On October 20, 1973, President Richard Nixon ordered Attorney General Elliot Richardson, the head of the Department of Justice, to fire special prosecutor Archibald Cox. Cox, who was investigating the Watergate scandal, had issued a subpoena to the President requesting copies of taped Oval Office conversations. Attorney General Richardson refused and resigned in protest. President Nixon then made the same demand to Deputy Attorney General William Ruckelshaus, who likewise refused and resigned immediately. President Nixon hunted for the next-in-command and found Solicitor General Robert Bork, who finally carried out the orders.

2. Id.
3. Id.
4. Id.
5. Id.
President Nixon’s unconscionable actions and the sequence of events that night became infamously known as the Saturday Night Massacre.

His actions, seen as a gross abuse of presidential power, infuriated the general public and Congress so intensely that Congress would eventually file impeachment bills against the President.

President Nixon defended his actions in a famous press conference on November 17, 1973:

...in all of my years of public life, I have never obstructed justice. And I think, too, that I can say that in my years of public life that I’ve welcomed this kind of examination, because people have got to know whether or not their President’s a crook. Well, I’m not a crook! I’ve earned everything I’ve got.

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On August 8, 1974, in an effort to avoid removal by impeachment and possible criminal charges, President Nixon would become the first President in U.S. history to resign.

In December 2006, another White House administration took steps to remove officials from the Department of Justice ("DOJ"), whose investigations with its political agenda. On December 6, in an unprecedented move, the Administration notified seven United States Attorneys ("U.S. Attorneys") and requested their resignation, effectually firing them.

While the DOJ initially stated that the dismissals were due to poor performance issues, further inquiry revealed that dismissals...

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The White House and Attorney General ("AG") Gonzales brushed aside any questions of impropriety and only emphasized that all U.S. Attorneys "serve at the pleasure of the President."

While U.S. Attorneys do serve under the authority of President, this presidential privilege does not— as demonstrated by Watergate— exempt the White House from charges of obstruction of justice or other charges.

12 See Eggen, supra note 11.


This article will investigate whether the firing of two U.S. Attorneys—Carol Lam and David Iglesias—violated federal obstruction of justice statute 18 U.S.C. § 1512(c). Part I will provide an overview of the U.S. Attorney position and background information of Lam and Iglesias’s dismissals. Part II will explore the legal questions raised by the Bush Administration’s action, and Part III will discuss the federal obstruction of justice statute in detail. Part IV will analyze the dismissals of Lam and Iglesias under the federal statute, respectively.

Passed the first three articles of impeachment, finding Nixon guilty of obstruction of justice in covering up the burglary. The House voted to impeach Nixon, and when it became apparent that the Senate would act similarly, Nixon resigned on August 8, 1974 to avoid impeachment. A month later, President Gerald Ford would pardon Nixon for his role in Watergate.

I focused on the dismissals of Lam and Iglesias because the circumstances of their dismissals, compared to the other attorneys, appeared to be the clearest violations of the federal obstruction of justice statute. In addition, because the media extensively covered and criticized Lam’s dismissal and Iglesias publically defended his tenure as U.S. Attorney, more facts are available regarding these two dismissals. See discussion infra Part IV.
Lastly, Part V will include recommendations for ensuring justice and protecting the integrity of the U.S. Attorney office.

I. Background

A. U.S. Attorneys' Role and Functions

U.S. Attorneys are attorneys that represent the United States in federal cases. They serve as the nation's principal litigators in both civil and criminal cases in which the United States is a party. As a government lawyer, a U.S. Attorney has a “greater responsibility to pursue the common good or the public interest than their counterparts in private practice, who represent non-governmental persons and entities.” Imbued with a duty to “seek justice,” U.S. Attorneys must seek an outcome that is “just” and “fair,” not merely a victory for the government. Additionally, as prosecutors, U.S. Attorneys serve as “ministers of justice” and must “see that defendants['] [are]...”

20 Green, supra note 19, at 279-80.
accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.

They must "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."

Furthermore, U.S. Attorneys have broad discretion to determine which cases to file, and they


22 Model Rules of Prof’l Conduct R. 3.8(a) (2002).

23 . . . , 559 F. 2d 1160, 1163 (9th Cir. 1977).

1162. A

1163. A

, 440 F. 3d 33, 36 (D. C. 1977) (A)

); . . . C , 440 F. 24, 26 (D. C. 1977) (A)

; . . .
They have the authority to set local priorities and set prosecution thresholds.

These responsibilities led Justice United States Attorney, an inculpated party’s aid in other matters outweighs the benefits of his prosecution."


Fleetwood v. Thompson, 358 F.Supp. 310 (D. Ill. 1972). In Fleetwood, the plaintiff alleged that two U.S. Attorneys joined with others to deprive him of his civil rights by failing to prosecute witnesses for alleged perjury. Id. at 311. In ruling against the plaintiff, the U.S. District Court held that courts may not interfere with the discretionary powers of U.S. Attorneys and that the U.S. Attorneys cannot be sued for "what they already have an absolute privilege to do." Id. In addition, it stated that "none of the U.S. Attorneys can be compelled to investigate or prosecute alleged criminal activity." Id. See also U.S. v. Cox, 342 F.2d 167, 171 (S.D. Miss. 1965) (stating that "courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions").

Sutherland of the U.S. Supreme Court to state what is among the most quoted text describing the role of the U.S. Attorney:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to restrain from improper methods calculated to produce a wrongful conviction as it is to use legitimate means to bring about a just one.

26 U.S. Attorneys are not elected officials but are appointed by the President of the United States and confirmed by the Senate.

27 Some believe that this appointment process protects the attorneys from harmful "electoral consequences of their decisions" and shields them from improper public and political pressure.

