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In 2001, Enron Corporation[1] was ranked the sixth-largest energy company in the world.[2] With the help of its accounting firm, Arthur Andersen LLP, Enron "boosted profits and hid debts totaling over $1 billion."[3] At its peak in mid-2000, its shares were worth ninety dollars, and by late 2001 they had fallen well below one dollar.[4] In response to this precipitous fall, Congress passed the Sarbanes-Oxley Act (SOX) of 2002.[5] Concerned that the "current federal obstruction of justice statutes [were] riddled with loopholes and burdensome proof requirements,"[6] Congress amended and codified a provision of SOX at 18 U.S.C. § 1512[7] as part of an effort "to provide for criminal prosecution of persons who alter or destroy evidence in certain Federal investigations."[8] However, a recent decision by the U.S. Court of Appeals for the Ninth Circuit undermined such congressional intent by narrowing what constitutes an "official proceeding" under § 1512.[9] The court's ruling has the potential to open a floodgate of criminal activity and have debilitating effects on the criminal justice system.

In *United States v. Ermoian*, the Ninth Circuit held that an investigation led by the FBI did not fall within the definition of an "official proceeding."[10] The *Ermoian* court concluded that when the defendants alerted members of a gang to an FBI criminal investigation, they were not obstructing an official proceeding.[11]

This case comment contends that the court erred in its plain meaning analysis because it failed to give weight to legislative intent despite that the plain meaning of "official proceeding" in § 1512 is ambiguous, evidenced by the court's admission and the circuit split on the issue. The court should have heeded persuasive arguments from other circuits and consulted the legislative history of the statute to effect Congress's intent to assign a broad definition to the term "proceeding" that would encompass a criminal investigation. Further, the court did not consider that a lack of

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1. Enron was formed by a merger between Houston Natural Gas and InterNorth in 1985. Paul M. Healy & Krishna G. Palepu, *The Fall of Enron*, J. Econ. Persp., Spring 2003, at 3, 4–7. "By 1992, Enron was the largest merchant of natural gas in North America." *Id.* at 6–7.

2. *Enron Fast Facts*, CNN (Apr. 17, 2016, 5:06 PM), http://www.cnn.com/2013/07/02/us/enron-fast-facts.

3. Penelope Patsuris, *The Corporate Scandal Sheet*, Forbes (Aug. 26, 2002, 5:30 PM), http://www.forbes.com/2002/07/25/accountingtracker.html. In addition, Enron "manipulated the Texas power [and] manipulated [the] California energy market." *Id.*

4. Richard A. Oppel Jr. & Andrew Ross Sorkin, *Enron's Collapse: The Overview; Enron Collapses as Suitor Cancels Plans for Merger*, N.Y. Times (Nov. 29, 2001), http://www.nytimes.com/2001/11/29/business/enron-s-collapse-the-overview-enron-collapses-as-suitor-cancels-plans-for-merger.html.

5. Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of the U.S.C.).

6. S. Rep. No. 107-146, at 6 (2002).

7. 18 U.S.C. § 1512 (2012).

8. S. Rep. No. 107-146, at 1.

9. *See* United States v. Ermoian, 752 F.3d 1165, 1172 (9th Cir. 2013).

10. *Id.*

11. *Id.*

consequences for those intentionally obstructing agency investigations would potentially lead to increased criminal activity.

