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Anticipatory Obstruction of Justice: Pre-Emptive Document Destruction under the Sarbanes-Oxley Anti-Shredding Statute, 18 U.S.C. 1519

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NOTE

ANTICIPATORY OBSTRUCTION OF JUSTICE: PRE-EMPTIVE DOCUMENT DESTRUCTION UNDER THE SARBANES-OXLEY ANTI-SHREDDING STATUTE, 18 U.S.C. § 1519

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INTRODUCTION

An employee of a large corporation receives an e-mail from her department manager. The e-mail reminds the employee about the company's document retention policy, a reminder she interprets to mean that she should destroy numerous files on a recent project. This savvy employee, however, reads the newspapers and keeps tabs on her company. She has heard about a government investigation into a division of her company, and, although she works in a separate division, she fears that the investigation may be expanding to include some of the matters on which she has worked.[1] She also knows that an investigation would uncover potentially problematic documents in her files. After reading countless headlines concerning corporate crime, she fears that this "retention" reminder may actually be an effort to encourage her to shred documents in anticipation of a broadening investigation—or worse, in response to an investigation which has already broadened to include her division. Despite her suspicions about the e-mail's purpose, she shreds several documents and deletes hundreds of e-mails. An hour later, she receives an e-mail from one of the company's in-house attorneys informing her that an internal investigation into certain irregularities in her department is underway. Although the internal investigation is unrelated to any current government investigation, the company's policy is to inform and involve governmental authorities in the case of wrongdoing. The employee, frightened not only by the prospect of losing her job, but now also by potential exposure to criminal liability if the government becomes involved, rips two pages from a "business diary." The two pages describe her destruction of the documents.[2] Has this employee committed obstruction of justice?

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1 This portion of the hypothetical loosely parallels the state of mind that former Credit Suisse First Boston investment banker Frank P. Quattrone claimed to have had when he forwarded an e-mail to his employees to remind them of the corporation's document retention policy. *See generally* Brooke A. Masters, *Quattrone Denies He Sought to Foil Probe; Cleanup Order Not Tied to Inquiry, Banker Says*, WASH. POST, Oct. 10, 2003, at E1 (describing Quattrone's claimed state of mind when sending the e-mail); *infra* Part III.C (discussing *U.S. v. Quattrone*).

2 This portion of the hypothetical loosely parallels the probable state of mind of former Freddie Mac President David Glenn, who admitted to ripping out at least one page

Before the enactment of the Sarbanes-Oxley Act of 2002, the answer to this question hid amidst a web of overlapping federal obstruction-of-justice statutes, each requiring the government to prove slightly different elements. Under these statutes, prosecuting this employee's obstructive acts would prove difficult. To varying degrees, the pre-Sarbanes-Oxley obstruction statutes require the government to prove that defendants have knowledge of the proceeding or investigation obstructed in order for that defendant to be found guilty of obstructing justice.[3] Even courts that have broadly interpreted these obstruction statutes to reach into the pre-proceeding realm still require the defendant to have knowledge of the particular proceeding that was obstructed at the time of the act before the defendant can be convicted.[4]

The hypothetical employee above committed two acts of document destruction with two different states of mind. This defendant, however, may not have had enough knowledge about the proceeding she obstructed in either situation to be convicted under the pre-Sarbanes-Oxley federal obstruction statutes.[5] In the first instance, the defendant employee suspected and believed that her document shredding and e-mail destruction might obstruct a investigation, but she had no knowledge of the particular proceeding she was obstructing. In the second situation, although the defendant may have assumed that ripping pages out of her diary obstructed an internal corporate investigation that could possibly hinder a subsequent government investigation, she did not *know* that her actions would necessarily obstruct a government inquiry.

The Sarbanes-Oxley Act of 2002 added a new anti-shredding provision, 18 U.S.C. § 1519, to the roster of federal obstruction-of-justice statutes. The statute is drafted in broader terms than prior existing law:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible

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of his business diary after learning of an internal investigation that may have sought the diary. *See generally* Kathleen Day, *Report Faults Freddie Mac Officials; Board Says Firm's Culture Led to Transactions that Forced Restatements*, WASH. POST, July 24, 2003, at E1 (discussing the need for Freddie Mac to restate its earning statements); Julian Evans, *The Secret Diary of David Glenn*, EUROMONEY, July 2003, at 6 (contemplating the content of the removed pages); Del Jones & Eliot Blair Smith, *Report Includes Pages from Fired President's Notebook*, USA TODAY, July 24, 2003, at 2B (detailing Glenn's admission that he removed diary pages).

3 *See infra* Part II.A.

4 *See infra* Part II.C.

5 In one of the cases upon which this hypothetical is based, Mr. Quattrone's claimed half-knowledge about the proceeding he obstructed led to a hung jury on charges of obstruction of justice under §§ 1503, 1505, and 1512(b)—the pre-Sarbanes-Oxley statutes dealing with document destruction. *See* Part III.C.

> object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.[6]

The provision does not require that the accused "corruptly" destroy documents—a required element of several other obstruction statutes.[7] Furthermore, the provision does not limit liability to those actors who are facing a "pending proceeding" nor does it link the "intent to obstruct" element to an official proceeding.[8] Although the actor must form an "intent to impede, obstruct, or influence" a federal investigation or administrative action, the statute includes the "in relation to or contemplation of" language—which is unique to the federal obstruction statutes—to modify the mental state sufficient for conviction.[9]

No court has yet interpreted § 1519, so the meaning of the broad statutory language is not clear.[10] Some commentators have dismissed the significance of the new anti-shredding provision as doing "very little to criminalize conduct that was not already criminal."[11] According to this view, because some courts have given a broad reach to some of the pre-Sarbanes-Oxley obstruction statutes, § 1519 reaches no further than prior law.[12] Commentators have also argued that § 1519 may have little practical application since it would be too difficult for the government to show that a defendant intended to impede an investigation without producing evidence of the defendant's specific awareness of the pending proceeding.[13] For these reasons and others, some have observed that "criminal practitioners view the new

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6 18 U.S.C.A. § 1519 (West Supp. 2003).

7 *See infra* note 289 and accompanying text (describing a letter from Senator Patrick Leahy, the draftsman of § 1519, pointing out that the statute's exclusion of "corruptly" as a modifier differentiates the statute from the other obstruction provisions).

8 *See infra* Part IV.B.

9 *See* 18 U.S.C. §§ 1501–18 (2000); *infra* Part IV.C.

10 *See* Keith Palfin & Sandhya Prabhu, *Obstruction of Justice*, 40 AM. CRIM. L. REV. 873, 874 (2003).

11 Michael A. Perino, *Enron's Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes-Oxley Act of 2002*, 76 ST. JOHN'S L. REV. 671, 680 (2002); *see also* Palfin & Prabhu, *supra* note 10, at 899 n.154 (noting that two new obstruction statutes, 18 U.S.C. §§ 1512(c) and 1519, may be redundant).

12 *See* Perino, *supra* note 11, at 680 (arguing that that § 1512 already reaches obstruction committed in the pre-proceeding realm); Recent Legislation: *Corporate Law—Congress Passes Corporate and Accounting Fraud Legislation—Sarbanes-Oxley Act of 2002*, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of titles 11, 15, 18, 28, and 29 of the U.S. Code), 116 HARV. L. REV. 728, 731 (2002) ("[Section] 1519 catches only slightly more conduct than the 'pending proceeding' language in 1505—such as when an actor destroys or alters documents long before an informal investigation begins.").

13 *See* Perino, *supra* note 11, at 680.

provisions and get-tough rhetoric [of Sarbanes-Oxley] as little more than sound and fury signifying nothing."[14]

Unlike commentators, courts should not dismiss the new anti-shredding provision as wholly redundant.[15] This Note argues for an alternative reading of § 1519 that draws from the congressional intent of the statute in order to give it a distinct and significant place within the panoply of federal obstruction statutes. This Note argues that the anti-shredding provision can play a new and significant role in prohibiting anticipatory obstruction of justice—document destruction by individuals who are savvy enough to pre-empt an investigation by acting before they have knowledge about the specific proceeding that may demand the documents.[16] In the area of anticipatory obstruction, the new Sarbanes-Oxley anti-shredding provision clarifies an area of obstruction of justice that has left the courts conflicted and juries confused.

Part I of this Note examines the significant role that obstruction-of-justice statutes play in white-collar crime enforcement. Part II analyzes the limits of the federal obstruction statutes used to prohibit document destruction before the passage of Sarbanes-Oxley. This Part

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14 John J. Falvey Jr. & Matthew A. Wolfman, *The Criminal Provisions of Sarbanes-Oxley: A Tale of Sound and Fury*, 16 WHITE-COLLAR CRIME REP. 1, 2 (2002); *see also* Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLA. L. REV. 937, 950 (2003) (noting "significant overlap" in obstruction provisions and concluding that the "ultimate usefulness [of the new provisions] is uncertain").

15 The canons of statutory construction instruct courts to interpret statutes *in pari materia* together, rather than in isolation, and they caution courts from construing statutes so as to render them wholly redundant. *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 523, 525 (1960); *see also* Branch v. Smith, 538 U.S. 254, 281 (2003) (stating that "the most rudimentary rule of statutory construction" is that courts do not consider statutes in pari materia in isolation, "but in the context of the *corpus juris* of which they are a part" and interpreting statutory language to avoid surplusage); Singer v. United States, 323 U.S. 338, 344 (1945) ("[W]here another interpretation is wholly permissible, we would be reluctant to give a statute that construction which makes it wholly redundant.").

16 While courts and commentators have not used the term "anticipatory obstruction," which this Note uses to describe preemptive obstruction of justice, the idea and term are not wholly new. Practitioners have noted that § 1519 reaches culpable conduct earlier than prior law. *See* W. Warren Hamel et al., *They Got Tougher: New Criminal Penalties for Fraud and Obstruction Affect All Companies*, LEGAL TIMES, Oct. 7, 2002, at 34 (concluding that the "in contemplation of" language of § 1519 "substantially enlarges the scope of liability for document destruction in advance of federal activity" codifying the "broadest standard for determining when criminal liability attaches"); Abbe David Lowell & Kathryn C. Arnold, *Corporate Crime After 2000: A New Law Enforcement Challenge or Déjà vu?*, 40 AM. CRIM. L. REV. 219, 225 (2003) (finding the ability to pursue charges of obstructing a "potential future investigation" to be a "true expansion of existing law"). In addition, this idea has surfaced in court opinions which link the "anticipation" mindset to obstruction of justice when describing the mindset of actors at the time when they form a conspiracy to obstruct justice. *See* discussion *infra* note 135. Finally, inchoate crimes have often been grouped together under the descriptor of "anticipatory offenses." *See* WAYNE R. LAFAVE, CRIMINAL LAW 524–25 (3d ed. 2000); Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 6 (1989).

highlights two requirements that courts have used to limit the reach of pre-Sarbanes-Oxley obstruction statutes: the "nexus" requirement and the requirement that defendants have knowledge of the particular proceeding obstructed by their actions. Part III examines the ineffectiveness of pre-Sarbanes-Oxley obstruction statutes in the courthouse by looking at juror confusion in two recent high-profile document destruction cases: Arthur Andersen's obstruction-of-justice conviction[17] and Frank Quattrone's hung jury.[18] Against this legal background, Part IV looks to the legislative record of § 1519 to discern Congress's intent regarding the statute's scope. Part V draws together conclusions from case law, practical application, and legislative intent to argue that § 1519 could play a powerful new role by criminalizing document destruction undertaken in anticipation of government investigations. This Note contends that the government should be able to convict a defendant for obstructive document destruction under this statute even when it can only prove the defendant acted with a generalized contemplation of official investigations or proceedings. Under this interpretation, Part V explores the final question of whether any constitutional boundaries would restrict how a court may impose criminal liability for anticipatory obstruction.

I
THE SIGNIFICANCE OF THE FEDERAL OBSTRUCTION-OF-JUSTICE STATUTES TO WHITE-COLLAR CRIME ENFORCEMENT

Even a subtle difference in the state of mind required to convict a defendant under § 1519 and prior federal obstruction statutes could have a practical impact on the recent wave of white-collar crime prosecutions. Conventional wisdom holds that, for a variety of reasons, prosecutors are quick to file obstruction-of-justice charges in cases of financial crimes and complex fraud.[19] One possible explanation is

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17 For reasons given below, this Note argues that the Arthur Andersen conviction was an unsuccessful obstruction prosecution, despite the conviction obtained in that case. *See* discussion *infra* Parts III.A–B.

18 Clearly this is not intended to be a representative cross-section. This Note focuses on these two high-profile cases because the media attention created more of a record in the press reports than less well-known cases. Post-verdict comments by the jurors to the press in these cases, as well as the contemporaneous record of evidence presented throughout the trial, provide some basis to analyze the strength of the legal theory presented to the jury in order to draw conclusions about the strength of the law under which the defendants were charged. In addition, both of these cases involve defendants who assert some form of a claim that they lacked the requisite knowledge about the proceeding they obstructed.

19 *See* Tamara Loomis, *The Challenge of Prosecuting Obstruction Cases*, N.Y. L.J., Dec. 8, 2003, at 1.

that because of the document-intensive nature of financial crimes,[20] prosecutors jealously guard their primary source of evidence.[21] Another possibility is that the prospect of proving an obstruction-of-justice case may appear easier than explaining esoteric and complex fraudulent schemes to a jury.[22] There is also the belief that an obstruction charge is a powerful tool to convince a reluctant witness to testify—a necessity in complex white-collar cases.[23] Finally, obstructive behavior also eases the prosecution's burden of establishing the defendant's culpable state of mind—the most difficult element to prove in prosecuting business crimes.[24] For all of these reasons, the interpretation of the new anti-shredding statute will significantly impact prosecutions of white-collar criminals.

It is difficult to either prove—or disprove—this conventional wisdom about the popularity of obstruction-of-justice charges with empirical data. On the one hand, federal crime reports show that the government rarely pursues obstruction-of-justice charges as a "primary offense."[25] Those statistics, however, may underestimate the govern-

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20 *See* MICHAEL L. BENSON & FRANCIS T. CULLEN, COMBATING CORPORATE CRIME: LOCAL PROSECUTORS AT WORK 70 (1998) (reporting a survey of local prosecutors who rank "a search of financial records" as the most useful investigative tool).

21 Among others, former SEC Chairman Harvey Pitt made this argument before Congress when he reasoned that "destruction of documents cannot be condoned, because once somebody gets away with it, everybody will try to get away with it, and the system falls apart." *The Corporate and Auditing Accountability, Responsibility and Transparency Act of 2002: Hearings Before the Comm. on Financial Services U.S. House of Representatives*, 107th Cong. 95 (2002) (statement of Harvey Pitt); *see also* Tamara Loomis, *The Challenge of Prosecuting Obstruction Cases*, N.Y. L.J., Dec. 8, 2003, at 1 (noting that obstruction of justice is a way for a potential defendant to guarantee himself or herself an indictment because prosecutors take the crime so seriously).

22 *See* Mary Flood, *Snowball Effect in the Enron Case?: Andersen Indictment May Pay Many Dividends to Prosecutors*, HOUSTON CHRON., Mar. 19, 2002, at 1A (noting that obstruction of justice is among "prosecutors' favorite charges" and "often easier to prove than the underlying crimes and generally take a lot less time to investigate"); Edward Iwata, *Obstruction Charge Can Be Easier to Prove*, USA TODAY, June 4, 2003, at 2B; Jeff Leeds, *Andersen Jury Comes to Deadlock*, L.A. TIMES, June 13, 2002, at C1 ("[P]rosecutors consider obstruction to be one of the easiest white-collar offenses to prove, in part because it doesn't usually require jurors to understand complex financial details.").

23 Kit R. Roane, *Andersen Clients Bolt—And Legal Risks Mount*, U.S. NEWS & WORLD REPORT, Mar. 18, 2002, at 34 (noting obstruction charges are often used to "spook people" into cooperating with the government's case).

24 *See* BENSON & CULLEN, *supra* note 20, at 186–88.

25 Justice Department statistics show that 0.4% of all persons arrested for federal offenses in 2000 were arrested for obstructing justice. U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2002, 387, tbl.4.33, *available at* http://www.albany.edu/sourcebook/1995/pdf/t433.pdf. The number of defendants indicted on obstruction cases is not clear, but it still seems to be very low. The U.S. Sentencing Commission does not report obstruction charges separately and instead groups obstruction-of-justice charges with other "Administration of Justice" offenses—including offense while on release, perjury, accessory after the fact, and several other charges. U.S. SENTENCING COMM'N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. A. (2001), *available at* http://www.ussc.gov/ANNRPT/2001/AppA_01.htm. This group of offenses only constituted 1.8% of the cases

ment's tendency to bring obstruction charges in conjunction with an underlying substantive charge.[26] The Sentencing Commission reports show that defendants in the federal system receive upward departures for obstruction under guideline § 3C1.1 more often than any other upward departure, which may support the notion that federal prosecutors routinely punish obstructive behavior in conjunction with a substantive offense.[27] However, the Sentencing Commission's statistics may be both over-inclusive and under-inclusive. They may include defendants not indicted for obstructing justice, and they may not account for all the defendants who were indicted on an obstruction charge.[28] Furthermore, studies that have specifically examined white-collar crime statistics often do not include obstruction-of-justice statistics because the offense is not exclusively committed by white-collar offenders.[29]

Although obstruction-of-justice cases do not flood federal courthouse dockets, they have dominated headlines,[30] which may deter more wrongdoers than the raw numbers of obstruction prosecutions

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brought in federal court in 2001. *Id.* at tbl.3, *available at* http://www.ussc.gov/ANNRPT/2001/table3.pdf.

26 Where a defendant is arrested and indicted for two criminal offenses, both the Justice Department and the Sentencing Commission only track the charge that carries the longest statutory term. U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 2000, 597, app. 11 (defining "most serious offense" as "the offense with the greatest potential sentence"); U.S. SENTENCING COMM'N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. A (2001), *available at* http://www.ussc.gov/ANNRPT/2001/AppA_01.htm (defining "primary offense" as the offense with the maximum statutory sentence). For instance, a two-count indictment of wire fraud and obstruction would only count toward the "fraud" category.

27 U.S. SENTENCING COMM'N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (2001).

28 If a defendant were charged with obstruction of justice, a court would face the thorny question of whether it would be impermissible double-counting to enhance a sentence that is based on the same conduct as the underlying offense. However, there have been situations in which a defendant convicted for obstructing justice has had his sentenced enhanced for obstruction. *See* United States v. Maggi, 44 F.3d 478, 482 (7th Cir. 1995) (allowing the enhancement of a sentence of a defendant charged with obstruction and money laundering because the departure only affected the more serious charge of money laundering); United States v. Fredette, 15 F.3d 272, 275–76 (2d Cir. 1994) (allowing enhancement based on further obstructive conduct).

