

Chapter 6

OBSTRUCTION OF JUSTICE

White-collar prosecutors are increasingly electing to rely on obstruction charges in high-profile cases such as the criminal prosecutions of Frank Quattrone (former star banker for Credit Suisse First Boston), Andrew Fastow (former CFO of Enron), Martha Stewart, Sam Waksal (founder of ImClone Systems), Arthur Andersen LLP, and I. Lewis “Scooter” Libby (the former Chief of Staff for Vice President Cheney). The federal criminal code gives prosecutors a tremendous selection of statutes to work with in pursuing such cases, including 18 U.S.C. §§ 1503 (Influencing or injuring officer or juror generally), 1505 (Obstruction of proceedings before departments, agencies, and committees), 1512 (Tampering with a witness, victim, or an informant), 1519 (Destruction, alteration, or falsification of records in federal investigations and bankruptcy), and 1520 (Destruction of corporate audit records).¹ The potential activities covered by these (and other) sections of the Code are wide-ranging. Because those provisions relating to obstruction by threat of force or physical coercion are not generally relevant to our subject-matter, this chapter focuses on the two provisions traditionally used in white-collar cases: the “omnibus” clause of § 1503 and the non-coercive witness tampering prohibitions in § 1512(b). Brief coverage is given to a less frequently invoked statute, § 1505, which has been used where obstructive activity takes place in the context of federal agency and congressional investigations and proceedings. Finally, Congress’s additions to the code in the Sarbanes-Oxley Act of 2002,² 18 U.S.C. §§ 1512(c), 1519, and 1520, are discussed and compared with the protections already embodied in sections 1503, 1505, and 1512(b).

Examining the post-2002 state of the criminal code should illustrate that obstruction is an area where statutes are often enacted in response to specific problems—such as, most recently, the destruction of Enron audit records by Arthur Andersen personnel and the resultant prosecution and conviction of Arthur Andersen. As a result, the code is fairly incoherent, often redundant, and

¹See also 18 U.S.C. § 1510; *id.* § 1516 (outlawing endeavors to obstruct or impede a federal auditor); 26 U.S.C. § 7212(a) (prohibiting corrupt endeavors to obstruct and impede the due administration of the Internal Revenue laws).

²P.L. 107–204, 116 Stat. 745 (2002).

overbroad—leaving much to the discretion of prosecutors. It is also very difficult to master. Accordingly, to assist students in working their way through these materials, charts comparing the elements of some of the most commonly used statutes are included throughout this chapter.

Section 1503's "omnibus clause" has been applied to sanction a great variety of non-coercive obstructive activity, including: false statements made to federal agents; false testimony before a grand jury or trial court; refusing to testify before a grand jury after immunity has been conferred; knowing concealment, falsification, or destruction of evidence to be submitted to a grand jury or court; and efforts to alter the testimony of witnesses for corrupt purposes. It has also been used to pursue conduct that is not perhaps as intuitively categorizable as "obstruction," including a grand juror's or others' unauthorized disclosure of grand jury information and lawyers' efforts to obtain monies from criminal defendants by false promises to "fix" the proceedings or pay off criminal justice officials.

Until Congress amended § 1512 in 2002, that statute was more narrowly focused on witness tampering, such as defendants' efforts to compromise physical evidence or the testimony of prospective witnesses. Among other changes made in the Sarbanes-Oxley Act of 2002, Congress added a very broad obstruction prohibition in § 1512(c) which mimics in major part § 1503's omnibus provision but which is applicable in contexts outside of the judicial proceedings that § 1503 protects, such as in proceedings before federal agencies and in congressional inquiries. Congress also added a whopping potential penalty for violations of § 1512(c), meaning that § 1512(c) may in the future eclipse § 1503 where applicable.

As these materials highlight, one of the interesting questions presented by these statutes is the degree to which otherwise legitimate legal advocacy or advisory activities may be pursued as obstruction under sections 1503, 1505 or 1512(c) or as witness tampering under § 1512(b). Two of the cases examined within, *United States v. Cueto* and the Supreme Court's decision in *Arthur Andersen LLP v. United States*, are relevant to these questions. Materials relating to the apparent theory upon which the jury convicted Arthur Andersen in its recent obstruction case—relating to the work product of in-house counsel—are also included as a case study on the website that supports this book, <http://www.federalwhitecollarcrime.org>.³

A. THE "OMNIBUS" CLAUSE OF 18 U.S.C. § 1503

"[T]he purpose of § 1503 is to protect not only the procedures of the criminal system but also the very goal of that system—to achieve justice."⁴ "The obstruction of justice statute was drafted with an eye to 'the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined.'"⁵ The main body of § 1503

³See also KC Goyer, Note, *Nancy Temple's Duty: Professional Responsibility and the Arthur Andersen Verdict*, 18 Geo. J. Legal Ethics 261 (2004).

⁴*United States v. Griffin*, 589 F.2d 200, 204 (5th Cir.1979).

⁵*Id.* at 206–07 (quoting *Anderson v. United States*, 215 F.2d 84, 88 (6th Cir.1954)).

specifically targets conduct that interferes with the duties of a juror or court officer. The “omnibus” clause is the portion of the statute with which we are principally concerned and it states that “[w]hoever ... *corruptly* or by threats or force, or by any threatening letter or communication, *influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice*, shall be punished” (Emphasis added.) This clause “is essentially a catch-all provision which generally prohibits conduct that interferes with the due administration of justice.”⁶

The Supreme Court’s *Aguilar* decision, below, illustrates the Court’s concern over the potential breadth of the statute, as well as the ambiguities that exist regarding its constituent elements.

UNITED STATES v. AGUILAR

515 U.S. 593 (1995)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

A jury convicted United States District Judge Robert Aguilar of one count of illegally disclosing a wiretap in violation of 18 U.S.C. § 2232(c), and of one count of endeavoring to obstruct the due administration of justice in violation of § 1503. ... We granted certiorari to resolve a conflict among the Federal Circuits over whether § 1503 punishes false statements made to potential grand jury witnesses

Many facts remain disputed by the parties. Both parties appear to agree, however, that a motion for postconviction relief filed by one Michael Rudy Tham represents the starting point from which events bearing on this case unfolded. Tham was an officer of the International Brotherhood of Teamsters, and was convicted of embezzling funds from the local affiliate of that organization. In July 1987, he filed a motion under 28 U.S.C. § 2255 to have his conviction set aside. The motion was assigned to Judge Stanley Weigel. Tham, seeking to enhance the odds that his petition would be granted, asked Edward Solomon and Abraham Chalupowitz, a.k.a. Abe Chapman, to assist him by capitalizing on their respective acquaintances with another judge in the Northern District of California, respondent Aguilar. Respondent knew Chapman as a distant relation by marriage and knew Solomon from law school. Solomon and Chapman met with respondent to discuss Tham’s case, as a result of which respondent spoke with Judge Weigel about the matter.

Independent of the embezzlement conviction, the Federal Bureau of Investigation (FBI) identified Tham as a suspect in an investigation of labor racketeering. On April 20, 1987, the FBI applied for authorization to install a wiretap on Tham’s business phones. Chapman appeared on the application as a potential interceptee. Chief District Judge Robert Peckham authorized the wiretap. The 30-day wiretap expired by law on May 20, 1987, but Chief Judge Peckham maintained the secrecy of the wiretap ... after a showing of good cause. During the course of the racketeering investigation, the FBI learned of the meetings between Chapman and respondent. The FBI informed Chief Judge Peckham, who, concerned with appearances of impropriety, advised respondent in August 1987 that Chapman might be connected with criminal elements because Chapman’s name had appeared on a wiretap authorization.

⁶United States v. Thomas, 916 F.2d 647, 650 n. 3 (11th Cir.1990).

Five months after respondent learned that Chapman had been named in a wiretap authorization, he noticed a man observing his home during a visit by Chapman. He alerted his nephew to this fact and conveyed the message (with an intent that his nephew relay the information to Chapman) that Chapman's phone was being wiretapped. ...

At this point, respondent's involvement in the two separate Tham matters converged. Two months after the disclosure to his nephew, a grand jury began to investigate an alleged conspiracy to influence the outcome of Tham's habeas case. Two FBI agents questioned respondent. During the interview, respondent lied about his participation in the Tham case and his knowledge of the wiretap. The grand jury returned an indictment; a jury convicted Aguilar of one count of disclosing a wiretap, 18 U.S.C. § 2232(c), and one count of endeavoring to obstruct the due administration of justice, § 1503. ...

Section 1503 ... is structured as follows: first it proscribes persons from endeavoring to influence, intimidate, or impede grand or petit jurors or court officers in the discharge of their duties; it then prohibits injuring grand or petit jurors in their person or property because of any verdict or indictment rendered by them; it then prohibits injury of any court officer, commissioner, or similar officer on account of the performance of his official duties; finally, the "Omnibus Clause" serves as a catchall, prohibiting persons from endeavoring to influence, obstruct, or impede the due administration of justice. The latter clause, it can be seen, is far more general in scope than the earlier clauses of the statute. Respondent was charged with a violation of the Omnibus Clause, to wit: with "corruptly endeavor[ing] to influence, obstruct, and impede the...grand jury investigation."

The first case from this Court construing the predecessor statute to § 1503 was *Pettibone v. United States*, 148 U.S. 197 (1893). There we held 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." The Court reasoned that a person lacking knowledge of a pending proceeding necessarily lacked the evil intent to obstruct. Recent decisions of Courts of Appeals have likewise tended to place metes and bounds on the very broad language of the catchall provision. The action taken by the accused must be with an intent to influence judicial or grand jury proceedings; it is not enough that there be an intent to influence some ancillary proceeding, such as an investigation independent of the court's or grand jury's authority. Some courts have phrased this showing as a "nexus" requirement—that the act must have a relationship in time, causation, or logic with the judicial proceedings. In other words, the endeavor must have the "natural and probable effect" of interfering with the due administration of justice. This is not to say that the defendant's actions need be successful; an "endeavor" suffices. *United States v. Russell*, 255 U.S. 138, 143 (1921). But as in *Pettibone*, if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct.

Although respondent urges various broader grounds for affirmance,¹ we find it unnecessary to address them because we think the "nexus" requirement developed in

¹Respondent argues that the term "corruptly" is vague and overbroad as applied to the type of conduct at issue in this case and that Congress narrowed the scope of the Omnibus Clause when it expressly punished his conduct in 18 U.S.C. § 1512.

the decisions of the Courts of Appeals is a correct construction of § 1503. 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.” We do not believe that uttering false statements to an investigating agent—and that seems to be all that was proved here—who might or might not testify before a grand jury is sufficient to make out a violation of the catchall provision of § 1503.

The Government did not show here that the agents acted as an arm of the grand jury, or indeed that the grand jury had even summoned the testimony of these particular agents. The Government argues that respondent “understood that his false statements would be provided to the grand jury” and that he made the statements with the intent to thwart the grand jury investigation and not just the FBI investigation. The Government supports its argument with a citation to the transcript of the recorded conversation between Aguilar and the FBI agent at the point where Aguilar asks whether he is a target of a grand jury investigation. The agent responded to the question by stating:

“[T]here is a Grand Jury meeting. Convening I guess that's the correct word. Um some evidence will be heard I'm ... I'm sure on this issue.”

Because respondent knew of the pending proceeding, the Government therefore contends that Aguilar’s statements are analogous to those made directly to the grand jury itself, in the form of false testimony or false documents.²

We think the transcript citation relied upon by the Government would not enable a rational trier of fact to conclude that respondent knew that his false statement would be provided to the grand jury, and that the evidence goes no further than showing that respondent testified falsely to an investigating agent. Such conduct, we believe, falls on the other side of the statutory line from that of one who delivers false documents or testimony to the grand jury itself. Conduct of the latter sort all but assures that the grand jury will consider the material in its deliberations. But what use will be made of false testimony given to an investigating agent who has not been subpoenaed or otherwise directed to appear before the grand jury is far more speculative. We think it cannot be said to have the “natural and probable effect” of interfering with the due administration of justice.

JUSTICE SCALIA criticizes our treatment of the statutory language for reading the word “endeavor” out of it, inasmuch as it excludes defendants who have an evil purpose but use means that would “only unnaturally and improbably be successful.” This criticism is unwarranted. Our reading of the statute gives the term “endeavor” a

²See, e.g., *United States v. Mullins*, 22 F.3d 1365, 1367–1368 (C.A.6 1994) (altered records and instructed co-worker to alter records subject to subpoena *duces tecum*); *United States v. Williams*, 874 F.2d 968, 976–982 (C.A.5 1989) (uttered false testimony to grand jury); *United States v. McComb*, 744 F.2d 555, 559 (C.A.7 1984) (created false meeting minutes and voluntarily delivered them to grand jury); *United States v. Faudman*, 640 F.2d 20, 23 (C.A.6 1981) (falsified records, some of which had been sought by subpoena *duces tecum*); *United States v. Walasek*, 527 F.2d 676, 679–680 (C.A.3 1975) (falsified documents requested by subpoena *duces tecum*).

useful function to fulfill: It makes conduct punishable where the defendant acts with an intent to obstruct justice, and in a manner that is likely to obstruct justice, but is foiled in some way. Were a defendant with the requisite intent to lie to a subpoenaed witness who is ultimately not called to testify, or who testifies but does not transmit the defendant's version of the story, the defendant has endeavored to obstruct, but has not actually obstructed, justice. Under our approach, a jury could find such defendant guilty.

JUSTICE SCALIA also apparently believes that *any* act, done with the intent to “obstruct ... the due administration of justice,” is sufficient to impose criminal liability. 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. ...

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in part and dissenting in part. ...

The “omnibus clause” of § 1503, under which respondent was charged, ... makes criminal not just success in corruptly influencing the due administration of justice, but also the “endeavor” to do so. We have given this latter proscription, which respondent was specifically charged with violating a generous reading: “The word of the section is ‘endeavor,’ and by using it the section got rid of the technicalities which might be urged as besetting the word ‘attempt,’ and it describes *any effort or essay* to accomplish the evil purpose that the section was enacted to prevent.” *United States v. Russell*, 255 U.S. 138, 143 (1921) (emphasis added) (interpreting substantially identical predecessor statute). Under this reading of the statute, it is even immaterial whether the endeavor to obstruct pending proceedings is possible of accomplishment. In *Osborn v. United States*, 385 U.S. 323, 333 (1966), we dismissed out of hand the “impossibility” defense of a defendant who had sought to convey a bribe to a prospective juror through an intermediary who was secretly working for the Government. “Whatever continuing validity,” we said, “the doctrine of ‘impossibility’ ... may continue to have in the law of criminal attempt, that body of law is inapplicable here.”¹

Even read at its broadest, however, § 1503's prohibition of “endeavors” to impede justice is not without limits. To “endeavor” means to strive or work for a certain end. Webster's New International Dictionary 844 (2d ed. 1950); 1 New Shorter Oxford English Dictionary 816 (1993). Thus, § 1503 reaches only *purposeful* efforts to obstruct the due administration of justice, *i.e.*, acts performed with that very object in mind. This limitation was clearly set forth in our first decision construing § 1503's predecessor statute, *Pettibone v. United States*, 148 U.S. 197 (1893), which held an

¹This complete disavowal of the impossibility defense may be excessive. As *Pettibone v. United States*, 148 U.S. 197 (1893), acknowledged, an endeavor to obstruct proceedings that did not exist would not violate the statute. “[O]bstruction can only arise when justice is being administered.”

indictment insufficient because it had failed to allege the intent to obstruct justice. That opinion rejected the Government's contention that the intent required to violate the statute could be found in “the intent to commit an unlawful act, in the doing of which justice was in fact obstructed”; to justify a conviction, it said, “the specific intent to violate the statute must exist.” *Pettibone* did acknowledge, however—and here is the point that is distorted to produce today's opinion—that the specific intent to obstruct justice could be found where the defendant intentionally committed a wrongful act that had obstruction of justice as its “natural and probable consequence.”

Today's “nexus” requirement sounds like this, but is in reality quite different. Instead of reaffirming that “natural and probable consequence” is one way of establishing intent, it *substitutes* “‘natural and probable effect’ ” *for* intent, requiring that factor even when intent to obstruct justice is otherwise clear.² But while it is quite proper to derive an *intent* requirement from § 1503's use of the word “endeavor,” it is quite impossible to derive a “*natural and probable consequence*” requirement. One would be “endeavoring” to obstruct justice if he intentionally set out to do it by means that would only unnaturally and improbably be successful. As we said in *Russell*, “any effort or essay” corruptly to influence, obstruct, or impede the due administration of justice constitutes a forbidden endeavor, even, as we held in *Osborn*, an effort that is *incapable* of having that effect.

The Court does not indicate where its “nexus” requirement is to be found in the words of the statute. Instead, it justifies its holding with the assertion that “[w]e 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 ... of what the law intends to do if a certain line is passed.” But “exercising restraint *in assessing the reach* of a federal criminal statute” (which is what the rule of lenity requires) is quite different from importing extratextual requirements *in order to limit the reach* of a federal criminal statute, which is what the Court has done here. By limiting § 1503 to acts having the “natural and probable effect” of interfering with the due administration of justice, the Court effectively reads the word “endeavor,” which we said in *Russell* embraced “any effort or essay” to obstruct justice out of the omnibus clause, leaving a prohibition of only actual obstruction and competent attempts....

Since I find against respondent on the § 1503 count, I must consider several other grounds offered by respondent for affirming the Court of Appeals' setting aside of his conviction. First, invoking the interpretive canon of *ejusdem generis*, he argues that, since all the rest of § 1503 refers only to actions directed at jurors and court officers, the omnibus clause cannot apply to actions directed at witnesses. But

²[*United States v. Thomas*, 916 F.2d 647, 651 (C.A.11 1990)], which appears to be the origin of this doctrine, made precisely the same mistake the Court does. It cited and misapplied earlier Court of Appeals cases standing for the entirely different principle—flowing from our language in *Pettibone*—that to prove an “endeavor” to obstruct justice, “all the government has to establish is that the defendant should have reasonably foreseen that the natural and probable consequence of the success of his scheme would [obstruct the due administration of justice].” *United States v. Silverman*, 745 F.2d 1386, 1393 (C.A.11 1984). This does not impose a requirement of “natural and probable consequence,” but approves a manner of proof of “intent.” See, e.g., *United States v. Neiswender*, 590 F.2d 1269, 1273 [(CA4 1979)].

the rule of *eiusdem generis*, which “limits general terms which follow specific ones to matters similar to those specified,” has no application here. Although something of a catchall, the omnibus clause is *not* a general or collective term following a list of specific items to which a particular statutory command is applicable (*e.g.*, “fishing rods, nets, hooks, bobbers, sinkers, and other equipment”). Rather, it is one of the several distinct and independent prohibitions contained in § 1503 that share only the word “Whoever,” which begins the statute, and the penalty provision which ends it. Indeed, given the already broad terms of the other clauses in § 1503, to limit the omnibus clause in the manner respondent urges would render it superfluous.