28 Each U.S. Attorney is assigned to a specific

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Attorneys serve 94 U.S. districts, with Guam and the Northern Mariana Islands sharing one attorney. They serve for a term of 93 U.S.

See Mission Statement, supra note 14.


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four years, and upon the expiration of the term, they remain in office until a successor is appointed.

The U.S. Attorneys serve in the Department of Justice, under the Executive Branch, under the supervision of the Attorney General.

The attorneys are "subject to removal by the President" and may be terminated at any time.

Only the President can fire a U.S. Attorney.

The AG lacks such power, and his ability to hire and fire staff depends on his influence with the President.

When a newly-elected President comes into office, incumbent U.S. Attorneys normally submit their resignations.

The President is then expected and permitted to fill these vacancies with whom he or she chooses, often political allies.

B. December 2006 Dismissals

http://fpc.state.gov/documents/organization/83000.pdf

[hereinafter "CSC Attorney Report"].


See Mission Statement, supra note 14.


On December 6, 2006, the White House, through the DOJ, dismissed seven U.S. Attorneys: David Iglesias, Carol Lam, Daniel Bogden, Paul Charlton, John McKay, Kevin Ryan, and Margaret Chiara. In January 2006, it had contacted the U.S. Attorney for Western Missouri, Todd Graves, and requested that he resign. In June 2006, it also asked Harry Earnest “Bud” to resign.

See Dan Eggen, U.S. Attorney Firings Set Stage for Congressional Battle, Wash. Post, Feb. 4, 2006, at A07. While these U.S. Attorneys were dismissed on this date, many remained in office to wrap up their duties. See, e.g., infra note 40.

After the Bush Administration requested his resignation in January 2006, Graves announced his resignation on March 10, 2006 and left on March 24, 2006. Id.

 Apparently, the White House noticed that Graves refused to take action against ACORN activists for allegedly registering ineligible people to vote. ACORN workers encourage low-income people to vote, which typically results in increased Democratic votes. In 2006, the Senate race between Republican Jim Talent and Democratic challenger Claire McCaskill was extremely close. In addition to the pressure to charge the ACORN activists, Bradley Scholzman, Graves’s supervisor, allegedly pressed Graves...
Cummins, the U.S. Attorney for Eastern Arkansas, to resign to make room for Tim Griffin, a Karl Rove protégé.

to bring a civil suit against Missouri Secretary of State Robin Carnahan, a Democrat, for failing to address voter fraud.

Graves refused, and when he resigned, Scholzman filled the position himself. As U.S. Attorney, Scholzman pressed voting-fraud charges against four ACORD employees and did so less than a week before election day in 2006. DOJ guidelines strongly discourage bringing such actions immediately before an election. Scholzman also pressed charges against Carnahan, which were dismissed for lack of merit. Murrary Waas, The Scales of Justice, National J., May 31, 2007, available at http://news.nationaljournal.com/articles/070531nj1.htm.


The Republicans were allegedly concerned that Cummins’s investigation of Missouri Republican Governor Matt Blunt would jeopardize the Missouri Senate race. Governor Blunt and his administration that allegedly awarded state contracts to political contractors. Cummins stated that a Justice Department official from the Bush Administration, William Mateja, repeatedly contacted him during the investigation, asking whether Blunt would be implicated in the corruption probe.
The December 2006 dismissals went largely unnoticed by Congress and the public and only gained media attention weeks later when it was hinted that the firings were to make room for Bush appointees. Some believe that "bloggers" were largely responsible for exposing this scandal, as traditional print media overlooked these dismissals.

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Josh Marshall of TalkingPointsMemo (TMP) identified the dismissals as an unprecedented running massacre back on January
Iglesias’s public declaration in late February that he had been pressured by Republicans to expedite an investigation against a Democrat official further fueled theories that the dismissals were politically motivated.

Interestingly enough, it was previously another emerging media medium, the television, that contributed to Nixon’s downfall. The public could, for the first time, hear and see judicial proceedings, and the Watergate television coverage had nightly audiences. Nixon would eventually resign on television.


See Washingtonpost.com, // . / - / / /2007/03/05/ 2007030500666. .

The DOJ initially explained it had dismissed all but one of the prosecutors for performance issues. But further inquiry revealed that most of the dismissed U.S. Attorneys had received positive job reviews. James B. Comey—the Justice Department's second in command and "direct supervisor" of all U.S. Attorneys from 2003 to August 2005—would later testify to a House Judiciary subcommittee that job performance was not a factor in the dismissals. He testified that he had positive experiences with the dismissed attorneys and that the reasons given for their firings were not consistent with his experience. All the fired attorneys had been appointed by the Bush Administration and had held their positions for substantial lengths of time.

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47 Id.

48 Id.

49 Id.

the cause, the Justice Department had been “asleep at the wheel for years.”

51 Documents and testimony later revealed that the Bush Administration had considered replacing all 93 U.S. Attorneys.

52 In 2005, White House Deputy Chief of Staff Karl Rove and White House Counsel Harriet Miers discussed dismissing all current U.S. Attorneys.

AG Gonzales rejected the idea of replacing all 93 attorneys as disruptive and suggested a more limited


52 See House Hearing, supra note 25; Senate Hearing, supra note 30; Sampson Emails, supra note 50.

The administration eventually decided to dismiss 15 to 20 percent of the current U.S. Attorneys, selecting them based on their perceived loyalty to the Bush Administration. The drop list also included those who did a poor job pursuing Bush administration priorities such as voter fraud prosecutions, immigration, and gun cases.

Gonzales’s Chief of Staff, Kyle Sampson, sent an e-mail to Mi...
prosecutors, chafed against Administration initiatives, etc.

After several versions, Sampson developed a final list of names—later admitting that the "distinction between 'political' and 'performance-related' reasons for removing a U.S. Attorney [was], in [his] view, largely artificial."

