

December 2018

Prosecutorial Discretion in Criminal Tax Obstruction Cases: How DOJ Internal Policy Limited the Crime of Corruptly Obstructing the IRS Until the Supreme Court Stepped In, and Why Tax Criminals Will Still Get Convicted

Kathryn W. Booth

Follow this and additional works at: <https://scholarship.law.uc.edu/uclr>

Recommended Citation

Kathryn W. Booth, *Prosecutorial Discretion in Criminal Tax Obstruction Cases: How DOJ Internal Policy Limited the Crime of Corruptly Obstructing the IRS Until the Supreme Court Stepped In, and Why Tax Criminals Will Still Get Convicted*, 86 U. Cin. L. Rev. 1125 (2018)

Available at: <https://scholarship.law.uc.edu/uclr/vol86/iss4/1>

This Article is brought to you for free and open access by University of Cincinnati College of Law Scholarship and Publications. It has been accepted for inclusion in University of Cincinnati Law Review by an authorized editor of University of Cincinnati College of Law Scholarship and Publications. For more information, please contact ronald.jones@uc.edu.

PROSECUTORIAL DISCRETION IN CRIMINAL TAX OBSTRUCTION CASES: HOW DOJ
INTERNAL POLICY LIMITED THE CRIME OF CORRUPTLY OBSTRUCTING THE IRS
UNTIL THE SUPREME COURT STEPPED IN, AND WHY TAX CRIMINALS WILL STILL
GET CONVICTED

*Kathryn W. Booth**

Abstract

In Marinello v. United States, the Supreme Court recently held 7-2 that the crime of corruptly obstructing the administration of the Internal Revenue laws under 26 U.S.C. § 7212(a) requires the government to prove that the defendant obstructed a known, pending IRS proceeding, or at least a proceeding that was “reasonably foreseeable” to the defendant. The court also held that the government must prove that the defendant’s conduct bore a “nexus” to such IRS proceeding. Prior to the Supreme Court decision, a majority of circuits—save only one—held that no such pending IRS proceeding and no such nexus was required. One of the reasons the Supreme Court articulated in Marinello for limiting the statute was that prosecutorial discretion was insufficient to limit the statute’s broad scope.

Indeed, prosecutorial discretion has historically been the primary safeguard against the statute’s broad reach. The Department of Justice (“DOJ”) has historically limited charges under § 7212(a) to conduct that occurs during a pending IRS audit or investigation, or to conduct that is large in scale and affecting the tax liability of third parties. These policy limitations have largely limited prosecutions to cases in which the defendant intended to hinder a specific IRS proceeding. What’s more, this DOJ internal policy guidance seems to have influenced courts’ decisions not to judicially curtail the statute’s scope. Because most actions authorized by DOJ fit within a narrow reading of § 7212(a), this prosecutorial discretion on initiating charges have ensured that prior constitutional overbreadth challenges to the statute have necessarily failed.

Despite the fact that the Supreme Court recently imposed apparently drastic new limitations on § 7212(a), prosecutions under the statute in the wake of Marinello are unlikely to significantly change. DOJ has historically limited the statute’s scope anyway, so complying with Marinello will not drastically alter what conduct is charged as obstruction. Further, when DOJ has charged conduct that occurred in the absence of a pending IRS proceeding, there were typically multiple additional crimes for which a defendant could have been convicted, such that without the § 7212(a) charge, the defendant’s sentence would not materially change.

* At the time this article was written, Kathryn W. Booth was an Instructor in Law at Vanderbilt University Law School. She is no longer affiliated with the university. She would like to express her gratitude to the following individuals for their helpful comments and edits: Carolyn Floyd, Carrie Gray, Kirsten Hildebrand, Mason Lowe, Darryl Stewart, and Culwell Ward.

Table of Contents

I.	Introduction	1127
II.	Attempts to Interfere with Administration of Internal Revenue Laws, 26 U.S.C. § 7212(a): Legislative History, DOJ Policy, the Circuit Split, and the Supreme Court’s Recent Decision in <i>Marinello v. United States</i>	1128
A.	The Legislative History of § 7212(a): The IRS Obstruction Statute Was Intended to Criminalize Threatening, Use of Force Against, or Corrupt Solicitation of an IRS Employee	1129
B.	Treading Cautiously: How Tax Division Internal Policy Has Limited the Scope of § 7212(a) Prosecutions to Conduct Obstructive of a Pending IRS Proceeding or Other Large-Scale Corrupt Obstructive Conduct	1131
C.	The Momentum of a Circuit Split: How the Sixth Circuit’s Flip- Flop-Flip Influenced the Expansion of § 7212(a).....	1135
D.	An IRS proceeding “in the offing:” Resolving the Circuit Split in <i>Marinello v. United States</i>	1141
III.	How Courts Previously Relied on Prosecutorial Discretion to Limit the Scope of § 7212(a).....	1146
A.	Courts have turned to DOJ Policy Limiting § 7212(a) When Interpreting the Statute.....	1147
B.	DOJ Policy Has Limited § 7212(a) Cases to Cases Where There Was A Pending IRS Action or the Defendant Knew His Conduct Would Cause the IRS to Initiate an Action.....	1150
1.	The Bailiwick of § 7212(a) Cases is Tax Protestors: Individuals Who Obstinate Refuse to Pay Their Taxes and Do Everything Possible to Make the IRS’s Job Harder	1150
2.	DOJ Policy Limiting § 7212(a) Charges to Large-Scale Cases Obstructing the Tax Liability of Third Parties Produces Cases Where the Defendant Knew His Conduct Would Cause the IRS to Initiate Proceedings	1153
C.	DOJ Policy Has Ensured That Challenges to § 7212(a) on Grounds of Overbreadth and Vagueness Have Failed	1156
IV.	Section 7212(a) Prosecutions in the Wake of <i>Marinello</i> : Not Much Will Change.....	1160
A.	DOJ Charging Policy Has Usually Restricted § 7212(a) Prosecutions to Those in Which the Defendant Obstructed a Pending Audit or Investigation	1160
1.	The Nexus Requirement Will Be Easy to Establish If the Government Alleges That There Was a Pending IRS Action	1161
2.	The IRS Proceeding Must Be Pending, Or At Least Foreseeable to the Defendant.....	1164
B.	In Most Cases in Which the Defendant Challenged His § 7212(a) Conviction, the Defendant’s Commission of Other Felony Offenses Mean that the Outcome Would Be the Same With § 7212(a) or Without It.....	1168
C.	The New § 7212(a) Requirements Are Unlikely to Motivate the IRS to Initiate More Proceedings or Advertise Those Proceedings Sooner Than Previously	1173

2018]	PROSECUTORIAL DISCRETION IN TAX OBSTRUCTION CASES	1127
V.	Conclusion.....	1174

I. INTRODUCTION

It is a crime to corruptly obstruct or impede the due administration of the Internal Revenue Laws.¹ The Supreme Court recently held in *Marinello v. United States* (“*Marinello III*”) that to convict a defendant of obstruction under 26 U.S.C. § 7212(a), the government must prove that the defendant obstructed a known, pending IRS proceeding and that there was a nexus between the defendant’s conduct and the proceeding.² Until *Marinello III*, a majority of circuit courts held that § 7212(a) reached conduct that occurred before, or in the absence of, a pending IRS proceeding.³

Although courts have until recently supported an expansive reading of the statute, the Department of Justice (“DOJ”) has traditionally limited the use of § 7212(a) to cases in which the defendant’s conduct interfered with a pending IRS proceeding, or at least where the conduct bore indicia of intent to interfere with a specific IRS action or agent.⁴ DOJ has traditionally exercised a great deal of prosecutorial restraint in selecting when to charge defendants with corrupt obstruction of the Internal Revenue Laws under § 7212(a). This restraint, in the form of Tax Division policy statements, has generally limited § 7212(a) prosecutions to those occurring after an audit has begun or a tax return was filed, except in large-scale tax schemes affecting the tax liability of third parties. As a result, nearly every prosecution initiated under § 7212(a)’s omnibus clause has been based on conduct that either obstructed a specific IRS action or that carried additional indicia of intent to interfere with pending IRS actions.

The DOJ’s atypical treatment seems to have influenced the way courts

1. See *Attempts to Interfere with Administration of Internal Revenue Laws*, 26 U.S.C. § 7212(a) (1954).

2. *Marinello v. United States*, 138 S.Ct. 1101, 1109 (2018).

3. See *United States v. Westbrook*, 858 F.3d 317, 322-23 (5th Cir. May 24, 2017), *reversed and remanded*, 584 U.S. ___ (2018); *United States v. Marinello*, 839 F.3d 209, 222 (2d Cir. 2016), *rev’d and remanded*, 584 U.S. ___ (2018) (holding that to be convicted of 7212(a), defendant need not have been aware of pending IRS action at time he engaged in corrupt conduct); *United States v. Sorensen*, 801 F.3d 1217, 1232 (10th Cir. 2015), *cert. denied*, 136 S.Ct. 1163 (2016) (same); *United States v. Floyd*, 740 F.3d 22, 32 (1st Cir. 2014)(same); *United States v. Wood*, 384 F. App’x. 698, 700 (10th Cir. 2010)(same); *United States v. Massey*, 419 F.3d 1008, 1009-10 (9th Cir. 2005)(same); *but see United States v. Miner*, 774 F.3d 336, 342 (6th Cir. 2014)(holding § 7212(a) requires the government to prove that, at the time he engaged in corrupt conduct, defendant was aware of pending IRS action or proceeding); *United States v. Kassouf*, 144 F.3d 952, 955 (6th Cir. 1998) (same).

4. See Part II(A).

prior to the Supreme Court's decision in *Marinello III* declined to limit the broad provisions of that statute. Courts considering the scope of § 7212(a) were clearly aware that the Tax Division usually curtails the use of § 7212(a). Moreover, DOJ policy has limited the types of cases initiated and thus limited the cases available to test the statute's limits to cases where the defendant intended to interfere with, or to initiate, a specific IRS proceeding. As a result, when courts were faced with overbreadth or vagueness challenges to § 7212(a), such challenges necessarily failed.

Despite the fact that the Supreme Court in *Marinello III* recently changed the law in most jurisdictions, imposing more stringent requirements on charges under § 7212(a), not much is likely to change. The same DOJ policy limitations that led courts to decline to limit the statute mean that charges under § 7212(a) already loosely complied with *Marinello III*'s new requirements for the statute. Further, DOJ policy limiting charges to large-scale conduct affecting the tax liability of third parties resulted in defendants being charged with § 7212(a) for conduct that was also punishable by other felony tax charges. Finally, the new requirements for charging § 7212(a) are not likely to motivate the IRS to notify targets that they are under investigation any sooner than it otherwise would have done.

II. ATTEMPTS TO INTERFERE WITH ADMINISTRATION OF INTERNAL REVENUE LAWS, 26 U.S.C. § 7212(A): LEGISLATIVE HISTORY, DOJ POLICY, THE CIRCUIT SPLIT, AND THE SUPREME COURT'S RECENT DECISION IN *MARINELLO V. UNITED STATES*.

This section will explain the legislative history surrounding the enactment of § 7212(a), the development of DOJ internal guidance about what type of conduct constitutes "corrupt obstruction" of the Internal Revenue Laws. This section will also examine the recent circuit split and the Supreme Court decision in *Marinello III*, in which the Court held that to be convicted of a violation of § 7212(a), a defendant's conduct must have a nexus to a known, pending IRS proceeding.⁵

Title 26 U.S.C. § 7212(a) makes it a crime to corruptly, or by force or by threats, obstruct or impede the due administration of the Internal Revenue laws.⁶ The provision of § 7212(a) criminalizing obstruction that

5. See *Marinello v. United States*, 138 S.Ct. 1101 (2018).

6. Title 26, United States Code, Section 7212(a) (1954) provides in relevant part, "Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction

is accomplished “corruptly,” rather than by force or by threats, is commonly referred to as the “omnibus clause.”⁷

The statute is broken into two parts. The first clause deals with use of force or threats of force against an officer or employee of the IRS.⁸ The second clause, the omnibus clause, is a “catch-all” prohibiting “in any other way corruptly” obstructing or impeding “the due administration of this title.”⁹

To prove a violation of the omnibus clause of § 7212(a), the government must prove the defendant (1) corruptly (2) endeavored (3) to obstruct or impede the administration of the Internal Revenue Code.¹⁰ “Corruptly” means to act with intent to secure an unlawful advantage or benefit for oneself or for another person.¹¹ To “endeavor” is to “knowingly and intentionally act or to knowingly and intentionally make any effort which has a reasonable tendency to bring about the desired result.”¹²

A. The Legislative History of § 7212(a): The IRS Obstruction Statute Was Intended to Criminalize Threatening, Use of Force Against, or Corrupt Solicitation of an IRS Employee

Section 7212(a) was enacted as part of the general Tax Code in 1954.¹³ It appears to have evolved from a predecessor statute in the 1939 Tax Code, which made it a crime to interfere with IRS assessment or collection efforts.¹⁴ The 1939 obstruction provision was a sub-section of a statute entitled “Entry of Premises for Examination of Taxable Objects,” making it a crime to “[f]orcibly obstruct or hinder any collector, deputy collector, internal revenue agent, or inspector, in the execution of any power and authority vested in him by law.”¹⁵ Apparently, prior to 1954, the criminal code did not prohibit intimidating an IRS employee by *threats* of force (only by actual force), and § 7212(a) was designed, in part, to remedy this and provide greater protection for IRS employees.¹⁶

thereof, be fined not more than \$5,000, or imprisoned not more than 3 years, or both

7. *See* United States v. Kassouf, 144 F.3d 952, 955 (6th Cir. 1998).

8. *See id.*

9. *See id.*

10. *See* United States v. Wilson, 118 F.3d 228, 234 (4th Cir. 1997).

11. *See* United States v. Reeves, 752 F.2d 995, 1001-02 (5th Cir. 1985).

12. *See* United States v. Kelly (“*Kelly P*”), 147 F.3d 172, 177 (2d Cir. 1998).

13. *See* United States v. Walker, 514 F. Supp. 294, 304 (E.D. La. 1981).

14. *See* Int. Rev. Code of 1939, ch. 34, § 3601(c) (1), 53 Stat. 436 (repealed 1954); *Walker*, 514 F. Supp. at 304.

15. *See* Int. Rev. Code of 1939, ch. 34, § 3601(c) (1), 53 Stat. 436 (repealed 1954).

16. *See* S. REP. NO. 83-1622, at 604 (1954), as reprinted in 1954 U.S. Code Cong. & Admin. News 4621, 4784 (emphasis added) and in 2 Internal Revenue Acts of the United States, The Act of 1954 with

Thus, § 7212(a) was broader than the previous iteration because it criminalized certain non-forceful, corrupt, obstructive conduct.

The House and Senate reports from § 7212(a)'s enactment are brief. Both reports, however, explained that the new § 7212(a) was intended to prohibit the use of force or threats of force against, or corrupt solicitation of, an IRS employee engaged in an official capacity. The House report stated:

A provision of the Criminal Code makes it an offense punishable by a \$5,000 fine or 3 years' imprisonment or both to forcibly assault, resist, oppose, etc., any officer or employee acting under the internal-revenue laws.¹⁷ *A similar, but amplified, provision of this bill covers all cases where the officer is intimidated or injured; that is, where corruptly, by force or threat of force, directly or by communication, an attempt is made to impede the administration of the internal-revenue laws.* The penalty in the case of all such attempts to interfere with administration of the internal-revenue laws is to be a fine of not more than \$10,000 or imprisonment for not more than 5 years or both.¹⁸

The Senate report discussing the enactment states:

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. Subsection (a) of this section is broader than section 111 of title 18 of the United States Code, relating to persons assaulting, resisting, or impeding certain officers or employees of the United States while engaged in the performance of their official duties, in that it covers threats of force (including any threatening letter or*

Legislative Histories and Documents, 562, 604 (Bernard D. Reams Jr. ed., 1982); *Walker*, 514 F. Supp. at 305.

17. This appears to be a reference to 18 U.S.C. § 111, which prohibited assaulting a federal officer performing official duties. See *Walker*, 514 F. Supp. at 304. [Footnote not included in statutory text.]

18. H.R. REP. NO. 83-1337, at 108 (1954), as reprinted in 1954 U.S. Code & Cong. Admin. News 4017, 4136 and in 1 Internal Revenue Acts of the United States, The Act of 1954 with Legislative Histories and Documents, at 108 (Bernard D. Reams Jr., ed., 1982) (emphasis added).

*communication) or corrupt solicitation.*¹⁹

Although the legislative history indicates that § 7212(a) was designed to deal with use of force, threats of force, or corrupt solicitation of identifiable internal revenue agents acting in an official capacity, and those agents' family members, neither the House report nor the Senate report gives any hint that the statute was intended to go further.²⁰ The legislative history contemplates prosecutions of archetypally obstructive conduct—conduct specifically designed to obstruct an ongoing IRS concern.

