International & National Security Law

Putting Terrorists out of Business: Using Sarbanes-Oxley to Prosecute Terror Financiers

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Assume a charity solicited contributions from donors willing to support a religious or social cause overseas in 2000 and 2001, and that charity's administrators funnel a portion of those funds to a State Department-designated foreign terrorist organization (FTO).[1] Fearing government investigations of their activities after the attacks of September 11, 2001 and the passage of the Patriot Act,[2] the charity's in-house counsel repeatedly encourages staff to "comply with" the charity's established document retention policy with respect to the distribution of donations, which effectively is a euphemism for ordering employees to destroy whatever records that could point to the group's activities that could be construed as material support of terrorism.[3] According to the Supreme Court's decision in *Arthur Andersen LLP v. United States*,[4] under then-existing laws, the hypothetical charity, its officers, and counsel might not have been guilty of obstructing justice because it is not "necessarily corrupt for an attorney to persuade a client with intent to cause that client to withhold documents from the Government," and because that persuasion to destroy documents may not have occurred with a particular government proceeding in mind.[5]

In 2002, however, Congress passed the Sarbanes-Oxley Act[6] in response to the wave of corporate scandals that came to light with Enron's collapse. Along with increasing penalties for existing crimes and generally tightening controls on record-keeping and accounting practices, Congress revised and added criminal provisions for anticipatory obstruction of justice such as the above hypothetical (which is modeled closely on Arthur Andersen's actions leading to the shredding of as many Enron-related documents as possible before being subpoenaed for them by the Securities and Exchange Commission[7]).

Section 802 of Sarbanes-Oxley, the "anti-shredding provision" codified as 18 U.S.C. § 1519, added a very broadly-worded tool to a prosecutor's arsenal—aimed at those who physically destroy documents or other evidence, it criminalizes attempts even to "impede" any matter under federal jurisdiction.[8] This is markedly different from older statutes such as 18 U.S.C. § 1512, the statute at issue in *Arthur Andersen*, which outlaws attempts to "corruptly persuade" someone else to obstruct an "official proceeding."

Furthermore, the Supreme Court has read a so-called "nexus" requirement into the older obstruction statutes: first in 1995 in *United States v. Aguilar*[9] with respect to 18 U.S.C. § 1503, and later reaffirming and arguably expanding the requirement in *Andersen* by applying it to § 1512. The requirement of proving a nexus between the charged obstructive act and an existing official proceeding requires the government to show that the alleged act had the "natural and probable effect" of obstructing a particular judicial proceeding, and that the defendant so intended.[10]

Section 1519, like its sister statutes, does not require a nexus to a particular investigation in its text. Further, the legislative history on § 1519 is clear and explicit—Congress intended no such demand on the government when prosecuting under this law. Federal courts, however, have split as to whether a nexus should be required in § 1519 prosecutions, and have differed (in theory, anyway) in interpreting exactly how that requirement applies to such a wide-reaching law.

Specifically with regard to prosecutions of terrorists or those who provide material support to terrorists, it is unclear whether a theoretical nexus requirement for § 1519 would make any difference in a prosecutor's case. Assuming that the Supreme Court's purpose for imposing such a requirement is to provide defendants fair notice,[11] if a non-profit or "charitable" organization sends money overseas to designated FTOs, files falsified reports with the IRS to gain or maintain tax-exempt status, and destroys associated records, it will not be free from prosecution for obstruction simply because it was unaware of a specific, ongoing IRS or FBI investigation into its activities. Proof that the individuals destroying evidence contemplated such investigations as they acted will subject them to criminal culpability. Perhaps ironically, however, this principle at work in § 1519 actions is arguably less clear in counterterrorism efforts because of the legal distinctions between law enforcement versus national security-related investigations, i.e. a defendant may claim that his destructive actions were not intended to hinder a potential legal probe as much as serving a basic counterintelligence function.[12] But regardless of whether one takes a purely textual approach to the statute or culls its legislative history to determine Congress' intent, that argument points to a procedural distinction without a legal difference for the defendant.

I. Background

Section 1519 was promulgated as part of the Sarbanes-Oxley Act in the wake of the Enron and Arthur Andersen accounting scandals. Generally, the Act served to tighten controls on corporate accounting and increase penalties for certain existing white-collar offenses. Section 1519 was one of two new criminal provisions called for in § 802 of the Act.[13] It reads:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of

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any department or agency of the United States . . . 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.