Respondent next contends that because Congress in 1982 enacted a different statute, 18 U.S.C. § 1512, dealing with witness tampering, and simultaneously removed from § 1503 the provisions it had previously contained specifically addressing efforts to influence or injure witnesses, see Victim and Witness Protection Act of 1982, Pub.L. 97-291, 96 Stat. 1249-1250, 1253, his witness-related conduct is no longer punishable under the omnibus clause of § 1503. The 1982 amendment, however, did nothing to alter the omnibus clause, which by its terms encompasses corrupt “endeavors to influence, obstruct, or impede, the due administration of justice.” The fact that there is now some overlap between § 1503 and § 1512 is no more intolerable than the fact that there is some overlap between the omnibus clause of § 1503 and the other provisions of § 1503 itself. It hardly leads to the conclusion that § 1503 was, to the extent of the overlap, silently repealed. It is not unusual for a particular act to violate more than one criminal statute, and in such situations the Government may proceed under any statute that applies. It is, moreover, “a cardinal principle of statutory construction that repeals by implication are not favored.”

Finally, respondent posits that the phrase “‘corruptly ... endeavors to influence, obstruct, or impede’ may be unconstitutionally vague,” in that it fails to provide sufficient notice that lying to potential grand jury witnesses in an effort to thwart a grand jury investigation is proscribed. Statutory language need not be colloquial, however, and the term “corruptly” in criminal laws has a longstanding and well-accepted meaning. It denotes “[a]n act done with an intent to give some advantage inconsistent with official duty and the rights of others It includes bribery but is more comprehensive; because an act may be corruptly done though the advantage to be derived from it be not offered by another.” As the District Court here instructed the jury:

“An act is done corruptly if it's done voluntarily and intentionally to bring about either an unlawful result or a lawful result by some unlawful method, with a hope or expectation of either financial gain or other benefit to oneself or a benefit of another person.”

Moreover, in the context of obstructing jury proceedings, any claim of ignorance of wrongdoing is incredible. Acts specifically intended to “influence, obstruct, or impede, the due administration of justice” are obviously wrongful, just as they are necessarily “corrupt.”...

Notes

1. *Elements/Source of the “Nexus” Requirement.* Courts use varying formulations to

describe the elements of a prosecution under the “omnibus” clause of 18 U.S.C. § 1503. A compilation of those formulations is that the government must prove beyond a reasonable doubt that the defendant, (1) knowing that a judicial proceeding was pending; (2) corruptly; (3) endeavored; (4) to influence, obstruct, or impede the due administration of justice. *See* United States v. Quattrone, 441 F.3d 153, 170 (2d Cir. 2006); United States v. Brenson, 104 F.3d 1267, 1275 (11th Cir.1997). Does the *Aguilar* opinion indicate that the government actually bears the burden of proving more than the above formula? Certainly, the Court indicates that an “intent to obstruct” is a “requisite”—is this a separate element to be charged and proved, or is it implicit in the above list of elements? What element does the *Aguilar* Court’s “nexus” requirement modify or define—or is this a new element created by the Court?

The *Aguilar* Court seems to derive the “nexus” requirement from lower court opinions. Those opinions were themselves all over the lot with respect to where the “nexus” requirement fit in the statutory scheme. *See, e.g.*, United States v. Thomas, 916 F.2d 647, 651 n. 5 (11th Cir.1990) (explaining that various panels of the Eleventh Circuit have grafted the “nexus” requirement onto different elements of § 1503). Those decisions cited with approval by the *Aguilar* Court in support of the “nexus” requirement treated the “nexus” requirement as modifying the “due administration of justice” element. Justice Scalia’s opinion is correct in noting, however, that the “natural and probable effect” language that the majority employs in its “nexus” requirement was and is often used not as an independent showing necessary to prove the impairment of the “due administration of justice,” but rather as a means of lightening the government’s burden of showing an intent to obstruct (more about that below). *See* United States v. Brenson, 104 F.3d 1267, 1277–78 (11th Cir.1997). Does it matter what element the “nexus” requirement modifies? Note that other obstruction statutes, discussed *infra*, such as § 1512, do not contain a requirement that the “due administration of justice” be impeded, obstructed, or influenced.

The Supreme Court in *Arthur Andersen LLP v. United States*, reproduced *infra*, also applied its “nexus” test to § 1512. In so doing, it seemed to characterize the “nexus” requirement as originating in the intent requirement—presumably inhering in the word “corrupt”—rather than the “due administration of justice” element.

2. *Perjury*. The “nexus” requirement has been deemed “particularly critical in section 1503 prosecutions premised on false testimony.” *Thomas*, 916 F.2d at 652. Most courts recognize that perjury can be the basis for an obstruction prosecution, but they caution that not all false or evasive testimony constitutes obstruction, citing the Supreme Court’s holding that perjurious testimony may not be the basis of a contempt sanction absent a showing that the perjury obstructed the court in the performance of its duty. *See In re Michael*, 326 U.S. 224, 227–28 (1945). To show an obstruction based on false testimony, then, the government generally must show that the “statements had the natural and probable effect of impeding justice.” *Thomas*, 916 F.2d at 652; *see also* United States v. Littleton, 76 F.3d 614, 619 (4th Cir.1996). Why might a prosecutor elect to charge an obstruction count together with, or in lieu of, a perjury count when pursuing false testimony? *See, e.g.*, United States v. Brown, 948 F.2d 1076, 1080 (8th Cir.1991) (testimony of a single witness sufficient to support a conviction under § 1503).

3. *Pending Proceeding*. Most courts believe that “*Aguilar* reaffirmed the proposition that a defendant may be convicted under section 1503 only when he knew or had notice of a pending proceeding.” United States v. Frankhauser, 80 F.3d 641, 650–51

(1st Cir.1996). There is nothing in the statute that requires proof of a pending judicial proceeding, let alone the defendant's knowledge thereof. *See, e.g., United States v. Novak*, 217 F.3d 566 (8th Cir.2000) (questioning existence of this requirement which is not reflected in plain language of statute but assuming its existence for purposes of the case). How, then, do these purported elements fit into the statutory scheme?

There is little litigation concerning the “pending proceeding” requirement where formal proceedings have commenced—for example, where the obstructive activity occurs in connection with pre-trial or trial activities. And there is relatively little call to address the question of when a proceeding ends for purposes of § 1503. Defendants commonly challenge this requirement when the obstructive activity occurs in the course of the investigation, for example when the defendant allegedly makes false statements to investigating officers or where he conceals, destroys, or falsifies documents before a designated grand jury could convene to investigate his case, hear witnesses, or in some cases, issue subpoenas. The courts have “decline[d] to establish a rule ‘by which some formal act of the grand jury will be required to establish ‘pendency.’ ” *United States v. Vesich*, 724 F.2d 451, 455 (5th Cir.1984) (quoting *United States v. Walasek*, 527 F.2d 676, 678 (3d Cir.1975)). Instead, the courts “look to whether the investigating agency has acted ‘in furtherance of an actual grand jury investigation, i.e., to secure a presently contemplated presentation of evidence before the grand jury.’ ” *Id.*

4. *Judge-Made Elements.* *Aguilar* was not an aberrational case in its attempt to secure an obstruction conviction based on false statements made to FBI agents in the course of an investigation. *See, e.g., United States v. Grubb*, 11 F.3d 426 (4th Cir.1993); *United States v. Wood*, 958 F.2d 963 (10th Cir.1992). Why would prosecutors in such cases elect to pursue an obstruction count with, or instead of, a false statements count under § 1001? Note that *Brogan v. United States*, reproduced *supra* Chapter 5, in which the Supreme Court definitively held that an “exculpatory ‘no’” does violate § 1001, was not decided until 1998, four years *after* the Ninth Circuit’s decision in *Aguilar*. Accordingly, the Ninth Circuit below in *Aguilar* stated that the conduct alleged in the case “is governed not by section 1503 but by 18 U.S.C. § 1001. Furthermore, even under a section 1001 charge, the statute does not apply to certain situations where a truthful response would have incriminated the declarant. This is known as the ‘exculpatory no’ doctrine.” *United States v. Aguilar*, 21 F.3d 1475, 1483 (9th Cir.1994).

This situation illustrates how judge-made elements designed to rationalize the application of a given statute (such as the “exculpatory ‘no’” defense under § 1001, the § 1001 “judicial function” exception, and the “nexus” requirement of § 1503), may actually work together to create unanticipated and irrational results. *See also Wood*, 958 F.2d 963 (in a case in which defendant allegedly made false statements to FBI agents who were “acting under the authority of the Phoenix grand jury,” affirming the dismissal of § 1001 count because defendant’s statements were made in the course of a judicial proceeding and thus were exempt from prosecution under the § 1001 “judicial function” exception, but at the same time affirming dismissal of § 1503 count because defendant’s statement would not have the natural and probable effect of impeding the pending grand jury investigation).

5. *Civil Cases.* Pending proceedings include not only grand jury investigations and criminal cases, but also civil judicial proceedings. For example, if representatives

of a party to a civil lawsuit (to which the government is not a party) were to destroy documents that might otherwise be discoverable (even though not then under court order or subpoena), those representatives may be subject to criminal prosecution for obstruction. *See, e.g.*, *United States v. Lundwall*, 1 F.Supp.2d 249 (S.D.N.Y.1998).

6. *No Subpoena Needed.* At least until the Arthur Andersen case, many people (including some lawyers) mistakenly believed that if a person destroys documents or attempts to subvert witness testimony *before* a subpoena issues, that person cannot be prosecuted for obstruction under § 1503. So long as there is proof that a defendant knows of the pending proceeding, however, “the 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.” *See, e.g.*, *Lundwall*, 1 F.Supp.2d at 254; *see also* *United States v. Ruggiero*, 934 F.2d 440, 450 (2d Cir.1991); *see also* *Wilder v. United States*, 143 F. 433, 442 (4th Cir.1906) (inducing witness not under subpoena to refuse to testify was actionable as an obstruction under the statute).

7. *Endeavor.* In reading the predecessor statute to § 1503, the Supreme Court defined an “endeavor” as “any effort or essay to accomplish the evil purpose that the section was enacted to prevent.” *United States v. Russell*, 255 U.S. 138, 143 (1921). The law is clear that an individual need not succeed in actually obstructing justice to violate § 1503. Indeed, an “endeavor” is deemed “very similar to a criminal solicitation ... and does not require proof that would support a charge of attempt.” *United States v. Fasolino*, 586 F.2d 939, 940 (2d Cir.1978). Given that the “endeavor” seems to be the *actus reus* of the crime, what should suffice? Should the same concerns that require that a “substantial step” be taken in furtherance of a criminal design before attempt liability will attach control in this context? *See* Model Penal Code § 5.01(1)(c).

Justice Scalia believes that the Court’s “nexus” requirement essentially reads the “endeavor” element out of the statute, “leaving a prohibition of only actual obstruction and competent attempts.” If the only cases the “nexus” requirement carves out of § 1503 are those in which the obstructive activity, although intentional, “would only unnaturally and improbably be successful,” is that much of a loss? Is the “nexus” requirement likely to succeed in narrowing the applicability of § 1503 to those cases in which the obstructive activity is most threatening, harmful, or blameworthy?

8. *Materiality?* In a number of high-profile cases, including the prosecutions of Martha Stewart and I. Lewis (“Scooter”) Libby, the government elected to pursue the defendants for obstruction but not to charge the allegedly criminal conduct whose investigation was obstructed. Thus, for example, Martha Stewart was charged with, *inter alia*, obstruction of justice (under § 1503’s kissing cousin, § 1505, considered *infra*) in connection with her sale of shares of ImClone Systems Inc. stock, allegedly after a “tip” from ImClone’s founder. Although convicted for obstruction, *see* *United States v. Stewart*, 443 F.3d 273 (2d Cir. 2006), in connection with the false explanations she offered for her stock sale, she was never indicted for the insider trading that spawned the investigation. Similarly, Scooter Libby was convicted for, *inter alia*, obstruction under § 1503 based on his lies to federal investigators and the grand jury about leaks of a CIA agent’s identity, but not for the underlying offense of unauthorized disclosure of classified information. *See, e.g.*, *United States v. Libby*,

429 F. Supp.2d 1 (D.D.C. 2006).

Some have criticized prosecutors' decisions to bring these cases; for example, one commentator argues that "it is far from clear that Stewart's trades were unlawful, let alone illegal, and it is hard to identify any harm her acts directly caused anyone." Jeanne L. Schroeder, *Envy and Outsider Trading: The Case of Martha Stewart*, 26 *Cardozo L. Rev.* 2023, 2023 (2004).

Professor Ellen Podgor, in response to cases such as these, proposes that Congress add a materiality element to the obstruction statutes—an element that is *not* presently required. See Ellen S. Podgor, *Arthur Andersen, LLP and Martha Stewart: Should Materiality Be an Element of Obstruction of Justice?*, 44 *Washburn L.J.* 583 (2005). Professor Podgor argues: "Clearly, when the obstructive conduct precludes prosecution on the underlying charge there is no choice but to use an obstruction statute to achieve justice. . . . In contrast, however, when the prosecutor selects an obstruction charge and fails to charge the underlying conduct solely for expediency purposes, the choice should be subject to scrutiny." *Id.* at 584. Others argue that this objection misconceives the harm in obstruction. See Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as a Case Study*, 96 *J. Crim. L. & Criminology* 643, 678 (2006). What do you think?

9. *Specific Intent to Obstruct and "Corrupt" Motive.* The *Aguilar* Court talks of the "requisite intent to obstruct," and the case upon which it relies, *Pettibone v. United States*, 148 U.S. 197, 207 (1893), refers to § 1503's predecessor statute as requiring "specific intent." What is the basis for this asserted intent requirement? Once again, there is a fair amount of confusion regarding the source, definition, and application of this element. There is also a great deal of confusion regarding the relationship between this specific intent requirement and the statutory requirement that the defendant act with a "corrupt" motive. Finally, the courts are not in agreement as to how to define a "corrupt" motive. And that definition is critical because, as the following case illustrates, in some circuits the only thing that separates entirely lawful—and even laudable—activity from illegal obstruction is the corrupt motive of the defendant.

UNITED STATES v. CUETO

151 F.3d 620 (7th Cir.1998)

BAUER, CIRCUIT JUDGE.

...

Thomas Venezia owned B & H Vending/Ace Music Corporation ("B & H"), a vending and amusement business, and operated an illegal video gambling business through a pattern of racketeering activities and illegal gambling payouts, in violation of state and federal anti-gambling and racketeering laws. Venezia hired Amiel Cueto, an attorney, to represent him as well as to defend the tavern owners associated with B & H in the event of any arrests and/or criminal charges for their participation in the illegal gambling operation. In March of 1995, Venezia and B & H were indicted on federal racketeering charges, in addition to other related charges including illegal gambling.¹ Throughout the investigation and prior to Venezia's

¹The charges alleged that B & H supplied video poker games to various liquor-selling

indictment, Cueto served as Venezia’s lawyer and advisor. Cueto was not Venezia’s attorney of record during the trial; nonetheless, the record indicates that Venezia continued to rely on Cueto’s advice throughout the prosecution of the racketeering case.

On December 2, 1995, Venezia and B & H were convicted of racketeering, illegal gambling, and conspiracy arising out of the operation of the illegal gambling business. Seven months later, another federal grand jury returned a second indictment naming Cueto, Venezia, and Robert Romanik, a local public official and investigator who worked for Cueto and Venezia. ... This second indictment is the impetus for the current appeal.

To understand the context of the instant indictment, convictions, and appeal, we examine the nature and scope of Cueto’s relationship with Venezia, his association with the illegal gambling operation, and his involvement in the investigation, indictment, and prosecution of Venezia, the illegal gambling operation, and the racketeering enterprise. In 1987, Venezia purchased a vending and amusement business, later known as B & H, which operated an illegal video gambling business for about eight years. B & H supplied video poker games to local bars in the metropolitan area of East St. Louis, Illinois, including a Veterans of Foreign Wars Post (“VFW”) on Scott Air Force Base, and the tavern owners agreed to make illegal gambling payouts to its customers.² State agents believed the video games were being used for illegal gambling purposes, and beginning in 1992, the Illinois Liquor Control Commission (“ILCC”) and the State Police initiated a joint investigation in St. Clair County, which targeted illegal gambling operations in Southern Illinois.

The ILCC has broad investigatory powers to supervise liquor licensees, and ILCC Agent Bonds Robinson worked on the task force and investigated the gambling operations in cooperation with the state police. Initially, Robinson worked in a non-undercover capacity as part of the state investigation to determine, in the course of routine liquor inspections, whether any establishment was making illegal gambling payouts. Agents of the ILCC began to strictly enforce the gambling regulations and frequently visited the taverns to ensure compliance. Eventually, the FBI became interested in the state’s investigation, and ultimately decided to use Robinson in a federal investigation of illegal gambling operations in St. Clair County, particularly Venezia’s gambling operation. At some later point, Robinson assumed an undercover role for the FBI as a corrupt liquor agent in an attempt to gather evidence against Venezia and B&H. Soon thereafter, the state police raided the VFW Post, seized B&H’s video poker games, and arrested two VFW employees for maintaining an illegal gambling establishment. After the raid, Venezia and B&H supplied additional video games to the VFW, which continued to provide its customers with illegal gambling payouts.

In an attempt to gather evidence, Robinson, who was present at the VFW raid,

establishments on which the tavern owners provided illegal gambling payouts to its customers. B & H then reimbursed the tavern owners for the money they paid out on the video games and shared with the owners any profits the games earned.