B. Treading Cautiously: How Tax Division Internal Policy Has Limited the Scope of § 7212(a) Prosecutions to Conduct Obstructive of a Pending IRS Proceeding or Other Large-Scale Corrupt Obstructive Conduct

The DOJ has historically maintained a conservative approach when charging defendants with the omnibus clause. Although § 7212(a) was enacted in 1954, the government did not bring the first charge under the omnibus clause until 1981.²¹ In fact, in at least one previous case, the government construed § 7212(a) to apply only to conduct involving force, violence, or threats against IRS agents.²² The court that apparently interpreted the first use of the omnibus clause noted that the court would need to “proceed cautiously where for over twenty-five years the government has feared to tread.”²³

Similarly, at one time, courts did not consider § 7212(a) to prohibit

19. S. REP. NO. 83-1622, at 604 (1954), *as reprinted in* 1954 U.S. Code Cong. & Admin. News 4621, 4784 (emphasis added) *and in* 2 Internal Revenue Acts of the United States, The Act of 1954 with Legislative Histories and Documents, 562, 604 (Bernard D. Reams Jr. ed., 1982).

20. *See* United States v. Popkin, 943 F.2d 1535, 1543 (11th Cir. 1991) (Roney, J., dissenting) (Section 7212(a)'s “legislative history reveals that that Congress intended only to prohibit interference with IRS agents, either through physical or verbal threats or through other actions which impeded their efforts to enforce the tax code.”); Robert S. Fink and Caroline Rule, *The Growing Epidemic of Section 7212(a) Prosecutions—Is Congress the Only Cure?*, 88 J. Tax'n 356, at 2 (“There is absolutely nothing in the legislative history that even intimates that the omnibus clause was intended to reach the whole gamut of acts which, through their effect on the reporting or payment of taxes, conceivably could be characterized as attempts to avoid the operation of the tax laws as a whole.”).

21. *See* United States v. Williams, 644 F.2d 696, 699 (8th Cir. 1981), *superseded by statute on other grounds*, Pub. L. No. 101-239, 103 Stat. 2393, *as recognized in* United States v. Brooks, 174 F.3d 950, 956 (8th Cir. 1999) (“Our research, however, has disclosed no case brought by the Government under the more general omnibus clause of section 7212. We note, therefore, that the proper interpretation of this clause presents us with an issue of first impression, and that we proceed cautiously where for over twenty-five years the Government has feared to tread.”).

22. *See* United States v. Henderson, 386 F. Supp. 1048, 1056 (S.D.N.Y. 1974); *see also* Williams, 644 F.2d at 699.

23. *See* Williams, 644 F.2d at 699.

merely any form of corrupt interference with the Internal Revenue laws.²⁴ At least one court previously construed § 7212(a) to prohibit only three harms: (1) corrupt solicitation of IRS agents or employees; (2) forceful interference with the Internal Revenue laws, or (3) the threat of forceful interference with the operation of the internal revenue laws.²⁵

Unlike most federal crimes, which can be prosecuted at will by any United States Attorney's Office, all prosecutions arising under Title 26 must be authorized by DOJ Tax Division.²⁶ This policy is intended to secure uniform enforcement of the federal tax laws across all jurisdictions of the United States.²⁷ To further ensure uniform enforcement, the Tax Division promulgates internal policy guidance about when prosecutions can be authorized.²⁸ Because the Tax Division rarely, if ever, authorizes prosecutions that go against its own policy guidance, Tax Division guidance is generally the final word on when and how statutes are prosecuted under Title 26.

In 1989, DOJ issued Tax Division Directive 77, which explained DOJ's self-imposed limitations in charging defendants with § 7212(a). Tax Division Directive 77 stated that:

In general, the use of the omnibus provision of Section 7212(a) *should be reserved for conduct occurring after a tax return has been filed—typically conduct designed to impede or obstruct an audit or criminal tax investigation*, when 18 U.S.C. § 371 charges are unavailable due to insufficient evidence of a conspiracy.²⁹

Directive 77 stated that § 7212(a) should be charged “consistent with the overall purpose of section § 7212(a), which is to penalize conduct aimed directly at IRS personnel in the performance of their duties, and at general IRS administration of the federal tax enforcement program, but not to penalize tax evasion as such.”³⁰ Directive 77 gave examples of

24. See *United States v. Walker*, 514 F. Supp. 294, 303 (E.D. La. 1981).

25. See *Walker*, 514 F. Supp. at 303.

26. See United States Attorney's Manual, 6-4.200 - Tax Division Jurisdiction and Procedures, available at <https://www.justice.gov/usam/usam-6-4000-criminal-tax-case-procedures#6-4.200>.

27. See United States Attorney's Manual, 6-4.010 - Federal Criminal Tax Enforcement, available at <https://www.justice.gov/usam/usam-6-4000-criminal-tax-case-procedures#6-4.010>.

28. See United States Attorney's Manual, 6-4.011 - Criminal Tax Manual and Other Tax Division Publications, available at <https://www.justice.gov/usam/usam-6-4000-criminal-tax-case-procedures#6-4.011>.

29. See Reply Brief of Plaintiff-Appellant, *United States v. Kassouf*, 144 F.3d 952, 955 (6th Cir. 1998) (No. 1:95-CR-199), (May 12, 1997), 1997 WL 34609476, at *7 (emphasis added).

30. See Kathryn Keneally, *Hard Facts & Tax Protestors, White-Collar Crime*, 21-AUG Champion 25, August 1997, at 25; Brief of Defendant-Appellee James J. Kassouf, *Kassouf*, 144 F.3d 952 (6th Cir. 1998) (No. 1:95-CR-199), 1996 WL 34386659; Reply Brief of Plaintiff-Appellant, *Kassouf*, 144 F.3d 952 (6th Cir. 1998) (No. 1:95-CR-199), (May 12, 1997), 1997 WL 34609476, at *7.

appropriate uses of the statute: “[c]ontinually assisting taxpayers in the filing of false returns or engaging in other conduct to make audits difficult; and other numerous large-scale violations of 26 U.S.C. Section 7206(2) or 18 U.S.C. Section 287 (as it pertains to refund claims for other or fictitious taxpayers)”³¹

Through this policy directive, the Tax Division placed an internal limitation on how far DOJ would push the bounds of § 7212(a). The Tax Division would generally prosecute conduct under § 7212(a) only if that conduct was designed to impede a specific audit or investigation, or, absent a pending investigation, if the conduct represented a large-scale effort to evade the tax liability of third parties.³² As a result, the only prosecutions authorized under Directive 77, in large part, were those in which the defendant acted with the intent to delay or hinder an active IRS investigation or specifically to interfere with the administrative functions of the IRS. Directive 77 made clear that the Tax Division did not see § 7212(a) as a substitute for the crime of tax evasion.³³

By 1997, DOJ was expanding how it was charging the statute, although DOJ guidelines still kept the statute well reigned in.³⁴ That year, the government charged several NBA referees with tax crimes, including the § 7212(a) omnibus clause, for engaging in a scheme to evade their own individual taxes.³⁵ The conduct in those cases did not strictly comply with Tax Division Directive 77 because it was not “aimed directly at IRS personnel in the performance of their duties,” nor was it aimed directly at

31. See Reply Brief of Plaintiff-Appellant, *United States v. Kassouf*, 144 F.3d 952, 955 (6th Cir. 1998) (No. 1:95-CR-199), (May 12, 1997), 1997 WL 34609476, at *7. Title 26 U.S.C. § 7206(2) is the crime of aiding and abetting the preparation of false tax returns, and 18 U.S.C. § 287 is the crime of filing false claims with the government. See 26 U.S.C. § 7206(2) (1982); 18 U.S.C. § 287 (1986).

32. It should be noted that DOJ policy does not limit § 7212(a) strictly to cases in which there is a pending IRS proceeding. Rather, the policy suggests that § 7212(a) is most appropriate in cases where there is a pending IRS proceeding, but allows for exceptions to this rule. As will be discussed later, the Supreme Court went further than DOJ policy and held that § 7212(a) requires the government to prove that the defendant was aware of a pending IRS action or proceeding or that such proceeding was foreseeable to him.

33. As Kathryn Keneally, then-tax law practitioner and later the head of the Tax Division, argued at the time Directive 77 was in force, Tax Division Policy Directive 77 “may actually provide the best guidance for the application of the omnibus clause of Section 7212(a).” See Keneally, *supra* note 30, at 28.

34. See generally Fink & Rule, *supra* note 18 (arguing in 1998 that the Government had recently begun using 7212(a) more expansively); Keneally, *supra* note 30, at 28 (“Concern over the parameters of Section 7212(a) has been heightened in recent months as a result of prosecutions in a number of jurisdictions against referees of the National Basketball Association (NBA).”)

35. See *United States v. Armstrong*, 974 F. Supp. 528, 529-532 (D.C. Va. 1997); *United States v. Toliver*, 972 F. Supp. 1030, 1032-34 (D.C. Va. 1997); *United States v. Mathis*, No. CR-1-97-15, 1997 WL 683648, at *3-4 (S.D. Ohio June 2, 1997); Fink & Rule, *supra* note 18; CBS Sportsline, *IRS Busts Another Ref*, CBS News, December 19, 1998, <http://www.cbsnews.com/news/irs-busts-another-ref/> (Last visited August 3, 2017).

“general IRS administration of the federal tax enforcement program.” Rather, the conduct in those cases appeared to be standard, garden-variety tax evasion.³⁶ This was apparently the first time the DOJ had charged § 7212(a) inconsistently with its own policy to prosecute individuals under § 7212(a) for what essentially amounted to tax evasion, and represented an expansion in the type of conduct DOJ typically prosecuted under § 7212(a).³⁷

In 2004, the Tax Division issued Directive 129, currently in force, which superseded Directive 77 but maintained similar limitations on the use of the omnibus clause under § 7212(a) to cases occurring after an IRS audit or investigation.³⁸ Directive 129 states that charges under § 7212(a) are most appropriate to penalize “*corrupt conduct that is intended to impede an IRS audit or investigation,*” including “*providing false information, destroying evidence, attempting to influence a witness to give false testimony, and harassing an IRS employee.*”³⁹ Additionally, Directive 129 notes that a “§ 7212(a) omnibus clause charge can also be authorized *in appropriate circumstances* to prosecute a person who, *prior to any audit or investigation, engaged in large-scale obstructive conduct involving the tax liability of third parties.*”⁴⁰ Directive 129 provides examples of obstructive conduct under § 7212(a) as “*assisting in preparing or filing a large number of fraudulent returns or other tax forms, or engaging in other corrupt conduct designed to obstruct the IRS from carrying out its lawful functions.*”⁴¹ Thus, DOJ Policy remains relatively consistent that § 7212(a) should be used primarily in cases of direct interference with an IRS action or proceeding, or in the case of large-scale obstructive conduct intended to obstruct the IRS from carrying out its lawful functions.

Like Directive 77, Directive 129 cautions that “[t]he omnibus clause should not be used as a substitute for a charge directly related to tax liability—such as tax evasion or filing a false tax return—if such a charge is readily provable.” Tax Division guidance has consistently opined that § 7212(a) is most appropriate to punish attempts to interfere with pending audits or investigations or in other obstructive cases involving large-scale

36. The various defendants, NBA referees, engaged in a scheme to underreport income they received for “downgrading” first class airline tickets. *See Armstrong*, 974 F. Supp. at 530-31; Fink & Rule, *supra* note 18, at 362-63.

37. *See* Fink & Rule, *supra* note 18, at 362.

38. *See* Dep’t of Just., Crim. Tax Manual, 3.00 Tax Div. Pol’y Directives & Memoranda, 49 (2012), <https://www.justice.gov/sites/default/files/tax/legacy/2014/08/05/CTM%20Chapter%203.pdf#Directive%20No.%20129> (emphasis added).

39. *See id.*

40. *Id.* (emphasis added).

41. *Id.* (emphasis added).

conduct and the tax liabilities of third parties. Aside from briefing and argument in specific cases, the Tax Division has never taken the official position that § 7212(a) is a “catch-all” tax crime that encompasses every corrupt act that makes it harder for the IRS to assess or collect taxes.

C. The Momentum of a Circuit Split: How the Sixth Circuit’s Flip-Flop-Flip Influenced the Expansion of § 7212(a)

Notwithstanding the legislative history and DOJ guidance limiting the scope of § 7212(a), several circuits expanded the statute to reach conduct that occurred before, or in the absence of, an IRS action or proceeding.⁴² Until the Supreme Court’s decision in *Marinello III* in March 2018, there was a circuit split, with only the Sixth Circuit limiting prosecutions under the statute to conduct aimed at pending IRS proceedings, while the First, Second, Ninth, Tenth, and Eleventh Circuits declined to adopt such a limitation.⁴³ One incredibly interesting aspect about the development of the circuit split is that the Sixth Circuit actually reversed itself—twice—on the issue, before landing back where it began and stating that § 7212(a) does indeed contain a “pending action” requirement.⁴⁴ This double reversal of course by the Sixth Circuit, in conjunction with various courts’ textual and contextual readings of § 7212(a), seems to have played into the development of the circuit split.

The Sixth Circuit began by imposing a “pending IRS action” requirement in *United States v. Kassouf* in 1998.⁴⁵ In *Kassouf*, the Sixth Circuit became the first circuit court to address whether, to be convicted under § 7212(a)’s omnibus clause, the defendant must have been aware of a pending IRS investigation or proceeding.⁴⁶ The court held that § 7212(a) did contain such a requirement, reasoning that § 7212(a) was analogous to the general obstruction of justice statute, 18 U.S.C. § 1503, and should be read the same way.⁴⁷ While § 7212(a) prohibited corrupt conduct designed to obstruct the “due administration” of the Internal Revenue Laws, 18 U.S.C. § 1503 prohibited whoever “corruptly or by threats or force or by any threatening letter or communications, influences, obstructs, or impedes, or endeavors to influence, obstruct or impede, *the due administration of justice . . .*”⁴⁸ Because the Sixth Circuit

42. See note 3, *supra*.

43. See *id.*

44. See *United States v. Kassouf*, 144 F.3d 952, 955 (6th Cir. 1998); *United States v. Bowman*, 173 F.3d 595, 600 (6th Cir. 1999); *United States v. Miner*, 774 F.3d 336, 342 (6th Cir. 2014).

45. See *Kassouf*, 144 F.3d at 955.

46. *Kassouf*, 144 F.3d at 955.

47. *United States v. Kassouf*, 144 F.3d 952, 956 (6th Cir. 1998).

48. *Id.* at 956 (emphasis added).

concluded that § 1503 and § 7212(a) contained “nearly identical language,” the court held that § 7212(a) required “some pending IRS action of which the defendant was aware.”⁴⁹ The court also noted concerns with the speculative nature of obstructive conduct that occurred prior to any IRS audit or tax return, and construed the criminal statute narrowly, in accordance with the principle that criminal statutes should provide fair notice to the public about what conduct is criminal.⁵⁰

Just one year after *Kassouf*, the Sixth Circuit reversed course in *United States v. Bowman*, purporting to limit *Kassouf* to its facts.⁵¹ *Bowman* held that obstructive acts that occurred before the IRS had initiated an action or proceeding were sufficient to support a conviction under § 7212(a).⁵² The defendant in *Bowman* was a tax protestor⁵³ who had filed several bogus documents with the IRS in an attempt to harass his creditors.⁵⁴ The court limited *Kassouf* to its facts, concerned that otherwise the government could not charge a defendant like Bowman under § 7212(a) when his clear intent was to obstruct the IRS.⁵⁵ The court held that § 7212(a) charges did not require the government to prove that there was a pending IRS proceeding at the time of the defendant’s corrupt conduct if the defendant deliberately filed forms with the IRS for the purpose of causing the IRS to initiate an action.⁵⁶

It was not until 2014, in the case of *United States v. Miner*, that the Sixth Circuit reaffirmed *Kassouf* and disavowed *Bowman*.⁵⁷ The court examined the tensions between *Kassouf* and *Bowman* and resolved the apparent conflict between the cases by explaining that *Kassouf* stated a general rule, while *Bowman* stood for the more specific proposition that a defendant who intentionally attempts to cause the IRS to initiate frivolous proceedings cannot claim he did not have the requisite intent to obstruct that proceeding.⁵⁸ The court thus reaffirmed the principle that “a

49. *Id.* As will be discussed later in this section, several courts have disagreed with the *Kassouf* court’s conclusion that § 7212(a) and § 1503 are nearly identical.

50. *Id.* at 957-58.

51. See *United States v. Bowman*, 173 F.3d 595, 600 (6th Cir. 1999).

52. See *id.*

53. Tax protestors are individuals who obstinately refuse to acknowledge their civic duty to pay taxes and who engage in myriad annoying and harassing tactics to make the IRS’s job harder. Today, the Tax Division refers to “tax protestors” as “tax defiers.” See John A. Townsend, *Tax Obstruction Crimes: Is Making the IRS’s Job Harder Enough?*, 9 Hous. Bus. & Tax L. J. 255, 301 n. 211 (2009).