This provision was purposefully drafted very broadly—Senator Leahy, Chairman of the Senate Judiciary Committee, envisioned § 1519 as a law that "could be effectively used in a wide array of cases where a person destroys or creates evidence with the intent to obstruct an investigation or matter" within federal jurisdiction.[14] Importantly, that a matter be "within the jurisdiction of the United States" is meant to be a jurisdictional requirement, *not* an element of the offense to be proved.[15] A defendant therefore need not be aware of any *particular* agency, etc. that could institute "a matter" which could be obstructed by his destruction of evidence. In other words, this law is *not* restricted to obstruction of an "official proceeding," as is required by other obstruction laws such as 18 U.S.C. § 1512, nor was its reach limited to those who act with the heightened, though undefined "corrupt" intent required by statutes including §§ 1503 and 1512, apparently to avoid the judiciary's narrow reading of those terms.

Although neither § 1503 nor § 1512 includes the element in their respective texts, for each the Supreme Court has read-in a requirement that the alleged obstructive act "have a particular 'nexus' with the official proceeding and have the 'natural and probable effect of interfering with the due administration of justice.'"[16] Courts and commentators alike have differed on whether to impose a nexus requirement for § 1519 prosecutions, in spite of what appears to be Congress' clear intent to the contrary. Senator Leahy explained that "it is sufficient that the act is done 'in contemplation' of or in relation to a matter or investigation."[17] Section 1519 is designed to go after the "individual shredder" in a way that the earlier statutes could not reach.[18] There is no persuasion element here, nor a "corrupt" element, as in other obstruction laws. Instead, § 1519 is designed only to be bound by an intent element and a jurisdictional element.[19]

Still, there have not yet been true test-cases that directly compare § 1519 to its sister statutes. *United States v. Ganier*, a case which stemmed from a 2005 indictment in the Middle District of Tennessee, could have served as a particularly valuable example of how § 1519 operates alongside § 1503. Ganier, a prominent corporate CEO accused of violating government contracting rules, was charged with searching for and destroying computer files as part of an "email retention policy" initiated in light of a grand jury investigation. He was indicted with one count of violating § 1503 and three counts under § 1519,[20] but pleaded guilty to one misdemeanor count of unauthorized access to a computer that was used in interstate commerce before trial.[21]

However, the district judge in *Ganier* had earlier issued an order establishing jury instructions for trial. Along with the general overview below of how § 1519 has been used, the analysis that appears later with regard to how the law might work against terrorist financiers takes the district court's order into account as a good example of how § 1519 is distinct from other obstruction laws.

II. Section 1519 in Action

The strikingly wide array of criminal conduct for which § 1519 violations have been charged shows the breadth, indeed the versatility of the provision, as was suggested in its legislative history.[22] Although the broad applicability of the statute may lend itself to abuse of prosecutorial discretion in both its application and potentially harsh sentencing, the published cases suggest that it has not been misused thus far. Rather, § 1519 is a tool employed by prosecutors against cover-ups of criminal activity.[23] Section 1519 has been used to prosecute destruction or alteration of a variety of documents or electronic data and even the destruction of physical evidence. Destruction cases include destruction of a passport with a fraudulent U.S. residence stamp[24] and other immigration documents.[25] Corruption, alteration, or falsification of documents prosecutions have included cases of falsified or exaggerated police reports,[26] records associated with Medicare or other health care fraud schemes,[27] falsified environmental reports,[28] and falsified records for bankruptcy or business records related to government contracts.[29] The most common cases of electronic data destruction are those involving child pornography[30] and deleted emails or other documents during grand jury investigations.[31] The law has even been used against defendants who torched their getaway car after shooting and killing a man on the street.[32]

In each instance, charges were brought against those who destroyed, altered, or fabricated evidence of a potential federal crime. In the convictions won, juries decided that the defendant had acted with the intent of somehow disrupting an investigation into the activity that the defendant was attempting to cover-up.[33] But what remains the central legal test for applying the statute to those who, for example, anticipate a federal investigation and begin shredding incriminating documents, is how early (in the series of events during which the defendant attempts to cover-up prior criminal conduct) a court will impose liability.[34] This begs two separate but interconnected inquiries which some courts may confound: 1) what was the defendant's state of mind at the time he started destroying documents, and 2) does a "nexus" have to be proved such that obstruction of an official proceeding is a "natural and probable result" of the defendant's act?

