Taxcrime! Obstructing the Due Administration of the Tax Code: The Orwellian Implications of 26 U.S.C. § 7212(a)

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What is the difference between a taxidermist and a tax collector? The taxidermist takes only your skin.

Mark Twain, 1902

Introduction

Section § 7212(a) includes an "omnibus" measure that has been used to target a scattershot array of practices deemed undesirable by tax authorities. [1] Indeed, it is an astonishingly amorphous measure, criminalizing *any* conduct which "*in any way* . . . corruptly . . . obstructs or impedes . . . the due administration of this title." 26 U.S.C. § 7212(a). The courts have so far resisted defense efforts to bookend the statute with explicit standards. Instead, the courts appear to have delegated basic policy matters on the contours of the statute to prosecutors and juries for resolution on an *ad hoc* and subjective basis. In essence, the courts have been content to view § 7212(a) as a "catch-all clause" aimed at any activity that may obstruct or impede the due administration of Title 26.

In this article, we explore the case law interpreting the statute, focusing on the Ninth Circuit's extremely broad interpretation when compared to other Circuits. We also examine the legislative history of § 7212(a) and the Department of Justice enforcement guideline as well as the various factual scenarios that have given rise to prosecutions under the provision. Our discussion also includes the recent Sixth Circuit case of United States v. Kassouf, which stands as a lone bulwark against the tide of broad interpretations of the statute. We discuss constitutional challenges which have been brought and which so far have failed. Finally, we address the applicable sentencing guidelines.

I. 26 U.S.C. § 7212(a): The Statute

Section 7212(a) of Title 26 of the United States Code makes it a crime to " *in any [] way corruptly obstruct[] or impede[]*, or endeavor[] to obstruct or impede, *the due administration of*

[1] An "'omnibus bill' is defined as a legislative bill which includes various separate and distinct matters." Dante Marrazzo, Practitioners -- Beware the Trojan Horse: The Government Unsheathes an Old Weapon to Target Practitioners for Criminal Tax Offenses 13 Akron Tax J. 85, 89 (1997).

this title." 26 U.S.C. § 7212(a) (emphasis added). The penalty for violation of this provision is a fine of not more than $5,000, or imprisonment for not more than 3 years, or both.

The full text of § 7212(a) is as follows:

> **Attempts to interfere with administration of internal revenue laws.**
>
> **(a) Corrupt or forcible interference**.- Whoever corruptly or by force or threats of force (including any threatening letter or communications) 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 thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The term "threats of force," as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

26 U.S.C. § 7212(a).

II. The Ninth Circuit's Interpretation of § 7212(a) Elements

The Ninth Circuit has taken the broadest possible view of § 7212(a). Under Ninth Circuit law, the elements of § 7212(a) are as follows: "(1) corruption, force, or threat of force, and (2) an attempt to obstruct the administration of the IRS." United States v. Hanson, 2 F.3d 942, 946 (9th Cir.1993); see also United States v. Trowbridge, 110 F.3d 71, **2 (9th Cir.1997) [unpublished] (same).

A. Definition of "Corruption"

An act "is 'corrupt' within the meaning of section 7212(a) if it is performed with the intention to secure an unlawful benefit for oneself or for another." Hanson, supra, 2 F.3d at 946; see also United States v. Workinger, 90 F.3d 1409, 1414 (9th Cir.1996) (same). A false statement on a tax return intended to secure a financial benefit satisfies the "corruption" requirement. Hanson, 2 F.3d at 947. Efforts "to impede the collection of one's taxes, the taxes of another, or the auditing of one's or another's tax records" also satisfy the requirement. Id.

B. Definition of "Attempt to Obstruct the Administration" of the IRS

Far more difficult to interpret is the second element under Ninth Circuit law. In criminal

law, "[a]n attempt" typically means specific intent and a substantial step. Under that analysis, the government has to prove that a defendant specifically intended to obstruct and took a substantial step towards obstruction. Yet there is language in Hanson, the key Ninth Circuit case on § 7212(a), that suggests that the second element does not require any showing of intent to obstruct. The Hanson court stated: "The evidence presented at trial clearly supports the second element of the offense. The government offered testimony that the IRS expended a large amount of time discovering and remedying the problems caused by Hanson's filing false forms." Hanson, 2 F.3d at 946. Commentators agree that the government's burden is minimal and can be satisfied by the government's reactions to the defendant's conduct, rather than by evidence of the defendant's intent. Commenting on the Ninth Circuit's discussion of § 7212(a)'s elements, the authors of a recent law review article stated:

> Generally the best defense would negate the government's proof of the defendant's force, threats of force, or 'corrupt' action. Once the government has established the first element, *it can easily establish obstruction by showing that the government expended a large amount of time investigating and remedying the problems caused by the defendant's act.*

Caroline H. Lee and Alan Lipman, *Tax Violations*, 36 Am.Crim.L.Rev. 1157, 1193-94 (1999) (emphasis added).

The statutory language itself could be read to lend support to an interpretation that corruption plus the fact of obstruction alone, without the additional showing of intent, can sustain a conviction under § 7212(a). See § 7212(a) (violation exists for conduct which "in any way . . . corruptly . . . obstructs or impedes . . . the due administration of this title.") At least one circuit other than the Ninth endorses this view. In United States v. Bostian, 59 F.3d 474, 477 (4th Cir.1995), the Fourth Circuit stated that "[a] defendant violates [§ 7212(a)] by either 1) 'corruptly' or 'by force or threats of force' endeavoring to 'intimidate or impede' *or* by 2) 'in any other way corruptly or by force or threats of force' impeding administration of the tax laws. This second clause is known as the 'omnibus clause.'" Together with the Ninth Circuit's decision in Hanson, this reading of § 7212(a) suggests that the second element does not require a showing of intent to obstruct. On the other hand, the "attempt" language of § 7212(a), cases from other circuits (see below), and the sheer oddity of erasing intent to obstruct from what is afterall an obstruction statute argue against such a broad reading. Ultimately, the construction of § 7212(a) may end up before the Supreme Court.