The *Ermoian* case arose as a result of a 2006 investigation by the Central Valley Gang Impact Task Force (CVGIT), a group funded by the Department of Justice and tasked with eliminating gang-related crimes in California's Central Valley region.[12] The CVGIT learned that the Hells Angels, a motorcycle club infamous for drug-related crime,[13] sought to establish a chapter in Modesto, California.[14] To stop the formation of this new chapter, the CVGIT started investigating known associates of the gang.[15] This entailed surveillance on the Road Dog Cycle (RDC) shop, a motorcycle shop that was owned by known associates of Hells Angels, and an inquiry into an alleged law enforcement information leak.[16] To determine the source of the leak, the CVGIT set up a false bulletin and distributed it to local law enforcement.[17] The bulletin stated that the CVGIT intended to conduct surveillance of a party that the RDC was hosting.[18] The CVGIT then proceeded to place wiretaps in the RDC in hopes of catching the culprits who were leaking information.[19] After the bulletin was circulated, a deputy sheriff informed defendant Gary Ermoian, a part-time private investigator employed by the RDC's attorney, of the bulletin so Ermoian could warn the RDC of the possible surveillance.[20] Ermoian then called the owners of the RDC to share the tip.[21] That same day, defendant Stephen Johnson, an acquaintance of Ermoian and the RDC's attorney, alerted the RDC to a pending law enforcement raid.[22] Believing that the raid was imminent, the defendants warned the local chapter that they were in "jeopardy" of a law enforcement crackdown and advised them to perform a preventive search to dispose of any drugs or contraband.[23] However, it was not until June 2008, almost two years later, that Ermoian and Johnson were arrested and charged with conspiracy to obstruct justice.[24]

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12. *Id.* at 1166.

13. *See, e.g.*, Holly Yan, *From Motorcycle Clubs to Organized Crime: Notorious Biker Gangs*, CNN (May 18, 2015, 8:53 PM), http://www.cnn.com/2015/05/18/us/dangerous-biker-gangs (calling the Hells Angels an "organized criminal enterprise[]").

14. *Ermoian*, 752 F.3d at 1166.

15. *Id.*

16. *Id.* at 1166–67.

17. *Id.*

18. *Id.* at 1167.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* Johnson owned and operated a business that subcontracted with law enforcement to perform canine searches. *Id.* He was hired on a few occasions to perform preventive canine searches on the RDC. *Id.*

23. *Id.* at 1168.

24. *Id.*

On May 28, 2009, a federal grand jury returned an indictment charging twelve defendants with racketeering and other related offenses.[25] Count seventeen charged Ermoian and Johnson with "knowingly and intentionally . . . conspir[ing] . . . with other persons . . . to obstruct, influence and impede an official proceeding, to wit, a law enforcement investigation conducted by the [FBI], in violation of sections 1512(c)(2) and (k)."[26]

On April 13, 2009, Ermoian filed a motion to dismiss arguing that § 1512(c)(2), which criminalizes spreading confidential information, "must be narrowly construed to those involved with witness tampering, the destruction of evidence, or who violate a known legal duty so as not to criminalize actions protected under the First Amendment or other lawful conduct."[27] The U.S. District Court for the Eastern District of California denied the motion.[28]

At trial, Ermoian and Johnson were found guilty of conspiracy to obstruct justice.[29] Shortly after, they filed a notice of appeal maintaining that an FBI investigation does not qualify as an "official proceeding."[30] The Ninth Circuit reversed and remanded the district court's ruling, holding that a criminal investigation does not constitute an "official proceeding" under § 1512(c)(2).[31]

The wide berth of the term "official proceeding" within § 1512 is an issue that has been addressed by several circuit courts. The result is a circuit split regarding whether the legislature intended that a narrow, technical definition of the term be used, or a nontechnical definition that would encompass a broader range of activities beyond legal proceedings before a court or agency.[32] Section 1512(c)(2) states that "[w]hoever corruptly . . . obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both."[33] The D.C. and Second Circuits held that "official proceeding" should be interpreted to encompass a criminal investigation to give effect to Congress's intent in passing the statute, and thus refused to assign a narrow definition

25. *Id.*

26. Superseding Indictment ¶ 78, United States v. Holloway, No. 1:08CR224 OWW (E.D. Cal. Nov. 20, 2009), *rev'd sub nom. Ermoian*, 752 F.3d 1165.