²Video games that swallow pocket change and “pay off” in game replays are unobjectionable; but if the owner of an establishment pays winners in cash or liquor, then it is a violation of Illinois anti-gambling laws.

indicated that Venezia could avoid further interruptions of his illegal gambling operation if he were to offer a bribe to discourage the investigation and the interference, and he suggested to Venezia that they meet. Venezia consulted with Cueto, who instructed Venezia to meet with Tom Daley, one of his law partners at the time. In an attempt to portray Robinson as a dishonest agent, Daley reported to the ILCC that Robinson had solicited a bribe at the VFW. A meeting was then scheduled between Venezia and Robinson, who met at B & H corporate headquarters. Robinson taped the conversation at the FBI's request, and the tape was introduced into evidence in the racketeering case and at Cueto's trial. Soon after the meeting, the VFW was raided again; B & H video poker games were seized, and two employees were arrested. The ILCC issued an administrative violation to the VFW as well as a warning to remove the illegal gambling machines, otherwise, its liquor license would be revoked. Again, Venezia consulted with Cueto about the raids, the criminal charges, and the prosecutions, and they discussed available options and courses of action.

First, Cueto and Venezia drafted a letter, detailing Robinson's alleged "corrupt" conduct and accusing him of soliciting bribes, and delivered it to St. Clair County State's Attorney Robert Haida. Cueto also filed a complaint in state court against Robinson, in which Cueto alleged that Robinson was a corrupt agent. *See Venezia v. Robinson*, No. 92-CH 299. Cueto obtained a court order that required Robinson to appear for a hearing in *People v. Moore*, one of the gambling prosecutions arising from the VFW raid.⁵ Pursuant to the order, Robinson appeared in state court, and Cueto immediately served him with a subpoena, which required him to appear in court within fifteen minutes for an injunction hearing in *Venezia v. Robinson*. Cueto had prepared a petition, requesting either a temporary restraining order or a preliminary and permanent injunction against alleged extortion and other vexation to prevent Robinson from interfering with the operation of Venezia's business. Robinson had not seen a copy of the complaint, had not been served with process, and was not represented by counsel.

At the hearing, Robinson's requests for an attorney were denied, and the state court judge permitted Cueto to question Robinson about the FBI's investigation (which at that point was still a covert operation) and the evidence it had obtained in the course of the investigation. Without permitting Robinson to put on a defense and without articulating any findings of fact or conclusions of law, the state court entered a preliminary injunction against Robinson, which indefinitely enjoined him from interfering with Venezia's business operations. Venezia then returned to the VFW, as well as other taverns affiliated with the gambling operation, to advise them that a state court judge had entered an injunction against Robinson and that he could no longer interfere with their establishments and the illegal gambling operation.

Notwithstanding the injunction and pursuant to instructions from the Director of ILCC to continue his routine liquor inspections, Robinson visited another establishment associated with B & H's gambling operation and discovered that the tavern owner was providing illegal gambling payouts on some of the video machines. Thereafter, Dorothy McCaw was arrested for operating and maintaining

⁵At trial, Cueto admitted that he obtained the court order for unlawful purposes and that he fraudulently used the court order to lure Robinson to court for the injunction proceedings.

an illegal gambling establishment, and she signed a written confession for her participation in illegal gambling activities. Upon learning of the inspection and arrest, Venezia contacted Cueto, who arranged for Venezia and Romanik, the third individual charged in the instant indictment, to obtain another statement from McCaw. Cueto then drafted a letter to the ILCC, State's Attorney Haida, the Office of the United States Attorney for the Southern District of Illinois, and the FBI, claiming that his client was suffering damage as a result of Robinson's “unlawful” interference with the operation of Venezia's business and threatened that if the conduct continued, he would file suit against the ILCC, in addition to Robinson, for damages incurred. Without McCaw's knowledge, Cueto attached to that letter the statement she had given to Venezia and Romanik, which supported Cueto's allegations of interference. Cueto also filed a rule to show cause in state court, which described Robinson's violations of the injunction and requested the court to find him in contempt; McCaw's statement also was attached to the rule to show cause, again without her knowledge.

Represented by the Office of the United States Attorney for the Southern District of Illinois, Robinson filed a motion to remove the rule to show cause in *Venezia v. Robinson* to federal district court pursuant to 28 U.S.C. § 1442(a)(1). In the removal proceeding, the district court determined that Robinson had been working for the FBI under the control of a federal agent during the VFW raids, which therefore established federal jurisdiction. After removal, the district court dissolved the injunction and dismissed the complaint. Cueto filed an appeal in this court, challenging the dissolution of the injunction and the dismissal of the complaint. Recognizing that the injunction hearing had violated Robinson's rights to due process, we affirmed the district court's order. Cueto filed a petition for certiorari in the Supreme Court, which also was denied.

During the investigation, the record indicates that Cueto and Venezia developed more than a professional attorney-client relationship, entering into various financial transactions and business deals, some of which involved secret partnerships. A few examples include: (1) they purchased unimproved real estate, developed the real estate, built and managed a topless nightclub (Club Exposed), which operated some of B & H's illegal gambling machines; (2) Venezia and Cueto incorporated Millennium III, an asbestos removal company, and applied for and obtained a \$600,000 line of credit to complete the purchase acquisition; and (3) Venezia purchased Cueto's office building and moved B & H corporate headquarters into it. The record demonstrates that in order to obtain financing, Venezia reported B & H as a principal asset on his financial statements and loan applications to establish the necessary credit he and Cueto needed to become joint borrowers on various loans. Moreover, the record indicates that the lender in the Millennium purchase relied upon Venezia's financial statement in its decision to loan the money for the acquisition.

About the time the Millennium purchase was finalized, state police and Robinson arrested George Vogt, a B & H customer, for gambling. At a hearing in the state's prosecution of Vogt, Robinson testified and Cueto cross-examined him. After the hearing, Cueto again approached State's Attorney Haida, provided him with the transcripts from the *Vogt* hearing, and urged Haida to indict Robinson for perjury. Thereafter, Haida commenced an investigation of Robinson's activities. Nothing came of Cueto's allegations of perjury, and the investigation ended without

any charges being filed.

The investigation of Venezia and B & H began in early 1992, and the events discussed above occurred over a period of approximately three years. We briefly mentioned some of the initial business and financial dealings between Venezia and Cueto, but to avoid an even longer discussion of these background facts, we think it unnecessary to specifically discuss every financial transaction contained in the record except to point out that together Venezia and Cueto participated in various business transactions, in which millions of dollars exchanged hands to finance the purchases of various real estate interests and construction costs relating to various development projects, including certain gambling operations. The indictment specifically charged that Club Exposed, the nightclub owned by Venezia and Cueto, Millennium III, as well as other business transactions in which they were involved, depended upon the continued operation of B & H and the illegal gambling business to secure and to cover the various loans and debts they incurred in their financial ventures.

Even after Cueto became a business partner of Venezia and invested in various real estate and development projects with him, he continued to give Venezia legal advice. Although Cueto was not an attorney of record, he participated in the preparation of Venezia's defense in the racketeering prosecution. Cueto continued to urge State's Attorney Haida to indict Robinson for perjury. He also contacted Congressman Jerry Costello, who owned an equal one-third partnership interest in a gambling development project with Cueto and Venezia, and asked the Congressman to contact Haida and to offer him a seat on the judiciary in exchange for Haida's recommendation that Cueto be appointed as the next State's Attorney. Cueto also began to publish a newspaper, the *East Side Review*, and authored an article in which he indicated that in the next election he intended to run for St. Clair County State's Attorney, and in the event he was elected, he would prosecute Robinson.⁷

In August of 1994, the government empaneled a grand jury to examine the evidence obtained in the FBI's investigation of Venezia and B & H, and the grand jury also initiated its own investigation of these allegations. In response, Cueto prepared and filed various motions to hinder the investigation and to discharge the grand jury, all of which were denied. Notwithstanding the defense tactics and delays, the grand jury indicted Venezia, among others; he was prosecuted, and ultimately, convicted for operating an illegal gambling enterprise, in addition to other related convictions.

Seven months after the racketeering convictions in July of 1996, another grand jury returned a separate nine count indictment against Cueto, Venezia, and Romanik. It is this indictment and the subsequent convictions on various counts of this indictment that are the subject of this appeal.⁸ Count 1 of the indictment

⁷In the *East Side Review*, Cueto also authored and published various articles in which he complained of prosecutorial misconduct in association with the racketeering case and attacked the integrity and reputations of various Assistant United States Attorneys involved in the indictment and prosecution of the racketeering case.

⁸For purposes of this opinion, we only discuss the counts for which Cueto was convicted: Counts 1, 2, 6, and 7. Cueto was acquitted of the charges in Counts 3, 4, and 8. Romanik pleaded guilty to Count 5 of the instant indictment for lying to the grand jury. Pursuant to a deal made with the government, Venezia pleaded guilty to the crimes charged in the indictment and testified at Cueto's trial in exchange for the government's recommendation that his 15 year sentence in the illegal gambling and racketeering case be reduced to the lower

charged Cueto in a three-part conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, alleging that he misused his office as an attorney and unlawfully and intentionally conspired with Venezia and Romanik to impede, impair, obstruct, and defeat the lawful function of the FBI, the grand jury, and the federal district court in connection with the investigation, indictment, and prosecution of Venezia, B & H, and the illegal gambling operation and racketeering enterprise. The indictment alleged that Cueto and Venezia's business relationship created Cueto's financial motive for his participation in the conspiracy, in which he endeavored to protect the illegal gambling enterprise and to maintain its continued operation in order to safeguard his personal financial interests....

Counts 2, 6, and 7 of the indictment charged obstruction of justice in violation of the omnibus clause of 18 U.S.C. § 1503, alleging that Cueto corruptly endeavored to use his office as an attorney to influence, obstruct, and impair the due administration of justice in various court proceedings in connection with the prosecution of Venezia, his illegal gambling operation, and the racketeering enterprise in *United States v. B & H Vending/Ace Music Corp. & Thomas Venezia, et al.* Specifically, Count 2 of the indictment charged that Cueto corruptly endeavored to influence the due administration of justice in *Venezia v. Robinson* by filing or causing to be filed pleadings in connection with the proceedings in federal district court, an appellate brief in this court, and a petition for certiorari to the United States Supreme Court. Count 6 involved Cueto's actions in regard to ILCC Agent Bonds Robinson, and the indictment charged that Cueto corruptly endeavored to obstruct the lawful function of the federal grand jury in his attempts to encourage and to persuade State's Attorney Haida to indict Robinson. Count 7 also focused on the filing of various court papers, and the indictment alleged that Cueto corruptly endeavored to influence, obstruct, and impede the proceedings in federal district court by preparing and filing and urging defense counsel to prepare and file false pleadings and court papers in connection with the racketeering case.

After a jury trial, Cueto was convicted of the charges in Counts 1, 2, 6, and 7 and the district court ordered him to serve a prison term of 87 months, to be followed by two years of supervised release, and imposed monetary penalties. Cueto filed a timely notice of appeal. ...

Cueto asserts several arguments with respect to his convictions on Counts 2, 6, and 7 for obstruction of justice, contending that the omnibus clause of § 1503 is unconstitutionally vague as applied to the conduct charged in the indictment and, alternatively, that the evidence established at trial on these counts is insufficient to support his convictions. We address each argument in turn and begin with the constitutional challenges. Cueto argues that “much of what lawyers *do*—are attempts to influence the justice system,” and that the omnibus clause of § 1503 was not intended to apply to the type of conduct charged in the indictment. ...

“[I]n determining the scope of a statute, one is to look first at its language. If the language is unambiguous, ordinarily it is to be regarded as conclusive unless there is ‘a clearly expressed legislative intent to the contrary.’ ” The omnibus clause of § 1503 is a catch-all provision This clause was intended to ensure that criminals could not circumvent the statute's purpose “by devising novel and creative schemes that would interfere with the administration of justice but would nonetheless fall

end of the Sentencing Guidelines, which would result in a reduction from 15 years to 10 years.

outside the scope of § 1503's specific prohibitions.” ...

Cueto also contends that the vagueness problems are exacerbated by this court's broad construction of the term “corruptly,” arguing that it fails to provide meaningful and adequate notice as to what conduct is proscribed by the statute. The Seventh Circuit has approved a jury instruction which articulates a definition for the term “corruptly,” and the district court judge included this definition in its instructions to the jury:

Corruptly means to act with the purpose of obstructing justice. *The United States is not required to prove that the defendant's only or even main purpose was to obstruct the due administration of justice.* The government only has to establish that the defendant should have reasonably seen that the natural and probable consequences of his acts was the obstruction of justice. Intent may be inferred from all of the surrounding facts and circumstances. *Any act, by any party, whether lawful or unlawful on its face, may violate Section 1503, if performed with a corrupt motive.**

The mere fact that a term “covers a broad spectrum of conduct” does not render it vague, and the requirement that a statute must give fair notice as to what conduct is proscribed “cannot be used as a shield by one who is already bent on serious wrongdoing.”

There is little case authority directly on point to consider whether an attorney acting in his professional capacity could be criminally liable under the omnibus clause of § 1503 for traditional litigation-related conduct that results in an obstruction of justice. “Correct application of Section 1503 thus requires, in a very real sense, that the factfinder discern—by direct evidence or from inference—the motive which led an individual to perform particular actions ‘Intent may make any otherwise innocent act criminal, if it is a step in a plot.’” Therefore, it is not the means employed by the defendant that are specifically prohibited by the statute; instead, it is the defendant's corrupt endeavor which motivated the action. Otherwise lawful conduct, even acts undertaken by an attorney in the course of representing a client, can transgress § 1503 if employed with the corrupt intent to accomplish that which the statute forbids. *See [United States v. Cintolo, 818 F.2d 980, 992 (1st Cir.1987)]* (“means, though lawful in themselves, can cross the line of illegality if (i) employed with a corrupt motive, (ii) to hinder the due administration of justice, so long as (iii) the means have the capacity to obstruct”).

We are not persuaded by Cueto's constitutional challenges, and his focus is misplaced. The government's theory of prosecution is predicated on the fact that Cueto held a personal financial interest in protecting the illegal gambling enterprise, which formed the requisite corrupt intent for his conduct to qualify as violations of the statute.¹⁰ Cueto focuses entirely on the legality of his conduct, and not the

*[Ed.] Italicization has been added to underscore the importance of this passage, both to the opinion and for purposes of the notes following this case.

¹⁰This theory of prosecution brings us some pause. With the government's emphasis on Cueto's involvement in Venezia's illegal gambling operation and the racketeering enterprise, we are puzzled why the government did not indict and prosecute Cueto in the underlying racketeering case for his participation in the illegal gambling operation. Although the government's decision not to prosecute Cueto in the previous case is fundamentally

requisite criminal intent proscribed by § 1503. It is undisputed that an attorney may use any *lawful* means to defend his client, and there is no risk of criminal liability if those means employed by the attorney in his endeavors to represent his client remain within the scope of lawful conduct. However, it is the corrupt endeavor to protect the illegal gambling operation and to safeguard his own financial interest, which motivated Cueto's otherwise legal conduct, that separates his conduct from that which is legal.

Even though courts may be hesitant, with good reason and caution, to include traditional litigation-related conduct within the scope of § 1503, the omnibus clause has been interpreted broadly in accordance with congressional intent to promote the due administration of justice and to prevent the miscarriage of justice, and an individual's status as an attorney engaged in litigation-related conduct does not provide protection from prosecution for criminal conduct. Cueto's arguments have no merit. As a lawyer, he possessed a heightened awareness of the law and its scope, and he cannot claim lack of fair notice as to what conduct is proscribed by § 1503 to shield himself from criminal liability, particularly when he was already “bent on serious wrongdoing.” More so than an ordinary individual, an attorney, in particular a criminal defense attorney, has a sophisticated understanding of the type of conduct that constitutes criminal violations of the law. There is a discernable difference between an honest lawyer who unintentionally submits a false statement to the court and an attorney with specific corrupt intentions who files papers in bad faith knowing that they contain false representations and/or inaccurate facts in an attempt to hinder judicial proceedings. It is true that, to a certain extent, a lawyer's conduct influences judicial proceedings, or at least attempts to affect the outcome of the proceedings. However, that influence stems from a lawyer's attempt to advocate his client's interests *within the scope of the law*. It is the “corrupt endeavor” to influence the due administration of justice that is the heart of the offense, and Cueto's personal financial interest is the heart of his corrupt motive.

An amicus brief submitted by the National Association of Criminal Defense Lawyers (“Association”) also questions the proper scope of the omnibus clause of § 1503, and the Association articulates its fears that if we affirm Cueto's convictions, criminal defense attorneys will be subject to future prosecutions not only for actual misconduct, but also for apparent and inadvertent wrongdoing, notwithstanding a lawyer's good faith advocacy. The Association believes that this type of sweeping prosecution will sufficiently chill vigorous advocacy and eventually destroy the delicate balance between prosecution and defense which is necessary to maintain the effective operation of the criminal justice system. Although the Association discusses valid policy concerns and asserts legitimate arguments, some of which we generally agree with, we are also concerned with the flipside of its argument. If lawyers are not punished for their criminal conduct and corrupt endeavors to manipulate the administration of justice, the result would be the same: the weakening of an ethical adversarial system and the undermining of just administration of the law. We have the responsibility to ensure that the integrity of the criminal justice system is maintained and that protection includes granting to both the prosecution and the

inconsequential to the instant appeal, we are concerned about the relationship between the instant appeal and the underlying prosecution of the gambling operation and the racketeering enterprise.

defense flexibility and “discretion in the conduct of the trial and the presentation of evidence,” in addition to enforcing mechanisms of punishment, which necessarily include criminal prosecution, to prevent abuses of the system.

We have carefully examined the fears articulated by the National Association of Criminal Defense Lawyers, in addition to the arguments put forth by the defendant, that a decision upholding the application of the omnibus clause of § 1503 to litigation-related conduct may deter or somehow chill the criminal defense lawyers in zealous advocacy, and we find those concerns to be exaggerated, at least as considered in light of the facts in the present case. Although we appreciate that it is of significant importance to avoid chilling vigorous advocacy and to maintain the balance of effective representation, we also recognize that a lawyer's misconduct and criminal acts are not absolutely immune from prosecution. We cannot ignore Cueto's corrupt endeavors to manipulate the administration of justice and his clear criminal violations of the law. As the First Circuit recognized in *Cintolo*:

Nothing in the caselaw, fairly read, suggests that lawyers should be plucked gently from the maddening crowd and sheltered from the rigors of 18 U.S.C. § 1503 in the manner urged by appellant and by the amici. Nor is there sufficient public policy justification favoring such a result. To the contrary, the overriding public policy interest is that “[t]he attorney-client relationship cannot ... be used to shield or promote illegitimate acts” “[A]ttorneys, just like all other persons, ... are not above the law and are subject to its full application under appropriate circumstances.”