29 *See, e.g.*, BENSON & CULLEN, *supra* note 20, at 44–45 (listing the nine offenses on which they chose to survey local prosecutors in order to analyze white-collar crime; none was obstruction of justice); Cynthia Barnett, *The Measurement of White Collar Crime Using Uniform Crime Reporting (UCR) Data*, NATIONAL INCIDENT-BASED REPORTING SYSTEM NIBRS PUBLICATION SERIES 1, 2–3, *at* http://www.fbi.gov/ucr/whitecollarforweb.pdf (excluding obstruction of justice from the list of white-collar offenses).

30 *See* Richard M. Strassberg & Roberto M. Braceras, *'Corruptly Persuading' the Obstruction of Justice*, 16 WHITE-COLLAR CRIME REP., May 2002, at 1 (noting that obstruction-of-justice prosecutions, while relatively rare, do dominate news coverage).

would indicate.[31] The contrast between Arthur Andersen's swift obstruction conviction and the slow progress in indicting Enron's top management exemplifies the idea that federal prosecutors file obstruction charges when the alternative is a complex financial crime.[32] Martha Stewart's trial reaffirmed the cliché that "it's not the crime, it's the cover-up," when she was charged with obstruction of justice[33] for covering up actions warranting only civil charges of insider trading[34] and a criminal charge of securities fraud that was eventually dismissed as a matter of law.[35] Similarly, prosecutors pursued the obstruction-of-justice case against former Credit Suisse First Boston banker Frank Quattrone despite the lack of an underlying criminal offense.[36] While this disparity was particularly ironic in Stewart's case,[37] the message sent by her case reinforced the idea that hiding wrongdoing invites a harsher punishment than the actual wrongdoing warranted.[38]

The widespread use of e-mail has also increased the importance of document destruction as a form of obstruction of justice committed in the business office. E-mail has been described as "a form of almost instantaneous communication . . . [that] has replaced the wiretap as

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31 *See* BENSON & CULLEN, *supra* note 20, at 95–96 (reporting a survey which found that white-collar crime prosecutions are motivated by the goal of general deterrence, while prosecutions of street crime are motivated by the goal of deterring the specific individual).

32 *See* Iwata, *supra* note 22, at 2B. In reports about the Enron scandal, federal prosecutors have described this rationale as their reason for pursuing the Arthur Andersen indictment before other indictments in the Enron case. *See* Jeffrey Toobin, *End Run at Enron: Why the Country's Most Notorious Executives May Never Face Criminal Charges*, NEW YORKER, Oct. 27, 2003, at 50 (quoting a government investigator describing the decision to prosecute Andersen first as driven by the belief that the obstruction case was "easy" and "obvious").

33 While there were numerous charges involving Stewart's cover-up, she was charged with both conspiracy to obstruct justice and obstruction of justice under 18 U.S.C. § 1505. *See* Superseding Indictment at ¶¶ 38, 55, United States v. Stewart & Bacanovic S1 03 Cr. 171 (S.D.N.Y. Jan. 2004), *available at* http://news.findlaw.com/hdocs/docs/mstewart/usmspb10504sind.pdf.

34 *But see* Richard A. Booth, *It's Not a Good Thing, But It's Not a Crime*, LEGAL INTELLIGENCER, Feb. 23, 2004, at 13 (quoting the prosecutor in charge of the Stewart prosecution who refused to file insider-trading charges because there was no precedent for doing so); Warren L. Dennis & Bruce Boyden, *Stewart Prosecution Imperils Business Civil Liberties*, 18 LEGAL BACKGROUNDER, Oct. 3, 2003, at 2 (noting that the Department of Justice sought obstruction charges against Ms. Stewart for hindering an investigation into insider-trading allegations that the same Department of Justice refused to charge as criminal "presumably because they were so weak"); Brooke A. Masters, *Stewart Prosecutor Balked at Insider-Trading Charges*, WASH. POST, June 6, 2003, at E1

35 *See* Jonathan D. Glater, *Most Serious Charge Against Stewart Is Dismissed*, N.Y. TIMES, Feb. 28, 2004, at A1.

36 *See infra* note 240 and accompanying text (listing the three obstruction statutes in the criminal indictment).

37 *See* Booth, *supra* note 34, at 13 ("The irony here is tremendous—Stewart is being tried for denying that she did something that the prosecution agrees she did not do!")

38 *See* Strassberg & Braceras, *supra* note 30, at 1–2 (citing Watergate, Whitewater, the Catholic Church, and Arthur Andersen as examples of leaders being brought down "not by their own substantive wrongdoing, but rather by their efforts to 'cover-up' and obstruct justice").

the best source of incriminating evidence in white-collar prosecutions."[39] In addition to being an invaluable record of the contemporaneous thoughts of a wrongdoer, e-mail is also more difficult for the actor to destroy than is commonly thought.[40] Deleting an e-mail from an individual computer may still leave copies on the computer's hard drive, the company's server, and the hard drives and servers of the recipients.[41] The conviction of Arthur Andersen, the prosecution of Credit Suisse First Boston banker Frank Quattrone, and the investigation of Merrill Lynch analysts relied heavily on e-mail evidence.[42] As Mr. Quattrone quipped to the jury during testimony in his obstruction trial, "E-mail is a medium that lasts forever and can come back to bite you."[43] The widespread use of e-mail ensures that prosecutors' reliance on such electronic evidence of substantive crimes and that obstruction-of-justice statutes' impact on white-collar criminal enforcement will only increase.

II
DOCUMENT DESTRUCTION UNDER FEDERAL OBSTRUCTION STATUTES BEFORE SARBANES-OXLEY

The central question that determines whether and how anticipatory obstruction of justice may be prohibited is how early a court will impose criminal liability for destroying documents. Simply put: when an individual destroys an incriminating document, how much must he know about the proceeding in order for a court to find he obstructed justice? The pre-Sarbanes-Oxley federal obstruction statutes have different requirements for a defendant's level of awareness. However, all of these statutes are similarly limited in their ability to effectively prohibit anticipatory obstruction.

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39 Robert J. Giuffra, Jr., *E-mail: The Prosecutor's New Best Friend*, BUS. CRIMES BULL., July 2003, at 1.

40 *Id.*; *see also* David F. Axelrod et al., *Hard Times with Hard Drives: Paperless Evidence Issues That Can't Be Papered Over*, *in* WHITE COLLAR CRIME 1999, M-9–M-10 (1999) (describing the difficulties in purging electronic files); Tamara Loomis, *Electronic Mail: A Smoking Gun for Litigators*, N.Y. L.J., May 16, 2002, at 5 (estimating that deleted e-mails are recoverable approximately 90% of the time even though the authors do not consider them a permanent record).

41 *See* Guiffra, *supra* note 39, at 1; *see also* Axelrod et al., *supra* note 40, at M-9 ("Backup files constitute a ready-made store-house of potentially damaging material that is readily available to a knowledgeable adversary.").

42 *See* Mark D. Walters, *Electronic Evidence: When Misconduct Allegations Surface, E-mail Proves Vital But It's Up to Companies to Handle It Properly*, SEATTLE POST-INTELLIGENCER, Oct. 13, 2003, at C1.

43 Andrew Ross Sorkin, *Ex-Banker Denies Intent to Obstruct U.S. Inquiry*, N.Y. TIMES, Oct. 10, 2003, at C1.

A. The Limits of § 1503, § 1505, and § 1512

Before the Sarbanes-Oxley Act, three federal obstruction-of-justice statutes prohibited document destruction:[44] § 1503, § 1505, and § 1512(b).[45] Statutory and judicially imposed requirements have essentially restricted the prosecution of obstruction of justice under those statutes to defendants who can be shown to have knowledge of the proceedings against them.[46] Even courts that stretched the language of § 1512(b) to impose criminal liability early in the pre-proceeding area balked at imposing criminal liability where the government could not prove the defendant's knowledge of the particular proceedings he obstructed.[47] It is against this background that § 1519 can be considered a significant new weapon in the arsenal of a federal prosecutor.

The "omnibus" obstruction provision, 18 U.S.C. § 1503, earned the title of the "catch-all" provision within the labyrinth of federal obstruction statutes.[48] The omnibus provision punishes an individual who "corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice."[49] The "catch-all" language was devised to prohibit a "variety of corrupt methods [of obstructing justice] . . . limited only by the imagination of the criminally inclined."[50] To convict a defendant for document destruction under § 1503, the government must show four elements:[51] (1) a judicial proceeding which was pending when the documents were destroyed (the "pending proceeding" requirement),[52] (2) the in-

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44 For the sake of simplicity, this Note focuses on document destruction. However, § 1519 prohibits a wide range of document-related obstruction, including the creation of false documents, another expansion from existing law. *See* Letter from Patrick Leahy, U.S. Sen., to John Ashcroft, Att'y Gen., U.S. Dep't of Justice 2–3 (Aug. 2, 2002) (on file with author) (emphasizing this as one of the distinctions between § 1512 and § 1519).

45 *See* JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE 171 (1989); Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 FORDHAM J. CORP. & FIN. L. 721, 729 (2003) (citing the three statutes as the pre-Sarbanes-Oxley protection against document destruction); Strassberg & Braceras, *supra* note 30, at 2 (citing sections 1503, 1505, and 1512 as the relevant statutes to document destruction).

46 *See* discussion *infra* Part II.C.1.

47 *See* discussion *infra* Part II.C.1.

48 *See* United States v. Aguilar, 515 U.S. 593, 600 (1995); Palfin & Prabhu, *supra* note 10, at 875–77.

49 18 U.S.C. § 1503(a) (2000).

50 Catrino v. United States, 176 F.2d 884, 887 (9th Cir. 1949).

51 These elements are enumerated by Palfin & Prabhu. *See supra* note 10, at 877–78; *see also In re* Impounded, 241 F.3d 308, 317 n.8 (3d Cir. 2001). In the context of document destruction, the documents' relevance and the defendant's knowledge of that relevance are part of the test. *See* GORELICK ET AL., *supra* note 45, at 175–76; Chase, *supra* note 45, at 731. However, the document's admissibility is not required. *See* GORELICK ET AL., *supra* note 45, at 175; Chase, *supra* note 45, at 732.

52 *See, e.g.*, United States v. Fleming, 215 F.3d 930, 934 (9th Cir. 2000) ("Although it is not mentioned in the statute, the Government must prove the existence of a pending

dividual had knowledge of that proceeding,[53] (3) a sufficient "nexus" existed between the document destruction and the proceeding,[54] and (4) the defendant acted corruptly and with an intent to obstruct or interfere with a judicial proceeding or administration of justice.[55] While the omnibus provision applies only to judicial proceedings, § 1505 uses similar language to prohibit obstruction of congressional or federal investigations.[56]

Punishing anticipatory document destruction through § 1503 is close to impossible. Logically, the requirements the government must establish—the existence of a pending proceeding at the time of the act and the defendant's knowledge of that proceeding—foreclose a prosecutor's ability to indict a defendant for obstructive acts that occur merely in anticipation of a future proceeding.[57] In addition, the Supreme Court's decision in *U.S. v. Aguilar*,[58] requiring a sufficient "nexus" between the obstruction and the proceeding, may have further restricted the scope § 1503 in combating anticipatory obstruction.[59] Perhaps because of the difficulties in proving these elements, courts have interpreted other obstruction statutes less restrictively.

The omnibus bill's companion statute, § 1505, uses the same language as § 1503 to prohibit actions taken with the intent to obstruct "any pending proceeding . . . before any department or agency of the United States."[60] Thus, § 1505 prohibits document destruction like § 1503,[61] but targets obstruction that is directed at agency and congressional investigations, as well as adjudicative functions undertaken

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judicial proceeding in a prosecution for a violation of § 1503."); United States v. Cihak, 137 F.3d 252, 263 (5th Cir. 1998) ("In order for the government to prove obstruction of justice and conspiracy to obstruct justice, there must have existed a pending judicial proceeding at the time that defendants acted.").

53 *See, e.g.*, United States v. Davis, 183 F.3d 231, 239 (3d Cir. 1999), *amended by* 197 F.3d 662 (3d Cir. 1999) ("In order to violate § 1503, a defendant must have notice or knowledge of the pendency of some judicial proceeding constituting the 'administration of justice.'" (citing United States v. Nelson, 852 F.2d 706, 710 (3d Cir. 1998))); United States v. Frankhauser, 80 F.3d 641, 650–51 (1st Cir. 1996) (reversing a § 1503 conviction because the defendant only had knowledge of an investigation; he lacked knowledge that the investigation was part of a grand jury proceeding).

54 *See infra* Part II.B.1.

55 *See, e.g.*, United States v. Fassnacht, 332 F.3d 440, 446 (7th Cir. 2003) (finding that a conviction under § 1503 requires a specific intent to obstruct justice; knowledge alone will not suffice); *see also* United States v. Schwarz, 283 F.3d 76, 107–08 (2d Cir. 2002) (distinguishing between knowledge of the obstructed proceeding and specific intent to obstruct).

56 *See* 18 U.S.C. § 1505 (2000); *infra* notes 60–66 and accompanying text.

57 GORELICK ET AL., *supra* note 45, at 176–83.

58 515 U.S. 593 (1995).

59 *See* discussion *infra* Part II.B.1.

60 18 U.S.C. § 1505 (2000).

61 *See* GORELICK ET AL., *supra* note 45, at 185; Palfin & Prabhu, *supra* note 10, at 889 ("Section 1505 . . . makes criminal much of the same behavior, but is applicable to proceedings before federal agencies.").

by those government entities.[62] Like the omnibus provision, § 1505 ties the obstructive act to a pending proceeding and requires knowledge of that proceeding.[63] However, the "pending proceeding" requirement under § 1505 is more broadly construed than the requirement under § 1503, allowing convictions when the obstructive acts occur in the preliminary, investigative stages of the case.[64] The *Aguilar* "nexus" requirement seems to apply to § 1505, as courts facing the issue have not distinguished the two statutes with regard to that requirement.[65] While knowledge of the pending proceeding is required under § 1505, it is unclear if a general belief about the proceeding to be obstructed, rather than knowledge about a specific pending proceeding, would suffice.[66]

Can § 1505 be used to prohibit anticipatory obstruction of justice? Courts have interpreted § 1505 to prohibit obstructive acts occurring much earlier in the criminal storyline than covered under the omnibus provision.[67] However, courts also require the government to establish that the defendant was aware of a pending proceeding before being convicted under § 1505.[68] Courts have not broadened that awareness to include merely a generalized contemplation of an investigation. In addition, the linguistic similarity to § 1503 makes it more likely that courts may require the government to show a proper "nexus" between the obstructive act and the proceeding. Thus, even

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62 *See* United States v. Senffner, 280 F.3d. 755, 761 (7th Cir. 2002) (finding that an SEC investigation is a "pending proceeding," even though SEC may only enforce orders through the courts); United States v. Cisneros, 26 F. Supp. 2d 24, 38 (D.D.C. 1998); Chase, *supra* note 45, at 736.

63 *See* United States v. Price, 951 F.2d 1028, 1031 (9th Cir. 1991) ("[T]he defendant must be aware of the pending proceeding"); Chase, *supra* note 45, at 737; Palfin & Prabhu, *supra* note 10, at 889; *see, e.g.*, United States v. Sutton, 732 F.2d 1483, 1490 (10th Cir. 1984).

64 *See Senffner*, 280 F.3d. at 760; United States v. Hopper, 177 F.3d 824, 831 (9th Cir. 1999) (finding that a collection of delinquent taxes by the United States Marshal is an IRS "proceeding"); United States v. Schwartz, 924 F.2d 410, 423 (2d Cir. 1991) (finding that interviews with customs officials qualify as pending agency proceedings); United States v. Leo, 941 F.2d 181, 199–200 (3d Cir. 1991) (applying § 1505 where defendant obstructed the investigation of a defense audit agency).

65 *See* United States v. Jacques Dessange, Inc., 4 Fed. Appx. 59, 63 (2d Cir. 2001) ("Assuming that the nexus requirement announced in *Aguilar* applies to § 1505 prosecutions, the jury could reasonably conclude that it was satisfied here."); *Hopper*, 177 F.3d at 830 (applying the *Aguilar* nexus requirement in a § 1505 prosecution); *see also* United States v. Veal, 153 F.3d 1233, 1250 & n.24 (11th Cir. 1998) (distinguishing the nexus requirement of § 1503 and § 1512 based on federal interest and noting that the federal interest at stake in § 1505 would indicate that the nexus requirement applies).

66 *See* Chase, *supra* note 45, at 737 ("It is unclear whether actual notice is required or whether likely suspicion of a proceeding is sufficient for this requirement."). *See generally* Strassberg & Braceras, *supra* note 30, at 2 (arguing that the rarity of obstruction-of-justice cases and the overlapping nature of the statutes leads to ambiguity and conflict in the case law which is challenging for even an experienced practitioner).

67 GORELICK ET AL., *supra* note 45, at 186–87.

68 *See supra* note 63 and accompanying text.

though the reach of § 1505 is less clear than that of § 1503 or § 1512, there are still potential obstacles for prosecutors to overcome before using the statute to charge a defendant for obstructing justice in anticipation of an agency investigation or proceeding.

The document destruction provision of the witness-tampering statute, § 1512(b), has a broad reach into the preliminary, investigative stages of law enforcement.[69] The statute targets an individual who "knowingly[,] . . . corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to . . . alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding."[70] In order for a defendant to be convicted under § 1512(b), the government must show:[71] (1) that the defendant knowingly,[72] (2) corruptly persuaded another to destroy documents,[73] (3) with intent to influence or obstruct an official proceeding.[74] While the statute ties the defendant's obstructive intent to "an official proceeding," this term includes investigations just like § 1505.[75] In addition, a subsection of the statute specifies that "an official proceeding need not be pending or about to be instituted at the time of the offense."[76] Since the specificity of the defendant's knowledge of the official proceeding is unsettled under § 1512,[77] the government is not

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69 *See* United States v. Gonzalez, 922 F.2d 1044, 1055–56 (2d Cir. 1991); John C. Coffee, Jr., *The Andersen Fiasco*, NAT'L L. J., Feb. 11, 2002, at A19 (noting that courts have read the statute to "reach conduct that occurs during an informal investigatory stage").

70 18 U.S.C. § 1512(b)(2)(B) (2000).

71 For the elements see GORELICK ET AL., *supra* note 45, at 189; Chase, *supra* note 45, at 739; Palfin & Prabhu, *supra* note 10, at 893.

72 *See* United States v. Kellington, 217 F.3d 1084, 1098 (9th Cir. 2000) (listing the defendant acting "knowingly" as the first element of obstruction of justice under § 1512); United States v. Frankhauser, 80 F.3d 641, 650–51 (1st Cir. 1996) (describing the defendant acting "knowingly" as the first element of obstruction of justice in a document destruction case under § 1512(b)).