27. Defendant Gary L. Ermoian's Memorandum in Support of Motion to Dismiss Count 17 of the Superseding Indictment at 2, United States v. Ermoian, 752 F.3d 1165 (9th Cir. 2013) (No. CR-F 08-224 OWW).

28. *Ermoian*, 752 F.3d at 1168.

29. *Id.* "Ermoian was sentenced to 6 months at a residential community correction center" while "Johnson was sentenced to 21 months imprisonment." Answering Brief of the United States at 5, United States v. Ermoian, 752 F.3d 1165 (9th Cir. 2013) (Nos. 11-10124, 11-10388).

30. *Ermoian*, 752 F.3d at 1168.

31. *Id.* at 1172–73.

32. *See infra* notes 34–35 and accompanying text.

33. 18 U.S.C. § 1512(c)(2) (2012).

to the term "proceeding."[34] The Fifth Circuit ruled that § 1512(c)(2) did not apply to the Border Patrol's internal investigation of alleged employee misconduct in failing to adhere to established Border Patrol firearm policies.[35] The *Ermoian* court, in a case of first impression for the Ninth Circuit,[36] found that a narrow interpretation of "official proceeding" should be used, favoring the reasoning used by the Fifth Circuit over that used by the D.C. and Second Circuits.[37]

The *Ermoian* court concluded that "in light of the plain meaning of the term 'proceeding,' its use in the grammatical context of the 'official proceeding' definition, and the broader statutory context, . . . a criminal investigation is not an 'official proceeding' under the obstruction of justice statute."[38]

The *Ermoian* court in its textual analysis initially noted that the term "official proceeding," while not defined in § 1512—the provision under which Ermoian and Johnson were convicted—is defined in another provision within Title 18 of SOX: § 1515(a)(1).[39] Section 1515(a)(1)(C) defines an "official proceeding" to include "a proceeding before a Federal Government agency."[40] The *Ermoian* court found that this is the only provision in § 1515(a)(1) that might cover an FBI investigation, and then focused on the meaning of the term "proceeding" as used in § 1512 to discern the meaning of "official proceeding" under the provision.[41]

The *Ermoian* court consulted dictionary definitions of the word "proceeding," reasoning that "proceeding" was used "somewhat circularly" in the § 1515 definition of "official proceeding."[42] It noted that *Black's Law Dictionary* defines proceeding as

34. *See* United States v. Kelley, 36 F.3d 1118, 1128 (D.C. Cir. 1994); United States v. Gonzalez, 922 F.2d 1044, 1055–56 (2d Cir. 1991).

35. United States v. Ramos, 537 F.3d 439, 462–64 (5th Cir. 2008).

36. *Ermoian*, 752 F.3d at 1165, 1168.

37. *Id.* at 1171 n.5.

38. *Id.* at 1172.

39. Section 1515(a)(1) states the following:

> As used in [18 U.S.C. §§] 1512 and 1513 . . . the term "official proceeding" means—
> (A) a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury;
> (B) a proceeding before the Congress;
> (C) a proceeding before a Federal Government agency which is authorized by law; or
> (D) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce[.]

18 U.S.C. § 1515(a)(1) (2012).

40. *Id.* § 1515(a)(1)(C).

41. *Ermoian*, 752 F.3d at 1169–70.

42. *Id.*

> (1) "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment;" (2) "[a]ny procedural means for seeking redress from a tribunal or agency;" and (3) "[t]he business conducted by a court or other official body; a hearing" or more broadly as "an act or step that is part of a larger action."[43]

The *Ermoian* court also consulted the *Oxford English Dictionary*, which defines "proceeding" as a "legal action or process; any act done by authority of a court of law; a step taken by either party in a legal case."[44] The court stated that, "the descriptor 'official' indicates a sense of formality normally associated with legal proceedings," which it considered further justification to assign a narrow definition to "proceeding."[45] The *Oxford English Dictionary* also defines "proceeding" more broadly as "[a] particular action or course of action,"[46] which would encompass investigations.