He finalized the list and gained approval, and the Bush Administration, through Gonzales, subsequently dismissed the seven U.S. Attorneys on the list.

The firings eventually erupted into a scandal, and many in media and public became alarmed and appalled at the "politicization" of the DOJ, an administrative body with the word "Justice" in its title and mission statement. By March 2007, the House and Senate had taken steps to investigate the

58 Id.


60 Id.

II. Illegal Actions?


All U.S. Attorneys serve at the pleasure of the President and are subject to removal by the President at any time.

If this is the case, why did the dismissal spark such intense scrutiny and criticism? Was not the President simply executing his "presidential privilege?" Are there are restrictions or perimeters of the President's power to appoint and dismiss U.S. Attorneys, and if there are, what are they?

A. Legal Perimeters to Presidential Privilege

The DOJ and Gonzales have repeatedly defended the dismissals as legitimate exercises of the President's authority. Others who support the Administration's decisions have made the same argument as well.

Andrew McCarty, a former Assistant U.S. Attorney, states that there are no legal limits to this "unreviewable" presidential power. But even he admits that the President may not use this power indiscriminately.

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67 See, e.g., Gonzales, supra note 54.
69 Id.
is certainly barred from using it to promote corruption and obstruction of justice.

Fur-thermore, others have suggested that in addition to the actual dismissals, the DOJ’s inconsistent statements to Congress explaining the dismissals may have been illegal.

Misrepresentation to Congress are illegal, under 18 U.S.C. § 1505.

See 18 U.S.C § 1505:

Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration

1505.
behind the dismissals and White House involvement, along with AG Gonzales's assertion that the dismissals were not for political reasons, may have violated the statute.

In addition, one of the dismissed U.S. Attorneys, Cummins, stated that Michael Elston, McNulty's Chief of Staff, contacted and possibly other dismissed U.S. Attorneys and suggested that he not respond to questions regarding his dismissal.

These actions may have been witness tampering, a violation of 18 U.S.C. § 1512(b).

Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;
Ironically, the DOJ's contradictory and inaccurate explanations of the dismissals served little purpose but to create confusion and attract suspicion. Had the DOJ only asserted presidential power to dismiss the attorneys, without mentioning performance issues, the dismissals may not have attracted such critical media and public attention.

B. Non-Legal Perimeters and Precedence

Others have suggested that the dismissals, while not technically illegal, may have been improper for other reasons and therefore worthy of public scrutiny. 76

Mark Agrast has (2) cause or induce any person to—

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

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

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

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

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation supervised release, parole, or release pending judicial proceedings; shall be fined under this title or imprisoned not more than ten years, or both.

76 See Audio Recording, supra note 68, (Mark Agrast Center for American Progress).
argued that even if the appointees and the process are inherently "political" and that the President is legally permitted to dismiss appointees on any whim, he should not do so.

According to Agrast, U.S. Attorneys wield immense power, exercise more control over life, liberty, and reputation than any other person in the United States, and are the embodiment of the system of justice.

Therefore, the dismissals, if for failure to be loyal "Bushies" or for failure to follow executive priorities, would be improper and should legitimately garner reaction and criticism.

In addition, the public may be justified in questioning these dismissals because they were factually unlike any other prior U.S. Attorney dismissal.

See CSC Attorney Report, supra note 31. However, Edward Whelan, President of the Ethics and Public Policy Center, during his discussion at the Federal Society, questions the accuracy of the report's results. He admits that he has not read the report but suggests that previous dismissals for "political reasons" may have simply been executed quietly.

77 Id.
78 Id.
79 Id.
80 See Audio Recording,
dismissed U.S. Attorneys without cause in the magnitude and manner that President Bush did.

Newly inaugurated presidents traditionally replace the former president's appointments, "clearing the palette" and dismissing U.S. Attorneys installed by the previous administration.

Former AG Janet Reno dismissed all 93 U.S. Attorneys in March 1993 when President Clinton was first elected.

Likewise, when President Bush first came into office, he removed nearly all the U.S. Attorneys and replaced them with new appointments.

President Bush's second attempt to turnover personnel, in contrast, removed U.S. Attorneys that he had personally appointed. U.S. Attorneys, from tradition and history, barring misconduct, generally serve out their

supra note 68 (Edward Whelan, President of the Ethics and Public Policy Center).

Id.


See Eggan, supra note 39.
Because these dismissals were factually unlike any other prior dismissals, they raised questions of misconduct, illegality, and abuse of power.

According to a Congressional Research Service report released on March 19, 2007, in virtually all dismissals from the past 26 years, only serious issues of personal or professional conduct led to a dismissal.

Of the 468 confirmations made by the Senate between 1981 and 2006, 54 U.S. Attorneys left office before completing their four-year term and whose terms did not extend beyond one President's tenure in office.

Out of the 54 attorneys, 18 left to become judges, and 15 left to enter or return to private practice.

Six attorneys left to take positions in the executive branch, four left to seek elective office, two left to serve in state government, and one died.

Of the remaining eight, two attorneys were dismissed with cause: William Kenney, dismissed in 1982 for accusing the Justice...
Department with blocking his attempt to prosecute former CIA informants, and J. William Petro, dismissed in 1984 due to improper disclosure of information regarding an undercover operation.

Out of the remaining six, three attorneys resigned after committing questionable conduct, including grabbing a reporter’s throat, biting a topless dancer, and lying to federal officials.

The final three attorneys’ reasons for leaving are unknown.

While the President may have power to dismiss any U.S. Attorney at will, previous sitting Presidents only dismissed U.S. Attorneys with cause and never approached the magnitude of the Bush Administration’s dismissals.

C. The Patriot Act

In addition, these dismissals attracted scrutiny due to a recent procedural change in filling vacant U.S. Attorney positions. In Prior to March 2006, an interim U.S. Attorney could only fill a vacant U.S. Attorney position for a maximum of 120 days.