III. Other Circuits' Interpretation of § 7212(a) Elements

Outside of the Ninth Circuit, courts generally hold that under § 7212(a) "the government must prove that the defendant: 1) corruptly; 2) endeavored; 3) to obstruct or impede the

administration of the Internal Revenue Code." [2] United States v. Wilson, 118 F.3d 228, 234 (4th Cir.1997); United States v. Williams, 644 F.2d 696, 699 (8th Cir.1981) (describing the three elements as "(1) in any way corruptly (2) endeavoring (3) to obstruct or impede the due administration of the Internal Revenue Code"); Dante Marrazzo, Practitioners -- Beware the Trojan Horse: The Government Unsheathes an Old Weapon to Target Practitioners for Criminal Tax Offenses 13 Akron Tax J. 85, 91-92 (1997) ("There are three elements to the omnibus clause of section 7212(a): (1) in any way corruptly, (2) endeavoring, and (3) to obstruct or impede the due administration of the Internal Revenue Code.")

A. Definition of "Corruptly"

All Circuits, including the Ninth, agree on the definition of the term "corruptly" under § 7212(a) as being with the "intent to secure an unlawful benefit either for oneself or for another." United States v. Reeves, 752 F.2d 995, 1001 (5th Cir.1985); Hanson, supra, 2 F.3d at 946. It is worth noting that the benefit does not necessarily have to be financial. The Reeves court explained:

> In the present case it may be that Reeves meant to impede or intimidate officers or agents of the Internal Revenue Service from collecting his just debt of taxes due or from scrutinizing his tax accounts; or it may be that he engaged in this conduct to secure an improper advantage or benefit for other unnamed persons or groups of persons. If this is the case, his actions constituted a corrupt endeavor under section 7212(a).

Id. at 1002; see also United States v. Yagow, 953 F.2d 423, 427 (8th Cir.1992) ("While we are inclined after examining Reeves to reject Yagow's assertion that the term corruptly is limited to situations in which the defendant wrongfully sought or gained a financial advantage, we need not decide this issue, as ample evidence was presented to show that Yagow acted with the motive of securing financial gain"); but see Webb & Strikis, Service Increases Use of 'Impeding IRS' Provision to Prosecute Tax Professionals, 80 J. Tax'n 362, 365 (1994) ("Section 7212(a) has been broadly read as a statute that prohibits actions designed to obtain an improper benefit or advantage. . . . What constitutes an improper benefit is not clearly defined, however.")

B. Definition of "Endeavor"

"Endeavor," the element required in several circuits but not in the Ninth, is defined as "to knowingly and intentionally act or to knowingly and intentionally make any effort which has a reasonable tendency to bring about the desired result." United States v. Kelly, 147 F.3d 172, 177 (2nd Cir.1998); United States v. Martin, 747 F.2d 1404, 1409 (defining "endeavor" as "any

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[2] One exception is the statement in Bostian that a defendant violates § 7212(a) by "'in any other way corruptly or by force or threats of force' impeding administration of the tax laws." United States v. Bostian, 59 F.3d 474, 477 (4th Cir.1995). This is, of course, the same circuit that included the additional element of "endeavored" in Wilson.

effort . . . to do or accomplish the evil purpose that section was intended to prevent"); see also United States v. Aguilar, 515 U.S. 593, 601-02 (stating that, in the context of 18 U.S.C. § 1503 [obstruction of justice], the "endeavor" element "makes conduct punishable where the defendant acts with an intent to obstruct justice, and in a manner that is likely to obstruct justice, but is foiled in some way"); id. at 610 ("To 'endeavor' means to strive or work for a certain end") (Scalia, J., dissenting).

C. Must the Underlying Acts be Illegal?

One final question addressed outside the Ninth Circuit is whether the acts underlying a § 7212(a) conviction must be illegal in order to prove a violation. The only case law on this issue derives from the Fourth Circuit, and it holds that there is no such requirement. In United States v. Wilson, 118 F.3d 228, 234 (4th Cir.1997), the Fourth Circuit held that "[t]he actions themselves need not be illegal. Even legal actions violate § 7212(a) if the defendant commits them to secure an unlawful benefit for himself or others." See also Bostian, *supra*, 59 F.3d at 479, citing United States v. Mitchell, 985 F.2d 1275, 1278 (4th Cir.1993) ("[Defendant] also contends his actions were not unlawful. However, as the Mitchell court observed, actions need not be illegal to violate § 7212(a).")

III. Courts and Legal Commentators Have Recognized the Extraordinary Breadth of § 7212(a)

As interpreted by the courts since the beginning of the 1980's, § 7212(a) has been widely recognized as a statute that reaches an extensive array of conduct. Many circuits, including the Fourth, Eighth and Eleventh, have explicitly "favored a broad construction of the omnibus clause." Mitchell, *supra*, 985 F.2d at 1279. The Eighth Circuit views "the broad language of section 7212's omnibus clause [as] demand[ing] a correspondingly broad construction." United States v. Williams, 644 F.2d 696, 700 (8th Cir.1981). Courts regard the omnibus clause as "catch-all clause" aimed at any activity that may obstruct or impede the due administration of Title 26. Bowman, *supra*, 173 F.3d at 598.