The *Ermoian* court noted the broad definitions in *Black's Law Dictionary* and in the *Oxford English Dictionary*, but favored the narrower definitions.[47] The court then consulted the text surrounding "proceeding," stating that "[w]hen a term has both a general and a more technical meaning, we must look to surrounding words and phrases to decide which of the two meanings is being used."[48] For example, the court looked at the term "before," which precedes "a Federal Government agency," as evidence that an "official proceeding" involved an appearance before a tribunal, rather than an informal investigation.[49]

The *Ermoian* court agreed with the reasoning of the Fifth Circuit in *United States v. Ramos*, which stated, "an 'official proceeding' involves some formal convocation of the agency in which parties are directed to appear."[50] The court concluded that the term "proceeding" had a narrow definition in the statute, which does not include a criminal investigation, and did not consult the statute's legislative history.[51]

In reversing the district court's ruling that an FBI criminal investigation does not constitute an "official proceeding," the *Ermoian* court was guided by a flawed analysis. The court incorrectly interpreted the plain meaning of the term by assigning it an unduly narrow definition that did not comply with legislative intent. The court should have considered legislative history and persuasive arguments from other circuits in its analysis to accurately determine congressional intent because the term

43. *Id.* at 1169 (quoting *Proceeding*, Black's Law Dictionary (8th ed. 2004)).

44. *Id.* (quoting *Proceeding*, OED, http://www.oed.com/view/Entry/151779 (last visited Apr. 6, 2017)).

45. *Id.* at 1170.

46. *Proceeding*, *supra* note 44.

47. *Ermoian*, 752 F.3d at 1169–70.

48. *Id.* at 1170. The court stated that "proceeding" by its narrow definition is a legal or technical term. *Id.*

49. *Id.* at 1170–71.

50. 537 F.3d 439, 462–64 (5th Cir. 2008) (finding that an internal investigation by Border Patrol agents of alleged employee misconduct in failure to adhere to the employer-established firearm policies did not constitute an "official proceeding" within § 1512(c)).

51. *Ermoian*, 752 F.3d at 1172 n.6.

is ambiguous, but it neglected to do so. The court further erred because it did not consider that a lack of consequences for those intentionally obstructing agency investigations would potentially lead to increased criminal activity.

The *Ermoian* court erred because it incorrectly interpreted the plain meaning of "official proceeding." The U.S. Supreme Court has long instructed that in examining a statute, the starting point is the plain meaning of the statute's text.[52] The *Ermoian* court noted that several definitions exist for the term "proceeding," some broad that would include a criminal investigation and some narrow that would not.[53] But it favored of a narrow definition that would exclude an investigation, on the bases of the dictionary definitions of "proceeding" and surrounding words such as the modifier "official," as well as "judge," "court," and "Congress," for example, that it believed indicated the legislature's intent to define "proceeding" narrowly in accordance with legal usage, which the court held would encompass legal actions that occur before a tribunal but not investigations that occur in the field.[54]

While *Ermoian*'s discussion about the dictionary definitions of "proceeding" was thorough, its conclusion to assign the narrow definition was ultimately incorrect because it failed to consider relevant legislative history. It is well settled in the U.S. Supreme Court that statutory language only governs when "the language is plain and admits of no more than one meaning."[55] When the text is ambiguous however, the court should consult external sources, such as legislative history, to discern the appropriate meaning of a term.[56] Other circuits have recognized that the broader definition of "official proceeding" complies with and gives effect to the legislature's intent to protect evidence in federal investigations. Therefore, the court should have followed those circuits instead of the Fifth Circuit.

