, *Marinello v. United States*, No. 16-1144 (Oct. 23, 2017).
[218] *See id.* at 11.
[219] Brief of the Chamber of Commerce of the United States of America and National Federation of Independent Business as *Amicus Curiae* in Support of Petitioner at 18, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017) (quoting United Dominion Indus, v. United States, 532 U.S. 822, 839 (2001) (Thomas, K., concurring).
[220] Brief of the Am. College of Tax Counsel as *Amicus Curiae* in Support of Petitioner at 36, *Marinello v. United States*, No. 16-1144 (Apr. 21, 2017). The Supreme Court has long recognized that in "our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law," and "[i]t is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care." *See also id.* at 7 (citing United States v. Bishop, 412 U.S. 346, 360-361 (1973) (quoting Spies v. United States, 317 U.S. 492, 496 (1943).
[221] Brief of the Am. College of Tax Counsel as *Amicus Curiae* in Support of Petitioner at 36, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017) (citing Spies v. United States, 317 U.S. 492, 499 (1943)).

'willfully' is not met, therefore, if a taxpayer has relied in good faith on a prior decision of the Supreme Court.[222]

With very few exceptions for taxpayers in special circumstances, tax felonies require "willful" commission of an affirmative act.[223] The common failures to act- failure to pay tax, failure to file a tax return, failure to keep records, and failure to supply information – are all misdemeanors under 26 U.S.C. § 7203.[224] In the tax enforcement system enacted by Congress, there are only narrowly tailored exceptions to the general rule that a non-willful violation of the tax code may subject a taxpayer to various levels of civil penalties, a willful failure to act may be prosecuted as a misdemeanor, and only a willful affirmative act may be prosecuted as a felony.[225]

III. Omissions are now included in Section 7212(a)

One commenter believes that the Second Circuit's interpretation of Section 7212 eviscerates the lines that Congress has drawn.[226] By enabling omissions- misdemeanor conduct- can now be prosecuted as felonies.[227] This creates unpredictability and a lack of fair notice for taxpayers and permits prosecutors to claim the "success" of a felony resolution where the defendant's conduct most clearly violated a misdemeanor statute.[228] This approach, as Marinello explains in his brief, enables the government to charge felonies without having "to prove the more demanding

[222] United States v. Bishop, 412 U.S. 346, 361 (1973) (citing James v. United States, 366 U.S. 213, 221-222, (1961)).
[223] Brief of the Am. College of Tax Counsel as *Amicus Curiae* in Support of Petitioner at 37, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017). *See* 26 U.S.C. §§ 7201(tax evasion), 7206(1) (filing a fraudulent tax return), 7206(2)(aiding and assisting in preparation of a false tax return).
[224] Brief of the Am. College of Tax Counsel as *Amicus Curiae* in Support of Petitioner at 37, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017). *See also* Brief of the Am. College of Tax Counsel as *Amicus Curiae* in Support of Petitioner at 5, *Marinello v. United States*, No. 16-1144 (Apr. 21, 2017) (stating the Section 7203 misdemeanors, like the tax felonies, require a willfulness mens rea requirement).
[225] *See id.*
[226] Brief of New York Council of Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 10, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017).
[227] *See id.*
[228] *See id.*

elements that Congress required of other key tax felonies" and in doing so fails to read Section 7212(a) in such a way as "to harmonize rather than conflict, with supersede, or be redundant of other provisions."[229]

IV. Potential risks of increasing felony prosecution

The Second Circuit's expansive interpretation of Section 7212(a) creates a material risk of felony prosecution without fair warning.[230] Now, taxpayers and their advisors face a risk of felony prosecution at a prosecutor's whim.[231] The Second Circuit's interpretation of the omnibus clause creates an all-purpose tax felony that reaches the "entire spectrum of administration of the tax code" without requiring willfulness or an affirmative act.[232] According to a commenter, this will give prosecutorial power to erase and re-draw the lines that Congress and the courts carefully drew between lawful conduct and a tax crime, and between a misdemeanor and a felony.[233]

Reading Section 7212(a) so broadly impermissibly shifts the balance of power between "the legislature, the prosecutor, and the court in defining criminal liability."[234] As the law currently stands in the Second Circuit, now attorneys could face felony charges under Section 7212(a) if they fail to produce requested materials from the IRS.[235] The Second Circuit acknowledged the Sixth Circuit's concern that such a broad reading could expose a defendant to felony charges for "conduct which was legal (such as failing to maintain records) and occurred long before an IRS