73 *See* United States v. Khatami, 280 F.3d 907, 911–12 (9th Cir. 2002) (interpreting the "corruptly persuades" requirement to include non-coercive persuasion); United States v. Davis, 183 F.3d 231, 250 (3d Cir. 1999) (finding that the accused need only "corruptly persuade" another person under § 1512; that other person does not need to be the actual witness); United States v. Poindexter, 951 F.2d 369, 378–79 (D.C. Cir. 1991) (rejecting an intransitive use of "corruptly persuades"—"wickedly" or "immorally"—as void for vagueness, though allowing for the transitive use of the phrase).

74 *See Kellington*, 217 F.3d at 1100–01 (upholding the grant of a new trial where prosecution asked the jury to infer intent to obstruct justice from "common sense"); United States v. Gabriel, 125 F.3d 89, 104 (2d Cir. 1997) (distinguishing the intent element of § 1512 from § 1503).

75 *See Frankhauser*, 80 F.3d at 652 (finding defendants' interference with an FBI investigation was an obstruction of an official proceeding); United States v. Kelley, 36 F.3d 1118, 1128 (D.C. Cir. 1994) (finding an investigation by the Office of the Inspector General of the U.S. Agency for International Development is an "official proceeding" for purposes of § 1512); Palfin & Prabhu, *supra* note 10, at 897–98.

76 18 U.S.C.A. § 1512(f)(1) (West Supp. 2003).

77 *See* discussion *infra* Part II.C.1.

required to prove the defendant's state of mind regarding the federal nature of the proceeding.[78] Although it is not settled law, some courts distinguish § 1512(b) from § 1503 and refuse to require the *Aguilar* nexus under § 1512(b).[79]

Because § 1512 eases the requirements that the government must fulfill, prosecutions under this statute are so common that the witness-tampering law "has become the predominant obstruction-of-justice statute."[80] It has proven to be effective in some high-profile cases, such as Arthur Andersen.[81] In fact, there is some debate about whether § 1512 has supplanted § 1503, so that the witness-tampering statute is now the exclusive tool for prosecuting the forms of obstruction of justice enumerated in the statute.[82] Because § 1512(b) was written as a witness-tampering statute, it initially criminalized only the attempt to persuade another person to destroy documents and did not apply to the document shredders themselves.[83] Congress corrected this disparity in the Sarbanes-Oxley bill by adding a new section, § 1512(c), which uses the language of § 1512(b) to punish the actor who destroys documents as well.[84]

Despite the ways in which § 1512(b) may ease a prosecutor's burden, the witness-tampering statute is still inadequate to effectively prohibit anticipatory obstruction. Courts have found that a conviction under § 1512(b) still requires the government to show the defendant's knowledge of an official proceeding.[85] As explored below, some courts have taken the statutory requirement, "with intent to impair the object's integrity or availability for use in an official proceeding," to mean that a defendant who obstructs justice must be acting with knowledge of a *specific* investigation before be may be convicted under the statute.[86] Without an active proceeding against the defen-

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78 *See* United States v. Tyler, 281 F.3d 84, 91 (3d Cir. 2002); United States v. Applewhaite, 195 F.3d 679, 687 (3d Cir. 1999); United States v. Gonzalez, 922 F.2d 1044, 1054 (2d Cir. 1991).

79 *See* discussion *infra* Part II.B.2. *But see* Jonathan D. Polkes, *Obstruction of Justice Nexus Requirement Unclear in New Statutes*, N.Y. L.J., July 7, 2003, at 7 (arguing that a nexus requirement could be read into both § 1512 and § 1519).

80 Strassberg & Braceras, *supra* note 30, at 3 (citing the statistic that, of cases brought under § 1503, § 1505, and § 1512 between 1995 and 2000, between 58–75% of the prosecutions were brought under § 1512).

81 *See* Indictment, United States v. Arthur Andersen, 2002 WL 32153945 (S.D. Tex. Mar. 14, 2002) (No. 02-121); Part III.A–B.

82 *See* Tina M. Riley, Note, *Tampering with Witness Tampering: Resolving the Quandary Surrounding § 18 U.S.C. §§ 1503, 1512*, 77 WASH. U. L.Q. 249, 275 (1999).

83 *See* 18 U.S.C. § 1512(b) (2000).

84 18 U.S.C.A. § 1512(c) (West Supp. 2003); Chase, *supra* note 45, at 741 ("[W]hat was seen as a technical distinction (punishing the persuader only) burdening prosecutors has now been lifted with the inclusion of language to prosecute the document destroyer himself.").

85 *See* discussion *infra* Part II.C.1.

86 *See* discussion *infra* Part II.C.1.

dant, the government's attempt to prove an intent to prevent a document's availability for "an official proceeding" becomes complicated.

When courts consider the scope of the new anti-shredding provision, they may examine the jurisprudence surrounding these other federal obstruction statutes and ask whether the limitations of those statutes should also apply to § 1519. The central question of "anticipatory" obstruction is whether the government is able to prohibit destruction of documents undertaken by an actor who, at the time of the act, had only general knowledge about the proceeding he sought to obstruct. Requiring that a defendant know about a proceeding before he obstructs serves two basic purposes. First, the requirement gives the actor fair notice that he is crossing the line from permissible to impermissible conduct. Second, it ensures that the defendant actually forms the required intent to obstruct justice. In the area of anticipatory obstruction, these rationales conflict. The anticipatory document shredder acts intentionally to obstruct justice, but does so before there is a clear demarcation to which courts would normally point to show the accused received notice that his activities were prohibited—the government subpoena, an internal memo, the start of an investigation, or an indictment.

This leaves the courts with three possible answers to the central question of how § 1519 can be used to prohibit anticipatory obstruction. First, courts could find that § 1519 applies only where the obstructive act and the proceeding are linked by a "nexus" that is currently required only of obstruction-of-justice charges brought under § 1503. The nexus requirement is driven by the concern that defendants have enough knowledge of the obstructed proceeding that they have "fair notice" their actions are proscribed.[87] Second, courts could follow a line of cases under § 1512(b) which require the government to show the defendant's knowledge about a *particular* proceeding in order to establish their intent to obstruct justice.[88] This combines both rationales—ensuring both "fair notice" and culpable intent in one requirement. Finally, courts could find that a defendant can be held accountable as long as he intends to obstruct justice, which can be accomplished even when he acts with vague or incomplete knowledge about the proceeding.[89] The next two sections explore the limitations of the first two paths.

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87 *See* discussion *infra* Part II.B.1.

88 *See* discussion *infra* Part II.C.I

89 The best example of this encompassing interpretation of the obstruction statutes comes from Justice Scalia's dissent in *Aguilar* in which he argues that an actor can act with an intent to obstruct justice even when he acts under a mistaken belief about the obstructed proceeding. *See infra* note 105 and accompanying text.

B. The "Nexus" Requirement

1. *The* Aguilar *Decision*

In *U.S. v. Aguilar*,[90] the Supreme Court established parameters for the "catch-all" language in § 1503. In *Aguilar*, the Court upheld the reversal of a conviction of a judge who lied to FBI agents during an investigation into his conduct.[91] The Court did not directly confront the question of the required knowledge of the obstructed proceedings because there was evidence that the defendant in *Aguilar* knew of the grand jury proceedings against him when he lied to the FBI agents.[92] The Court's reasoning, however, sheds light on the question of how pre-emptive obstruction can and cannot be criminalized.

The *Aguilar* Court held that the defendant's obstructive act of lying to investigators was not sufficiently connected to the grand jury proceedings to uphold his conviction.[93] *Aguilar* required that in order to find a violation of § 1503, the courts must find a "nexus" between the obstructive act and the proceedings that the defendants sought to impede.[94] The Court described the "nexus" element under § 1503 as requiring that "the act must have a relationship in time, causation, or logic with the judicial proceedings" and that "the endeavor must have the 'natural and probable effect' of interfering with the due administration of justice."[95]

The *Aguilar* Court did not base the nexus requirement on constitutional grounds, expressly disavowing such "broader grounds" for its ruling as "unnecessary."[96] However, the Court alluded to the problem of fair notice for defendants that lack knowledge of the obstructed proceedings:

> We have traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress and out of concern that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.[97]

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90 515 U.S. 593 (1995).

91 *Id.* at 606.

92 *See id.* at 614 (Scalia, J., dissenting).

93 *Id.* at 600–01 (ruling that the government's evidence "would not enable a rational trier of fact to conclude that respondent knew that his false statement would be provided to the grand jury").

94 *Id.* at 599–601.

95 *Id.* at 599 (citations omitted).

96 *Id.* at 600. The Court also declined to address respondent's contention that the term "corruptly" in the statute was "vague and overbroad" as applied to this case. *Id.* at n.1.

97 *Id.* at 600 (internal quotation omitted). The Court subsequently cited *Aguilar* in a case about fair notice for the proposition that "[t]he fair warning requirement . . . reflects the deference due to the legislature, which possesses the power to define crimes and their punishment." United States v. Lanier, 520 U.S. 259, 265 n.5 (1997).

The Court approvingly quoted a 19th century Supreme Court interpretation of the federal obstruction statutes for the proposition that "a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court."[98] The Court required this nexus not only to ensure fair notice to the defendant, but also because some knowledge of the proceeding's existence was a necessary component of the "intent to obstruct."[99] The Court declared that "if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct."[100] Thus, the *Aguilar* Court's "nexus" element not only required a "natural and probable" link between the obstructive act and the proceedings, but also that the defendant had knowledge of the link during the time of the act.[101]

Three members of the Court joined in a dissent penned by Justice Scalia in which he described the majority's acceptance of the "nexus" requirement as "importing extratextual requirements in order to limit the reach of a federal criminal statute."[102] Justice Scalia argued for imposing liability as early as obstructive intent could be shown, which, he argued, a rational jury in *Aguilar* could have found.[103] While his dissent noted that Judge Aguilar likely knew about the ongoing proceeding against him,[104] Justice Scalia indicated that he would punish a defendant for obstructing justice even if that defendant acted under a mistaken belief about being the target of a proceeding:

> The critical point of knowledge at issue, in my view, is not whether "respondent knew that his false statement *would be provided* to the grand jury," (a heightened burden imposed by the Court's . . . [nexus] requirement), but rather whether respondent knew—or in-

98 *Aguilar*, 515 U.S. at 599 (quoting Pettibone v. United States, 148 U.S. 197, 206 (1893)).

99 *Id.*

100 *Id.*

101 The *Aguilar* Court's application of the nexus requirement revealed that the determinative component of the "nexus" test is the defendant's *knowledge* of how the obstruction connects to the proceeding. The Court ruled that no rational trier of fact could have found the requisite nexus since Judge Aguilar only knew that he was lying to an agent; to assume the judge knew the statement would be repeated to the grand jury would be too speculative. *Id.* at 601. The dissenters pointed out how this requirement centers on the defendant's knowledge at the time of the act. According to the dissent, "The Court apparently adds to its 'natural and probable effect' requirement the requirement that the defendant *know* of that natural and probable effect." *Id.* at 613 (Scalia, J., dissenting); *see also* United States v. Schwarz, 283 F.3d 76, 108 (2d Cir. 2002) (describing the "nexus" requirement as part of the intent element).

102 *Aguilar*, 515 U.S. at 612 (Scalia, J., dissenting) (emphasis omitted).

103 *Id.* at 613–14 (Scalia, J., dissenting).

104 *Id.* at 614 (Scalia, J., dissenting).

> deed, even erroneously *believed*—that his false statement *might* be provided to the grand jury (which is all the knowledge needed to support the conclusion that the purpose of his lie was to mislead the jury).[105]

In responding to this idea, the *Aguilar* majority posed a hypothetical case involving an act of obstruction that—in their view—fell short of the bar they were setting for culpable conduct:

> Under the dissent's theory, a man could be found guilty under § 1503 if he knew of a pending investigation and lied to his wife about his whereabouts at the time of the crime, thinking that an FBI agent might decide to interview her and that she might in turn be influenced in her statement to the agent by her husband's false account of his whereabouts. The intent to obstruct justice is indeed present, but the man's culpability is a good deal less clear from the statute than we usually require in order to impose criminal liability.[106]

According to Justice Scalia's reading of § 1503, the only limitation on convicting defendants for obstructing justice is their "intent to obstruct," and defendants' knowledge of the obstructed proceedings is only relevant to establish that intent.[107] The dissent concluded by specifically rejecting the defendant's constitutional challenge that § 1503 was void for vagueness as applied to his acts.[108]

When lower courts look to *Aguilar* for guidance on how to interpret the scope of § 1519, they will likely reach at least three conclusions about the Supreme Court's interpretation. First, the Court seems more likely to evaluate the applicability of federal obstruction statutes on the basis of their construction rather than constitutional notice requirements.[109] Second, three members of the Court have found that an obstruction statute limited only by the requirement of a defendant's intent to obstruct would survive constitutional challenge.[110] Third, six members of the Court have alluded to concerns about whether a defendant has adequate notice when a broad statute prohibits acts of obstruction that seem tenuously tethered to the obstructed proceeding.[111]

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105 *Id.* at 613 (citations omitted).

106 *Id.* at 602.

107 *Id.* at 613 (Scalia, J., dissenting) ("I think an act committed *with intent to obstruct* is all that matters; and what one can fairly be thought to have intended depends in part upon what one can fairly be thought to have known.").

108 *See id.* at 616–17 (Scalia, J., dissenting); *see also* discussion *infra* Part V.B.

109 *Id.* at 605–06.

110 *Id.* at 609–17.

111 *Id.* at 598–600.

2. *The Lack of "Nexus" Requirement in § 1512*

Since the *Aguilar* ruling, the courts that have directly addressed the nexus question refuse to require the government to show a nexus in convictions secured under § 1512, effectively limiting the *Aguilar* ruling's application to the broadly worded § 1503.[112] Courts that refuse to apply the nexus requirement have distinguished the witness-tampering provision from the "catch-all" provision.

The Second Circuit Court of Appeals in *U.S. v. Gabriel*,[113] on facts notably similar to *Aguilar*,[114] found that the government did not need to show a nexus between the obstruction and the proceeding in order to support a conviction under § 1512.[115] The *Gabriel* court reasoned that the specificity of § 1512 allowed for the "fair notice to the world" that § 1503 failed to capture.[116] It also found that applying the *Aguilar* "nexus" requirement to the panoply of obstruction statutes would "work a major and unwarranted overhaul of the statutory scheme."[117] The *Gabriel* court finally argued that importing into § 1512 the *Aguilar* requirement that the obstructive act be "likely to affect" the proceeding would import a "pending proceeding" requirement contrary to the express provisions of the statute.[118]

The Eleventh Circuit in *U.S. v. Veal*[119] also refused to apply the *Aguilar* nexus requirement to a conviction reached under § 1512(b)(3)—an obstruction statute which prohibits a defendant from preventing communication of information to a law enforcement officer regarding the commission of a federal offense.[120] The court rejected the defendants' argument that the charge lacked the requisite "nexus" because the defendants never intended to obstruct a *federal* investigation, since their interaction was with *state* authorities.[121] The *Veal* court distinguished § 1503 from § 1512 by the nature of the federal interest at stake; § 1503 seeks to protect the federal proceeding itself, while § 1512 specifically protects the transmission of infor-

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112 *See* Polkes, *supra* note 79, at 10.

113 125 F.3d 89 (2d Cir. 1997).

114 *Id.* at 103 ("[T]he facts in this case and in *Aguilar* are similar—each defendant was convicted for telling a lie to a potential witness with the intent that the witness would believe the lie and repeat it to a grand jury . . . .").

115 *Id.* at 104.

116 *Id.*

117 *Id.* at 105.

118 *Id.* at 104; *see* 18 U.S.C. § 1512(e)(1) (2000), *amended by* 18 U.S.C.A. § 1512(f)(1) (West Supp. 2003).

119 153 F.3d 1233 (11th Cir. 1998).

120 *Id.* at 1250; *see* 18 U.S.C. 1512(b)(3) (2000).

121 *Id.* at 1247–52 (summarizing this argument by the defendant).

mation to federal authorities.[122] Because the federal interest in § 1512 stems from the character of the obstructive act itself (lying to a federal investigator), the *Veal* court found that the government needs only to show a nexus between the defendant's obstructive act and the interest at stake (the possibility that the defendant's misleading information is communicated to a federal agent).[123]

3. *The "Nexus" Requirement Applied to § 1519*

What does this mean for the judicial reception of § 1519? If courts generally follow the *Gabriel* and *Veal* decisions, they could draw on the same logic and not require the government to prove a nexus between document destruction and the obstructed proceeding under § 1519. The Sarbanes-Oxley anti-shredding provision, § 1519, differs from the § 1503 obstruction provision in many of the same ways that the witness-tampering provision does. Like § 1512(b), § 1519 is statutorily designed to avoid a pending proceeding requirement.[124] Like § 1512(b), § 1519 criminalizes a specific subset of the activity covered by the broad, "catch-all" language of § 1503.[125] Also, as the *Veal* court intimated, the various requirements of the different obstruction statutes indicate that Congress did not intend any single requirement to apply to all federal obstruction statutes.[126]

However, if courts understand *Aguilar* as requiring a certain minimal connection for *all* cases of obstruction of justice, its application would change. For example, under § 1519, an obstructive act would need to have the "natural and probable" effect of obstructing justice,

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122 *Id.* at 1250–51. By examining the federal interest at stake, the *Veal* court regarded the *Aguilar* nexus requirement as a jurisdictional component of the obstruction statutes rather than a requirement derived from concerns about notice or intent.

123 *Id.* at 1251. In contrast to the *Veal* and *Gabriel* courts, two Courts of Appeals, while not explicitly exploring the issue, have used the language of *Aguilar* to evaluate convictions under § 1512, effectively applying the nexus requirement to this statutory provision. In reviewing a § 1512(b) conviction, the Third Circuit alluded to *Aguilar* without explicitly citing the case by noting that "[t]o be criminally liable [for obstruction under § 1512], the defendant must know that his conduct has the natural and probable effect of interfering with the witness's communication." United States v. Davis, 183 F.3d 231, 248 (3d Cir. 1999), *amended by* 197 F.3d 662 (3d Cir. 1999). The Ninth Circuit used similar *Aguilar*-esque language when it required that "the government must demonstrate a logical connection between the acts of concealment and the official proceeding" for an obstruction charge under § 1512. United States v. MacFarlane, No. 96-30296, 1998 U.S. App. LEXIS 2999, at *3 (9th Cir. Jan. 7, 1998). This broader interpretation of *Aguilar* holds that there is a minimum level of connection required between the obstructive act and the obstructed proceeding in *all* federal obstruction statutes. However, it may be presumptuous to assume that these courts are adopting such holdings without more explicit discussion of the issue.