It is clear from the statutory language that the requisite intent for § 1519 is the intent simply to obstruct—as stated above, there are no qualifiers or descriptors such as "corruptly," nor the requirement of an "official proceeding." The second question is more vexing—did the defendant have to know more about a proceeding, generally or particularly, and is the government required to prove that there was a sufficient nexus between the defendant's action and that proceeding?

Some argue that fairness concerns exist above and beyond what is written in the statute and Congress' intent. They believe an individual's abstract thought that an action he undertakes might affect an official proceeding, with no knowledge of any particulars of and without a nexus to a particular proceeding, does not reach the level of criminal culpability. [35] Further, they assert that although the Court in *Andersen* "made no explicit reference to Section 1519, its observations regarding

the requirement that 'knowing' impediment is insufficient for criminal culpability could be read as a direct criticism of the section."[36] The *Anderson* decision was even described as one that declared "what was clearly out of bounds—criminality hinged upon an unforeseen proceeding."[37]

At least two courts have followed the nexus route for § 1519. In *United States v. Ganier*, the jury instruction order of the district court, which was filed on June 30, 2005 (one month after the *Arthur Andersen* decision) included a nexus requirement.[38] In *Ganier*, the court acknowledged that § 1519's legislative history "confirms that Congress intended that a broad scope of actions be covered," cited arguments that the section covers destruction of documents in contemplation of an investigation,[39] and agreed that "it appears that Congress intended to remove the nexus requirement from § 1519."[40] The court nevertheless held that, despite the statute's intent, courts still need to determine whether a nexus requirement should be adopted to satisfy the fairness concerns of *Aguilar*. Particularly concerned that defendants may lack fair warning, the *Ganier* court ruled that "the nexus requirement guarantees that conduct is punishable where the defendant acts with an intent to obstruct a particular investigation and in a manner that is likely to obstruct that particular investigation." More recently, in *United States v. Russell*, the court appears to have assumed without deciding that a nexus requirement applies to actions taken under § 1519.[41]

However, there has been clear confusion among some who have advocated for or assumed the existence of a nexus requirement for § 1519. The same article that interpreted the *Andersen* decision as declaring 'what was clearly out of bounds' also clearly distinguished the application of § 1519 from the *Andersen* Court's analysis that applied § 1503's nexus reasoning to § 1512 prosecutions. "Since the statute clearly states the required mens rea, the Court cannot easily assume that Congress intended any higher degree of scienter. As such, the Court also cannot easily apply the nexus requirement that it has imputed to § 1512(b) and other obstruction statutes to limit their reach."[42]

Indeed, the most detailed discussion of § 1519's mens rea requirement in a published judicial opinion cites Senator Leahy's explanation of the purpose of the statute, that it was drafted specifically to avoid the requirement that the defendant know about the proceeding against him.[43] In *United States v. Jho*, the court invoked the same academic article examining § 1519 as did the *Ganier* court. Calling the analysis "an excellent discussion" of the intent of § 1519, the *Jho* court assumed that the statute was designed to remedy the loopholes in other obstruction laws, and stated simply that the required mens rea is that the "defendant act knowingly with the intent to obstruct justice."[44] Defendant Jho, the chief engineer of a foreign vessel, was indicted for:

> Knowingly [altering, concealing, covering up, falsifying, or making a false entry] in any record or document with the intent to impede, obstruct, or influence the investigation and proper administration of a matter within the jurisdiction of the U.S. [Government] and in relation to and in contemplation of a matter, namely, the U.S. Coast Guard's inspections to determine the [ship's] compliance with [the international maritime pollution control protocol] and United States laws.[45]

In that case, the court held:

> [A]ll that is required is proof that Jho knowingly made false entries in a document (the [ship's] Oil Record Book) with the intent to impede, obstruct, or influence the proper administration of any matter within the jurisdiction of the United States Coast Guard. As noted in the legislative history, it is also sufficient that the act is done 'in contemplation' of or in relation to a matter or regulation.[46]