[229] *See id.* at 11 (referring to see Petitioner's Brief 40-41) (citing Aguilar, 515 U.S. at 600; Achilli v. United States, 353 U.S. 373, 378-79 (1957)).
[230] Brief of the Am. College of Tax Counsel as *Amicus Curiae* in Support of Petitioner at 8, *Marinello v. United States*, No. 16-1144 (Apr. 21, 2017).
[231] *See id.* at 8.
[232] *See id.* at 2.
[233] *See id.*
[234] Yates v. United States, 135 S. Ct. 1074, 1088 (2015) (quoting Liparota v. United States, 471 U.S. 419, 427 (1985)).
[235] Brief of the Am. College of Tax Counsel as *Amicus Curiae* in Support of Petitioner at 10, *Marinello v. United States*, No. 16-1144 (Apr. 21, 2017).

audit, or even [before] a tax return was filed."[236] The Second Circuit held that concerns about the sweeping nature of the statute were unwarranted because the statute required a defendant to have acted "corruptly".[237] Under the current Second Circuit "corruptly" applied standard, criminality may hinge on the prosecutor's ability to show that a benefit was unlawful, rather than the mental state of the defendant at the time of the act or omission.[238]

Judge Jacobs rejected the Second Circuit's panel contention that the statute's "corrupt" mens rea requirement provided adequate protection, given that corruption could easily be charged by an aggressive prosecutor and "the line between aggressive tax avoidance and 'corrupt' obstruction can be hard to discern, especially when no IRS investigation is active."[239] At some point, prosecutors must encounter boundaries to discretion, so that no American prosecutor can say, "Show me the man and I'll find you the crime."[240] Criminal law cannot sanction "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.[241]

V. There are real threat concerns with the Second Circuit's interpretation

According to the Second Circuit, it is now a felony to "corruptly" take (or try to take) any action that may impede the "due administration" of the IRC.[242] In theory, any action that could make

[236] Brief for Petitioner at 22a, *Marinello v. United States*, No. 16-1144 (Mar. 21, 2017) (quoting United States v. Kassouf, 144 F.3d 952, 957 (6th Cir. 1998).
[237] Brief for Petitioner at 27a, *Marinello v. United States*, No. 16-1144 (Mar. 21, 2017).
[238] Brief of Action Institute and National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 23, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017) (see Julie R. O'Sullivan, *Symposium 2006: The Changing Face of White-Collar Crime: The Federal Criminal "Code" is a Disgrace: The Obstruction Statutes As Case Study*, 86 J. Crim. L. & Criminology 643, 673 (Winter 2006).
[239] United States v. Marinello, 855 F.3d 455, 457 (2d Cir. 2017).
[240] *See id.* at 459.
[241] Brief of the Chamber of Commerce of the United States of America and National Federation of Independent Business as *Amicus Curiae* in Support of Petitioner at 19, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017) (citing Kolender v. Lawson, 461 U.S. 352, 358 (1983) (*alteration in original*) (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974)).
[242] United States v. Marinello, 855 F.3d 455, 456 (2d Cir. 2017) (stating that such action may include but not limited to the following: failing to maintain corporate books and records, failing to provide accountants with complete and

the IRS's ability to assess and collect taxes more difficult – such as discarding any business document – could become the basis of a felony obstruction charge if alleged by the government that it was done in a "corruptly" manner.[243] An unlawful benefit could be paying less taxes than legally required, on the basis of having adopted an interpretation of the tax law that a Court ultimately determines was incorrect.[244] Any act that could have the effect of making it more difficult or time-consuming for the IRS to collect tax revenues or investigate and audit tax returns and determine the amount of tax dues, under the Second Circuit's view, could trigger Section 7212(a) and subject an innocent defendant to a felony charge.[245]

Section 7212(a), is the sole statute that seeks to impose criminal liability on taxpayers without expressly mandating that willfulness be shown, is an outlier in the tax enforcement system.[246] When charges are applied to the omnibus clause, some legal parameters and safeguards are essential to keeping the statute from being interpreted so broadly as to serve as a potential threat to all taxpayers.[247]

According to Marinello, the Second Circuit's decision transforms an obstruction provision into an all-purpose tax crime.[248] Tax fraud and tax evasion are already felonies.[249] Under the Second Circuit's current ruling, those crimes could be charged as obstruction cases because they [may] necessarily involve *willful* wrongful acts to reduce or eliminate a defendant's tax burden.[250] As

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accurate information related to personal and corporate tax information, destroying, shredding and discarding business records, cashing business checks for services rendered, and paying employees with cash.

[243] US Supreme Court Grants Certiorari in High-Profile Dispute about IRS Tax Obstruction Statute https://jenner.com/library/news/17186, last visited at Dec. 23, 2017.

[244] Brief of the Chamber of Commerce of the United States of America and National Federation of Independent Business as *Amicus Curiae* in Support of Petitioner at 18, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017).

[245] *See id.* at 5.

[246] *See* Keneally & Scarduzio, *supra* note 42, at 37.

[247] *See id.*

[248] Brief for Petitioner at 15, *Marinello v. United States*, No. 16-1144 (Mar. 21, 2017).

[249] *See* 26 U.S.C. §§ 7201 (tax evasion) and 7206 (tax fraud).