Commentators have remarked on the strange reluctance of the courts to corral the wide-roaming application of § 7212(a). The courts "have refused to curb the government prosecutors' escalating reliance on Section 7212(a), suggesting that the statute may expand almost infinitely to reach all misconduct that is in any way tax-related." Robert S. Fink & Caroline Rule, The Growing Epidemic of Section 7212(a) Prosecutions- Is Congress the Only Cure?, 88 J. Tax'n 356, 356 (1998). [3] Even without the utter erosion of proof of intent that has taken place in the Ninth and Fourth Circuits, commentators agree that § 7212(a) allows a "relaxed standard of proof for criminal charges" by omitting any requirement that the prosecution prove the element of "wilfulness," a customary proof requirement in tax cases.

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[3] The authors noted one exception, United States v. Kassouf, 144 F.3d 952 (6th Cir.1998), which will be discussed infra.

Webb & Strikis, supra, at 364; see also Marrazo, supra, at 95-96 ("The prosecutorial appeal of section 7212(a) in no small way emanates from its lesser standard of proof").

The obvious difficulty with § 7212(a) from the defense perspective is that its amorphousness allows the government to take a scattershot approach to a case without the constraint of having to prove intent. In this way, anything and everything, even years in the past, can be presented as an attempt by the taxpayer " *in any [] way" to* obstruct *the due administration"* of the tax code. Indeed, the Deputy Assistant Attorney General of the Department of Justice Tax Division acknowledged the increase of § 7212(a) prosecutions, "justifying this self-admitted 'epidemic' on the ground that the statute 'allows [the government] to tell a story . . . particularly if [the defendants' conduct spans] multiple years, conduct that doesn't neatly fall into tax years,' and that the Section 7212(a) charges consequently reduce the government's need to fight evidentiary battles at trial." Fink & Rule, supra, at 363. As set forth below, there is little in the legislative history to contradict the Department of Justice view of § 7212(a).

IV. The Legislative History of § 7212(a)

According to the courts, the legislative history of § § 7212(a) does little to limit the breadth of its application. The legislative history is "wholly silent on s 7212's omnibus clause." Williams, *supra*, 644 F.2d at 699 n.13. The Fourth Circuit has labeled the legislative history as not "particularly enlightening or dispositive as to Congress's understanding of the precise scope of the omnibus provision." Mitchell, supra, 985 F.2d at 1279. Nonetheless, the Mitchell court noted "the expressed intent of the Congress to expand the reach of the statute beyond protection for IRS agents against force to cover threats and intimidation as well, and the inclusion of the omnibus 'in any other way' and 'the due administration of this title' language encourage a broad rather than narrow construction." Id.; see also United States v. Martin, 747 F.2d 1404, 1409 (11th Cir.1984) ("the legislative history does not purport to limit the broad language [of the statute]").

Some commentators have argued that the silence of the legislative history on the omnibus clause supports a limiting construction, however. According to one commentator,

> The legislative history of Section 7212(a), albeit limited, indicates that the statute, including its omnibus clause, was intended to extend these previous protections for IRS employees to encompass all behavior that, whether through force or otherwise, targets and attempts to derail investigations or other specific collection activities by particular agents of the IRS. 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.

Fink & Rule, supra, at 357. This interpretation of § 7212(a) as encompassing only acts intended

to impede the investigation of a specific IRS agent has been rejected by courts. See, e.g., Bowman, supra, 173 F.3d at 598 ("Unlike the first clause of § 7212(a), under the omnibus clause, 'the prohibited act need not be an effort to intimidate or impede an individual officer or employee'"); Mitchell, supra, 985 F.2d at 1277-79 (reversing district court's ruling that § 7212(a) required the "kind of corruption that goes to a particular officer or employee"); see also Marrazo, supra, at 93 ("The most substantive evolution of application of section 7212(a) is that violation of the statute includes acts not directed at IRS employees.")

Indeed, the plain language of § 7212(a) also suggests that the obstruction need not be directed at a particular IRS employee. ("Whoever corruptly or by force or threats of force . . . 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 . . . obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title . . . ."§ 7212(a) (emphasis added).)

V. DOJ Guidelines Do Not Limit the Breadth of § 7212(a)

An IRS Directive in 1989 stated that § 7212(a)'s omnibus clause should be reserved for uses "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." Department of Justice Tax Division Directive No. 77, "Section 7212(a) Policy Statement" (7/7/89). The Directive added that "[i]n 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 a criminal tax investigation. . . ." Id. The Directive also stated that "[t]he omnibus clause should not be utilized when other more specific charges are available and adequately reflect the gravamen of the offense." Id. In seeming negation of these limitations however, the Directive pointed to specific fact situations to which § 7212(a) would be applicable, including "engaging in [] conduct to make audits difficult." Id. Further, "[u]nder a DOJ-Tax operative manual, '[t]he manner by which a defendant can 'endeavor' to impede the due administration of the internal revenue laws is unlimited.'" Marrazo, supra, at 92.

Importantly, Directive No. 77 also states that "[u]se of the omnibus clause in an indictment must be approved by the Director of the Criminal Enforcement Sections or higher." Before charges are filed, you should attempt to obtain a conference at main Justice in Washington D.C. to present reasons why a § 7212(a) charge should not be filed in your client's case.