It is also worth noting that the district court in *Russell* cited these passages of the *Jho* decision, including that § 1519 "was specifically meant to eliminate any technical requirement, which some courts had read into other obstruction statutes, that the obstructive conduct be tied to a pending or imminent proceeding,"[47] signifying that the court may have confounded somewhat the questions of nexus and intent. Further, the Seventh Circuit's decision in *United States v. Wortman* made no hint that any extra-textual requirements are required for culpability, and never suggested a problem with the jury instructions in that case, which did not include a nexus requirement. Rather, the *Wortman* court ruled that the evidence presented was sufficient to establish that the defendant did, in fact, destroy evidence (a CD-ROM) and that she acted with the intent of obstructing a federal investigation.[48]

III. Application to Prosecuting Terrorist Financiers

Although neither the Patriot Act nor the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA)[49] went as far as the United Kingdom in terms of imposing an affirmative duty to report "information which he knows or believes might be of material assistance . . . in preventing the commission by another person of an act of terrorism,"[50] U.S. courts have uniformly recognized the broad applicability of § 1519, and it certainly appears that the law may also be a valuable tool against terrorists, or, more likely, against those who finance terrorism.[51]

The split among the courts about the applicability of a nexus requirement in § 1519 actions, however, begs the question of whether its presence or absence is particularly important for prosecuting terror financiers under this law. There are three key scenarios in which a suspected terrorist, or one who allegedly materially supports terrorists might find himself subject to a § 1519 charge. The first is straight-forward: the defendant has or had knowledge or suspicion of an ongoing investigation at the time of his obstructive act. Here, an imposition of a nexus element seems almost certainly inconsequential.

The second case is the commonplace, *Jho*-like scenario wherein the defendant engages in "run of the mill" document or evidence destruction in contemplation or anticipation of future federal investigations. Still, the legal analysis of activities otherwise similar to Jho's may differ somewhat in matters related to conduct supportive of terrorism, in that knowledge that one is assisting a designated FTO might obviate a nexus requirement if the broader scienter associated with helping an FTO can

be incorporated into the act of covering up that assistance. In other words, especially where the destination of funds is a designated FTO, knowledge of that fact during the course of the transaction itself implies a defendant's understanding that destroying records relating to the transaction amounts to impeding a potential federal investigation. On its face, this seems to satisfy the fairness concerns the Supreme Court expressed when creating the nexus requirement in *Aguilar*. This also comports with the *Jho* court's reasoning: Jho's position as a vessel's chief engineer put him on notice of possible investigations by federal authorities (in his case, Coast Guard inspection of pollution logs). The court rejected his argument that a specific investigation must be ongoing (i.e. that routine inspections do not fall under the statute), that he must have known about that investigation, and must have acted with intent to obstruct that investigation.[52] Likewise, financial records of charitable organizations like the one described in the above hypothetical come under routine scrutiny by the IRS, and determining the origin of monies laundered to terrorist organizations is well within the jurisdiction of the FBI. Furthermore, the sophistication of the defendant's counter-intelligence capabilities may be circumstantial evidence of evil intent.[53]

Finally, there is a scenario unique to international/transnational operations, though not necessarily limited to functions of terror groups. A United States person defendant may gain knowledge or suspicion of a possible investigation into his activities due to the disruption of his foreign network or business. For businessmen as well as terrorists, a foreign law enforcement agency's raid on an overseas office or headquarters may signal trouble to come in the United States. In addition, for terrorist suspects or supporters in the U.S., the disruption may be caused either by military or intelligence activities. To what extent these occurrences would afford judicially-recognized contemplation of a U.S. federal investigation, because of which domestic persons would begin destroying documents or other evidence illustrating their association with the overseas operation, will ultimately have to be decided on a case-by-case basis, as is contemplated by § 1519.[54]

Importantly, there does not seem to be any contemplation of distinctions between law enforcement and intelligence operations in § 1519's legislative history, nor would one expect that of a statute whose enactment was prefaced by corporate accounting scandals. A strict reading of § 1519's text probably allows for prosecution in cases where a U.S. law enforcement investigation is contemplated, even if the target is tipped-off by non-law enforcement activity. This leaves an additional question: could § 1519 be used against those who merely destroy documents that would be useful only to the intelligence community, rather than as part of an administrative or judicial proceeding? Would shredding documents to keep them out of the hands of the CIA qualify as an attempt to impede a "matter within the jurisdiction of any department or agency of the United States"?[55] The answer is likely forever to remain purely academic conjecture, but would nevertheless seem to hinge upon how "jurisdiction" is defined for the purposes of this statute, i.e., in the broad sense of sheer power or authority, versus requiring the exercise of that power to be pursuant to some sort of adjudicatory function.