[250] Brief for Petitioner at 15, *Marinello v. United States*, No. 16-1144 (Mar. 21, 2017) (*emphasis added*).

stated in the CTM, the obstruction charge may be used as a supplemental charge when there is additional obstructive conduct that has impeded enforcement.[251] It is a misdemeanor offense to willfully fail to pay one's taxes.[252] Most of the substantive offenses in the IRC contain the requirement that a defendant had acted "willfully" to commit the accused crime.[253] It could be hard to imagine any willful failure to file a tax return that would not also hinder the IRS's ability to collect taxes and administer the tax code.[254] The Second Circuit's decision could transform every misdemeanor into a felony obstruction charge.[255]

The Second Circuit's interpretation also enables prosecutors to charge or threaten to charge otherwise innocent activity.[256] "The lack of any nexus requirement to a pending IRS proceeding could enable the government to bring (1) felony charges where the taxpayer's conduct would otherwise constitute a mere misdemeanor under 26 U.S.C. § 7203 [such as in Marinello's case]; (2) felony charges where there is insufficient proof to support a felony prosecution under 26 U.S.C. §§ 7201, 7206(1), or 7206(2); or (3) tax charges where all tax-related misconduct would otherwise be barred by the statute of limitations."[257]

E. After Marinello's Second Circuit Appeal

I. Cases since Marinello outside the Second Circuit

[251] CTM § 17.03; Lee A. Sheppard, *Overcharging? The Implications of Marinello*, Tax Notes (Aug. 28, 2017) at 1051.
[252] *See* 26 U.S.C. § 7203.
[253] Brief of Action Institute and National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 18, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017).
[254] Brief of Action Institute and National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 18, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017).
[255] Brief for Petitioner at 15, *Marinello v. United States*, No. 16-1144 (Mar. 21, 2017).
[256] Brief of New York Council of Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 3, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017).
[257] *See id.* at 3, 9.

In United States v. Pflum, the government asserted that the defendant committed endeavors to obstruct or impede the due administration of the Internal Revenue Laws by submitting false financial statements, "transferring assets to fictitious entities and to third parties, instructing third parties to ignore collection efforts by the IRS, and threatening legal action against third parties who compiled with the IRS's collection efforts.[258]

In United States v. Hall, the defendant tried to argue that the superseding indictment was defective because it did not allege a pending IRS proceeding.[259] The Court held that the indictment alleged that the IRS commenced an investigation and an IRS compliance officer interviewed the defendant about his tax returns. It is sufficient to allege that the defendant "kn[ew] that the IRS's interest in [him] ha[d] been piqued in a manner that is out of the ordinary."[260]

II. There are more Section 7212(a) prosecutions likely to be charged

Speaking at an ABA Tax Section Civil and Criminal Penalties Committee session in May 2017, the DOJ Tax Division strongly believes that more tax obstruction cases are forthcoming because Section 7212(a) is an integral part to self-reporting and voluntary tax compliance.[261] The DOJ's position is that "there needs to be a way to deal with and punish those who would seek unlawful benefits … from obstruction."[262] The omnibus clause of Section 7212(a) has been used more frequently in recent years by the government in charging taxpayers as an addition to the

[258] United States v. Pflum, Case No. 14-40062-01-DDC, 2017 WL 1908592 at * 7 (D. Kan. May 10, 2017).
[259] United States v. Hall, No. 16-20839, 2017 U.S. Dist. LEXIS 126361 at *9 (E.D. Mich. Aug. 9, 2017) Opinion and Order Opinion and Order Denying Motion to Dismiss Count I of the Superseding Indictment or for a Bill of Particulars.
[260] See id. at *10 (citing United States v. Miner, 774 F.3d 336, 346 (6th Cir. 2014)).
[261] Lee A. Sheppard, *Overcharging? The Implications of Marinello*, Tax Notes (Aug. 28, 2017) at 1051.
[262] *See id*.

substantive tax crimes charged.[263] The government takes the view that "tax administration is continuous, ubiquitous, and universally known to exist. People are therefore on notice that the IRS is administering the tax code, even when they are not aware of a specific, pending proceeding against them."[264] This argument has been rejected by at least one court in the Sixth Circuit.[265] In United States v. Ogbazion, applying the laws of the Sixth Circuit, the Court rejected the government's contention that a defendant did have knowledge that his conduct would obstruct an IRS proceeding because his company had "hundreds of locations, hundreds of employees, and by its nature, [was] continually subject to IRS scrutiny and review".[266]

F. Comparison of Section 7212(a) to other Criminal Tax Statutes

All of the primary tax crimes set forth in Chapter 75 of the IRC require that the defendant act with a specific mental state – that the acts giving rise to the offense be done "willfully".[267] Congress has not defined the term "willfulness" in the IRC and the Supreme Court has continuously reinterpreted and modified its definition of the term.[268] Generally, the "Supreme Court has held that the term "willfully" has the same meaning in the felony provisions of the IRC (e.g., sections 7201 and 7206) as it does in the misdemeanor provisions (e.g., sections 7203 and