124 *See* discussion *infra* Part IV.B.

125 Just as § 1512 targets witness tampering, § 1519 applies only to destruction and alteration of documents. *See* 18 U.S.C.A. § 1519 (West Supp. 2003).

126 *See Veal*, 153 F.3d at 1249–50 (describing the different bases for the federal jurisdiction of each of the obstruction statutes).

and the government would also have to establish the defendant's knowledge of that connection.[127] The anticipatory act of obstruction this Note describes is undertaken when the "natural and probable effect" of interfering with justice is low. If it is too speculative to infer a defendant's knowledge that lying to an FBI agent would obstruct a judicial proceeding of which he was aware, then it would clearly be too speculative to convict a defendant who shreds documents in advance of a proceeding he suspects is in the offing.

Since *Aguilar*, lower courts have rarely confronted both the issue of document destruction and the nexus requirement in the context of anticipatory obstruction under § 1503.[128] In *U.S. v. Lundwall*, the Southern District of New York allowed a prosecution where the connection between the documents destroyed and the proceedings was somewhat tenuous.[129] The defendants were charged with obstruction for concealing and destroying not just requested documents, but also documents "likely to be requested by" the opposition.[130] The court upheld the obstruction charge, not only for the documents the defendants knew were being sought, but also for those documents they should have anticipated would be requested.[131] The court analyzed the connection between the obstructive act and the proceeding as a factual matter, and did not require that the actor have knowledge of the connection.[132]

However, there is more uncertainty in the Second Circuit than the *Lundwall* decision indicates. Several cases from the circuit show that the *Aguilar* "nexus" requirement has hampered the use of § 1503 against acts of anticipatory obstruction. In a pre-*Aguilar* case, the Second Circuit Court of Appeals showed some willingness to allow the omnibus provision to be used against anticipatory obstruction by holding that "destroying documents in anticipation of a subpoena can con-

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127 For the argument that the Aguilar "nexus" requirement should apply to § 1512 and § 1519, as well as § 1503, see Polkes, *supra* note 79, at 7. Polkes, however, acknowledges that § 1519 makes the argument for a nexus requirement more difficult because its language was carefully crafted in order to avoid such restraint. *Id.*

128 *See* Strassberg & Braceras, *supra* note 30, at 1 (citing statistics showing that § 1512 became the predominant obstruction statute after 1995, the year in which the Supreme Court imposed the 'nexus' requirement on obstruction of justice under § 1503); *see also* Polkes, *supra* note 79, at 10 ("[T]here are very few reported cases that apply *Aguilar*'s nexus requirement to a charge of obstruction of justice for document destruction under [§ 1505 and § 1503] . . . .").

129 *See* United States v. Lundwall, 1 F. Supp. 2d 249, 254 (S.D.N.Y. 1998).

130 *Id.* ("[T]he law is clear that neither a subpoena nor a court order directing the production of documents must be issued or served as a prerequisite to a § 1503 prosecution, and that the concealment and destruction of documents likely to be sought by subpoena is actionable under the statute.").

131 *Id.*

132 *Id.* ("[T]he requisite nexus exists—there is no uncertainty that the alleged destruction of documents impaired a pending judicial proceeding.").

stitute obstruction" under § 1503.[133] However, in a post-*Aguilar* case, the Second Circuit refused to uphold a conviction for conspiracy to obstruct justice that was formed in anticipation of a judicial proceeding. In *U.S. v. Schwarz*,[134] the government argued that three police officers conspired to obstruct justice by lying to investigators, because "experienced police officers—could have anticipated that a case such as this would result in a federal grand jury proceeding."[135] In stating the law regarding conspiracy to obstruct justice, the *Schwarz* court required that the government show "knowledge, or at least anticipation, of a pending judicial proceeding" as one of the elements of the offense.[136] However, the court expressly avoided the issue of whether the government's theory of anticipation established the defendants' knowledge of the proceeding sufficiently to sustain the charge.[137] The court found that an inquiry into the defendants' knowledge was unnecessary because the government failed to prove the defendants' specific intent to obstruct the federal grand jury.[138] The *Schwarz* court

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133 United States v. Ruggiero, 934 F.2d 440, 450 (2d Cir. 1991).

134 283 F.3d 76 (2d Cir. 2002).

135 *Id.* at 107. It is important to note that the charge in Schwarz was conspiracy to obstruct justice. *Id.* at 105–06. While courts use various standards to assess the required state of mind for this offense, courts generally seem more willing to punish those acting in "anticipation" of the proceeding when the charge is conspiracy to obstruct justice. *Id.*; *see* United States v. Davis, 183 F.3d 231, 243 n.3 (3d Cir. 1999), *amended by* 197 F.3d 662 (3d Cir. 1999) (holding that conspiracy to obstruct justice charges requires "some proof that the conspirators knew of or anticipated a grand jury investigation"); United States v. Vaghela, 169 F.3d 729, 734–35 (11th Cir. 1999) (finding that charges for conspiracy to obstruct a proceeding do not require a pending proceeding at the formation of the conspiracy, but do require the defendants to have knowledge of the proceeding at the outset that is "more than merely 'speculative'" (quoting United States v. Aguilar, 515 U.S. 593, 601 (1995))). *But see* United States v. Cihak, 137 F.3d 252, 263 (5th Cir. 1998) (retaining a form of a pending proceeding requirement for conspiracy to obstruct justice by requiring that a proceeding be pending "at the time the defendants acted"). The precise culpable mindset required at the formation of a conspiracy to obstruct justice has only received recent attention in the courts. *See* GORELICK ET AL., *supra* note 45, at 195–96 (discussing a 1942 case preceding *U.S. v. Davis* in the Third Circuit which "affirmed convictions for a conspiracy to obstruct . . . even though the conspirators were not found guilty of the substantive crime of obstruction," and noting that these situations are "exceedingly rare"). *Schwarz* adds to these cases by finding that a "judicial proceeding need not be pending at the time the conspiracy began so long as the appellants had reason to believe one would begin and one in fact did." *Schwarz*, 283 F.3d at 107. However, *Schwarz* is cited here not to explore the confluence of conspiracy and obstruction law, but rather to show the effect of the *Aguilar* case on a court's willingness to allow prosecution of obstruction taken in anticipation of a proceeding. *Schwarz* shows the Second Circuit—a court once willing to accept charges of obstructing an anticipated proceeding as sufficient for an *underlying substantive obstruction charge* of § 1503—citing *Aguilar* to foreclose criminalization of anticipatory obstruction even when the charge is *conspiracy to obstruct justice*. *Compare Schwarz*, 283 F.3d at 107 (rejecting anticipatory conspiracy to obstruct charge) *with Ruggiero*, 934 F.2d at 450 (upholding anticipatory obstruction charge).

136 *Schwarz*, 283 F.3d at 105–06.

137 *Id.* at 107.

138 *Id.* The court did find that the one officer who received a subpoena had knowledge of the proceeding, but went on to state that "we need not finally decide whether [the two

found that "[a]t best, the government proved that [the subpoenaed defendant] . . . , knowing of the existence of a federal grand jury investigation, lied to federal investigators regarding issues pertinent to the grand jury's investigation."[139] Given this "best case" scenario of the government's proof, the court found a missing connection and reversed the conviction, citing *Aguilar* for the proposition that if the defendant "lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct."[140] Thus, the *Schwarz* case exemplifies how the "nexus" requirement augments the required mental state that the government must establish in order to convict a defendant for obstructing justice. With the "nexus" requirement, the government must show not only that a defendant had knowledge about the proceeding when he acted, but also that the defendant knew that his actions would have the natural and probable effect of interfering with that proceeding.[141]

C. Knowledge of a Particular Proceeding

Unlike its more broadly worded cousin, § 1503, the courts have given an expansive reach to § 1512(b) in punishing obstructive acts that occur in the early stages of investigations and enforcement.[142] Congress mandates that no "pending proceeding" requirement restrain the use of the statute,[143] and courts refuse to apply the "nexus" requirement to witness-tampering charges.[144] For these reasons, § 1512 is a powerful tool for prosecutors seeking to impose criminal liability early in the criminal storyline. However, some courts still describe § 1512(b) as reaching only those defendants who have knowledge of *particular* investigations and proceedings initiated against

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non-subpoenaed defendants'] . . . knowledge was establisbed because . . . we conclude that there was insufficient evidence to support a jury finding that the appellants intended to . . . violate § 1503." *Id.*

139 *Id.* at 109.

140 *Id.*

141 *See also* United States v. Fassnacht, 332 F.3d 440, 448–51 (7th Cir. 2003) (allowing for the jury to infer that the defendants, knowing that a grand jury was investigating their taxes, thought their actions would have the required "probable effect" of obstructing justice); United States v. Triumph Capital Group, Inc, 260 F. Supp. 2d 470, 475 (D. Conn. 2003) (upbolding sufficiency of an indictment for pre-subpoena document destruction, but noting that the government is required to prove at trial that the defendant thought his obstructive actions were "likely to affect the grand jury").

142 *See* Coffee, *supra* note 69, at A19 (noting that § 1512 "extended the net of criminal liability" to pre-proceeding obstructive acts prohibited by § 1503); Chase, *supra* note 45, at 740–41; *see also* United States v. Frankhauser, 80 F.3d 641, 650–53 (1st Cir. 1996) (upholding a § 1512(b) conviction while reversing a § 1503 conviction on the same conduct where there was an ambiguous connection between the proceeding and the act).

143 *See* 18 U.S.C. § 1512(e)(1) (2000), *amended by* 18 U.S.C.A. § 1512(f)(1) (West Supp. 2003).

144 *See* discussion *supra* Part II.B.2.

them.[145] In addition, the instruction to juries that they must find an intent to obstruct a proceeding at the time of the act—even though there does not need to be an actual proceeding at that point—seems contradictory, leading to jury confusion in some high-profile cases.[146] For these reasons, the document-destruction provision of § 1512 is more limited than the new anti-shredding provision.

1. *Specific Knowledge or General Knowledge of the Proceeding?*

Courts are divided on the question of how specific the defendant's knowledge about the obstructed proceeding must be in order to establish the defendant's intent to obstruct. In *U.S. v. Shively*,[147] the Fifth Circuit announced the most restrictive standard for the knowledge a defendant must have before obstruction may be charged. While acknowledging that the witness-tampering statute specifically does not require that a proceeding be pending at the time of the act, the court noted that the statute still requires an "intent to obstruct"—an element the court felt must be given meaning:

> A defendant can act without knowledge of an official proceeding or its federal nature and, as a result, influence the witness's testimony at that proceeding. The coincidence of this act and result will not suffice, however, for criminal liability to attach under . . . [§ 1512]. Without at least a circumstantial showing of intent to affect testimony at some particular federal proceeding that is ongoing or is scheduled to be commenced in the future, this statute does not proscribe his conduct.[148]

The *Shively* court reversed the defendants' convictions under § 1512 because of the insufficient evidence that they knew of the federal investigators' involvement at the time of the obstructive act.[149]

Similarly, the First Circuit in *U.S. v. Frankhauser*[150] required some knowledge of the obstructed proceeding under § 1512(b), while noting that the burden was lighter than that imposed by § 1503.[151] The *Frankhauser* court reversed a defendant's conviction under § 1503 because he did not have adequate notice that he was obstructing a grand jury proceeding.[152] The court, however, affirmed the defendant's conviction under § 1512 even though the same factual ambiguity exis-

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145 *See* United States v. Shively, 927 F.2d 804, 812–13 (5th Cir. 1991); *see also* Coffee, *supra* note 69, at A19 ("The only important issue on which courts have divided [in application of § 1512(b)] involves whether the defendant must know that an official proceeding is imminent or has been scheduled.").

146 *See infra* Part III.

147 927 F.2d 804 (5th Cir. 1991).

148 *Id.* at 812–13.

149 *See id.*

150 80 F.3d 641 (1st Cir. 1996).

151 *Id.* at 651–52.

152 *Id.* at 651.

ted regarding the defendant's knowledge about the obstructed proceeding.[153] The court differentiated between "actual knowledge" of a proceeding and knowledge in relation to the intent to obstruct:

> Because an official proceeding need not be pending or about to be instituted at the time of the corrupt persuasion, . . . [§ 1512] obviously cannot require actual knowledge of a pending proceeding. On the other hand, the defendant must act knowingly and with the intent to impair an object's availability for use in a particular official proceeding.[154]

The *Frankhauser* court rejected the approach taken in *Shively* "insofar as . . . a defendant in every case must actually know that an official proceeding has been commenced or scheduled."[155] The *Frankhauser* court also rejected another court's holding "insofar as . . . [it allows for] conviction in any case where there is some circumstantial evidence that the defendant may have foreseen an official proceeding at some time in the future."[156] In what appeared to be an attempt to reach a compromise between these two cases, the *Frankhauser* court evaluated whether the defendant intended to interfere with "an identifiable official proceeding."[157]

Other courts describe the state of mind required under § 1512 as somewhat less specific than the intent to obstruct a "particular" inquiry.[158] In *U.S. v. Kelley*,[159] the D.C. Circuit Court of Appeals described the defendant's awareness of the obstructed proceeding in more subjective terms than the Fifth and First Circuits had:

> [Section] 1512 does not require explicit proof of knowledge on the part of . . . [the defendant] that such proceedings were pending or were about to be instituted. The statute only requires that the jury be able reasonably to infer from the circumstances that . . . [the defendant], fearing that a grand jury proceeding had been or might be instituted, corruptly persuaded persons with the intent to influence their possible testimony in such a proceeding.[160]

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153 *Id.* at 652.

154 *Id.* at 651.

155 *Id.* at 652.

156 *Id.* The second case referred to by the *Frankhauser* court was *U.S. v. Conneaut Industries, Inc.* *See* discussion *infra* note 161 and accompanying text.

157 *Frankhauser*, 80 F.3d at 652.

158 *See* Coffee, *supra* note 69, at A19 (noting that courts have relied on the "no pending proceeding" requirement to reject the requirement of knowledge of a proceeding).

159 36 F.3d 1118 (D.C. Cir. 1994).

160 *Id.* at 1128 (citations omitted); *see also* United States v. Davis, 183 F.3d 231, 248 (3d Cir. 1999), *amended by* 197 F.3d 662 (3d Cir. 1999) (finding that since § 1512 has no pending proceeding requirement, "[a] reasonable belief that the named witness will communicate information to a law enforcement officer is enough to create liability under the statute").

Similarly, a court in the District of Rhode Island inferred from the circumstances that a defendant who ordered document destruction intended to obstruct a federal proceeding where "she realized that a federal proceeding could be commenced in the future."[161] According to such cases, obstructive acts caused only by the defendant's "fear" or "realization" of a future proceeding could be prosecuted. These cases are the closest that federal courts have come to recognizing the offense of anticipatory obstruction.

A high-profile case recently forced the Fifth Circuit to revisit this issue, though the court did little to answer the questions it raised. In Arthur Andersen's criminal trial for obstruction, the company cited *Shively* and urged the court to instruct the jury to find a "specific purpose of making that [document] . . . unavailable for use in a particular official proceeding that is ongoing or has been scheduled to be commenced in the future."[162] Instead, the judge simply charged the jury to find an intent to impede "an official proceeding"—an instruction Arthur Andersen contested on appeal.[163]

In upholding the guilty verdict, the Fifth Circuit first noted that "§ 1512(b)(2) . . . does not offer guidance as to the concreteness of the defendant's expectation of a proceeding."[164] The *Andersen* court rejected the language in *Shively* requiring the obstructed proceeding to be "ongoing or scheduled."[165] The court found the language to be "dicta" that could not be reconciled with the "plain language of the statute."[166]

The court gave more attention to the argument that the government should be required to show that Arthur Andersen had a "particular" proceeding in mind to be convicted for obstruction, finding this contention to be "not without force."[167] The court pointed out that "without insisting that a defendant's intent to impede a proceding have some limiting sights, companies could be convicted for maintain-

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161 United States v. Conneaut Industries, Inc., 852 F. Supp. 116, 125 (D.R.I. 1994).

162 Andersen's Proposed Jury Instructions at 4, United States v. Arthur Andersen, LLP, 2002 WL 32153900 (S.D. Tex. Apr. 26, 2002) (No. 02-0121).

163 Court's Instructions to the Jury, United Stated v. Arthur Andersen, LLP (No 02-0121), *reprinted in* JULIE R. O'SULLIVAN, FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS 446 (2d ed. 2003); Reply Brief of Appellant Arthur Andersen, LLP at 16–17, United States v. Arthur Andersen, LLP, 2003 WL 22160032 (5th Cir. June 30, 2003) (No. 02-21200); Brief for United States at 50–54, United States v. Arthur Andersen, LLP, 2003 WL 22340391 (5th Cir. June 2, 2003) (No. 02-21200).

164 United States v. Arthur Andersen, No. 02-21200, 2004 U.S. App. LEXIS 11814, at *42–43 (5th Cir. June 16, 2004).

165 *Id.* at *44.

166 *Id.* The court supported its conclusion that this language was dicta by noting that *Shively* had found the government had failed to show intent. *Id.* The language from the case, however, clearly linked the idea of the defendant's knowledge to the idea of his intent. *See supra* note 148.

167 Arthur Anderson v. United States, 2004 U.S. App. LEXIS 11814, at *45.

ing records retention programs which were adopted with no proceeding in mind."[168] The court hinted that those limits may lie in "a sound application of the elements of corrupt purpose and intent."[169] The court, however, concluded that "[w]herever the permissible reach of [§ 1512(b)(2)] may be finally drawn, it is beyond the reach of this case" since Arthur Andersen had been tried under a theory of obstructing "a proceeding of the SEC" and not "some other shadowy opponent."[170]

In *Andersen*, the Fifth Circuit left open the question of whether § 1512(b)(2) could be used in a case of anticipatory obstruction. On the one hand, the *Andersen* court rejected some of the language in *Shively* that would restrict the use of § 1512(b)(2) to proceedings that were "ongoing or scheduled." On the other hand, by finding that the audit company's knowledge of a specific SEC proceeding was concrete enough to uphold the convention, the *Andersen* court implicitly retained *Shively*'s "particular proceeding" requirement. It also expressly refused to demarcate how courts can discern the future defendants who are acting with concrete enough knowledge when they destroy documents from those acting with only a "shadowy opponent" in mind. At a minimum, *Andersen* teaches that the specificity or "concreteness" required of a defendant's knowledge under § 1512(b)(2) remains unsettled.