However, on March 9, 2006, President Bush reauthorized the Patriot Act with an amendment that permitted the Attorney General to appoint interim U.S. Attorneys, who

90 Id.
91 Id.
92 Id.
93 See Ferrara, supra note 51.
could then serve for an indefinite period of time. These attorneys could serve for the remainder of the presidential term without receiving Senate confirmation.


The original subsection (c) read:

A person appointed as United States attorney under this section may serve until the earlier of—

(1) the qualification of a United States attorney for such district appointed by the President under section 541 of this title; or (2) the expiration of 120 days after appointment by the Attorney General under this section.

The 2006 Amendment rewrote it to read:

A person appointed as United States attorney under this section may serve until the qualification of a United States attorney for such district appointed by the President under section 541 of this title.

In 2007, the House and Senate reintroduced the 120 day restriction to subsection (c) and added subsection (d):

(c) A person appointed as United States attorney under this section may serve until the earlier of—

(1) the qualification of a United States attorney for such district appointed by the President under section 541 of this title; or (2) the expiration of 120 days after appointment by the Attorney General under this section.

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Selecting U.S. Attorneys is a political process that usually involves both the Executive and Legislative branches of government. Senators can influence the appointment of U.S. Attorneys in their states and have practical veto power of the President's choices. With the new process in place, an administration could strategically use the absence of Senate confirmation to install attorneys who may never have gained Senate approval. Under this change, President Bush did install new U.S. Attorneys without Senate confirmation. Congress quickly closed this loophole in June 2007, but its existence and the Bush Administration's use of it only bolstered accusations of impropriety and political machinations.

III. Obstruction of Justice

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(d) If an appointment expires under subsection (c)(2) of this section, the district court for such district may appoint a United States attorney to serve until the vacancy is filled. The order of appointment by the court shall be filed with the clerk of the court.

95 See id.
96 See Audio Recording, supra note 68, (Andrew McCarty, Federalist Discussion).
97 Id.
As mentioned in the Part II, Section A, a president’s privilege to dismiss U.S. Attorneys may be limited by actions that constitute an obstruction of justice. Interfering with official proceedings in an obstruction of justice, and if the dismissals were motivated by a desire to interfere with official proceedings, the dismissals may have been obstructions of justice.

Of the seven attorneys fired in December 2007, the dismissals of Carol Lam and David Iglesias present the strongest cases for such violations. Lam may have been fired due to her high-profile prosecution of Republican Representative Randy "Duke" Cunningham. Iglesias may have been fired for his refusal to prosecute Democratic officials.

99 See Audio Recording, supra, note 68.
100 See 18 U.S.C. § 1512 (c).
101 Id.
102 See 18 U.S.C. § 1512 (c).
A. 18. C. 1512 ((2))

Obstruction of justice is "interference with the orderly administration of law and justice, as by giving false information to or withholding evidence from a police officer or prosecutor, or by harming or intimidating a witness or juror."

105 It is the "frustration of government purposes by violence, corruption, destruction of evidence, or deceit."

106 It may also


106 See Charles Doyle, CRS Report for Congress: Obstruction of Justice: An Overview of Some of the Federal Statutes that Prohibit Interference with Judicial, Executive, or Legislative
include any action not recognized as a distinct crime that is intended to distort or impede the administration of law.


Congress originally enacted Section 1512 to provide federal protection of witnesses. However, Congress revised this...
section in 2002 when the Enron, WorldCom, and other corporate scandals shook the business world.

It passed the Sarbanes-Oxley Act of 2002, which President Bush called the "most far-reaching reforms of American business practices since the times of Franklin Delano Roosevelt."

The bill overhauled corporate, securities, and accounting laws, created two new obstruction of justice related offenses regarding the destruction of documents, and a new subsection to Section 1512. This new subsection, (c), reads:


Under new 18 U.S.C. § 1519, individuals that knowingly destroy, alter, or falsify records "with the intent to impede, obstruct, or influence" a federal investigation or bankruptcy proceeding are subject to fines and potential imprisonment of up to twenty years. Another provision, 18 U.S.C. § 1520(a)(1), relates to the destruction of corporate audits and requires
(1) Whoever corruptly alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

Congress created and enacted this new section to "plug holes" in the existing statutes and help courts prosecute those who obstruct justice by destroying evidence. Section 1512(b) permitted the court to prosecute an individual who persuaded another to destroy documents, but no federal statute permitted the courts to prosecute an individual who personally destroyed the same documents. Section 1512(c) now permitted courts to take such action.

Accountants that conduct audits under the Securities Exchange Act of 1934 to maintain all audit or review documents for five years. See Perino, supra note 110.


116


118 See Doyle, supra note 106, at 16.
Despite the historical roots of Section 1512(c), the courts have liberally interpreted Section 1512(c)(2) to charge people with crimes unrelated to document destruction.

119 In U.S. v. Lucas, United States Court of Appeals for the Eighth Circuit affirmed the appellant's conviction of attempted obstruction of justice, under 18 U.S.C. § 1512(c)(2), when he asked others to claim ownership of his gun to avoid being charged with possession of a weapon.

120 Indeed, the other subsections of Section 1512 require a defendant to act upon another party to obstruct or impede justice. Only Subsection (c) convicts an individual for his or her own actions, absent another party. See 18 U.S.C. §§(a), (b), and (d).

119 See U.S. v. Lucas, 499 F.3d 769 (8th Cir. 2007); U.S. v. Reich, 479 F.3d 179 (2nd Cir. 2007).

120 See id., 499 F.3d 769. The appellant escaped from a work release program, and when the police apprehended him, they found drugs, cash, and a stolen revolver. Id. at 774. While in jail, the appellant's telephone calls were recorded as part of routine policy, and he was heard asking different individuals to claim ownership of the gun in exchange for money. Id. The appellant was found guilty of obstruction of justice under 18 U.S.C. § 1512(c)(2). Id. at 780-81.
Court of Appeals for the Second Circuit upheld the conviction of the appellant for obstruction of justice, under the same subsection, when he used a forged court document in an attempt to mislead the opposing counsel.