[263] BNA U.S. Income Portfolios: Tax Crimes at A-6. *See also* Brief of Action Institute and National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 3, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017), (citing thirteen cases, *see* Footnote 3 stating in 2014, the omnibus clause was the debate of at least thirteen reported prosecutorial cases that did not include countless other indictments that were filed the same year.)
[264] *See* Coyle, *supra* note 5; *see also* Brief for Respondent at 9, *Marinello v. United States*, No. 16-1144 (May 22, 2017)).
[265] *See* United States v. Ogbazion, No. 15-CR-104, 2016 U.S. Dist. LEXIS 143358, at *47-50 (S.D. Ohio Oct. 17, 2016) appeal pending at United States Court of Appeals for the Sixth Circuit No. 16-4298.
[266] *See id.* The court held this kind of information was not sufficient to implicitly hold that the defendant had knowledge of a pending IRS investigation.
[267] Stanley S. Arkin, et al., *Business Crime: Criminal Liability of the Business Community*, 27.02[1] n.1, (Matthew Bender (2017) (discussing stating Sections 7201-7207. Note that subsections (3) and (4) of Section 7206 do not contain the "willfully" element. The same is true for both provisions of Section 7212.)
[268] *See id.* at 27.02[1].

7207)."[269] All of the other tax felony statutes require willfulness; however Section 7212(a) imposes no such requirement on the face of the statute.[270]

I. Section 7201

Felony tax evasion is described in Section 7201, and has been called the "capstone" of sanctions for tax delinquency.[271] Since Section 7201 is commonly referred to as the capstone of the criminal tax system, the elements of the offense often overlap with the elements of lesser offenses under the IRC.[272] The three basic elements of a prima facie Section 7201 case are: 1) the existence of a tax deficiency, 2) an affirmative act constituting an evasion or attempted evasion of the tax, and 3) willfulness.[273]

The Supreme Court has interpreted Section 7201 to require a positive attempt to evade or defeat assessment or payment of any tax.[274] An act to evade tax must be one of commission rather than omission, a mere passive neglect is insufficient to establish a violation.[275] Willfulness has been

[269]*See id.* at 27.02[1] n.2; see also BNA U.S. Income Portfolios: Tax Crimes at A-4 (stating that Section 7202 has the same willfulness element).
[270] *Cf.* 26 U.S.C. §§ 7201 and 7206 with 7212(a).
[271] Lizet Steele, *Article: Tax* 54 Am. Crim. L. Rev 1881, 1888 n. 57 (2017).
[272] *See id.* at 1899 n. 144 (citing United States v. Jenkins, 745 F. Supp. 2d 692, 694-95 (E.D. Va. 2010) (describing the relationship between Section 7201 and other tax offenses by analogizing the Internal Revenue Code to a Venn diagram).
[273] BNA U.S. Income Portfolios: Tax Crimes at A-6 n. 134; *see* 26 U.S.C. § 7201 which provides: Any person who willfully attempts in any matter to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony, and upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation) or imprisoned not more than 5 years, or both, together with the costs of prosecution.
[274] *See* Steele, *supra* note 271, at 1892 (citing Spies v. United States, 317 U.S. 492, 497-98 (1943); United States v. Carlson, 235 F.2d 466, 468-69 (9th Cir. 2000)).
[275]*See id.* at 1893 n. 89 & 90.

defined as the "voluntary, intentional violation of a known legal duty".[276] The willfulness element is essentially the same for Sections 7201, 7202, 7203, 7206, and 7207.[277]

II. Section 7203

Section 7203 is a misdemeanor offense, which is a specific intent crime.[278] Willfully failure to file an income tax return is the offense most frequently prosecuted under Section 7203.[279]

Under Section 7203, taxpayers may be prosecuted for a misdemeanor if they willfully fail to: i) pay an estimated tax, ii) pay a tax, iii) file a tax return, iv) keep legally required tax records, or v) supply required tax-related information.[280] Section 7203 does not require an affirmative act, but only a "willful omission" of a required legal duty.[281] Willfulness may be inferred from the defendant's conduct and tax filing history.[282] A violation of Section 7203 generally is a lesser included offense of the felony of attempting to evade or defeat taxes.[283]

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[276] BNA U.S. Income Portfolios: Tax Crimes at A-6 (citing United States v. Pomponio, 429 U.S. 10, 13 (1976); United States v. Kim, 884 F.2d 189, 192 (5th Cir. 1989)).