Still, as noted above, in the instance of prosecuting terrorist financing operations, if the target is fronting as a non-profit or charitable organization, it seems that the organization and its principals are conceivably on notice about IRS reporting requirements by virtue of the regulated nature of their activities and status, and any intentionally falsified reporting in violation of IRS regulations would certainly have the "natural and probable" effect of interference with official proceedings. Furthermore, the "charitable" organization itself likely does not have Fifth Amendment protections against producing incriminating documents as might a sole proprietor or individual citizen.[56]

Beyond the judicial debate as to what properly constitutes fair notice, even for terrorists, the government needs to remain mindful of fair application of the statute, as "zealous use of [§ 1519] by prosecutors could render it vulnerable to as-applied constitutional challenges."[57] As a general practice, prosecutors usually do not pursue obstruction charges as primary offenses,[58] but § 1519 "leaves ill-defined what conduct it prohibits, and while it is not unconstitutional to criminalize 'innocuous' behavior, it is unconstitutional to leave citizens guessing as to what behavior is prohibited." [59] Accordingly, it is possible for § 1519 to be arbitrarily or discriminatorily enforced, but that does not appear to have happened so far.

That in mind, terrorism prosecutions under § 1519 have both the likely advantage of making it easier to prove the evil intent of the defendant, as well as the possible disadvantage of being open to as-applied challenges, though the courts have rejected every such challenge so far. But as the statute may broadly be applied in cases ranging from child pornography possession and standard corporate crimes, to document destruction in regulated industries such as health care fraud and environmental violations, it seems that counterterrorism cases, especially those dealing with designated FTO targets, benefit from a presumption that defendants have fair notice that document destruction—in contemplation of an FBI raid, for example—is subject to § 1519.

IV. Conclusion

A charge under an obstruction of justice provision sometimes seems lazy—why would a prosecutor have to rely on such a charge if he has a strong case for a "primary" offense? Indeed, obstruction statutes are fundamentally different from other criminal laws, but for a very important reason: destruction of documents and/or other evidence, if successful, not only obstructs the proper administration of justice, but can prevent the possibility of justice being served altogether. Section 1519 is broad enough to incorporate acts of obstruction across the board such that society can limit, as much as possible, the survival of the fittest criminals.[60] By comparison, a long-held principle in immigration law is that the government has a right to investigate the backgrounds and moral character of visa and citizenship applicants.[61] Likewise, the government has the legitimate power to investigate criminal conduct domestically, and the destruction of evidence limits its ability to do so. As a society, we should prefer that those best at covering their tracks not be handled

lightly by the judicial system. Obstruction statutes therefore can be viewed as an effort to counterbalance criminals' attempts to "get away with it." In a macro-sense, penalties for obstructing justice should sway the cost-benefit analysis of continuing one's criminal activity via cover-ups.[62]

This is not to say that the job of courts is simply to make life easier for prosecutors by artificially keeping evidentiary thresholds low or generally interpreting statutes in the government's favor. Rather, legal cannons summarily reject these notions via lenity with respect to statutory ambiguity and impose all but the highest burden of proof on the evidence to win criminal convictions. This is where the tensions between liberty and justice appear—as a society, we value individuals', even criminals', liberty but also want justice done for wrongdoing. Yet courts have generally agreed that § 1519's language is very clear—it is intended to be far-reaching and was clearly written to avoid additional judicially-created conditions, such as a nexus requirement.