Even if the DOJ guidelines can be said to effectively limit the breadth of § 7212(a), the courts do not give much weight to internal government interpretations of statutes. As noted by one court in the context of § 7212(a), "the DOJ's internal guidelines create no substantive rights for defendant." United States v. Armstrong, 974 F.Supp. 528, 538 (E.D.Va.1997); see also Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (finding, in a non-§

7212(a) case, that because criminal statutes are "not administered by any agency but by the courts" the "interpretation of those charged with prosecuting criminal statutes is not entitled to deference.")

VI. The Breadth of § 7212(a) as Reflected in Fact Patterns

A. Typical § 7212(a) Cases

Most post-1980 § 7212(a) cases follow similar patterns. The most common fact patterns found in reported cases involve tax protester situations wherein the taxpayer files false 1096 and 1099 forms claiming that he has made payments to various people (often including IRS agents). Usually, the supposed payment is in fact property that has been seized by the IRS. Sometimes these same taxpayers also file 1040 forms falsely claiming a refund; also occasionally, they file liens on the properties of IRS agents. These taxpayers also sometimes directly obstruct the sale of property that had been seized by the IRS. Courts have universally held, in the Ninth Circuit and elsewhere, that this kind of conduct constitutes a violation of § 7212(a). See, e.g., United States v. Trowbridge, 110 F.3d 71 (9th Cir.1997) [unpublished] (interfered with auction of seized property and placed liens on IRS agents' property); United States v. Cree, 62 F.3d 1426 (9th Cir.1995) [unpublished] (lien on IRS agent's property and writ of attachment on agent's wages); United States v. Van Krieken, 39 F.3d 227 (9th Cir.1994) (false 1099 and tax returns, and seeking tax levy on innocent taxpayers); United States v. Koff, 1994 WL 603135 (9th Cir.) [unpublished] (false 1099 forms and notices of liens); United States v. Hanson, 2 F.3d 942 (9th Cir.1993) (false 1040, 1096, and 1099 forms); United States v. Kuball, 976 F.2d 529 (9th Cir.1992) (false 1040, 1096 and 1099 forms); United States v. Reeves, 752 F.2d 995 (5th Cir.1985) (common law lien against IRS investigator).

Many of these cases involve actions targeted directly at IRS agents. In that sense, they constitute clear efforts to impede the investigation of a particular agent and fall within the narrow view of § 7212(a). It is worth noting, however, that some of these cases involve actions by a defendant against only third-party taxpayers. Those cases do not involve direct actions against IRS employees and sometimes simply involve the filing of false forms with the IRS. The courts nonetheless uphold § 7212(a) convictions in such circumstances.

B. Broader Applications of § 7212(a) to Reach Dishonest or Evasive Conduct

In United States v. Workinger, 90 F.3d 1409 (9th Cir.1996), the defendant was a dentist convicted under § 7212(a). The Ninth Circuit summarized the facts as follows:

> The heart of his scheme consisted of creating and using various entities to hide income, purposely misstating his income, filing forms which substantially underreported the value and quantity of his financial resources and holdings, and diverting his practice income to his spouse. Among other things, the government accused Workinger of maintaining numerous unreported bank accounts holding substantial unreported funds, depositing business receipts into bank accounts that

> he had not listed on IRS forms, and failing to disclose real estate which he controlled. The government also alleged that he had misled federal investigators by showing a rental agreement form to prove that he rented a home which he actually owned and by filing false statements of financial condition. . . . He was indicted for corruptly obstructing and impeding the due administration of the internal revenue laws by submitting inaccurate financial forms to IRS collection officers on three separate occasions -- once on February 17, 1988, and twice on March 29, 1989.

Workinger, 90 F.3d at 1411. The Ninth Circuit, without directly addressing the issue of whether the defendant's actions could sustain a conviction under § 7212(a), made it clear that Workinger's conduct was "corrupt" under the statute:

> There can be little doubt that Workinger set out to deprive the government of taxes that he properly owed. Despite his almost daedalian schemes to avoid paying his share of the cost of maintaining our society, he was found out. He now seeks to escape from part of his criminal liability by asserting that because he was accused of corruption rather than fraud, as such, one of the counts against him was barred by the statute of limitations. He is wrong because when it enacted § 6531(6) Congress assured that the corrupt as well as the fraudulent would be subject to a six-year statute of limitations.

Id. at 1416.

Other circuits have also upheld the use of § 7212(a) to a range of activities traditionally viewed as being simply dishonest or evasive rather than obstructive. In United States v. Popkin, 943 F.2d 1535 (11th Cir.1991), the defendant/attorney was convicted under § 7212(a) for creating a corporation to enable his client to disguise the character of illegally earned income and repatriate it from a foreign bank. There was no federal money laundering statute at the time of his actions. The court adopted the Reeves definition of "corruptly" ("intent to secure an unlawful benefit either for oneself or for another") stating:

> We agree with the definition adopted in Reeves. It comports with our view that 'corruptly' was used in § 7212(a), as in the general obstruction of justice statute, to prohibit all activities that seek to thwart the efforts of government officers and employees in executing the laws enacted by Congress. In a system of taxation such as ours which relies principally upon self-reporting, it is necessary to have in place a comprehensive statute in order to prevent taxpayers and their helpers from gaining unlawful benefits by employing that 'variety of corrupt methods' that is 'limited only by the imagination of the criminally inclined.' We believe that § 7212(a) is such a statute and that the use of 'in any other way corruptly' in the second clause gives clear notice of the breadth of activities that are proscribed.