[277] *See* Steele, *supra* note 271 at 1895 (citing Cheek, 498 U.S. at 201, United States v. Pomponio, 429 U.S. 10, 12 (1976)). The government must demonstrate that the defendant acted with more than mere carelessness. To prove willfulness, the government must show that a taxpayer had a specific intent to commit the violation. A taxpayer's good-faith belief that they have no income or are not required to file a return does not have to be objectively reasonable in order to negate the willfulness element of Section 7201 and 7203. See also BNA U.S. Income Portfolios: Tax Crimes at A-1 (citing Cheek v. United States, 498 U.S. 192 (1991)) and BNA U.S. Income Portfolios: Tax Crimes at A-4.

[278] BNA U.S. Income Portfolios: Tax Crimes at A-3(citing United States v. Birkenstock, 823 F.2d 1026 (7th Cir. 1987)); *see also* 26 U.S.C. § 7203 provides that any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor….

[279] *See* Comisky et al., *supra* note 16, at 2.09[1].

[280] *See* Steele, *supra* note 271, at 1903 n. 175 (citing 26 U.S.C. § 7203).

[281] *See id.* at 1905 n. 187 (citing Sansone v. United States, 380 U.S. 343, 351 (1965)(stating that the difference between a violation of Section 7201 and violation of Section7203 is that the former requires an affirmative act to evade, while the latter requires only willful omission)).

[282] *See* Steele, *supra* note 271, at 1905 n. 188.

[283] BNA U.S. Income Portfolios: Tax Crimes at A-3 n. 42.

If there is sufficient proof to charge a defendant with a misdemeanor for failure to file under Section 7203, then the government will already have undertaken the burden of establishing that the defendant acted "willfully".[284] In such a situation, requiring the government to establish that the defendant acted "corruptly" will impose no additional mens rea burden.[285] If a defendant has not committed any tax misdemeanor, "corruptly" provides a fairly "toothless limitation" on the scope of the omnibus clause.[286]

G. Potential Violations of Section 7212(a)

Potential violations of Section 7212(a) may result from a lack of knowledge or a misunderstanding of its complexities.[287] Through the internal revenue administration system, the government interacts with "virtually the entire citizenry."[288] Every receipt collected by an individual for a charitable donation, every expense paid by a landlord for their rental property, and every bookkeeping entry made by an accountant are potentially suspect to the powerful scrutiny of the IRS.[289] Companies and [individuals] may not generally retain every document that they ever possessed regarding each possible type of documentation that the IRS could ever want.[290] A prosecutor may just need to establish whether a company had preserved all records relevant to its tax returns or taken a tax position in an area where the law is uncertain and then

[284] Brief of New York Council of Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 21, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017).
[285] Brief of New York Council of Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 21, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017) (referring to *see* Petitioner's Brief 42-43, 52-53).
[286] Brief of New York Council of Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 21, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017).
[287] *See* Keneally & Scarduzio, *supra* note 42, at 36.
[288] *See id.* at 37.
[289] *See id.* at 36.
[290] Brief of the Chamber of Commerce of the United States of America and National Federation of Independent Business as *Amicus Curiae* in Support of Petitioner at 11, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017). By failing to produce this type of document that the IRS believes could be relevant to an IRS proceeding, this could be viewed as impeding the administration of the tax laws and seen as obstruction under the Second Circuit's view.

charge them with a felony under 7212(a).[291] The Supreme Court should consider construing the omnibus clause of Section 7212(a) narrowly to avoid the potential full sweeping effect of the Second Circuit's broad interpretation of the statute.[292]

H. Potential Overreach of Prosecutorial Discretion

Unfairness can result when Section 7212(a) is used to pile onto weak or deficient cases against defendants charged with crimes involving third parties' tax returns.[293] The government in the Second Circuit has recently aggressively pursued criminal charges relating to tax shelters designed and promoted by some of the country's largest and most prestigious law and accounting firms – only to have many of those cases reversed on appeal or dismissed by the district court.[294] In a multi-defendant case involve tax shelters marketed by one of the leading law firms in the country, the government charged two defendants with having violated Section 7212(a) even though neither was in any way involved with IRS audits relating to the tax shelters.[295] The potential for prosecutorial abuse from an overbroad reading of the omnibus clause of Section

[291] *See id.* at 23.
[292] James R. Malone, Jr., Almost anyone can be a felon: The Troubling Scope of Tax Obstruction, Part II http://www.postschell.com/publications/1405-almost-anyone-can-be-felon-troubling-scope-tax-obstruction-part-ii (Aug. 16, 2017) (describing two potential options on dealing with the omnibus clause).
[293] Brief of New York Council of Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 16, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017).
[294] Brief of New York Council of Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 16, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017). *See, e.g.*, United States v. Coplan, 703 F.3d 46 (2d Cir. 2012); United States v. Stein, 541 F.3d 130 (2d Cir. 2008).
[295] Brief of New York Council of Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 16-17, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017)(citing United States v. Parse, 09-cr-581 (S.D.N.Y.); United States v. Field, 09-cr-581 (S.D.N.Y)). The defendants included a broker who executed securities transactions for tax shelter clients at the direction of the lawyers who designed the tax shelters and an accounting firm CEO who was uninvolved in the firm's work for the tax shelter clients. Ultimately, both defendants were vindicated; however, the irreparable reputation damage was already done.