Criminal law, generally, governs the punishments of those who, with a blameworthy state of mind, commit acts that society deems unacceptable. Contemplating a federal investigation—*any* federal investigation—into one's own wrongdoing and acting to try to make such an investigation impossible, has long been thought of, at least in the abstract, as being criminally culpable. And such anticipatory obstruction under § 1519 is a specific intent crime; a defendant's intent to obstruct a government investigation, outside of means which are otherwise Constitutionally and/or statutorily protected, implies that the defendant had fair notice that his acts of destroying evidence were illegal. If, as applied, § 1519 seems to be only the overly harsh product of a Congress reeling from legislative loopholes exploited by major corporations throughout the 1990's, then it is up to Congress to amend the statute. But, in reading this very clear statute, with very explicit legal history, and incorporating notions of what truly constitutes fair notice of unlawful acts, the courts should steer clear of distending *Aguilar*'s nexus requirement to limit § 1519's reach, especially in the case of prosecuting those who try to cover up material support of terrorism.

Endnotes

1 *See* 8 U.S.C. § 1189.

2 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. 107-56, 115 Stat. 272 (2001).

3 *See* 18 U.S.C. §2339A.

4 544 U.S. 696 (2005).

5 *Id.* at 704, 707 (internal quotes and punctuation omitted).

6 Corporate and Auditing Accountability and Responsibility Act of 2002 (Sarbanes-Oxley Act), Pub. L. 107-204, 116 Stat. 745 (2002).

7 *See Andersen*, 544 U.S. at 698-702.

8 *See, e.g.,* United States v. Ionia Management SA, 526 F. Supp. 2d 319, 329 (D. Conn. 2007).

9 *See* 515 U.S. 593 (1995).

10 *Id.* at 599-601.

11 *See Aguilar*, 515 U.S. at 599; *Andersen*, 544 U.S. at 707-08.

12 Similar principles to the ones examined herein may also apply to counterespionage investigations, but particular differences between the two render such comparisons beyond the scope of this article.

13 The other new offense is codified at 18 U.S.C. § 1520, which addresses auditors' record-keeping practices. In addition, Section 1102 of the act modified 18 U.S.C. § 1512, the section under which Arthur Andersen was prosecuted, to include document destruction.

14 148 Cong. Rec S7, 418 (daily ed. July 26, 2002) [hereinafter Leahy floor comments].

15 *Id.* at 7419.

16 *Aguilar*, 515 U.S. at 599; *see also Andersen*, 544 U.S. at 708. Justice Scalia, dissenting in *Aguilar*, believed that the nexus requirement the Court ordered substituted "natural and probable effect" for intent. 515 U.S. at 611 (Scalia, J. dissenting). Possibly in light of that observation, between *Aguilar* and *Andersen* circuit courts that directly addressed the nexus issue for charges under Section 1512 refused to expand the doctrine to that statute. *See* Dana E. Hill, *Anticipatory Obstruction of Justice: Pre-emptive Document Destruction Under the Sarbanes-Oxley Anti-Shriedding Statute, 18 U.S.C. § 1519*, 89 Cornell L. Rev. 1519, 1538 (2004).

17 Leahy floor comments, *supra* note 14, at 7419.

18 *See id.*

19 Hill, *supra* note 16, at 1559, *cited in* United States v. Jho, 465 F. Supp. 2d 618, 636 (E.D. Tex. 2006).

20 The pertinent filings in the district court do not appear to be readily available; the facts above come from a brief discussion of the charges that appeared in the published Sixth Circuit opinion on an interlocutory appeal, 468 F.3d 920 (2006), which addressed the government's handling of expert witness testimony. *See also* Milt Capps, *Ganier Pleads Guilty to Federal Charges*, Nashville Post, July 24, 2007, *available at* http://www.nashvillepost.com/news?id=27210.

21 *See Ganier, Friend of Sundquist, Pleads Guilty to Misdemeanor*, KnoxNews.com, July 24, 2007, http://www.knoxnews.com/news/2007/jul/24/ganier-friend-sundquist-pleads-guilty-misdemeanor/?printer=1/.

22 *See* Leahy floor comments, *supra* note 14.

23 Not all of the below-cited cases have resulted in convictions by juries, and few appellate opinions that cite the statute exist. The most complete discussions of the elements of the law can be found in trial-level opinions, *Jho* and *Gainer*, examined further below.

24 *See* Khan v. Gonzales, 2006 WL 4447634 at *1 (W.D. Tex. 2006).

25 *See* United States v. Vega, 184 Fed. Appx. 236, 242-43 (3d Cir. 2006) (taking judicial notice that the destruction of immigration documents to obstruct an investigation would violate § 1519, which helped to establish corruption for the § 1512 charge).