Accordingly, we conclude that the omnibus clause of § 1503 may be used to prosecute a lawyer's litigation-related criminality and that neither the omnibus clause of § 1503 nor this court's construction of the term “corruptly” is unconstitutionally vague as applied to the conduct charged in the indictment for which Cueto was convicted.

We now turn to Cueto's argument that his convictions on the obstruction of justice counts were not supported by sufficient evidence. Cueto's task is a formidable one, and an examination of the record illuminates that the evidence presented in this case overwhelmingly supports the jury's verdict. ...

Again the focus of Cueto's argument is misplaced; he argues that his conduct does not fall within the scope of the omnibus clause of § 1503 and that the government presented insufficient evidence to demonstrate his guilt. Cueto, however, fails to address the essence of the government's allegations and, ultimately, the basis for his convictions; it is his corrupt endeavor to obstruct the administration of justice that transforms his traditional litigation-related conduct into criminal violations of the law. ... [T]he record adequately supports the conclusion that Cueto's conduct, though nominally litigation-related conduct on behalf of his client, was undertaken with the corrupt intent to protect Venezia, Venezia's associates, and his business from criminal prosecution and to safeguard his personal financial interest in the illegal gambling operation, whatever the costs and consequences to the due administration of justice.

The charges in Count 2 of the indictment included allegations of a corrupt endeavor to obstruct the due administration of justice in *Venezia v. Robinson* by filing pleadings in federal district court and a continued attempt to hinder the proceedings

by filing an appeal in this court and a petition for certiorari in the United States Supreme Court. The evidence demonstrates that Cueto successfully exposed the FBI's investigation, uncovered the evidence it had gathered, obtained the injunction against Robinson, and continued to file frivolous appeals after the district court dismissed the injunction and the complaint. Government agents, in fact, testified that the investigation was disrupted and that Cueto “blew the lid off the ongoing investigation.” The jury was amply justified in concluding that Cueto's repeated filings were motivated by his attempt to protect his client from prosecution and to safeguard his financial interest. Cueto's actions may qualify as traditional litigation-related conduct in form, but not in substance, and the evidence presented at trial demonstrates that Cueto clearly intended and corruptly endeavored to obstruct the due administration of justice in *Venezia v. Robinson*.

Similar to Count 2, Count 7 includes allegations of preparing and filing and causing defense counsel to prepare and file false pleadings and other court papers; the indictment specifically charged Cueto with encouraging defense counsel in the racketeering case to file false motions and pleadings for the purpose of impeding and obstructing the administration of justice in that case. We have no doubt that Cueto in fact intended to interfere with the investigation, attempted to delay the indictment, and endeavored to obstruct the proceedings in federal district court in connection with the prosecution of Venezia. We simply are not dealing with non-corrupt, legitimate involvement in the preparation of Venezia's (and his co-defendants') defense. Nor are we dealing with inadvertent interference. From the evidence presented at trial, the jury was amply justified in concluding without a doubt that Cueto corruptly endeavored to obstruct the district court's proceedings in the gambling and racketeering prosecution. ...

Whatever the contours of the line between traditional lawyering and criminal conduct, they must inevitably be drawn case-by-case. We refuse to accept the notion that lawyers may do anything, including violating the law, to zealously advocate their clients' interests and then avoid criminal prosecution by claiming that they were “just doing their job.” As the First Circuit stated in *Cintolo*, “[w]e refuse to chip some sort of special exception for lawyers into the brickwork of § 1503.” We respect the importance of allowing defense counsel to perform legitimate activities without hindrance and recognize the potential dangers that could arise if prosecutors were permitted to inquire into the motives of criminal defense attorneys ad hoc. This case, however, does not create that avenue of inquiry; our conclusion is limited to the specific facts of this case. Viewing the facts and inferences most favorably to the government, as we are required to do, there was ample basis for the jury to find that Cueto corruptly endeavored to obstruct the due administration of justice. The jury was justified in concluding that Cueto had the requisite knowledge of the FBI's investigation of Venezia, the grand jury's inquiry, and the district court's proceedings and then acted in a manner that had the natural and probable effect of interfering with the lawful function of those governmental entities and the due administration of justice. His role as a defense attorney did not insulate him from the criminal consequences of his corruptly-motivated actions. Accordingly, we affirm Cueto's convictions on Counts 2, 6, and 7....

Notes

1. Should otherwise entirely legal activities be transformed into criminal acts by a “corrupt” motive? Consider the following:

The “corrupt” *mens rea* required under § 1503 and other obstruction statutes is nothing more than proof of an “evil” or “improper” *motive* and thus is a throw-back that requires policing. . . . [A]ncient notions of *mens rea* turned on “evil” motives; the modern conception, however, is that “motives” as elements should be abandoned in favor of proof of specific states of mind—such as “knowledge” or “purpose.” As Jerome Hall put it in 1960, “hardly any part of penal law is more definitely settled than that motive is irrelevant” to criminal liability. [Jerome Hall, *General Principles of Criminal Law* 88 (2d ed. 1960).] Scholars recently have taken aim at Hall’s statement and the tradition it reflects, both as a descriptive and as a normative matter. And certainly the scholars are correct that Hall’s much-quoted statement is overinclusive. Thus, motive has long been relevant as *evidence* to prove matters such as intent, has traditionally been part of prosecutors’ *charging* choices, and often has often been used in judges’ *sentencing* determinations. Legislators have recently resurrected “motive” crimes as well, making motive an element of an offense in, for example, hate crimes statutes.

Still, there remains a universal consensus that while “motive” may sometimes excuse or justify conduct that is otherwise criminal, or it may make more blameworthy that which is already criminally culpable behavior, it may *not* make a crime of an innocent act. “As a general rule, no act otherwise lawful becomes criminal because done with a bad motive. . . .” A “bad” act must attend a corrupt motive for a variety of good reasons. “One basic premise of Anglo-American criminal law is that no crime can be committed by bad thoughts alone” and that basic premise applies in the obstruction context just as elsewhere. [Wayne R. LaFave, *Criminal Law* 303 (4th ed. 2003).] First Amendment concerns play a part, as does the difficulty of “proving” thoughts unmoored from action and distinguishing “a fixed intent from mere daydream and fantasy.” [*Id.* at 304.] Professor LaFave emphasizes “the notion that the criminal law should not be so broadly defined to reach those who entertain criminal schemes but never let their thoughts govern their conduct.” [*Id.*]

In the context of statutes that do not require proof of a specific type of obviously criminal “act” (such as killing, raping, or the like), this prohibition has another rationale. “[I]n morality there is by no means agreement on just what sort of good motives justify what sort of wrongdoing” and what sort of “improper” motives might render an innocent act criminal. While we trust our elected representatives to consider, outside of specific cases, whether particular motives should be a crime, modern legislatures have generally done so with reasonable specificity. That is, we know what *types* of motives are “improper”—such as harming another because of their race, sex, or ethnicity. When confronted with the question of what constitutes a “corrupt” motive in the obstruction context, however, juries and judges are given no such guidance. And where all that stands between an otherwise legal act and incarceration is a “corrupt” motive, this lack of guidance constitutes an invitation to arbitrary, uneven, and potentially very unjust results depending on the “ethical”

predispositions of the persons called upon to decide a given case. This is especially true when what is at issue is defense counsel’s actions in defending his client. Many jurors will not understand, or if they do, sympathize with, the defense imperative of zealous advocacy even for a guilty-as-sin client. ...

Courts do not explain why it is appropriate to read this statute to violate a foundational rule of criminal law. Nothing on the face of the statute would seem to *require* a reading that allows a “corrupt” motive to render otherwise innocent conduct—like filing legal papers or advising one’s client to claim his constitutional rights—criminal. It may be that judges have relied upon their moral intuitions rather than their criminal-law learning. In moral theory,

although a good motive does not excuse a bad intention, a bad ulterior motive does render an otherwise good action impermissible. In contrast, the orthodox legal doctrine holds that motives in general are irrelevant, be they good or bad. (Thus an executioner does not do wrong in executing a man for motives of personal vengeance).

[Whitley R.P. Kaufman, *Motive, Intention, and Morality in the Criminal Law*, 28 *Crim. Just. Rev.* 317, 334 (2003).] While judges’ judgments may be correct as a matter of moral theory, it is not their role to embody that morality in law; that job is emphatically the province of the legislature. ...

How can it be that Congress has invited judges and juries to delve into the defendant’s psychology to determine his *motive* and to apply their own notions of what is “evil” or “improper” to judge his actions? How can it be that judges have decided that an “evil” or “improper” motive can convert an otherwise blameless act into something that warrants jail time? How can it be that courts are unable to arrive at a uniform and reasonably specific meaning for the word “corruptly” in § 1503 given that this one word separates entirely legal conduct from conduct that could send one away for ten years? And why *is* this a ten-year count, anyway? The same offense was punishable by a maximum of *three months* in 1892 and five years in 2005—is this incarceration inflation based on any rational judgment? My belief is that there are no satisfactory answers to these questions, and that the American public deserves better.

O’Sullivan, *supra*, 96 *J. Crim. L. & Criminology* at 698-702. *But see* Eric J. Tamashasky, *The Lewis Carroll Offense: The Ever-Changing Meaning of “Corruptly” Within the Federal Criminal Code*, 31 *J. Legis.* 129 (2004).

2. Just how far does the court’s reasoning go? If a lawyer advises a client, or even a non-client, to assert a valid privilege—say, his or her right against self-incrimination—may that lawyer be indicted for obstruction? *See* *United States v. Cintolo*, 818 F.2d 980, 992 (1st Cir.1987) (yes if done with a corrupt motive); *United States v. Cioffi*, 493 F.2d 1111, 1119 (2d Cir.1974) (same); *cf.* *United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997) (under § 1512, no). What if defense counsel tells the prosecutor that his client is innocent because the client lacks the requisite knowledge or intent to commit the crime under investigation. If this later turns out to be erroneous information, may the prosecutor pursue the lawyer and/or the client? What if the target of a criminal investigation were to deny any wrongdoing and

provide friends, family, and business associates with a false impression of what actually transpired. Would this constitute obstruction? Again, the answer may depend on the existence of a “corrupt” motive (assuming the defendant’s associates’ nexus to the investigation). Can we trust prosecutors and ultimately juries to be able to dispassionately assess whether such a “corrupt motive” exists? What is the possibility here for prosecutorial abuse or for a chilling of the defense function?

3. *Definition of “Corrupt” Motive.* Given the centrality of the term “corrupt” in separating entirely legal activity from activity that will warrant jail time, how satisfying is the definition of that term offered? Judging by the case law, “corruptly” is word of many meanings. See, e.g., Eric J. Tamashasky, *The Lewis Carroll Offense: the Ever-Changing Meaning of “Corruptly” Within the Federal Criminal Law*, 31 J. Legis. 129 (2004); Daniel A. Shtob, *Corruption of a Term: The Problematic Nature of 18 U.S.C. § 1512(c), the New Federal Obstruction of Justice Provision*, 57 Vand. L. Rev. 1429 (2004).

Justice Scalia approved one definition in his dissent in *Aguilar*: “An act is done corruptly if it’s done voluntarily and intentionally to bring about either an unlawful result or a lawful result by some unlawful method, with a hope or expectation of either financial gain or other benefit to oneself or a benefit of another person.” Does this definition’s emphasis on financial gain or other benefit make it more apposite to public corruption cases than many obstruction cases? As the Supreme Court notes in *Arthur Andersen LLP v. United States*, *infra*, the Fifth Circuit Pattern Jury Instructions define “corruptly” for purposes of § 1503 as “knowingly and dishonestly, with the specific intent to subvert or undermine the integrity” of a proceeding. In *Andersen*, the Supreme Court also (for purposes of determining what “knowingly ... corruptly” meant in § 1512) noted that the dictionary defines “corrupt” and “corruptly” as normally associated with “wrongful, immoral, depraved, or evil.” Probably the most common ways of expressing the meaning of “corruptly” under § 1503 is “acting with an improper motive.” See *Cintolo*, 818 F.2d at 990–91; *United States v. Fasolino*, 586 F.2d 939, 941 (2d Cir.1978). Other popular formulations are (the circular) acting “with a corrupt motive.” *Brenson*, 104 F.3d at 1278, or (the somewhat vague) with an “evil or wicked purpose,” see *United States v. Haas*, 583 F.2d 216, 220 (5th Cir.1978); 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, 579 n.58 (1992).

4. *The Relationship between Corrupt Motive and Specific Intent.* Although courts often conflate these two elements—as did the *Cueto* jury instructions—they are in fact independent requirements. As Eric J. Tamashasky explains:

... Just Scalia agreed that a “corrupt” act is “[a]n act done with an intent to give some advantage inconsistent with official duty and the rights of others....” This definition comports with the traditional common law understanding and the way in which most prosecutions are brought. Justice Scalia went further and promulgated a classic mistake common among the circuits. He added, “Acts specifically intended to ‘influence, obstruct, or impede, the due administration of justice’ are obviously wrongful, just as they are necessarily ‘corrupt.’” Under the statute, however, not all acts specifically intended to influence, obstruct, or impede are unlawful, but only those done “corruptly.” While some cases conclude that acts intended to obstruct or impede the due administration of justice are tantamount to “corrupt” actions, the inclusion of “influence” makes

the statement overbroad. Moreover, actions intended to “obstruct” justice need not be “necessarily corrupt.” ... If the prohibited conduct is “corruptly endeavoring to impede or obstruct the due administration of justice,” a construction of “corruptly” to mean “to endeavor to impede and obstruct” renders the term “corruptly” surplusage.

Tamashasky, *supra*, 31 J. Legis. at 130-32.

5. *What Does One Have to Specifically Intend?* Although the federal courts acknowledge that obstruction is a specific intent crime, there is some confusion regarding just *what* the defendant must specifically intend. See *United States v. LaRouche Campaign*, 695 F.Supp. 1265, 1270-74 (D.Mass.1988). Does the defendant have to do the obstructive act with a specific intent *to obstruct justice*? Or will it suffice that the defendant specifically intended *to engage in the conduct alleged to be obstructive* and *should have reasonably foreseen that the natural and probable consequences of his actions* would be the obstruction of justice?

Although there is support in the caselaw for both propositions, the latter seems to be in ascendancy. See DeMarco, *supra*, 67 N.Y.U. L. Rev. at 576-84. The instruction in the *Cueto* case is typical of that used in jurisdictions that ascribe to the latter view. See also *United States v. Brenson*, 104 F.3d 1267, 1277-78 (11th Cir.1997). *But see United States v. Rasheed*, 663 F.2d 843, 852 (9th Cir.1981) (“We hold that the word ‘corruptly’ as used in the statute means that the act must be done with the purpose of obstructing justice”).

It was in reliance on instructions such as that employed in *Cueto* that Justice Scalia argued in *Aguilar* that the Court’s “nexus” requirement—which requires that the defendant’s activity have the “natural and probable effect” of interfering with the due administration of justice—is correctly viewed as a means of proving intent, not an independent evidentiary requirement. Should this still be regarded as good law? The *Aguilar* majority certainly implied in its response to Justice Scalia’s dissent its belief that the intent to obstruct may be present even where the requisite “nexus” is absent, thus evidencing its belief that the two proof requirements are separate. What difference does any of this make? See also *Arthur Andersen, LLP v. United States*, *infra*. Consider the following:

... The “specific intent” terminology was applied by the Supreme Court to this statute in 1893. Since that time, this term has become outmoded: it (and its cognate, “general intent”) do not appear in the code and have been rejected by the Supreme Court as outdated and confusing. Yet, because of the *Pettibone* case, courts of appeals are still trying to apply this element in § 1503 cases, with (in my view) decidedly mixed results. ...

Today’s statutes generally include some type of express *mens rea* element, but this is a modern development. The historical meaning of “specific” versus “general” intent reflects the fact that statutes formerly did not specify the mental state necessary to be proved. Thus, “general intent” meant that the crime required a *mens rea* in the culpability sense of a blameworthy state of mind. “Specific intent” was a designation reserved for those offenses that required proof of a particular, additional state of mind [(i.e., a special motive for the conduct)]. ...

In this context, then, it would appear that a specific intent to obstruct would

mean that government must prove that the defendant's *purpose* was to obstruct justice—that was his special motive for acting. An apparent majority of federal courts hold, however, that a defendant can be said to have acted with a specific intent to obstruct when he specifically intended to engage in the conduct alleged to be obstructive and he should have reasonably foreseen that the natural and probable consequences of his actions would be the obstruction of justice. This means that most federal courts read the “specific intent to obstruct” element to be satisfied by proof that the defendant acted intentionally in, for example, destroying documents but *negligently* with respect to the possibility that the destruction of those documents would obstruct justice.

Substituting a negligence (“reasonably foreseeable”) standard for a specific intent to obstruct requirement does not make sense. Considered together with the fact that criminal liability founded on negligence is generally only reserved for the most severe harms (such as negligent manslaughter), and that traditional notions of “specific intent” reflect the highest, not the lowest, form of culpable mental states, the majority rule seems particularly misguided. And this is not a quibble. Such a reading permits the criminal sanction to be applied to all kinds of nonculpable conduct: “[i]t is easy to imagine conduct which could foreseeably result in obstruction of justice but which lacks any sort of criminal culpability. For example, employees often ignore office memoranda; people carelessly—sometimes even recklessly—fail to preserve evidence. Section 1503 was not meant to criminalize such conduct.” [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, 589 (1992).] Judges, in relying on a misconstruction of the meaning of “specific intent,” have significantly increased the power of prosecutors to pick and choose among potential defendants—only some of whom could be deemed to have been truly culpable. Why would courts wish to water down the intent to obstruct requirement, and empower prosecutors, in this way?