54. *Bowman*, 173 F.3d at 596-97.

55. *Id.* at 600.

56. *Id.*

57. See *United States v. Miner*, 774 F.3d 336, 342 (6th Cir. 2014).

58. To resolve the conflict, the Sixth Circuit explained that, “[t]o the extent that *Kassouf* and *Bowman* conflict, of course, the first-in-time (*Kassouf*) controls.” The court explained that *Kassouf* and *Bowman* are not reconcilable because the arguments in *Bowman* were the same arguments Judge Daughtrey had made in her dissent in *Kassouf*. The court concluded that “*Bowman*, therefore, is largely predicated upon a rationale that had already lost in this court a year before it was decided.” *Miner*, 774

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.’”⁵⁹

Between *Bowman* and *Miner*, however, several courts considered whether § 7212(a) contained a pending action requirement.⁶⁰ Every other court to consider the question held that there was no such requirement; the Sixth Circuit’s indecisiveness seems to have had a marked impact on those decisions.⁶¹

In 2005, the Ninth Circuit held, in *United States v. Massey*, that § 7212(a) did not require the government to prove that the defendant was aware of a pending IRS action.⁶² This was the first post-*Kassouf* federal appeals court decision on the issue, but the court did not even mention *Kassouf* or *Bowman*.⁶³ In fact, the opinion contains almost no analysis of the issue, and the case the court cited in support did not address the issue.⁶⁴ The Ninth Circuit’s decision that § 7212(a) does not have a “pending action” requirement therefore added little analysis to the question presented in *Kassouf*. There is no evidence that the court was even aware of *Kassouf* or *Bowman* (*Miner* had not been decided yet), or the tensions underlying those decisions. The court did not analogize to § 1503 or cite the Supreme Court’s decision in the case of *United States v. Aguilar*, which were the bases of the reasoning in *Kassouf*.⁶⁵ Thus, it is unclear how thoroughly the Ninth Circuit actually considered the question, or even if it even realized that it was creating a circuit split.

F.3d at 343-45.

59. *Id.* at 345. Despite its holding on § 7212(a), the court upheld the conviction, explaining that any error was harmless because there was “ample evidence that Miner was aware of one or more pending IRS proceedings when he corruptly attempted to obstruct the IRS’s administration of the tax laws” *Id.* at 346.

60. See *United States v. Floyd*, 740 F.3d 22, 32 (1st Cir. 2014); *United States v. Wood*, 384 F. App’x. 698, 700 (10th Cir. 2010); *United States v. Massey*, 419 F.3d 1008, 1009-10 (9th Cir. 2005).

61. See *id.*

62. *Massey*, 419 F.3d at 1010.

63. *Id.*

64. See *Massey*, 419 F.3d at 1009-10; *United States v. Kuball*, 976 F.2d 529, 531 (9th Cir. 1992). Interestingly, *United States v. Kuball*, the case the Ninth Circuit cited in *Massey* in support of its decision that 7212(a) did not directly or indirectly address that question whether the defendant must be aware of a pending IRS proceeding at the time he engaged in corrupt obstructive conduct. See *Kuball*, 976 F.2d at 531. Similar to the defendant in *Bowman*, the defendant in *Kuball* was a tax protestor. See *id.* at 530-31. The obstructive conduct in *Kuball* consisted of the defendant filing false tax returns and supporting documents with the IRS and sending threatening letters to the IRS and his former employer requesting tax related information. See *id.* Rather than standing for the broad rejection of a “pending action” requirement that the court in *Massey* used it to support, *Kuball* merely affirmed a 7212(a) conviction even though there did not appear to be any allegation that the defendant was aware of a pending IRS action at the time he filed the forms and sent the letters. See *id.* The defendant did not argue, nor did the court address, whether 7212(a) requires a pending IRS action at the time of the crime. See *id.* Similar to the defendant in *Bowman*, the defendant in *Kuball* clearly intended his actions to obstruct the administration of the IRS. See *id.*

65. See *Massey*, 419 F.3d at 1008-10; *United States v. Kassouf*, 144 F.3d 952, 955 (6th Cir. 1998).

In 2010, the Tenth Circuit joined the Ninth Circuit in rejecting a “pending IRS action” requirement in § 7212(a) in the unpublished opinion *United States v. Wood*.⁶⁶ In that case, the defendant, a New York attorney, was convicted under § 7212(a)’s omnibus clause for using nominee accounts and offshore bank accounts and offshore debit cards to hide from the IRS millions of dollars of income to himself and third parties.⁶⁷ The defendant claimed that his “religious beliefs” prevented him from filing federal income taxes, which he had not done since the mid-1980’s.⁶⁸

The Tenth Circuit rejected the “pending IRS proceeding” requirement in large part because, at the time *Wood* was issued, *Kassouf* appeared to have been largely limited and restricted to its facts by *Bowman*.⁶⁹ The court disagreed with *Kassouf*’s conclusion that § 7212(a) was similar to § 1503.⁷⁰ The Tenth Circuit explained that *Kassouf* was further unpersuasive because it had been rejected by other courts.⁷¹ In support of this proposition, the court cited *Massey*, which, as previously discussed, contained scant analysis about that provision, along with two district court cases.⁷² The two district court cases also declined to impose a “pending IRS action” requirement in § 7212(a) prosecutions based at least in part on the fact that *Kassouf* had been strictly construed and limited by *Bowman*.⁷³ In 2015, in *United States v. Sorensen*, the Tenth Circuit solidified *Wood* and formalized its holding that § 7212(a) does not require proof that there was an ongoing IRS audit or proceeding at the time the defendant engaged in corrupt conduct.⁷⁴ The court reaffirmed its reasoning in *Wood* that § 1503 and § 7212(a) are “substantially different.”⁷⁵

66. 384 Fed. App’x. 698 (10th Cir. 2010).

67. *United States v. Wood*, 384 F. App’x. 698, 700 (10th Cir. 2010).

68. *Id.*

69. *Id.* at 704. Before turning to its own analysis of 7212(a), the Tenth Circuit noted that the defendant’s argument “relie[d] entirely on precedent from the Sixth Circuit.” *Id.* at 703. The court then gave a brief synopsis of the reasoning in *Kassouf* before it concluded that *Kassouf* was unpersuasive because it had been limited to its holding and facts by *Bowman*. *Id.* at 704 (citation omitted).

70. *United States v. Wood*, 384 Fed. App’x 698, 704 (10th Cir. 2010).

71. *Id.*

72. *Id.*

73. *See id.*; *United States v. Willner*, No. 07 Cr. 183, 2007 WL 2963711, at *4 (S.D.N.Y. Oct. 11, 2007) (basing its conclusion that 7212(a) does not require the defendant to be aware of a pending IRS proceeding at the time of his obstructive conduct in part on the fact that *Kassouf* was largely overruled by *Bowman*, as well as the court’s view that 7212(a) is much broader than 1503); *United States v. Kelly*, 564 F. Supp.2d 843, 844 (N. D. Ill. 2008) (rejection challenge to 7212(a) based on “pending action” requirement because (1) the weight of authority does not restrict the statute, noting that *Kassouf* was limited to its precise facts by *Bowman*, (2) the language of 7212(a) is broad, and (3) the legislative history is ambiguous).

74. *See United States v. Sorensen*, 801 F.3d 1217, 1232 (10th Cir. 2015), *cert. denied*, 136 S.Ct. 1163 (2016) (“7212(a) does not require an ongoing proceeding . . .”).

75. *Id.* at 1232.

The next court to jump into the fray was the First Circuit in 2014, joining the Tenth and Ninth Circuits in rejecting the “pending IRS action” limitation on § 7212(a).⁷⁶ In *United States v. Floyd*, the defendants had operated two large-scale schemes to aid third parties in evading taxes.⁷⁷ The First Circuit summarily dismissed the defendants’ arguments that § 7212(a) requires proof of an ongoing audit.⁷⁸ The court did not engage in any analysis on the point, but merely cited the unpublished Tenth Circuit opinion in *Wood*.⁷⁹ The court did note in a footnote that it was aware of the opinion in *Kassouf*, but declined to follow *Kassouf* because it had been limited to its precise facts.⁸⁰

In *United States v. Marinello* (“*Marinello I*”), the Second Circuit joined the Tenth, Ninth, and First Circuits in holding that § 7212(a) does not require a pending IRS action to sustain a conviction.⁸¹ Strikingly, the court also held that a § 7212(a) violation could be premised on an omission, rather than an affirmative act.⁸² This represented an expansion of the statute even beyond the other circuits that have refused to require a pending IRS proceeding. The Supreme Court granted certiorari and reversed the conviction in *Marinello III*, as discussed in more detail below.⁸³

In May, 2017, in *United States v. Westbrooks*, the Fifth Circuit joined the First, Second, Ninth, and Tenth Circuits in holding that § 7212(a) does not require that there was a pending IRS action at the time the defendant engaged in corrupt conduct.⁸⁴ In upholding the conviction, the court explained that it was joining “a majority of the circuits to consider the question” whether § 7212(a) required a pending IRS action.⁸⁵ Tracking the reasoning of the Second Circuit, the Fifth Circuit found that the text

76. See *United States v. Floyd*, 740 F.3d 22 (1st Cir. 2014).

77. *Id.* at 26-27.

78. *Id.* at 32.

79. *Id.*

80. *Id.* at 32 n. 4.

81. See *United States v. Marinello*, 839 F.3d 209, 222 (2d Cir. 2016), *rev'd and remanded*, 138 S.Ct. 1101 (2018).

82. *Id.* at 224-25.

83. *Marinello v. United States*, 138 S.Ct. 1101 (2018).

84. See *United States v. Westbrooks*, 858 F.3d 317, 322-23 (5th Cir. 2017), *rev'd and remanded*, 138 S.Ct. 1101 (2018).

85. *Id.* The court did note that “[o]f the five circuits to directly address the issue, only the first to consider the question adopted Westbrooks’s position, and one judge dissented from that ruling.... Four have since held that section 7212(a) does not require an ongoing IRS action.” *Id.* (citing *United States v. Kassouf*, 144 F.3d 952, 955-58 (6th Cir. 1998); *United States v. Floyd*, 740 F.3d 22, 32 n.4 (1st Cir. 2014); *United States v. Marinello*, 839 F.3d 209, 222 (2d Cir. 2016), *cert. granted*, 2017 WL 1079367 (U.S. June 27, 2017) (No. 16-1144); *United States v. Massey*, 419 F.3d 1008, 1010 (9th Cir. 2005); *United States v. Sorensen*, 801 F.3d 1217, 1232 (10th Cir. 2015), *cert. denied*, 136 S.Ct. 1163 (2016).) As for the outlier case with one dissenter, the court was, of course, referring to *Kassouf*.

of § 7212(a) was “substantially different” from § 1503 because the general obstruction statute was tied to court proceedings, whereas § 7212(a) relates to administration of the entire tax code, and the actual phrases “due administration of justice” and “due administration of this title” were different.⁸⁶ The court noted that in previous cases under § 7212(a), the government had never been required to prove that the defendant was aware of a pending IRS proceeding.⁸⁷ The court finally seemed persuaded by the fact that a broad reading of § 7212(a) seemed to comport with its purpose to “prevent frustration of tax collection efforts.”⁸⁸ In March 2018, the Supreme Court vacated and remanded this case to the Fifth Circuit in light of *Marinello III*.⁸⁹

The impact that *Bowman*’s reversal of *Kassouf* had on the circuit split cannot be understated. Almost every court that came after *Bowman* cited its limitation of *Kassouf*’s holding in support of an expansive interpretation of § 7212(a).⁹⁰ While many of the courts that came after *Bowman* and before *Miner* did engage in some analysis on the proper scope of § 7212(a) vis-à-vis § 1503, most courts had already dismissed the defendant’s argument for a narrow reading of the statute based on their read that *Kassouf* had been abrogated by *Bowman*.⁹¹

After *Bowman*, the split gained momentum with each court that joined the side of a broad § 7212(a). The first Court of Appeals to consider the issue after *Bowman* was the Ninth Circuit in *Masse*y, and that court did not spend much time analyzing the issue.⁹² Next came the unpublished Fifth Circuit opinion in *Wood*, which noted *Bowman*’s strict limitation of *Kassouf*.⁹³ Although the court did conduct its own textual analysis of § 7212(a), its starting point was the fact that *Kassouf* appeared to be bad law.⁹⁴ Next came *Floyd*, which did not engage in any analysis about § 7212(a) except to cite *Wood* and note that *Kassouf* had been limited to its

86. *Id.*

87. *Id.* at 323.

88. *Id.* at 324.

89. *Westbrooks v. United States*, 138 S.Ct. 1323 (2018).

90. *See United States v. Marinello*, 839 F.3d 209, 222 (2d Cir. 2016), *rev’d and remanded*, 138 S.Ct. 1101 (2018); *United States v. Westbrooks*, 858 F.3d 317, 322-23 (5th Cir. May 24, 2017), *rev’d and remanded*, 138 S.Ct. 1323; *United States v. Floyd*, 740 F.3d 22, 32 n.4 (1st Cir. 2014); *United States v. Sorensen*, 801 F.3d 1217, 1232 (10th Cir. 2015), *cert. denied*, 136 S.Ct. 1163 (2016); *United States v. Wood*, 384 F. App’x 698, 700 (10th Cir. 2010); *United States v. Massey*, 419 F.3d 1008, 1010 (9th Cir. 2005); *but see United States v. Miner*, 774 F.3d 336, 342 (6th Cir. 2014) (holding that § 7212(a) does require the government to prove that the defendant’s conduct occurred while there was a known, pending IRS proceeding).

91. *See id.*

92. *See Massey*, 419 F.3d at 1009-10.

93. *See Wood*, 384 Fed. App’x at 700.

94. *See id.*

precise facts.⁹⁵ By the time the Fifth Circuit addressed the issue again in *Sorensen*, four Courts of Appeals, including the Fifth Circuit's own unpublished opinion, at least appeared to agree that § 7212(a) did not require a pending IRS action. The *Sorensen* court acknowledged in a footnote that *Miner* had reaffirmed *Kassouf*,⁹⁶ but by then the momentum of the circuit split clearly favored *not* imposing a “pending IRS action” requirement in § 7212(a).

While of course it is impossible to say whether the Sixth Circuit would have solely occupied the side of the debate limiting § 7212(a) were it not the opinion in *Bowman*, that decision seems to have impacted the way the law developed about whether § 7212(a) has a pending IRS action prerequisite.

*D. An IRS Proceeding “in the offing:” Resolving the Circuit Split in
Marinello v. United States*

In *Marinello III*, the Supreme Court finally resolved the circuit split about the proper scope of § 7212(a), holding that to prove a violation of § 7212(a), the Government must show both a “nexus” between the defendant's obstructive conduct and an administrative proceeding, and also that the proceeding was pending, or at least reasonably foreseeable, at the time the defendant engaged in that conduct.⁹⁷

In *Marinello III*,⁹⁸ the defendant did not file personal or business tax returns for at least fifteen years.⁹⁹ He also failed to keep books and records related to his courier business, paid employees in cash and did not issue any Forms 1099 or Forms W2, and used business funds to pay personal expenses.¹⁰⁰ Marinello received advice from both a tax lawyer and an accountant that he needed to file tax returns and maintain his business records so that returns could be prepared, but still Marinello did not start maintaining books and records or filing tax returns.¹⁰¹ On a previous occasion, the IRS had investigated Marinello, but closed the

95. See *United States v. Floyd*, 740 F.3d 22, 32 (1st Cir. 2014).

96. See *United States v. Sorensen*, 801 F.3d 1217, 1232 n. 9 (10th Cir. 2015), *cert. denied*, 136 S.Ct. 1163 (2016).

97. *Marinello v. United States*, 138 S.Ct. 1101, 1109 (2018).

98. The facts that form the basis of the opinions in the Second Circuit (“*Marinello I*”), the dissent from denial of *en banc* review (“*Marinello II*”), and the Supreme Court's opinion (“*Marinello III*”) are the same.

99. *United States v. Marinello*, 839 F.3d 209, 211-12 (2d Cir. 2016), *rev'd and remanded* 138 S.Ct. 1101 (2018).

100. *Id.* at 211-12.