Id. at 1540. The court found that the "corruptly" requirement was satisfied "because at least one

intent in creating the corporation was to secure an unlawful benefit for his client." Id. The court continued:

> The effect of all these maneuvers would be more than just to disguise the source of the money thus repatriated. It would also place in Musick's wholly owned corporation the power to determine when, if ever, the $200,000 earned in 1983 and 1984 would be reported for income tax purposes. The income tax laws require annual reporting of all income in the year earned. The entire system is built on the basis of annual reporting, and any arrangement that permits a taxable entity to avoid reporting income in the taxable year when earned has the effect of skewing the system and thus impeding or obstructing the due administration of the tax laws.

Id. at 1541. In Mitchell, *supra*, 985 F.2d 1275, the defendant was a zoologist with the Department of the Interior's Fish and Wildlife Service who formed a tax-exempt corporation that was supposed to promote scientific research. In fact, the corporation was used to solicit "contributions" from big-game hunters, in exchange for which the defendant performed various services for the hunters. The defendant also caused the hunters to file tax returns that claimed the donations as tax-deductible contributions. The Fourth Circuit sustained the conviction, holding that § 7212(a) reached misrepresentation and fraud: "Misrepresentation and fraud, in fact, are paradigm examples of activities done with an intent to gain an improper benefit or advantage." Id. at 1278. The court also stated that "[i]t is just such a creative and multi-faceted scheme to evade taxes that the omnibus clause of § 7212 targets." Id. at 1279.

In Wilson, supra, 118 F.3d 228, the defendant/attorney helped his client conceal assets to prevent the IRS from attaching them. Some assets were assigned to the defendant through partnerships, while other assets were placed in the client's employees' names. The defendant also created a corporation to take over the operations for one of his client's companies, again to avoid tax problems. The Fourth Circuit upheld the conviction, stating that "the jury clearly could infer from the testimony at trial that Wilson acted with the intent to secure unlawful benefits for himself and for Rogers by concealing Rogers's business activities and sources of income from the IRS." Id. at 235.

In United States v. Kelly, 147 F.3d 172 (2d Cir.1998), the defendant/attorney had worked for a corporation named IMC. He left IMC and formed a new corporation with an associate, executing an agreement before his departure under which he agreed to provide IMC with consulting services for two years in exchange for $244,200. The defendant was supposed to be paid in two installments; IMC paid him earlier than expected with advances, with the fee to be earned as of the dates in the original agreement. The defendant assigned the IMC income to his associate, and reported it on his return noting that it had been assigned. He claimed a deduction because of the assignment. The IRS found that the assignment was a sham, based largely on the fact that the defendant's associate had not claimed the income. The defendant was charged with § 7212(a) for providing the IRS agent (named Marcantinio) a copy of the allegedly false assignment agreement to substantiate his deduction. The court stated:

> Kelly characterized his actions as 'garden variety' tax evasion rather than obstruction. We disagree. Kelly's delivery of the Condor assignment agreement to Marcantinio did more than merely further a tax evasion scheme -- it was designed to impede Marcantinio from uncovering a tax evasion scheme that already had been effectuated. It expanded and delayed the progress of Marcantinio's audit and investigation and thus can be characterized accurately as obstruction, rather than evasion.

Id. at 176.

Finally, in United States v. Armstrong, 974 F.Supp. 528 (E.D.Va.1997), the defendant was an NBA referee charged with § 7212(a). The court upheld the conviction under the following facts and rationale:

> The Indictment does not simply allege that defendant filed tax returns containing false information. It also alleges that defendant engaged in a scheme over several years to avoid paying the correct amount of taxes. Defendant allegedly 'down graded' his first class and full price coach tickets for lower cost tickets and pocketed the difference without reporting this taxable income to the IRS or the NBA. He caused his travel agency to issue numerous bogus airline ticket stubs, receipts, and invoices. . . . Surely defendant was aware the NBA would use the information he submitted to calculate his income, his business expenses, and the amount of money to withhold for taxes. . . . Such conduct is clearly intended to obstruct or impede the due administration of the internal revenue laws. . . .

Id. at 537.

The foregoing cases demonstrate that § 7212(a) now applies to a wide range of situations, including as shown by Popkin and Kelly, cases involving only one act of obstruction, rather than an elaborate and long running scheme. Most of the foregoing cases also reflect the lack of any requirement that the acts of obstruction be directed at a particular IRS employee. Section 7212(a) is a broad statute ready to be deployed against taxpayers that the IRS particularly wants to punish.

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VII. The Sole Exception to Broad Applications of § 7212(a): United States v. Kassouf

A. The Holding of Kassouf

United States v. Kassouf, 948 F.Supp. 36 (N.D.Ohio 1996) is the one exception to the

apparent rule that § 7212(a) be broadly construed. [4] The defendant in Kassouf,, was charged under § 7212(a) for:

> (1) obtaining the personal use of the assets of certain partnerships without maintaining records necessary to reflect the tax consequences of this personal use, (2) using partnership and corporate bank accounts to conceal income, (3) impeding and obstructing the IRS's ability to audit and determine the tax consequences of transactions.

Id. at 37. He did this by: a) failing to maintain partnership books/records; b) causing partnerships to borrow funds which were in part used for D's personal benefit [loans not reported in partnership's returns]; c) using partnership bank funds for personal benefit without disclosure; d) failing to report/improperly reporting interest income earned on partnership accounts; e) causing one partnership to transfer to another partnership proceeds of a sale, without ever recording the same; f) causing partnerships to file returns which i) failed to report money/property deposited or transferred to them or withdrawn/transferred from them and ii) failed to disclose asserts they held on the tax return balance sheet. Id.