2. *Witness-Tampering Statute's Limitations Applied to § 1519*

Courts looking to cases involving acts of anticipatory obstruction under the witness-tampering statute will find two strains of legal reasoning that could limit the applicability of § 1519. First, they will see the requirement that the defendants must have specific knowledge about the document-seeking proceeding before the documents' destruction becomes criminal. This idea runs counter to the idea that anticipatory obstruction is criminally culpable. Not only would courts allow the "half-knowledge" defense advanced by Frank Quattrone in his first obstruction trial to reach a jury,[171] but without some evidence of the specificity of the defendant's knowledge, a conviction could not stand on appeal. Such a requirement protects the actor who disposes of evidence before it is established that he knows of the proceeding seeking it, and contradicts the expressed congressional intent in drafting the measure.[172]

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168 *Id.* at *46.

169 *Id.*

170 *Id.*

171 Quattrone claimed to know about the government inquiry, but did not believe that the scope of the inquiry covered documents in his possession. *See* Part III.C.

172 *See* discussion *infra* Part IV.B.

Second, these cases also show how the pending proceeding requirement is only partially removed from § 1512(b).[173] The *Frankhauser* and *Shively* cases show the courts' conundrum in interpreting legislative efforts to rid obstruction statues of the "pending proceeding" requirement. While the courts admit, on the one hand, that no pending proceeding is required in order to convict under § 1512, the courts still question whether the defendant intended to interfere with "some particular federal proceeding that is ongoing or is scheduled to be commenced in the future"[174] or an "identifiable official proceeding."[175] In other words, the effect of § 1512(e) is that even though the government no longer needs to show a pending proceeding at the time of the act, it must still prove the actor's intent to obstruct a specific and identifiable proceeding—which is almost impossible if no proceeding has yet begun.[176] This retention of a "pending proceeding" requirement may be precisely what Senator Patrick Leahy referred to when he stated that § 1519 is "specifically meant not to include any technical requirement . . . to tie the obstructive conduct to a pending or imminent proceeding or matter *by intent or otherwise.*"[177]

While the *Frankhauser* and *Shively* decisions dealt with the standards for reviewing convictions on appeal, the pending proceeding and intent paradox will more likely directly impact the courtroom through jury instructions. The courts' interpretation of the witness-tampering statute compels judges to give jury instructions that may appear contradictory to the average juror: "You must find that the defendant acted with the intent to obstruct an official proceeding, and there need be no proceeding pending when the defendant acted."[178]

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173 *See* Coffee, *supra* note 69, at A19 (noting that the relaxed language of § 1512 "still retains a form of the 'official proceeding' requirement" because it will only allow punishment for obstructing a proceeding commenced later "if there was an intent to render documents unavailable for use in any such proceeding").

174 United States v. Shively, 927 F.2d 804, 812–13 (5th Cir. 1991).

175 United States v. Frankhauser, 80 F.3d 641, 652 (1st Cir. 1996).

176 There is, perhaps, room within the logic of this paradox for the prosecution of an anticipatory obstruction. The employee in this Note's introduction destroyed documents intending to interfere with a government investigation (an identifiable proceeding) even though her company had not yet involved the government authorities (no existing proceeding yet). An appeals court deciding our hypothetical would then cleanly resolve the question of whether this kind of conviction could legally stand. Tbis Note's examination of § 1512(b) does not hope to establish that prosecuting anticipatory obstruction of justice under the statute is a logical impossibility. Rather, this is only meant to point out that the witness-tampering statute retains some legal obstacles (the specific knowledge requirement) and some practical obstacles (juror confusion, discussed in Part III) to the prosecution of anticipatory obstruction.

177 148 CONG. REC. S7,419 (daily ed. July 26, 2002) (statement of Sen. Leahy) (emphasis added); *see also infra* note 266 and accompanying text; discussion Part IV.B.

178 *See, e.g.*, Court's Instructions to the Jury, United States v. Arthur Andersen, LLP (S.D. Tex.) (No. 02-121), *reprinted in* O'SULLIVAN, *supra* note 163, at 447–48.

These paradoxical instructions may contribute to some jury confusion, which is explored further in Part III.

III
JURY CONFUSION

A. *U.S. v. Arthur Andersen*: The Government's Theory

The criticism that § 1519 is merely a redundant statute is bolstered by the result in the case for which it was designed: the conviction of Arthur Andersen for obstructing justice. In *U.S. v. Arthur Andersen*, prosecutors presented a story of a massive, company-wide shredding operation on the eve of an SEC subpoena.[179] The conviction of the company was obtained under § 1512(b).[180] If federal prosecutors could effectively convict Arthur Andersen under the witness-tampering statute, why is a new anti-shredding statute necessary?[181] If Arthur Andersen was punished for wrongdoing, is the new anti-shredding provision part of the sound and fury of Sarbanes-Oxley, signifying nothing?[182] While at first glance the Arthur Andersen conviction would seem to support this argument, a closer examination of the guilty verdict in the case shows a vast disparity between the prosecution's legal rationale and the jury's rationale for convicting the company.[183] This disparity indicates that the government's success in obtaining a guilty verdict in the Andersen case may mask the weaknesses of the obstruction statute used to reach that result.

The indictment of Arthur Andersen laid out the government's case against the audit company for violating § 1512(b)(2).[184] The indictment consisted of four sections in which the government asserted the facts of the case.[185] The first described the players in the offense: Arthur Andersen and Enron.[186] The second listed a number of events leading up to the SEC investigation of Enron and Andersen which point to Andersen's motive for the document destruction.[187] The

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179 Indictment ¶¶ 8-12, United States v. Arthur Andersen, LLP, 2002 WL 32153945 (S.D. Tex. Mar. 14, 2002) (No. 02-121).

180 *Id.* ¶ 13.

181 *See* Lowell & Arnold, *supra* note 16, at 225–26 (describing the Justice Department's successful Arthur Andersen conviction under existing statute § 1512(b) as ironic and questioning whether the Sarbanes-Oxley Act's anti-shredding provision was really necessary).

182 *See* Falvey & Wolfman, *supra* note 14, at 2.

183 *See* Stephen Gillers, *The Flaw in the Andersen Verdict*, N.Y. TIMES, June 18, 2002, at A23; discussion *infra* Part III.A–B.

184 Indictment ¶ 13, *Arthur Andersen*, 2002 WL 32153945 (S.D. Tex. Mar. 14, 2002) (No. 02-121).

185 *Id.* ¶¶ 1–13.

186 *Id.* ¶¶ 1–4.

187 *Id.* ¶¶ 5–8.

third section described the actus reus of the offense.[188] The fourth described the law under which the charge was brought.[189]

In the third section of the indictment, the government charged the company with engaging in a company-wide shredding effort in anticipation of an SEC subpoena:

> ANDERSEN personnel were called to urgent and mandatory meetings. Instead of being advised to preserve documentation so as to assist Enron and the SEC, ANDERSEN employees on the Enron engagement team were instructed . . . to destroy immediately documentation relating to Enron, and told to work overtime if necessary to accomplish the destruction. During the next few weeks, an unparalleled initiative was undertaken to shred physical documentation and delete computer files. Tons of paper relating to the Enron audit were promptly shredded as part of the orchestrated document destruction. The shredder at the ANDERSEN office at the Enron building was used virtually constantly and, to handle the overload, dozens of large trunks filled with Enron documents were sent to ANDERSEN's main Houston office to be shredded. A systematic effort was also undertaken and carried out to purge the computer hard-drives and E-mail System of Enron-related files.[190]

The indictment also listed other offices participating in the shredding and alluded to the e-mail telling employees that "there could be no more shredding," which was sent after the SEC served the firm with a subpoena.[191] In its description of the factual context leading up to the document destruction, the government also mentioned a press release issued by Enron in October 2001 that spurred the SEC's investigation of the company.[192] The indictment, however, did not describe the details of how Enron drafted the press release[193]—actions the jurors thought to be crucial.[194]

The government's trial strategy also conveyed its theory that the firm had committed obstruction through the company-wide shredding.[195] The government negotiated a plea bargain with former Arthur Andersen partner David Duncan in exchange for his testimony regarding his intention in ordering employees to destroy docu-

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188 *Id.* ¶¶ 9–12.

189 *Id.* ¶ 13.

190 *Id.* ¶ 10. Numerous spelling errors, likely caused by electronic reproduction of the document, have been corrected. *Compare* Indictment ¶ 6, United States v. Arthur Andersen, LLP, 2002 WL 32153945 (S.D. Mar. 14, Tex. 2002) (No. 02-121) *with* http://news.findlaw.com/hdocs/docs/enron/nsandersen030802ind.html.

191 *See id.* ¶¶ 11–12; Chase, *supra* note 45, at 752.

192 Indictment at ¶ 6, United States v. Arthur Andersen, LLP, 2002 WL 32153945 (S.D. Tex. 2002) (No. 02-121).

193 *Id.* ¶¶ 6, 8.

194 *Infra* Part III.B.

195 *See* Gillers, *supra* note 183, at A23.

ments.[196] The government produced Arthur Andersen's billing records which indicated "the firm billed Enron almost $540,000 for work on the matter under a line item called 'S.E.C. Inquiry'" during the eleven days after the firm learned of the SEC investigation to show the firm's widespread awareness of the investigation.[197] The government also entered into evidence Duncan's e-mails instructing his employees to "stop the shredding," which he sent after the company was formally notified of an investigation.[198] In his closing argument, federal prosecutor Samuel Buell compared the ninety pounds of Enron documents which Arthur Andersen shredded each day *before* learning of the SEC investigation with the 3,500 pounds of documents that the firm shredded daily *after* learning of the SEC investigation and concluded that the firm was "getting ready to deal with the [SEC] and the investors who would sue them."[199] Buell argued that the firm's strategy was "the less the better," and remarked, "[w]ho knows what kind of hideous documents might be buried in those worker bee files."[200]

At the close of the case, Arthur Andersen's lawyers, citing *U.S. v. Shively*,[201] urged the court to instruct the jury that it had to find "specific purpose [by Andersen] of making th[e] object unavailable for use in a particular official proceeding that is ongoing or has been scheduled to be commenced in the future."[202] District Judge Melinda Harmon refused this suggested instruction and opted instead for an instruction eliminating the pending proceeding requirement, but requiring an intent to obstruct an official proceeding:

> In order to establish that Andersen committed the charged offense, it is not necessary for the government to prove that an official proceeding was pending, or even about to be initiated, at the time the obstructive conduct occurred. Nor is it necessary for the government to prove that a subpoena had been served on Andersen or any other party at the time of the offense. The government need only

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196 *See* Tom Fowler, *'Soul Searching' Led to Plea, Duncan Says*, HOUSTON CHRON., May 16, 2002, at 1A (noting that Davis testified that he agreed to the plea only after "soul searching about [his] . . . intent and what was in [his] . . . head at the time" and that he admitted to being motivated by a fear of the SEC investigation).

197 Kurt Eichenwald, *Andersen Auditors Knew about Federal Inquiry, Records at Trial Show*, N.Y. TIMES, May 15, 2002, at C10 (quoting a former prosecutor who stated that the documents "impute knowledge of the S.E.C. inquiry to the entire firm").

198 Arthur Andersen apparently was operating under the misunderstanding that document destruction was legal up until the firm was formally notified of the proceeding. *See* Coffee, *supra* note 69, at A19; Stephan Landsman, *Death of an Accountant: The Jury Convicts Arthur Andersen of Obstruction of Justice*, 78 CHI.-KENT L. REV. 1203, 1238 (2003).

199 *Arthur Andersen Investigation: Criminal Case Goes to Jury*, 62 FACTS ON FILE 437, 440 (2002).

200 Jeff Leeds, *Andersen Jury Hears Forceful Arguments*, L.A. TIMES, June 6, 2002, at C1.

201 927 F.2d 804 (5th Cir. 1991); *see also* discussion *supra* Part II.C.1.

202 Andersen's Proposed Jury Instructions at 4, United States v. Arthur Andersen, LLP, 2002 WL 32153900 (S.D. Tex. Apr. 26, 2002) (No. 02-0121).

> prove that Andersen acted corruptly and with the intent to withhold an object or impair an object's availability for use in an official proceeding, that is, a regulatory proceeding or investigation whether or not that proceeding had begun or whether or not a subpoena had been served.[203]

Although the instruction effectively dispels jurors of the notion that the SEC subpoena issuance was the moment at which the shredding became impermissible, Judge Harmon faced the same conundrum that surfaced in both *Frankhauser* and *Shively*.[204] On the one hand, the instructions assure jurors that it is unnecessary to find a pending proceeding when the obstruction occurred. On the other hand, the charges instruct the jurors that they must find an intent to impede an official proceeding.

B. *U.S. v. Arthur Andersen*: The Jury's Theory

Eight days into deliberations, the jury sought the court's guidance by posing a hypothetical to Judge Harmon: "If each of us believes that one Andersen agent acted knowingly and with corrupt intent, is it for all of us to believe that it was the same agent. . . . Can one believe it was Agent A, another believe it was Agent B, and another believe it was Agent C?"[205] The question struck on a fine point of corporate criminal law, whether a firm could be convicted for obstruction even if jurors disagreed about which specific actor at the firm had criminal intent.[206] Acknowledging the lack of case law on point, Judge Harmon ruled that a conviction could be reached despite jurors' disagreement on "who at Andersen had criminal intent."[207] Although this ruling may spur debate about criminal corporate culpability issues, the question and its answer are significant in evaluating § 1512(b) because they demonstrate the jury's difficulty in finding the precise state of mind required for a conviction.[208]

On June 15, 2002, the jury returned a verdict finding Arthur Andersen guilty of obstruction of justice.[209] However, in post-verdict in-

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203 Court's Instructions to the Jury, United States v. Arthur Andersen, LLP (S.D. Tex.) (No. 02-121), *reprinted in* O'SULLIVAN, *supra* note 163, at 447–48.

204 *See* discussion *supra* notes 160–63 and accompanying text.

205 Kurt Eichenwald, *Andersen Jury Startles Court with Question: Both Sides Researching Law on Issues of Intent*, N.Y. TIMES, June 14, 2002, at C1 (quoting the note from the jury to District Judge Melinda Harmon).

206 *See* Lisa Girion, *Jury Query Reveals a Gray Area of the Law*, L.A. TIMES, June 14, 2002, at C1.

207 Mary Flood & Tom Fowler, *Judge's Answer Backs Andersen Prosecution*, HOUSTON CHRON., June 15, 2002, at 1A (quoting Judge Harmon describing the issue as a question of first impression).

208 *See* Landsman, *supra* note 198, at 1218 (describing the Andersen jury's difficulty in reaching a verdict).

209 *See* Kurt Eichenwald, *Andersen Guilty in Effort to Block Inquiry on Enron: Firm Informs U.S. It Will Give Up Auditing Public Companies*, N.Y. TIMES, June 16, 2002, at A1.

terviews, jurors declared that they had rejected the government's theory of the obstruction. Oscar Criner, the jury foreman, told reporters that "[a]ll this business about telling people to shred documents was largely superficial and largely circumstantial"[210] and that the jury's quest to find a corrupt persuader within Andersen had "almost . . . nothing to do with shredding documents."[211] Instead of focusing on the massive shredding operation, the jury focused on an e-mail in which Nancy Temple, an in-house Andersen lawyer in Chicago, advised David Duncan, lead Enron auditor, about altering the press release.[212] Criner described Temple's e-mail as a "smoking gun," and told reporters he would have voted against a conviction based on the shredding alone.[213] According to juror Wanda McKay, "Nancy Temple was found guilty of altering one document. . . . One person did one thing and tore the whole company down."[214]

The jurors' basis for the guilty verdict was surprising for several reasons. First, the jury relied on a wholly different theory of obstruction than the one the government presented.[215] Nowhere in the indictment does the government allege that Arthur Andersen was guilty of obstruction for altering documents; rather, the indictment focuses on document destruction.[216] Second, § 1515(c), a "safe harbor" provision, arguably covers Ms. Temple's advice as in-house counsel and thus protects it from obstruction charges as a matter of law.[217] Temple's e-mail offered such common legal advice that the chairman of the American Corporate Counsel Association wrote in a letter to his members: "Who amongst us has not thought: 'There but for the grace of God go I.'"[218] This "smoking gun" e-mail seemed so innocuous that practitioners declared the Andersen case "a nightmare for inside

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210 Mary Flood, *Decision by Jurors Hinged on Memo*, HOUSTON CHRON., June 16, 2002, at 1A.

211 *Jury Finds Arthur Andersen Guilty of Obstructing Justice* (NPR radio broadcast, June 15, 2002).

212 *See* Flood, *supra* note 210, at 1A; Gillers, *supra* note 183, at A23.

213 *See* Flood, *supra* note 210, at 27A (quoting Oscar Criner).

214 Jonathan D. Glater & John Schwartz, *Jurors Tell of Emotional Days in a Small Room*, N.Y. TIMES, June 17, 2002, at A14.

215 *See* Gillers, *supra* note 183, at A23 ("[T]he jury was unimpressed with the government's theory and came up with its own."); Landsman, *supra* note 198, at 1218 (describing that the basis on which the jurors agreed to convict as "not . . . the one primarily pressed by the government"); Mary Mullally, *The Killer E-mail*, LEGAL WEEK, June 27, 2002, *available at* http://www.legalweek.com/PrintItem.asp?id=9561 ("[T]he jury chose to focus on a communication which was largely ignored by the lawyers on both sides.").

216 *See* Indictment at ¶¶ 1–13, United States v. Arthur Andersen, LLP, 2002 WL 32153945 (S.D. Tex. Mar. 14, 2002) (No. 02-121).

217 *See* Gillers, *supra* note 183, at A23 (arguing that Temple's e-mail falls into § 1515(c)'s exception for "lawful, bona fide, legal representation services").

218 Jon Robins, *The Whole Truth?; Enronitis Has Caused a Fever of Anticipation-and-Dread-Over New Regulations to Make Corporate Lawyers Report Client Misdeeds to the Powers That Be*, THE LAWYER, July 29, 2002, at US3.

counsel," and predicted it would "mark the end, for both lawyer and client, of the traditional safe-haven . . . [for] unfettered advice to a corporate client."[219] As Legal Ethics Professor Stephen Gillers declared: "Nancy Temple's e-mail message was not a crime: she was giving bona fide legal advice to a client[,] . . . the kind of advice lawyers routinely give. . . . [T]he jury's flawed theory gives the government a victory that is hard to accept."[220]

Andersen's attorneys seized on the discrepancy between the jurors' rationale for their verdict and the government's theory in their motion for a new trial.[221] Arthur Andersen's attorneys argued that Temple's e-mail fell under the safe harbor provision of § 1515(c) and that the evidence at trial was in "fatal variance" with the indictment.[222] The government debated this point,[223] and the court rejected the argument, basing its decision on a federal rule of evidence[224] that bars the court from re-examining a verdict's validity based on post-verdict press interviews about jury deliberations.[225]

The jury's rationale for convicting Arthur Andersen is a puzzle. Why did the jury find it easier to convict the firm on the basis of a rather mundane e-mail from corporate counsel regarding a press release rather than a corporation-wide effort to destroy as many documents as possible before the receipt of a government subpoena? Any analysis of the practical impact and import of federal obstruction statutes demands an answer.