101. *Id.* at 212.

investigation before Marinello ever knew about it.¹⁰² When Marinello and his business were finally audited by the IRS again, Marinello was completely unapologetic.¹⁰³ He acknowledged he knew should have paid taxes but “never got around to it.”¹⁰⁴ He said he shredded his business records because “that’s what he had been doing all along,” and admitted that he “took the easy way out.”¹⁰⁵ Marinello was charged with one count of § 7212(a) and eight counts of misdemeanor failure to file taxes under § 7203.¹⁰⁶ The indictment alleged that Marinello failed to maintain books and records and that he failed to turn over all of his records to his accountant. The Second Circuit held that these omissions were sufficient to constitute obstruction under § 7212(a).¹⁰⁷

In *Marinello I*, the Second Circuit refused to adopt the “pending IRS action” limitation on § 7212(a), explaining that § 7212(a) was distinct from § 1503.¹⁰⁸ The court also noted that there was no legislative history indicating that Congress intended the statute to be construed narrowly.¹⁰⁹ In addition to refusing to require a pending IRS proceeding subsequent to a § 7212(a) conviction, the court additionally stated such conviction could be premised on an omission, rather than an affirmative act.¹¹⁰ The court also rejected the defendant’s challenge to § 7212(a) on grounds that the statute was vague and overbroad.¹¹¹ The court noted that previous courts had similarly rejected vagueness and overbreadth challenges to § 7212(a), and concluded that the *mens rea* requirement that the conduct be accomplished “corruptly” sufficiently restricted the omnibus clause.¹¹²

Marinello requested and was denied *en banc* review of the Second Circuit’s decision.¹¹³ However, in a strongly-worded dissent from the denial of *en banc* review (“*Marinello II*”), two Second Circuit judges disagreed with the panel’s denial of *en banc* review.¹¹⁴ Judge Jacobs, who authored the dissent, expressed concern that “nobody [was] safe” if the defendant’s conviction was allowed to stand because that conviction could have been based on a number of otherwise innocuous actions, such

102. *Id.*

103. *Id.*

104. *Id.*

105. *United States v. Marinello*, 839 F.3d 209, 211-12 (2d Cir. 2016), *rev’d and remanded* 138 S.Ct. 1101 (2018).

106. *Id.* at 212-13.

107. *Id.*

108. *Id.* at 219-20.

109. *Id.* at 221.

110. *Id.* at 224-25.

111. *Marinello I*, 839 F.3d at 221-22.

112. *Id.* at 222.

113. *See United States v. Marinello (“Marinello II”)*, 855 F.3d 455 (2d Cir. 2017) (Jacobs, J., dissenting from denial of *en banc* review).

114. *Id.* (Jacobs, J., and Cabranes, J., dissenting).

as failing to maintain records, destroying records, or failing to give records to his accountant.¹¹⁵ Most particularly, Judge Jacobs expressed fervent concerns that unless § 7212(a) was limited to conduct that occurred after a defendant learned of a pending IRS action, the statute would become unconstitutionally vague and overbroad because it would “afford the sort of capricious, unbounded, and oppressive opportunity for prosecutorial abuse that the Supreme Court has repeatedly curtailed.”¹¹⁶ In Judge Jacobs view, the requirement that the conduct be accomplished “corruptly” did not remedy this overbreadth and potential for prosecutorial abuse, because gaining an unlawful benefit for oneself or another is so akin to lawful aggressive tax avoidance that innocent citizens are likely to be ensnared in the penumbra of the statute based upon legal behavior.¹¹⁷ Judge Jacobs explained that he declined to defer to DOJ’s view about the scope of the statute, stating that “[a]t 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.’”¹¹⁸

In *Marinello III*, the Supreme Court held that, to establish a violation of § 7212(a), the Government must prove “that there is a ‘nexus’ between the defendant’s conduct and a particular administrative proceeding, such as an investigation, and audit, or other targeted administrative action.”¹¹⁹ The Court explained that the “nexus requires a ‘relationship in time, causation, or logic with the [administrative] proceeding.’”¹²⁰ The Court went on to say that the concept of a “particular administrative proceeding” does not include every act carried out by IRS employees in furtherance of their duties, and does not include “routine, day-to-day work carried out in the ordinary course by the IRS, such as the review of tax returns.”¹²¹ In addition to the “nexus” requirement, the Court held that the Government must prove that, when the defendant engaged in obstructive conduct, the action was pending, or was at least reasonably foreseeable by the defendant.¹²²

The Court took as a starting point the Supreme Court decision of *United States v. Aguilar*, which interpreted the general obstruction of justice provision, 18 U.S.C. § 1503.¹²³ In *Aguilar*, the Supreme Court

115. *Id.* at 456.

116. *Id.* at 457 (2d. Cir. 2017) (Jacobs, J., dissenting from denial of *en banc* review).

117. *Id.*

118. *Id.* at 459.

119. *Marinello v. United States (“Marinello III”)*, 138 S.Ct. 1101, 1109 (2018).

120. *Id.* (citing *Aguilar*, 515 U.S. at 599 and *Wood*, 6 F.3d at 696).

121. *Id.* at 1110.

122. *Id.*

123. *Id.*

solidified that § 1503 required the government to prove that the defendant's obstructive conduct bore a "nexus" to a pending judicial proceeding.¹²⁴ In *Aguilar*, the Supreme Court explained that actions such as "uttering false statements to an investigating agent . . . who might or might not testify before a grand jury [was] [in]sufficient to make out a violation of the catchall provision of § 1503."¹²⁵ The Court in *Aguilar* limited § 1503 in part out of deference to Congressional prerogative about the scope of the statute, and because the Court wanted to ensure proper notice to the defendant about what conduct was criminalized by § 1503.¹²⁶

Like the court in *Aguilar*, the Supreme Court in *Marinello III* explained that the Court has traditionally exercised restraint in interpreting criminal statutes out of a desire to defer to Congressional intent.¹²⁷ The Court concluded that Congressional intent in the text of § 7212(a) was "neutral," because the statutory words "obstruct or impede" are broad, but the verbs "obstruct" and "impede" suggest an object (such as a particular person or proceeding).¹²⁸ However, the Court found that the statutory context in which § 7212(a) was enacted suggested that the omnibus provision was limited to particular administrative proceedings.¹²⁹ This was because the omnibus provision was located immediately after a prohibition against intimidating or impeding "any officer or employee of the United States acting in an official capacity" and before a phrase dealing with any "property" seized under the Internal Revenue Code.¹³⁰ This, the Court reasoned, meant that the omnibus provision was intended as a "catchall" provision to encompass any conduct directed at identifiable persons or property, but *not* as a catchall to encompass every violation that interfered with the administration of the IRS generally.¹³¹

Although many previous courts have averred that the legislative history surrounding the enactment of § 7212(a) is silent on the intended scope of the omnibus clause,¹³² the Supreme Court found that the legislative

124. See *United States v. Aguilar*, 515 U.S. 593, 599-600 (1995).

125. *Aguilar*, 515 U.S. at 600; *United States v. Kassouf*, 144 F.3d 952, 957 (6th Cir. 1998).

126. See *Aguilar* at 600.

127. *Marinello III*, 584 U.S. at 1106.

128. *Id.*

129. *Id.* at 1107.

130. *Id.* at 1106-07.

131. *Id.* at 1107.

132. See *United States v. Williams*, 644 F.2d 696, 699 n. 13 (8th Cir. 1981), *superseded by statute on other grounds*, Pub. L. No. 101-239, 103 Stat. 2393, *as recognized in* *United States v. Brooks*, 174 F.3d 950, 956 (8th Cir. 1999) ("This legislative history is virtually useless with respect to the issue before us, however, because it is wholly silent on § 7212's omnibus clause."); *United States v. Mitchell*, 985 F.2d 1275, 1279 (4th Cir. 1993) ("We do not find the history particularly enlightening or dispositive as to Congress's understanding of the precise scope of the omnibus provision."); *United States v. Kelly*, 564 F. Supp.2d 843, 844 (N. D. Ill. 2008) (stating that the legislative history of 7212(a) "is—at best—ambiguous" and explaining that while both the Senate and House reports refer to 7212(a) as punishing

history supported a more limited scope of § 7212(a).¹³³ The Court further found that nothing in the legislative history of § 7212(a) suggested that the Omnibus clause was a “catchall” to punish all conduct otherwise in violation of the Tax Code.¹³⁴ Rather, the House and Senate reports both indicate that § 7212(a) makes it a crime to obstruct a specific, identifiable IRS agent.¹³⁵ As the Court pointed out, the Tax Code includes numerous misdemeanors, such as failure to file tax returns under § 7203. An expansive reading of § 7212(a) would transform those misdemeanors into felonies, rendering other, more specific provision of the Tax Code redundant.¹³⁶

Next, the Court found that reading § 7212(a) too broadly would not ensure fair warning to putative defendants about what conduct is criminal.¹³⁷ In the Court’s view, the requirement that the conduct be done “corruptly” (as opposed to the *mens rea* “willfully” typically found in tax crimes) did not save the statute from overbreadth.¹³⁸ Although the Supreme Court did not specifically ground its analysis in a Due Process context, as other courts have done,¹³⁹ it did note the concerns that a broad reading of § 7212(a) would not provide fair warning to the public about what conduct that statute criminalizes.¹⁴⁰ The Supreme Court gave several examples of low-level misdemeanor criminal tax offenses, such as paying a babysitter \$41 per week in cash without withholding taxes, that could be charged as a felony violation of § 7212(a) if the statute was

threats or threatening acts against IRS agents or employees, “they are silent on the significance of the omnibus clause.”).

133. *Marinello v. United States*, 138 S.Ct. 1101, 1107 (2018).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 1108.

138. *Id.*

139. *See United States v. Kassouf*, 144 F.3d 952, 958 (6th Cir. 1998). Similar to the Supreme Court’s overbreadth analysis in *Aguilar* with respect to § 1503, in *Kassouf*, the Sixth Circuit concluded that if § 7212(a) was not limited to pending actions, the statute would be open to constitutional challenges for vagueness and overbreadth because it would not provide notice of what conduct was criminal. *See Kassouf* at 958. The court explained that the “due administration of [Title 26]” encompassed “a vast range of activities of the Internal Revenue code, including: mailing out internal revenue forms; answering taxpayers’ inquiries; receiving, processing, recording, and maintaining tax returns, payments and other taxpayer submissions; as well as monitoring taxpayers’ compliance with their obligations.” *Id.* at 956. The court noted that the IRS audits only a small percentage of tax returns. *Id.* Thus, the court found that unless the statute required that the defendant knew about a pending IRS proceeding, it was highly speculative whether conduct such as failing to maintain books and records would actually impede the IRS. *Id.* A broad reading of § 7212(a) would therefore provide inadequate notice to a defendant that failing to keep records was criminal, because he may not have had any idea that such conduct might someday obstruct the IRS’s efforts to assess his taxes. *Id.*

140. *Marinello v. United States*, 138 S.Ct. 1101, 1108 (2018).

not limited to specific IRS actions.¹⁴¹

Finally, the Supreme Court expressed concern that a broad reading of § 7212(a) would risk allowing “policemen, prosecutors, and juries to pursue their personal predilections.”¹⁴² The Court explained that it could not rely on prosecutorial discretion to narrow the scope of § 7212(a).¹⁴³ The Court noted that, while the Government had prosecuted the omnibus provision only sparingly when the statute was first enacted, the Government had used the clause more often after the early 1990s.¹⁴⁴ The Court noted that the Government maintained a policy to charge a more punitive provision over a less punitive criminal provision if both apply to the defendant’s conduct.¹⁴⁵

III. HOW COURTS PREVIOUSLY RELIED ON PROSECUTORIAL DISCRETION TO LIMIT THE SCOPE OF § 7212(A)

It is a longstanding tenant of criminal law that the government retains broad discretion in charging decisions.¹⁴⁶ This concept is particularly relevant with respect to § 7212(a), because DOJ has traditionally limited the scope of prosecutions under that provision. In fact, as previously discussed, the first time DOJ charged the omnibus clause was in 1981, even though the statute was enacted in 1954.¹⁴⁷ However, while DOJ has traditionally prosecuted under § 7212(a) conduct that impacts a specific IRS proceeding, until *Marinello III*, § 7212(a) had been broadened by the courts so that virtually any act of malfeasance related to filing or paying taxes was a possible violation of § 7212(a). Thus, prosecutorial restraint, not judicial boundary-setting, was the only limiting factor in whether an individual was charged with § 7212(a), whether he was charged with misdemeanor § 7203, or whether he faced no charges at all.

While courts are tasked with the job of interpreting federal criminal statutes to determine their scope, DOJ decides which criminal statutes it will prosecute and to what extent. These two roles are distinct but work in harmony. Courts delineate how far the government may go in prosecuting an individual under a criminal statute, and DOJ thereafter issues policy statements and internal guidance within the boundaries set by the courts. From a legal perspective, DOJ policy should be issued

141. *Id.*

142. *Id.* (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)).

143. *Id.*

144. *Id.*

145. *Id.*

146. *See* *United States v. Armstrong* (“*Armstrong II*”), 517 U.S. 456, 464 (1996).

147. *See* *United States v. Williams*, 644 F.2d 696, 699 (8th Cir. 1981), *superseded by statute on other grounds*, Pub. L. No. 101-239, 103 Stat. 2393, *as recognized in* *United States v. Brooks*, 174 F.3d 950, 956 (8th Cir. 1999).

based on judicial interpretation of the criminal statutes, not the other way around. However, as will be discussed in this Part, sometimes DOJ policy can impact the way courts interpret criminal statutes.

Courts have considered DOJ policy limiting the scope of § 7212(a) when deciding that § 7212(a) does not require a defendant to have been aware of a pending IRS requirement at the time he engaged in corrupt obstructive conduct. At least some of the courts considering whether § 7212(a) should require a “pending IRS action” have also considered Tax Division guidance that has traditionally limited the scope of how § 7212(a) is charged. Thus, courts have clearly been aware of DOJ guidance in this context.

Further, the historical charging restraint exercised by DOJ, which limits the scope of how § 7212(a) has been charged, impacted judicial review of the scope of the omnibus clause. DOJ, by issuing policy statements about how the statute could be used, limited what cases were available for judicial review. DOJ policy has usually ensured that courts declining to limit the ambit of § 7212(a) have primarily considered cases in which the conduct was obstructive of a specific IRS proceeding.

Finally, DOJ guidance limiting the statute has ensured that constitutional vagueness and overbreadth challenges to § 7212(a) have necessarily failed, because the conduct was typically within even a narrow reading of the statute.

A. Courts Have Turned to DOJ Policy Limiting § 7212(a) When Interpreting the Statute

In considering whether § 7212(a) contains a “pending IRS action” requirement, some appellate courts considered Tax Division guidance limiting the use of the statute. In *Kassouf* in the Sixth Circuit, the parties argued that the § 7212(a) charges were inconsistent with internal DOJ guidance, which makes it apparent that the court was aware of the guidance when ruling on the § 7212(a) question.¹⁴⁸ Further, in two recent Courts of Appeals cases under § 7212(a)—*Marinello I* and *Sorensen*—the Second and Eleventh Circuits addressed the Tax Division directives that limit the prosecutorial scope of the statute.¹⁴⁹ However, these courts did not acknowledge what role DOJ policy played in limiting the cases that make their way to judicial review.

In *Kassouf*, the Sixth Circuit limited § 7212(a) despite the fact that DOJ

148. See *United States v. Kassouf*, 144 F.3d 952, 958 (6th Cir. 1998).

149. See *United States v. Marinello*, 839 F.3d 209, 222 (2d Cir. 2016), *cert. granted*, 2017 WL 1079367 (U.S. June 27, 2017) (No. 16-1144); *United States v. Sorensen*, 801 F.3d 1217, 1226-27 (10th Cir. 2015), *cert. denied*, 136 S.Ct. 1163 (2016).

had in place at the time self-imposed limitations on bringing charges under the statute.¹⁵⁰ The *Kassouf* court was clearly aware what DOJ policy was at the time of the opinion because the parties argued about the policy in their briefs.¹⁵¹ In his principle brief, the defendant-appellee asserted that the court's reading of a "pending action" requirement into § 7212(a) was consistent with DOJ policy.¹⁵² DOJ policy at the time was Tax Division Directive 77, which stated "the use of the 'omnibus' provision of Section 7212(a) should be reserved for conduct occurring after a tax return has been filed—typically conduct designed to impede or obstruct an audit or criminal tax investigation, when 18 U.S.C. § 371 charges are unavailable due to insufficient evidence or a conspiracy."¹⁵³ The government-appellant contended that charging the defendant in *Kassouf* with § 7212(a) was not inconsistent with DOJ policy, but that even if it was, that fact was legally irrelevant because DOJ policy did not confer any substantive rights on defendants.¹⁵⁴

Although the *Kassouf* court never directly mentioned DOJ policy, the court expressed concern that "[i]n this day, when Congress is attempting to curb the reach of the IRS into the homes of taxpayers, we cannot construe a penal law such as § 7212(a) to permit such an invasion into the activities of lawabiding citizens."¹⁵⁵ This statement demonstrates that the court recognized a broad judicial interpretation of the statute may lead to a broader swath of prosecutions, perhaps reaching conduct that did not obstruct a specific IRS proceeding. The court, clearly uncomfortable with the idea that DOJ and the IRS might expand the scope of prosecutions under the statute, therefore chose to impose judicial limitations as a safeguard against the statute's overuse.