The defendant in Kassouf argued that § 7212(a) required that the government prove that there was a pending IRS proceeding which he specifically intended to obstruct. The district court agreed. The court found that:

> The other elements of the omnibus clause -- the requirements that the defendant act 'corruptly' and with intent to obstruct or impede -- are insufficient to create the necessary 'nexus' or relationship between the defendant's conduct and 'the

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[4] United States v. Mathis, 1997 WL 683648 (S.D.Ohio) arguably is another case that bucks the prevailing broad view of § 7212(a). Mathis is another NBA referee case. The court, in what appears to be an unreported decision, dismissed the § 7212(a) count. The indictment alleged three types of conduct under § 7212(a): 1) the defendant's having been contacted by the IRS regarding his failure to file income taxes for the years 1988 through 1992; 2) the defendant's having improperly induced the NBA to underreport his income and withhold insufficient taxes; and 3) the defendant's causing the preparation of false returns and the filing of said false returns. The court found the first -- simply that the defendant had been contacted by the IRS -- insufficient to show obstruction. The court also found that the mere failure to file was insufficiently relevant to the airline ticket scheme. Addressing the second type of conduct alleged in the indictment, inducing the NBA to underreport income and withhold insufficient taxes, the court found that, under the relevant IRS regulations, the defendant could not have improperly induced the NBA to underreport his income and withhold insufficient taxes. Finally, left with only the false return conduct, the court found that such conduct was multiplicitous in light of the § 7206(1) count. Refreshing as Mathis is, the Ninth Circuit would not have followed suit. Ninth Circuit law strongly suggests that § 7206(1) and § 7212(a) counts involving the filing of false returns are not multiplicitous.

> due administration of this title.' Intentions are not punishable in themselves; there must be some likelihood that the conduct will produce the intended result. Furthermore, specific intent to obstruct or impede is impossible to infer unless the defendant has notice or knowledge of a proceeding which his or her conduct would obstruct or interfere with. One cannot be held criminally liable for conduct intended to obstruct or impede a government action that may never occur.

Id. at 38. The court found that "the broad prohibition against endeavoring to obstruct or impede 'the due administration of [Title 26]' should be limited to conduct which has the natural and probable effect of obstructing or impeding a pending government action under the Internal Revenue Code, of which the defendant had notice." Id. According to the district court, such a government action/proceeding "might include a subpoena, audit, or criminal tax investigation, though this listing is not intended to be exhaustive." Id., n.1.

On appeal, the Sixth Circuit agreed. In United States v. Kassouf, 144 F.3d 952 (6th Cir.1998), the court noted that "[s]ome courts have applied the clause [§ 7212(a)] to cases in which there was no pending investigation or proceeding, without being directly confronted with or deciding the precise issue here." Id. at 955-56, citing, among others, the Ninth Circuit's decision in Hanson, supra, 2 F.3d 942 and United States v. Kuball, 976 F.2d 529 (9th Cir.1992). In addressing these cases, the court stated:

> While these cases may provide some support for a reading of the statute that reaches conduct committed before a defendant was aware of a pending IRS action under the Internal Revenue Code, we decline to extend their holdings to reach the conduct involved in this case. All of the circuit court decisions noted above were decided well before the Supreme Court's decision in United States v. Aguilar, 515 U.S. 593 (1995), imposing the "nexus" requirement to the obstruction of justice statute, 18 U.S.C. § 1503, and supporting a more strict reading of obstruction statutes generally.

Id. at 956. The court found that

> were we to permit the allegations in Count 26 to stand, we would be imposing liability for conduct with even less of a causal connection than that rejected by the Supreme Court in Aguilar. We would be permitting the IRS to impose liability for conduct which was legal (such as failure to maintain records) and occurred long before an IRS audit, or even a tax return was filed. The speculative nature of this 'obstructive' conduct is readily apparent, and we agree with the district court that the statute cannot be construed to permit it. Because Title 26 encompasses such routine actions as even the government points out, imposing liability for actions committed before a person knew of an investigation or proceeding, would open them up to a host of potential liability of conduct that is not specifically proscribed.

Id. at 957. The court also noted that, if it construed the statute otherwise, it would be opening the "statute to legitimate charges of overbreadth and vagueness. . . ." Id. at 958. The court also stated that "[i]f upon hearing that the IRS was conducting an audit of his returns, however, Kassouf had begun destroying records and funneling money through various accounts to prevent detection of his illegal activities, § 7212(a) would clearly apply." Id. at 958.

By requiring the government to prove that the defendant knew of an IRS investigation or proceeding when committing his obstructive acts, the Kassouf court placed an important limit on § 7212(a)'s breadth. The question is whether Kassouf remains good law.

B. Bowman and the Retreat from Kassouf

The Sixth Circuit revisited the "pending action" issue in United States v. Bowman, 173 F.3d 595 (6th Cir.1999). The government in Bowman argued the Kassouf panel majority "only considered the defendant's failure to keep adequate records and concluded that this action was too speculative to violate 26 U.S.C. § 7212(a)." Id. at 599. The government stated that Bowman, which involved the filing of false 1096 and 1099 forms against third parties, involved the wilful and knowing sending of false information to the IRS. The government claimed that there was nothing speculative about the defendant's conduct.