Indeed, the plain language of Section 1512(c)(2)—which indicates that anyone who "obstructs, influences, or impedes an official proceeding or attempts to do so," shall be fined or imprisoned—appears to expand the reach of the statute beyond mere document destruction. An obstruction of justice charge against the Bush Administration may, therefore, be easiest to obtain under this statute’s broad scope.

B. 18 U.S.C. 1512(c)(2) Elements: Official Proceeding and

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\(121\) 479 F.3d 179, 181-82 (2d Cir. 2007).

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\(122\) 18 U.S.C. 1512( )(2)
A conviction under this subsection requires an intent to violate the subsection and a substantial step toward the accomplishment of that goal. It also requires an "official proceeding." Subsection (f)(1) of the same section states that for the purposes of Section 1512, "an official proceeding need not be pending or about to be instituted at the time of the offense. . . ."

Furthermore, a conviction requires a "nexus between [the] defendant's conduct and the effect on the judicial proceedings." In Reich, the court held that a conviction under 18 U.S.C. § 1512(c)(2) requires a "nexus" outlined by the U.S. Supreme Court in U.S. v. Aguilar.

According to Aguilar, a conviction under 18 U.S.C. § 1503, another obstruction of justice statute, requires that the defendant's act must have a relationship in time, causation, or logic with the judicial proceeding.

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123 See U.S. v. Lucas, 499 F.3d 769, 781 (8th Cir. 2007).
124 18 U.S.C. 1512(f)
125 See Reich, 479 F.3d at 192.
126 Id. See also U.S. v. Aguilar, 515 U.S. 593 (1995)
127 One of the six major federal obstruction of justice statutes mentioned in Part III, Section A.
128 Aguilar, 515 U.S. at 599.
The natural and probable effect of interfering with the administration of justice.

The U.S. Supreme Court also discussed one of its previous cases, Pettibone v. U.S., in which it reasoned that "a person lacking knowledge of a pending proceeding necessarily lacked the evil intent to obstruct."

The court in Reich—in light of the fact that it had required the Aguilar nexus requirement for 28 U.S.C. §§ 1503 and 1505 convictions and given the language similarities between those sections and Section 1512(c)(2)—ultimately decided to require the Aguilar nexus for a Section 1512(c)(2) conviction as well.

The "official proceeding" and "nexus" requirements play important roles in analyzing the Bush Administration's actions. As discussed in the following section, a 18 U.S.C 1512(c) conviction may hinge on a court's interpretation of these elements.

IV. Lam and Iglesias’s Dismissals

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IV. Lam and Iglesias’s Dismissals

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130  148  .  .  197, (1893).

131  A______, 515  .  .  599.

132  ____, 479 F. 3  186.

133  __.
Many Democrats and others in the media have speculated that the White House dismissed Carol Lam because of her prosecution of Republican Representative Randy "Duke" Cunningham.

David Iglesias himself testified during congressional hearings in March 2007 that he believed he was dismissed for failing to bring charges against former Democratic state senator Manny Aragon and others involving government construction projects in Bernalillo County, New Mexico.

If the White House, through the DOJ, dismissed Lam and Iglesias with an intent to "obstruct, influence, or impede" an official proceeding related to these investigations, then its actions may have been obstructions of justice and prosecutable under 18 U.S.C. § 1512(c)(2).

A. Analysis of Lam's Dismissal

Many Democrats have suggested that the White House dismissed Lam for prosecuting Republican Representative Randy "Duke" Cunningham.

1. Alleged Failure to Prosecute Gun and Immigration Crimes

In 2002, President Bush nominated Lam to be the U.S. Attorney for the Southern District of California, and the Senate

134 See supra note 103.

135 See supra note 104.

136 See supra note 103.
confirmed the nomination.

From 2002 to 2007, Lam received numerous positive performance evaluations, department awards, and community awards.

On December 6, 2006, the Director of the Executive Office for US Attorneys, Michael Battle, asked her to resign.

He failed to tell her reasons for her dismissal,


Lam received the Director's Award for Superior Performance and the Attorney General's Award for Distinguished Service.


See House Hearing, supra note 25.

See House Hearing, supra note 25.

Id.
and Lam was unaware that her job performance was "inadequate" in any manner. Lam then contacted Deputy Attorney General Paul McNulty to inquire why she had been asked to resign. He stated that he needed time to think and did not want to give her an "answer that would lead" [her] down the wrong route.

She then contacted Battle to request time to prepare her office for her departure, as she was asked to resign effective January 31, 2007. Michael Elston, who was Chief of Staff to McNulty, responded to her request and stated that it was not "received positively" and suggested that she depart in a matter of weeks, not months.

Lam subsequently submitted her resignation on January 16, 2007, effective February 15, 2007. Justice Department officials would later state that the dismissal was based on her inadequate record of prosecuting.
According to the Justice Department, Lam caught its attention back in 2004 when she pursued fewer illegal immigration cases than other districts. In July 2004, House Republicans from California sent a letter to then Attorney General John Ashcroft to complain about Lam’s office’s failure to address illegal immigration.

United States Representative of California’s 49th District, Darrell Issa, repeatedly complained about Lam, and sent a letter to Gonzales in October 2005 complaining of her failure to handle a specific illegal immigration case.

In May 2006, Kyle Sampson, Chief of Staff to AG Gonzales, wrote an email to Bill...

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149 Id.