As it turns out, this instruction is useful to the government where the government chooses to pursue wrongful conduct as obstruction but the heart of the harm involved is something other than obstruction—usually simple fraud. Rather than forcing prosecutors to proceed on a fraud theory to prosecute this clearly wrongful activity, however, judges have acceded to prosecutors' reliance on inapposite statutes. In so doing, they have responded to bad facts by making bad law, giving prosecutors a *mens rea* instruction that can be used to prosecute the culpable *and* the not culpable.

For example, in *United States v. Neiswender*, shortly after the beginning of the criminal trial of former Maryland Governor Marvin Mandel, defendant Neiswender contacted Mandel's defense attorney and told the attorney that he had a contact with a corrupt juror and could “guarantee” an acquittal of Mandel if “proper financial arrangements were made.” [590 F.2d 1269, 1270 (4th Cir. 1979).] Defense counsel promptly informed the court and prosecutor but no corrupt juror was ever identified. Neiswender, indicted for obstruction under § 1503, argued that his primary intent was to defraud, not to obstruct. He contended that his actual motivation “was directly at odds with any design to obstruct justice since a guilty verdict would have revealed Neiswender's fraud. It was in his best interests for [Mandel's defense counsel to continue] to press

hard in his efforts to obtain an acquittal.”

The Fourth Circuit, however, upheld the conviction, ruling that “a defendant who intentionally undertakes an act or attempts to effectuate an arrangement, the reasonably foreseeable consequence of which is to obstruct justice, violates § 1503 even if his hope is that the judicial machinery will not be seriously impaired.” The court reasoned that had Neiswender convinced defense counsel that Neiswender had a juror under his control and induced defense counsel to participate in the scheme, the natural consequence would have been to reduce defense counsel’s efforts in defending his client. Presumably most people would agree that this conduct is harmful—particularly the disturbing number of *Neiswender*-type cases that involve fraud by attorneys on criminal defendants involving false offers by counsel to pay off criminal justice officials to secure favorable treatment for the defendants. But they are not first and foremost the type of *purposeful* obstructive activity that is supposed to be pursued under § 1503. To allow the government to salvage these cases against (I concede) people who are committing a crime (just not obstruction) by watering down the “specific intent” instruction, courts are inviting overbroad and irresponsible applications of the statute.

Julie R. O’Sullivan, *The Federal Criminal “Code” Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. Crim. L. & Criminology 643, 687-90 (2006).

B. OBSTRUCTION OF PROCEEDINGS BEFORE CONGRESS AND FEDERAL AGENCIES UNDER 18 U.S.C. § 1505

I. *Elements.* Section 1505 is the obstruction statute specifically addressed to obstruction of administrative agency proceedings and congressional inquiries. Section 1505 cases are relatively rare, at least in comparison to the frequency with which sections 1503 and 1512 are employed. The statute reads, in relevant part:

Whoever corruptly, or by threats or force, or by threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of Congress [] shall be fined under this title or imprisoned not more than five years, or both.

The requisites for a conviction under § 1505 are that the defendant, (1) knowing that there is a proceeding pending before a department or agency of the United States or an inquiry or investigation being before either House, any committee of either House, or a joint committee of the Congress; (2) corruptly; (3) endeavors; (4) to influence, obstruct, or impede the “due and proper administration of the law” under which the pending agency proceeding is being had, or “the due and proper

exercise of the power” of the congressional inquiry. *See* United States v. Johnson, 71 F.3d 139, (4th Cir.1995) (stating elements for a congressional case); United States v. Price, 951 F.2d 1028, 1031 (9th Cir.1991)(stating elements for an agency case).

This statute is very similar in structure to § 1503. How do they compare in terms of elements and coverage?

18 U.S.C. § 1503 (Omnibus Provision: Obstruction in Judicial Proceedings)

The defendant

knowing that a judicial proceeding is pending

corruptly (probably includes *Aguilar* “nexus” requirement)

endeavors

to influence, obstruct, or impede

the due administration of justice

with a specific intent to obstruct

10 year maximum (where a killing or attempted killing is not at issue and the offense was not committed against a petit juror)

18 U.S.C. § 1505 (Obstruction in Federal Agency Proceedings and Congressional Investigations)

The defendant

knowing that there is a pending proceeding before a department or agency of the United States
or
an inquiry or investigation being had in Congress

corruptly (may include *Aguilar* “nexus” requirement)

endeavors

to influence, obstruct, or impede

the due and proper administration of the law under which the pending proceeding is being had before any department or agency of the United States
or
the due and proper exercise of the power of congressional inquiry

may also require a specific intent to obstruct

5 year maximum (if the crime does not involve terrorism)

2. *Proceeding.* The term “proceeding” for purposes of § 1505 is very broad. Despite the statutory requirement that the defendant corruptly obstruct “the due and proper administration of the law under which any pending proceeding is being had,” the reach of § 1505 is not confined to proceedings that are “judicial or administrative in nature.” United States v. Fruchtman, 421 F.2d 1019, 1021 (6th

Cir.1970). Courts have instead held that the statute encompasses both the investigative and adjudicative functions of a department or agency. *See, e.g., id.* Further, the “investigative” aspect of a “proceeding” has been interpreted to include “most agency activity conducted before an investigation is formally commenced. Even if the matter investigated will ultimately be tried before a criminal court (as opposed to an agency court), obstruction of agency investigations is still prosecutable under § 1505.” *Twenty-First Survey of White Collar Crime*, 43 AM. CRIM. L. REV. 763, 779 (2006) (footnotes omitted); *see also* *United States v. Schwartz*, 924 F.2d 410, 423 (2d Cir.1991).

3. “Nexus” Requirement? Must the government demonstrate an *Aguilar* “nexus” in a § 1505 case? It is not yet clear whether the *Aguilar* “nexus” requirement will extend to § 1505. This may depend upon which element the *Aguilar* Court read this into for purposes of § 1503. Thus, if it is a part of the “due administration of justice” element, it may not apply; if the nexus requirement inheres in the “corruptly” element, however, it may well apply. Again, the Supreme Court in *Arthur Andersen LLP v. United States*, reproduced *infra*, applied its *Aguilar* “nexus” test to § 1512. In so doing, it seemed to characterize the “nexus” requirement as originating in the intent requirement—presumably inhering in the word “corrupt”—rather than the “due administration of justice” element.

4. “Corruptly”. In 1990, a jury convicted Admiral John Poindexter, President Reagan’s National Security Advisor, *inter alia*, on two counts of obstruction of justice in violation of § 1505 for making false and/or misleading statements to congressional committees, participating in the preparation of a false chronology, deleting information from his computer, and arranging a meeting with members of Congress at which Oliver North gave false statements. In *United States v. Poindexter*, 951 F.2d 369, 379 (D.C. Cir.1991), the D.C. Circuit reversed Poindexter’s § 1505 convictions, ruling that § 1505 was unconstitutionally vague as applied to the false and misleading statements to Congress. The court found that the word “corruptly” does not meet due process standards in this context for two reasons.

First, the D.C. Circuit concluded that to apply § 1505 to Poindexter’s false and misleading statements would require an “intransitive” reading of the work “corruptly” (*i.e.*, the defendant corrupts or the defendant becomes corrupt—in other words, the defendant himself does the obstruction) rather than a “transitive” meaning (*i.e.*, the defendant corrupts *another* by causing the *other* person to act corruptly—in other words, the defendant causes *others* to do his dirty work, wittingly or not). On its face, the court reasoned, the statute favored a transitive reading. That is, the court “found that the defendant could not be constitutionally convicted under § 1505 for his own independent lies. . . . [T]he term ‘corruptly’ . . . commands a ‘transitive’ interpretation (A corrupts B), in contrast with an “intransitive” interpretation (A is or becomes corrupt) [required by the Poindexter indictment].” *Kelley*, 36 F.3d at 1127. The court favored a transitive reading in part because “[t]he other terms in the disjunctive series in which it appears are ‘by threats,’ ‘[by] force,’ and ‘by any threatening letter or communication,’ all of which are transitive—indeed all of which take as their object a natural person. In addition, to read ‘corruptly’ in an intransitive sense as ‘wickedly’ or ‘immorally’ would appear to render the other methods of violating the statute superfluous: surely the use of force to influence a congressional inquiry would always be ‘wicked’ or at least ‘immoral.’” *Poindexter*, 951 F.2d at 379.

Second, the court, after examining various definitions of the term “corruptly,” found that term was too vague to provide sufficient notice that it forbade lying to Congress. *Poindexter*, 951 F.2d at 378. The court indicated that “corruptly” might not be deemed unconstitutionally vague if applied transitively to reach the “core behavior” at which the statute was addressed, *i.e.*, a case in which the defendant, “for the purpose of influencing an inquiry, influences another person (through bribery or otherwise) to violate a legal duty.” *Id.* at 385 (emphasis added). It concluded, however, that “[e]ven if the statute may constitutionally be applied to all attempts to influence or to obstruct a congressional inquiry by influencing another to violate his legal duty, it would still not cover the conduct at issue on this appeal—making false and misleading statements [directly] to Congress.” *Id.* at 386.

Do these arguments make sense in the context of the statutory scheme as a whole? When it created § 1512 in 1982, Congress shifted “many activities that were formerly prohibited by §§ 1503 and 1505” to § 1512. *Id.* at 382. The Act “deleted the word ‘witness’ from § 1503 and deleted the first clause (prohibiting corruptly etc. influencing etc. a witness) from § 1505.” *Id.* It left the omnibus provision of § 1505 untouched. Does it make sense, then, to hold that § 1505 was specifically and solely concerned with witness tampering of the sort § 1512 was designed to address, and lying to Congress is not covered by either § 1505 or § 1512?

Section 1503 cannot pick up the slack because it may only be invoked in the context of pending *judicial* proceedings. But isn’t § 1503 subject to the same complaints? The *Poindexter* court’s statutory analysis would counsel that § 1503 also apply only transitively—apparently excluding persons such as perjurers and other “intransitive” offenders heretofore regularly sanctioned under that statute. And the word “corruptly” in this statute is just as vague as the word “corruptly” in § 1505.

The D.C. Circuit, however, has rejected a vagueness challenge to § 1503’s use of the term “corruptly” in a case in which the defendant was convicted under that statute for lying before a grand jury with the intent to impede the due administration of justice. *United States v. Russo*, 104 F.3d 431, 437 (D.C. Cir.1997). The court did not treat *Poindexter*’s statutory construction argument, or rehearse the *Poindexter* court’s problems with the inherent vagueness of the word “corruptly.” Rather, the *Russo* court explained that:

While the portion of § 1503 at issue here, and the portion of § 1505 at issue in *Poindexter*, are very nearly identical, the settings in which the provisions apply are vastly different. One can imagine any number of non-corrupt ways in which an individual can intend to impede the work of an agency or congressional committee. [Once example is] an executive branch official calling the chairman of a congressional committee and stating, “We both know this investigation is really designed to embarrass the President (or a Senator), not to investigate wrongdoing. Why don’t you call it off?” The problem for the *Poindexter* court, then, was to discern some special meaning in the word “corruptly,” some meaning “sufficiently definite as applied to the conduct at issue on this appeal, *viz.* lying to Congress, to be the basis of a criminal conviction.” Otherwise, “the statute would criminalize all attempts to ‘influence’ congressional inquiries—an absurd result that the Congress could not have intended in enacting the statute.” We have no such problem here.

Anyone who intentionally lies to a grand jury is on notice that he may be

corruptly obstructing the grand jury's investigation. Whatever the limits of "corruptly" in § 1503, Russo's acts of perjury were near its center. ... [As we have said in other contexts,] "very few non-corrupt ways to or reasons for intentionally obstructing a judicial proceeding leap to mind." That is why ... "the *Poindexter* court [] drew a sharp distinction between § 1505 and § 1503, and repeatedly warned that the provisions were too 'materially different' for the construction of one to guide the other."

Id.; see also *United States v. Brenson*, 104 F.3d 1267, 1280 (11th Cir.1997)(rejecting similar attempt to apply *Poindexter* to § 1503). Do you buy this distinction? Should the D.C. Circuit have accepted the as-applied vagueness challenge resting on the meaning of the word "corrupt" in a case in which a senior executive branch official was alleged to have (*inter alia*) knowingly lied to or misled Congress? Are there a great many "non-corrupt ways to or reasons for" impeding a congressional investigation by intentionally lying to Congress that "leap to mind"?

In 1996, Congress added § 1515(b) to the code in an effort to correct this problem. See 142 Cong. Rec. 11605-02, 11607-608 (1996). Section 1515(b) states that "[a]s used in Section 1505, the term 'corruptly' means acting with an improper purpose, *personally or by influencing another*, including *making a false or misleading statement*, or withholding, concealing, altering, or destroying a document or other information." (Emphasis added.) Thus, § 1515(b) puts persons chargeable under § 1505 on notice "that Congress intended the word 'corruptly' ... to be used in both the transitive and intransitive sense, that is, both a defendant who corrupts herself and a defendant who corrupts another can be prosecuted under Section 1505." *United States v. Kanchanalak*, 37 F.Supp.2d 1, 4 (D.D.C. 1999). It also, by specifying certain types of activity that are deemed "corrupt," gives defendants like *Poindexter* notice that lying to or misleading Congress is proscribed in § 1505.

C. WITNESS TAMPERING UNDER 18 U.S.C. § 1512

Section 1512, at least when originally enacted, was not aimed at protecting the integrity of the whole of the justice system or the "due administration of justice." In design, § 1512 was specifically concerned with protecting witnesses and their safety.⁷ These witness tampering prohibitions formerly were contained within § 1503 and § 1505. In 1982, Congress removed the express references to intimidating or influencing witnesses in § 1503 and § 1505, and created § 1512. When first enacted, § 1512 contained provisions prohibiting tampering with witnesses by intimidation, physical force, threats, misleading conduct, or harassment.⁸ With the exception of misleading conduct, all the activities proscribed by the 1982 incarnation of § 1512 involved some element of coercion. This provision, then, did not cover all the

⁷Although not as relevant to the portions of the statute upon which these materials focus, it is worth noting that the statute protects "any person" from the types of activities proscribed. Accordingly, it extends beyond witnesses to victims, informants, and those involved with them.

⁸See Victim and Witness Protection Act, P.L. 97-291, 96 Stat. 1249 (1982).

non-coercive types of witness tampering that courts had, prior to 1982, recognized as falling with the “omnibus” obstruction prohibition in § 1503.

Even after passage of § 1512, then, prosecutors successfully continued to invoke § 1503 to address non-coercive witness tampering such as “efforts to urge a witness to give false testimony or withhold or destroy evidence.”⁹ In 1988, Congress responded to this perceived gap by amending § 1512 to cover non-coercive witness tampering by adding the “corruptly persuades” language.¹⁰ Finally, in the Sarbanes-Oxley Act of 2002, Congress expanded the reach of § 1512 beyond witness tampering by including within it a general obstruction prohibition whose reach is not yet clear but which appears to be even broader in scope than the omnibus clause of § 1503. Again, that portion of the statute that relates to coercive activity is not as relevant for our purposes as that portion which deals with non-coercive obstruction.

As we have just seen, § 1503 and § 1505 contain a requirement that the government prove that the defendant acted “corruptly,” which should help to ensure that juries find that the defendant at least acted with an “improper purpose” in knowingly engaging in the conduct alleged to be obstructive. The requisites of § 1512 are different—in purpose and effect. Under § 1512, only one of the proscribed activities—persuasion—requires proof of a “corrupt” motive. Instead of § 1503’s broad prohibition on any type of activity that obstructs the “due administration of justice,” § 1512 focuses more narrowly on specific types of conduct through which physical evidence can be compromised or witnesses tampered with. In short, § 1512 *is said to change the focus from corrupt motives to presumptively corrupt methods*—raising concerns among the defense bar that § 1512 may pose an even greater threat to legitimate defense functioning than § 1503 for reasons that may become clearer as we examine, *infra*, whether all the proscribed conduct should be treated as presumptively corrupt.

ARTHUR ANDERSEN LLP v. UNITED STATES

544 U.S. 696 (2005)

REHNQUIST, C.J. delivered the opinion for a unanimous Court.

As Enron Corporation’s financial difficulties became public in 2001, petitioner Arthur Andersen LLP, Enron’s auditor, instructed its employees to destroy documents pursuant to its document retention policy. A jury found that this action made petitioner guilty of violating 18 U.S.C. §§ 1512(b)(2)(A) and (B). These sections make it a crime to “knowingly us[e] intimidation or physical force, threate[n], or corruptly persuad[e] another person ... with intent to ... cause” that person to “withhold” documents from, or “alter” documents for use in, an “official proceeding.”¹¹ The Court of Appeals for the Fifth Circuit affirmed. We hold that the jury instructions failed to convey properly the elements of a “corrup[t] persuas[ion]” conviction under § 1512(b), and therefore reverse.

Enron Corporation, during the 1990’s, switched its business from operation of

⁹See, e.g., *United States v. Ladum*, 141 F.3d 1328, 1338 (9th Cir.1998); *United States v. Lester*, 749 F.2d 1288, 1294 (9th Cir.1984).

¹⁰See *United States v. Farrell*, 126 F.3d 484, 488 (3d Cir.1997).

¹¹We refer to the 2000 version of the statute, which has since been amended by Congress.

natural gas pipelines to an energy conglomerate, a move that was accompanied by aggressive accounting practices and rapid growth. Petitioner audited Enron's publicly filed financial statements and provided internal audit and consulting services to it. Petitioner's "engagement team" for Enron was headed by David Duncan. Beginning in 2000, Enron's financial performance began to suffer, and, as 2001 wore on, worsened.² On August 14, 2001, Jeffrey Skilling, Enron's Chief Executive Officer (CEO), unexpectedly resigned. Within days, Sherron Watkins, a senior accountant at Enron, warned Kenneth Lay, Enron's newly reappointed CEO, that Enron could "implode in a wave of accounting scandals." She likewise informed Duncan and Michael Odom, one of petitioner's partners who had supervisory responsibility over Duncan, of the looming problems.

On August 28, an article in the Wall Street Journal suggested improprieties at Enron, and the SEC opened an informal investigation. By early September, petitioner had formed an Enron "crisis-response" team, which included Nancy Temple, an in-house counsel.³ On October 8, petitioner retained outside counsel to represent it in any litigation that might arise from the Enron matter. The next day, Temple discussed Enron with other in-house counsel. Her notes from that meeting reflect that "some SEC investigation" is "highly probable."