Although Executive Branch policy statements are not binding on courts considering the scope of a statute,¹⁵⁶ both the Second Circuit and the Tenth Circuit turned to Tax Division guidance when declining to limit § 7212(a).¹⁵⁷ The Tenth Circuit in *Sorensen* acknowledged that DOJ had a

150. See *Kassouf*, 144 F.3d at 958.

151. See Brief of Defendant-Appellee James J. Kassouf at 19, *Kassouf*, 144 F.3d at 955 (No. 1:95-CR-199), 1996 WL 34386659, at *17; Reply Brief of Plaintiff-Appellant at 6-8, *Kassouf*, 144 F.3d at 955 (No. 1:95-CR-199), (May 12, 1997), 1997 WL 34609476, at *7.

152. Brief of Defendant-Appellee James J. Kassouf at 19, *Kassouf*, 144 F.3d at 955 (No. 1:95-CR-199), 1996 WL 34386659, at *17.

153. *Id.*

154. Reply Brief of Plaintiff-Appellant at 6-8, *Kassouf*, 144 F.3d at 955 (No. 1:95-CR-199), (May 12, 1997), 1997 WL 34609476, at *7.

155. *Kassouf*, 144 F.3d at 958.

156. See *Sorensen*, 801 F.3d at 1226-27 (citing *Abramski v. United States*, 134 S.Ct. 2259, 2274 (2014) and *United States v. Apel*, 134 S.Ct. 1144, 1151 (2014)) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference.")

157. See *id.*; *United States v. Marinello* ("*Marinello I*"), 839 F.3d 209, 222 (2d Cir. 2016), *rev'd and remanded*, 138 S.Ct. 1101 (2018).

policy limiting the conduct that DOJ would prosecute under § 7212(a).¹⁵⁸ The court explained that DOJ policy instructed that § 7212(a) “should not be used as a substitute for a charge directly related to tax liability—such as tax evasion or filing a false tax return—if such a charge is readily provable.”¹⁵⁹ The court noted that it was up to DOJ, not the court, to determine how to enforce that policy, and declined to second-guess the government’s view whether § 7201 was “readily provable” in that case.¹⁶⁰ The court did note that DOJ’s failure to comply with its own policy did not confer any substantive rights on the defendant.¹⁶¹ Although the court cited the policy, it gave no indication that it was aware what impact that policy had in selecting the cases that comprise the corpus of § 7212(a) jurisprudence.

In a striking display of deference to the Executive Branch, the Second Circuit in *Marinello I* seemed to rely heavily on DOJ guidance when declining to limit § 7212(a). In *Marinello I*, the Second Circuit upheld the defendant’s conviction under § 7212(a) in part because the charges were brought consistent with DOJ policy.¹⁶² In concluding that the omnibus clause of § 7212(a) criminalizes any corrupt interference with IRS agents administering any aspect of the tax code, the court reasoned, in part, that this interpretation was consistent with internal Tax Division policy stating that the omnibus clause may be charged prior to any audit or investigation if the conduct is large-scale obstructive conduct and involves the tax liability of third parties.¹⁶³

The *Marinello I* court’s deference to the executive branch to determine the scope of § 7212(a) was highly unusual and somewhat alarming. The dissent from denial of *en banc* review in the Second Circuit even curtly noted, “unlike the panel, I decline to defer to the Department of Justice’s views to determine the scope of a criminal statute.”¹⁶⁴ After all, it is the job of the Judiciary, not the Executive, to say what the law means.¹⁶⁵

158. *Sorensen*, 801 F.3d at 1226-27.

159. *Id.* at 1227.

160. *Id.*

161. *Id.*

162. *See Marinello I*, 839 F.3d at 222.

163. *Id.* at 222-23. It should be noted that the court in *Marinello I* read DOJ policy as far more expansive than the author of this article, who considers the charges in *Marinello I* to be outside the scope of DOJ policy guidance.

164. *United States v. Marinello* (“*Marinello II*”), 855 F.3d 455 (2d. Cir. 2017) (Jacobs, J., dissenting from denial of *en banc* review).

165. *See United States v. Sorensen*, 801 F.3d 1217, 1226-27 (10th Cir. 2015), *cert. denied*, 136 S.Ct. 1163 (2016) (citing *Abramski v. United States*, 134 S.Ct. 2259, 2274 (2014) and *United States v. Apel*, 134 S.Ct. 1144, 1151 (2014)) (“[W]e have never held that the Government’s reading of a criminal statute is entitled to any deference.”). The Second Circuit’s partial reliance on DOJ guidance about when to prosecute a statute is indeed troubling. It is the job of the judiciary to say what the law is and the job of

These examples represent three of the six circuits weighing in on the issue whether § 7212(a) has a “pending IRS action” requirement. The *Sorensen* opinion, which discussed DOJ policy at some length, was cited by the court in *Westbrooks*, which means that the Fifth Circuit was clearly aware of the DOJ policy as well.¹⁶⁶ Thus, there is evidence that at the very least four of the six circuits deciding this issue were aware that since 1989, DOJ has had limiting policies in place curtailing use of the statute, but there is little evidence these courts appreciated the impact that such limiting policy could have on the development of judicial limits on § 7212(a).

B. DOJ Policy Has Limited § 7212(a) Cases to Cases Where There Was A Pending IRS Action or the Defendant Knew His Conduct Would Cause the IRS to Initiate an Action

DOJ policy limiting § 7212(a) prosecutions has curated the cases that reached judicial review, ensuring that for cases charged under the omnibus provision, the defendant’s conduct was, at least most of the time, obstructive of a particular IRS agent or proceeding. By limiting the cases that have undergone scrutiny by a court in § 7212(a) cases, DOJ chose its hand carefully so that even when courts were confronted with cases that stretched the boundaries of § 7212(a), the conduct impacted or caused an IRS proceeding and thus fit within even a narrow reading of § 7212(a).

1. The Bailiwick of § 7212(a) Cases is Tax Protestors: Individuals Who Obstinate Refuse to Pay Their Taxes and Do Everything Possible to Make the IRS’s Job Harder

The omnibus clause of § 7212(a) has traditionally been used in the context of the “tax protestor,” the individual who has made it his mission to thwart the IRS’s ability to collect his taxes. Tax protestors engage in myriad tactics to prevent the IRS from collecting taxes, from sending multitudinous frivolous correspondence to the IRS, filing false tax returns, filing liens and court actions to harass IRS agents, and just generally being a pain in the IRS’s neck.¹⁶⁷ The omnibus clause therefore

the executive to enforce that law. If courts began routinely referring to DOJ policy to support judicial decisions about the scope of criminal statutes, every court opinion deciding the scope of a criminal statute would involve circular logic: the government charged the statute in a particular way, and since we defer to the government’s view of the scope of the statute, they must have charged it correctly. In essence, *no* criminal appeal challenging the scope of a statute would *ever* succeed as long as DOJ followed its own internal policy.

166. See *United States v. Westbrooks*, 858 F.3d 317, 323 (5th Cir. 2017), *rev’d and remanded*, 138 S.Ct. 1101 (2018).

167. For a discussion of tax protestor schemes and tactics, see Dep’t of Just., *Crim. Tax Manual*, 40.00 Tax Defiers (also known as illegal tax protestors), at 1-17 (2012), available at

seems a particularly appropriate charge for the tax protestor—pretty much every action he engages in is intended to interfere with a pending IRS action or to fraudulently cause the IRS to initiate an action.

In many cases involving tax protestors, there was no question that the defendant intended to obstruct a known, pending IRS proceeding, even if the government failed to allege that there was such proceeding. These prosecutions were authorized consistent with DOJ guidance to use § 7212(a) for cases where a defendant obstructs an active investigation or audit. For example, in *Massey*, the defendant did not file tax returns for six tax years, and when the IRS contacted him, he threatened to sue the IRS and its agents, told IRS that he would charge them \$500,000 for unauthorized use of his name, and demanded IRS stop the investigation.¹⁶⁸ While the government did not allege that there was a pending IRS action, the proof at trial demonstrated that the defendant was aware that the IRS had initiated collection efforts.¹⁶⁹ In other words, the defendant harassed the IRS during ongoing IRS collection efforts that he clearly knew about.¹⁷⁰

In *Miner*, in which the government likewise did not allege that there was a pending IRS action, the defendant's conduct perpetuating two large-scale tax protestor schemes was so clearly obstructive of a pending IRS proceeding that the Sixth Circuit upheld the defendant's conviction even though the court simultaneously limited the scope of § 7212(a).¹⁷¹ Although the court held that § 7212(a) did indeed require the government to prove that the defendant was aware of a pending IRS action or proceeding at the time he engaged in corrupt conduct, the court held that there was ample evidence that the defendant was aware of a pending IRS proceeding when he attempted to obstruct the IRS.¹⁷²

Some courts faced with tax protestor defendants, when the government failed to allege that the defendant was aware of a pending IRS proceeding, have held that § 7212(a) reaches conduct that the defendant knows would *cause* the IRS to initiate a proceeding. The best example of a court upholding a tax protestor's conviction under § 7212(a) although the government failed to allege that there was a pending IRS proceeding—in the face of conflicting, binding authority, no less—is found in the Sixth Circuit opinion in *Bowman*.¹⁷³ *Bowman* was a tax protestor who had

<https://www.justice.gov/sites/default/files/tax/legacy/2012/12/05/CTM%20Chapter%2040.pdf>.

168. *United States v. Massey*, 419 F.3d 1008, 1009 (9th Cir. 2005).

169. *Id.*

170. *Id.*

171. *See United States v. Miner*, 774 F.3d 336, 346 (6th Cir. 2014).

172. *Id.* at 346.

173. *See United States v. Bowman*, 173 F.3d 595 (6th Cir. 1999).

gotten himself deep in debt, harassed his creditors with bogus lawsuits, and filed fake Forms 1099 with the IRS to cause the IRS to issue false notices of tax delinquency to his creditors.¹⁷⁴ The scheme arguably fit DOJ policy because it was fairly expansive (it involved numerous individuals and businesses), and it involved the tax liabilities of numerous third parties (although Bowman was not technically trying to help them avoid their tax liability—which seems to be the spirit of Tax Division Directive 129—but to create tax liability where there was none). But regardless whether this prosecution was entirely consistent with Tax Division guidance on how to charge § 7212(a), this case represents a situation where the defendant engaged in behavior that was clearly intended fraudulently to cause the IRS to initiate actions against Bowman’s creditors.

In holding that § 7212(a) did not contain a pending IRS action requirement, the court seemed particularly concerned that prosecutors should be able to convict tax protestor defendants, whose mission was to annoy and harass the IRS, of obstruction under § 7212(a). The court explained that “unless *Kassouf* is limited to its facts, its effect would be to prevent the prosecution of actions whose sole purpose is to obstruct or impede the IRS in the administration of its duties, as those acts of obstruction only trigger or attempt to trigger investigation by the IRS.”¹⁷⁵ The court was understandably consternated that *Kassouf* would prevent a conviction in Bowman’s case, where the defendant clearly intended to cause the IRS to initiate frivolous proceedings, wasting IRS resources and taxpayer money.

Similarly, the court in *United States v. Molesworth* held that a tax protestor who intended to fraudulently cause the IRS to initiate an action violated § 7212(a). The defendant in *Molesworth* was a tax protestor who hoped to harass his creditors by filing false forms with the IRS that claimed his creditors had \$24 million in unreported income.¹⁷⁶ This scheme, which was apparently a once-popular method for tax protestors to vent their angst against their creditors and the IRS, also caused the IRS to spend time and resources to determine that the forms were fraudulent.¹⁷⁷ The court held, consistent with *Bowman*, that because the defendant engaged in conduct designed to cause the IRS to initiate an action, his conduct was covered by § 7212(a).¹⁷⁸ In each case, the court held that § 7212(a) extended to cover the tax protestor’s conduct, which

174. See *Bowman*, 173 F.3d at 596-97.

175. *Id.* at 600.

176. See Government’s Trial Brief, *United States v. Molesworth*, No. 05-045-C-EJL, 2005 WL 5840367, at 1 (D. Idaho, August 26, 2005).

177. *Id.*

178. *United States v. Molesworth*, 383 F. Supp.2d 1251, 1253-54 (D. Idaho 2005).

was clearly intended to cause the IRS to initiate an action, notwithstanding the fact that the defendant was not aware of a pending IRS proceeding at the time.¹⁷⁹

2. DOJ Policy Limiting § 7212(a) Charges to Large-Scale Cases
Obstructing the Tax Liability of Third Parties Produces Cases
Where the Defendant Knew His Conduct Would Cause the IRS to
Initiate Proceedings

In addition to authorizing cases when a defendant obstructed a known IRS proceeding, DOJ policy permits § 7212(a) charges when a defendant's conduct is large in scale and obstructs the tax liability of third parties. Several defendants who have challenged the government's failure to allege a pending IRS action under § 7212(a) have been tax protestors who promoted large-scale scams to help third parties avoid paying taxes.¹⁸⁰ These cases were consistent with DOJ policy about when to authorize § 7212(a) charges. For example, in *United States v. Crim*, the defendant promoted two large-scale tax scams, both foreign and domestic, to help third parties evade their taxes.¹⁸¹ The court held that helping others conceal their money from the IRS was sufficient to obstruct the due administration of the Internal Revenue Code.¹⁸²

Similarly, the charged conduct in *Floyd* involved operating two elaborate, large-scale, tax protestor scams to help third parties avoid paying the IRS.¹⁸³ The first scam involved allowing clients, who were employers, to pay funds to a nominee company to allow the employers to avoid paying the required withholding taxes.¹⁸⁴ The second scam involved comingled funds of multiple clients into nominee "warehouse bank" accounts, thereby disguising the funds from the IRS.¹⁸⁵ This conduct was consistent with Tax Division guidance about when to charge § 7212(a) because both scams were large in scale and affected the tax liability of third parties. Additionally, the defendants' conduct was clearly specifically intended to obstruct the IRS's ability to assess and collect taxes; there was no question that the IRS would initiate

179. See *United States v. Crim*, No. 06-CR-00658-2, 2007 WL 4563481, *2 (E.D. Pa., December 13, 2007); *Molesworth*, 383 F. Supp.2d at 1253-54.

180. See *Crim*, No. 06-CR-00658-2, 2007 WL 4563481; *Molesworth*, 383 F. Supp.2d 1251; *United States v. Floyd*, 740 F.3d 22 (1st Cir. 2014); *United States v. Miner*, 774 F.3d 336, 344-45 (6th Cir. 2014).

181. See Superseding Indictment at 1-4, *United States v. Crim*, No.06-CR-00658, 2007 WL 3299068, at *1-2. (E.D. Pa. April 24, 2007).

182. *Crim*, 2007 WL 4563481, at *2.

183. *United States v. Floyd*, 740 F.3d 22, 32 n.4 (1st Cir. 2014).

184. *Id.* at 27.

185. *Id.*

proceedings based on the sheer number of fraudulent transactions. The court held that the totality of the evidence demonstrated that the defendants corruptly endeavored to impede the IRS's assessment of their taxes.¹⁸⁶

Not all defendants charged under § 7212(a) are tax protestors. However, in non-tax protestor cases, DOJ policy limiting the use of § 7212(a) has ensured that there are some additional indicia of intent to upset the IRS's internal procedures beyond the garden variety tax case. For example, the defendant in *Wood* was a seasoned attorney with experience in criminal tax law, which indicates that he knew what impact his conduct would have on the IRS.¹⁸⁷ The defendant was charged under § 7212(a) when he not only refused to pay his own taxes, but had previously represented clients facing criminal tax charges, and took \$11 million income he and his cohorts swindled from investors in a Ponzi scheme and hid it from the IRS in the offshore and nominee bank accounts.¹⁸⁸ Further, though this defendant was not identified as a tax protestor, he claimed that his "religious beliefs" prevented him from paying taxes, which is the sort of tax-thwarting mindset common to tax protestors.¹⁸⁹

The charges in *Wood* fall squarely within Tax Division guidance about when to charge a § 7212(a) prosecution "prior to any audit or investigation" because the conduct was large in scale and involved the tax liabilities of third parties.¹⁹⁰ Moreover, the defendant was an attorney with specific knowledge about his duties to comply with the tax laws.¹⁹¹ The court found that the "natural and probable effect" of his conduct was to obstruct or impede the IRS, notwithstanding the fact that the government failed to prove any pending IRS action or proceeding.¹⁹²

Similarly, in *United States v. Willner*, the defendant charged with § 7212(a) was an IRS employee; clearly this defendant should have known the impact his actions would have on pending or future IRS actions.¹⁹³ The defendant used his advertising agency to conceal from the IRS his income from teaching business courses at graduate schools in Manhattan.¹⁹⁴ The defendant invited others to participate in his scheme to conceal income from the IRS, and took a 20% fee for concealing their

186. *Id.*

187. *See* *United States v. Wood*, 384 Fed. App'x 698, 700 (10th Cir. 2010).

188. *See id.*

189. *Id.*

190. *See id.*

191. *Id.*

192. *See* *United States v. Wood*, 384 Fed. App'x 698, 705-06 (10th Cir. 2010).