7212(a) can extend expose to charge financial professionals with felony tax prosecutions even if they engage in no obstructive conduct and they are otherwise innocent of any tax crimes.[296]

I. Rule of Lenity

In United States v. Kahre, the defendant was convicted of violating Section 7212(a) by concealing and attempting to conceal from the IRS, the nature and extent of his assets, and the location by placing funds and property in the name of nominee family members.[297] The defendant attempted to assert the rule of lenity, stating that the third superseding criminal indictment did not "rest on a clear rule of law" and must be dismissed.[298] The Court held that the Section 7212(a) was not ambiguous; it defines behavior in clear language that provides a defendant with notice of what conduct Congress intended to punish.[299] The rule of lenity is applicable only where "there is a grievous ambiguity or uncertainty in the language and the structure of [an] Act, such that even after a court has seize[d] everything from which aid can be derived, it is still left with an ambiguous statute."[300] Marinello argues to the extent that the Supreme Court finds Section 7212(a) to be ambiguous, that "ambiguity … should be resolved in favor of lenity."[301] The government argues that the statute is not ambiguous; therefore the rule of lenity should not be applied.[302]

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[296] Brief of New York Council of Defense Lawyers as *Amicus Curiae* in Support of Petitioner at 17, *Marinello v. United States*, No. 16-1144 (Sept. 8, 2017).
[297] United States v. Kahre, 2009 U.S. Dist. LEXIS 39473 at *3.
[298] *See id.* at 3.
[299] *See id.* at 9.
[300] *See id.* at 7 (quoting United States v. Bendtzen, 542 F.3d 722, 728-29 (9th Cir. 2008) (*internal quotations omitted*); *see also* Brief for Respondent at 37, *Marinello v. United States*, No. 16-1144 (Oct. 23, 2017), (quoting Ocasio v. United States, 136 S. Ct. 1423, 1434 n.8 (2016) (quoting Muscarello v. United States, 524 U.S. 125, 138-39, (1998)).
[301] Brief for Petitioner at 57, *Marinello v. United States*, No. 16-1144 (Sept. 1, 2017) (citing Cleveland v. United States, 531 U.S. 12, 25 (2000) (*internal citations omitted*).
[302] Brief for Respondent at 37, *Marinello v. United States*, No. 16-1144 (Oct. 23, 2017). The government believes that the petitioner's reading of Section 7212(a) is inconsistent with the ordinary meaning of the statutory text, and nothing in the statute's structure or history overcomes that meaning.

Part III: The Possible Effects After Marinello

However Marinello is ultimately decided, there is currently no national standard of uniform applicability defining the necessary elements of the omnibus clause under Section 7212(a).[303] The Sixth Circuit's position of the omnibus clause of Section 7212(a) is currently in the minority.[304] The decisions of five other courts of appeals have rejected the rule adopted by the Sixth Circuit.[305] The government acknowledges the vast split among the circuits and asks the Supreme Court to "reject the Sixth Circuit's determination" because it "conflicts with three other circuits which have issued decisions which are more consistent with the statutory language."[306] A majority of the circuits that have not expressly considered the Kassouf question have nevertheless affirmed convictions under the omnibus clause without any indication that the defendants acted in response to a pending IRS investigation, or other proceeding.[307]

A. Taking the Sixth Circuit Approach

If the Supreme Court holds that the omnibus clause of Section 7212(a) requires knowledge of a pending IRS investigation or proceeding, the court would be considering the Sixth Circuit's approach as discussed in Kassouf.[308] This interpretation of the statute would greatly reduce the

[303] Brief of the Am. College of Tax Counsel as *Amicus Curiae* in Support of Petitioner at 14, *Marinello v. United States*, No. 16-1144 (Apr. 21, 2017). Taxpayers in the United States should not be segmented into classes subject to heightened penalties because of where they live or operate and do business.
[304] See *supra* note 78.
[305] *See id.*
[306] *See* Brief for Respondent at 9 *Marinello v. United States*, No. 16-1144 (Oct. 23, 2017) (quoting Brief for Petitioner at 28, *Marinello v. United States*, No. 16-1144 (Mar. 21, 2017)). The government further argues that the Supreme Court has repeatedly denied other petitions raising the same issue as addressed in Kassouf. *See also* Brief for Respondent at 7 n.2, *Marinello v. United States*, No. 16-1144 (May 22, 2017). *See* Sorensen v. United States, 136 S. Ct. 1163 (2016) (No. 15-595); Crim v. United States, 132 S. Ct. 2682 (2012) (No. 11-8948); Wood v. United States, 562 U.S. 1225 (2011) (No. 10-7419); Massey v. United States, 547 U.S. 1132 (2006) (No. 05-8633).
[307] *See* Brief for Respondent at 15 n.6, *Marinello v. United States*, No. 16-1144 (May 22, 2017). *See* Crim, 451 F. Appx. at 200; United States v. Phipps, 595 F.3d 243, 244-245, 247 (5th Cir.), *cert. denied*, 560 U.S. 935 (2010); United States v. Mitchell, 985 F.2d 1275, 1276-1279 (4th Cir. 1993); Popkin, 943 F.2d at 1536-1537; United States v. Williams, 644 F.2d 696, 701 (8th Cir.), *cert. denied*, 454 U.S. 841 (1981).
[308] *See supra* note 84.