In June 2006, Sampson wrote another email to another official which said, "Have a heart-to-heart with Lam about the urgent need to improve immigration enforcement... if she balks on any of the foregoing or otherwise does not perform in a measurable way by July 15 [my date] remove her."  

Lam, in responding to questions before the House Judiciary Committee, would state that she had no knowledge her dismissal was related to her attention to those two issues.  

With regards to the gun issue, Lam would state that her office determined that the District Attorneys were doing a good job prosecuting gun crimes, and it implemented a protocol in which it would prosecute a case if it were not being handled effectively by the state or in cases where a substantially higher sentence would be available. As a result, her office did not prosecute a high number of gun crimes.  

With regards to immigration, Lam stated that her office was initially "neglecting important large smuggling investigations..."
in order to meet the demands of handling numerous smaller reactive cases."

Therefore, after two years of study, her office "implemented new guidelines focused on investigations and prosecutions of alien smuggling organizations, corrupt border law enforcement agents, and immigration defendants with prior convictions for violent crimes."

The change in approach lead to "huge cases, which yielded only a few 'stats' but dismantled criminal organizations" and would not have been possible if her office focused on "dozens of small cases involving lower-level criminals."

She stated that her office pursued "more serious immigration crime, which may have yielded fewer statistics, but put behind bars more serious criminals for longer periods of time."

Furthermore, Lam defended her decisions, stating that while the AG technically sets the priorities for the Department, there is substantial variance in local priorities because of the discretion that lies with each individual local U.S. Attorney.

Illegal immigration may be the priority of the Attorney General, but if other issues, such as civil rights enforcement for example, are the U.S. Attorney's priority, then she has the prerogative to pursue such a priority. 

Regions may be plagued by different types of crime, and law enforcement flexibility absolutely vital. Prosecutors will inevitably respond to pressures from within the communities in which they work. As the U.S. Attorney for the Southern District of California, Lam had the prerogative to pursue cases and crimes she believed to be pertinent to that particular community. Thus even if Lam's pursuit of gun or immigration cases were lax, they may have been insufficient grounds for a dismissal "for cause," especially given Lam's numerous accolades.

2. Political Pressure

161 Id.


163 Id.

164 Id.

165 Id.
Others have suggested that Lam's dismissal had more to do with political retribution for her successful prosecution of Republican politicians than her alleged failure to prosecute gun and illegal immigration crimes.

Disclosed emails and testimony suggest that Lam was targeted because of her supervision of the probe that resulted in the guilty plea of then Representative Randy "Duke" Cunningham, a Republican.

On May 10, 2006, Lam's office notified the Justice Department of search warrants in a Republican bribe scandal. The next day, May 11, the Attorney General's Chief of Staff, Sampson, warned the White House that Lam was a "real problem." Sampson sent an email message to William Kelley in the White House counsel's office saying that Lam should be removed as soon as possible.

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166 See Steinhauer and Lipton, supra note 148; Ferrara, supra note 51.
167 See Steinhauer and Lipton, supra note 148.
169 See Eggen, supra note 168.
Lam later sent a notice to the Justice Department saying that there would be two search warrants in a criminal investigation of defense contractor Brent R. Wilkes and Kyle "Dusty" Foggo, who had just quit as the CIA's top administrator amid questions about his ties to Cunningham. The FBI raided Foggo's home, and Foggo was indicated along with Wilkes on fraud and money-laundering charges on Feb. 13, two days before Lam's departure.

When Sampson created his initial hit-list, he admittedly evaluated potential dismissal candidates by their relationships with law enforcement and other government leaders, and their support for the priorities of the president and the attorney general. He testified that a "U.S. Attorney who is unsuccessful from a political perspective, either because he or she had alienated the leadership of the department in Washington or cannot work constructively with law enforcement or other government constituencies in the district, is unsuccessful."

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170 Id.
171 Id.
172 Id.
173 Id.
174 See Sampson, supra note 59.
175 Id.
Sampson’s initial list, dated January 1, 2006 and sent via official memorandum to Miers, included Lam’s name. Another Sampson list, compiled in March of 2005 ranked all the U.S. Attorneys, and Lam was one of the attorneys he suggested for removal.

News of the Cunningham scandal did not break until June 2005.

Sampson finalized the list in the fall of 2006.

3. Application of Federal Statute

Sampson’s statements indicate that while Lam was on his “radar” for immigration complaints, she was not dismissed for the stated immigration and gun issues. If immigration was the real issue, then, according to his previous email,

See Sampson Emails, supra note 50, January 1, 2006 Memorandum for the Counsel to the President, Subject: U.S. Attorney Appointments.

See Sampson Emails, supra note 50.


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See Steinhauer and Lipton, supra note 148.
should have tried to remove her by July 15, 2006, independent of the U.S. Attorney dismissal list. In addition, while Lam was on the initial list, Sampson did not finalize the dismissal list until late 2006.\textsuperscript{181}

There is no indication that he declined to dismiss Lam in July 2006 in order to dismiss her in December 2006. If Sampson had a legitimate reason to dismiss Lam, there is no reason why he would have waited until December.\textsuperscript{182}

His May 2006 email further implies that it was her prosecution of Cunningham that drew administration ire, and the timing of the events suggest that Lam’s name remained on the list because of the Cunningham case. Therefore, while the immigration reasons stated by the DOJ may have initially caused Lam’s name to appear on the list, it was her prosecution of Cunningham that kept her name onto Sampson’s final list.

The plain language of 18 U.S.C. § 1512(c)(2) requires that the accused intend to obstruct, influence, or impede an official proceeding. Under Aguilar,\textsuperscript{183} a charge of obstruction of justice under that subsection requires a “nexus between a defendant’s conduct and the effect on the judicial proceeding.” In Lam’s

\textsuperscript{181}See Sampson Emails, supra note 50.