193. *United States v. Willner*, No. 07 Cr. 183, 2007 WL 2963711, at *4 (S.D.N.Y. Oct. 11, 2007).

194. *Id.* at *1.

income through the advertising agency.¹⁹⁵ Although it did not deal with a tax protestor, this case fits within Tax Division policy because it was large scale and involved the tax liability of third parties. Further, the defendant's intent seemed particularly culpable because Willner was an IRS employee who certainly should have known better.¹⁹⁶

Likewise, the defendant in *Westbrooks* was a tax return preparer who engaged in a large-scale scheme to thwart the tax liability of multiple third parties.¹⁹⁷ *Westbrooks* filed false tax returns which underreported the income she paid to the employees of her tax return preparation business and failed to properly file IRS forms documenting cash payments she made to employees.¹⁹⁸ Additionally, the IRS executed a search warrant on her business and served her with a grand jury subpoena to provide business records.¹⁹⁹ *Westbrooks* was later held in criminal contempt for failing to comply with the subpoena.²⁰⁰ The court held that § 7212(a) did not require the government to allege a pending IRS proceeding.²⁰¹ Similarly, the court held that *Westbrooks*' vagueness and overbreadth challenge failed because her conduct was prohibited by the statute.²⁰² While the court reached both these conclusions based on the government's allegations that *Westbrooks* engaged in deceptive practices like making cash payments and not filing required documents with the IRS, it cannot be ignored that *Westbrooks* also interfered with an ongoing IRS criminal proceeding.²⁰³ This case appears to be well within DOJ guidelines.

Most cases in which a defendant has challenged his § 7212(a) conviction based on the absence of a then-pending IRS action are consistent with DOJ's internal policy limiting § 7212(a) prosecutions to cases "prior to any audit or investigation" to those cases involving "large-scale obstructive conduct involving the tax liability of third parties." Large-scale conduct affecting the tax liability of third parties tends to impact pending IRS proceedings or to cause the IRS to initiate proceedings. That is, in most of these cases, the defendant's intent to interfere with a pending IRS action or to fraudulently cause the IRS to initiate an action is clear.

195. *Id.*

196. *Id.*

197. *United States v. Westbrooks*, 858 F.3d 317, 322-23 (5th Cir. 2017), *rev'd and remanded*, 138 S.Ct. 1101 (2018).

198. *Id.* at 321.

199. *Id.*

200. *Id.*

201. *Id.* at 324.

202. *Id.* at 325.

203. *Id.* at 325.

C. DOJ Policy Has Ensured That Challenges to § 7212(a) on Grounds of Overbreadth and Vagueness Have Failed

Several courts have considered whether § 7212(a) would be vague or overbroad if not limited to conduct occurring in response to a concurrently pending IRS action.²⁰⁴ The Tenth, Second, and Fifth circuits have rejected such vagueness and overbreadth challenges, while the Sixth noted that the statute would be ripe for vagueness and overbreadth challenges if § 7212(a) were not limited to conduct occurring in response to pending IRS actions.²⁰⁵

DOJ policy limiting the scope of § 7212(a) to cases that did, in many cases, involve a pending IRS proceeding, has ensured that the statute has never been held unconstitutionally vague or overbroad based on the fact that it does not require a pending IRS action. A criminal statute is unconstitutionally vague if it fails to “define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited” or if it does not establish guidelines to prevent “arbitrary and discriminatory enforcement of the law.”²⁰⁶ A defendant’s claim that a criminal statute is vague “will fail if a reasonable person would have known from the language of the statute that his specific alleged conduct was at risk.”²⁰⁷ Because vagueness and overbreadth challenges are

204. See *United States v. Westbrooks*, 858 F.3d 317, 322-23 (5th Cir. 2017), *rev’d and remanded*, 138 S.Ct. 1101 (2018) (rejecting challenge to § 7212(a) on grounds of vagueness and overbreadth based on the defendant’s conduct); *United States v. Marinello*, 839 F.3d 209, 221-22 (2d. Cir. 2016), *rev’d and remanded*, 138 S.Ct. 1101 (2018) (rejecting challenge to § 7212(a) on grounds of vagueness and overbreadth because previous courts had rejected similar challenges and restricted the term “corruptly” to render the statute constitutional); *United States v. Wood*, 384 Fed. App’x 698, 706 (10th Cir. 2010) (holding that § 7212(a) was not vague or overbroad as applied to the defendant’s conduct).

205. See *Westbrooks*, 858 F.3d at 322-23; *Marinello*, 839 F.3d at 221-22; *Wood*, 384 Fed. App’x at 706; *United States v. Kassouf*, 144 F.3d 952, 958 (6th Cir. 1998) (concluding that if § 7212(a) is not limited to pending IRS actions, the statute would be open to “legitimate charges of overbreadth and vagueness”); see also *United States v. Miner*, 744 F.3d 336, 343 (6th Cir. 2014) (reaffirming *Kassouf* on this point).

The majority of Courts of Appeals decisions that have rejected challenges to § 7212(a)’s vagueness and overbreadth have not considered whether the statute should have a pending IRS requirement; most vagueness and overbreadth challenges to the statute have concerned the proper scope of the term “corruptly.” See *United States v. Ring*, 191 F.3d 442 (9th Cir., Sept. 8, 1999) (unpublished) (rejecting challenge to § 7212(a) on grounds of vagueness and overbreadth); *United States v. Kelly*, 147 F.3d 172, 176 (2d. Cir. 1998) (same); *United States v. Popkin*, 943 F.2d 1535, 1540 (11th Cir. 1991); *United States v. Reeves*, 752 F.2d 995, 999 (5th Cir. 1985); see also *United States v. Bostian*, 59 F.3d 474, 479 (4th Cir. 1995) (adopting same definition of “corruptly” as *Reeves* and upholding conviction under § 7212(a) when defendant corruptly interfered with IRS auction of his property); *United States v. Yagow*, 953 F.2d 423, 427 (8th Cir. 1992) (adopting *Reeves*’s definition of “corruptly” and upholding § 7212(a) conviction when defendant tax protestor sent tax “bills” to various individuals and also filed those forms with the IRS).

206. See *City of Chicago v. Morales*, 527 U.S. 41, 64-65 (1999) (O’Connor, J., concurring); *United States v. Westbrooks*, 858 F.3d 317, 324 (5th Cir. 2017), *rev’d and remanded*, 138 S.Ct. 1101 (2018).

207. *Brennick*, 908 F. Supp. at 1010; see *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988); *United*

limited to the facts of the case at hand, if a defendant's conduct as charged is clearly prohibited by a statute, a vagueness or overbreadth challenge can never prevail.²⁰⁸ Thus, when DOJ policy has limited prosecutions under § 7212(a)'s omnibus clause as described above, such conduct typically fell under even a narrow reading of the statute.

The court's rejection of the defendant's vagueness and overbreadth challenge in *Westbrooks* highlights the role that DOJ policy limiting the statute has played in courts rejecting similar challenges. The defendant in *Westbrooks* was a tax return preparer who was convicted of § 7212(a) for filing false tax returns for her employees, failing to properly file forms with the IRS, and providing false and misleading testimony at a show cause hearing in response to a grand jury subpoena in a criminal IRS investigation.²⁰⁹ *Westbrooks* argued on appeal that unless § 7212(a) required a pending IRS action, it was unconstitutionally vague.²¹⁰ The court explained in *dicta* that the requirement that the conduct be "corrupt" was sufficient to protect the statute from vagueness and overbreadth challenges.²¹¹

More importantly, the Court held that *Westbrooks* could not challenge the vagueness of a statute if her conduct was clearly proscribed by the statute.²¹² The court explained that *Westbrooks* had fabricated "compensation amounts on her returns and engaged in deceptive practices, such as making cash payments and not filing wage reporting documents to conceal the low amounts of compensation the workers received."²¹³

The court conceded that the mere fact that some conduct clearly falls within § 7212(a) does not save the statute; the statute may still be vague or overbroad as to some other conduct. But the court explained that "a defendant whose conduct is clearly prohibited cannot be the one making that challenge."²¹⁴ Although the court in *Westbrooks* relied in its reasoning on the return preparer's deceptive practices and failure to file documents on behalf of her employees, she was also charged with providing false documents in response to a grand jury subpoena and making misleading statements at a show cause hearing.²¹⁵ Thus, not only

States v. Powell, 423 U.S. 87, 92 (1975). This applies only to vagueness claims the non-First Amendment context. See *Maynard*, 486 U.S. at 361.

208. See *United States v. Brennick*, 908 F. Supp. 1004, 1010 (D. Mass. 1995).

209. *Westbrooks*, 858 F.3d at 321-22, *rev'd and remanded*, 138 S.Ct. 1101 (2018).

210. *Id.* at 324-25.

211. *Id.* at 325.

212. *Id.*

213. *Id.*

214. *Id.* at 325-26.

215. *Id.* at 326, *rev'd and remanded*, 138 S.Ct. 1101 (2018).

was her conduct “large-scale” and “affecting the tax liability of third parties,” it was also obstructive of a pending criminal IRS investigation.²¹⁶

Westbrooks illustrates how DOJ policy limiting conduct that can be charged under § 7212(a) has ensured that any vagueness and overbreadth challenge to the statute would fail. *Westbrooks*’ vagueness and overbreadth challenge failed because her conduct was prohibited by § 7212(a). While the court did not focus on her conduct failing to comply with a subpoena to produce records during the course of an ongoing investigation, that conduct surely helped support the court’s conclusion that *Westbrooks*’ actions amounted to criminal obstruction. Because DOJ limited prosecutions to those impacting a pending audit or proceeding or those that are large in scale and affecting the tax liabilities of third parties, *Westbrooks*’ conduct fell under these strictures, her conduct naturally also violated a narrow reading of § 7212(a).

Likewise, the Tenth Circuit in *Wood* rejected the defendants’ claims that the statute was overbroad because the *sine qua non* of the defendant’s specific conduct in that case fell squarely within the statute’s ambit.²¹⁷ The court explained that the defendant’s actions using “deceptive techniques including using domestic non-interest-bearing bank accounts under his signature, offshore credit card accounts, and nominee entities to hide income and assets from the IRS” fell under § 7212(a).²¹⁸ These actions are punishable under DOJ guidance about when to charge § 7212(a) because the defendant’s actions were large in scale and affected the tax liability of third parties. Further, the defendant had an increased level of knowledge about when and what would trigger an IRS proceeding as an attorney, which makes it more likely that an IRS proceeding was “reasonably foreseeable” to the defendant. In this case, the prosecution under § 7212(a) was consistent with DOJ guidance and was based on conduct the defendant could not have realistically thought was legal. It is unlikely a court would find a defendant who engaged in egregiously corrupt conduct such as this was not on fair notice about what conduct was prohibited.²¹⁹

In holding that § 7212(a) was not unconstitutionally overbroad or vague, both the Tenth and the Fifth Circuits examined conduct that was clearly unlawful. However, examining what conduct *could* fall under the broadest reading of § 7212(a) demonstrates that the statute could easily

216. *Id.* at 321.

217. *United States v. Wood*, 384 Fed. App’x 698, 706 (10th Cir. 2010).

218. *Id.*

219. *See Westbrooks*, 585 F.3d at 325 (5th Cir. 2017), *rev’d and remanded*, 138 S.Ct. 1101 (2018) (stating that to prevail on a claim that § 7212(a) is unconstitutionally vague, defendant must show that a person of ordinary intelligence is not on fair notice of what is prohibited.).

ensnare some otherwise lawful conduct. In *Kassouf*, the Sixth Circuit expressed concerns that a broad reading of § 7212(a) would open the statute to “legitimate charges of overbreadth and vagueness, particularly where the statute may pose liability for otherwise lawful conduct.”²²⁰ The court reasoned “out of the hundreds of people who file taxes every day, there is no guarantee that a particular tax return will be audited. Therefore, 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.”²²¹ The court ultimately rejected the defendant’s argument that § 7212(a) was unconstitutionally vague, overbroad, and ambiguous on the grounds that such concerns were unfounded after the court had limited the statute to conduct occurring after an IRS proceeding was initiated.²²²

In her dissent in *Kassouf*, Judge Daughtrey averred that such concerns were unfounded because § 7212(a) still required such conduct to be done “corruptly.”²²³ In her view, the requirement that conduct must also be “corrupt” was “comforting” and, if properly enforced by the courts, would not permit prosecutions of otherwise lawful conduct.²²⁴ But the Supreme Court in *Marinello III* emphatically disagreed with the government’s argument that the term “corruptly” saved the statute from overbreadth.²²⁵ The government argued that § 7212(a) would not encompass misdemeanor tax violations, such as failure to file a tax return under § 7203, because § 7203 requires the government to prove that the conduct was “willful” while § 7212(a) required the government to prove that the conduct was “corrupt.”²²⁶ The Court rejected this proposition, explaining that “we struggle to imagine a scenario where a taxpayer would ‘willfully’ violate the Tax Code . . . without intending someone to obtain an unlawful advantage [which is the requirement to prove ‘corrupt’ conduct].”²²⁷ Thus, the Court agreed with *Kassouf*’s concern that, unless § 7212(a) was limited to pending IRS proceedings, the statute may be vague and overbroad as to some conduct.

Any time a defendant’s conduct was clearly intended to be obstructive to the functions of the IRS, a court considering a vagueness or overbreadth challenge to § 7212(a) will necessarily reject such challenge because the

220. *Kassouf v. United States*, 144 F.3d 952, 958 (6th Cir. 1998).

221. *Id.*

222. *Id.*

223. *Id.* at 960 (Daughtrey, J., concurring and dissenting).

224. *Id.*

225. *Marinello v. United States*, 138 S.Ct. 1101 (2018).

226. *See id.*

227. *Id.*

defendant cannot complain that such malicious and nefarious actions were in some way immune from prosecution.²²⁸ It is only when faced with cases that do not involve prototypically obstructive conduct that a court would entertain such a challenge.²²⁹ Because DOJ policy has limited prosecutions under § 7212(a) to those that occur after an audit or investigation, or in the case of large-scale attempts to evade the tax liabilities of third parties, such policy has likewise ensured that non-prototypical obstructive acts are not charged and therefore never reach the courts.

IV. SECTION 7212(A) PROSECUTIONS IN THE WAKE OF *MARINELLO*: NOT MUCH WILL CHANGE

Despite the fact that it abrogates the binding decisions in a majority of circuits considering the scope of § 7212(a), Supreme Court's new guidance in *Marinello III* is unlikely to dramatically expand or contract the compendium of cases DOJ already prosecutes under § 7212(a). First, DOJ policy has typically resulted in prosecutions where either there was, in fact, a pending IRS proceeding, or else such proceeding was reasonably foreseeable to the defendant. Second, when DOJ has not alleged a pending IRS proceeding, the defendant's conduct was typically extensive and egregious, which means the § 7212(a) count was not the only criminal conduct for which he is liable. As a result, the obstruction count does not change the punishment he would receive. Finally, nothing in *Marinello III* is likely to cause the IRS to alter its usual procedures about when to open an investigation or how soon to notify a taxpayer that an IRS proceeding is underway.

A. *DOJ Charging Policy Has Usually Restricted § 7212(a) Prosecutions to Those in Which the Defendant Obstructed a Pending Audit or Investigation*

The Supreme Court's decision in *Marinello III* imposes slightly different limitations on § 7212(a) than DOJ guidance, because the Court explained that to prove a violation of § 7212(a), the government must show that (1) there was a "nexus" between the defendant's conduct and the administrative proceeding at issue, and (2) the proceeding was either pending at the time or was reasonably foreseeable by the defendant. Thus,

228. See *United States v. Brennick*, 908 F. Supp. 1004, 1010 (D. Mass 1995).

229. Cf. *United States v. Reeves*, 752 F.2d 995, 1003 (5th Cir. 1985) (Williams, J., dissenting) ("The conclusion that a statute is too vague and therefore void as a matter of due process is thus unlikely to be triggered without two findings: that the individual challenging the statute is indeed one of the entrapped innocent, and that it would have been practical for the legislature to draft more precisely.") (quoting Laurence H. Tribe, *AMERICAN CONSTITUTIONAL LAW*, at 718).

the Supreme Court's guidance adds a "nexus" requirement that is not found in the Tax Division policy statements limiting § 7212(a). The Supreme Court's decision in *Marinello III* is also slightly more encompassing than DOJ guidance; the Court explained that the proceeding need not actually be pending, as DOJ policy states, but that § 7212(a) charges may be initiated if the IRS proceeding was "reasonably foreseeable" to the defendant.

In any event, the Supreme Court's opinion is unlikely to affect how § 7212(a) is charged. First, whether there was a "nexus" between the defendant's conduct and a pending IRS proceeding can likely be established by the same proof that there was a pending IRS proceeding at the time the defendant engaged in obstructive conduct, which is what DOJ has traditionally alleged anyway.