possibility of prosecutorial overreach and could potentially result in less innocent and legal taxpayer's activity being prosecuted as a felony. Specifically limiting Section 7212(a) to interference with a known IRS investigation or proceeding appropriately reserves the felony charge for the more serious misconduct and prevents Section 7212(a) from "swallowing up" the misdemeanor provisions of Section 7203.[309]

The government is concerned if Marinello's interpretation of the omnibus clause of Section 7212(a) is upheld, most obstruction prosecutions under Section 7212(a) would be effectively foreclosed.[310] The government contends if Section 7212(a) requires proof of a known pending IRS investigation or other proceeding, a taxpayer's successful efforts to thwart computation of their income and tax liability could only be prosecuted as a misdemeanor under Section 7203.[311] If a taxpayer's destruction of documents results in an inability to determine the taxpayer's gross income and resulting obligation to file a tax return, a taxpayer could potentially go completely unprosecuted [because the requirements for prosecution under Section 7201 have not been met].[312] The government suggests that they were prevented from charging Marinello with tax evasion because they could not prove the "specific tax deficiency" that Marinello owned.[313]

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[309] Brief for Petitioner at 45, *Marinello v. United States*, No. 16-1144 (Sept. 1, 2017).
[310] Brief for Respondent at 11, *Marinello v. United States*, No. 16-1144 (Oct. 23, 2017). The government further believes that this effectively would reward activities, such as Marinello's, who thoroughly obstructed the calculation, assessment, and collection phases of tax administration that other crimes cannot later be proved
[311] Brief for Respondent at 25, *Marinello v. United States*, No. 16-1144 (Oct. 23, 2017).
[312] Brief for Respondent at 18, 25, *Marinello v. United States*, No. 16-1144 (Oct. 23, 2017). Many obstructive endeavors such as concealing income and structuring of corporate affairs to avoid complying with legal duties – would likely be successful only if they occurred before the start of an administrative process that commences once the taxpayer has reported their income.
[313] However, a "specific tax deficiency" is not a required element of evasion under Section 7201. *See* Reply Brief for Petitioner at 13, *Marinello v. United States*, No. 16-1144 (Nov. 22, 2017). (referring to CTM, Government Proposed Jury Inst. No, 26.7201-14 which states "the proof need not show, however, the precise amount or all of the additional tax due as alleged. The government is only required to establish, beyond a reasonable doubt, that the defendant attempted to evade a substantial income" (citing that a tax deficiency does not need to be substantial in the Ninth Circuit). *See* United States v. Marashi, 913 F.2d 724, 735 (9th Cir. 1990); Manual of Model Jury Instructions for the Ninth Circuit (2005 Ed.), Section 9.35 Cmt. CTM, Government Proposed Jury Inst. No 26.7201-14 is available at https://www.justice.gov/sites/default/files/tax/legacy/2013/02/26/CTM%20JI%20-%20Title%2026.pdf, last visited at Dec. 22, 2017. *See also supra* note 273 for a discussion of the Section 7201 elements.

However, the government has ample resources available to prosecute individuals who take evasive action, make false statements, or engage in other misconduct prior to an IRS enforcement proceeding.[314]

The government argues that if a taxpayer must know that they are under current IRS examination, even if a defendant who is aware of a forthcoming audit or investigation, and who actually obstructs that action with the requisite mens rea, that individual has not violated the statute according to the Sixth Circuit's decision in Ogbazion.[315] However, in Ogbazion, the indictment focused on alleged preparatory conduct in anticipation of a possible, routine compliance IRS audit.[316] The government fails to recognize that in Obgazion the conduct was related to a mere anticipation of a routine compliance audit.[317]

However, if Marinello was somehow aware of the 2004 IRS investigation for tax evasion on the basis of an anonymous tip, he would then have been placed on alert of a pending IRS investigation or proceeding.[318] During the IRS's 2009 investigation, Marinello admitted to failing to file tax returns, using business income to pay for personal expenses, and destroying