On October 10, Odom spoke at a general training meeting attended by 89 employees, including 10 from the Enron engagement team. Odom urged everyone to comply with the firm's document retention policy.⁴ He added: " '[I]f it's destroyed in the course of [the] normal policy and litigation is filed the next day, that's great. ... [W]e've followed our own policy, and whatever there was that might have been of interest to somebody is gone and irretrievable.' " On October 12, Temple entered the Enron matter into her computer, designating the "Type of Potential Claim" as "Professional Practice–Government/Regulatory Inv[estigation]." Temple also e-mailed Odom, suggesting that he " 'remin[d] the

²During this time, petitioner faced problems of its own. In June 2001, petitioner entered into a settlement agreement with the Securities and Exchange Commission (SEC) related to its audit work of Waste Management, Inc. As part of the settlement, petitioner paid a massive fine. It also was censured and enjoined from committing further violations of the securities laws. In July 2001, the SEC filed an amended complaint alleging improprieties by Sunbeam Corporation, and petitioner's lead partner on the Sunbeam audit was named.

³A key accounting problem involved Enron's use of "Raptors," which were special purpose entities used to engage in "off-balance-sheet" activities. Petitioner's engagement team had allowed Enron to "aggregate" the Raptors for accounting purposes so that they reflected a positive return. This was, in the words of petitioner's experts, a "black-and-white" violation of Generally Accepted Accounting Principles.

⁴The firm's policy called for a single central engagement file, which "should contain only that information which is relevant to supporting our work." The policy stated that, "in cases of threatened litigation, ... no related information will be destroyed." It also separately provided that, if petitioner is "advised of litigation or subpoenas regarding a particular engagement, the related information should not be destroyed. See Policy Statement No. 780-Notification of Litigation." Policy Statement No. 780 set forth "notification" procedures for whenever "professional practice litigation against [petitioner] or any of its personnel has been commenced, has been threatened or is judged likely to occur, or when governmental or professional investigations that may involve [petitioner] or any of its personnel have been commenced or are judged likely."

engagement team of our documentation and retention policy.”

On October 16, Enron announced its third quarter results. That release disclosed a \$1.01 billion charge to earnings.⁵ The following day, the SEC notified Enron by letter that it had opened an investigation in August and requested certain information and documents. On October 19, Enron forwarded a copy of that letter to petitioner.

On the same day, Temple also sent an e-mail to a member of petitioner's internal team of accounting experts and attached a copy of the document policy. On October 20, the Enron crisis-response team held a conference call, during which Temple instructed everyone to “[m]ake sure to follow the [document] policy.” On October 23, Enron CEO Lay declined to answer questions during a call with analysts because of “potential lawsuits, as well as the SEC inquiry.” After the call, Duncan met with other Andersen partners on the Enron engagement team and told them that they should ensure team members were complying with the document policy. Another meeting for all team members followed, during which Duncan distributed the policy and told everyone to comply. These, and other smaller meetings, were followed by substantial destruction of paper and electronic documents.

On October 26, one of petitioner's senior partners circulated a New York Times article discussing the SEC's response to Enron. His e-mail commented that “the problems are just beginning and we will be in the cross hairs. The marketplace is going to keep the pressure on this and is going to force the SEC to be tough.” On October 30, the SEC opened a formal investigation and sent Enron a letter that requested accounting documents.

Throughout this time period, the document destruction continued, despite reservations by some of petitioner's managers.⁶ On November 8, Enron announced that it would issue a comprehensive restatement of its earnings and assets. Also on November 8, the SEC served Enron and petitioner with subpoenas for records. On November 9, Duncan's secretary sent an e-mail that stated: “Per Dave—No more shredding We have been officially served for our documents.” Enron filed for bankruptcy less than a month later. Duncan was fired and later pleaded guilty to witness tampering.

In March 2002, petitioner was indicted in the Southern District of Texas on one count of violating §§ 1512(b)(2)(A) and (B). The indictment alleged that, between October 10 and November 9, 2001, petitioner “did knowingly, intentionally and corruptly persuade ... other persons, to wit: [petitioner's] employees, with intent to cause” them to withhold documents from, and alter documents for use in, “official proceedings, namely: regulatory and criminal proceedings and investigations.” A

⁵The release characterized the charge to earnings as “non-recurring.” Petitioner had expressed doubts about this characterization to Enron, but Enron refused to alter the release. Temple wrote an e-mail to Duncan that “suggested deleting some language that might suggest we have concluded the release is misleading.”

⁶For example, on October 26, John Riley, another partner with petitioner, saw Duncan shredding documents and told him “this wouldn't be the best time in the world for you guys to be shredding a bunch of stuff.” On October 31, David Stulb, a forensics investigator for petitioner, met with Duncan. During the meeting, Duncan picked up a document with the words “smoking gun” written on it and began to destroy it, adding “we don't need this.” Stulb cautioned Duncan on the need to maintain documents and later informed Temple that Duncan needed advice on the document retention policy.

jury trial followed. When the case went to the jury, that body deliberated for seven days and then declared that it was deadlocked. The District Court delivered an “Allen charge,” and, after three more days of deliberation, the jury returned a guilty verdict. The District Court denied petitioner’s motion for a judgment of acquittal.

The Court of Appeals for the Fifth Circuit affirmed. It held that the jury instructions properly conveyed the meaning of “corruptly persuades” and “official proceeding”; that the jury need not find any consciousness of wrongdoing; and that there was no reversible error. Because of a split of authority regarding the meaning of § 1512(b), we granted certiorari.

Chapter 73 of Title 18 of the United States Code provides criminal sanctions for those who obstruct justice. Sections 1512(b)(2)(A) and (B), part of the witness tampering provisions, provide in relevant part:

“Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to ... cause or induce any person to ... withhold testimony, or withhold a record, document, or other object, from an official proceeding [or] alter, destroy, mutilate, or conceal an object with intent to impair the object’s integrity or availability for use in an official proceeding ... shall be fined under this title or imprisoned not more than ten years, or both.”

In this case, our attention is focused on what it means to “knowingly ... corruptly persuad[e]” another person “with intent to ... cause” that person to “withhold” documents from, or “alter” documents for use in, an “official proceeding.”

“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.’” *United States v. Aguilar*, 515 U.S. 593, 600 (1995).

Such restraint is particularly appropriate here, where the act underlying the conviction—“persua[sion]”—is by itself innocuous. Indeed, “persuad[ing]” a person “with intent to ... cause” that person to “withhold” testimony or documents from a Government proceeding or Government official is not inherently malign.⁸ Consider, for instance, a mother who suggests to her son that he invoke his right against compelled self-incrimination, see U.S. Const., Amdt. 5, or a wife who persuades her husband not to disclose marital confidences.

Nor is it necessarily corrupt for an attorney to “persuad[e]” a client “with intent to ... cause” that client to “withhold” documents from the Government. In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), for example, we held that Upjohn was justified in withholding documents that were covered by the attorney-client privilege from the Internal Revenue Service (IRS). No one would suggest that an attorney who “persuade[d]” Upjohn to take that step acted wrongfully, even though he surely intended that his client keep those documents out of the IRS’ hands.

⁸Section 1512(b)(2) addresses testimony, as well as documents. Section 1512(b)(1) also addresses testimony. Section 1512(b)(3) addresses “persuade[rs]” who intend to prevent “the communication to a law enforcement officer or judge of the United States of information” relating to a federal crime.

“Document retention policies,” which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business. See generally Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 *Ford. J. Corp. & Fin. L.* 721 (2003). It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances.

Acknowledging this point, the parties have largely focused their attention on the word “corruptly” as the key to what may or may not lawfully be done in the situation presented here. Section 1512(b) punishes not just “corruptly persuad[ing]” another, but “*knowingly* ... corruptly persuad[ing]” another. (Emphasis added.) The Government suggests that “knowingly” does not modify “corruptly persuades,” but that is not how the statute most naturally reads. It provides the *mens rea*—“knowingly”—and then a list of acts—“uses intimidation or physical force, threatens, or corruptly persuades.” We have recognized with regard to similar statutory language that the *mens rea* at least applies to the acts that immediately follow, if not to other elements down the statutory chain. The Government suggests that it is “questionable whether Congress would employ such an inelegant formulation as ‘knowingly ... corruptly persuades.’” Long experience has not taught us to share the Government’s doubts on this score, and we must simply interpret the statute as written.

The parties have not pointed us to another interpretation of “knowingly ... corruptly” to guide us here.⁹ In any event, the natural meaning of these terms provides a clear answer. “[K]nowledge” and “knowingly” are normally associated with awareness, understanding, or consciousness. See *Black’s Law Dictionary* 888 (8th ed. 2004) (hereinafter *Black’s*); *Webster’s Third New International Dictionary* 1252-1253 (1993) (hereinafter *Webster’s 3d*); *American Heritage Dictionary of the English Language* 725 (1981) (hereinafter *Am. Hert.*). “Corrupt” and “corruptly” are normally associated with wrongful, immoral, depraved, or evil. See *Black’s* 371; *Webster’s 3d* 512; *Am. Hert.* 299-300. Joining these meanings together here makes sense both linguistically and in the statutory scheme. Only persons conscious of wrongdoing can be said to “knowingly ... corruptly persuad[e].” And limiting criminality to persuaders conscious of their wrongdoing sensibly allows § 1512(b) to reach only those with the level of “culpability ... we usually require in order to impose criminal liability.” *United States v. Aguilar*, 515 U.S., at 602.

The outer limits of this element need not be explored here because the jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing.

Indeed, it is striking how little culpability the instructions required. For example, the jury was told that, “even if [petitioner] honestly and sincerely believed that its conduct was lawful, you may find [petitioner] guilty.” The instructions also diluted the meaning of “corruptly” so that it covered innocent conduct.

The parties vigorously disputed how the jury would be instructed on “corruptly.” The District Court based its instruction on the definition of that term found in the Fifth Circuit Pattern Jury Instruction for § 1503. This pattern instruction defined “corruptly” as “‘knowingly and dishonestly, with the specific intent to subvert or undermine the integrity’ “ of a proceeding. The Government,

⁹The parties have pointed us to two other obstruction provisions, 18 U.S.C. §§ 1503 and 1505, which contain the word “corruptly.” But these provisions lack the modifier “knowingly,” making any analogy inexact.

however, insisted on excluding “dishonestly” and adding the term “impede” to the phrase “subvert or undermine.” The District Court agreed over petitioner’s objections, and the jury was told to convict if it found petitioner intended to “subvert, undermine, or impede” governmental factfinding by suggesting to its employees that they enforce the document retention policy.

These changes were significant. No longer was any type of “dishonest[y]” necessary to a finding of guilt, and it was enough for petitioner to have simply “impede[d]” the Government’s factfinding ability. As the Government conceded at oral argument, “impede” has broader connotations than “subvert” or even “undermine,” and many of these connotations do not incorporate any “corrupt[ness]” at all. The dictionary defines “impede” as “to interfere with or get in the way of the progress of” or “hold up” or “detract from.” Webster’s 3d 1132. By definition, anyone who innocently persuades another to withhold information from the Government “get[s] in the way of the progress of” the Government. With regard to such innocent conduct, the “corruptly” instructions did no limiting work whatsoever.

The instructions also were infirm for another reason. They led the jury to believe that it did not have to find *any* nexus between the “persua[sion]” to destroy documents and any particular proceeding. In resisting any type of nexus element, the Government relies heavily on § 1512(e)(1), which states that an official proceeding “need not be pending or about to be instituted at the time of the offense.” It is, however, one thing to say that a proceeding “need not be pending or about to be instituted at the time of the offense,” and quite another to say a proceeding need not even be foreseen. A “knowingly ... corrup[t] persuaude[r]” cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material.

We faced a similar situation in *Aguilar, supra*. Respondent Aguilar lied to a Federal Bureau of Investigation agent in the course of an investigation and was convicted of “corruptly endeavor[ing] to influence, obstruct, and impede [a] ... grand jury investigation” under § 1503. All the Government had shown was that Aguilar had uttered false statements to an investigating agent “who might or might not testify before a grand jury.” We held that § 1503 required something more—specifically, a “nexus” between the obstructive act and the proceeding. “[I]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding,” we explained, “he lacks the requisite intent to obstruct.”

For these reasons, the jury instructions here were flawed in important respects. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Notes

1. *Section 1512 v. § 1503*. Defendants indicted under § 1503 for conduct that could be prosecuted under § 1512 often make the argument (as did Aguilar) that Congress’s creation of § 1512, and in particular the 1988 amendment, repealed by implication the application of § 1503’s “omnibus” provision to witness tampering. The Second Circuit stands alone in accepting this argument, holding that prosecutors must pursue witness tampering under § 1512, not § 1503’s “omnibus” provision. *See United States v. Masterpol*, 940 F.2d 760 (2d Cir.1991). All other circuits to consider the

issue have held to the contrary. *See, e.g.*, *United States v. Ladum*, 141 F.3d 1328 (9th Cir.1998); *United States v. Mullins*, 22 F.3d 1365, 1369 (6th Cir.1994).

Assuming that conduct could be prosecuted under either § 1503 or § 1512, which is the “better” statute from the prosecution's and the defense's perspective? Consider the following comparisons:

18 U.S.C. § 1503 (Omnibus Provision: Obstruction in Judicial Proceedings)	18 U.S.C. § 1512(b) (Non-coercive Witness Tampering)	18 U.S.C. § 1512(c) (Tampering with Physical Evidence & Omnibus Provision)
knowing that a judicial proceeding is pending and corruptly (probably includes <i>Aguilar</i> “nexus” requirement)	knowingly	corruptly
endeavors to influence, obstruct, or impede the due administration of justice	uses intimidation, threatens, corruptly persuades, or engages in misleading conduct toward another person (or attempts to do so)	(2) otherwise obstructs, influences, or impedes any official proceeding (or attempts to do so)*
with a specific intent to obstruct	with intent to (1) influence, delay or prevent the testimony of any person in an official proceeding; (2) cause or induce any person to (A) withhold testimony or an object from an official proceeding; (B) alter, destroy, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding; (C) evade legal process summoning that person to appear or to produce an object in an official proceeding; or (D) be absent from an official proceeding despite service of legal process; or (3) hinder, delay, or prevent the communication to a law enforcement officer or U.S. judge of information relating to the commission or possible commission of a Federal offense	(1) alters, destroys, mutilates, or conceals an object (or attempts to do so) with the intent to impair the object's integrity or availability for use in an official proceeding*

*[Ed.]: These subsections have been placed out of order for purposes of comparison with §1503.

2. “*Official Proceeding*”. In terms of coverage, an important distinction between § 1503 and § 1512 concerns the type of proceedings to which the alleged obstructive activity must relate. Section 1512(b)(1), (b)(2)(A)-(D), and (c)(1)-(2) all require that the proscribed conduct occur in the context of an “official proceeding.” Section 1515(a) defines “official proceeding” as a proceeding in any federal court (including those conducted before bankruptcy judges) and before a federal grand jury, “a proceeding before the Congress,” “a proceeding before a Federal Government agency which is authorized by law,” or a proceeding involving (interstate) insurance businesses. Thus, § 1512 is much more broadly applicable than § 1503, which may be invoked only when the due administration of justice in *judicial* proceedings (such as grand jury or court proceedings) is threatened.

Furthermore, “[i]n contrast to section 1503, ‘an official proceeding need not be pending or about to be instituted at the time of the offense’” for a defendant to be convicted under § 1512(b). *United States v. Frankhauser*, 80 F.3d 641, 651 (1st Cir.1996) (quoting 18 U.S.C. § 1512(f)(1), which at the time was numbered § 1512(e)(1)). “Because an official proceeding need not be pending or about to be instituted at the time of the [allegedly obstructive conduct], the statute obviously cannot require actual knowledge of the proceeding.” *Id.*; *see also* *United States v. Kelley*, 36 F.3d 1118, 1128 (D.C. Cir.1994)).

What *caveat* does the *Andersen* Court apply here? Does the Supreme Court require, as have some lower courts, that the government prove “at least a circumstantial showing of intent to affect the testimony [or production of physical evidence] at some particular federal proceeding that is ongoing or is scheduled to be commenced in the future”? *United States v. Shively*, 927 F.2d 804, 812-13 (5th Cir.1991). Just how proximate or foreseeable must an official proceeding be, and what degree of knowledge must the defendant have?

3. *Section 1512(b)(3)*. Of all the acts proscribed in § 1512(b), only § 1512(b)(3) does not require that the allegedly obstructive activity take place in the context of an “official proceeding.” Under § 1512(b)(3) the defendant must have committed the obstructive conduct with the intent to “hinder, delay, or prevent” communication to a federal law enforcement officer or judge of information relating to the commission or *possible* commission of a federal crime. This section “do[es] not depend on the existence or imminency of a federal case or investigation but rather on the *possible* existence of a federal crime and a defendant’s intention to thwart an inquiry into that crime.” *United States v. Veal*, 153 F.3d 1233, 1250 (11th Cir.1998); *see also* *United States v. Davis*, 183 F.3d 231, 248 (3d Cir.1999).

Can § 1512(b)(3) be used to pursue a defendant for obstruction–witness tampering–when the defendant lies to investigating officers? *See Veal*, 153 F.3d at 1245-47 (yes). Can § 1512(b)(3) be used to sanction an employee who lies to corporate counsel in the course of an internal corporate investigation into alleged misconduct, on the theory that the corporation may choose at some point to share what it learns in the internal investigation with federal officials in return for regulatory or prosecutorial leniency? *Cf. United States v. Gabriel*, 125 F.3d 89 (2d Cir.1997).

4. “*Nexus*”? Must prosecutors proceeding under § 1512 satisfy the *Aguilar* “nexus” requirement to prevail? Prior to *Andersen*, the answer was “no.” *See, e.g., United States v. Gabriel*, 125 F.3d 89 (2d Cir.1997); *United States v. Veal*, 153 F.3d 1233, 1250-51

(11th Cir.1998). Given that § 1512 does not mandate that a defendant know of a pending proceeding, and indeed does not require that a pending proceeding even exist, how would a “nexus” requirement work in this context? Did the Supreme Court read this element into the statute?