Next, when DOJ prosecutes § 7212(a) in the absence of a pending IRS proceeding, DOJ typically restricts its obstruction prosecutions to "large scale" conduct "affecting the tax liability of third parties." These requirements typically mean that the defendant is subject to additional felony tax crimes that result in a substantially similar punishment whether § 7212(a) is charged or not.

1. The Nexus Requirement Will Be Easy to Establish If the Government Alleges That There Was a Pending IRS Action

Most of the time DOJ has charged § 7212(a), the government has alleged that the defendant obstructed a pending audit or investigation. In cases where there was no concurrently pending IRS audit or investigation, DOJ guidance suggests that § 7212(a) is appropriate in cases where the taxpayer's conduct was large in scale and affected the tax liability of third parties.²³⁰ Although this article has focused on the cases in which the government did not make such an allegation, there are numerous examples of when § 7212(a) has been used, consistent with DOJ guidance, to punish conduct related to a pending proceeding.²³¹ For example, in *United States v. Kelly*, the defendant was convicted of a violation of § 7212(a) for providing false information to an IRS employee

230. Dep't of Just., Crim. Tax Manual, 3.00 Tax Div. Pol'y Directives & Memoranda, 49 (2012), <https://www.justice.gov/sites/default/files/tax/legacy/2014/08/05/CTM%20Chapter%203.pdf#Directive%20No.%20129> (emphasis added).

231. *See generally*, 26 A.L.R. Fed. 2d 229 (Originally published in 2008) ("One area of conduct to which said statute has applied is providing false documents or information. In that regard, courts have upheld convictions of defendants under said statute who have filed false tax returns or IRS forms . . . or provided other false income-related information . . . filed false complaints, liens, or other false legal documents . . . and presented warrants or other false financial instruments . . .").

during an audit.²³² In *United States v. Bostian*, the defendant was convicted of § 7212(a) when he recorded fraudulent *lis pendens* on property the IRS was attempting to sell auction to satisfy his tax debts, in an effort to thwart the IRS's active and ongoing collection efforts.²³³ In *United States v. McBride*, the defendant was convicted of § 7212(a) for filing a fraudulent petition to place an IRS agent in involuntary bankruptcy when the defendant knew the IRS agent was attempting to collect taxes from the defendant's girlfriend, who had been convicted of tax evasion.²³⁴ These examples are straightforward illustrations of how § 7212(a) is typically used by DOJ, to punish corrupt obstructive conduct aimed at a known pending IRS proceeding or a specific IRS agent.

The Supreme Court's "nexus" requirement will likely not change much for cases in which the government was already alleging that the defendant obstructed a pending IRS proceeding. Certainly, the "nexus" requirement imposes a new evidentiary bar for the government to hurdle. Section 7212(a) jury instructions will hereafter need to explain that not only was there a pending or foreseeable IRS proceeding, but that there was a "nexus" between the defendant's conduct and the proceeding. However, when the defendant's obstructive conduct was directed a pending IRS proceeding, proof of the "nexus" will typically be established through proof of the conduct itself.

For example, in *Miner*, the defendant was charged with one count of obstruction under § 7212(a) and two counts of failing to file tax returns in violation of § 7203 (misdemeanor violations) for his conduct promoting two tax protestor schemes to help clients illegally avoid paying taxes.²³⁵ Under the first scheme, the defendant told prospective clients that the IRS was conducting a huge fraud and that he could help write letters and file documents with the IRS in exchange for a \$1,800 annual fee.²³⁶ Under the second scheme, the defendant helped clients conceal from the IRS funds that he funneled through business trust accounts.²³⁷ At the end of trial, the defendant requested a jury instruction that he could only be convicted under § 7212(a) if he was aware of a pending IRS proceeding at the time he took his allegedly criminal actions. The district court denied the motion.²³⁸ The Sixth Circuit held that the defendant's conduct was insufficient to support a violation of § 7212(a), because "a defendant

232. *United States v. Kelly*, 147 F.3d 172, 176 (2d Cir. 1998).

233. *United States v. Bostian*, 59 F.3d 474, 479 (4th Cir. 1995).

234. *United States v. McBride*, 362 F.3d 360, 372 (6th Cir. 2004).

235. *United States v. Miner*, 774 F.3d 336, 339 (6th Cir. 2014).

236. *Id.*

237. *Id.*

238. *Id.* at 342.

may not be convicted under the omnibus clause unless he is ‘acting in response to some pending IRS action of which he is aware.’”²³⁹

Although the Sixth Circuit held in *Miner* that the district court erred in failing to give the defendant’s proposed jury instruction, the court upheld the conviction.²⁴⁰ The court concluded that the district court’s error was harmless because there was “ample evidence that Miner was aware of one or more pending IRS proceedings when he corruptly attempted to obstruct the IRS’s administration of the tax laws”²⁴¹ This same evidence that Miner was aware of multiple pending IRS proceedings and that he fraudulently wrote letters and filing documents with the IRS, in light of those pending proceedings, seems sufficient to satisfy the “nexus” requirement in *Marinello III*.²⁴²

Similarly, in *Massey* (in which the Ninth Circuit upheld a defendant’s conviction under § 7212(a)), although the government failed to allege that there was a pending IRS proceeding, the evidence at trial clearly established that the defendant was aware of multiple pending IRS proceedings. In *Massey*, the defendant did not file tax returns for several years.²⁴³ When the IRS contacted him about his failure to file, he threatened to sue the IRS and its agents, and told them that if they did not leave him alone he would assess them with a \$500,000 penalty for “unauthorized” use of his name.²⁴⁴ The defendant was convicted of one count of § 7212(a) and three misdemeanor counts of failure to file under § 7203.²⁴⁵

While the Ninth Circuit spared few words on the issue,²⁴⁶ the context of the case as described in the parties’ briefs hints at why the court may have ruled the way it did. The evidence at trial clearly proved that the IRS had initiated collection efforts at the time the defendant engaged in his corrupt conduct.²⁴⁷ That is, the evidence did show that the defendant was aware of a pending IRS action when he engaged in obstructive conduct. The IRS notified the defendant multiple times by letter and over

239. *Id.* at 342, 345.

240. *Id.* at 346.

241. *United States v. Miner*, 774 F.3d 336, 346 (6th Cir. 2014).

242. *See Marinello v. United States*, 138 S.Ct. 1101 (2018).

243. *United States v. Massey*, 419 F.3d 1008, 1009 (9th Cir. 2005)

244. *Id.*

245. *Id.*

246. *Id.* (citing *Kuball*, 976 F.2d at 531). The court simply stated that “[t]he law of this circuit establishes that the government need not prove that the defendant was aware of an ongoing tax investigation to obtain a conviction under 7212(a); it is sufficient that the defendant hoped ‘to benefit financially’ from threatening letters or other conduct. *Id.* at 1010.

247. *See* Brief for the Appellee at 4-6, *United States v. Massey*, 419 F.3d 1008 (9th Cir. 2005) (No. 03-30434), 2004 WL 2085155, at *4-6.

the telephone that he was the subject of a civil IRS investigation; when he did not stop his behavior, the IRS notified him that he was the subject of a criminal investigation.²⁴⁸ The defendant sent numerous letters to the IRS and the United States Attorney's Office demanding, among other things, that they cease the investigations.²⁴⁹ Thus, although the case was not *charged* consistently with *Marinello* because the government failed to allege that the defendant knew there was a pending IRS proceeding or that there was a nexus between the defendant's conduct and that proceeding, there is no question that the "pending IRS proceeding" and "nexus" requirements were met.

2. The IRS Proceeding Must Be Pending, Or At Least Foreseeable to the Defendant

While the new "nexus" requirement appears to impose a stricter limitation on § 7212(a) than traditional DOJ policy guidance, the Supreme Court's opinion in *Marinello III* also expands DOJ policy about when to charge § 7212(a), because the Court added that the proceeding need not actually be "pending," but that § 7212(a) charges are appropriate if the proceeding was "reasonably foreseeable" to the defendant.²⁵⁰ The Court did not elaborate what it meant by a proceeding that is "reasonably foreseeable" to a defendant. With little guidance from the Supreme Court, one could surmise that conduct designed fraudulently to cause the IRS to initiate a proceeding would suffice as a prerequisite to charging § 7212(a). The idea that § 7212(a) should reach conduct designed to *cause the IRS to initiate* bogus proceedings—even if the IRS has not yet initiated a proceeding—has been articulated in the cases of *Bowman*²⁵¹ and *Molesworth*.²⁵² These cases may illuminate what the Supreme Court meant when it said § 7212(a) might be appropriate when an IRS proceeding was "reasonably foreseeable" to a defendant.

In *Bowman*, the court held that a tax protestor's activities, which were designed to induce the IRS to initiate action against his creditors, were sufficient to sustain a violation of § 7212(a).²⁵³ The defendant in *Bowman* engaged in a string of malfeasance designed to cause the IRS to initiate fraudulent proceedings.²⁵⁴ The defendant was a tax protestor who had made several bad business decisions that landed him in serious debt.²⁵⁵

248. *Id.*

249. *Id.*

250. *Marinello v. United States*, 138 S.Ct. 1101, 1110 (2018).

251. 173 F.3d 595 (6th Cir. 1999).

252. 383 F. Supp.2d 1251 (D. Idaho 2005).

253. *United States v. Bowman*, 173 F.3d 595, 600 (6th Cir. 1999).

254. *Id.* at 596-97.

255. *Id.*

Because of the bad debts, there were several outstanding default judgments against the defendant in favor of his creditors.²⁵⁶ In response, the defendant sued his creditors, claiming they had violated his civil rights.²⁵⁷ He then totaled up the “fines” he asserted he was owed and sent each of his creditors a “bill.”²⁵⁸ Then, he purported to “forgive” these “debts,” which he asserted had become “income” to his creditors.²⁵⁹ He next sent to the IRS several Forms 1099 reflecting this “income.”²⁶⁰ The defendant apparently executed this scheme with respect to several different creditors.²⁶¹ In other words, while there was no pending IRS proceeding, the defendant was clearly aware that his conduct would cause the IRS to initiate proceedings.

The Sixth Circuit clearly could not fathom how the defendant’s conduct, which was designed to cause the IRS to initiate fraudulent proceedings, could escape punishment under § 7212(a). The *Bowman* court did back-flips to avoid applying *Kassouf*, which was then binding law in the Sixth Circuit.²⁶² The court concluded that not only did the defendant’s conduct have a “direct impact on the administration of this agency’s duties,” but “the obvious purpose of [the defendant’s] actions was to harass his creditors.”²⁶³ The court concluded that unless *Kassouf* was limited to its facts, prosecutors could not convict a defendant of § 7212(a) even if he acted with sole purpose of obstructing and impeding the IRS prior to any pending IRS action or proceeding.²⁶⁴ The *Bowman* court ultimately held that if a defendant deliberately filed forms with the IRS for the purpose of causing the IRS to initiate action against taxpayers, it was a violation of § 7212(a) notwithstanding the fact that the defendant was not aware of a pending IRS action at the time he filed the forms.²⁶⁵

Similarly, the defendant in *Molesworth* was a tax protestor who filed false forms with the IRS specifically for the purpose of causing the IRS to open proceedings that would assess penalties against his creditors.²⁶⁶

256. *Id.* at 597.

257. *Id.*

258. *United States v. Bowman*, 173 F.3d 595, 597 (6th Cir. 1999).

259. *Id.*

260. *Id.*

261. *Id.* at 596. As the court in *United States v. Miner* so succinctly explained, “After all, *Bowman*, in rejecting *Kassouf*’s application to a defendant who was attempting to instigate a frivolous IRS proceeding rather than to impede a preexisting one, did so primarily because it believed that the indicia of intent to impede were patently obvious, even though there was no IRS proceeding pending at the time of the defendant’s conduct.” *Miner*, 774 F.3d at 344 (6th Cir. 2014).

262. *Id.* at 599-600.

263. *Id.* at 600.

264. *United States v. Bowman*, 173 F.3d 595, 600 (6th Cir. 1999).

265. *Id.*

266. *See* Government’s Trial Brief, *United States v. Molesworth*, No. 05-045-C-EJL, 2005 WL

This scheme caused the IRS to spend time and resources to determine that the creditors did not, in fact, owe any penalties.²⁶⁷ The court in *Molesworth* followed the *Bowman* court's reasoning that § 7212(a) was satisfied if the defendant *caused the IRS to initiate an action*, even if there was no pending IRS action at the time he engaged in such conduct.²⁶⁸

While the Supreme Court in *Marinello III* did not explicitly acknowledge the reasoning underlying the decisions in *Bowman* or *Molesworth*, one can surmise that these types of situations, if not these very cases, were on the Court's mind when it said that the IRS proceeding must "at the least . . . [be] reasonably foreseeable by the defendant."²⁶⁹ The Court seemed to be saying that it would be illogical not to extend the crime of obstructing the IRS to situations in which the defendant intends corruptly to cause the IRS to initiate a specific proceeding. Based on this precedent, it seems likely that *Marinello III* would permit the government to prosecute tax protestor activities under § 7212(a) even if there was no concurrent IRS proceeding, so long as the government can prove that the defendant intended his conduct to cause the IRS to initiate a specific proceeding.

To take things a step further, *Marinello III* may even extend to large-scale conduct which would be likely to cause the IRS to initiate a non-specific IRS proceeding. That is, unlike the above cases, where the defendants intended the IRS to initiate specific proceedings, if a defendant engages in large-scale conduct designed to evade the tax liabilities of multiple parties, the sheer number of fraudulent returns or assets hidden could arguably make it foreseeable that the IRS would initiate *some* proceeding, such as an audit or a criminal investigation, on at least one of his cohorts. Under *Marinello III*, conduct that is so beyond the pale that it is likely to trigger an IRS investigation or audit likely makes such IRS investigation or audit "reasonably foreseeable" to the defendant.

For example, in *Crim*,²⁷⁰ the defendants, tax protestors, ran a huge scheme through which they encouraged clients to engage in sham offshore transactions using a complicated web of trust accounts in order to conceal assets from the IRS.²⁷¹ The defendants were charged with obstruction under § 7212(a) for promoting the scam, but the government did not allege that there was a pending IRS action at the time they engaged in their corrupt conduct.²⁷²

5840367, at 1 (D. Idaho, August 26, 2005).

267. *Id.*

268. *United States v. Molesworth*, 383 F. Supp.2d 1251, 1253-54 (D. Idaho 2005).

269. *Marinello v. United States*, 138 S.Ct. 1101, 1110 (2018).

270. 2007 WL 4563481 (E.D. Pa. Dec. 13, 2007).

271. Superseding Indictment, *United States v. Crim, et al.*, E.D. Pa. No. 06-CR-00658 (April 24, 2007).

272. *United States v. Crim*, 2007 WL 4563481, at *2 (E.D. Pa. Dec. 13, 2007)

While this conduct really borders on tax evasion, rather than obstruction, the defendant's clear flaunting of the IRS rules seems to push this case into obstructive territory. Tax protestors are typically hyper aware that the IRS does not agree with their actions and can be certain that the IRS will act to stop such behavior if it is detected. It is easy to fathom how a jury might conclude that the defendants could foresee that such conduct would result in the IRS initiating one or more proceedings, such as a civil audit or a criminal investigation. Thus, under *Marinello III*, which permits a prosecution under § 7212(a) not just if there is a pending IRS proceeding, but if it is foreseeable that the IRS would initiate a proceeding, it is not clear that this conduct would escape punishment, even if the defendants did not intend to cause the IRS to initiate any one specific proceeding. This situation also hints at why DOJ has previously permitted prosecutions for "large scale conduct" that aids third parties evade their taxes. Tax protestor schemes such as the one described in *Crim* clearly fall under this DOJ guidance, and they also seem to satisfy *Marinello III*'s requirement that the IRS proceeding be pending, "or at least, was then reasonably foreseeable by the defendant."²⁷³

Not all cases involving "large-scale" conduct affecting the tax liability of third parties will satisfy the test in *Marinello III* that an IRS proceeding must have been reasonably foreseeable to the defendant. Most non-tax protestor cases involving the large-scale evasion of third-party taxes will likely meet the test only if there are some other indicia that the defendant intended or knew the IRS would initiate a proceeding based on his conduct. For example, the defendant in *Willner* was an IRS employee who used his advertising agency to conceal his and others' income from the IRS.²⁷⁴ *Willner* was charged within Tax Division policy of charging defendants with § 7212(a) pre-audit in the case of "large-scale" evasion of third parties.²⁷⁵ Unlike the tax protestor context, where tax protestors set out to cause the IRS to initiate a proceeding, it is not clear that *Willner*'s conduct would cause the IRS to initiate a proceeding, much less that a proceeding was foreseeable to him. Certainly, *Willner* could have foreseen that the IRS might review his and others' tax returns, and that they could be subject to audit. But the Supreme Court was clear in *Marinello III* that routine administration of the tax code, which seems to encompass the reviewing of tax returns, was an insufficient IRS action to trigger the crime of obstruction.²⁷⁶ And even if an audit counts as a proceeding, it is far from foreseeable that the audit will happen, or that

273. *Marinello v. United States*, 138 S.Ct. 1101, 1110 (2018).