A close examination of the Temple e-mail reveals a key distinction between the government's theory and the jury's theory of the case. For a jury concerned and confused about what state of mind was required in order to convict a corporation, Ms. Temple's e-mail shows a culpable mental state with two elements on the same page: an intent to alter a document and an awareness of legal proceedings. In her e-mail, Temple makes three suggestions related to the firm's preparation of an Enron-related press release. First, she suggested deleting

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219 Loren Schechter et al., *The Effect of the Arthur Andersen Verdict on Inside Counsel*, 3 J. INVESTMENT COMPLIANCE, Summer 2002, at 27, 29.

220 Gillers, *supra* note 183, at A23; *see also* Kurt Eichenwald, *Andersen Team Weighs Asking Judge to Undo Guilty Verdict*, N.Y. TIMES, June 19, 2002, at C1 ("What the jury fixated on with Nancy Temple is conduct that is simply not criminal." (quoting Charles Rothfeld, a lawyer for Arthur Andersen)).

221 Andersen's Motion for Judgment of Acquittal or a New Trial, United States v. Arthur Andersen, LLP (No. 02-121), *reprinted in* O'SULLIVAN, *supra* note 163, at 449–50.

222 *See id.* at 453–54.

223 Government's Memorandum of Law in Opposition to Andersen's Motion for a Judgment of Acquittal or a New Trial, United States v. Arthur Andersen, LLP (No. 02-121), *reprinted in* O'SULLIVAN, *supra* note 163, at 459–61 (arguing that Temple's advice constituted fraud, so that it was not "lawful" advice under § 1515(c) and that § 1512(b) covers alteration of documents as well as their destruction).

224 *See* O'SULLIVAN, *supra* note 163, at 461.

225 FED. R. EVID. 606(b).

her name from the memo, because she stated that having her name on the memo "increase[d] the chances that I might be a witness, which I [would] prefer to avoid."[226] Second, she proposed removing language in the memo that "might suggest [that Andersen had] . . . concluded the release is misleading."[227] Third, she offered to investigate whether a characterization in the memo would violate certain SEC auditing regulations.[228]

In opposing Andersen's post-verdict motion to dismiss, federal prosecutors defended the jury's rationale for its verdict, arguing that Temple's second suggestion was a "dramatic demonstration" of how the draft was being "sanitized" before the outside world viewed it.[229] If this was the wrongdoing on which the jury convicted Arthur Andersen, it is a less dramatic demonstration of culpability than the shredding effort. The distinguishing feature of the memo was not Temple's second suggestion, but her first, which shows her awareness of the future legal proceedings and her expressed desire to avoid involvement in them.[230] Unlike the government's theory in which the "intent" element was amorphous enough to prompt the jury's question about trifurcated corporate culpable intent, the intentional alteration of the memo exists on the same page as Temple's discussion of legal proceedings. Only if the jury's reluctance to convict was based on its inability to connect the intent to obstruct with a pending legal proceeding would Temple's e-mail be crucial in bridging that gap.[231]

Deciphering a theory of Arthur Andersen's culpability that only a few jurors held may not help fully understand the general applicability of federal obstruction statutes. However, the disparity between the jury's theory and the government's theory of the case is instructive for future prosecutions of obstructive document destruction in white-collar cases. First, it is important to understand that the underlying basis

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226 Government Exhibit No. 1018B, United States v. Arthur Andersen, LLP (S.D. Tex.) (No. 02-121), *reprinted in* O'SULLIVAN, *supra* note 163, at 463 (depicting the e-mail from Nancy Temple to David Duncan)).

227 *Id.*

228 *See id.*

229 Government's Memorandum of Law in Opposition to Andersen's Motion for a Judgment of Acquittal or a New Trial, United States v. Arthur Andersen, LLP (No. 02-121), *reprinted in* O'SULLIVAN, *supra* note 163, at 458.

230 *See* Schechter et al., *supra* note 219, at 28–29 (arguing that Ms. Temple's awareness of litigation may make the e-mail vulnerable to be construed as an attempt to alter documents with intent to obstruct an official proceeding).

231 The comments from the jury foreman, Oscar Criner, about the case also suggest that the memo connecting Temple's intent to the proceeding was crucial. Mr. Criner described the law as prohibiting "[alteration of] the document with the intent to impair the fact-finding ability of an official proceeding" and described the e-mail as a "smoking gun." Lianne Hart, *Deliberations Came Down to a Single Memo*, L.A. TIMES, June 16, 2002, at A24. According to Criner, "You read [the e-mail] . . . , you read the law in the charge, and it just stands out." Flood, *supra* note 210, at 27A.

for the government's case against Arthur Andersen failed.[232] The jury convicted the firm based on a theory that was not presented to them.[233] Second, although the court instructed the jury that no proceeding needed to be pending at the time of the obstructive act, the jury seemed to be confounded by questions regarding the requisite state of mind to convict under § 1512(b). This confusion is evident in both the jury's question to the judge about the intent of different corporate actors[234] and in the only piece of evidence on which all jurors agreed—a memo that exhibits both an intent to alter documents and an awareness of legal proceedings.[235] The final lesson in the Arthur Andersen verdict is the weaknesses of using § 1512 to prosecute shredders for document destruction. Even if courts give instructions which relieve the government from having to prove that a proceeding was pending when the obstruction occurred, juries may still find that the plain language of § 1512 (requiring an intent to impact "an official proceeding"[236]) imposes a burden on the government to prove that a document shredder was aware of the proceedings.[237]

C. *U.S. v. Quattrone*: The Hung Jury

The first, unsuccessful obstruction prosecution of Credit Suisse First Boston banker Frank Quattrone is another example of the inability or unwillingness of jurors to convict for document destruction if a defendant's awareness of the obstructed proceeding is in question.[238] The basis for the case against Quattrone was described as "simple, slender, and well known"—an e-mail that Mr. Quattrone forwarded to his subordinates reminding them of a corporate retention policy after learning about a government investigation into his company.[239] The

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232 *See supra* note 213 and accompanying text (noting at least one juror's refusal to convict based on the shredding theory).

233 *See supra* note 215 and accompanying text.

234 *See supra* note 205 and accompanying text.

235 *See* discussion *supra* notes 226–31 and accompanying text.

236 18 U.S.C. § 1512(b) (2000).

237 This can be seen in Judge Harmon's jury instruction, which descrihed the proceeding as part of the intent to obstruct. *See supra* note 203 and accompanying text. It is also evident in jurors' descriptions of their understanding of the law presented in the charge. *See supra* note 231 and accompanying text.

238 This section focuses on Frank Quattrone's first trial, which led to a hung jury. In his second trial, Quatrrone was found guilty of obstructing justice. Terence Neilan, *Ex-Banker Is Convicted of Obstructing* Investigation, N.Y. TIMES, May 4, 2004, at A1. However, this guilty verdict does not change this section's conclusion that the pre-Sarbanes-Oxley statutes, under which he was charged, resulted in jury confusion in his first trial. Whatever lessons can be drawn from the different outcomes, the effectiveness of pre-§ 1519 ohstruction statutes to penalize acts of anticipatory document destruction remains very much in doubt.

239 E. Scott Reckard, *U.S. May Push to Retry Quattrone; Prosecutors Could View Conviction as Necessary to Bolster Other Cases Involving Allegations of White-Collar Crime*, L.A. TIMES, Oct. 27, 2003, at C1; United States v. Quattrone, Indictment at ¶ 36–44, *available at* http://news.

government charged Quattrone with obstruction of justice under all of the pre-Sarbanes-Oxley statutes—sections 1503, 1505, and 1512(b).[240]

The case came down to a simple debate over the extent to which Quattrone knew about the investigation at the time of the obstructive act. Quattrone testified that he did not realize that the investigation had broadened so far to encompass the documents he directed his subordinates to destroy.[241] Quattrone's attorney concentrated on the "intent" element during his questioning of Quattrone: "Were you intending to obstruct justice in a Securities and Exchange Commission investigation? . . . Were you intending to obstruct a grand-jury investigation? . . . Were you intending to tamper with witnesses?" This prompted a series of "No, I was not" answers from Quattrone.[242] The government, on the other hand, presented testimony from the lawyer who informed Quattrone of the investigation; he claimed that the banker knew of the scope of the investigation and that the documents ordered to be destroyed were within that scope.[243] They also presented numerous e-mails showing Quattrone and colleagues discussing the investigation and document retention reminders.[244]

The question of Quattrone's state of mind was ultimately the issue that deadlocked the jury. The most telling sign that this issue was the stumbling block came before the judge declared a mistrial. During deliberations, the jury sent a note to the judge asking whether there was "any testimony and/or evidence that Frank Quattrone saw the grand jury or S.E.C. subpoenas, was sent the subpoenas or was informed of the list of documents requested in the subpoenas" before he forwarded the e-mail.[245] After the judge declared a mistrial, jurors who voted to convict recalled that Quattrone's sophistication allowed

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findlaw.com/hdocs/docs/csfb/usquattrone51203ind.pdf. Quattrone was charged for forwarding an e-mail which reminded his subordinates that "if a lawsuit is instituted, our retention policy is suspended . . . (since it constitutes the destruction of evidence). We strongly suggest that before you leave for the holidays, you should catch up on file cleaning." *Id.* ¶ 39. Quattrone forwarded the e-mail and endorsed it based on his experience in prior litigation.

240 United States v. Quattrone, Indictment ¶ 45–49, *available at* http://news.findlaw.com/hdocs/docs/csfb/usquattrone51203ind.pdf.

241 *See* Randall Smith & Kara Scannell, *Quattrone Defends His E-mail*, WALL ST. J., Oct. 10, 2003, at C1.

242 *Id.*

243 *See* Joshua Chaffin, *Quattrone 'Was Warned of IPO Investigation,'* FIN. TIMES, Oct. 4, 2003, at 1; Walter Hamilton, *Witness: Banker Knew of Probe*, L.A. TIMES, Oct. 4, 2003, at C1.

244 United States v. Quattrone, Indictment ¶ 16-44, *available at* http://news.findlaw.com/hdocs/docs/csfb/usquattrone51203ind.pdf. In one interchange, one of Quattrone's colleagues noted "Today, it's administrative housekeeping. In January, it could be improper destruction of evidence." *Id.* ¶ 36. Quattrone cautioned the colleague that he "shouldn't make jokes like that on email!" *Id.* ¶ 38.

245 Andrew Ross Sorkin, *Likelihood of Mistrial Grows in Case of Ex-Banker*, N.Y. TIMES, Oct. 24 2003, at C1.

them to infer a culpable state of mind because he would have "had all his fingers on the buttons" and was in a position to "know anything and everything."[246] Jurors who refused to convict Quattrone explained that the government's evidence was not strong enough because it required them "to make a leap"[247] in order to arrive at a conclusion. However, the case may have been even weaker than this disagreement indicates. When the jurors took their first vote, it was 7–4 in favor of acquittal.[248] After the hung jury, one juror recounted, "I heard a lot of jurors say if [Quattrone] . . . hadn't been a witness, it would have been 'not guilty' the first day."[249] The apparent problem with his testimony was that his command over all aspects of business matters undermined his claims that he was ignorant about the nature of the government inquiry.[250]

The hung jury in Frank Quattrone's first trial is another example of how the pre-Sarbanes-Oxley federal obstruction statutes encounter difficulties when employed against an act of anticipatory obstruction. Quattrone derailed the prosecution's case by claiming incomplete knowledge of the investigation.[251] This claim nearly won him an acquittal, even though his business sophistication was readily apparent to the jury[252] and numerous e-mails in which he discussed the government inquiry were presented as evidence.[253] Both the Quattrone and Andersen cases show that even when courts allow prosecutions to proceed against defendants who destroy documents before they have all the information about a proceeding, juries have difficulty finding the obstructive intent necessary to convict. Thus, even jurisdictions where courts have interpreted the statutory language broadly to uphold convictions for anticipatory obstruction may still encounter obstacles in securing guilty verdicts.

IV
THE LEGISLATIVE RECORD

While the legal and practical limitations of prior law are important in understanding the significance of § 1519, the crucial source for courts interpreting the scope of the new Sarbanes-Oxley anti-

246 Andrew Ross Sorkin, *Quattrone Juror Says Three Wouldn't Budge*, N.Y. TIMES, Oct. 27, 2003, at C10 (quoting juror Kenneth Shook).

247 *See* Carolyn Said, *Mistrial Declared in Quattrone Case: Jury Unable to Reach Unanimity on All Counts*, S.F. CHRON., Oct. 25, 2003, at B1 (quoting juror Michael Roman).

248 Randall Smith & Kara Scannell, *Inside Quattrone Jury Room, Discord Culminates in Mistrial*, WALL ST. J., Oct. 27, 2003, at A1.

249 Sorkin, *supra* note 246, at C10 (quoting juror Mayo Villalona).

250 *See Trial of Investment Banker Frank Quattrone Ends in a Mistrial* (NPR radio broadcast, Oct. 24, 2003).

251 *See* Smith & Scannell, *supra* note 248, at C1.

252 *See supra* notes 245–50 and accompanying text.

253 *See supra* note 244 and accompanying text.

shredding provision will be the legislative record and drafting of the statute. This record shows a congressional intent that the statute be applied broadly, as a new weapon in the federal prosecutors' arsenal in combating obstruction of justice in white-collar criminal cases. This intent seems to run counter to the dismissive attitudes shown by some commentators about the provision.[254]

A. White-Collar Crime Headlines

The first indication from the legislative record of Congress's intent comes from the news that spurred congressional action. While no one news story can ever independently spur legislative action, the Sarbanes-Oxley bill was primarily motivated by the collapse of energy-trading giant Enron and its accounting firm Arthur Andersen.[255] As members of Congress considered and drafted the measures of the bill, stories about wrongdoing at Andersen and Enron, particularly the document shredding, dominated headlines.[256] The passage of the anti-shredding provision can be seen as a direct response to the story of Arthur Andersen's massive shredding operation on the eve of an SEC subpoena.[257] David Duncan's widely reported "stop the shredding" e-mail, sent only after Arthur Andersen received a subpoena from the SEC, reinforced the popular misconception that shredding is legal until the moment when the actor receives a subpoena and knows that the documents are being sought for a legal proceeding.[258] Though legally impotent, this hyper-technical defense—"I did not

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254 *See supra* notes 11–14 and accompanying text.

255 The record is replete with references to the Enron/Arthur Andersen collapse; one example is Sen. Leahy's remarks in first introducing § 1519 on the Senate floor. *See* 148 CONG REC. S1,785-86 (daily ed. Mar. 12, 2002) (statement of Sen. Leahy).

256 A Pew Center for People and the Press public opinion survey shows that the news audience reported a steep increase in how closely they followed the stories leading up to the passage of Sarbanes-Oxley. The percentage of respondents who claimed to have followed stories about "recent business scandals" either "very closely" or "fairly closely" rose from 34% in December 2001 to 64% in July 2002. *News Media's Improved Image Proves Short-Lived: The Sagging Stock Market's Big Audience*, PEW RES. CENTER FOR THE PEOPLE & THE PRESS 1, Q.2(c) (Aug. 4, 2002), *at* http://people-press.org/reports/print.php3?PageID=631.

257 *See* Perino, *supra* note 11, at 678 (noting that § 1519 was passed "[w]ith an eye clearly on the Arthur Andersen document destruction prosecution").

258 *See* O'SULLIVAN, *supra* note 163, at 394 (noting that until the Arthur Andersen case "many people (including some lawyers) mistakenly believed that if a person destroys documents . . . *before* a subpoena issues, that person cannot be prosecuted for obstruction under § 1503"); Coffee, *supra* note 69, at A19 (positing that Andersen's shredding was the result of bad legal advice that shredding non-subpoenaed documents was legal); Michael B. Himmel & Christopher S. Porrino, *Criminal Law: Document Destruction May Constitute Pre-Subpoena Obstruction of Justice*, N.J. L.J., Feb. 1, 1999, at 32 ("[M]any lawyers do not know . . . that destruction of documents may be a crime, even *before* a subpoena is served upon a company or individual."). For an outdated example of this advice, see MARVIN G. PICKHOLZ ET AL., GUIDE TO WHITE COLLAR CRIME . . . A PRACTICAL GUIDE FOR THE CORPORATE COUNSELOR 61–62 (1986) (advising, in a section entitled "Response to a Grand Jury Subpoena," that "[a]t this stage it is important that counsel stress to the client the need to retain all

know that shredding those documents was illegal yet"—may have seeped into the Senate's consciousness as its members crafted and voted on the Sarbanes-Oxley document destruction provision.[259]

B. Statement of Intent

Senator Patrick Leahy, then-Chairman of the Committee on the Judiciary, drafted the obstruction-of-justice provisions[260] of the Sarbanes-Oxley bill.[261] Before the final vote on the Sarbanes-Oxley bill, Leahy summarized the legislative intent of the new anti-shredding provisions on the floor of the Senate. Leahy described the state of preexisting statutes prohibiting document destruction as "a patchwork that have [sic] been interpreted, often very narrowly, by federal courts."[262] He specifically noted § 1512(b) "make[s] it a crime to persuade another person to destroy documents, but not a crime to actually destroy the same documents yourself."[263] Further, he argued that the Supreme Court's *Aguilar* holding limited obstruction charges under § 1503 to those "closely tied to a pending judicial proceeding."[264] According to Leahy, § 1519 was intended to correct the "ambiguities and technical limitations" of the current state of the federal obstruction statutes.[265]

Leahy noted that the drafters intended the new obstruction statute to apply broadly to acts of document destruction and be bound only by an "intent" element and a "jurisdictional" element. Leahy described the "intent" element of § 1519 in detail:

> [T]his section would create a new 20-year felony which could be effectively used in a wide array of cases where a person destroys or

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documents" since "[a]ny destruction or secreting of documents after a subpoena is received may constitute a criminal offense").

259 This idea may have driven Sen. Leahy to comment that § 1519 had "no technical requirement . . . that the documents were formally under subpoena." 148 CONG REC. S1,786 (daily ed. Mar. 12, 2002) (statement of Sen. Leahy). This precise language was no longer included in the statement before the Senate on the final vote, perhaps recognizing that the subpoena/no-subpoena distinction was not the dividing line between other federal obstruction statutes, making § 1519 no different than prior law. *See* 148 CONG. REC. S7,419 (daily ed. July 26, 2002) (statement of Sen. Leahy).