5. *Mens Rea*. Courts draw a distinction between § 1503 and § 1512 in terms of the *mens rea* they require. For example, the Sixth Circuit has explained that the *mens rea* for § 1503 is the general intent of knowledge of a pending proceeding and a specific intent or purpose to obstruct (along with a corrupt motive), while the *mens rea* for § 1512 is “knowing” use of obstructive methods (using intimidation, threats, corrupt persuasion or misleading conduct) with an intent to influence or prevent testimony, § 1512(b)(1), or cause or induce another person to engage in the obstructive activities outlawed by the statute, § 1512(b)(2). See *United States v. Jeter*, 775 F.2d 670, 679 (6th Cir.1985); *United States v. Scaife*, 749 F.2d 338, 348 (6th Cir.1984). Does the *Andersen* decision change this? Does it require, for example, proof in a § 1512 case of a “specific intent to obstruct”?

The *Andersen* Court focuses on the meaning of “knowingly ... corruptly persuades.” Does its gloss on this language have any relevance to the *other* types of presumptively obstructive conduct covered by § 1512 (*i.e.*, using intimidation, threats, or misleading conduct)? In a case alleging “corrupt persuasion” what more, in terms of *mens rea*, must the government prove?

6. *Actus Reus*. Let us begin our examination of the *actus reus* of § 1512 by focusing on § 1512(b)(1) and (2)(A). The statute makes it a crime, *inter alia*, for any person to knowingly *threaten* or *corruptly persuade* or *engage in misleading conduct* with the *intent* to “influence” the testimony of any person or to cause any person to withhold a document from an official proceeding. As the *Andersen* Court recognizes, although the intention behind this statute was to focus on *presumptive correct methods, rather than corrupt state of mind*, both “influencing” witnesses’ testimony and causing clients to withhold documents can be entirely legitimate—and very important—defense functions.

Whether working for the prosecution or the defense, any lawyer who has interviewed a witness prior to an appearance before a grand jury or at trial has probably sought to “influence” testimony. ... Refreshing a witness’ recollection, pointing out inconsistencies in his testimony, suggesting how he might handle expected questions on cross-examination, even simply leading questions in an interview—all are proper and even necessary methods of preparing a witness, and all have the objective as well as the effect of “influencing” testimony.

William H. Jeffress, *The New Federal Witness Tampering Statute*, 22 Am. Crim. L. Rev. 1, 6 (1984) (written prior to 1986 amendment adding § 1515(c)). Similarly, defense counsel commonly will attempt to read requests for documents as narrowly as ethically possible to avoid the production of damning documents; certainly, counsel will advise clients to withhold the production of privileged documents.

Returning to an earlier hypothetical, what if a defendant merely encourages another to take the Fifth? Does it matter what his or her motive is? As we know, the *Cueto* court would say that such otherwise legal conduct is criminal under § 1503 if undertaken with a corrupt motive. Is the same true under § 1512? In *United States v. Farrell*, the Third Circuit found that the defendant’s attempt to persuade his co-

conspirator to withhold cooperation or not to disclose information to law enforcement officials—as opposed to actively lying—did not fall within the ambit of § 1512(b), at least where the witness had a valid Fifth Amendment right. 126 F.3d 484, 489 (3d Cir. 1997) (“[M]ore culpability is required for a statutory violation than that involved in the act of attempting to discourage disclosure in order to hinder an investigation”). By contrast, the Eleventh Circuit upheld a defendant’s conviction under § 1512(b) for attempting to persuade his secretary not to speak to FBI agents, expressly rejecting the reasoning of the *Farrell* court. *United States v. Shotts*, 145 F.3d 1289, 1300 (11th Cir.1998); *see also Khatami*, 280 F.3d at 913-14. Does lawyers’ liability turn (after *Andersen*) on the methods they use to effect these ends—knowingly threatening, “corruptly” persuading, or engaging in misleading conduct?

7. *Corrupt “Persuasion”*. With respect to “persuasion,” this method alone requires proof of “corrupt” motive. Obviously, the *Andersen* Court concluded that “knowingly ... corruptly” must mean something more in the context of a § 1512 prosecution than “corruptly” in a § 1503 case. *Cf. Andersen, supra*, footnote 9. What constitutes the “something more” that will satisfy the statute? The distinction between “corruptly persuading” someone and “misleading” someone is an important one. “Misleading conduct” “has been held to apply to conduct which is intended to mislead the witness, not to mislead the government. If a witness knows that the defendant is encouraging him or her to tell a false story and knows the purpose of the story, there can be no misleading conduct.” Sarah N. Welling, Sara Sun Beale, Pamela H. Bucy, *Federal Criminal Law and Related Actions: Crimes, Forfeiture, the False Claims Act and RICO § 19.18*, at 192 (West Group 1998). Such a case should be pursued under the “corrupt persuasion” prong of the statute. Thus, attempting to persuade a witness to give false testimony and bribing a witness to withhold information are both forms of corrupt persuasion. *See, eg., United States v. Khatami*, 280 F.3d 907 (9th Cir.2001); *United States v. Morrison*, 98 F.3d 619, 630 (D.C. Cir.1996).

8. *Misleading Conduct*. With respect to “misleading conduct,” Congress defined this term in § 1515(a)(3) as follows:

(A) knowingly making a false statement;

(B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement;

(C) with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity;

(D) with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or

(E) knowingly using a trick, scheme, or device with intent to mislead.

18 U.S.C. § 1515(a)(3). Could the government in *Aguilar* have successfully pursued a § 1512(b)(1) case on a theory that Judge Aguilar “knowingly ... engage[d] in misleading conduct toward another person, with intent to ... influence ... the testimony of any person in an official proceeding”? *See* § 1512(b)(1); § 1515(a)(3)(A) (“misleading conduct” includes “knowingly making a false statement”).

Could a party who denies guilt to family, friends, and associates who may be potential witnesses be charged with witness tampering? The Second Circuit deems “[t]he most obvious example of a section 1512 violation [for “misleading” a witness] may be the situation where a defendant tells a potential witness a false story as if the story were true, intending that the witness believe the story and testify to it before the grand jury.” *United States v. Rodolitz*, 786 F.2d 77, 81-82 (2d Cir.1986).

What of counsel's activities under § 1515(a)(3)(B)? Would an attorney who, in closing argument, omits some facts favorable to the opposing party be chargeable with “intentionally concealing a material fact, and thereby creating a false impression”? If a witness invokes his Fifth Amendment right, is he concealing material facts? Under § 1515(a)(3)(A) and (B), could defense counsel be threatened with prosecution for witness tampering in the conduct of witness interviews? Consider the following discussion, keeping in mind that it was written regarding the pre-1986 statute (which did not contain § 1515(c), discussed below):

It is natural for a lawyer in witness interviews, during investigations or in preparation for trial, to test the witness' recollection of the facts against the position of his client, and to seek either to minimize the areas of disagreement, or to convince the witness that he is or could be mistaken. In doing so, counsel may refer to conflicting testimony of other witnesses or documents that appear inconsistent with the witness' recollection; he may tell the witness what his own client recalls of the events in question; or he may simply suggest to the witness an alternative, non-incriminating explanation or interpretation of the occurrence. Quite likely, the prosecutor will disagree with defense counsel's position on the facts: he will contend that the defendant's account is false, and that the alternative non-incriminating explanation is a sham. Quite possibly, he will also claim that defense counsel knew it was so.

Under prior law[, § 1503], a prosecutor in such a case would have had the burden of proving the lawyer corruptly endeavored to obtain false testimony from the witness. Under section 1512, however, the prosecutor need only prove the lawyer knowingly made a false or misleading statement, intending to influence the testimony of a witness. ... [T]hese burdens are not by any means equal; the government's burden is considerably less under section 1512.

William H. Jeffress, *The New Federal Witness Tampering Statute*, 22 Am. Crim. L. Rev. 1, 12-13 (1984).

9. *Section 1512(c)*. A reform act enacted in response to the 2002 corporate accounting scandals, the Sarbanes-Oxley Act of 2002, P.L. 107-204, 116 Stat. 745 (2002) was signed into law by President Bush on July 30, 2002. Perhaps not surprisingly in light of Arthur Andersen's highly-publicized destruction of audit-related documents after becoming aware of an SEC investigation into Enron's financials, Congress focused on perceived deficiencies in the existing coverage of federal obstruction statutes, adding four new crimes.

The most important of these new crimes is § 1512(c). Section 1512(c) “arguably has the potential to be regarded as the most expansive legislative revision of the obstruction of justice statutes in the history of the statutory scheme. Defining the parameters of this subsection will significantly impact prosecutors' ability to prove liability, courts' ability to assess a penalty, and the ability of individuals and

businesses to avoid obstruction of justice charges.” Daniel A. Shtob, *Corruption of a Term: The Problematic Nature of 18 U.S.C. 1512(c), the New Federal Obstruction of Justice Provision*, 57 Vand. L. Rev. 1429, 1433 (2004). This new provision reads:

(c) Whoever corruptly—

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.

10. *Comparison of new § 1512(c)(1) with § 1512(b)(2)(B) and § 1503*: Review the chart reproduced *supra* in note 1 following the *Andersen* decision. With respect to the first new subsection, § 1512(c)(1), note that the most closely analogous pre-existing provision, § 1512(b)(2)(B), requires that the defendant tamper with *another* witness, either through threats, corrupt persuasion, or misleading conduct, with the intent to cause or induce that *other* person to alter, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding (in the *Poindexter* court's terms, a “transitive” meaning). By contrast, the new § 1512(c)(1) would cover instances in which *the defendant* (and not some other person upon whom he is acting) is the primary actor and is altering or destroying evidence with a corrupt intent (in the *Poindexter* court's lexicon, an “intransitive” meaning). See § 1512(c)(1). In this respect, § 1512 is no longer a pure witness tampering statute, unless one considers the defendant or the objects he alters or destroys as the witnesses sought to be protected.

Note that the penalty under § 1512(c) is up to 20 years' imprisonment, while non-coercive tampering under § 1512(b) provides for up to 10 years imprisonment. Should a defendant who directly destroys evidence be subject to twice the potential sentencing exposure as a defendant who causes someone else to do the destroying?

May the type of misconduct addressed in the first subsection, § 1512(c)(1), also be prosecuted under § 1503? How, if at all, do the elements needed to prove them differ? Despite the fact that some cases may be pursued under either § 1503 or § 1512(c)(1), the maximum penalty for non-coercive obstruction under § 1503 is up to 10 years' imprisonment and under § 1512(c) is up to 20 years in jail. Does this make sense?

11. *Comparison of new § 1512(c)(2) with § 1503*: Review the chart reproduced *supra* in note 1 following the *Andersen* decision. What does the second subsection, § 1512(c)(2), achieve? This omnibus provision appears to be as broad as, if not broader than, § 1503's omnibus provision in its potential scope. The omnibus provision of § 1503 penalizes a defendant who “corruptly ... influences, obstructs, or impedes,” the “*due administration of justice*,” or *endeavors* to do so. (Emphasis added.) The new § 1512(c)(2) penalizes a defendant who “corruptly ... obstructs, influences, or impedes *any official proceeding*, or *attempts* to do so.” (Emphasis added.) In what ways, if any, do the proof requirements of the two sections differ? Could one attempt to limit the reach of this provision by arguing that its scope must be read in light of its placement after § 1512(c)(1), meaning that the activity proscribed in the new omnibus clause must also concern the compromising of physical evidence (and not, for

example, false statements)? Note, again, the differences in the maximum penalties applicable to each. Does this congressional choice make sense?

12. *Comparison of § 1512 with § 1505*: Review the chart which follows comparing § 1505 and § 1512. Both § 1505 and § 1512 can be invoked in the context of congressional and federal agency proceedings. See § 1515(a)(1)(B), (C). Congress took witness tampering conduct that formerly had been covered by § 1505 and moved it to § 1512 when it created that statute in 1982. How do § 1505 and § 1512 compare in terms of the elements to be proved?

**18 U.S.C. § 1505
(Obstruction in
Federal Agency
Proceedings and
Congressional
Investigations)**

knowing that there is a pending proceeding before a department or agency of the United States or an inquiry or investigation being had in Congress, corruptly

endeavors to influence, obstruct, or impede the due and proper administration of the law under which the pending proceeding is being had before any department or agency of the United States or the due and proper exercise of the power of congressional inquiry

**18 U.S.C. § 1512(b)
(Non-coercive Witness
Tampering)**

knowingly

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

(1) influence, delay or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to

(A) withhold testimony or an object from an official proceeding;

(B) alter, destroy, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding; (C) evade legal process summoning that person to appear or to produce an object in an official proceeding; or (D) be absent from an official proceeding despite service of legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or U.S. judge of information relating to the commission or possible commission of a Federal offense

**18 U.S.C. § 1512(c)
(Tampering with Physical
Evidence & Omnibus
Provision)**

corruptly

(2) otherwise obstructs, influences, or impedes any official proceeding (or attempts to do so)*

(1) alters, destroys, mutilates, or conceals an object (or attempts to do so) with the intent to impair the object's integrity or availability for use in an official proceeding*

*[Ed.]: These subsections have been placed out of order for purposes of comparison with § 1505.

Note that the general statutory maximum penalty for § 1505 is up to 5 years' imprisonment while the maximum exposure for non-coercive obstruction under § 1503 and § 1512(b) is up to 10 years' imprisonment. Is obstruction in the context of agency or congressional proceedings less dangerous or blameworthy than obstruction in other contexts (*e.g.*, judicial proceedings under § 1503)? Is witness tampering in the context of agency and congressional proceedings which may be pursued under § 1512(b) more dangerous or blameworthy than other types of obstruction prosecutable under § 1505 in the same agency or congressional context?

13. *Nexus and § 1512(c)(2)*, The DOJ is already bringing prosecutions under § 1512(c)(2) that it would normally pursue under § 1503, in part in hopes of avoiding proof of the *Aguilar* "nexus" requirement. See Julie R. O'Sullivan, *The DOJ Risks Killing the Golden Goose Through Computer Associates/Singleton Theories of Obstruction*, -- Am. Crim. L. Rev. - (forthcoming 2007). When might this "nexus" requirement matter? Consider the following cases, which involve an obstruction theory that is deeply concerning to the white-collar bar.

In September 2004, the DOJ indicted Sanjay Kumar, the Chief Executive Officer of Computer Associates International, Inc. ("CA"), and Stephen Richards, CA's Head of Worldwide Sales. Among other charges, Kumar and Richards were charged with obstructing justice under 18 U.S.C § 1512(c)(2) based, in part, on allegations that these executives repeatedly lied when interviewed by the *company's outside law firms*. It was alleged that two outside law firms had been hired by CA to investigate allegations of accounting malfeasance and that the defendants had lied to both law firms, as well as directly to the government. Similarly, the DOJ indicted Greg Singleton, a natural gas trader at El Paso Corporation for, among other things, obstruction under § 1512(c)(2) based, again, on allegations that he *lied to corporate counsel* during counsel's internal investigation into the primary wrongdoing alleged. Notably, Singleton, unlike the CA executives, was *not* alleged to have engaged in a widespread conspiracy to obstruct that included lies to the government as well as to counsel.

Not surprisingly, Kumar, Richards, and Singleton argued that an obstruction case could not be founded on lies to the corporation's own counsel. They argued, *inter alia*, that false statements made to counsel do not bear the requisite causal connection or, in the Supreme Court's *Aguilar* terminology, "nexus," to an official proceeding. Federal prosecutors contended in response that (1) there was no "nexus" requirement under § 1512(c)(2); and (2), in any case, there was an obvious "nexus" between the executives' lies to corporate counsel and the official proceedings (grand jury and the Securities and Exchange Commission (SEC) investigations) at issue because the defendants knew (CA) or believed (*Singleton*) that the corporation was cooperating (CA) or might cooperate (*Singleton*) with the government and, in so doing, intended (CA) or at least contemplated (*Singleton*) that counsel would turn over the defendants' false or misleading statements to the grand jury and SEC. As the District Court in *Singleton* indicated, the proposed "nexus" was, in essence, the fact that private counsel were working as "an arm of the government" while conducting their nominally private investigations on behalf of the entity. *United States v. Singleton*, 2006 WL 1984467, Slip Op. at *6 (S.D. Tex. July 14, 2006).

In the Computer Associates case, the District Court did not resolve, or even mention, the question whether § 1512(c)(2) required proof of an *Aguilar* "nexus" in

denying the defendants' motion to dismiss. Rather, the Court simply ruled that the allegations in the indictment, if proved, would satisfy a "nexus" requirement. See *United States v. Kumar*, Memorandum and Order, No. 04-CR-846 (ILG), slip op. at *9 (E.D.N.Y. Feb. 21, 2006). The court also did not address at all the question whether, or in what circumstances, lying to or misleading corporate counsel could be deemed actionable obstruction. In responding to the defendants' claims of a lack of the requisite "nexus," the court pointed only to the allegations that Richards knowingly lied and concealed information during his testimony before the SEC and that Kumar made false statements in an interview at the U.S. Attorneys Office. And the court relied solely on the allegations relating to the causal connection between the defendants' face-to-face lies to government agents and in the SEC's "official proceeding" to rule that the indictment was sufficient to proceed to trial. In short, the court did *not* hold that the defendants could be convicted under § 1512 for lies to corporate counsel alone. The District Court had the final word because, in April 2006, the defendants pleaded guilty to the indictment. Kumar was sentenced to twelve years in prison and Richards was sentenced to seven years in prison, for both the securities fraud and the obstruction.

The District Court in Singleton's case also declined his invitation to dismiss the indictment on the ground that the indictment pled an insufficient "nexus" between Singleton's lies and an "official proceeding." Notably, the *Singleton* court, unlike the *Computer Associates* court, upheld the government's theory that lying to corporate counsel—even where there is no allegation that the defendant *knew* that counsel would be turning over his statements to the government—could have the requisite causal nexus to obstruction of an "official proceeding" (the grand jury investigation):

The Indictment . . . alleges facts indicating that the *outside attorneys were acting as an arm of the investigating agencies*, that the investigating agencies had formally requested information from El Paso, and that Singleton *believed* that his statements to the outside attorneys would be provided to the investigating federal agencies. The indictment alleges that Singleton supplied a written response to at least one federal agency's inquiry; that he met (accompanied by his criminal defense counsel) with El Paso's outside attorneys whom he knew were performing a detailed investigation in response to the governmental inquiries; and that he "*believed* that El Paso's Outside Lawyers would inform government agencies of his statements [made] during the interview," and that, in fact, the outside attorneys did so through a memorandum of interview. These allegations—in combination—are adequate to satisfy the requirement for an official proceeding, of which Singleton was aware. The allegations, if proved . . ., could raise the inference that Singleton *expected* and thus arguably intended that his intentionally false statements would be supplied to the Federal government in connection with one or more of these identified official proceedings.