274. *Id.*

275. *United States v. Willner*, No. 07 Cr. 183, 2007 WL 2963711, at *4 (S.D.N.Y. Oct. 11, 2007).

276. *Marinello*, 138 S.Ct. at 1110.

there would be a nexus between that proceeding and the conduct.

Under *Marinello III*, cases like *Willner* are unlikely to survive under § 7212(a). However, these cases are the exception, rather than the rule, so removing such cases from the corpus of § 7212(a) prosecutions will have little overall impact on who is prosecuted under the statute.

B. In Most Cases in Which the Defendant Challenged His § 7212(a) Conviction, the Defendant's Commission of Other Felony Offenses Mean that the Outcome Would Be the Same With § 7212(a) or Without It

The other reason that not much will change in the wake of *Marinello III* is that when the Tax Division has authorized charging the omnibus provision in the absence of a pending IRS proceeding, it has generally required those cases to be “large scale” and affecting the tax liability of third parties.²⁷⁷ These situations will almost invariably encompass conduct that could easily be charged under other provisions of the Federal Criminal Code.

Sometimes, the presence of other felony criminal counts makes the addition of § 7212(a) obstruction almost meaningless in terms of the overall outcome of the case. For example, in *Kassouf*—in which the Sixth Circuit for the first time imposed the “pending IRS action” requirement—the defendant was charged with *twenty-five* felony counts in addition to § 7212(a).²⁷⁸ The government alleged that the defendant engaged in myriad partnership transactions that inured to his personal benefit, but failed to maintain the necessary records to calculate the tax liabilities for those transactions.²⁷⁹ Specifically, the indictment alleged that he failed to maintain partnership books and records, transferred funds between bank accounts to deceive the IRS, and filed false tax returns that did not report those transactions, thereby misleading the IRS about how much he owed in taxes.²⁸⁰ The government charged the defendant with § 7212(a) and with twenty-five other felony counts, including four counts of § 7201 (tax evasion) and twenty counts of § 7206(1) (failure to file).

Thus, the outcome of the prosecution in *Kassouf* was likely not at all dependent on the viability of the § 7212(a) count. The defendant’s conduct supported *twenty-five* other felony counts with higher maximum

277. Dep’t of Just., Crim. Tax Manual, 3.00 Tax Div. Pol’y Directives & Memoranda, 49 (2012), <https://www.justice.gov/sites/default/files/tax/legacy/2014/08/05/CTM%20Chapter%203.pdf#Directive%20No.%20129> (emphasis added).

278. *United States v. Kassouf*, 144 F.3d 952, 953 (6th Cir. 1998).

279. *Id.* at 953.

280. *Id.* In addition to charging the defendant with one count of § 7212(a), the government charged him with four counts of tax evasion under § 7201 and twenty-six counts of filing false tax returns under § 7206(1). *Id.*

sentences.²⁸¹ In fact, the defendant's sentence is unlikely to have changed much, if at all, if the § 7212(a) count remained viable. Total cumulative tax loss, not the number of felony counts of conviction or the statutory maximum penalty of those felony counts, drives the sentencing guidelines calculation. Similar to the Guidelines today, the Federal Sentencing Guidelines in 1998 contained an Application Note to the applicable guidelines provision, U.S.S.G. § 2T1.1, stating that all conduct contributing to the tax loss should be considered part of the same course of conduct for purposes of determining the tax loss. Thus, whether the defendant pled guilty to one or more counts or was convicted at trial, the tax loss amount would have determined the starting point for his sentencing guidelines calculation. In other words, the charge of obstruction was not necessary to achieve the same result.

Another example of a case in which the § 7212(a) charge would not have impacted sentencing is *United States v. Kelly*, 564 F. Supp.2d 843, 844 (N. D. Ill. 2008). In *Kelly*, the defendant was charged with twelve counts of tax-related crimes.²⁸² The defendant operated a consulting business and a commercial roofing business, which he used to pay personal expenses, including purchasing a \$700,000 home and other personal expenditures, including a \$19,000 home theater, \$70,000 in home electronics, \$40,000 in landscaping, a \$23,000 dining room table, drapes, jewelry, motorcycle repairs, hardwood floors, and other various incidentals.²⁸³ Rather than report his income as he was legally obligated to do, the defendant instead used his companies' books to conceal those personal expenses and classified them instead as business expenses in order to conceal them from the IRS.²⁸⁴ This resulted in false tax returns under-reporting over \$1.3 million in personal income.²⁸⁵

The defendant was charged with one count of obstructing the IRS under § 7212(a), nine counts of filing false tax returns (26 U.S.C. § 7206(1)), one count of aiding and assisting in the preparation of a false tax return (26 U.S.C. § 7206(2)), and one count of structuring transactions to evade reporting requirements (18 U.S.C. § 5313(a) and § 5324(a)(3)). The basis of the obstruction charge under Count One was that the defendant

281. The statutory maximum sentence for 7212(a) is three years, whereas the statutory maximum sentence for § 7201 and § 7206(1) is five years each. See *Attempt to Evade or Defeat Tax*, 26 U.S.C. § 7201 (1982); *Fraud and False Statements*, 26 U.S.C. § 7206(1) (1982); *Attempts to Interfere with Administration of Internal Revenue Laws*, 26 U.S.C. § 7212(a) (1954).

282. Indictment, *United States v. Kelly*, No. 07-CR-837 (N.D. Illinois, Eastern Division), Docket Entry 1.

283. Plea Agreement, *United States v. Kelly*, No. 07-CR-837 (N.D. Illinois, Eastern Division), Docket Entry 35, at 4-6.

284. *Id.* at 6-9.

285. *Id.* at 9.

impeded the IRS's ability to assess and collect his taxes, which included submitting false information to the IRS.²⁸⁶

The defendant ultimately pled guilty to one count of § 7212(a) and one count of structuring.²⁸⁷ Sentencings for financial crimes are typically driven by the dollar value of the financial loss; in this case, the tax loss amount drove the calculation, and the structuring counts did not change the defendant's sentencing guidelines calculation.²⁸⁸ In pleading guilty, the defendant agreed to the entire tax loss amount, the cumulative amount of tax loss for all the various tax counts.²⁸⁹ However, the total tax loss would have been used for sentencing if the defendant had pled guilty to just one count of § 7206(1) instead of § 7212(a). United States Sentencing Guideline § 2T1.1, Application Note Two states, "In determining the total tax loss attributable to the offense (see §1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated."²⁹⁰ Thus, there was nothing magical about using § 7212(a) as the count of conviction. The obstruction count carried a maximum sentence of three years, while each count of § 7206(1) carried a maximum sentence of five years; perhaps this made § 7212(a) a better bargaining chip for purposes of plea negotiations.²⁹¹ However, as the defendant's guidelines calculation was 37 to 46 months, well below the statutory maximum of 60 months for one count of § 7206(1), the statutory maximum sentence was, for practical purposes, irrelevant.²⁹²

Similarly, in *United States v. Armstrong*, 974 F.Supp. 528 (E.D. Va. 1997), the defendant was charged with one count of obstructing the due administration of the Internal Revenue Laws under § 7212(a) and five counts of filing a false tax return, in violation of § 7206(1).²⁹³ In that case, the defendant, an NBA referee, had defrauded the IRS by failing to report income he received in the course of his employment by "down grading" first-class tickets and pocketing the difference in price.²⁹⁴ Just as in *Kassouf* and *Kelly*, the total tax loss, not the number of counts or the

286. *United States v. Kelly*, 564 F.Supp. 2d 843, 843-44 (N.D. Ill. 2008).

287. Plea Agreement, *United States v. Kelly*, No. 07-CR-837 (N.D. Illinois, Eastern Division), Docket Entry 35, at 2.

288. *Id.* at 16.

289. *Id.* at 9, 15.

290. U.S.S.G. § 2T1.1, Application Note 2 (Sentencing Guidelines Effective November 2018). This Application Note is the same in the 2017 Guidelines.

291. Plea Agreement, *United States v. Kelly*, No. 07-CR-837 (N.D. Illinois, Eastern Division), Docket Entry 35, at 14.

292. *Id.* at 17. Note that the defendant also pled guilty to one count of structuring, which carries a five-year maximum sentence, which adds to the maximum sentence of whichever tax count the government decided to choose.

293. *United States v. Armstrong*, 974 F.Supp. 528, 531 (E.D.Va. 1997).

294. *Id.*

inclusion of § 7212(a), would have driven the sentencing calculation.

While the addition of § 7212(a) to these cases likely would not have changed the outcome for the defendant or the government, there are, admittedly, a few intangible prosecutorial advantages to adding a § 7212(a) count to an indictment that also alleges other tax crimes. For one thing, a § 7212(a) count, which is a continuing offense, helps “tie together” the evidence of other tax crimes, which are typically related to a particular tax year (for example, each count of filing a false tax return or tax evasion is related to a specific tax year). In a trial on several tax counts, it can help the jury to see a theme in the defendant’s conduct, and to put in evidence of the defendant’s nefarious *mens rea* related to tax years not charged as evasion or false returns. For another thing, prosecutors in tax cases are often concerned that evidence related to older tax crimes may constitute inadmissible 404(b) evidence. Adding a continuing offense, such as § 7212(a), helps the prosecutor avoid the potential 404(b) problem, allowing her to admit into evidence *all* acts of malfeasance, even those that occurred outside the statute of limitations. However, evidence of obstructive conduct is generally admissible anyway—with or without a continuing offense—to prove the defendant’s willful intent.

Aside from these concerns, adding an obstruction charge does not seem to have added much to prosecutions that included multiple other counts of filing false returns or other counts of tax evasion. That is, the evidence needed to establish the obstruction, as charged, was essentially the same as the evidence needed to establish the false returns counts. Moreover, the obstruction counts in these cases seem largely irrelevant to the overall outcomes.

In other cases, charging decisions led to charging § 7212(a) in lieu of what might otherwise have been charged as tax evasion. For example, in *United States v. Sorensen*, the defendant, an oral surgeon and tax protestor, hired a corrupt attorney to use trusts and nominee bank accounts to hide his income of at least \$1.5 million from the IRS.²⁹⁵ The evidence clearly demonstrated that the defendant knew the trust scheme was illegal, or at least that he deliberately ignored one red flag after another, including the advice of counsel and the advice of an accountant.²⁹⁶ He even continued to use the scheme after he learned that a federal search warrant had been executed at the attorney’s law office.²⁹⁷ At the end of the scheme, the IRS notified the defendant that he was the target of a criminal

295. *Id.* at 1220-24.

296. *Id.*

297. *Id.* at 1223.

investigation.²⁹⁸ An IRS agent came to his office, and the defendant locked the door and refused to let her in.²⁹⁹ Instead of being compliant with the investigation, he sent the IRS agent a questionnaire asking her for personal information, including her home address, social security number, and birthday.³⁰⁰

In *Sorensen*, the defendant himself argued that he should have been charged with tax evasion rather than obstructing the IRS.³⁰¹ The defendant engaged in a series of proffers with the government, but rather than pleading guilty, he was tried and ultimately convicted of one count of § 7212(a).³⁰² On appeal, he raised several arguments, among them that § 7212(a) required that he was aware of a pending IRS action at the time he engaged in his corrupt conduct, and that his conduct was more appropriately charged under § 7201, another felony count with a five-year statutory maximum, rather than the three-year statutory maximum found in § 7212(a).³⁰³

In analyzing the question whether the defendant in *Sorensen* should have been charged under § 7212(a) or § 7201, the court explained that Tax Division policy instructed that § 7212(a) “should not be used as a substitute for a charge directly related to tax liability—such as tax evasion or filing a false tax return—if such a charge is readily provable.”³⁰⁴ The court explained that it would not second-guess the government’s decision not to charge § 7201 because such charge was not “readily provable.”³⁰⁵ The court later explained that DOJ’s failure to comply with its own policy does not confer any substantive rights on the defendant.³⁰⁶

For cases such as this, DOJ could likely substitute § 7201, or some other criminal tax statute, and still obtain a conviction. While it is, of course, possible that the government did not have sufficient evidence to convict the defendant in *Sorensen* of tax evasion under § 7201, tax evasion clearly seems to fit the conduct at issue in the case. Admittedly, tax evasion under § 7201 is more difficult to prove than § 7212(a), in part because the government is required to prove that the IRS suffered a tax loss. Proving a tax loss can be cumbersome and time-consuming, both during the investigation and prosecution of the case and also at trial. From the perspective of a trial attorney, it is much easier to keep the attention

298. *Id.* at 1224.

299. *Id.*

300. *United States v. Sorensen*, 801 F.3d 1217, 1224 (10th Cir. 2015), *cert. denied*, 136 S.Ct. 1163 (2016).

301. *Id.* at 1220.

302. *Id.* at 1223-25.

303. *Id.* at 1220.

304. *Id.* at 1227.

305. *Id.*

306. *Id.*

of a jury by talking about obstructive conduct than by painstakingly going through the mechanics of a tax loss calculation. However, § 7201 is a specific statute that encompasses conduct, like Sorensen's, that is intended to evade the assessment or payment of taxes. Thus, while § 7212(a) might be an *easier* avenue to obtain a conviction, it is not the *only* way to do so.

C. The New § 7212(a) Requirements Are Unlikely to Motivate the IRS to Initiate More Proceedings or Advertise Those Proceedings Sooner Than Previously

In addition to having scant impact on charging decisions, the new § 7212(a) requirements the Supreme Court articulated in *Marinello III* are unlikely to have a practical “upstream” impact on the IRS itself. That is, the IRS is not likely to change its procedures for initiating proceedings because of *Marinello III*. First, the IRS is not likely to open additional proceedings. One could imagine a scenario where the IRS decided, to ensure that § 7212(a) was a viable option for every individual who might later engage in annoying or harassing behavior, to open an investigation on every taxpayer. This would result in a “pending IRS action or proceeding” on every taxpayer, thus giving the government the foothold to charge § 7212(a) if the interactions began to sour. This tactic would likely be entirely fruitless; *Marinello III* requires that the taxpayer is aware of the pending IRS proceeding and that his conduct have some “nexus” to the proceeding, which would keep the IRS from initiating meaningless proceedings to open the door to § 7212(a) prosecutions.

Nor is the IRS any more likely than it already was to notify taxpayers that they are under investigation. First, most taxpayers who end up being charged with § 7212(a) are well aware that they are under investigation by the IRS, or at the very least know that they are the subject of an IRS civil audit. Many of these individuals are the notorious “tax protestors,” who loudly and repeatedly insist that the IRS has no right to collect their taxes or conduct investigations. For these individuals, the IRS has already notified them that they are under investigation, and the defendant's prerequisite knowledge to underlie § 7212(a) charges is already well in hand.

Moreover, *Marinello III* likely does not mean the IRS is likely to disclose that an individual is under investigation if the IRS was not already inclined to do so. In many cases, the IRS is already motivated to be transparent when it begins to criminally investigate someone because early disclosure encourages the suspect individual to come to the plea bargain table early, saving everyone time and resources (and resulting in a better deal for the individual). However, there are certainly cases where

the IRS might delay publicizing an investigation out of fear that assets will be disposed of, evidence will be destroyed, or putative criminals will flee the reach of U.S. laws. The new guidelines in *Marinello III* are unlikely to motivate the IRS to disclose the existence of an investigation in these cases. These cases tend to be far more serious than one three-year felony obstruction count, and it is unlikely that the IRS will risk losing assets, evidence, or persons in a serious case in order to notify an individual he is under investigation so that a § 7212(a) charge might later result.

V. CONCLUSION

Although the Supreme Court's decision in *Marinello III* abrogated all but one circuit court and appears to have drastically altered the landscape for what charges under § 7212(a) require, the outcomes in most criminal tax cases are unlikely to change in the wake of that decision. The development of the circuit split appears to have been heavily influenced by the fact that DOJ has traditionally limited § 7212(a) prosecutions to those where a defendant interferes with an audit or investigation, or when the defendant's conduct was large in scale and affected the tax liability of third parties. While judicial opinions appear to have expanded the conduct that can be prosecuted under § 7212(a), prosecutions have, in reality, remained relatively self-limited by DOJ. Further, the Supreme Court's holding that § 7212(a) requires the government to prove that, at the time he engaged in corrupt conduct, the defendant was aware of a pending or reasonably foreseeable IRS proceeding, and that his conduct bore a "nexus" to that proceeding, does not limit the statute much farther than DOJ already has. The same evidence that the defendant obstructed a pending proceeding will typically also establish the "nexus" between the proceeding and the defendant's actions. Further, most defendants who were previously charged with § 7212(a) when there was not a pending IRS proceeding will be subject to the same penalties for violating other criminal tax laws. Finally, *Marinello III* is unlikely to change the way the IRS initiates audits and investigations. As a result, *Marinello III* is unlikely to drastically change the landscape of criminal tax prosecutions.