260 The Sarbanes-Oxley bill added two new obstruction provisions to the federal statutes: § 1519 and § 1520, a provision targeting the destruction of audit records of public companies. *See* 18 U.S.C.A. § § 1519–20 (West Supp. 2003).

261 *See* Letter from Patrick Leahy, U.S. Sen., to John Ashcroft, Att'y Gen., U.S. Dep't of Justice 1 (Aug. 2, 2002) (on file with author).

262 148 CONG. REC. S7,419 (daily ed. July 26, 2002) (statement of Sen. Leahy).

263 *Id.*; *see* 18 U.S.C. § 1512(b), (c) (2000). This disparity was corrected by a separate amendment in the Sarbanes-Oxley bill. Congress amended § 1512 to add a new subsection (c). The provision uses language parallel to § 1512(b) and punishes the person who destroys documents rather than the person who "corruptly persuades" another to destroy documents. *See* 18 U.S.C.A. § 1512(c) (West Supp. 2003).

264 148 CONG. REC. S7,419 (daily ed. July 26, 2002) (statement of Sen. Leahy).

265 *Id.*

> creates evidence with the intent to obstruct an investigation or matter that is, as a factual matter, within the jurisdiction of any federal agency or any bankruptcy. It also covers acts either in contemplation of or in relation to such matters. . . . [T]he intent required is the intent to obstruct, not some level of knowledge about the agency processes of [sic] the precise nature of the agency of [sic] court's jurisdiction. This statute is specifically meant not to include any technical requirement . . . to tie the obstructive conduct to a pending or imminent proceeding or matter by intent or otherwise.[266]

Leahy's statement that Congress drafted the language of the statute in a manner that avoided a link between the "intent" requirement and the "jurisdictional" element, supports the notion that the statute was drafted in order to prosecute pre-emptive obstructers. The exclusion of the requirement that the government must prove the defendant's knowledge about "agency processes," "the precise nature of the . . . jurisdiction," and "technical requirements" of pending proceedings in Leahy's statement,[267] shows a rejection of any requisite link between the obstructive act and the obstructed proceedings. Leahy's criticism of the *Aguilar* decision can also be read as legislative frustration with such a required link or knowledge of it.[268] Leahy's discussion about the dissatisfaction with the current legal strictures surrounding obstruction prosecution, as well as his description of this offense's "intent" element, make clear that the statutory language was intended to avoid judicially imposed limits on prior federal obstruction statutes.[269] For all of these reasons, Leahy's description of the "intent" element indicates that Congress drafted the statute with an eye towards prosecuting defendants who obstruct an investigation they merely anticipate.

C. Contemplation

In order to give § 1519 this broader reach and avoid the strictures of pre-Sarbanes-Oxley obstruction provisions, Leahy used language in the statute unique to the federal obstruction statutes:[270] prohibiting acts taken "in contemplation of or in relation to" federal investigations. In his statement describing the "intent" element, Leahy made clear that including the language "in contemplation" broadened the scope of the anti-shredding provision to encompass the early stages of criminal conduct.

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266 *Id.* at S7,418–19.

267 *See Id.*

268 *See supra* note 264 and accompanying text.

269 *See* Chase, *supra* note 45, at 742–43 (reaching this conclusion about the legislative intent).

270 *See* 18 U.S.C. § § 1501–18 (2000).

> It is also sufficient that the act is done "in contemplation" of or in relation to a matter or investigation. . . . [Section 1519] extends to acts done in contemplation of such federal matters, so that the timing of the act in relation to the beginning of the matter or investigation is also not a bar to prosecution. The intent of the provision is simple; people should not be destroying, altering, or falsifying documents to obstruct any government function.[271]

Commentators criticized this language for being undefined, unspecific, and vague.[272] One analysis of the "in contemplation" language suggested that courts have interpreted a similar phrase in § 152 of the bankruptcy statutes to *add* a mens rea requirement, so that an actor needs to be "contemplating" bankruptcy before a court may find that he fraudulently transferred or concealed property.[273] If courts were to follow that logic, they would defy Leahy's description of the legislative intent of the measure. By twice noting that the statute "also" prohibit acts taken "in contemplation of or in relation" to federal investigations within his statement about intent in the congressional record,[274] Leahy made clear that the statutory language was intended to provide federal prosecutors with an alternative option when they cannot show that the defendant had specific awareness of the proceeding he or she is accused of obstructing.[275] Thus, using that statutory language to *augment* the requirements for the defendant's state of mind contradicts the stated legislative intention to *dilute* the "intent" element.

While Leahy's statements regarding the intended scope of the language are instructive, the "contemplation" language itself also provides courts a solid textual basis for prohibiting anticipatory obstruction of justice. The *Quattrone* and *Arthur Andersen* cases demonstrate how this language would, in application, ease the government's burden of proving anticipatory white-collar obstruction. Because "contemplate" signifies a state of mind regarding a future or contingent event,[276] it describes a state of mind that may exist earlier than the

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271 148 CONG. REC. S7,418–19 (daily ed. July 26, 2002) (statement of Sen. Leahy).

272 Polkes, *supra* note 79, at 7 (criticizing the language as "undefined and unspecific," and alluding to notice problems that would accompany a vagueness criticism); *see also* Patrick J. Burke & H. Kirke Snyder, *Sarbanes-Oxley's Tough Criminal Penalties Relating to Destruction of Corporate Communications and Documents*, METROPOLITAN CORP. COUNS., Feb. 2003, at 24 ("There are bound to be disputes about how far in advance of a federal inquiry a defendant can be deemed to have 'contemplated' that the government would have interest in the documents at issue.").

273 Recent Legislation, *supra* note 12, at 731 (drawing from the bankruptcy statute analogy to conclude that the "in contemplation of" language of § 1519 "may take in less conduct than the plain language of the statute would suggest").

274 *See supra* note 266 and accompanying text.

275 *See* Hamel et al., *supra* note 16, at 34.

276 MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 249 (10th ed. 1993) (defining "contemplate" as "to view as contingent or probable"); 3 OXFORD ENGLISH DICTIONARY 811 (2d

required obstructive intent that the *Quattrone* and *Andersen* juries failed to find.[277] Further, because "contemplate" denotes a state of mind that continues over a period of time,[278] juries may be more willing to look at a number of different actions by a defendant to infer contemplation.[279] "Contemplate" differs from "intend" because "intend" implies a more fixed state of mind about a particular act.[280] In addition, by providing separate mental states for the obstructive act and the proceeding, § 1519 allows the courts in these cases to differentiate the required mental states a defendant must have towards the different elements of the offense. Therefore, instead of deliberations about whether and how Arthur Andersen evinced intent to obstruct an official proceeding, the inquiry would focus on whether Arthur Andersen intentionally destroyed documents and whether the firm "contemplated" the investigation. Frank Quattrone's claim of incomplete knowledge about the proceeding would be an even more precarious defense. Instead of an inquiry into whether Mr. Quattrone intended to impede an investigation, the focus would be on whether he intentionally destroyed documents while "contemplating" an investigation. While these cases were not part of Leahy's drafting,[281] they are informative examples of how "contemplation" removes obstacles from the government's path to obtaining convictions for pre-emptive document destruction.

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ed. 1991) (defining "contemplate" to mean "[t]o have in view, look for, expect, take into account as a contingency to be provided for")

277 The *Andersen* jurors' description of looking at the law and looking at the Temple e-mail and Quattrone's attorney's focus on the word "intent," indicates that the statutory language is crucial in jury deliberations. *See supra* notes 231, 242 and accompanying text.

278 MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, supra note 276, at 249 (defining "contemplate" to mean also "to view or consider with continued attention"); 3 OXFORD ENGLISH DICTIONARY, *supra* note 276, at 811 (defining "contemplate" as "[t]o look at with continued attention").

279 The *Andersen* jurors' dismissal of document-shredding evidence as "circumstantial" in favor of a "smoking gun" e-mail, and the minority of Quattrone jurors who were willing to infer culpability, and the refusal of some of them to "make a leap," may signify a reluctance among jurors to infer obstructive intent from a defendant's behavior. *See supra* notes 210, 213, 247 and accompanying text.

280 *Compare supra* notes 276 *and* 278 and accompanying text (defining "contemplate"), *with* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 276, at 608 (defining "intend" as "to direct the mind on"), *and* 7 OXFORD ENGLISH DICTIONARY 1073 (2d ed. 1991) (defining "intend" as "[t]o have in the mind as a fixed purpose").

281 This Note's exploration of the Andersen and Quattrone cases is intended only to show the confusion that pre-Sarbanes-Oxley obstruction law has caused in the jury room, not to argue that these cases were considered in the drafting of § 1519. Clearly, the *Quattrone* case took place after the passage of the bill. *See* Part III.C. The impact of the Arthur Andersen conviction is more difficult to gauge. The details of the case were being widely reported, and likely had an impact on the drafting of the bill. See Perino, *supra* note 11, at 678. However, the conviction was obtained after the provision had been introduced. *See* 148 CONG REC. S1,785-86 (daily ed. Mar. 12, 2002) (statement of Sen. Leahy); *see also* Eichenwald, *supra* note 205, at A1.

D. Passage and Signing

Presumably based on Leahy's description of this new statute, the obstruction statutes were added to the Sarbanes-Oxley bill, which passed both houses with quick debate and little dissention.[282] The final version of the bill passed 99–0 in the Senate and 423–3 in the House of Representatives, and was signed into law on July 30, 2002 by President Bush.[283] While the record of the Bush Administration's intent in signing the Sarbanes-Oxley Act and enacting § 1519 into law is not as precisely articulated, there are indications that White House officials shared some of Leahy's concerns about the patchwork of federal obstruction statutes. Before the passage of Sarbanes-Oxley, the record indicates that the White House was advocating to correct the problem that § 1512(b) only applied to the individual who persuaded the shredder, as opposed to the shredder himself.[284] In congressional testimony, Assistant Attorney General Michael Chertoff highlighted this disparity as an obstacle to prosecuting an individual who obstructed "an anticipated official proceeding," and relayed a request to Congress from President Bush "to clarify unambiguously the government's ability to prosecute all individuals involved in obstructing justice."[285] While the record does not reflect the detailed enunciation of intent contained in Leahy's statements, there are indications that the White House, in signing and negotiating the bill, was also driven by a concern about the state of obstruction statutes and a desire to prosecute individuals for obstruction undertaken in anticipation of investigations.

E. Department of Justice Field Guidance: Leahy v. Ashcroft

After the passage of Sarbanes-Oxley, Attorney General John Ashcroft issued a "Field Guidance" report for U.S. Attorneys on implementing new provisions of the bill.[286] In the memo, the Attorney

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282 *See* Falvey & Wolfman, *supra* note 14, at 1 (noting that Sarbanes-Oxley "rolled through Congress with eye-popping speed and unanimity"); Moohr, *supra* note 14, at 952 (minimizing the significance of the criminal provisions of the bill and pointing out that it was "[e]nacted in haste and out of political expediency . . . [in] an effort to restore confidence in securities markets in a sagging economy").

283 *See* Mike Allen, *Bush Signs Corporate Reforms into Law: President Says Era of 'False Profits' is Over*, WASH. POST, July 31, 2002, at A4; Falvey & Wolfman, *supra* note 14, at 1.

284 Press Release, White House, Corporate Responsibility Fact Sheet (July 9, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/07/20020709-1.html.

285 *Penalties for White Collar Offenses: Are We Really Getting Tough on Crime?: Hearing Before the S. Subcomm. on Crime and Drugs of the Comm. on the Judiciary*, 107th Cong. 223–24 (2002) (statement of Michael Chertoff, Assistant Att'y Gen.); *see also* News Briefing, White House, *White House Officials Hold Background White House Briefing* (July 9, 2002) (explaining the strictures of *Aguilar* and § 1512(b) in briefing with reporters).

286 Memorandum from the Att'y Gen. to the Dir. of the FBI, the Dir. of the Exec. Office of U.S. Att'ys, and all U.S. Att'ys all special-agents-in-charge (Aug. 1, 2002), *reprinted in* 71 CRIM. L. REP. 585–88 (2002).

General recognized the limitations of the current obstruction statutes and noted that § 1519 "explicitly reaches activities by an individual 'in relation to or contemplation of' any matters [within federal jurisdiction]."[287] Ashcroft's memo continued by linking § 1519 to § 1512:

> New Section 1519 should be read in conjunction with the amendment to 18 U.S.C. 1512 [which applied the language of § 1512(b) to the person who acts to destroy documents instead of only to the person who persuades another to do so] . . . which similarly bars corrupt acts to destroy, alter, mutilate or conceal evidence, in contemplation of an "official proceeding."[288]

A day after the memo was issued, Leahy sent a critical letter to the Attorney General in which he described the field guidance as falling short of fulfilling the congressional intent of Sarbanes-Oxley, and stated that Congress had passed a "strong law," but that "any law is only as strong as its enforcement."[289] Leahy criticized the contention that § 1512 and § 1519 should be read "in conjunction" with one another:

> This statement is inaccurate and risks a significant narrowing of the new crime created in section 1519. Section 1519 . . . is plainly written to be a new, stand alone felony that imposes broad prohibitions on evidence tampering. New section 1519 is in *no way* linked to the amendment to existing 18 U.S.C. 1512 . . . and the statutory and judicial limitations on the use of section 1512 simply have no bearing on the intended reach of new section 1519.[290]

Leahy went on to describe differences between the two statutes. He first noted that the "official proceeding" requirement in § 1512 does not apply to § 1519.[291] He then emphasized that § 1519 was drafted in order to avoid the requirement that the defendant know about the proceeding against him:

> [Section] 1519 requires only proof of the defendant's intent to obstruct, impede, or influence and not any link to the defendant's knowledge about the nature of the government's jurisdiction. . . . The reason for this is simple: establishing this level of intent has caused serious problems for prosecutors and confusion for juries in the past and does not make sense from a policy perspective when there is an act of evidence tampering.[292]

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287 *Id.* at 585.

288 *Id.*

289 Letter from Patrick Leahy, U.S. Sen., to John Ashcroft, Att'y Gen., *supra* note 44, at 1; *see also Leahy Faults Ashcroft Guidance on Implementation of Sarbanes-Oxley Act*, 71 CRIM. L. REP. 583, 583 (2002) (describing how Leahy "warned that if Justice reads the new law too narrowly, it could diminish the statute's effectiveness in combating financial fraud").

290 *Id.* at 2.

291 *Id.*

292 *Id.* at 2–3.

Leahy noted that the effort to dilute the requirement of the defendant's knowledge of the proceeding, was one of the reasons why "corruptly"—a mental state descriptor included in the language of many other obstruction statutes—was not included in the language of § 1519.[293] Assistant Attorney General Daniel J. Bryant responded to Leahy's letter, clarifying that "the guidance was not intended to link the substantive elements of [§ 1519] . . . with the elements of . . . [§ 1512]," but rather to direct prosecutors to "consider both provisions and determine which is more appropriate in the particular factual situation."[294] Leahy's vigorous defense of the anti-shredding law is yet another indication that § 1519 was drafted with the intent that it prohibit forms of obstruction not already covered under existing statutes. The Justice Department's response to Leahy could be understood as either a concession or a clarification that it too acknowledges the two statutes as distinct.

V
AN EXPANSIVE INTERPRETATION OF § 1519

A. Anticipatory Obstruction

This Note argues that Congress designed the Sarbanes-Oxley anti-shredding provision to venture into a new area of obstruction-of-justice law enforcement: anticipatory obstruction. To do this, courts could simply find that § 1519 imposes criminal liability where an actor intentionally destroys documents with only a general contemplation of the obstructed proceedings. The government could show that the actor intended to obstruct justice even if he acted without knowledge of the specific proceeding he would obstruct at the time of the act.[295]

This reading gives distinct meaning to the unique language of § 1519, which imposes liability on those who act "in relation to or contemplation of" a federal investigation or matter.[296] It recognizes Leahy's statements describing the intent element of the law and his subsequent efforts to distinguish the offense from the document destruction provision of the witness-tampering statute.[297] This reading gives § 1519 a distinct place among the panoply of federal obstruction statutes and rejects an analysis of the provision that renders it wholly redundant.[298] The interpretation offers an alternative to the confus-

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293 *Id.*

294 Letter from Daniel J. Bryant, Assistant Att'y Gen., to Patrick Leahy, U.S. Sen., 2 (Aug. 19, 2002) (on file with author).

295 The closest articulation of this kind of obstructive intent is expressed in Justice Scalia's *Aguilar* dissent: the actor's awareness of a pending proceeding need only be shown as it pertains to his intent. *See supra* note 107 and accompanying text.

296 18 U.S.C.A. § 1519 (West Supp. 2003); *see* discussion *supra* Part IV.C.

297 *See* discussion *supra* Part IV.B, E.

298 *See supra* notes 11–14.

ing jury instructions under § 1512 which instruct jurors that they do not need to find that a proceeding was in progress when the obstructive act took place, but that they do need to find an "intent to obstruct . . . an official proceeding."[299] Under this interpretation, the new provision may make a difference for jurors, like those in recent high-profile obstruction cases, who seem confounded as to whether they may convict a defendant of obstruction when the defendant's knowledge about the obstructed proceeding is not clearly provable.[300] It ensures that courts do not reward perpetrators of business crimes for their prescience by shifting the focus from the actor's mental state *regarding the proceeding* to the actor's mental state *regarding the obstruction.* It poses a direct and unsettling question to a document shredder: aside from the investigation you suspected was imminent, what other reason did you have to destroy those documents? Such a reading of § 1519 compels companies to heed the warning issued by Assistant U.S. Attorney Andrew Weissman upon receiving word of the Arthur Andersen guilty verdict: "When you expect the police, don't destroy evidence."[301]

Such a broad reading of the statute does not leave the accused corporation defenseless, nor does it force corporations to become indiscriminant warehouses of old documents for fear of possible future investigations.[302] In defending against a broadly interpreted anti-shredding provision, one analysis of § 1519 recommends that a "consistently applied and routinely followed retention policy" could demonstrate that the corporation that shredded documents "did not have the specific intent to obstruct justice as required by federal law."[303] Clearly, just as an e-mail reminding employees to comply with a document retention program could be strong evidence a defendant contemplated a judicial proceeding, evidence of a regularly applied retention policy could exculpate a defendant.[304] Arthur Andersen's conviction has already been cited as a "cautionary tale" for corporations to have "a coherent document retention policy that is followed

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299 *See* discussion *supra* Part II.C.2.

300 *See* discussion *supra* Part III.

301 Brenda Sapino Jeffreys, *Altering Document Led to Andersen Conviction*, LEGAL INTELLIGENCER, June 19, 2002, at 4 (quoting Assistant U.S. Att'y Andrew Weissmann).