The court admitted that there are two definitions of "official proceeding," and the circuit split on its plain meaning further demonstrates that the term is ambiguous. The view that a "proceeding" should not be limited to a narrow definition that excludes all criminal investigations finds support in other circuits. The Tenth Circuit in *United States v. Browning, Inc.* stated:

> [T]he term "proceeding" is not, as one might be inclined to believe, limited to something in the nature of a trial. The growth and expansion of agency activities have resulted in a meaning being given to 'proceeding' which is much more inclusive and which no longer limits itself to formal activities in a court of law.[57]

52. *See* Lawson v. FMR LLC, 134 S. Ct. 1158, 1165 (2014) ("In determining the meaning of a statutory provision, 'we look first to its language, giving the words their ordinary meaning.'" (quoting Moskal v. United States, 498 U.S. 103, 108 (1990))).

53. *Ermoian*, 752 F.3d at 1169–70.

54. *Id.* at 1169–71.

55. Caminetti v. United States, 242 U.S. 470, 485 (1917).

56. Donald G. Gifford et al., *A Case Study in the Superiority of the Purposive Approach to Statutory Interpretation:* Bruesewitz v. Wyeth, 64 S.C. L. Rev. 221, 228 (2012).

57. 572 F.2d 720, 724 (10th Cir. 1978).

The court further stated that an investigation of facts should not be "ruled as a non-proceeding simply because it is preliminary to an indictment and trial."[58] In *Rice v. United States*, the Eighth Circuit stated that the word "'[p]roceeding' is a comprehensive term meaning the action of proceeding—a particular step or series of steps, adopted for accomplishing something."[59] The Eighth Circuit further elaborated, "[p]roceedings before a governmental department or agency simply mean proceeding in the manner and form prescribed for conducting business before the department or agency, including all steps and stages in such an action from its inception to its conclusion."[60]

The *Ermoian* court should have consulted legislative history to comply with and give effect to Congress's intent. Legislative history serves as a guide to aid judges in "understand[ing] the meaning of the words that . . . make up the statute."[61] Courts should examine the purpose of the legislature when the words in a statute are ambiguous.[62]

The legislative history of § 1512 confirms that Congress intended for the term "official proceeding" to be applied broadly.[63] The term was used in the Victim and Witness Protection Act (VWPA) of 1982.[64] In enacting VWPA, Congress wanted stronger protection for witnesses of federal crimes and therefore sought an expansive meaning of the term "official proceeding."[65] Congress recognized that "[i]ntimidation offenses are particularly insidious and do violence to traditional notions of justice because no one can be convicted of a crime which is not reported. [The VWPA] specifically reaches intimidation offenses committed before a crime is reported to the appropriate authorities."[66] Before the insertion of § 1512(c)(2), it seems that Congress intended for the statute to reach illicit behavior committed before a report had even been made, let alone an official trial had begun.

Section 1512(c) became effective on July 30, 2002, as part of SOX.[67] Congress's intent was to improve the reliability of corporate disclosures by penalizing those who obstructed justice by impairing the availability of documents.[68] The purpose section

58. *Id.*

59. 356 F.2d 709, 712 (8th Cir. 1966).

60. *Id.*

61. Matthew J. Hertko, Note, *Statutory Interpretation in Illinois: Abandoning the Plain Meaning Rule for an Extratextual Approach*, 2005 U. Ill. L. Rev. 377, 391 (citing Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 863 (1992)).

62. *Id.*

63. S. Rep. No. 97-532, at 17–18, 22 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2515, 2523–24, 2530.

64. Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified as amended at 18 U.S.C. §§ 1512–1515, 3579–3580 (2012), and Fed. R. Crim. P. 32(c)(2)).

65. *Id.* § 2(a)–(b), 96 Stat. at 1248–49.

66. S. Rep. No. 97-532, at 19.

67. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 1102, 116 Stat. 745, 807 (codified as amended at 18 U.S.C. 1512(c)).