United States v. Singleton, 2006 WL 1984467, Slip Op. at *6 (S.D. Tex. July 14, 2006) (emphasis added). Singleton, almost alone among those charged in the overall investigation, took his case to trial. At the conclusion of the government's case, Singleton argued that the government's evidence was insufficient to sustain a

conviction on the obstruction count because (1) corporate counsel testified at trial that he was not “acting as an arm of the investigating agencies”; and (2) the government failed to present evidence that he believed that El Paso’s outside counsel “would inform government agencies of his statements during the interview.” Defendant Greg Singleton’s Motion for Judgement [sic] of Acquittal as to Count Ten, *United States v. Singleton*, Cr. No: 4:06-CR-00080, 1-2 (July 31, 2006). The trial judge granted the defense’s motion without written opinion and dismissed the obstruction count. *See* Hearing Minutes and Order, *United States v. Singleton*, No. 4:06-CR-00080 (July 31, 2006).

14. *Affirmative Defense: §1512(e)*. There are two provisions—§§ 1512(e) (which, prior to 2002, was numbered § 1512(d)) and 1515(c)—that are intended to safeguard lawyers from prosecution for allegedly “obstructive” activities related to legitimate advocacy. The first, § 1512(e) provides an affirmative defense as to which the defendant has the burden of proof by a preponderance of the evidence. Section 1512(e) provides that a person may lawfully engage in the prohibited means of influencing testimony or withholding documents if his conduct “consisted solely of lawful conduct and ... the defendant’s sole intention was to encourage, induce, or cause the other person to testify truthfully.” Why might defense counsel be less than thrilled with this provision—especially when this statutory scheme is contrasted with § 1503?

15. *Affirmative Defense: §1515(c)*. Second, § 1515(c) was added to the statutory scheme in 1986. It provides: “This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.” Note that the “chapter” referred to includes sections 1503, 1505, 1510, 1512, 1519, and 1520. The legislative history of this enactment is exceedingly sparse. It appears to consist of one statement in the congressional record:

The Subcommittee on Criminal Justice has received complaints of prosecutors’ harassing members of the defense bar. Vigorously and zealously representing a client, however, is not a basis for charging an offense under the obstruction of justice chapter. Section 50(2) therefore amends 18 U.S.C. 1515 to provide specifically that the lawful, bona fide provision of legal representation services does not constitute an offense under any of the obstruction of justice offenses in 18 U.S.C. ch. 73.

132 Cong. Rec. H32,805 (Oct. 17, 1986). Section 1515(c) has been dubbed the “safe harbor” provision by some courts. *See United States v. Davis*, 183 F.3d 231, 248 (3d Cir.1999). One question that has arisen is whether § 1515(c) constitutes an amplification of the affirmative defense set forth in § 1512(e), an independent affirmative defense, or a negative element of an obstruction prosecution. The Eleventh Circuit has held that section 1515(c)’s “safe harbor” for legitimate attorney advocacy activities constitutes a negative element of the offense. *United States v. Kloess*, 251 F.3d 941 (11th Cir. 2001). It ruled that § 1515(c) provides only an affirmative defense but concluded that “[a]lthough the burden of raising Section 1515(c) as a defense is on the defendant, the burden of proof as to its non-applicability is always on the government.” Similarly, in *United States v. Kellington*, 217 F.3d 1084 (9th Cir.2000), the Ninth Circuit termed § 1515(c) a “complete defense,” *id.* at 1098, pointing out that testimony as to the ethical obligations of an attorney representing a client was relevant “to negate criminal intent and/or to establish a

'bona fide legal representation' defense under § 1515(c)." *Id.* at 1099. Does it matter whether this section is an affirmative defense or a negative element of the offense? Which will better protect defense counsel from the concerns discussed above?

16. *Constitutional Challenges.* Litigants have (largely unsuccessfully) lodged a variety of constitutional challenges to § 1512. For example, in *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir.1996), the defendant argued that "§ 1512 violated his First Amendment rights by broadly 'proscrib[ing] persuasion' and violated his due process rights by shifting the burden of proof to him, 'compel[ing] him] to prove the lack of corruption.'" The Second Circuit rejected his challenges, holding that "[b]y targeting only such persuasion as is 'corrupt[],' § 1512(b) does not proscribe lawful or constitutionally protected speech and is not overbroad" or vague. *Id.* Further, the Court ruled that the affirmative defense provided in § 1512(e) (then numbered § 1512(d)) does not improperly shift the burden of proof of elements of the offense to a defendant. While conceding that the elements of the crime and the affirmative defense overlap "in the sense that evidence to prove the latter will often tend to negate the former," this overlap did not shift to the defendant the burden of disproving the element of corrupt persuasion or allow the jury to presume elements of the government's case. *Id.* (citation omitted); *see also* *United States v. Johnson*, 968 F.2d 208, 213 (2d Cir.1992) (rejecting burden shifting argument). *But see* William H. Jeffress, *The New Federal Witness Tampering Statute*, 22 Am. Crim. L. Rev. 1, 1 (1984).

17. *Problem.* Article II of the Articles of Impeachment brought against President Clinton charged that the President "has prevented, obstructed, and impeded the administration of justice, and has to that end engaged personally, and through his subordinates and agents, in a course of conduct or scheme designed to delay, impede, cover up, and conceal the existence of evidence and testimony related to a Federal civil rights action brought against him" 145 Cong. Rec. 51,548-9 (February 12, 1999). In the Report of the House Judiciary Committee on the impeachment, the Committee discussed the applicability of 18 U.S.C. §§ 1503 and 1512(b)(1)-(2) to witness tampering cases and concluded:

The first alleged act by President Clinton, "corruptly encourag[ing] a witness in a Federal civil rights action brought against him to execute a sworn affidavit in that proceeding that he knew to be perjurious, false and misleading", and the second alleged act, "corruptly encourag[ing] a witness in a Federal civil rights action brought against him to give perjurious, false and misleading testimony[.]" clearly violate both statutes. The third alleged act, "corruptly engag[ing] in, encourag[ing] or [supporting] a scheme to conceal evidence that had been subpoenaed in a Federal civil rights action brought against him[.]" clearly violates the second statute. The fourth alleged act, that President Clinton "intensified and succeeded in an effort to secure job assistance to a witness in a Federal civil rights action brought against him in order to corruptly prevent the truthful testimony of that witness[.]" clearly violates both statutes. The sixth alleged act, "relat[ing] a false and misleading account of events relevant to a Federal civil rights action brought against him to a potential witness in that proceeding, in order to corruptly influence the testimony of that witness[.]" and the seventh alleged act, "ma[king] false and misleading statements to potential witnesses in a Federal grand jury proceeding in order to corruptly influence the testimony of those witnesses[.]" clearly violate both statutes. ...

Do you agree? As a prosecutor, are these charges that you would pursue criminally? What considerations might affect your judgment?

**D. SARBANES-OXLEY ACT OF 2002 PROHIBITION OF
DESTRUCTION OF RECORDS AND
WHISTLEBLOWER
PROVISIONS: 18 U.S.C. §§ 1519, 1520, 1513, 1514A**

1. Section 802 of the Sarbanes-Oxley Act added two new crimes now found at 18 U.S.C. §§ 1519, 1520.

§ 1519. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy

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 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.

Why might Congress have added § 1519? See Dana E. Hill, Note, *Anticipatory Obstruction of Justice: Pre-emptive Document Destruction Under the Sarbanes-Oxley Anti-Shredding Statute*, 18 U.S.C. § 1519, 89 Cornell L. Rev. 1519 (2004). Like the new § 1512(c), it concerns the destruction of objects by the defendant. What does this statute cover that § 1512(c) does not?

18 U.S.C. § 1519 (New tampering with records in federal investigations and bankruptcy)

The defendant

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 any department or agency of the United States or any bankruptcy case

20 year maximum

18 U.S.C. § 1512(c) (New omnibus provision)

The defendant

corruptly

(1) alters, destroys, mutilates, or conceals a record, document, or other object (or attempts to do so)

with the intent to impair the object's integrity or availability for use in an official proceeding
or

(2) otherwise obstructs, influences, or impedes any official proceeding (or attempts to do so)

20 year maximum

18 U.S.C. § 1505 (traditional means of prosecuting obstruction in federal agency proceedings)

The defendant

knowing that there is a pending proceeding before a department or agency of the United States ...

corruptly

endeavors

to influence, obstruct, or impede the due and proper administration of the law under which the pending proceeding is being had before any department or agency of the United States

5 year maximum

2. Section 1519 is restricted to circumstances in which the destruction or alteration of physical evidence takes place in connection with “any matter within the jurisdiction of any department or agency of the United States” or a bankruptcy case under title 11 (as opposed to § 1503, which requires knowledge of a pending judicial proceeding, or § 1512(c), which applies to obstructive activity pertinent to an “official proceeding”). Just what does this mean?

The definitions of § 1515(a) do not apply; by that subsection's terms, it is confined to sections 1512 and 1513. The reference to “any department or agency of the United States” may be drawn from the portion of § 1505 proscribing obstruction in connection with federal agency proceedings. That portion of § 1505 has been confined in application to proceedings before executive branch departments (*e.g.*, Department of Justice, IRS, Customs Service) or federal agencies (*e.g.*, SEC). It also may be notable that the language here echoes the language of § 1001 before that statute was amended in 1996. Prior to 1996, § 1001 outlawed false statements “within the jurisdiction of any department or agency of the United States.” Recall that the Supreme Court, in *Hubbard v. United States*, 514 U.S. 695 (1995), read the terms “any department or agency of the United States” to exclude the judicial branch. The *Hubbard* Court's reasoning also indicated that the Court would read the language to exclude false statements made to the legislative branch. *See, e.g.*, *United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir.1997). Congress overruled the *Hubbard* decision by amending § 1001 to include false statements made “in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States.” 18 U.S.C. § 1001.

Given this recent judicial and legislative interchange, one must presume that Congress intentionally chose language that would be read to *preclude* application of § 1519 to the judicial or legislative branches. It appears, then, that this statute is aimed at obstructive activity that affects the investigation, or proper administration, of any matter within the jurisdiction of *the executive branch or the independent agencies*. This limitation is consistent with the context in which the statute was enacted: Congress was, at least in part, concerned with the obstructive activity of Arthur Andersen that was said to impede the investigation of Enron's financials by the SEC. Also, given the similarity in language, it seems likely that courts will turn to the Supreme Court's broad interpretation of the term “jurisdiction” under § 1001 and hold that that term includes “all matters confided to the authority of an agency or department.” *United States v. Rodgers*, 466 U.S. 475 (1984).

3. *Comparison of new § 1519 with § 1505*: If this is a correct reading, how does § 1519 compare in terms of elements to the statute specifically designed to address obstruction in federal department and agency proceedings, § 1505? Note that a violation of § 1505 warrants up to 5 years' imprisonment while a violation of § 1519 may be punished by up to 20 years' imprisonment. Does this make sense?

4. *Comparison of new § 1519 with § 1512(c)*: In structure, § 1519 owes more to § 1512 than to § 1505. The portions of § 1512 that deal, like § 1519, with efforts to compromise physical evidence are § 1512(b)(2)(B) and § 1512(c). Again, § 1519 is clearly intransitive and thus should be measured against the intransitive provisions of § 1512(c) rather than the transitive requirements of § 1512(b)(2)(B). If the above analysis in note 2, *supra*, regarding the types of proceedings in which § 1519 may be invoked is correct, how does § 1519 stack up against § 1512(c)? How do their elements compare? This statute, like § 1512(c), carries a penalty of up to 20 years'

imprisonment, while a conviction for other types of non-coercive witness tampering under § 1512(b) result in exposure of up to 10 years' imprisonment. Is the destruction, alternation, or concealment of physical evidence twice as culpable or dangerous as persuading witnesses to lie under oath?

According to news reports, the test case for § 1519 involves a lawyer charged with destroying evidence of a pornography crime for which his client might have derivative exposure—not corporate malfeasance. Philip D. Russell, an attorney, was indicted in the District of Connecticut on charges of violating both § 1512(c)(1) and § 1519. *See United States v. Russell*, Crim. No. 3:07 CR 00031-AHN (D. Conn.). The indictment charged that on October 6, 2006, the FBI began investigating Robert F. Tate, the choirmaster and organist at a church for 34 years, for possession of child pornography. It is further alleged that on October 7, a church employee discovered the pornography on Tate's laptop; the church hired Russell on October 8 to represent the church "with respect to its employment of Tate given that Tate's laptop computer contained images of naked boys." *Id.* ¶ 7. On October 9, Russell and other church officials confronted Tate, provided him with the name of a defense lawyer, made arrangements for Tate to leave Connecticut, and took possession of Tate's laptop. Russell is then alleged to have "altered, destroyed, mutilated, and concealed [the laptop] by taking it apart thereby causing Tate's laptop computer to be unavailable for an official proceeding before a ... governmental agency, such as the [FBI]." *Id.* ¶ 11, 13.

The indictment does not explicitly allege that Russell *knew* that the FBI had launched an investigation. Note, too, that knowing possession of child pornography is a crime, regardless of motive. So if counsel and his client could not legally hold on to the evidence, and if Russell did not know that an investigation was ongoing, what does this prosecution suggest he do, consistent with his obligation to his client? One could turn contraband over to the police but refuse (to safeguard one's client's interests) to identify the source of the contraband. Can one do that with a laptop? If one wipes out identifying information (akin to wiping the fingerprints off a gun before turning it in), is that obstruction?

The defense bar has not had a positive reaction to this prosecution. Thus, for example, Norm Pattis blogged on Crime & Federalism that:

... Unlike pre-Sarbanes-Oxley tampering statutes, [§ 1519 does not require] an investigation in place or even imminent as a predicate for prosecution. The statute appears to criminalize what was once considered prudence by defense counsel. ... Once again, the law of unintended consequences results in overcriminalization: A law designed to prevent accountants and lawyers from shredding forms has become a tool in child pornography prosecutions. No one will care much about that. But what happens tonight if you find cocaine in your child's bedroom?

Norm Pattis, *Don't Touch That Evidence!*, Crime & Federalism Blog (posted Feb. 16, 2007), at http://federalism.typepad.com/crime_federalism/2007/02/dont_touch_that.html; *see also* Robert J. Ambrogi, *SOX: Unintended Consequences for Lawyers*, Law.com (Posted March 6, 2007) (quoting chief disciplinary counsel for the Connecticut Bar Association as querying "[t]he question is what's evidence and when does something become evidence? How prescient does a lawyer need to be?

Now if you guess wrong you've got big problems, because it is a serious crime"), http://legalblogwatch.typepad.com/legal_blog_watch/2007/03/sox_unintended_.html.

5. Section 802 of the Sarbanes-Oxley Act also added 18 U.S.C. § 1520, which states:

§ 1520. Destruction of corporate audit records

(a)(1) Any accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(a)) applies, shall maintain all audit or review workpapers for a period of 5 years from the end of the fiscal period in which the audit or review was concluded.

(2) The Securities and Exchange Commission shall promulgate, within 180 days, after adequate notice and an opportunity for comment, such rules and regulations, as are reasonably necessary, relating to the retention of relevant records such as workpapers, documents that form the basis of an audit or review, memoranda, correspondence, communications, other documents, and records (including electronic records) which are created, sent, or received in connection with an audit or review and contain conclusions, opinions, analyses, or financial data relating to such an audit or review, which is conducted by any accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(a)) applies. The Commission may, from time to time, amend or supplement the rules and regulations that it is required to promulgate under this section, after adequate notice and an opportunity for comment, in order to ensure that such rules and regulations adequately comport with the purposes of this section.

(b) Whoever knowingly and willfully violates subsection (a)(1), or any rule or regulation promulgated by the Securities and Exchange Commission under subsection (a)(2), shall be fined under this title, imprisoned not more than 10 years, or both.

(c) Nothing in this section shall be deemed to diminish or relieve any person of any other duty or obligation imposed by Federal or State law or regulation to maintain, or refrain from destroying, any document.

Section 1520 is notably different from § 1512(c) and § 1519 in that it does not penalize the obstructive act of compromising or destroying physical evidence in certain contexts. Instead, it establishes a positive duty to retain specified records and then penalizes the "knowing and willful" failure to meet that duty. Note that this provision does not require a corrupt intent for criminal liability to attach. Nor does § 1520 require that proceedings be pending or even contemplated.

Does § 1520 outlaw all accounting firms' "document retention" policies (which generally authorize the destruction of certain categories of workpapers)? Does this section put accountants at risk if they destroy *any* papers relating to a review or audit (if such destruction was done non-corruptly but knowingly and willfully) even if the evidence is not relevant to a current or future investigation or proceeding? Is there any materiality requirement implicit here? May the regulations issued under (a)(2) limit the scope of the retention duty specified in (a)(1)?

6. Congress focused in the Sarbanes-Oxley Act on protection of whistleblowers.

Thus, section 1107 of the Act amended 18 U.S.C. § 1513 to add a new subsection at the end of the statute:

(e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

The requirement that there be an “intent to retaliate” narrows this provision somewhat, but it is notable that the defendant need only take “*any* action harmful to any person” in order to be liable. Might this include leaving an anonymous and insulting note on the whistleblower’s desk or inscribing “rat” in the snow on her car hood? *See generally* Ronald H. Levine & Michelle L. Ostrelich, *Whistleblower Retaliation Under Sarbanes-Oxley: It’s a Crime!*, 10 Bus. Crimes Bulletin 1 (May 2003).

Further, section 806 of the Sarbanes-Oxley Act adds 18 U.S.C. § 1514A, which creates additional whistleblower protection in the form of a civil action for employees of publicly traded companies who provide information or assist in the investigation of a fraud case and suffer retaliation as a result.