26 United States v. Hunt, 526 F.3d 739 (11th Cir. 2008) (Defendant narcotics detective, having had prior training that the FBI may investigate claimed civil rights violations by officers, made false entries in a use of force report.); United States v. Perkins, 470 F.3d 150 (4th Cir. 2006) (Defendant police officer included false allegations in a police report—plead out on another charge.); United States v Jackson, 186 Fed. Appx. 736 (9th Cir. 2006) (Defendant police officer wrote a deliberately vague report to protect a fellow federal officer.).

27 *See* United States v. Hoffman-Vaile, 2006 WL 2927564 at *1 (M.D. Fla. 2006) (Defendant in Medicare fraud case removed photographs from files before turning them over to federal investigators. The judge rejected the argument that Section 1519 does not prohibit interference with a grand jury investigation.); United States v. Mermelstein, 2007 WL 1299162 (E.D.N.Y.) (Defendant ophthalmologist indicted for destroying, altering, and falsifying records involved in an investigation and proper administration of matters within the jurisdictions of HHS and the FBI—he falsified and altered medical records submitted as part of a health care fraud scheme.).

28 United States v. Ionia Mgmt. S.A., 555 F.3d 303 (2d Cir. 2009) (Defendant shipping company made false entries in ship's pollution logs.); United States v. Jho, 465 F. Supp. 2d 618 (E.D. Tex. 2006) (Defendant, chief

engineer on a foreign vessel, falsified entries in ship's pollution control logs that would be turned over to the United States Coast Guard. The district court's grant of defendants' motion to dismiss certain non-Section 1519 charges was reversed and remanded, 534 F.3d 398 (5th Cir. 2008)).

29 United States v. Velasco, 2006 WL 1679586 (M.D. Fla. 2006) (Defendant project manager of a construction company, in securing a contract with the Veterans Administration, back-dated an employment contract to hide a kick-back/obstruct an investigation by the VA's Office of the Inspector General.); Thrower v. United States, 2005 WL 1460128 (N.D. Ohio 2005) (Defendant falsified records in bankruptcy.).

30 *See* United States v. Wortman, 488 F.3d 752 (7th Cir. 2007) (Defendant destroyed a CD-ROM with the intent to impede, obstruct, or influence an FBI child pornography investigation, then told someone to lie about what she did.); United States v. Smyth, 2007 WL 81664 (3rd Cir. 2007) (Defendant destroyed his hard drive to obstruct an FBI child pornography investigation, after being contacted by the FBI and agreeing to cooperate. Defendant pleaded guilty.); United States v. Mays, 2007 WL 1839480 (M.D. Fla. 2007) (Defendant deleted child pornography files from his company-issued laptop during an investigation of his alleged physical touching of a young girl on a commercial airliner.).

31 United States v. Ganier, 468 F.3d 920 (6th Cir. 2006) (*see* MDTN Criminal Action No. 04-193-KSF, Case 3:04-cr-00193) (Defendant deleted emails pertaining to a grand jury investigation of his company. Defendant pleaded guilty to lesser charges. *See* brief discussion in the main text, *supra*.); *In re* Grand Jury Investigation, 445 F.3d 266 (3rd Cir. 2006) (Defendant deleted files during a grand jury investigation; conduct also allowed for the application of the crime/fraud exception to the a/c privilege).

32 See generally the *United States v. Eye* and *United States v. Sandstrom* series of decisions in the Western District of Missouri in 2006.

33 The jury need not be instructed that a falsification must be "material." *See* United States v. Ionia Mgmt. S.A., 555 F.3d 303, 310 (2d Cir. 2009).

34 Hill, *supra* note 16, at *1527.

35 Jonathan D. Polkes, *Obstruction of Justice Nexus Requirement Unclear in New Statutes*, N.Y.L.J., July 7, 2003 ("Despite Congress' arguably clear intent to avoid the nexus requirement under § 1519, it is still possible that courts will consider adopting it to satisfy the fairness concerns alluded to in *Aguilar* . . . [I]n light of the Supreme Court's fairness concerns, Congress may have reached too far in attempting to prevent document destruction.").