The Sixth Circuit agreed, holding that "Kassouf did not, as Aguilar did, explicitly impose a 'nexus' requirement. Kassouf 'declined to extend,' but did not disavow, the holdings of a number of pre-Aguilar cases which did not require that in order to impose liability under § 7212(a), the defendant must be aware of a pending IRS action." Id. at 599. The court held that

> Kassouf must be limited to its precise holdings and facts, and that it cannot be read to encompass the kind of activity for which Bowman was indicted. All of the reasoning in Kassouf supports the conclusion that an individual's deliberate filing of false forms with the IRS specifically for the purpose of causing the IRS to initiate action against a taxpayer is encompassed within § 7212(a)'s proscribed conduct. The filing of false tax forms is not legal when undertaken; it is not speculative; it is specifically designed to cause a particular action on the part of the IRS. The action it is designed to cause is not routine; rather, the intended action is one that, but for the false filing, would not be undertaken at all relative to the victimized taxpayers. Finally, 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 investigations by the IRS.

Id. at 600.

At least one other court has found Kassouf unpersuasive. Presented with a defendant's argument that § 7212(a) required a pending IRS audit or investigation, the district court in

United States v. Armstrong, 974 F.Supp. 528 (E.D.Va.1997) [5] pointedly disagreed:

> This court disagrees with the district court in Kassouf that § 1503 is analogous to § 7212(a) [for purposes of a pending proceeding requirement]. While most Americans do not have judicial proceedings pending against them at any given moment, each year, we are required to file federal income tax returns and forms, and pay any taxes due to the IRS. Since the filing of income tax returns and forms and the collection of taxes is part of the administration of the tax laws, and such activities can be obstructed or impeded, the court does not believe that § 7212(a) is limited to corrupt conduct which endeavors to obstruct or impede a pending IRS audit or investigation known to the defendant.

Id. at 536. The Armstrong court noted that "[s]everal appellate courts, including the Fourth Circuit, have affirmed convictions under § 7212 for conduct that did not involve a pending IRS audit or investigation." Id. at 536, citing, among others, Hanson, *supra*, 2 F.3d 942.

C. Kassouf and the Ninth Circuit

The Ninth Circuit has not explicitly ruled on the "pending action" issue. As noted by the Armstrong court however, the Ninth Circuit has upheld convictions under § 7212(a) where there was no pending IRS action. See, e.g., Hanson, *supra*, 2 F.3d 942 (9th Cir.1993). Other circuits have assumed that § 7212(a) does not require a pending IRS action. In Reeves, *supra,* 752 F.2d at 999, [6] the Fifth Circuit held that "interference with the administration of the tax laws need not concern a proceeding in which a party stands to gain an improper advantage . . . ." The Reeves court contrasted § 7212(a) with § 1503's pending proceeding requirement: "In contrast, the Internal Revenue Service is permitted great power to intrude on, and investigate virtually every aspect of economic life to effect its purpose of administering the tax laws; thus, the narrow circumstances in which section 1503 applies have no parallel cases involving § 7212(a). . . ." Id.

Still, Kassouf is an unknown quantity in the Ninth Circuit. With the right fact pattern, the Ninth Circuit might be persuaded of the logic of Kassouf. As the Reeves court put it, "[a] disgruntled taxpayer may annoy a revenue agent with no intent to gain any advantage or benefit other than the satisfaction of annoying the agent. Such actions by taxpayers are not to be condoned, but neither are they 'corrupt' under section 7212(a)." Reeves, 752 F.2d at 999.

VIII. Constitutional Challenges to § 7212(a)

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[5] Armstrong was decided after the Kassouf district court opinion was published but before the decision of the Sixth Circuit.

[6] The Ninth Circuit, in Hanson, favorably cited United States v. Reeves, 752 F.2d 995 (5th Cir.1985) for the definition of "corruptly." Reeves is perhaps the most frequently cited § 7212(a) case.

A. Vagueness/Overbreadth Challenges

Although not many courts have addressed the issue, all courts that have considered vagueness or overbreadth challenges to § 7212(a) have upheld the statute. See United States v. Kelly, 147 F.3d 172 (2nd Cir.1998) (rejecting overbreadth and vagueness challenge to § 7212(a)); Reeves, *supra*, 752 F.2d at 1001 (5th Cir.1985) ("Where 'corruptly' is taken to require an intent to secure an unlawful advantage or benefit, the statute does not infringe on first amendment guarantees and is not 'overbroad'"); see also Popkin, *supra*, 943 F.2d 1535, 1540 (11th Cir.1991) ("the use of 'in any other way corruptly' in the second clause gives clear notice of the breadth of activities that are proscribed.")

The Ninth Circuit recently considered the issue in an unpublished opinion. In United States v. Ring, 1999 WL 699489 (9th Cir.), the court found "that section 7212(a) is neither vague nor overbroad" given the definition of "corruptly" adopted by the Ninth Circuit. Id. at **1. Nonetheless, § 7212(a)'s constitutionality has not been upheld in a reported Ninth Circuit case, and is therefore probably worth challenging. The Sixth Circuit in Kassouf explicitly stated that if it neglected to require proof of a "pending action," "we would be opening the statute to legitimate charges of overbreadth and vagueness, particularly where the statute may impose liability for otherwise lawful conduct." Kassouf, 144 F.3d at 958.

B. Commerce Clause Challenge

At least one defendant has tried to challenge § 7212(a) by arguing that it exceeds Congress's power under the Commerce Clause. The Tenth Circuit in United States v. Boos, 1999 WL 12741 (10th Cir.) firmly rejected the argument in an unpublished opinion, finding that "Section 7212(a), a provision in the Internal Revenue Code, is authorized not by the Commerce Clause, but by the taxing provisions of the Constitution." Id. at **2. The court held that § 7212(a) was also authorized under the Necessary and Proper Clause.