\textsuperscript{182}Indeed, the DOJ asked U.S. Attorney Bud Cummins to resign in January 2006.

If it intended to impede her investigations. If it had done so then, the administration could be liable for obstruction of justice violations. What is more probable is that the Bush Administration acted in retaliation for Lam’s persistence in the Cunningham case, not in an effort to corrupt, influence, or impede it. While the dismissal was dishonest and dishonorable, it does not easily satisfy the “official proceeding” or “nexus” requirements.

One could argue that the retaliatory nature of the dismissal may obstruct, influence, or impede “future” official proceedings by creating a “chilling effect.” U.S. Attorneys may think twice before bringing cases against politically powerful...
or Administrative-supported politicians. However, case law that discusses the “nexus” requirement indicates that courts will narrowly interpret this requirement. \textsuperscript{186} Furthermore, case law also indicates that courts are unwilling to broadly interpret both the “official proceeding” and the “nexus” requirement for other subsections of Section 1512. \textsuperscript{187} A claim of a potential, future, unidentified official proceeding will likely be sufficient to support a Section 1512(c)(2) violation.

B. Analysis of Iglesias’s Dismissal

Iglesias indicated that he was dismissed for not bending to political pressure to prosecute Democrats in his state. \textsuperscript{188} 1. Lack of Prosecution of a Case Justice officials state that Iglesias, a five year veteran U.S. Attorney of New Mexico, had performed poorly, was absent too often, and therefore, dismissed. \textsuperscript{189} Iglesias, however, had received positive job reviews and was increasing the numbers of prosecutions in his office. \textsuperscript{190} In January 2006, he received a

\textsuperscript{188} See, \textsuperscript{supra} note 104.  
\textsuperscript{189} See, \textsuperscript{Eggen}, \textsuperscript{supra} note 104.  
\textsuperscript{190} Id.
letter from Michael Battle, the DOJ officer who later fired him, commending him for “exemplary leadership in the department’s propriety programs.”

His office’s immigration prosecutions had risen more than 78 percent during his tenure, and his office prosecuted record numbers of narcotics and firearms cases. Furthermore, unlike Lam, Iglesias testified before Congress that he had received no notification that his superiors were dissatisfied with his performance.

Unlike Lam’s dismissal, Iglesias’s dismissal did not attract as much media scrutiny or accusations of obstruction of justice until he publicly disclosed the facts regarding the dismissal himself. Iglesias believed that he was dismissed because he was not aggressively pursuing an investigation involving a Democratic official. According to Iglesias’s testimony, Senator Pete Domenici and Representative Heather

\[191\] Id.
\[192\] Id.
\[193\] See House Hearing, supra note 25.
\[195\] See Eggen, supra note 104.
Wilson, both Republican lawmakers from New Mexico, called him in October 2006 about a well-known criminal investigation involving a Democratic legislator. The investigation involved former Democratic state senator Manny Aragon and government construction projects in Bernalillo County.

Iglesias stated the lawmakers seemed focused on whether charges would be filed before the November elections. When Iglesias stated that pre-November charges would be unlikely, the Republican officials became angry.

According to Sampson's testimony, Iglesias was not on the original list of U.S. Attorneys to be dismissed in December 2006. However, Sampson later added him in October, based in part on complaints from Senator Domenici and other New Mexico Republicans that he was not prosecuting enough voter-fraud cases.

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196 See House Hearing, supra note 25.
197 See also Eggen, supra note 104.
198 See House Hearing, supra note 25.
199 Id.
200 See Eggen and Solomon, supra note 53.
201 See also, House Hearing, supra note 25.
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As a U.S. Attorney, Iglesias determines the sufficiency of the evidence to bring charges against a party. After evaluating a case, if he finds a lack of strong evidence and decides not to pursue action, he is acting within the scope of his position. If he, on the other hand, chooses to pursue politically motivated cases, such as voter fraud cases, that lack substantial evidence, he is acting outside of the professional rules of conduct for his position. As a U.S. Attorney, Iglesias was free to decline an assignment or case he perceived as improper, illegal, or weak. Thus, Iglesias’s “failure” to prosecute a weak case would likely be insufficient grounds for a “for cause” dismissal. The decision not to bring charges against Manny Aragon was completely within the scope of Iglesias’s position. Additionally, if Iglesias had brought charges against Manny Aragon with knowledge that the charges were improper, Iglesias himself could be in violation of his duties as a federal prosecutor.

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3. Application of the Federal Statute to the Lawmakers’ Inquiry

18 U.S.C. §1512(c)(2) requires an intent to obstruct, influence, or impede an official proceeding. It does not, however, punish actions that are merely inquiries into an official proceeding. When the Republican officials contacted Iglesias in attempts to influence his decision making, they may have been interfering with the process of a federal investigation. However, courts may have a difficult time determining whether their actions were nosy inquiries or deliberate attempts to influence Iglesias’s investigation. Or courts may find that the telephone calls were less innocent but not sufficient ly influential enough to warrant an obstruction of justice charge. Although they have apologized for making the phone calls, both Republican lawmakers have denied “pressuring” Iglesias.

207 Furthermore, the unlikelihood for successful prosecution of these lawmakers for obstruction of justice violations is reflected in the lack of charges and lack of discussion in the media.

An alternative theory for the lack of charges also suggests that perhaps Congress is willing to overlook the improprieties 207 See Eggen, supra note 104.
of these lawmakers in its attempt to pursue a larger fish, the Bush Administration, for wrongdoing in Iglesias's case.