[314] Reply Brief for Petitioner at 12, *Marinello v. United States*, No. 16-1144 (Nov. 22, 2017). Corrupt conduct that does not meet the required elements of Section 7212(a) would still be able to be prosecuted under the other criminal tax statutes if the required elements are met.
[315] Brief for Respondent at 27, *Marinello v. United States*, No. 16-1144 (Oct. 23, 2017).
[316] United States v. Ogbazion, No. 15-CR-104, 2016 U.S. Dist. LEXIS 143358, at *47-50 (S.D. Ohio Oct. 17, 2016) appeal pending at United States Court of Appeals for the Sixth Circuit No. 16-4298.
[317] *See id.* at 18-19. The government must prove that the defendant's action was linked to a specific inquiry by the IRS and it must be out of the ordinary, is critical to the elements of the Section 7212(a) offense. A defendant's general awareness that the IRS conducts periodic compliance audits does not meet the requirement that he must be aware of a pending IRS action. However if the defendant in Ogbazion had performed impeding conduct that was linked to a non-routine ordinary IRS audit, any attempt to corruptly impede the IRS's inquires after that point could become potentially criminal.
[318] If Marinello prior to participating in his alleged conduct, known that the IRS was investigating him, he could be prosecuted under Section 7212(a) under Kassouf. *See* Reply Brief for Petitioner at 7, *Marinello v. United States*, No. 16-1144 (Nov. 22, 2017) (describing circumstances where a taxpayer does have knowledge that his actions will affect the administration of the tax laws when the government has given notice of an audit, issued a summons, or initiated some other enforcement proceeding).

bank statements and records.[319] There could be many instances in which failing to maintain documents could amount to obstruction charge under Section 7212(a), such as when an individual does not maintain such documents after receiving a summons or an audit notification from the IRS.[320] The triggering point for the obstruction change would be knowledge that the commencement or anticipating commencement of an IRS proceeding or investigation.

B. Taking an "non-Kassouf" Approach

If the Supreme Court holds that the omnibus clause of Section 7212(a) does not require knowledge of an IRS investigation or proceeding, the Court would be utilizing the approach that several circuits, by not adopting the Sixth Circuit's Kassouf analysis.[321]

If knowledge of a pending IRS investigation or proceeding is not required, there must be sufficient safeguards in place to prevent prosecutorial overreach to prevent innocent taxpayers from being charged with a felony obstruction charge under Section 7212(a). Anyone who has incomplete records could potentially become subject to felony charges under Section 7212(a) if the government can prove that it was done in a corrupt manner.[322]

Generally, most tax felonies require willful commission of an affirmative act.[323] The government argues that a taxpayer must have acted "corruptly" in order to be prosecuted under Section 7212(a), which is defined more specific and demanding than the meaning of that term compared

[319] Brief for Petitioner at 5a, *Marinello v. United States*, No. 16-1144 (Mar. 21, 2017).
[320] Brief for Petitioner at 45, *Marinello v. United States*, No. 16-1144 (Sept. 1, 2017).
[321] *See supra* note 78.
[322] *See supra* note 242.
[323] *See supra* note 277. *See also supra* note 270 (noting that Section 7212(a) does not contain such a requirement).

to other general obstruction statutes.[324] As Judge Jacobs has pointed out in Marinello's en banc dissent, corrupt actions are easy to allege.[325]

One acceptable safeguard that the Court could adopt is to limit Section 7212(a) by requiring an affirmative act to support an obstruction felony conviction, not including omissions.[326].[327] Allowing for omissions conduct without the need for knowledge of a pending IRS investigation creates an "all-encompassing" view in which *any* act or omission that somehow, someday makes it harder for the IRS to administer the tax laws can form the basis of a Section 7212(a) felony charge, if a prosecutor later believes the act or omission was undertaken with "corrupt" intent.[328]

The statute without the omission conduct can still appropriately capture the type of conduct that the statute was intended to capture. The statute would then resemble the felony statute, Section 7201 which requires an affirmative act.[329] However, since there is no willfulness requirement, omissions could still be charged under Section 7203 if the other statutory elements are met.[330]

Conclusion

The Marinello Supreme Court decision will be a game changer in Section 7212(a) omnibus clause prosecutions. This is an extremely prevalent topic in the criminal tax community and the impact on all taxpayers worldwide. There is no uniformity among the circuits and the Supreme Court's decision will establish the essential requirements for Section 7212(a) felony convictions.

[324] Brief for Respondent at 19, *Marinello v. United States*, No. 16-1144 (Oct. 23, 2017).
[325] Brief for Petitioner at 45a, *Marinello v. United States*, No. 16-1144 (Mar. 21, 2017).
[326] *See supra* note 292 (discussing one potential option which limits the scope of the omnibus clause by requiring an affirmative act to support a conviction). *See supra* note 163. This safeguard would limit the Second Circuit's interpretation of Marinello, which allows for omissions to be prosecuted under Section 7212(a).
[327] *See supra* note 163.
[328] Reply Brief for Petitioner at 4, *Marinello v. United States*, No. 16-1144 (Jun. 10, 2017).
[329] *See supra* note 275.
[330] *See supra* note 280.