C. Multiplicity

At least one court has held, albeit in an unpublished opinion, that § 7206(1) and § 7212(a) charges are multiplicitous. United States v. Mathis, 1997 WL 683648 (S.D.Ohio). The court concluded that "the legislature did not intend for a violation of Section 7206(1), alone, to be the basis for a Section 7212(a) violation." [7] The court stated:

[I]n the instant case, the government must establish the same proof of facts in

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[7] The Mathis court specifically noted, however, that it did "not suggest that conduct which is chargeable under other criminal provisions of the Tax Code can never be chargeable under Section 7212(a). The Court merely finds that Congress did not intend for the filing of false returns, alone, to subject a defendant to liability under Section 7212(a)." Id. at *8 n.7.

> order to establish violations of Sections 7212(a) and 7206(1); therefore the charges are multiplicitous. Courts have recognized that 'the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.' In applying this test, courts will generally look to the terms of the statutes, rather than the allegations in the indictment. . . . However, the 'rigid 'look-only-at-the-statute' approach is inappropriate in some cases where one of the statutes covers a broad range of conduct.' In particular, courts will examine the facts alleged in the indictment when there is 'no realistic likelihood of violating the narrow [statutory] provision . . . without also violating the broad [statutory] provision. . . .'

Mathis, at **8. For this latter proposition, the Mathis court cited United States v. Seda, 978 F.2d 779, 781 (2nd Cir.1992). Based on this language, the court found the § 7206(1) and § 7212(a) counts multiplicitous.

The problem with this analysis from the defense perspective is that the Ninth Circuit has explicitly rejected the Seda multiplicity analysis. In United States v. Nash, 115 F.3d 1431 (9th Cir.1997), the Ninth Circuit ruled that "[t]he Supreme Court has held that the test from Blockburger v. United States governs this determination. Thus, if each offense requires proof of a fact that the other does not, the offenses are not multiplicitous, absent a clear indication of contrary legislative intent." Id. at 1437. The court went on to "agree with the First Circuit that in evaluating this question we should look to the elements of the offenses alone, rather than the way they are charged in the indictment, as in Seda." Id. Even the Mathis court acknowledged that the counts are not multiplicitous when analyzed by looking at the elements of the offenses alone. Mathis, at *8 ("Upon examining the language of the statutes, alone, the Court would agree with the government that the Counts do not appear to be multiplicitous"); see also United States v. Sarcia, 1997 WL 458426, *1 (N.D.Ill.) [unpublished] (finding § 7206(1) and § 7212(a) counts not to be multiplicitous by looking at the elements of each statute.)

IX. Sentencing

The Statutory index to the Sentencing Guidelines, U.S.S.G. Appendix A, specifies that § 2A.2.2, Aggravated Assault, and § 2A2.3, Minor Assault, are the guidelines ordinarily applied to a violation of 26 U.S.C. § 7212(a). But for violations of the "omnibus clause" of § 7212(a), the Guidelines specify that either § 2J1.2, Obstruction of Justice, or 2T1.1, Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements or Other Documents, are appropriate. U.S.S.G. App. A.

In Hanson, *supra*, 2 F.3d 942, the Ninth Circuit overturned the district court's decision to apply § 2T1.9 (Conspiracy to Impair, Impede or Defeat Tax) to the defendant's conduct. The court held that "[t]he evidence demonstrates that Hanson acted alone." Id. at 947. The court found the appropriate guideline to be § 2T1.5, Fraudulent Returns, Statements, or Other Documents.

In United States v. Koff, 1994 WL 603135 (9th Cir.) [unpublished], a tax protester case, the court examined whether the district court had properly applied § 2J1.2, Obstruction of Justice, to the defendant's conviction under § 7212(a). The court noted that in Hanson, the conduct had been directed at third parties rather than at IRS agents. Id. at *3. The Koff defendants had "specifically targeted and attempted to intimidate IRS officials whom they believed were involved in the proceedings against them, from the acting Commissioner all the way down to the caseworker working on the Koffs' cases. In addition, they attempted to use the fake 'refunds' they claimed the IRS owed them directly to offset the tax liability the IRS had assessed for 1982-85." Id. The court held that the conduct "goes beyond the misdemeanor offense contemplated by guideline § 2T1.5, Fraudulent Returns, Statements, or Other Documents" and upheld the use of the Obstruction of Justice guideline. Id.

The Ninth Circuit also upheld the use of the obstruction of justice guideline in another tax protester case, United States v. Van Krieken, 39 F.3d 227 (9th Cir.1994). The court stated "[u]nlike Hanson, Van Krieken's behavior of filing false Forms 1099, filing false returns and seeking a tax levy on innocent taxpayers, as well as filing a groundless lawsuit and police theft report could be considered on par with obstruction of justice." Id. at 231; see also United States v. Ring, 1999 WL 699489, **1 (9th Cir.) (upholding the use of § 2J1.2, Obstruction of Justice, instead of § 2T1.5, Fraudulent Returns, Statements, or Other Documents.)

Conclusion

The picture that emerges from our review of § 7212(a) is one of enormous prosecutorial latitude in choosing how and against whom to enforce the statute. More and more, as the Department of Justice itself acknowledges, § 7212(a) is deployed to address conduct traditionally prosecuted under false statement and evasion provisions. The ease with which § 7212(a) can be made to fit amorphous conduct of which the IRS disapproves should re-energize defense lawyers in their bid to limit application of the statute to conduct that is intentionally and purposefully obstructive.