302 Of course, the harm of forcing companies to preserve documents, or electronic versions of documents, is diminished by new technologies for electronic document storage. However, storage costs and space limitations are real and legitimate business concerns. *See* Chase, *supra* note 45, at 724.

303 *Id.* at 758–59.

304 *See id.* at 759.

consistently,"[305] including an e-mail retention policy.[306] Therefore, such a broad reading of § 1519 would not be unlimited, as an actor who destroyed documents as a matter of routine, truly without contemplating an investigation, would not be held criminally liable.[307]

In addition, this expansive interpretation does not remove all boundaries to the criminal liability imposed by this new anti-shredding provision. The use of "contemplation" as a separate mental state that the defendant must have toward the obstructed proceeding will allow courts to give the term meaning through application. The first defendant accused of anticipatory obstruction will likely argue that all wrongdoers take some actions to hide their wrongdoing, and all of these actions are taken with some "contemplation" of the authorities who could expose their offense.[308] Are all acts of document destruction now prohibited by § 1519? While commentators wrestle with the question of what mental state justifies the criminalization of "anticipatory offenses" primarily in the context of inchoate crime,[309] the "con-

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305 Adam I. Cohen & David J. Lender, *Retaining Documents in Electronic Age: Failing to Actively Manage Information Can Lead to Adverse Inferences in Litigation*, N.Y. L.J., Dec. 2, 2002, at S5; *see also* Burke & Snyder, *supra* note 272, at 24 (arguing that because § 1519 looks to what was "contemplated" by a defendant when documents are destroyed, companies should adopt some mechanism for evaluating documents' potential value to a future government inquiry).

306 *See* Angie Fares, *Sarbanes-Oxley Guidelines*, 36 INFO. MGMT. J., Nov.-Dec. 2002, at 17, 17; Giuffra, *supra* note 39, at 2, 4 (recommending an e-mail retention policy for businesses who hope to avoid liability).

307 A pre-*Aguilar* criticism of a court for overreaching under § 1503 used document destruction to show how a commonplace action could be criminalized by a court imposing "unheard-of criminal liability for negligent obstruction of justice." Joseph V. DeMarco, Note, *A Funny Thing Happened on the Way to the Courthouse: Mens Rea, Document Destruction, and the Federal Obstruction of Justice Statute*, 67 N.Y.U. L. REV. 570, 571 (1992). The "contemplation" language clearly allows courts to avoid the accusation that § 1519 is imposing criminal liability for negligent document destruction.

308 If a drug user deletes an e-mail from his dealer before he meets him, would that be document destruction in contemplation of a potential DEA investigation? Some practitioners have already begun to pose hypothetical examples to show how little would be required to show "contemplation" of an investigation in the corporate setting. *See* Hamel et al., *supra* note 16, at 34 (asking if one employee's e-mail is enough to show contemplation so that a failure to suspend a document retention policy could mean criminal liability for an entire corporation); Frank C. Razzano, *It's the Cover-Up That Will Get You!*, 4 J. INVESTMENT COMPLIANCE 39, 41 (2003) ("[R]eading the statute literally[,] . . . a person who periodically deletes e-mails from his computer files, with the intent that those files should not be available for use in any future contemplated government investigation, may be violating the law, even if no hint of an investigation currently exists.").

309 *See* LAFAVE, *supra* note 16, at 524–25; Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crime*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1161–62 (1997) (summarizing different scholars' approaches toward understanding the mens rea required to justify punishment of inchoate crime); Lawrence Crocker, *Justice in Criminal Liability: Decriminalizing Harmless Attempts*, 53 OHIO ST. L.J. 1057, 1109–10 (1992) (arguing against the "modern theory" subjectivist approacb of basing criminal liability of inchoate crime on mental culpability); Robbins, *supra* note 16, at 3–6 (1989) (exploring the culpable intent that would be required to punish "double inchoate" crimes).

templation" language allows courts to avoid these theoretical quandaries. By simply requiring some evidence to support the inference that a defendant contemplated the obstructed proceeding, a court can differentiate between an actor destroying documents in contemplation of an investigation from one merely completing the offense by covering his tracks. For example, in *U.S. v. Quattrone*, the government detailed numerous e-mail discussions with Quattrone from which his contemplation could be inferred.[310] In *U.S. v. Arthur Andersen*, the government identified the day of the audit firm's first conversation with Enron about the SEC action, which could show when the corporation began to contemplate government involvement.[311] Both cases show how a real-world application of the statute can give meaning to the term "contemplation" so that § 1519 may allow juries to infer a document shredder's obstructive intent, but also so that it does not impose indiscriminate criminal liability in the realm of pre-proceeding obstruction. Clearly, the meaning of this new term depends on a wise use of prosecutorial discretion of the initial prosecutions of shredding violations.

Finally, this expansion of criminal penalties into the realm of anticipatory obstruction of justice follows, or at least does not contradict, the trend of modern criminal law toward allowing earlier intervention to punish criminal behavior, so long as culpable intent can be shown. One commentator described the modern era of criminal law as witnessing "the justice system's focus [shifting] from punishing past crimes to preventing future violations."[312] Commentators have focused on inchoate crimes, or even "double-inchoate crimes," to evaluate the justifications and fairness of imposing criminal liability early-on.[313] While obstruction of justice is not an inchoate offense,[314] the

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310 *See supra* note 244 and accompanying text.

311 Indictment ¶ 9, United States v. Arthur Andersen, 2002 WL 32153945 (S.D. Tex. Mar. 14, 2002) (No. 02-121) (citing the date of the meeting when Enron alerted the audit firm that the SEC had begun their inquiry).

312 Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1429 (2001); *see also* Robbins, *supra* note 16, at 62–63 (describing the development of courts' acceptance of "double inchoate crimes"); Crocker, *supra* note 309, at 1059 (labeling the approach toward penalizing inchoate crime based solely on subjective culpability "the modern theory").

313 *See* Robbins, *supra* note 16, at 4–6 (proposing approaches to allow the imposition of criminal liability for "double inchoate crime"); *see also* Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 4–5 (2003) (arguing that preventative punishment should be both consistent with, and proportional to, the dangerousness of the individual); Douglas N. Husak, *The Nature and Justifiability of Nonconsummate Offenses*, 37 ARIZ. L. REV. 151, 152–53 (1995) (arguing for a principled basis to restrict criminal liability for "noncommensurate offenses" in order to avoid the problem of "overcriminalization"). For a critique of the concept of multiple inchoate crimes, see Nick Zimmerman, *Attempted Stalking: An Attempt-to-Almost-Attempt-to-Act*, 20 N. ILL. U. L. REV. 219, 247–49 (2000).

314 *See* Robbins, *supra* note 16, at 115 (defining inchoate crime as "conduct falling short of the completed object offense"). However, incomplete obstruction is punished

issues raised by criminalizing anticipatory document shredding are similar: in both situations, the culpable act precedes the harm the act could cause.[315] While this Note does not attempt to resolve precisely how offenses of preemptive interference with administration of justice fit within the theories that support criminalizing nascent wrongdoing, it is clear that imposing criminal liability earlier than prior law allows does not raise questions wholly foreign to criminal law scholars.[316] Thus, courts penalizing anticipatory obstruction of justice will follow a general trend toward penalizing wrongdoing earlier in the criminal story and will not be raising new issues of criminal theory.

B. Constitutional Boundaries

The final question is whether courts can constitutionally give the anti-shredding provision the reach which Congress intended. Does the Constitution impose any limits on federal criminal law's reach into the earliest manifestations of obstructive behavior? Can the government constitutionally criminalize obstruction that is undertaken only with a generalized contemplation of future investigation?

Obstruction statutes have repeatedly withstood constitutional challenges from defendants who claim that they had no notice that their actions were proscribed.[317] Defendants who challenge their lack of notice under a criminal statute often pursue constitutional challenges under the void-for-vagueness doctrine, which requires legislatures to define criminal offenses "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[318] Courts rebuffed arguments that § 1503 and § 1505 are void for vagueness, finding that the use of the term "corruptly" limits the scope of those laws to actors who have notice that their actions are

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under the federal statutes. Incomplete obstruction is prohibited in § 1503's proscription of "endeavors" to obstruct justice; the defendant need not be successful in obstructing justice. United States v. Aguilar, 515 U.S. 593, 599 (1994). In fact, some have argued that this language reaches conduct even earlier than inchoate offenses. Michael E. Tigar, *Crime Talk, Rights Talk, and Double Talk: Thoughts on Reading Encyclopedia of Crime and Justice*, 65 TEX. L. REV. 101, 111 n.72 (1986) (arguing that the "endeavor" language "attaches liability to conduct that would fall short of an attempt").

315 Clearly, this is assuming that the harm caused by obstruction of justice occurs in the courtroom or when the government demands the documents rather than the moment when documents are destroyed. *See* Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1612 (1997) (describing the harm sought to be prevented by several administrative offenses, including obstruction of justice, as a combination of *malum in se* and *malum prohibitum* harms).

316 *See supra* note 313.

317 *See* Palfin & Prabhu, *supra* note 10, at 886–87, 900–01.

318 Kolender v. Lawson, 461 U.S. 352, 357 (1983).

proscribed.[319] Courts also relied on the "corruptly persuade" language in § 1512 as a limit on the scope of the provision, so as to avoid invalidating the statute as void for vagueness.[320] The "intent to obstruct" element in the obstruction statutes was also used by courts to reject vagueness challenges.[321]

However, one vagueness challenge did succeed in overturning former National Security Advisor John M. Poindexter's conviction under § 1505 for lying to Congress during the Iran-Contra affair.[322] The D.C. Circuit found that the term "corruptly," which described the mental state required for violation of § 1505, was unconstitutionally vague as applied to Poindexter's acts since it did not provide adequate notice that the statute imposed criminal liability on those who lie to Congress.[323] The *Poindexter* court distinguished between the transitive and intransitive use of the term[324] to find that "corruptly," when used to modify the *manner* of an action, would survive constitutional challenge, while "corruptly" used to describe the *motive* of the action would be unconstitutionally vague.[325] Congress subsequently amended the statute to counter the notion that it was unconstitutionally vague,[326] and other circuits have since rejected attempts to extend *Poindexter* to other obstruction statutes.[327] Nevertheless, for the pur-

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319 *See* United States v. Cueto, 151 F.3d 620, 631 (7th Cir. 1998) (finding the term "corruptly" keeps § 1503 within constitutional limits even though the statute "covers a broad spectrum of conduct" (quoting United States v. Griffin, 589 F.2d 200, 206 (5th Cir. 1979))).

320 United States v. Shotts, 145 F.3d 1289, 1300 (11th Cir. 1998) (rejecting vagueness challenge because § 1512(b) "forbids only persuasion with an improper purpose"); United States v. Farrell, 126 F.3d 484, 489–90 (3d Cir. 1997) (differentiating "corruptly" when it is used as the sole scienter requirement from the "corruptly persuade" language that supplements the specific intent requirements in § 1512(b)); United States v. Thompson, 76 F.3d 442, 452 (2d Cir. 1996) (finding that § 1512's use of "corruptly" to describe the persuasion that is prohibited provides adequate notice of unlawful behavior, so that § 1512 is not unconstitutionally vague).

321 United States v. Tyler, 281 F.3d 84, 91–92 (3d Cir. 2002) (finding that § 1512's "intent to obstruct" element ensures that it is "not bereft of scienter requirements" and thus not void for vagueness).

322 United States v. Poindexter, 951 F.2d 369, 377–79 (D.C. Cir. 1991).

323 *Id.* at 379. The Poindexter court was concerned with the prospect that broad definition of "corruptly" may "criminalize all attempts to 'influence' congressional inquiries—an absurd result that the Congress could not have intended." *Id.* at 377–78.

324 *Id.* at 379.

325 *See* United States v. Morrison, 98 F.3d 619, 629 (D.C. Cir. 1996) (explaining the transitive-intransitive distinction).

326 *See* United States v. Brady, 168 F.3d 574, 578 n.2 (1st Cir. 1999) (noting that § 1505 was added to the obstruction statutes to counter the *Poindexter* decision).

327 *See* United States v. Church, 11 Fed. App. 264, 268 (4th Cir. 2001) (finding "corruptly" not vague as applied in § 1517, which prohibits obstruction of bank investigations by federal agencies); United States v. Brennick, 908 F. Supp. 1004, 1010 (D. Mass. 1995) (noting that five of the circuit courts that have considered the use of "corruptly" in § 7212(a), a tax obstruction law, have upheld the statute). In fact, after deciding *Poindexter*, the D.C. Circuit found the term "corruptly" in § 1512(b) to survive a vagueness

pose of analyzing the new anti-shredding provision, the *Poindexter* case serves as an important reminder that federal obstruction statutes can tread close to the constitutional boundaries for vagueness and failure to give notice.

In addition, the argument that § 1519 is unconstitutionally vague is stronger than those made against the other federal obstruction statutes. The statutory language of § 1519 does not limit its reach to actions undertaken "corruptly."[328] The reading advocated by this Note dilutes the notion of the "intent to obstruct," so that the government is no longer required to show the defendant's knowledge of the obstructed proceeding to prove that he intended to obstruct justice. If the language "in relation to or contemplation of" describes a state of mind toward the obstructed investigation, a defendant challenging the law might argue that intentional document destruction occurring "in relation to" a federal investigation would eliminate all mens rea requirements toward the obstructed proceeding. An interpretation that renders § 1519 "a criminal law that contains no mens rea requirement and infringes on constitutionally protected rights" may expose the statute, not just to a challenge that it is vague as applied to anticipatory obstruction, but also to facial attack where "vagueness permeates the text of such a law."[329] Practitioners have already alluded to these constitutional problems; one argued that in an attempt to rid § 1519 of the "nexus" requirement, "Congress may have reached too far in attempting to prevent document destruction" because without a nexus requirement defendants may lack fair warning of the scope of § 1519, and this "violate[s] some of the fairness concerns alluded to in Aguilar."[330] Another described the breadth of § 1519 and questioned whether "Congress . . . criminalized conduct that it did not intend to punish."[331]

There is support, however, for the argument that the anti-shredding provision's scope is narrow enough to withstand constitutional scrutiny, when used to criminalize anticipatory obstruction. The same sources that show how the anti-shredding law can be used to prohibit pre-emptive document destruction also show how it can provide clear

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challenge. *See Morrison*, 98 F.3d at 630. The arguable vagueness of the term "corruptly" was dealt another blow when the dissent in *Aguilar* rejected a vagueness challenge to § 1503 by describing the use of "corruptly" in the federal criminal law as having a "long-standing and well-accepted meaning." United States v. Aguilar, 515 U.S. 593, 616 (1995) (Scalia, J., dissenting).

328 18 U.S.C.A. § 1519 (West Supp. 2003); *see supra* note 205 and accompanying text.

329 City of Chicago v. Morales, 527 U.S. 41, 55 (1999)(citations omitted) (italics removed).

330 Polkes, *supra* note 79, at 10 *see also* Burke & Snyder, *supra* note 272, at 24 (repeatedly referring to the "vagueness" of § 1519's statutory language, though not explicitly raising the constitutional challenge).

331 Lowell & Arnold, *supra* note 16, at 226.

notice to potential violators. The legislative intent in the drafting of the statute and the reasoning of the Supreme Court's decision in *Aguilar* both support the constitutionality of prohibiting anticipatory obstruction.

Congress intended the contemplation language in § 1519 to diminish the level of knowledge a prosecutor must prove.[332] But it does not completely eliminate a mens rea element from the provision. Leahy's statements indicate that the "contemplation" language in the statute was incorporated to ease the prosecutor's burden, so that he or she would not have to prove the defendant's knowledge about the obstructed proceedings.[333] However, by using a new and unique term—"contemplation"—to describe the level of knowledge the defendant must possess toward the obstructed proceeding, § 1519 maintains a mens rea element that clearly divides the permissible from the impermissible. Just as the contemplation language extends liability to the earliest acts of obstruction, it also protects from liability those who destroy documents without contemplating the illegality of their actions.

The reasoning in the *Aguilar* decision provides some support for the constitutionality of prohibiting anticipatory obstruction. While the *Aguilar* majority did not have to address the defendant's vagueness challenge because it found that the conviction lacked the proper "nexus," the dissent did have to explain why § 1503 survived the vagueness challenge.[334] Justice Scalia characterized the defendant's challenge as an argument that the statute "fails to provide sufficient notice that lying to potential grand jury witnesses in an effort to thwart a grand jury investigation is proscribed," and briskly rebuffed this argument.[335] He declared that when dealing with the obstruction of jury proceedings, "any claim of ignorance of wrongdoing is incredible," and that acts committed with the intent to obstruct the due administration of justice are "obviously wrongful."[336] To the dissenting justices, obstructive intent itself is enough to provide constitutionally required notice—including the obstructive intent of a defendant who acts under a mistaken belief about the investigation he impedes.[337] The *Aguilar* majority opinion also provides support for the notion that anticipatory obstruction can be constitutionally criminalized. The majority expressly refused to base its ruling on constitutional "fair notice" requirements[338] and instead based its holding on the proper construc-

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332 *See supra* Part IV.B (discussing the intent element of § 1519).

333 *See supra* Part IV.C.

334 United States v. Aguilar, 515 U.S. 593, 614, 616 (1994) (Scalia, J. dissenting).

335 *Id.* at 616 (Scalia, J., dissenting).

336 *Id.* at 617 (Scalia, J., dissenting).

337 *See* discussion *supra* notes 105–107 and accompanying text.

338 *See* discussion *supra* note 96 and accompanying text.

tion of § 1503.[339] This decision can be seen as an implicit acknowledgment that, if Congress constructed statutes differently, it could constitutionally prohibit obstruction where the nexus between the action and the proceeding is more tenuous than is required under § 1503. In order to follow *Aguilar*, courts will analyze these new statutes by asking how Congress intended them to be used, rather than inquiring into constitutional constraints on how they may be used.[340] While the *Aguilar* majority did not directly address a vagueness challenge, the reasoning and discussion in this case, involving the most broadly worded federal obstruction statute, portends a quick fate for vagueness challenges to all federal obstruction statutes.

CONCLUSION

Courts have not yet faced a case that allows them to consider the breadth of the new Sarbanes-Oxley anti-shredding provision with respect to the prevention of document destruction. Nevertheless, given the scope that Congress intended for the measure, courts should allow prosecutors to use the statute to prevent and punish acts of "anticipatory obstruction." As long as the government can prove that the defendant destroyed documents, intended to destroy documents, and contemplated the obstructed investigation, courts should permit charges to be brought and convictions to stand for obstructing justice. By giving § 1519 a broad reach, courts not only give effect to the legislative intent behind Sarbanes-Oxley, but also punish obstruction undertaken by the most sophisticated defendants in the justice system.

339 *See supra* note 95 and accompanying text.

340 *See* discussion *supra* Part II.B.1.

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INDEX
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