36 Albert D. Spalding & Mary Ashby Morrison, *Criminal Liability for Document Shredding after Arthur Andersen LLP*, 43 Am. Bus. L.J. 647, 656.

37 *The Supreme Court, 2004 Term, Leading Cases*, 119 Harvard L.Rev. 404, 410 (2005).

38 Middle District of Tennessee docket number 3:04-cr-00193.

39 *See id.* (citing Hill, *supra* note 16, at 1562).

40 *Id.*

41 639 F. Supp. 2d 226, 234 (D. Conn. 2007) (where § 1512 was also at issue).

42 *Id.* at 413 (citations omitted).

43 *Jho*, 465 F. Supp. 2d at 636 (citing a letter from Senator Leahy to Attorney General Ashcroft, 8/2/02).

44 *Id.* at 635, 636 n.9. Note also that the Jho decision is more recent than Judge Forester's Ganier order.

45 United States v. Jho, Second Superseding Indictment, Case 1:06-cr-00065-TH, Document 46 (E.D. Tex.).

46 *Jho*, 465 F. Supp. 2d at 636.

47 *Russell*, 639 F. Supp. 2d at 237.

48 *See* United States v. Wortman, 488 F.3d 752, 754-55 (7th Cir. 2007).

49 Pub. L. 108-458.

50 *See* Anti-Terrorism, Crime and Security Act 2001, c.24, § 117 (U.K.) ("Information About Acts of Terrorism"), *available at* http://www.opsi.gov.uk/Acts/acts2001/ukpga_20010024_en_12#pt13-pb4-l1g117 (last visited Jan. 20, 2010). The Explanatory Notes to the Act are available at http://www.opsi.gov.uk/acts/acts2001/en/01en24-d.htm.

51 IRTPA did amend two statutes similar to the ones discussed in this article (18 U.S.C. §§ 1001 (fraud and false statements) and 1505 (obstruction)) to increase the maximum possible sentence of those convicted under either of those laws "if the offense involves international or domestic terrorism (as defined in section 2331)." It is outside the scope of this article but nevertheless worth noting that although there is little doubt of Congress' intent in passing IRTPA, the text of the amendments themselves leaves unclear whether those increased maximums for crimes that *involve* terrorism can be applied to defendants convicted of material support of terrorism, rather than committing terrorist acts.

52 *See* 465 F. Supp. 2d at 635.

53 Indeed, Hill's argument for a broad reading of § 1519 assumed somewhat sophisticated parties. *See* Hill, *supra* note 16, at 1523. Still, in the unlikely event that a court were to require that a defendant have knowledge of a particular proceeding for the statute to apply, it is unlikely that the government would want to present some such evidence in open court. Any such order, however, would clearly be contrary to Congress' intent, and where defendants have raised this issue, none appears to have been successful in the cases reported thus far.

54 *See* Leahy floor comments, *supra* note 14, at 7419.

55 18 U.S.C. § 1519.

56 *Cf.* United States v. Shinderman, 2006 WL 522105 at *13 (D. Me. 2006).

57 *See supra*, n. 37, 119 Harv. L. Rev. at 413. *See also* Albert D. Spalding & Mary Ashby Morrison, *Criminal Liability for Document Shredding After* Arthur Andersen LLP, 43 Am. Bus. L.J. 647, 684 ("Congress likely did not intend for the obstruction of justice provisions of SOX to be used oppressively."). It would seem a stretch (and belittling), for example, to call a terrorist's bombing of people or infrastructure "obstruction" simply because evidence is destroyed in the blast. There should be a logical disconnect between the act under investigation and the act of destroying evidence (presumably as a secondary offense, both legally and temporally).

58 *See* Hill, *supra* note 16, at 1526 (citing DOJ statistics that only 0.4% of all persons arrested for federal offenses in 2000 were arrested for obstructing justice).

59 *See supra*, n. 37, 119 Harv. L. Rev. at 413.

60 For a discussion about the philosophical and moral principles behind criminalizing obstruction and similar crimes, see Stuart P. Green, *Uncovering the Cover-Up Crimes*, 42 Am. Crim. L. Rev. 9 (2005).

61 *See, e.g.,* Corrado v. United States, 227 F.2d 780, 784 (6th Cir. 1955).

62 *But see* 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 (2002) (doubting the Act's potential for deterring corporate crime).