68. *See id.*; *see also id.* § 101(a), 116 Stat. at 750.

states that SOX was intended "to provide for criminal prosecution and enhanced penalties of persons who defraud investors in publicly traded securities or alter or destroy evidence in certain Federal investigations."[69] Because Congress enacted the statute with the broad purpose of protecting evidence in federal investigations, an investigation by the FBI should be included within § 1512, which criminalizes conduct that would negatively affect evidence of the kind the legislature contemplated in enacting SOX.[70]

Section 1512(c)(1) criminalizes an individual's conduct if that person "corruptly . . . alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding,"[71] while § 1512(c)(2) accounts for unenumerated conduct—"otherwise obstructs, influences, or impedes any official proceeding, or attempts to so"—that violates the section.[72] This is further evidence that Congress intended for § 1512(c)(2) to have a broad application and encompass criminal conduct not specifically listed in § 1512(c)(1).

Further, the legislative history of SOX states that the collapse of Enron was what prompted Congress to impose stricter regulations.[73] "Enron apparently, with the approval or advice of its accountants, . . . overstate[d] corporate profits, understate[d] corporate debts and inflate[d] [its] stock price."[74] In 2001, Enron announced a $618 million loss for the third quarter alone.[75] While this was occurring, Arthur Andersen LLP employees were shredding documents "in anticipation of a SEC subpoena."[76] As a result of this activity, Congress became concerned with the federal obstruction of justice statutes that were in place.[77] More specifically, Congress focused on how § 1503[78] had been "narrowly interpreted by courts . . . to apply only to situations when the obstruction of justice may be closely tied to a judicial proceeding."[79] Additionally,

69. S. Rep. No. 107-146, at 2 (2002).

70. *See id.*

71. 18 U.S.C. § 1512(c)(1).

72. *Id.* § 1512(c)(2).

73. S. Rep. No. 107-146, at 2.

74. *Id.*

75. *Id.* at 3.

76. *Id.* at 4.

77. *Id.* at 5–7.

78. Section 1503 applies to whoever "corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede . . . the due administration of justice." 18 U.S.C. § 1503(a) (2012).

79. S. Rep. No. 107-146, at 6–7.

it noted how § 1517[80] and § 1518[81] only applied to "limited types of cases, such as bankruptcy fraud, examinations of financial institutions, and healthcare fraud."[82] Congress referenced specific courts that had applied other sections of Title 18 and characterized their applications as narrow, which likely exhibits its intent not to limit the definition of "official proceeding." Congress's discussion of these SOX provisions suggests that it intended the definition of "official proceeding" to be applied generally and not to be limited to judicial proceedings.[83] Thus, including criminal investigations within "official proceeding" is in line with the purpose of SOX.

The *Ermoian* court should have followed the D.C. and Second Circuit's analyses, favoring a broader definition of "proceeding," particularly the D.C. Circuit's analysis in *United States v. Kelley*.[84] The *Ermoian* court noted that the D.C. Circuit did not analyze the term "official proceeding," but instead assumed an agency's investigation was a proceeding on the basis of a stipulation between the parties.[85] In *Kelley*, the defendant was charged with obstruction of justice and conspiring to obstruct justice when he tried to conceal his activities during the pendency of an investigation by the Inspector General of the Agency for International Development.[86] While the D.C. Circuit did not explicitly rule on whether the Inspector General's investigation was an "official proceeding," that the court allowed the stipulation suggests that it probably would have constituted an "official proceeding" because courts do not permit stipulations that are legally incorrect.[87] Instead of shadowing the *Kelley* ruling, the *Ermoian* court stated that it was not persuaded by the case and interpreted § 1512 narrowly.[88]

Another example of when a court considered an agency investigation to be a "proceeding" is the *United States v. Browning* case from the Tenth Circuit.[89] In *Browning,* the Customs Service[90] conducted an investigation into the importation practices of the

80. Section 1517 applies to whoever "corruptly obstructs or attempts to obstruct any examination of a financial institution by an agency of the United States with jurisdiction to conduct an examination of such financial institution." 18 U.S.C. § 1517.