4. Application of the Federal Statute to the Bush Administration

While the Republican lawmakers were putting pressure on Iglesias, there is no indication that the Bush Administration was acting similarly. Sampson put Iglesias's name on the dismissal list apparently in response to his failure to prosecute a Democratic official. This complaint was brought to his attention by Republican elected officials, not the Bush Administration. Furthermore, the timing of Iglesias's placement on Sampson's list was not early enough to show an intent to influence the corruption charges. As in the Lam case, Sampson was acting in response to politically unpopular actions. This action, although distasteful, does not trigger a Section 1512(c)(2) violation. Furthermore, courts will have a difficult time establishing the existence of an "official proceeding" or "nexus." No "official proceeding" existed at the time of the dismissals, and no current case exists today. Additionally, Iglesias's 208 Id. 209 Id. 210 See Sampson Emails, supra note 50.
replacement, his former assistant Larry Gomez, has not taken action to bring corruption charges against Aragon. Unlike other U.S. Attorney replacements, Gomez's appointment does not appear to be politically motivated, and there is no indication the Sampson or the Bush Administration dismissed Iglesias to install a more pro-Republican attorney.

Under 18 U.S.C. § 1512(c)(2), it is unlikely that a court would find any official guilty of an obstruction of justice violation with regards to the dismissals of Lam and Iglesias. The dismissals were politically motivated and in retaliation for legitimate actions. They caused public humiliation, raised unnecessary and painful questions regarding work performance, and brought shame and dishonor to a noble department whose mission was to pursue and protect justice. The dismissals, however, did not obstruct justice under 18 U.S.C. § 1512(c)(2).

V. Recommendations

The dismissals rightfully attracted media scrutiny and public scorn. The actions of the Bush Administration were deplorable and should not go unpunished. To ensure that such actions do not repeat themselves in the future, perhaps Congress should amend 18 U.S.C. § 1512(c)(2) to encompass retaliatory action. However, such language would be difficult to reconcile with the other subsections of §1512 and the legislative intent behind Section 1512(c)(2). Furthermore, criminal or civil
protection against retaliatory action may be difficult to define and prove. Actual charges under this type of legislation may limit official, legitimate action, and false or frivolous accusations may actually hinder, not help the political process. Congress could also prosecute officials under the statutes briefly mentioned in Part II. A: 18 U.S.C. § 1505 (misrepresentation to Congress) or 18 U.S.C. § 1512(b). It, additionally, could seek prosecution under one of the other general federal obstruction of justice statutes listed in Part III. A, such as 18 U.S.C. § 371 (conspiracy) or 18 U.S.C. §§ 401, 402 (contempt). However, Congress has yet to take any such action, and its investigation to date does not appear to point to those charges. In addition, many of these chargess may focus prosecute ancillary actions—such as lying to Congress—and not the dismissals themselves. Congress could, however, provide statutory protection for attorney's right of conscience and right to refuse to try.

In fact, it appears that Gonzales's resignation may have been the high point of the controversy. Although the Senate and the House have held their own hearings, neither has pressed any charges, to date.
The American Bar Association could create a canon of ethics, which could be adopted by Congress, that would provide protection for prosecutors who rightfully decline to try cases. Courts could then find it unreasonable for the government to dismiss a prosecutor for adhering to the explicit ethics of his or her profession and provide an appropriate remedy.

This type of protection might have prevented the Bush Administration from dismissing Iglesias, or at the very least, provided him with an appropriate remedy for his inappropriate discharge.

The best solution, however, may be simple: continue to let the public decide. One of the checks on the Executive and Legislative branches is electability and public opinion.


Even though a single official has yet to be charged and convicted with a crime, Gonzales and other members of his staff have resigned. Their careers will undoubtedly be stained by this scandal. While they will not face prison time or charges, they have earned the ire of the public, which may prove harder to overcome and may effectively end any pre-existing or burgeoning political career.

Robert Bork’s career is one example of how scandal can stunt later political aspirations. Solicitor General Bork, who finally fired special prosecutor Archibald Cox during the Watergate scandal, later failed to earn Senate confirmation of a seat on the U.S. Supreme Court despite his stellar credentials as a judge and law school professor. See Gerald M. Boyd, Bork Nomination To Court Weighed, N.Y. Times, June 30, 1987, available at http://query.nytimes.com/gst/fullpage.html?res=9B0DE3D7153DF933A05755C0A961948260&=&=& = ; G ,

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Furthermore, criminal and civil convictions may not provide the best solutions. Lewis "Scooter" Libby, former Assistant to President Bush and Chief of Staff of Vice President Dick Cheney, was found guilty of multiple charges, including obstruction of justice, related to the Valarie Plame affair. President Bush, however, commuted his prison sentence in July 2007, and many politicians continue to ask the President for a full pardon. Former President Ford also fully pardoned Richard Nixon of his obstruction of justice charges. Guilty verdicts, especially when politics and Presidents are involved, are not guaranteed to stick, and presidential pardons easily save individuals from facing the consequences of their actions. Public scorn and shame may perhaps be the best punishment for those who walk on the edges of justice.

VI. Conclusion

\[\text{Wash. Post.}, \quad 3, \ 2007, \ A01, \]

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A court never found Nixon guilty of obstruction of justice. However, Nixon was forced to resign, and Watergate forever tainted his presidential legacy, overshadowing any accomplishment by his Administration. Likewise, a court may never find the Bush Administration or its agents guilty of obstruction of justice violations. The Bush Administration's decision to dismiss seven U.S. Attorneys in December 2006 was an abuse of presidential privilege, a perversion of the justice system, and a juvenile display of revenge. However, the dismissals of Carol Lam and David Iglesias, two venerable U.S. Attorneys, were not illegal under one of the most broad federal obstruction statutes, 18 U.S.C. § 1512(c)(2). At the same time, justice does not belong solely in the hands of politicians, judges, and juries. The American public plays a vital role in determining what is right and just. Its concern and contempt for the dismissals—which led to Attorney General Gonzales's resignation and other resignations from members of his staff, changes in the Patriot Act, and clarification on appropriate DOJ actions—may have provided the ultimate justice.