81. Section 1518 applies to whoever "willfully prevents, obstructs, misleads, delays or attempts to prevent, obstruct, mislead, or delay the communication of information or records relating to a violation of a Federal health care offense to a criminal investigator." *Id.* § 1518(a).

82. S. Rep. No. 107-146, at 6–7.

83. *See id.*

84. *See* United States v. Kelley, 36 F.3d 1118, 1128 (D.C. Cir. 1994).

85. United States v. Ermoian, 752 F.3d 1165, 1171 n.5 (9th Cir. 2013).

86. *Kelley*, 36 F.3d at 1123. The U.S. Agency for International Development is a government agency that works to end extreme global poverty and help countries build responsive local governance. *What We Do*, USAID, http://www.usaid.gov/what-we-do (last visited Apr. 6, 2017).

87. *See Kelley*, 36 F.3d at 1128.

88. *Ermoian*, 752 F.3d at 1171 n.5.

89. 572 F.2d 720 (10th Cir. 1978).

90. The U.S. Customs Service was an agency of the federal government that collected import tariffs and secured borders. *CBP Through the Years*, U.S. Customs & Border Prot., http://www.cbp.gov/about/history (last visited Apr. 6, 2017). In March 2003, it closed, and the Customs and Border Patrol was created. *Id.*

Browning Arms Company.[91] During the investigation, the defendant advised a Belgian corporation to give misleading information to Customs Services.[92] The Tenth Circuit in its analysis stated that the term "proceeding" was not plain on its face, and therefore the legislative history should be reviewed.[93] The court found that the Customs Service investigation was a "proceeding" within the meaning of the statute.[94]

The Second Circuit in *United States v. Gonzalez* also assigned a broad definition to proceeding.[95] In *Gonzalez*, the Drug Enforcement Administration was conducting an investigation when an informant was shot and killed by the defendant.[96] The defendant was convicted of witness tampering and first-degree murder.[97] Applying a broad interpretation, the Second Circuit affirmed the lower court's ruling that an "official proceeding" includes an investigatory stage.[98] In reaching its decision, the court relied on legislative history to give effect to Congress's intent.[99] Similarly the *Ermoian* court should have relied on legislative history and found the FBI investigation to be included in the term "official proceeding." Instead, the *Ermoian* court ignored instructive case law that identifies the importance of a broader definition. By not deferring to interpretations from other circuits that assigned broad definitions of "proceeding," the *Ermoian* court dismissed crucial reasoning as to why an investigation should be considered a "proceeding."

Lastly, the *Ermoian* court erred because it failed to take into account the broader policy implications that may result from its ruling. As stated in *United States v. Hutcherson*: "Section 1512(c)(2) is the omnibus clause that intends to punish the myriad of obstructive conduct that cannot be adequately defined in the statute."[100] By excluding FBI investigations from the statute's reach, the *Ermoian* court created precedent that could allow an expansive area of criminal activity to go unpunished. Essentially, those impeding investigations conducted by the FBI, or any other agency, would not have any repercussions because of the court's narrow interpretation of the term "official proceeding." The *Ermoian* court should have considered the impact that its ruling will have. This decision has foreseeable debilitating effects on the criminal justice system and the ability of law enforcement officers to do their job.

91. *Browning*, 572 F.2d at 721.

92. *Id.*

93. *Id.* at 723.

94. *Id.* at 724.

95. 922 F.2d 1044, 1055–56 (2d Cir. 1991). *Ermoian* expressly rejected *Gonzalez*'s reasoning. United States v. Ermoian, 752 F.3d 1165, 1171 n.5 (9th Cir. 2013).

96. *Gonzalez*, 922 F.2d at 1046.

97. *Id.*

98. *Id.* at 1055–56.

99. *Id.* at 1050, 1054.

100. No. 6:05CR00039, 2006 WL 1875955, at *3 (W.D. Va. July 5, 2006).